
Document 1 of 52**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1

Volume 1

Berens v Berens	2009 (1) ZLR 1 (H)
Bakaris v Kattavenos	2009 (1) ZLR 6 (H)
Mukoko v Commissioner-General of Police & Ors	2009 (1) ZLR 21 (S)
Dube v Maphepha Syndicate & Ors	2009 (1) ZLR 29 (H)
Mazibuko v Sithole & Ors	2009 (1) ZLR 33 (H)
Kadengu & Ors v Kadengu & Ors	2009 (1) ZLR 38 (S)
S v M (a juvenile)	2009 (1) ZLR 47 (H)
Ralph v van Vuuren	2009 (1) ZLR 51 (H)
Guruva v Traffic Safety Council of Zimbabwe	2009 (1) ZLR 58 (S)
Sibanda v Sibanda & Anor	2009 (1) ZLR 64 (H)
S v Hove	2009 (1) ZLR 68 (H)
Chiwawa v Mutzuris & Ors	2009 (1) ZLR 72 (H)
Etheredge v Minister of State for Lands & Anor	2009 (1) ZLR 82 (H)
S v Mukoko	2009 (1) ZLR 93 (H)
Zimbabwe Open University v Mazombwe	2009 (1) ZLR 101 (H)
BGM Traffic Control Systems v Minister of Transport & Ors	2009 (1) ZLR 106 (H)
Flowerdale Investments (Pvt) Ltd & Anor v Bernard Construction (Pvt) Ltd & Ors	2009 (1) ZLR 110 (S)
The Master v Moyo NO & Ors	2009 (1) ZLR 119 (H)
S v Moyo & Anor	2009 (1) ZLR 126 (H)
Border Timbers Ltd v Zimbabwe Revenue Authority	2009 (1) ZLR 131 (H)
Harris v Harris	2009 (1) ZLR 145 (H)

Asher v Minister of State for Lands, Land Reform and Resettlement & Anor	2009 (1) ZLR 153 (H)
Mashonaland Turf Club v Nyamangunda	2009 (1) ZLR 160 (H)
Kwindima v Mvundura	2009 (1) ZLR 168 (H)
Nyikadzino v Asher & Ors	2009 (1) ZLR 174 (H)
Chitengwa v Manase	2009 (1) ZLR 179 (S)
Dodhill (Pvt) Ltd & Anor v Minister of Lands and Rural Resettlement & Anor	2009 (1) ZLR 182 (H)
Gute v Jumbe	2009 (1) ZLR 192 (H)
Chirenje v Vendfin Investments (Pvt) Ltd & Ors	2009 (1) ZLR 196 (S)
Thandazo Retail & Marketing (Pvt) Ltd v Main Motors (Pvt) Ltd & Anor	2009 (1) ZLR 203 (H)
S v Paragon Real Estate & Anor	2009 (1) ZLR 208 (H)
City of Harare v Zvobgo	2009 (1) ZLR 218 (S)
Gonye v Gonye	2009 (1) ZLR 232 (S)
Mutizhe v Ganda & Ors	2009 (1) ZLR 241 (S)
Nyoni v Elmissing & Anor	2009 (1) ZLR 251 (H)
Agro Chem Dealers (Pvt) Ltd v Gomo & Ors	2009 (1) ZLR 255 (H)
Beckford v Beckford	2009 (1) ZLR 271 (S)
Bruce v Econet Wireless (Pvt) Ltd & Anor	2009 (1) ZLR 284 (H)
Chikafu v Dodhill (Pvt) Ltd & Ors	2009 (1) ZLR 293 (S)
Dhlamini & Ors v Attorney-General	2009 (1) ZLR 299 (H)
Murawo v Grain Marketing Board	2009 (1) ZLR 304 (S)
Mbayiwa v Chitakunye & Anor	2009 (1) ZLR 314 (S)
Savanhu v Marere NO & Ors	2009 (1) ZLR 320 (S)
Zimbabwe Express Services (Pvt) Ltd v Nuanetsi Ranch (Pvt) Ltd	2009 (1) ZLR 326 (S)
Zimpost (Pvt) Ltd v Communications & Allied Workers' Union	2009 (1) ZLR 334 (S)

Trust Corporation Securities (Pvt) Ltd v Gabilo & Anor	2009 (1) ZLR 343 (H)
SAI Enterprises (Pvt) Ltd v Girdle Enterprises (Pvt) Ltd	2009 (1) ZLR 352 (H)
EBI Zimbabwe (Pvt) Ltd v Old Mutual Unit Trusts (Pvt) Ltd & Anor	2009 (1) ZLR 356 (H)
Matanda (Pvt) Ltd v Gotore Makoni J	2009 (1) ZLR 364 (H)
Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor	2009 (1) ZLR 368 (S)
Guwa & Anor v Willoughby's Investments (Pvt) Ltd	2009 (1) ZLR 380 (S)

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Document 2 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/BERENS v BERENS 2009 (1) ZLR 1 (H)

BERENS v BERENS 2009 (1) ZLR 1 (H)

2009 (1) ZLR p1

Citation	2009 (1) ZLR 1 (H)
Case No	Judgment No. HH-28-09
Court	High Court, Harare
Judge	Chitakunye J
Heard	6 January 2009
Judgment	6 January 2009
Counsel	<i>R M Fitches</i> , for the applicant <i>T H Chitapi</i> , for the respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

c Family law – child – custody – rights of custodian parent – right to determine where child should go to school – no obligation to consult non-custodian parent – when custodian parent's decision may be interfered with

Headnote

The applicant and the respondent had separated, pending divorce proceedings. ▯ The respondent, the wife, had custody of their son, who was about to start at senior school. The applicant enrolled the

boy at a private school in Harare, while the respondent enrolled him at a private school in the country. The applicant sought an order compelling the respondent to allow the boy to attend the school in Harare. He claimed that the respondent's ^ε insistence that the boy go to the other school was unreasonable, there being various advantages claimed for the Harare school.

Held, that the respondent, as the boy's mother, had sole custody of the boy in terms of s 5(1) of the Guardianship of Minors Act [*Chapter 5:08*]. As custodian parent, she had the right to regulate the life of the child, determining with whom he should or should not associate, how he ^ϕ should be educated, what religious training he should receive and how his health should be cared for, and so on. The applicant, as non-custodian parent, had no right to interfere in these matters, though he could petition the court to do so if it appeared that the respondent had exercised her discretion in a manner contrary to the interests of the child or in conflict with an order of court. In such intervention, the applicant would need ^ϑ to establish that the choice or decision was unreasonable or irrational or that no reasonable custodian parent could make such a decision and that such a decision was therefore not in the best interests of the child. While the custodian parent may consult the non-custodian parent, as this would in some cases be in the best interests of the minor, failure to ^η consult would not on its own turn a good decision into an unreasonable

2009 (1) ZLR p2

Chitakunye J

or irrational decision. Even where consultation has taken place, the final ^α decision is still with the custodian parent, with the non-custodian parent left to challenge such decision. It could not be said that the respondent's choice of school was irrational.

Case referred to

Makuni v Makuni 2001 (1) ZLR 189 (H) ^β

Legislation considered

Guardianship of Minors Act [*Chapter 5:08*], s 5(1)

Case information

R M Fitches, for the applicant ^Ϸ

T H Chitapi, for the respondent

Judgment

CHITAKUNYE J: The applicant and the respondent are husband and wife. In HC 4530/07 the respondent instituted divorce proceedings. That divorce action is still pending. Arising from difficulties in their marriage, the parties separated in or about April 2007 and they have been living apart since. ^δ On separation the custody of their three minor children remained with the respondent.

The respondent subsequently moved to Victoria Falls in or about December 2007. She took the children with her and enrolled them at a school in Victoria Falls. Their eldest child Matthew, born on 28 July 1996, is due to start ^ε secondary education this year 2009. Each parent has purportedly secured a secondary school place for him at their own school of choice. The applicant said he has secured a place for Matthew at St John's College, Harare, as a day scholar, whereas the respondent said she had secured a place for him at Falcon College, Esigodini, as a boarder.

The applicant seeks an interim order to the effect that the respondent be ^ϕ interdicted with immediate effect from interfering in or obstructing in any way the attendance at St John's College, Borrowdale, Harare of Matthew to undertake his secondary education with effect from 12 January 2009.

The terms of the final order were that:

1. That the enrolment of the minor child MATTHEW LEWIS BERENS at St ^ϑ John's College, Harare, from January 2009 be and is hereby confirmed.
2. that the secondary education of MATTHEW LEWIS BERENS at St John's College shall commence on the 1st day of the 2009 calendar year and shall continue thereafter at the said College unless and until the parties may agree to change the school, or until his attendance at the said school may for good cause no longer be permissible or in his best interests". ^η

Chitakunye J

A In seeking the above order the applicant in para 31 of his founding affidavit alleged:

"In my capacity as Matthew's natural father and co-guardian I do hereby request this Honourable Court to intervene as upper guardian of all minors, and to overrule what is, in my respectful submission the unreasonable decision by Matthew's mother to enroll him at Falcon College in Esigodini near Bulawayo, B where he has no family and friends at all, and to direct that he be enrolled at St Johns College in Harare where he has his father and his devoted and caring grandmother (being my mother). And for which school (unlike Falcon) he has passed the entrance exam.

I should also point out that the respondent's parents also live in Harare."

C The respondent's response was to this effect:

"I oppose the relief sought vehemently. I have not acted unreasonably. Passing an entrance examination for St John's was excellent. However, all private schools have the same criteria. I have already denied that it is a good ground to insist on a child attending a day school merely because his parents and grand parents will have access to him daily. Living away from the applicant and the grandparents is of course not a new experience to Matthew."

D On her efforts at securing a place at Falcon the respondent said:

"My position is that Matthew must attend Falcon College. He has been placed in Chubb House and he is wanted at the school on 10 January 2009. I attach and mark 'H' a copy of an e-mail confirming this."

The parties are agreed that the respondent has sole custody of Matthew in E terms of s 5(1) of the Guardianship of Minors Act [Chapter 5:08]. That section provides:

"Where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made under section four or this section or by a superior court such as is referred to in subparagraph (ii) F of paragraph (a) of subsection (7)."

As the custodian parent, the respondent is given certain rights and powers in the exercise of such custody. In *Makuni v Makuni* 2001 (1) ZLR 189 (H) Gowora J alluded to the fact that a custodian parent is vested with all the rights that entail the nurturing, shaping and bringing up of the minor children. She quoted with approval from Boberg *Family Law* at p 460 where the G learned author stated:

"An award of custody to a mother entrusts to her all that is meant by the nurture and upbringing of the minor children, in this is included all that makes up the ordinary daily life of the child – shelter, nourishment and the training of the mind ... The child ... passes into the home of the mother, and there it must find all that is necessary to its growth in mind and body... A custodian parent has H therefore the right to regulate the life of the child, determining with whom he

Chitakunye J

should or should not associate, how he should be educated, what religious training A he should receive and how his health should be cared for. The non-custodian parent has no right to interfere in these matters, though he may petition the court to do so if it appears that the custodian parent has exercised his discretion in a manner contrary to the interests of the child or in conflict with an order of court. Otherwise, he is confined to his right of access to the child."

It should thus be clear that the custodian parent is empowered to make B decisions on the day to day needs of the child without having to refer to the non-custodian parent. One of those decisions is the choice of school for the child. In the exercise of such custody she may, if she so desires, consult the non-custodian parent. The non-custodian parent can apply for intervention in the choice or decision made by the custodian parent where such decision C is not in the best interest of the child or the decision is inimical to the child. In such intervention, the applicant needs to establish or show that the choice or decision is unreasonable or irrational or that no reasonable custodian parent can make such a decision and that such a decision is therefore not in the best interest of the child.

In casu, it is clear that each parent opted for a school of their own choice D for their own reasons. In as far as the respondent's choice is concerned as the custodian parent, the question is: is the decision by respondent to secure a place for Matthew at Falcon College unreasonable, irrational or one such that no reasonable custodian parent can make? Can it be said the decision is not in the best interest of the child? E

There is no dispute that the school chosen by the respondent is an equally good school to that chosen by the applicant. The applicant did not point at any areas of inferiority of that school as compared to St Johns College. No differences in the quality of education offered thereat were alluded to. There was no challenge to the assertion on the well structured nature and disciplinary aspect of Falcon College. The applicant's bone of contention ^F was simply the fact of the College being a boarding school and the lack of family or friends of Matthew at or near the school. The applicant was averse to Matthew attending a boarding school, apparently because of his own childhood experience at a boarding school. The question that naturally arises is whether being in a boarding school and in a place where Matthew has no family members or friends makes the choice of the school unreasonable or ^G irrational and one that no reasonable custodian parent can make.

In my considered view, that is not so. The boarding facilities were not shown to be unsuitable for Matthew's needs.

The issue of lack of friends is one that should not turn a good decision into a bad decision. As a child grows up, whether in a new environment or familiar ^H

2009 (1) ZLR p5

Chitakunye J

^A environment, he or she makes friends. In my view, a child should not be denied a good education at a good school just because he has no friends at that school.

As for family members, unless there is a particular need for family members to be close by in order to attend, say, to the child's special needs, I do not ^B see this as cause for concern.

The question of what is in the best interest of the minor has to be looked at from both short term and long term viewpoints. In assessing such, the court has to consider that which will assist the child to grow up and not that which serves selfish parental interests but end up spoiling the child. Emotional or sentimental feelings maybe disturbed in the short term for the long term ^C interest of the child.

On consultation, it is my view that the custodian parent may consult the non-custodian parent, as this would in some cases be in the best interest of the minor. However, failure to consult would not, on its own, turn a good decision into an unreasonable or irrational decision. Even where consultation ^D has taken place, the final decision is still with the custodian parent, with the non-custodian parent left to challenge such decision.

The non-custodian parent is at liberty to apply for custody as provided for in the Act. It may also be pertinent to point out that the net effect of what the applicant seeks is to be granted custody without having applied for it in terms of the Act. This cannot be.

^E I am of the view that the application cannot succeed. Accordingly, the application is hereby dismissed with each party to bear their own costs.

Atherstone & Cook, legal practitioners for the applicant

^F *T H Chitapi & Associates*, legal practitioners for the respondent

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Document 3 of 52

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/BAKARIS v KATTAVENOS 2009 (1) ZLR 6 (H)

BAKARIS v KATTAVENOS 2009 (1) ZLR 6 (H)

2009 (1) ZLR p6

Citation 2009 (1) ZLR 6 (H)

Case No Judgment No HH-1-09

Court	High Court, Harare
Judge	Kudya J
Heard	4 December 2007; 17 December 2007; 19 December 2007
Judgment	14 January 2009
Counsel	<i>E T Matinenga</i> , for the plaintiff <i>Mrs J B Wood</i> , for the defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Partnership – dissolution – division of property following dissolution – *actio communi dividendo* – principles – court's discretion – need for plaintiff to plead ancillary claims relating to adjustment of claim – assessment of value of claims

Practice and procedure – claim – quantification – inflation – effect of – D adjustment of claim to counter effects of inflation – such adjustment contrary to principle of nominalism

Property and real rights – property – division of – following dissolution of partnership – *actio communi dividendo* – principles – court's discretion – need for plaintiff to plead ancillary claims relating to adjustment of claim – assessment of value of claims – adjustment of claims to counter E effects of inflation – such adjustment contrary to principle of nominalism

Headnote

The parties, who were brothers-in-law, had been in partnership together. They owned several properties in equal shares. The parties eventually decided to terminate the partnership and the applicant sought an order F for the termination of the joint ownership and for a fair and equitable distribution of the properties. It was common cause that the plaintiff's claim was based on the *actio communi dividendo*, by means of which not only division, but also adjustment may be claimed. Adjustment may relate to, for example, damage caused to or profits enjoyed or expenses G incurred in connection with the joint property.

Held, that if the co-owners cannot agree on the manner in which the property is to be divided among them, the court will make such order as appears to be fair and equitable in the circumstances. The court has a wide equitable discretion in making a division of joint property. This wide equitable discretion is substantially identical to the similar discretion which a court H

2009 (1) ZLR p7

A has in respect of the mode of distribution of partnership assets among partners. The court usually endeavours to divide the property physically amongst the co-owners in accordance with the value of the property and each co-owner's share in it. If such a division is uneconomical or inequitable, the court may, for instance, allot the property to one co-owner and order him to pay compensation to the other co-owners.

B *Held*, further, that while the *actio communi dividendo* may be used to claim for adjustments for profits enjoyed and expenses incurred, it is axiomatic that the pleadings must set out the cause of action in clear and concise language. The plaintiff must specifically plead the ancillary claims. *In casu*, the plaintiff did not do so. By his failure to plead the ancillary relief C that he sought, he misled the defendant as to the nature and extent of his claim. The defendant did not prepare his defence with the ancillary claims in mind and was, therefore, prejudiced in the conduct of his defence.

Held, further, that the system used by the plaintiff of upgrading values to counter the effects of inflation was contrary to our law as it offended against the principle of nominalism. It would

represent a revolutionary ^D transformation of our legal system if courts were to be called upon to determine the true economic value (in terms of purchasing power) of all obligations sounding in money. A monetary debt has to be paid in terms of its nominal value.

Cases cited ^E

Bennett NO v Le Roux 1983 (2) ZLR 301 (H)

d'Ambrosi v Bane & Ors 2006 (5) SA 121 (C)

Eden v Pienaar 2001 (1) SA 158 (W)

Maketo & Anor v Wood & Ors 1994 (1) ZLR 102 (H)

Marume & Anor v Muranganwa HH-27-07

^F *Mugabe & Anor v Law Society of Zimbabwe* 1994 (2) ZLR 356 (S)

Muzeya NO v Marais & Anor 2004 (1) ZLR 326 (H)

Parish v King 1992 (1) ZLR 216 (S)

Phillip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd 1975 (2) SA 420 (A)

^G *Pitluk v Law Society of Rhodesia* 1974 (2) RLR 245 (A); 1975 (2) SA 21 (RA)

Rademeyer & Ors v Rademeyer & Ors 1968 (3) SA 1 (C)

Robson v Theron 1978 (1) SA 841 (A)

SA Eagle Ins Co Ltd v Hartley 1990 (4) SA 833 (A)

Legislation considered ^H

2009 (1) ZLR p8

Kudya J

Prescribed Rate of Interest Act [*Chapter 8:10*] ^A

Case information

E T Matinenga, for the plaintiff

Mrs J B Wood, for the defendant

Judgment

KUDYA J: The parties are brothers-in-law. They own four immovable ^B properties in equal shares. These are Tawona of Galway Estate (Tawona); Lot 4 of York of Galway Estate (Lot 4); Subdivision B of York of Galway Estate (Subdivision B) and Stand 244 of Mangula Township 2 of Lot 1 of Plateau, Mhangura (Mhangura property).

The parties are not able to work together. On 4 April 2002, the plaintiff issued ^C summons out of this court seeking the termination of their joint ownership of Lot 3A of York, Goromonzi District (Lot 3A) in a fair and equitable manner; the rendering of a full account of the net rentals from tenants on this property from January 1993 within 30 days of this order; the debatement of such accounts; the payment by the defendant to the plaintiff of one half of such net rentals and costs of suit. The summons was served on 12 April ^D 2002 and the appearance to defend filed on 26 April 2002. The defendant sought further particulars on 31 May 2002, which were supplied on 17 June 2002. The defendant filed his plea on 5 July 2002. On 13 February 2003 the plaintiff filed a notice of amendment in which he included Subdivision B, Lot 4 and the Mhangura property as due for termination and distribution. Tawona was only incorporated by an amendment that was entered into by ^E the plaintiff on 16 February 2007.

The latter amendment had been preceded by an agreement reached by the parties at the pre-trial conference held before Hlatshwayo J on 26 September 2003. In that agreement the parties reached an out of court settlement on the termination of their business relationship and ownership of Lot 3A. In ^F addition, they agreed to negotiate on a *bona fide* basis the division between them of the four properties in dispute which they accepted they owned on an equal basis within two weeks from 26 September 2003.

They failed to resolve the division of the properties in question. At the pre-trial conference of 16 July 2004, the joint minute of which they signed on 28 November 2006 and filed on 6 December 2006, the matter was referred to trial for the determination of a fair and equitable partition of the four properties in question. The costs of that pre-trial conference were to be in the cause.

The trial failed to commence on 30 July and 24 September 2007 because of the unavailability of the defendant. It started in earnest on 4 December 2007. At the conclusion of the trial on 19 December 2007, I postponed the

2009 (1) ZLR p9

Kudya J

A matter for judgment. From 28 December 2007 until 28 April 2008 I was a member of a constitutional inquiry and thereafter until September 2008 I was involved in electoral petitions. These activities made it difficult for me to deliver this judgment with promptitude. The delay to the parties is regretted.

[The learned judge then considered the evidence in detail and continued:]

B The law

It was common cause that the plaintiff's claim was based on the *actio communi dividendo*. According to Joubert JA in *Robson v Theron* 1978 (1) SA 841 (A) at 854H-855A the *actio communi dividendo* is a claim for the division of joint property. The learned Judge of Appeal stated thus:

" c The *actio communi dividendo* has a two-fold purpose, viz. to claim division of joint property and payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property. *Van der Linden* 1.15.15; *Voet* 10.3.3; *Van Leeuwen Censura Forensis* 1.4.27.2.4."

To the same effect is *The Law of South Africa (LAWSA)* vol 27 para 414 which states that:

" d The institution of the *actio communi dividendo* does not entail partition only but also an adjustment of the various claims amongst the co-owners. All extant expenses for necessary improvements, disproportionate gathering of fruits and losses suffered on account of the fault of a co-owner are set off against each other."

Robson v Theron supra at 855A-H sets out the nature and effect of the *actio communi dividendo* and then summarizes it at 856G-857D in these words:

"(B) The principles of the common law applicable to the *actio communi dividendo* may be briefly summarized as follows:

1. No co-owner is normally obliged to remain a co-owner against his will.
2. This action is available to those who own specific tangible things (*res corporales*) in co-ownership, irrespective of whether the co-owners are f partners or not, to claim division of joint property.
3. Hence this action may be brought by a co-owner for the division of joint property where the co-owners cannot agree to the method of division. Since a partnership asset is joint property which is held by the partners in co-ownership, it follows that a partner may as a co-owner bring this action for the division of a partnership asset where the co-partners cannot agree g to the method of its division. This would obviously cover the position where, after dissolution of a partnership, a continuing partner as a co-owner retains possession of an undivided partnership asset. A retiring partner as a co-owner would accordingly be entitled to institute this action against the continuing partner as co-owner to compel a division of the partnership asset in question. h
4. It is for purposes of this action immaterial whether the co-owners possess

2009 (1) ZLR p10

Kudya J

the joint property jointly or neither of them possesses it or only one of them a is in possession thereof.

5. This action may also be used to claim as ancillary relief payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property.
6. A court has a wide equitable discretion in making a division of joint property. This wide equitable discretion is substantially identical to the b similar discretion which a court has in respect of the mode of distribution of partnership assets among partners as described by *Pothier*.

(C) The principles of the common law which are applicable to the *actio communi dividendo* have in Roman-Dutch law been extended to intangible things (*res incorporales*) which are held in co-ownership by means

of the *utilis actio communi dividendo*.”^c

The court has a wide discretion in partitioning and distributing the joint property. It is guided by what is fair and equitable in the circumstances before it. *LAWSA, supra*, at para 414 graphically outlines the extent of the discretion in these terms:

“If the parties cannot agree on the terms of partition or on the appointment of a ^d suitable arbitrator, an *actio communi dividendo* can be instituted for the partition of the property. However, the court will not countenance such an application if the parties have not previously seriously endeavoured to reach an agreement on the terms of a partition. It is customary that a proposal of a possible division forms part of the application but the court is not bound by such a proposal. The court has a wide discretion to effect an equitable partition amongst the ^e co-owners in accordance with the value of the property and each co-owner’s share in it. If such a division is uneconomical or inequitable, the court may, for instance, allot the property to one co-owner and order him to pay compensation to the other co-owners. This type of division occurs as a rule in the case of indivisible articles such as a building, a painting or a farm the partition of which would result in uneconomic portions. If a farm of one of the co-owners borders ^f on a farm held in common, the court will usually allot a portion adjacent to his farm to that co-owner. In appropriate circumstances the common property will be decreed to be sold by public auction and the proceeds divided amongst the co-owners. In a case which concerned the partition of a farm which belonged to two brothers the court decided that the most equitable solution was to hold a closed auction with the two brothers bidding. The court also has discretion to postpone partition or sale of the common property if this will prejudice the ^g co-owners or any one of them.”

The same point is made by Kleyn and Boraime *Silberberg and Schoeman’s The Law of Property* 3 ed at pp 312-313. The learned authors state thus:

“For, if co-owners cannot agree on the manner in which the property is to be divided among them, the court will make such order as appears to be fair and equitable in the circumstances. Where the property, for example agricultural land, ^h

2009 (1) ZLR p11

Kudya J

A is indivisible the court will either order one of the co-owners to take it over and pay out the others, or it will order the property to be sold and the proceeds to be divided among the co-owners according to their shares. In *Kruger v Terblanche* 1979 (4) SA 38 (T) at 39 an order was made, by consent, that certain agricultural land, being indivisible, was to be sold to the highest bidder at a *private auction of the joint owners*. The applicable action is the *actio communi dividendo*, by means of which not only division, but also adjustment may be claimed. Adjustment ^b may relate to, for example, damage caused to or profits enjoyed or expenses incurred in connection with the joint property.”

See also *Amler’s Precedents of Pleadings* 5 ed at p 240 and *Bennett NO v Le Roux* 1983 (2) ZLR 301 (H) at 303E-304B.

Resolution of the matter

^c It was common cause that the parties were unable and unwilling to manage the joint properties together. It was also common cause that between 2003 and 2007 they had seriously endeavoured but had failed to reach agreement on the terms of the partition of the four properties in question and the bakery business. In their negotiations the parties agreed that they were equal co- ^d owners of the properties under consideration. This is clear from the offers and counter offers made in their respective correspondence of 5 and 18 December 2006 and in Lamb’s letter of 28 February 2007. I am therefore at large in determining the most equitable way of partitioning these properties.

Mr *Matinenga* contended that in arriving at an equitable partition of the joint property, I was obliged to consider the expenses incurred and the profits, ^e benefits and other advantages missed by the plaintiff in the joint property notwithstanding that these had not been specifically pleaded. Mrs *Wood* disagreed. She urged me to disregard them on the ground that these had not been pleaded and as a result were prejudicial to the defendant.

It was common cause that the expenses that were incurred by the plaintiff were ^f for the construction of the embankment for the water reservoir. Mr *Matinenga* contended that the advantages that were enjoyed by the defendant to the exclusion of the plaintiff were for rentals from the restaurant and Econet, the value of the movable assets purchased from Copanakis, and the cash misappropriated from the stand sales. He submitted that the starting point ^g was to consider the parties as equal joint owners and allocate a one-half share of the total value of the properties to

each party. The second stage was to determine the expenses incurred by the plaintiff and the value of the advantages enjoyed by the defendant. The third stage was to deduct one half of the expenses incurred by the plaintiff in the construction of the embankment from the half share of the defendant and add it to the plaintiff's portion. The next stage was to deduct half the value of the advantages enjoyed by the

2009 (1) ZLR p12

Kudya J

defendant and add them to the plaintiff's portion. ^A

Mr *Matinenga* urged me to accept the evidence of value that was led by Masaya, Miles and Lamb, which was conveniently set out in Lamb's table. He submitted on the authority of *Maketo & Anor v Wood & Ors* 1994 (1) ZLR 102 (H) at 131 that the evidence on value was sufficient for me to come to a decision. He further submitted that Lamb's table accurately captured the fairest and equitable way of partitioning the properties between the parties.

In her submissions, Mrs *Wood* did not impugn the formula advanced by Mr *Matinenga*. She first attacked the sufficiency of the evidence that was adduced on the value of the expenses incurred by the plaintiff to the exclusion of the defendant. She relied on the principle of nominalism. She also disputed that the plaintiff had established on a balance of probabilities the following facts: ^C

- a) the actual amounts of rentals received by the defendant from the restaurant and Econet;
- b) that movable assets were purchased from Copanakis for the account of the co-owners and even if that were proved, their values;
- c) that the defendant had misappropriated cash from the sale of stands and ^D even if he had done so, the amount that he misappropriated.

I will deal firstly with the submissions made by counsel on the necessity of pleading the ancillary claims of the expenses incurred and benefits enjoyed. Mr *Matinenga* relied on the sentiments expressed by Kleyn and Borraine *op cit* in the last two sentences of the quotation cited above; *LAWSA supra*, which ^E are both to the effect that the *actio communi dividendo* may be used to claim for adjustments for profits enjoyed and expenses incurred. It is axiomatic that pleadings must set out the cause of action in clear and concise language. In his declaration, the plaintiff sought the termination of joint ownership only. He did not seek ancillary relief for the four properties in question. He ^F was the one who dragged the defendant to court. He was aware what it is that he wanted from the defendant. He was aware as shown by his initial summons that he had to set out separate claims for rentals and any other ancillary claims he may have sought. In the original summons he did just that in respect of his claims on Lot 3A, which were settled out of court on 26 September 2003. By his failure to plead the ancillary relief that he now ^G seeks, he misled the defendant as to the nature and extent of his claim. After all, in our practice, a claim is set out in the declaration and not in evidence. This is done to notify the defendant of the nature of the claim against him so that he can respond to it appropriately. The defendant did not prepare his defence with the ancillary claims in mind. He was, therefore, prejudiced in the conduct of his defence. ^H

2009 (1) ZLR p13

Kudya J

^A In any event, I understood the text book writers referred to by Mr *Matinenga* to say that a joint owner may use the *actio communi dividendo* to seek partition and or adjustments. In my view the use of the word "claim" by these authors underscores the need for the plaintiff to specifically plead the ancillary claims that he set out in evidence. *Amler's Precedents supra* at p 241, on the authority of *Robson v Theron supra* at 857C and *Rademeyer v Rademeyer & Ors* 1968 (3) SA 1 (C), underscored the need to claim for the ancillary relief that the plaintiff sought. Accordingly, I agree with Mrs *Wood* that as those claims are improperly before me, I cannot take them into account in the partitioning of the four properties in question.

In the alternative, Mrs *Wood* submitted that the adjustments sought by the ^C plaintiff were not proved. She conceded that the expenses incurred by the plaintiff in the construction of the embankment were proved. These were in the sum of \$178 393 365 (see pp 328-334 of exhibit 1) and the defendant was willing to pay half that amount as his share. The plaintiff did not lead evidence on the actual rentals that were received by the defendant for which he sought an adjustment. There was no basis for using a complex ^D and mysterious formula for estimating the

rentals received when the actual amount was ascertainable. The plaintiff proved to be his own worst enemy by failing to plead this adjustment. On the movables that were allegedly purchased from Copanakis, the documentary evidence produced by the defendant from Copanakis destroyed the plaintiff's pretensions that these assets were jointly owned. But even if they were proved to have been jointly ^ε owned, the plaintiff failed to prove their value. The use of a single quotation for new property was an inadequate method for evaluating used property. Furthermore, it would appear on the authority of *Phillip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd* 1975 (2) SA 420 (A) at 428F-G and 429F and *Parish v King* 1992 (1) ZLR 216 (S) at 225C-D that the plaintiff ought ^ϕ to have launched a delictual claim for the disposal of what would have been joint property. *Parish v King supra* makes the point that such disposal would amount to a delictual rather than a contractual breach.

Mrs Wood further raised the issue of prescription against some of the adjustment based claims. The plaintiff amended his settled claims after the defendant raised prescription on his claims for rentals in the settled claims for Lot 3A. ^ϑ He was aware that by the date of trial in December 2007, all claims sought after 4 December 2004 would have prescribed. The movables purchased from Copanakis fell into this category as they were sold in 2003. Into this category would fall all rentals sought and all sums allegedly misappropriated from the sale of stands. I agree with her submission in this regard.

^η As regards the amount that was allegedly misappropriated, the evidence

2009 (1) ZLR p14

Kudya J

used by the plaintiff indicates that this could be in the region of \$2.5 million ^Α if regard is had to the \$1.8 million of his own money that the defendant expended. The plaintiff stated that the misappropriation took place between 2001 and 2002. The defendant handed all the books of account to Figg who in turn surrendered everything to EMA who in turn handed all to Lorraine Castedo. In the absence of reconciliation from either EMA or Lorraine Castedo ^Β of the sums received by the defendant and those handed to Figg, there was no evidence to show that any money was misappropriated. The schedule by EMA simply listed the amounts of money that were in the receipt book that was compiled by the defendant. The EMA accounts did not indicate the presence of a deposit book or any sums that were banked by Figg. There was insufficient evidence to prove misappropriation, which needed to be proved ^ϑ beyond a reasonable doubt because of the criminal connotations involved. See *Pitluk v Law Society of Rhodesia* 1974 (2) RLR 245 (A); 1975 (2) SA 21 (RA) and *Mugabe & Anor v Law Society of Zimbabwe* 1994 (2) ZLR 356 (S) at 363-365B.

The plaintiff failed to justify the necessity for an adjustment of the expenses ^ϑ he incurred and the benefits he alleged accrued to the defendant. His ancillary claims would also fail on the ground that they were not proved by the evidence that he called.

Mr *Matinenga* also submitted that the values of the properties had been proved by the evidence called by the plaintiff. He urged me to use them in partitioning the properties in a manner that achieves a clean break between ^ε the parties. The estimates on value were eroded by inflation by the time of trial and more so by the time of judgment. I have already dealt with the deficiencies in the methodologies that were used by Masaya, Miles and Lamb in setting the values of the four properties.

The method used by Lamb of upgrading values is contrary to our law. It ^ϕ offends against the principle of nominalism that was enunciated by E M Grosskopf JA in *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A) at 840F-G in the following terms:

"It would represent a revolutionary transformation of our legal system if courts were to be called upon to determine the true economic value (in terms of purchasing power) of all obligations sounding in money. I need not, however, labour this ^ϑ point: currency nominalism, for whatever reason, is firmly entrenched in our law."

At 839G he had defined currency nominalism in these terms:

"This result seems to me to be in conflict with the principle of nominalism of currency which underlies all aspects of South African law, including the law of obligations. Its essence, in the field of obligations, is that a debt sounding in ^η

2009 (1) ZLR p15

Kudya J

a money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency. This places the risk of a depreciation of the currency on the creditor and saddles the debtor with the risk of an appreciation."

See also *d'Ambrosi v Bane & Ors* 2006 (5) SA 121 (C) at 126C-I

The learned Judge of Appeal emphasized at 841E-F that while the principle *b* affected monetary debts it did not apply to general damages. In dealing with such damages one would be determining, not a monetary debt but the valuation of a non-monetary loss, which had to be made in terms of the currency values obtaining at the time of valuation, and not in an earlier time. He further noted that a valuer of a farm would not use the currency of the past and concluded that "*a monetary debt is not, however, subject to a c similar type of valuation. It has to be paid according to its nominal value*" (emphasis is mine).

The principle was adopted in Zimbabwe by Chinhengo J in *Muzeya v Marais & Anor* 2004 (1) ZLR 326 (H) at 336-338 and passing reference was made by the Judge President in *Marume & Anor v Muranganwa* HH-27-07 at *d* p 4 of the judgment. Courts have adopted a conservative approach to the question of determining the true economic value of money because they defer to the executive branch of government the formulation of economic policy. The Prescribed Rate of Interest Act [*Chapter 8:10*] is one piece of legislation which empowers the Minister of Justice, Legal and Parliamentary Affairs to revalorize currency through the management of interest rates. *e* He is better suited than a court of law to assess the competing economic interests of inflation, money supply growth, export performance and balance of payments support amongst other variables. See also *Eden v Pienaar* 2001 (1) SA 158 (W).

The principle of nominalism militates against the upgrading of values as *f* was employed by Lamb in his table. While nominalism would not apply to evaluation of the properties in issue or any other property for that matter, it would apply to monetary debts such as those that the plaintiff referred to as adjustments. It would apply to the durawall and roofing assets disposal, property sales not banked, Plaka rents not banked and reservoir payments that appear in Lamb's table. It would not apply to fixed property evaluation, *g* the cost of works in progress, that is, the cost to complete infrastructure for properties sold and the cost to complete the reservoir that appear in the same table.

In resolving the issue before me, I will be guided by the principles that I have set out in regard to the wide discretion that I have and the law, to achieve *h* an equitable apportioning of the four properties and the bakery business.

2009 (1) ZLR p16

Kudya J

Even though Mhangura Bakery is a partnership, it is within my common *a* law powers to divide its assets between the co-partners. See *Theron's case supra* at 857A. The defendant was amenable to the plaintiff buying him out as long as an independent evaluation of the all the assets of the bakery was commissioned by the court.

In dealing with Lot 4, Subdivision B and Tawona, I will be guided by the *b* caution in *Amler's Precedents supra* at p 240 that to achieve an equitable distribution the court is empowered to divide the property if that can be done physically and legally. The full quotation states thus:

"The general rule is that the court will follow the method which is fair and equitable to both parties. Examples of such methods include a division of the property, if that can be done physically and legally: *Badenhorst v Marks* 1911 TPD 144; a *c* sale by public auction and division of the nett income: *Estate Rother v Estate Sandig* 1943 AD 47; an allocation of the property to the one co-owner: *Robson v Rother supra*; and a private auction restricted to the co-owners and a division of the nett amount: *Kruger v Terblanche* 1979 (4) SA 38 (T)."

The ideal situation would be for the court to allocate each party a one-half share in Lot 4 and Subdivision B in terms of the subdivision permit No 12/1997, *d* exhibit 15. It was unclear from the evidence whether the subdivision permit for these two properties was cancelled. Exhibit 15, however, indicates that the permit for the subdivision of the two properties was granted on 25 March 1998. The subdivision permit envisages the construction of a 15 meter wide road across these properties which has the effect of dividing each property *e* into two equal portions. While I could order registration of title to each party against each portion of each property, the construction of the

road would require the parties to work together. Past experience and the breakdown of the business and personal relationship between them is such that they will not be able to work together. It would thus be inequitable to apportion each party a share in terms of the subdivision permit exhibit 15. The allocation ^F of the portions on each property may be difficult bearing in mind that the front portions would be used for commerce while the back portions would be for residential development. The defendant sought the front portions on the basis that he holds greater interest in the restaurant on Subdivision B. He would end up with the more valuable commercial portions while the plaintiff ^G would be saddled with the less lucrative residential stands. The defendant's prayer in this regard would not be equitable.

The other option available would be to order the evaluation of the two properties and allow one of the parties to buy out the other in a specified time frame, failing which the properties would be sold to best advantage with the parties sharing equally in the net proceeds. This option would work ^H

2009 (1) ZLR p17

Kudya J

^A but our hyperinflationary environment may result in injustice to the party whose portion is bought out or to both if the properties are sold and they share in the net proceeds. The second option would thus be inequitable to either one or both parties.

In the exercise of my discretion, I am obliged to consider the sentimental ^B attachments the parties have to the properties in question and the Mhangura property and business. The evidence showed that the plaintiff was in charge of the Mhangura operations. Until the economic down turn occasioned by the closure of Mhangura Mine and the land reform programme, he lived in Mhangura. He is more attached to Mhangura than the defendant. The plaintiff was the only one who made drawings from the Mhangura operations. The ^C defendant maintained that the Mhangura operations were solely managed by the plaintiff. The plaintiff also demonstrated his sentimental attachment to Mhangura by undervaluing the movable assets of Mhangura and by seeking to cling to the motor vehicles. The defendant was prepared to forego his share in Mhangura in exchange for an equivalent share due to the plaintiff in any other property.

^D On the other hand, while the parties are equal owners in Subdivision B, the defendant has greater sentimental attachment to it because of the work he carried out on the restaurant. He was also responsible for the renovation of the house in which the plaintiff's son used to live. The funds that were used on both buildings came from the supermarket in which the defendant held 75 ^E per cent of the shares against the plaintiff's 25 per cent. That the defendant played a more overarching role than the plaintiff was demonstrated in the questions that were directed at the defendant's son in cross-examination concerning the construction of the restaurant. The defendant would ideally be entitled to a greater portion of Subdivision B.

^F Subdivision B has existing buildings and has a hectareage of 1 2140 while Lot 4 has a wall around it and has a hectareage of 2 2781. While Masaya's evaluations were inaccurate, they demonstrated that Subdivision B is more valuable than Lot 4. Masaya's unreliable valuation also showed that even the aggregate of the values of Mhangura and Lot 4 would not match half the value of Subdivision B. In my view, however, Lot 4 has more potential ^G for future developments than Subdivision B.

I am of the view that the orders that I contemplated above of evaluations that are accompanied by buy-outs or disposals would be cumbersome, dilatory, expensive and unsatisfactory. The most fair and just method of apportioning these three properties would be to allocate the Mhangura property and ^H business; and Lot 4 to the plaintiff; and Subdivision B to the defendant. I

2009 (1) ZLR p18

Kudya J

will accordingly make orders to that effect. ^A

The property which remains to be apportioned is Tawona. Both counsel correctly contended that the parties did not desire the apportionment of Tawona that was outlined in their respective correspondence of 5 and 18 December 2006. They were also agreed that the recommendations made by Lamb in his letter of 28 February 2007 were not workable. My view is that ^B the net effect of the suggestions that were made in these three letters would require the parties to work together in the development of Tawona. It was common cause that they did not have such an inclination.

Accordingly, I agree with both counsel that the suggestions that were made in December 2006 and February 2007 are unworkable and would result in injustice c between the parties.

Tawona is a development project in which the parties have an equal stake. The defendant accepted that the plaintiff was the one who incurred expenses in the construction of the embankment. He was willing to pay one half of the expenses. Based on my finding that these were not pleaded and that they had prescribed, the defendant is not legally obliged to pay them. The due d amount, in the light of the principle of nominalism and after the revaluation of our currency in August 2006 and August 2008, would be insignificant. In fairness to the plaintiff, I find that the amount he paid would be counteracted by the incalculable and invaluable energy that the defendant injected into the development of the project before he left the country in 2003.

The defendant suggested an attractive method of apportioning Tawona that e is based on square meters. The parties were agreed that the value of a stand incorporates the cost of developing infrastructure to the extent that half the value of the stand would be equal to the cost of infrastructural development. Mrs Wood urged me to employ this method of allocation in such a way that whoever between the parties is ordered to develop the infrastructure would f end up receiving a 75 per cent as against a 25 per cent share of the property. The submission effectively means I would be obliged to award 75 per cent of Tawona to one party and direct that party to take charge of infrastructural development. The remaining 25 per cent would go to the passive party. I find the suggestion fair and equitable. g

I will adopt it with modifications. The evidence revealed that the defendant and his family moved to Greece in 2005, where he is now domiciled. He will be prepared to send his son to develop Tawona, if the court so directs. The defendant's son indicated that the defendant was amenable to the plaintiff buying out his interest in Tawona, provided the value of the property was properly assessed by an independent evaluator. I am satisfied that the h

2009 (1) ZLR p19

Kudya J

A defendant's interest in the development of the project has waned. The plaintiff's interest in the development of Tawona is still very high. The task of developing Tawona will thus fall on the plaintiff. He knows what needs to be done to complete the project. He is resident in Zimbabwe. He paid Tawona's share of the construction of the embankment. The most equitable way of apportioning the property would be to award to the plaintiff a 75 per b cent share of Tawona and the remaining 25 per cent to the defendant. I will further direct that the plaintiff purchase the defendant's share in a specified time frame. If he fails to do so, then the property would have to be sold by public auction with the parties sharing equally in the nett proceeds thereof.

Costs

c Neither party's position has carried the day. In the circumstances each party shall bear his own costs.

Disposition

Accordingly, it is ordered that: d

- 1
 - a. Stand 244 of Mangula Township 2 of Lot 1 of Plateau registered under Deed of Transfer number 3731/1986 in favour of Constantinos Bakaris and George Kattavenos is hereby awarded to the plaintiff.
 - b. The defendant shall within 10 days of being called upon to do so by the plaintiff, sign all documents necessary to effect transfer to the plaintiff of his one-half share in the property described in (a) e above, failing which the Deputy Sheriff shall sign all such necessary documents.
 - c. The costs of the transfer shall be borne by the plaintiff
- 2 The Mhangura business trading as Mhangura Bakery and Supermarket is awarded to the plaintiff. f
- 3
 - a. Lot 4 of York of Galway Estate registered under Deed of Transfer number 2729/1989 in favour of George Kattavenos and Constantinos Bakaris is hereby awarded to the plaintiff;

- b. the defendant shall within 10 days of being called upon to do so by the plaintiff, sign all documents necessary to effect transfer to ^G the plaintiff of his one-half share in the property described in (a) above, failing which the Deputy Sheriff shall sign all such necessary documents.
 - c. The costs of the transfer shall be borne by the plaintiff.
- 4 a. Subdivision B of York of Galway Estate registered under Deed of ^H Transfer number 8579/1989 in favour of George Kattavenos and

2009 (1) ZLR p20

Kudya J

- Constantinos Bakaris is hereby awarded to the defendant. ^A
- b. the plaintiff shall within 10 days of being called upon to do so by the defendant, sign all documents necessary to effect transfer to the defendant of his one-half share in the property described in (a) above, failing which the Deputy Sheriff shall sign all such necessary documents ^B
 - c. the costs of the transfer shall be borne by the defendant.
- 5 The plaintiff is awarded 75 per cent share of Tawona Portion of Galway Estate also known as Tawona Estate of Mutare Road registered under Deed of Transfer number 7916/1988 in favour of George Kattavenos and Constantinos Bakaris while the defendant is awarded the remaining ^C 25 per cent share.
- a. The Registrar shall, within 10 days of this order from his list of evaluators, appoint an evaluator other than Seef Properties;
 - b. The evaluator appointed in terms of (a) above shall evaluate the said property and submit his report to the parties and the Registrar ^D within 10 days from the date of his appointment;
 - c. The costs of such evaluation shall be shared equally between the parties;
 - d. The plaintiff shall within 30 days of the receipt of the report referred to in (b) above make payment to the defendant in one lump sum of such amount as represents 25 per cent of the net value of the ^E property;
 - e. In the event that the plaintiff fails to effect such payment within the period referred to in (d) above, the property is to be sold by public auction and the net amount distributed equally between the parties.
- 6 Each party shall bear his own costs. ^F

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Byron Venturas & Partners, defendant's legal practitioners ^G

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Document 4 of 52

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MUKOKO v COMMISSIONER-GENERAL OF POLICE & ORS 2009 (1) ZLR 21 (S)

2009 (1) ZLR p21

Citation	2009 (1) ZLR 21 (S)
Case No	Judgment No. S-03-09
Court	Supreme Court, Harare
Judge	Chidyausiku CJ (in chambers)

Heard	12 January 2009
Judgment	14 January 2009
Counsel	<i>M P Mahlanga</i> , for the applicant <i>P Machaya</i> , for the respondents
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – s 24 – referral of constitutional question to Supreme Court – question arising out of proceedings in lower court – may only be referred by that court in terms of s 24(1) – not open to party to apply directly in terms of s 24(1)*

Headnote

The applicant was placed on remand by the fifth respondent, a magistrate. She contended that there was no legal basis to place her on remand and that her constitutional rights had been violated by her being placed on remand in the circumstances in which she had been arrested. She then brought an application to the Supreme Court in terms of s 24(1) of the Constitution.

Held, that the application was fatally defective. As the application arose from proceedings in the magistrate's court, the applicant should have proceeded in terms of s 24(2) of the Constitution. The application should have come to the Supreme Court by way of referral in terms of s 24(2), as opposed to a direct application in terms of s 24(1) of the Constitution. When a matter is before the High Court or any court subordinate to the High Court, such as the magistrate's court as in this case, the question of the contravention of the guaranteed rights should be referred to the Supreme Court by the court *mero motu*, or at the instance of any one of the parties to the proceedings. That constitutional question cannot be brought to the Supreme Court by way of an application in terms of s 24(1) of the Constitution. Section 24(3) of the Constitution expressly provides that. If the lower court fails to act *mero motu* or refuses upon application to refer the matter to the Supreme Court for reasons other than those permitted under s 24 of the Constitution, an applicant is

2009 (1) ZLR p22

Chidyausiku CJ

then entitled to approach the Supreme Court in terms of s 24(1). Once proceedings have 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.

Cases cited ^B

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

Shumba & Anor v Zimbabwe Electoral Commission & Anor 2008 (2) ZLR 65 (S)

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

Legislation considered

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

Case information

M P Mahlanga, for the applicant

P Machaya, for the respondents **D**

Judgment

CHIDYAUSIKU CJ: In this chamber application, the applicant seeks an order to depart from the Supreme Court Rules in regard to the set down of a constitutional court application made in terms of s 24(1) of the Constitution of Zimbabwe (hereinafter referred to as "the Constitution"). In other words, this **E** is an application for the hearing of the court application on an urgent basis. Both counsel agree the matter is urgent. I accept that the matter is urgent. I, however, do not accept that the matter should be set down, because the constitutional court application is fatally defective in that it does not comply with s 24 of the Constitution. Section 24 of the Constitution is peremptory. This court has no discretion to condone a departure from compliance with **F** s 24 of the Constitution. Consequently, failure to comply with the procedure set out in s 24 of the Constitution is fatal to any Court application made in terms thereof. Although the court application does not, as it should, state explicitly that it is being made in terms of s 24(1) of the Constitution, it is quite clear from the papers that it is being made in terms of that subsection. In my **G** view, the applicant cannot proceed in terms of s 24(1). The court application arises from proceedings in the magistrate's court and the applicant should have proceeded in terms of s 24(2) of the Constitution. Put differently, the court application should have come to the Supreme Court by way of referral in terms of s 24(2), as opposed to a direct application in terms of s 24(1) of the Constitution. **H**

2009 (1) ZLR p23

Chidyausiku CJ

A The relevant part of s 24 of the Constitution provides as follows:

"Enforcement of protective provisions

(1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to **B** the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.

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

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

(4) he Supreme Court shall have original jurisdiction –

- (a) to hear and determine any application made by any person pursuant to subsection (1) or to determine without a hearing any such application which, in its opinion, is merely frivolous or vexatious; and
- (b) to determine any question arising in the case of any person which is referred to it pursuant to subsection (2);

E and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights:

Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions **F** of this Constitution or under any other law."

Thus s 24 of the Constitution is very explicit in the following two respects:

- (a) a party alleging violation of a guaranteed constitutional right can approach the Supreme Court directly in terms of s 24(1); and
- (b) if the alleged violation of the guaranteed right has arisen in any proceedings **G** in the High Court or in any court subordinate to the High Court, the Supreme Court can only adjudicate on the matter upon referral by the lower court in terms of s 24(2).

Thus, when a matter is before the High Court or any court subordinate to the High Court, such as the magistrate's court as in this case, the question of **H** the contravention of the guaranteed right should be referred to the Supreme

Chidyausiku CJ

Court by the court *mero motu*, or at the instance of any one of the parties ^A to the proceedings. That constitutional question cannot be brought to the Supreme Court by way of an application in terms of s 24(1) of the Constitution. Section 24(3) of the Constitution expressly prohibits that. If the lower court fails to act *mero motu*, or refuses upon application to refer the matter to the Supreme Court for reasons other than those permitted under s 24 of the ^B Constitution, an applicant is then entitled to approach the Supreme Court in terms of s 24(1). See *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S).

Section 24(3) of the Constitution specifically prohibits the making of an application in terms of s 24(1) in respect of matters arising in any proceedings in the High Court or in any court subordinate to the High Court. This court has drawn the attention of legal practitioners to this provision in a number ^C of cases. Malaba JA (as he then was) dealt with this issue in some detail in the case of *Tsvangirai v Mugabe & Anor* 2006 (1) ZLR 148 (S). The learned Judge of Appeal had this to say at 157-158:

"There are, however, two separate procedures prescribed in ss 24(1) and 24(2) of the Constitution by which redress of a contravention of the Declaration of Rights may be sought from the Supreme Court. In this case the question is whether the ^D applicant ought to have used the procedure prescribed in terms of s 24(2) for the enforcement of the protection of the rights he claimed were contravened in relation to him.

In *Mandirwhe v Minister of State* 1986 (1) ZLR 1 (S) Baron JA said that compliance with the procedure prescribed in s 24(2) of the Constitution was mandatory where there was litigation in progress and the determination of the ^E question as to the contravention of the Declaration of Rights by the Supreme Court had a bearing on the decision by the High Court or the court subordinate to it on the matter in dispute in the proceedings in that court.

The learned Judge of Appeal said at 7F-8D:

'The purpose of s 24 is to provide, in a proper case, speedy access to the final court in the land. The issue will always be whether there has been ^F an infringement of an individual's fundamental rights or freedoms, and frequently will involve the liberty of the individual; constitutional issues of this kind usually find their way to this court, but a favourable judgment obtained at the conclusion of the normal, and sometimes very lengthy, judicial process could well be of little value. And even where speed is not of the essence there are obvious advantages to the litigants and to the public ^G to have an important constitutional issue decided directly by the Appellate Division [now the Supreme Court] without protracted litigation.

Subsection (1) contemplates the situation in which it is clear from the outset that the existence of a remedy depends on whether there has been (or is likely to be) a contravention of the Declaration of Rights, when the person alleging to be aggrieved is given the right to go direct to the Appellate Division. ^H

Chidyausiku CJ

^A Subsection (2) deals with a different situation; it contemplates that proceedings have been commenced in the General Division [now the High Court] or in a subordinate court in circumstances in which it was not anticipated that the question of a contravention of the Declaration of Rights would necessarily arise, since otherwise one expects subs (1) to be invoked. The question having arisen, the subsection provides a speedy procedure for ^B the determination by the Appellate Division of, in effect, a constitutional point of law without the necessity first to conclude the trial in the court of first instance and to come to this court by way of appeal. When the question is referred to this court, the proceedings are merely interrupted; this court answers the question but the matter must be concluded in the court *a quo*. The subsection does not authorise the proceedings to be transferred to this court.'

^C Section 24(2) of the Constitution only applies when there is a question arising in the proceedings in the High Court or in a court subordinate to the High Court."

The learned Judge of Appeal went on to explain in some detail what constitutes a question arising in proceedings. The following is what he said at 157D-H:

"The question is whether there were proceedings in the High Court at the time ^D that (the) question as to a contravention of the Declaration of Rights arose. My view of the facts is that I must answer the question in the affirmative. The words 'in any proceedings in the High Court' mean proceedings that have come to, or have been instituted in, the High Court. They are proceedings that have found existence in the High Court, in the sense that that court has been called upon, through a method prescribed by law, to exercise

the judicial functions of the State over the matter in dispute between the parties and it is in control of the conduct and progress of the proceedings.

The word 'proceedings' has a wider meaning in s 24(2) of the Constitution than 'goings-on' in court. There are no proceedings without an action or case. Proceedings ordinarily progress in steps. The word is, therefore, 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 of the action or application. See *Re Appleton French & Scrafton Ltd* [1905] 1 ChD 749 at 753; *Mundy v The Butterley Co Ltd* [1932] 2 ChD 227 at 233; *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 at 219.

There is, therefore, no need to limit the very general words of s 24(2) of the Constitution and say that the question as to the contravention of the Declaration of Rights arises only when the court is actually sitting. The words 'if in any proceedings in the High Court any question arises as to the contravention of the Declaration of Rights' imply that proceedings may take place in the High Court without any such question arising."

The judgment in *Tsvangirai's case supra* was followed in *Shumba & Anor v*

2009 (1) ZLR p26

Chidyausiku CJ

Zimbabwe Electoral Commission & Anor 2008 (2) ZLR 65 (S) where, after referring to the above passage of Malaba JA, I had this to say at 77D-E:

"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."

The facts of this case are that the applicant was placed on remand by the fifth respondent. The court takes judicial notice of what constitutes a remand. It is the first formal procedure by a court to commence a criminal trial. There has to be a sufficient legal basis for a court to place an accused person on remand. The applicant contends that there was no legal basis to place her on remand. She makes the following averment in para 6 of the founding affidavit: c

"(The fifth) respondent is Mishrod Guvamombe, the Provincial Magistrate at Rotten Row Magistrates Court who is cited herein in his official capacity as the magistrate who I believe unlawfully purported to remand me in custody without considering the unlawful circumstances that led to my appearance before him. His address for service is care of Rotten Row Magistrates Court, Harare."

The applicant cites the fifth respondent in his official capacity as the person who presided over proceedings as a result of which she was remanded in custody. The applicant contends that remanding her in custody was unlawful and violated her constitutionally guaranteed right. On these facts, clearly the question of the alleged violation of the applicant's constitutional guaranteed rights, in particular the allegation of unlawful remand, arises from the proceedings in the magistrate's court before the fifth respondent. The argument by Mr *Mahlanga* that the issue of the contravention of the Declaration of Rights was not specifically raised during those proceedings is simply untenable. Indeed, a similar argument was raised in *Tsvangirai's case supra* and was dismissed by this court.

Thus, quite clearly the constitutional application should have been brought to this court by way of referral in terms of s 24(2) of the Constitution and failure to do so is fatal to the application.

As I have already stated, the parties are in agreement that this matter is urgent. Mr *Machaya* had indicated that, while he accepted that the matter is urgent, he had intended to raise the issue of non-compliance with s 24 of the Constitution at the actual hearing of the constitutional court application. Mr *Mahlanga* indicated that they would prefer the matter to be set down before the full constitutional court and the issue of the non-compliance with s 24 of the Constitution be determined then. In my view, following that course would not be in the best interests of the applicant, as that would lead to further unnecessary delay in the determination of the issues that she

2009 (1) ZLR p27

Chidyausiku CJ

a raises. The previous decisions of this court on this point are very clear, and setting this application down before a full constitutional court is an exercise in futility. Justice will not be served by following a road that leads nowhere. Indeed, I would have considered setting down the matter in

the constitutional court for determination of the issue if the applicant's counsel had wished to argue that both *Tsvangirai's case supra* and *Shumba's case supra* were ^B wrongly decided. However, that is not his stance. Mr *Mahlanga* admitted that he has not read the above judgments. He did not ask for an opportunity to familiarise himself with those judgments and then reconsider his position. Given this attitude, setting this matter down for argument before the full constitutional court would be, as I have already stated, an exercise in futility ^C and would cause a further delay in the finalisation of the applicant's search for a determination by this court. If the applicant wishes this matter to be determined by the Supreme Court, she should proceed in terms of s 24(2) and not s 24(1) of the Constitution.

It is a matter of regret that an opportunity to determine this application on an urgent basis has been squandered by the crass incompetence and sheer ^D ineptitude of the applicant's legal practitioners, who do not appear to have taken the trouble to peruse the provisions of s 24 of the Constitution before committing pen to paper and drafting this application. In my view, the best way forward is to dismiss this chamber application and, hopefully, the applicant's legal practitioners will familiarise themselves with the provisions ^E of s 24 of the Constitution and the judgments of this court before advising the applicant on the best course to follow.

Before concluding, I wish to make the following observation. I was advised from the bar, following my inquiry, that the applicant has not received proper medical examination despite Dr Lovemore's affidavit that the applicant should be examined in appropriate medical circumstances. Dr Lovemore ^F had this to say in para 3 of her affidavit:

- "3. I duly compiled an affidavit setting out my findings following the examination and this is attached hereto as Annexure 'E'. The facilities at Chikurubi were rudimentary and I could not carry out procedures requiring investigations where one needs equipment such as X-rays. In addition, there was neither water nor electricity at the facility where I examined the applicant. In my ^G professional view, it is absolutely crucial that the applicant be availed further medical investigations at a medical facility that is properly equipped with back-up power and investigation facilities such as the Avenues Clinic. From a medical point of view, I am extremely concerned that the applicant has not been allowed to attend at (the) Avenues Clinic for these further medical investigations and treatment and if permanent physical harm is to ^H be minimised, particularly to her feet and general health, it is imperative

2009 (1) ZLR p28

Chidyausiku CJ

that she be given access to these medical facilities without delay, and that ^A she thereafter be dealt with as recommended by medical personnel on all issues associated with her health."

The applicant should be afforded appropriate medical attention as a matter of urgency. Mr *Machaya* has undertaken to assist in the facilitation of this.

The chamber application is dismissed. The applicant should comply with the ^B provisions of s 24 of the Constitution before this matter can be set down as a constitutional application. There will be no order as to costs.

Mtewa & Nyambirai, applicant's legal practitioners

Office of the Attorney-General, respondents' legal practitioners ^C

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Document 5 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/DUBE v MAPHEPHA SYNDICATE & ORS 2009 (1) ZLR 29 (H)

DUBE v MAPHEPHA SYNDICATE & ORS 2009 (1) ZLR 29 (H)

2009 (1) ZLR p29

Citation

2009 (1) ZLR 29 (H)

Case No	Judgment No. HB-5-09
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	26 November 2008
Judgment	15 January 2009
Counsel	<i>J James</i> , for the applicant <i>T Moyo</i> , for the respondent No appearance for the second and third respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Court — *jurisdiction — magistrates court — magistrates court acting outside its monetary jurisdiction — decision a nullity and of no force or effect — no benefit can result therefrom*

Headnote

- ▯ The first respondent obtained an order from the magistrates court evicting the applicant from the mining claim she had lawfully occupied for some time. She sought an order setting aside the decision of the magistrates court. The court's monetary civil jurisdiction was at the relevant time very low, far below the value of a mining claim.
- ▯ *Held*, that the court which granted the eviction order had no jurisdiction to entertain a claim relating to the ejectment of the applicant from a valuable mining claim. When a magistrates court does what is not within its jurisdiction, the result of what it purports to do is void and it is a nullity in law with no force or effect. No benefit can be derived from it.

Cases cited ^F

MacFoy v United Africa Co Ltd [1961] 3 All ER 1165 (PC)

Manning v Manning 1986 (2) ZLR 1 (S)

Mkhize v Swemmer & Ors 1967 (1) SA 186 (D)

Legislation considered ^G

Magistrates Court Act [Chapter 7:10], s 11(b)

Case information

J James, for the applicant

T Moyo, for the respondent

▯ No appearance for the second and third respondents

2009 (1) ZLR p30

Kamocha J

Judgment

KAMOCHA J: In this matter the first respondent, Maphepha Syndicate, ^A applied and was granted an order *ex parte* by the magistrates court on 16 October 2008. The order authorised the messenger of court to proceed and evict the applicant, her employees and any persons claiming title through her from the mining claim identified in annexure "A" and "B". The messenger of court was authorised to enlist the assistance of members of the Zimbabwe ^B Republic Police Sun Yet Sen if the need arose.

On receipt of the above magistrate's order, the applicant applied for and was granted a provisional order by this court on 22 October 2008 wherein the Deputy Sheriff, Gwanda, was ordered and directed to immediately eject Maphepha Syndicate and all those claiming title through it from the mining claim, referred to in annexure "A" and "B", from which the applicant was ^C evicted 6 days previously, i.e. 16 October 2008, and to restore the applicant in possession thereof. The first respondent was then interdicted from interfering with the applicant's possession of and utilisation of the aforesaid mining claim.

The parties approached me, requesting me to hear an application for confirming or discharging the provisional order early. I acceded to the request and set ^D the matter down on the earliest available date, i.e. 26 November 2008.

In the final relief the applicant sought the following order:

- "(a) The rule *nisi* issued on the 16th October, 2008 in PA 28/08 by the 3rd respondent be and is hereby set aside and declared a nullity.
- (b) The first respondent be and hereby is interdicted from interfering with the ^E applicant's possession of, and enjoyment of the mining claim set out in annexure 'A' and 'B' to PA 28/08 unless there is a valid court order to that effect.
- (c) That the first respondent pays the costs of this application on a legal practitioner and client scale and 2nd and 3rd respondents pay costs of this application on a legal practitioner and client scale only in the event that ^F they oppose this application."

The first respondent filed a counter-application wherein it sought an order in the following terms:

"It is ordered that:

- 1. The applicant and the first respondent herein, together with all those ^G claiming title through them, be and are hereby interdicted from carrying on any mining operations for gold or other minerals at the disputed site, until such time as the 2nd respondent has resolved as to in whose claim the site lies.
- 2. Any gold ore already mined at the site, but not yet removed be left at the site until the resolution of this current dispute, at which stage its ownership will go to the party with the right to exploit the site for mining purposes. ^H

2009 (1) ZLR p31

Kamocha J ^A

- 3. The parties, by arrangement and agreement, be and are hereby allowed to station security guards for the purposes of ensuring compliance with this court order.
- 4. The first respondent be and is hereby ordered to pay the costs of this application if she opposes it, otherwise each party to meet its own costs."

The main allegation by the applicant in the main application was that the ^B first respondent had unlawfully ejected her from her mining claim with effect from 16 October 2008, the reason being that the magistrates court which granted the eviction order had no jurisdiction to entertain a claim relating to the ejection of the applicant from a valuable mining claim. The magistrates court monetary civil jurisdiction was at the relevant time a paltry \$50 after ^C revaluation. Quite clearly a mining claim is worth far much more than that. The magistrates' court, being a creature of statute, should operate within the confines of monetary jurisdiction bestowed on it by law. See s 11(b)(ii) and (iii) of the Magistrates' Court Act [Chapter 7:10].

It was submitted on behalf of the applicant that what the magistrate had done was similar to a situation where the magistrate presides over a murder trial ^D and sentences the accused to death. That would be clearly wrong and a nullity.

There is merit in the applicant's contention. When a magistrates' court does what is not within its jurisdiction, the result of what it purports to do is void and it is a nullity in law with no force or effect. No benefit can be derived from it. It has been repeatedly stated that it is like trying to build something ^E on nothing and expect it to stand; it will collapse. See for instance *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC).

See also *Mkhize v Swemmer and Others* 1967 (1) SA 186 (D) where it was stated at 197C-D that:
 “judicial decisions will ordinarily stand until set aside by way of appeal or review, but to that rule there are exceptions, one of them being that, where a decision ^F is given without jurisdiction, it may be disregarded without the necessity of a formal order setting it aside.”

See also a Zimbabwean case, *Manning v Manning* 1986 (2) ZLR 1 (S) at 3D-F, where a village court acted without jurisdiction.

In the light of the foregoing, I hold that the applicant was unlawfully evicted ^G from the mining claim in question on 16 October 2008.

In the result the need to consider other issues that were raised by the first respondent does not arise.

As regards the counter-application, I find no factual or legal basis for the order that is being sought. The founding affidavit falls far too short from ^H meeting the requirement to prove its case. For instance, it is not clear why

2009 (1) ZLR p32

Kamocha J

the first respondent wants the applicant to be interdicted from carrying on ^A any mining operations for gold on the said mining claim. She has been doing so for years with the authority of the Mining Commissioner. She has got a certificate of registration and a letter from the Mining Commissioner dated 29 June 2005. In the result, the counter-application must fail with costs.

Consequently, the order of this court is this: ^B

It is ordered that:

- (a) the provisional order be and is hereby confirmed in terms of the draft order; and
- (b) that the counter application be and is hereby dismissed with costs. ^C

James, Moyo-Majwabu and Nyoni, applicant’s legal practitioners

Messrs Galen Moyo-Masiye, first respondent’s legal practitioners ^D

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Document 6 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/MAZIBUKO v SITHOLE & ORS 2009 (1) ZLR 33 (H)

MAZIBUKO v SITHOLE & ORS 2009 (1) ZLR 33 (H)

2009 (1) ZLR p33

Citation	2009 (1) ZLR 33 (H)
Case No	Judgment No. HB-6-09
Court	High Court, Bulawayo
Judge	Ndou J
Heard	3 October 2006
Judgment	15 January 2009
Counsel	<i>S Chamunorwa</i> , for the plaintiff <i>Ms D Vundla</i> , for the defendants

Case Type	Civil action
Annotations	No case annotations to date

Flynote

Damages – assessment of – delictual – *actio injuriarum* – quantum – police officer forcefully preventing legal practitioner from obtaining access to arrested client – exemplary damages justified

Headnote

Following a demonstration in Bulawayo, several of the demonstrators ^D were arrested by the police. The plaintiff, a legal practitioner of several years' good standing, attended the police station along with other legal practitioners, in order to assist their arrested clients. The first defendant, the officer in charge, denied them access to their clients, without giving any valid reasons for so doing. When the plaintiff and his colleagues intimated that they would not leave the station until they had seen their ^E clients, the first defendant instructed some junior policemen to remove them. The plaintiff and his colleagues were pushed, shoved, poked with batons and had explicit invectives unleashed on them. This assault started from the courtyard, continued into the charge office and stopped in the street outside the police station. The plaintiff was assaulted in full view ^F of his clients, other police officers and members of the public, some of whom were going about their ordinary business and had to stop and watch the unfolding spectacle of the legal practitioners being assaulted and insulted.

Held, that the delict complained of had been established by the evidence. This was a proper case for the award of exemplary damages. The fact ^G that the plaintiff was a legal practitioner and that the delict was directed against him in his professional capacity was grave, warranting heavy damages. Costs on the higher scale would also be awarded.

Case referred to

^H *Black & Ors v Joseph* 1931 AD 132

2009 (1) ZLR p34

Ndou J

Case information

S Chamunorwa, for the plaintiff ^A

Ms D Vundla, for the defendants

Judgment

NDOU J: The plaintiff is a legal practitioner practising with Messrs Calderwood, Bryce Hendrie and Partners, legal practitioners in Bulawayo. He has sued the defendants for payment of damages for assault, *injuria* and ^B impairment of dignity, following the defendants' actions of forcibly and under injurious circumstances removing, or causing the removal of, the plaintiff from Bulawayo Central Police Station on 14 February 2003.

The background facts are the following. It is common cause that there was a demonstration on 14 February 2003. Several persons were arrested for participating in the demonstration, which the police regarded as unlawful. ^C Several legal practitioners, including the plaintiff, attended at Bulawayo Central Police Station in order to assist their arrested clients. The said legal practitioners were denied access to their clients by *inter alia*, the first defendant. The legal practitioners' reaction was to refuse to leave the police station before they saw their clients. They insisted that they have access to their clients. The first defendant ordered that the legal practitioners be ^D removed from the police station. This order was carried out, resulting in the actions that form the subject matter of these proceedings. There is a dispute as regards the manner of the removal of the plaintiff from the police station and such a factual dispute can only be resolved by considering the evidence of the witnesses in turn. ^E

Ndabezinhle Mazibuko

He testified that he was duly admitted as a legal practitioner in 1994 and he is a partner at the above-mentioned law firm. Regarding the events of 14 February 2003, he said he attended at Bulawayo Central Police Station to take instructions from his client who had been arrested. At the station, he was referred to the first defendant who, he was advised, was the man in charge. The first defendant was in the courtyard, and this is where his clients and other arrestees were. The plaintiff said he duly identified himself to the first defendant as a legal practitioner, but the first defendant, who for some reason appeared agitated, ordered him to immediately leave the police station. He was also told why he could not have access to the clients. At some point, the plaintiff was joined by other legal practitioners namely, Ms Perpetua Dube, Mr Kucaca Phulu and Mr Mkwanzani. They had all come to the police station to take instructions from their respective clients. He and the other legal practitioners did not leave as demanded by the first defendant. They insisted that they be allowed access to their clients, as the first defendant could not give a valid and legal reason why they could not, while the first

2009 (1) ZLR p35

Ndou J

A defendant stood resolute in denying them access without explaining why. The first defendant then started pushing him, trying to get him to leave and when he failed to move him, he enlisted the help of his subordinates. The first defendant instructed members of the Police Reaction Group ("PRG") more commonly known as "Riot Police", to remove the plaintiff and his colleagues from the police station. He and the other legal practitioners were pushed, shoved, poked with batons and had explicit invectives unleashed on them. The plaintiff said that this assault started from the courtyard, continued into the charge office and stopped in the street outside the police station. He said he was assaulted in full view of his clients, other police officers and members of the public, some of whom were going about their ordinary business and had to stop and watch the unfolding spectacle of the legal practitioners being assaulted and insulted. The plaintiff said he was deeply humiliated and thus suffered a knock on his fair and impeccable reputation and dignity. For good measure, the plaintiff stated that the first defendant and his subordinates were acting in the course and scope of their employment and as such the second and third defendants were liable. I am satisfied that this witness gave his testimony very well. He did not seek to exaggerate the unlawful actions of the first defendants and his subordinates.

Kucaca Ivumile Phulu

He said he is a legal practitioner and partner at Coghlan and Welsh, legal practitioners. He has been a legal practitioner of six years' experience. As alluded to above, he is one of the legal practitioners who was present. His testimony is corroborative of that of the plaintiff. Like the previous witness, he gave his evidence in a coherent and logical manner. His demeanour was not shaken under cross-examination. The long and short of it is that I find that these two witnesses gave credible testimony.

On the other hand, three witnesses were called in support of the defendants' case. I will also consider their testimony in turn.

Donald Sithole: the first defendant

He appeared on his own behalf and on behalf of the two other defendants. He denies that he was in charge of the arrestees on the day in question. He is a chief inspector and not chief superintendent as cited (this error was subsequently rectified). He testified that at all material times he was in his office and at no time did he venture into the courtyard. He further said that at all material times the identity of the plaintiff and his colleagues as legal practitioners was not in issue. He disputed that he instructed his subordinates to assault the legal practitioners and that he personally came to know of the assault on the following day. This witness was clearly untruthful. As will

2009 (1) ZLR p36

Ndou J

appear hereinunder, he deliberately tried to remove himself from the scene. A

Nhamo Makhiwa

His evidence was brief and material in one respect. He said that on the material day, as he was on his way to the canteen, whose door leads out to the courtyard, the first defendant asked him to summon four officers from PRG. He obliged. I am satisfied that he is a truthful witness. ^B

Maxwell Guvava

He is a member of the PRG. He said that he was sitting with his colleagues when the first defendant instructed them to "drive" out the plaintiff and his colleagues. He said that, acting on first defendant's instructions, they did not assault the plaintiff and his colleagues but rather, they used their batons ^C as a barricade, and this was what caused the legal practitioners to leave the police station. What appears clearly in the defendants' case are irreconcilable contradictions of a material nature. As illustrated above, whereas the first defendant disputed ever being in the courtyard, the other witnesses placed him at the scene. Whereas the first defendant disputed that he was in charge of the arrestees, the evidence adduced from the other defendants' other ^D two witnesses is indirectly corroborative of the plaintiff's case that the first defendant was in charge on that day. Further, whereas, the first defendant said that he did not know how the plaintiff and the other legal practitioners left the police station, the last witness said that he was present when the plaintiff and his colleagues were driven out; in fact he said the first defendant is the ^E one who issued instructions that they be driven out.

Interestingly, the evidence of the first defendant was in material respects inconsistent with the defendants' plea and synopsis of evidence. The defendants' counsel did not seek to reconcile the evidence given by the first defendant with the defendants' plea nor with their synopsis of evidence. From the credible evidence, the plaintiff's feelings of dignity and self-respect ^F have been intentionally violated by the conduct of the first defendant. He was violently driven out of the police station to the street. This, as alluded to above, was done within full view of his clients, other arrestees, police officers and other onlookers. There was no need for the first defendant to act in this fashion. *Injuria* is committed when a person, without cause, intentionally ^G violates another's dignity. A person's dignity includes his feelings of dignity or self-respect. These feelings may be violated by any conduct that actually insults a person: *Law of Damages* 1 ed (Juta, 1993) at p 100. In light of the above, I find that the delict complained of has been established by the evidence led on behalf of the plaintiff.

Coming to question of the quantum of damages, I hold the view that this ^H

2009 (1) ZLR p37

Ndou J

^A is a proper case for an award of exemplary damages. The plaintiff has established that he is a man of high standing in the society. He is a legal practitioner with more than ten years' experience and practising in the city of Bulawayo where this delict occurred. He is considerably well known and has a fair reputation. Indeed, in his testimony, the plaintiff stated that some people who witnessed this incident called him later on to find out why he had ^B been treated in such a manner. Further, he stated that he does a considerable amount of criminal work and is thus known to most police officers. This conduct is likely to affect his working relationship with police officers and he was gravely humiliated in front of them. The fact that the plaintiff is a legal practitioner and that the delict was directed against him in his capacity ^C as a professional is grave, warranting heavy damages: *Black & Ors v Joseph* 1931 AD 132 at 146.

Accordingly, judgment is entered for the plaintiff against the defendants jointly and severally in the sum of \$1 000 000 000 with interest thereon calculated at the prescribed rate from 14 February 2003 to date of full payment. The defendants are ordered to pay costs of this action jointly and severally at the ^D scale of legal practitioner and client.

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

^E *Dube & Partners*, defendants' legal practitioners

Document 7 of 52**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/KADENGU & ORS v KADENGU & ORS 2009 (1) ZLR 38 (S)

KADENGU & ORS v KADENGU & ORS 2009 (1) ZLR 38 (S)**2009 (1) ZLR p38**

Citation	2009 (1) ZLR 38 (S)
Case No	Judgment No. S-27-08
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Garwe JA
Heard	5 May 2008
Judgment	19 January 2009
Counsel	<i>H Zhou</i> , for the appellants <i>G Mhlanga</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Administration of estates – executor – distinction from trustee – roles and functions of executor and trustee – appointment of executor – may be made by the Master – trustee – must be appointed by court

Headnote

The testator appointed a firm of legal practitioners as executors and trustees of his estate. His will directed that the executor should realise the assets of the estate and with the proceeds establish and administer a trust fund. The fund was to be used for the maintenance and general advancement of his mother, wife and children. The senior partner of the firm left the country before he had completed the administration of the estate and the firm subsequently renounced agency. The Master appointed an executor. Due to delays by the executor in carrying out his duties, the appellants brought an action, in which they sought an order that the trust be abandoned and the estate be disposed of in a different way from that expressed in the will. It was argued that the appointment of a trustee was now a practical impossibility since the will envisaged the appointment of the nominated firm as trustees and that an executor appointed by the Master cannot assume the office of trustee in terms of the will. Further, the will itself made no provision for the appointment of any other person as trustee in the event that the appointed firm failed to take up the appointment for any reason.

Held, that there is a distinction in our law between an executor and a trustee. The executor realizes the estate, reduces it into possession and accounts for it to the Master. When the executor has discharged his duties, the trustee (if one has been appointed) steps in and administers the fund, which the executor has realized in accordance with the terms of the will. Not infrequently, a testator appoints the same person to be both

2009 (1) ZLR p39

Ziyambi JA

^A executor and trustee. While there is no objection to this, the two offices are under our law quite separate and distinct and the person who will be appointed to both will be required to act in two different capacities.

Held, further, that where an executor has renounced his appointment under a will, the Master is empowered by the Administration of Estates Act [*Chapter 6:01*] to appoint an executor whose duties are as set out in the ^B Act, namely, to bring in the assets of the estate, file a liquidation and distribution account and to account to the Master for the assets of the estate as set out in that account. However, the Master has no power to appoint a trustee, so if a trustee appointed in a will has renounced his appointment or is incompetent or, having been appointed, is for some reason no longer acting or, if a testator has created a trust but failed ^C to appoint a trustee, only the court can appoint a trustee to administer the estate in accordance with the wishes of the testator. The court will exercise this power in order to enable the trust to be continued.

Cases cited

^D Ex p *Atherstone* 1942 CPD 559

Ex p *Davenport & Anor* 1962 R & N 805; 1963 (1) SA 728 (SR)

L Ferera (Pty) Ltd v Vos NO & Ors 1953 (3) SA 450 (A)

The Master v Edgecombe's Exors 1910 TPD 263

Middleton v Carr 1949 (2) SA 374 (A)

Port Elizabeth Assurance Agency & Trust Co Ltd v Est Richardson ^E 1965 (2) SA 936 (C)

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

Legislation considered

Administration of Estates Act [*Chapter 6:01*], s 29

Case information

^F *H Zhou*, for the appellants

G Mhlanga, for the respondents

Judgment

ZIYAMBI JA: The late Job Bruno Kadengu died testate on 25 March 1990. His will contained the following clauses: ^G

- "2. The expression 'Executors' or 'Executor' wherever used in this Will mean either Executors or Administrators or Trustees or any two or all of these offices as may be appropriate in the circumstances and in the context thereof and the term 'Executors' includes the singular and the term 'Executor' includes the plural.
- 5 My Executor shall take possession of all my property, whether movable ^H or immovable of whatsoever nature and sort and wheresoever situate and

2009 (1) ZLR p40

Ziyambi JA

whether the same be in possession, reversion, remainder or expectancy, and ^A after paying thereout all my just debts and taxes payable by reason of my death and the expenses of the administration of my Estate, then he shall pay and apply the same as hereinafter directed.

6. I hereby direct that my Executor shall purchase a house in the northern suburbs of Harare and I desire that such house be large enough and commodious enough in the discretion of my Executor to comfortably accommodate my ^B wife, Olga, and any dependent children born of me and my said wife who may survive me. I hereby give and bequeath to my said wife the said house as a special legacy. I further give and bequeath to my said wife as a special legacy (or special legacies) all the household furniture and effects of which I may die possessed and effects of which may, at the time of my death, be situate in the residential property where my said wife and I may be living as at the date of my death. The legacies referred to in this paragraph shall ^C be conditional upon my said wife, Olga, surviving me for a period in excess of thirty (30) days.

7. I record that I own a certain farming property situate near Rusape. Provided that my mother shall survive me for a period in excess of (30) thirty days and provided that I still own the said farming property as at the date of my death, I hereby give as special legacies to my mother all the farming implements, ^d live-stock and other movables which may belong to me at my death and which may be situate on the said farm as at the date of my death. I further hereby give and bequeath to my said mother a life usufruct in respect of the said immovable farming property but subject to the provisions contained in the immediately subsequent paragraph hereof pertaining to my sister, Rosa Chimambo. I direct that the *dominium* in the said farming property shall be assumed and taken by my Trustee appointed hereunder who shall ^e deal with the same as directed hereunder.
9. After discharging my debts and taxes and paying the legacies and providing for the aforesaid usufruct and generally dealing with my directives detailed hereinabove, my Executor shall sell and liquidate and turn into cash the entire balance of my Estate and my Executor shall hold the resultant monies in his own name as Trustee of a Trust Fund and he shall apply the income ^f and capital thereof as hereinafter directed. The successor in office as Trustee of my Trust Fund shall be the Senior Partner for the time being of the said Messrs Gollop & Blank.
10. My Executor, as Trustee, in such manner as he shall in his absolute discretion from time to time think fit, pay and apply the income of my Trust fund to or for or towards, the benefit, maintenance, education and advancement of ^g my said wife, OLGA, my said mother and any and every child born of my union with my previous wife and any and every child born of my union with my said wife, OLGA, and, without derogating from the generality of the foregoing the following persons; *viz.*"

The appellants were among the persons listed under paragraph 10.

It is common cause that Gregory Slater, who was appointed executor of ^h

2009 (1) ZLR p41

Ziyambi JA

^a the will, failed to complete the administration thereof before he fled the country on allegations of misappropriation of funds and that Gollop and Blank renounced their appointment as executors and trustees of the estate on 5 September 1997. The assets of the estate were given as 4 000 shares in Paradise Park Motel (Pvt) Ltd and a certain piece of land in the district of Makoni called Alloa Farm.

^b The Master, in an attempt to speed up the administration of the estate, on 2 July 1999 appointed the second respondent as executor dative of the estate. It seems that the second respondent was unable to remedy the problems left unresolved by Slater and, on 28 September 2000, the first and the second appellants wrote to the Master complaining of the second respondent's ^c inaction and his failure to wind up the estate in accordance with the wishes of the testator. The letter did not achieve the desired result and on 24 March 2003 the appellants made an application to the High Court seeking the following order:

"IT IS ORDERED THAT: ^d

1. The Trust which was to be set up in terms of Clause 9 of the Will be and is hereby abandoned.
2. The deceased's 4 000 shares in Paradise Park Motel (Pvt) Ltd shall be sold to the best advantage of the beneficiaries.
3. A large enough and commodious enough house shall be purchased for the first Respondent and her minor children from the proceeds of the sale of Paradise Park Motel (Pvt) Ltd. The Master of the High Court (the third ^e respondent) shall determine whether the house which the estate shall be purchasing for the first respondent and her children is 'large enough and commodious enough'.
4. After purchasing the house described above for the first respondent and her children, the residue shall be equally distributed among the surviving beneficiaries. The shares of the beneficiaries who are outside the country ^f or who are not part (*sic*) to these proceedings shall be ... (illegible).
5. The immovable property situate in Makoni District, namely Alloa Farm, held under Deed of Transfer 7689/81 shall not be sold. It shall be retained as the family home to be registered in all beneficiaries names or to be registered in the name of the nominated beneficiary in trust for the rest of the beneficiaries".

^g It was their contention that the intention of the testator as expressed in clause 9 of the will could no longer be implemented because of the abdication of Slater and the renunciation by Gollop & Blank. They alleged that they could not agree on a suitable substitute and in any event some of the beneficiaries could not be located while others were resident outside Zimbabwe.

^h On 23 July 2003 the appellants obtained a default judgment in the terms set

2009 (1) ZLR p42

Ziyambi JA

out above. This order was, however, rescinded by consent and the matter *a quo* was argued before the court *a quo*.

The second respondent, the executor *dative*, alleged that the estate was illiquid making it impossible for him to discharge his mandate. It was his view that the ownership of the 4 000 shares should be determined before the estate could be wound up. The three issues argued by the parties before *B* the court *a quo* were as follows:

1. Whether or not the estate can no longer be wound up in terms of the will because some clauses have become irrelevant;
2. Whether or not the 4 000 shares in Paradise Park Motel (Pvt) Ltd form part of the deceased's estate; and *C*
3. Whether or not Alloa farm can still be dealt with in terms of the will.

The application was dismissed by the court *a quo* primarily on the grounds that the appellants had no *locus standi* to bring such an application. In this regard the learned judge said:

"It seems to me however, that a more fundamental point, which unfortunately was not addressed, arises. It is whether or not the applicants have *locus standi*, *D* that is, a direct and substantial interest in seeking variation or rectification of the will."

And later at p 6 of his judgment:

"It seems to me therefore that the applicants *in casu* are obliged to show the direct and substantial interest that they have in the subject matter before me of *E* seeking the variation of certain clauses of the will. In terms of the will they are residuary heirs. They will only be able to benefit from the will after clause 9 thereof has been fulfilled."

The court *a quo*, though alive to the fact that neither party had been given the opportunity to make submissions on this issue, yet proceeded to decide the matter on an issue not raised during the hearing and addressed by the *F* parties. In so doing the learned judge misdirected himself. It was imperative that the issue was fully canvassed and investigated.

As it was said in *Middleton v Carr* 1949 (2) SA 374 (A) at pp 385-6 of the judgment:

"... as has often been pointed out, where there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further *G* examination of the facts might lead to a different conclusion, the court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. But unless the court is satisfied that the investigation has been full, in the above sense, injustice may easily be done if the issue is treated as being before the court."

The issue was not before the court *a quo* and in the absence of a full *H*

2009 (1) ZLR p43

Ziyambi JA

A investigation thereof the court erred in treating the issue as one which was before it. Clearly there was a real chance of an injustice being done to the appellants against whom the finding was made.

In any event it would seem to me that the appellants, as beneficiaries under the will, would have a legal and substantial interest in the proper administration *B* of the estate since a proper administration of the estate would ensure the protection of their inheritance. Their interest is, in my view, sufficient to give them *locus standi in judicio* in any matter relating to the proper administration of the estate.

I would therefore allow the appeal on this ground. But that is not the end of the matter, for the court went on to decide the issues before it and found *C* against the appellants on all three issues. I turn to consider the appeal against the court's finding on the merits of the application.

The first and second issues which fell for decision by the court *a quo* may conveniently be dealt with together. They are, whether or not the estate could no longer be wound up in terms of the will because some of the clauses have *D* become irrelevant; and whether Alloa farm could no longer be dealt with in terms of the will.

Mr *Zhou's* submission, as I understand it, is that clause 3 of the will which nominated Gollop & Blank as executors and trustees has been overtaken by events by virtue of that firm of legal practitioners having renounced its appointment as executors and trustees under the will. It was submitted further *E* that with reference to clause 9 of the will, the appointment of a trustee was now

a practical impossibility since the will envisaged the appointment of Gollop & Blank as trustees and the second respondent, being an executor appointed by the Master, cannot assume the office in terms of the will. Further, the will itself makes no provision for the appointment of any other person as F trustee in the event that the appointed firm fails to take up the appointment for any reason. The deceased, it was submitted, had specifically appointed his executors to be the trustees as he was clear as to who the executors were. There was nothing in the will, so it was submitted, that supports the conclusion that an executor dative would be entitled to become the trustee since the executor dative was not nominated by the testator but by the Master.

G A reading of clauses 2 and 4 of the will would appear to support the submission on behalf of the respondents that a person other than *Gollop & Blank* was envisaged by the testator as being his executor and/or trustee. For instance reference is made to an accountant as being a possible executor or trustee:

"Any executor of this my will or any trustee of any Trust Fund hereinafter created H who is by a (sic) profession a legal practitioner or conveyancer or accountant

2009 (1) ZLR p44

Ziyambi JA

or notary may charge the estate or any such Trust Fund ...". A

However, that having been said, an executor appointed by the Master cannot by virtue of that appointment assume the position of trustee or administrator of the estate. If he is to act as an administrator he must be appointed as such by the court. See Ex p *Atherstone* 1942 CPD 559; *L Ferera (Pty) Ltd v Vos NO & Ors* 1953 (3) SA 450 (A) at 463E-464A. B

Thus where an executor has renounced his appointment under a will, the Master is empowered by the Administration of Estates Act [Chapter 6:01], to appoint an executor whose duties are as set out in that Act, namely, to bring in the assets of the estate, file a liquidation and distribution account and to account to the Master for the assets of the estate as set out in that account. C

However, the Master has no power to appoint a trustee, so if a trustee appointed in a will has renounced his appointment, or the trustee is incompetent or, having been appointed, is for some reason no longer acting or, if a testator has created a trust but failed to appoint a trustee, only the court in the exercise of its inherent power to appoint, control and remove trustees can appoint a trustee to administer the estate in accordance with the wishes of the testator D as set out in the will. The court will exercise this power in order to enable the trust to be continued. See Ex p *Davenport & Anor* 1962 R & N 805; 1963 (1) SA 728 (SR) at 731; *The Master v Edgcombe's Executors* 1910 TPD 263 at 269-270; *Port Elizabeth Assurance Agency & Trust Co Ltd v Estate Richardson* 1965 (2) SA 936 (C) at 938C-939D.

It is evident from the above that there is a distinction in our law between E an executor and a trustee. In *The Master v Edgcombe's Executors supra* at 274, Innes CJ remarked as follows:

"The distinction between an executor and an administrator is well known in our law. The executor realizes the estate, reduces it into possession and accounts for it to the Master. When he has discharged his duties the administrator (if one F has been appointed) steps in and administers the fund, which the executor has realized, in accordance with the trusts of the will."

See also *The Law of Succession in South Africa* by Corbett *et al* at p 414 where the authors say:

"Not infrequently, a testator appoints the same person to be both executor and trustee (or administrator) of the estate. There is no objection to this, but it must G be emphasized that the two offices are quite separate and distinct under our law and the person who will be appointed to both will be required to act in two different capacities."

In the instant case, once the executor has completed his duties in terms of the Act, the Master, or the beneficiaries, may apply to the court for the appointment of a trustee to administer the estate in terms of the will. H

2009 (1) ZLR p45

Ziyambi JA

A With regard to Alloa Farm, there is nothing on record from which I can conclude that the intention of the testator regarding the farm as expressed in the will cannot be implemented. I would, accordingly, agree with the learned judge that clause 9 of the will is capable of implementation.

I turn to the final issue which is whether the 4 000 shares in Paradise Park Motel (Pvt) Ltd form part of the deceased estate. The learned judge dealt with the matter thus:

"The applicants referred to affidavits by the first respondent in which she stated that the shares belonged to the estate. They also attached the first interim liquidation and distribution account laid for inspection on 4 December 1992 and the subsequent first and final liquidation and distribution account of 1 November 1996 in which the shares are reflected as being assets belonging to the estate as c proof that they are estate property.

In paragraph 13 of the founding affidavit the applicants aver that the shares belong to the estate. In response in her opposing affidavit the first respondent averred that those shares in Paradise Park Motel (Pvt) Ltd had not been paid for at the time the testator died and that he never owned them. She then goes on to state that they never became part of the estate.

▷ Apparently the sellers of the shares invited interested beneficiaries to participate in Paradise Park Motel (Pvt) Ltd. None was interested save the first respondent who negotiated transfer to herself and who took transfer.

In their answering affidavit the applicants insisted that the shares form part of the estate, no doubt on the basis of the earlier statements on oath to this effect by the first respondent. The applicants did not dispute the averment that the E letter of 23 April 2002 by Messrs Gill, Godlonton & Gerrans was written in response to the one by their then erstwhile legal practitioners Messrs Musunga & Associates over the transfer of an immovable property associated with Paradise Park Motel (Pvt) Ltd. This letter on page 74 of the record indicated that the agreement referred to was entered into between Auto Export/Import (Pvt) Ltd and Auto Import/Export (Pvt) Ltd as purchaser and that transfer could only be F effected to Paradise Park Motel (Pvt) Ltd and not the estate.

The applicants did not lay facts before this court on the status of Paradise Park Motel (Pvt) Ltd other than averments of the first respondent's sworn affidavit to the effect that she would become co-director with the testamentary executor in this company which was part of her late husband's estate. The letter from Gill, Godlonton & Gerrans seems to suggest that post payments on the purchase price were paid by the first respondent. There would be need to lead evidence G on the true circumstances surrounding the shares in question. It may very well be that the shares belong to the estate notwithstanding that in terms of s 104(1) of the Companies Act [Chapter 24:03] the holder of a certificate duly signed and with the seal of the company is presumed to be the owner of the shares on a *prima facie* basis. This however is an area where further evidence will be needed. If so advised, it seems to me that this is an issue to be pursued by the H second respondent with the Motel and the first respondent.

2009 (1) ZLR p46

Ziyambi JA

When the applicants brought the application it must have been in their A contemplation from the contents of the letter from Gill, Godlonton & Gerrans that a dispute of fact would arise on the question of shares. They did not cite the company. These factors are fatal to the present application.

I would thus dismiss the request to hold that the 4 000 shares belong to the estate in the absence of further evidence."

It appears to me that the dispute as to the ownership of the shares is *bona B fide* and not merely illusory. In such a case the onus is on the appellants to satisfy the court that the matter could be resolved on the affidavits without the risk of injustice to the other party. See *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) at 339C. This they failed to do. I cannot fault the learned judge for finding himself unable to resolve the C dispute on the papers without hearing evidence. In choosing to proceed by way of court application the appellants, aware of the dispute of fact, took the risk of failing to discharge the *onus* on them to convince the court that the matter could be determined without calling evidence.

In the premises, I would uphold the decision of the learned Judge on this issue as well. ▷

Accordingly, while it is my judgment that the appellants had *locus standi* to approach the court, I am satisfied that their appeal on the merits must fail.

The appeal is, therefore, dismissed with costs.

SANDURA JA and GARWE JA concurred. E

Hungwe & Partners, appellants' legal practitioners

Chihambakwe, Mutizwa & Partners, respondents' legal practitioners F

Document 8 of 52**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/S v M (A JUVENILE) 2009 (1) ZLR 47 (H)

S v M (A JUVENILE) 2009 (1) ZLR 47 (H)**2009 (1) ZLR p47**

Citation	2009 (1) ZLR 47 (H)
Case No	Judgment No. HH-04-09
Court	High Court, Harare
Judge	Kudya J & Guvava J
Heard	21 January 2009
Judgment	21 January 2009
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

c **Criminal procedure (sentence)** – offences under Criminal Law Code – rape – juvenile offender – appropriate sentence – need to pursue options other than imprisonment

Criminal procedure (sentence) – general principles – juvenile offender – offender convicted of rape – need to consider options other than *d* imprisonment

Headnote

The accused was aged about 14 years at the time he sexually assaulted two girls who were aged 6 years. He was charged with, pleaded guilty to and was convicted of rape. The magistrate disregarded the recommendation *e* of the probation officer that the accused receive corporal punishment, saying that such a punishment would be too lenient. She sentenced him to nine years' imprisonment, of which three years were suspended on appropriate conditions.

Held, that the magistrate had misdirected herself. To sentence such an immature person to prison at all, let alone for the length imposed, is *f* so harsh as to induce a sense of shock. She also misdirected herself in holding that corporal punishment was lenient. Corporal punishment is brutal, inhuman and degrading, and can never be characterized as lenient. Juvenile offenders convicted of rape should not be treated as little adults. Their very ages denote their mental immaturity. Non-custodial options other than fines and community service should be pursued. Some of these *g* options are counselling, institutionalization in juvenile reformatories and corporal punishment. The choices in Zimbabwe are limited by our level of economic development and our prevailing economic challenges, which impact negatively on the development of new institutions and the funding and staffing of existing ones. Our courts, therefore, are *h* obliged to resort to the disproportionate use of corporal punishment,

2009 (1) ZLR p48

Kudya J

coupled with a suspended term of imprisonment, as the only available ^A and viable option.

Cases cited

S v A Juvenile 1989 (2) ZLR 61 (S)

S v Kuzhinginya HH-175-94

S v Mhlanga & Ors HB-2-94 ^B

S v Stoddart 1996 (1) ZLR 1 (H)

S v Tendai & Anor 1998 (2) ZLR 423 (H)

S v Zaranyika & Ors 1995 (1) ZLR 270 (H)

S v Zhou 1995 (1) ZLR 329 (H) ^C

Judgment

KUDYA J: The accused was born on 24 May 1992. On an unknown date, but during the period between December 2006 and January 2007, he sexually assaulted two six-year-old girls in the bush where they were all herding cattle. He threatened them with dire consequences if they ever reported the incident. The threats held sway until 3 March 2007, when the two girls made a report to their grandmother. The accused was thereafter arrested. The two ^D girls were taken to hospital where a medical doctor examined them on 13 March 2007. He confirmed that penetration had been effected.

The accused was arraigned before the regional magistrate, Masvingo, on 9 July 2008. He pleaded guilty to, and was duly convicted of, two counts of rape in violation of s 65 (1) of the Criminal Law (Codification and Reform) ^E Act [*Chapter 9:23*]. A detailed probation officer's report that was compiled on 27 April 2007 was produced. In addition, the boy told the regional magistrate, in mitigation, that he was a form two pupil at a secondary school in Masvingo. In answer to the question why he committed the two offences, he retorted that he thought they were playing.

The trial magistrate paid regard to his plea of guilty. She surmised that ^F he must have pleaded guilty because of the presence of the two girls who had come to testify, as the probation officer's report indicated that he was denying the charges. She noted that he was 14 years of age at the time of commission of the offence. She counterpoised these factors against the seriousness of the offences, the ages of the girls at the time and the threats he ^G issued against them. She disregarded the recommendation of the probation officer to consider corporal punishment, on the basis that such a punishment would be too lenient. She proceeded to sentence him, on the day she took the plea, to nine year's imprisonment, of which three years was suspended for five years on condition that he did not, during that period, commit any offence of a sexual nature for which he would be sentenced to imprisonment ^H

2009 (1) ZLR p49

Kudya J

^A without the option of a fine.

It seems to me that the trial magistrate misdirected herself in her approach to sentence. There is no doubt in my mind, that at the time the accused committed the offences he knew that his actions were wrongful, otherwise he would not have issued the threats and then proceeded to deny the offences, ^B by hiding behind the façade of some perceived animosity between their families. These factors notwithstanding, it must have dawned on the trial magistrate that, on the date of commission, he had just completed Grade 7 and was waiting to make entry into Form 1. He was clearly an immature 14-year-old boy, who was given to acting out childish pranks. To consign such an immature character to prison at all, and for the length imposed, is ^C so harsh as to induce a sense of shock.

The second misdirection was her consideration that corporal punishment is a lenient sentence. Her view contradicts the sentiments expressed in superior court decisions such as *S v A Juvenile* 1989 (2) ZLR 61 (S) and *S v Mhlanga & Ors* HB-2-94 Those decisions have characterized

corporal ^D punishment as brutal, inhuman and degrading. Such a sentence cannot ever be characterized as lenient.

This court, in such cases as *S v Zaranyika & Ors* 1995 (1) ZLR 270 (H) and *S v Tendai & Anor* 1998 (2) ZLR 423 (H), set out guidelines for regional magistrates in sentencing juveniles convicted of rape. The common thread in those decisions is that juvenile offenders should not be treated as little ^E adults. Their very ages denote their mental immaturity. Non-custodial options, other than fines and community service, should be pursued. See *S v Zhou* 1995 (1) ZLR 329 (H) and *S v Stoddart* 1996 (1) ZLR 1 (H). Some of these options are counselling, institutionalization in juvenile reformatories and corporal punishment. The choices in Zimbabwe are limited by our level ^F of economic development and our prevailing economic challenges, which impact negatively on the development of new institutions and the funding and staffing of existing ones. Our courts, therefore, are obliged to resort to the disproportionate use of corporal punishment, coupled with a suspended term of imprisonment, as the only available and viable option.

At the age of 14, the accused must have been undergoing pubertal stirrings ^G of his sexuality which he did not appreciate. His actions of setting upon two infants would be inexplicable, other than through a failure on his part to handle his sexuality. Such a boy would be a suitable candidate for rehabilitation through counselling, perhaps in a probation home or other reformatory institution other than prison. See *S v Kuzhinginya* HH-175-94. It appears ^H from the probation officer's report that such an option was not available,

2009 (1) ZLR p50

Kudya J

hence his recommendation for corporal punishment. ^A

The appropriate sentence would have been in the region of five cuts with a rattan cane, with an additional suspended period of imprisonment of three years. The boy has unnecessarily been in prison for the past six months. One hopes that he has not been contaminated by the corrosive prison subculture. I will set aside the sentence that was imposed and substitute it with a wholly ^B suspended term of imprisonment and thereafter issue a warrant for his immediate liberation. In the result, the sentence that was imposed is set aside and substituted by the following:

Three years' imprisonment, the whole of which is suspended for three years on condition he does not, during that period, commit any offence of a sexual nature for which he is sentenced to imprisonment without ^C the option of a fine.

I have issued a warrant for his immediate release from prison.

GUVAVA J agrees. ^D

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Document 9 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/RALPH v VAN VUUREN 2009 (1) ZLR 51 (H)

RALPH v VAN VUUREN 2009 (1) ZLR 51 (H)

2009 (1) ZLR p51

Citation	2009 (1) ZLR 51 (H)
Case No	Judgment No. HH-5-09
Court	High Court, Harare
Judge	Kudya J
Heard	22 January 2009

Judgment	22 January 2009
Counsel	<i>N R Mutasa</i> , for the applicant Respondent in default
Case Type	Civil application
Annotations	No case annotations to date

Flynote

c Family law – child – custody and guardianship – distinction between the two – attributes of custody – attributes of guardianship – application for guardianship by custodian parent – what applicant must establish – need to show that guardian has failed to perform the functions of guardianship

Headnote

- There is a fine destination to be drawn between custody and guardianship. "Custody is but one incident or sector of natural guardianship. Where, as happens in most cases, custody is awarded to the mother and no order is made as to guardianship, the father is left with guardianship minus custody. The mother as the custodian parent is entitled to have the child with her, to control its daily life, to decide all questions relating to its ^ε education, training, religious upbringing and to determine what homes or houses the child may or may not enter and with whom it may or may not associate. In cases of urgency she can supply the necessary consent to a surgical operation on the child. Where custody and guardianship are separated, the custodian parent has the care and control of the minor's ^ϕ person, while the guardian parent administers his property and business affairs (guardianship in the narrower sense)" (*dicta per H R Hahlo South Africa Law of Husband and Wife* 5 ed at pp 388-9 and 394 followed).

Where an applicant, as the custodian parent, also seeks to perform the role of guardian, he or she must bear the onus of proving, on a balance of probabilities, that the respondent, as the guardian, has refused to perform ^Ϸ the functions of guardianship or has, in his or her role as a guardian, been irresponsible or neglectful of the child's interests.

Cases cited

Governing Body, Gene Louw Primary School v Roodtman 2004 (1) SA 45 (C) ^η

2009 (1) ZLR P52

Kudya J

Pinto v Benjamin HH-292-86 ^Α

Ryan v Ryan 1963 R & N 356 (SR)

van Rensburg v van Rensburg GS-177-81

Legislation considered

Guardianship of Minors Act [*Chapter 5:08*], s 4(1) ^Β

Matrimonial Causes Act [*Chapter 5:13*], s 3 (1)(c)

Case information

N R Mutasa, for the applicant

Respondent in default

Judgment

KUDYA J: The applicant seeks appointment as the sole guardian of the minor child Roxanne Chantal van Vuuren, born 1 December 1994. She is the mother of the child. Her marriage to the girl's father was terminated by consent by order of this court on 7 August 2002 in case number HC 2367/2002. The order adopted the detailed consent paper that was executed by the applicant and her former husband in Harare and Johannesburg, respectively.

This court assumed jurisdiction on the basis of the additional grounds found in s 3(1)(c) of the Matrimonial Causes Act [Chapter 5:13]. Apparently, as appears in his affidavit of waiver that was executed in Johannesburg, he was not domiciled in Zimbabwe, a country he had left in 1998. She was, *inter alia*, awarded custody of the minor child.

She launched the present application on 1 April 2008. She provided the address of service of the respondent as 127 Enterprise Road, Highlands in Harare. On 23 June 2008, she obtained an order to serve the application by edictal citation once in the *Herald* newspaper and in the Government Gazette, which she duly did in both medium on 14 November 2008.

Paragraphs 11 and 13 of her founding affidavit are the mainstay of her application. I reproduce them hereunder:

11. It has become necessary that I apply for the minor child's passport and get her a visa so that she can pursue her education outside Zimbabwe and have the benefit of better educational facilities. However, to be able to apply for the minor child's passport and Visa, respondent will be required to sign the application forms. This has proved to be extremely difficult, as I do not have any contact or communication with him. Without the respondent's signature, the immigration authorities demand that I furnish them with legal documentation to prove that I am the minor child's guardian, or to get the respondent to sign up the documents.
13. I submit that it is in the best interest of the minor child if sole guardianship

2009 (1) ZLR P53

Kudya J

A is awarded to me in that:

- 13.1. it will be easy to obtain her student permit in the United Kingdom where she can have access to better living and educational facilities and conditions
- 13.2. it will remove the barrier of having to trace the respondent's whereabouts so as to make joint decisions regarding the child, a situation that is not expedient in cases of emergency or ordinary course of the child's livelihood. In any event, respondent having deserted the matrimonial home and having shown no indication of seeking to re-establish any connection with the minor child there is doubt that the respondent will be agreeable to make joint decisions with me
- 13.3. the respondent has not involved himself in any way, in any decisions regarding the upbringing or nurturing of the child and has no contact with the child or myself
- 13.4. notwithstanding the existence of a court order for maintenance respondent never paid maintenance for the minor child
- 13.5. at this age, the child cannot identify her father let alone identify with him
- 13.6. respondent has elected to abandon his right of guardianship over the child.

As framed by the applicant, these two paragraphs seek to cast the burden of proof on the respondent by blaming him for failing, firstly, to communicate with her and, secondly, to exercise his guardianship role. It also emerges from the other clauses in her founding affidavit that she remarried on 8 March 2003. Further, that the respondent also remarried. Her founding affidavit is silent on the steps that she took to notify the respondent of the need for him to exercise his role as a guardian.

In my view, the application betrayed a failure by the applicant to appreciate the fine distinction between custody and guardianship. Had she done so, her application would have been structured differently. It is necessary that I set out what the two concepts entail. Textbook writers have attempted to define both concepts. H R Hahlo in *South African Law of Husband and Wife* 5 ed at 394 wrote:

"Custody is but one incident or sector of natural guardianship. Where as happens in most cases, custody is awarded to the mother and no order is made as to guardianship, the father is left with guardianship minus custody. The mother as the custodian parent is entitled to have the child with her, to control its daily life, to decide all questions relating to its education, training, religious upbringing

Kudya J

and to determine what homes or houses the child may or may not enter and A with whom it may or may not associate. In cases of urgency she can supply the necessary consent to a surgical operation on the child."

See also Boberg *The Law of Persons and Family* 2ed at p 661-664.

Van Heerden J in *Governing Body, Gene Louw Primary School v Roodtman* 2004 (1) SA 45 (C) at 51H-52B set out the rights and duties of the custodian B parent in terms similar to those outlined above by Hahlo *op cit* in these terms:

"At common law a parent (or other person) who has the custody of a minor child is entrusted with the care of the child's person and the decision-making power in respect of the child's day-to-day life, upbringing and education. A useful description of the position of the custodian parent is given by Gubbay J in *Matthee v MacGregor Auld and Another* 1981 (4) SA 637 (Z) at 640D-F: C

'(T)he custodian parent has, therefore, the right and duty to regulate the life of the child; to choose and establish his residence (*Landmann v Mienie* 1944 OPD 59 at 65); to resolve with whom he should be allowed to associate (*Wolfson v Wolfson* 1961 R&N 853; 1962 (1) SA 34 (SR) at 37C-H); to direct the lines on which his secular education should proceed (*Simleit v Cunliffe* 1940 TPD 67 at 76; *Scott v Scott* 1946 WLD 399 at 401), including the choice of the school (*Martin v Mason* 1949 (1) PH B9 (N)); to devise upon D his religious instruction (*Ryan v Ryan* 1963 R & N 356 (SR) at 368A); to determine what medical advice, supervision or assistance should be sought in the event of his becoming ill or sustaining an injury (*Oosthuizen v Rix* 1948 (2) PH B65 (W); *Custner v Hughes* 1970 (3) SA 622 (W) at 625B). The ... non-custodian parent has no right of interference in these matters."

Hahlo *op cit* at p 388-9 further states that: E

"At common law, guardianship in its widest sense includes custody, and embraces the care and control of the minor's person as well as the administration of his property and business affairs. Where custody and guardianship are separated, the custodian parent has the care and control of the minor's person, while the guardian parent administers his property and business affairs ('guardianship' in the narrower sense)." F

The learned author proceeds to define guardianship in the narrower sense at p 395 in these terms:

"By virtue of his guardianship, it is the father's right and duty to take charge of and administer the property of the minor; invest his moneys; pay his debts; and contract on his behalf in business matters. In legal proceedings the minor must G be represented or assisted by the father, unless the mother obtains leave from the court to bring or defend an action on the minor's behalf. The right to alter the child's name, too, vests in the guardian and not in the custodian spouse.

For marriage, the minor requires the consent of both parents, unless one of them has been awarded the sole guardianship of the minor, in which case that parent's consent is necessary and sufficient. For an antenuptial contract, the consent of the father as guardian is necessary and sufficient, unless he has been deprived H

Kudya J

A of the guardianship of the minor, or his parental powers have been overridden."

The factors that the applicant used in her founding affidavit to portray the respondent as an uninterested parent all fall in the category of those that are exercisable by a custodian parent. She was awarded custody and she alone has the legal obligation to exercise those rights. She cannot use the non- B interference of the respondent in the exercise of her rights as demonstrative of his ineligibility as a guardian.

It seems to me that she bears the onus of proving on a balance of probabilities that the respondent as the guardian has refused to perform the functions of guardianship or has, in his role as a guardian, been irresponsible and neglectful of the child's interests. See *Ryan v Ryan supra* at p 367E and Ncube *Family C Law in Zimbabwe* at 115.

Mr *Mutasa*, for the applicant, submitted written heads at my instance. He contended that s 4(1) of the Guardianship of Minors Act [*Chapter 5:08*] enjoins the High Court as the upper guardian of all minors to wrest guardianship from the father and grant it to the mother where the mother has proved that he has D refused or discarded the duties of guardianship. He correctly submitted that it was not the duty of the court, in these circumstances, to protect a "natural" or "God given" right of guardianship vested in the father. His submission resonates with the sentiments expressed by

Gibson J in *Pinto v Benjamin* HH-292-1986 at p 3 of the judgment. The learned judge stated as follows:

"Under the Guardianship of Minors Act [Chapter 34], unlike the common law, ^ε the father and mother have equal standing, and either is eligible on merits to be considered for guardianship of minor children of the parties. Under this statute the primary consideration to be borne in mind in determining the issues by the court is what is in the best interests of the minor; the *paterfamilias* no longer has that easy ascendancy over the mother, to be displaced only where there is good reason, such as refusal or neglect. This list is not exhaustive.

^ϕ It is clear from various past authorities that what is in the best interests of a minor can be arrived at after looking at a wide variety of factors, such as the sex, age, and health of the minor child. Apart from that the ability of either parent to safeguard the moral wellbeing and financial needs of the child must bear a decisive influence on the entitlement of either parent."

Gibson J did not, in her judgment, identify the various past authorities. She ^ϑ may have had in mind the sentiments of Squires J in *van Rensburg v van Rensburg* GS-177-1981 at p 2-3 of the judgment where it is stated thus:

"Now, although the Guardianship of Minors Act provides that the best interests of a minor is the primary consideration in awarding guardianship of a child to one or other of divorced parents, and although the wife and mother now occupies a position of equality in such choices as distinct from the common law, in practice ^η the courts are still reluctant to appoint a mother as the guardian of a minor to

2009 (1) ZLR P56

Kudya J

the complete exclusion of the father unless there are some good grounds for so ^α doing. The reason for this, it would seem, is that since guardianship imposes duties as much as, or even more than, it confers rights, it is normally not in the best interests of a minor child to deprive the father of guardianship unless he refuses to perform the function of a guardian or is sufficiently irresponsible or neglectful of the child's interest as to amount to such a refusal; or is physically so far from the child as to be unable to do so, or some circumstances of a similar ^β nature and effect can be identified."

A full reading of the *Pinto* case, however, shows that Gibson J was influenced by the fact that Mr Benjamin was an incorrigible criminal who relished going in and out of prison and who was serving a three year prison sentence. He had had no contact with the children since his divorce from their mother in 1981, had not exercised his right of access nor paid maintenance despite her ^γ best endeavours to obtain his cooperation in these respects. His explanations were dismissed and it was held that he was both irresponsible and thoroughly neglectful of his duty. It seemed to me that the factors that were listed by Gibson J fall into the realm of custody rather than guardianship in the narrower sense. To the extent that she was influenced by these custodian factors in her decision to grant Mrs Pinto sole guardianship of the parties' three minor ^δ children, I would respectfully disagree with her decision.

In the *van Rensburg* case *supra*, despite the fact that the father had refused to sign documents that would enable the minor to obtain a passport and had an erratic record of maintenance payments, Squires J declined to award sole guardianship to the mother. Rather, he extended her custodian powers ^ε to cover those specific areas that the father had refused or neglected to exercise guardianship.

Both the *Pinto* and *van Rensburg* cases *supra* are distinguishable to the present case in one major respect, that is, that the respondents opposed the application. Again, in the *van Rensburg* case, the mother had made a diligent ^ϕ search for the father. In the present matter, the respondent did not oppose the application. He was not personally served with the application which was served by edictal citation through a local newspaper and the *Government Gazette*. It was not clear to me why the applicant chose to do this when the divorce proceedings showed that the respondent was domiciled outside Zimbabwe since 1998 and lived in Johannesburg. No diligent search for him ^ϑ was ever conducted by the applicant. Mr *Mutasa* intimated from the bar that he had been instructed by the applicant that the respondent had at the time the application was instituted been residing at a house in Harare. In my view, even if that instruction was correct, the applicant did not aver what steps she took to bring to the respondent's attention her decision to remove the child from Zimbabwe to the United Kingdom that appears to have triggered the ^η

2009 (1) ZLR P57

Kudya J

A need for her to obtain a passport some six years after the divorce. She did not state what measures she took to either trace his whereabouts or to enforce the maintenance order. She appeared to have been content with his alleged lack of interest in the affairs of his child. I found her affidavit lacking in candour. In one vein she appeared to be ignorant of the happenings in the respondent's life since his desertion and in another she was aware that he ^B had remarried, just as she had done. I had the distinct impression that she was snatching at sole guardianship.

It was clear from her affidavit that the respondent had not refused to exercise any of his powers of guardianship. The factor which necessitated the application arose from the applicant's unilateral decision to remove ^C the child from Zimbabwe, which decision she did not communicate to the respondent. When he allegedly came to Zimbabwe, she did not advise him of her intentions. It does not appear to me that he was aware that there was a need for him to exercise his guardianship powers. He is not aware of the application. I do not know whether the allegations of neglect in the general custodian welfare of the child are true. Because he has not had notice of the ^D application, I cannot hold that he has deliberately refused to come to court. It appears to me that the applicant is snatching at sole guardianship.

In these circumstances, it would be remiss of me to exercise my discretion by depriving him of guardianship. The applicant has failed to discharge the onus on her to show that he has been neglectful of his duties as a guardian ^E in the narrower sense.

Accordingly, her application for sole guardianship is dismissed with no order as to costs.

^F *Costa and Madzonga*, applicant's legal practitioners

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Document 10 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/GURUVA v TRAFFIC SAFETY COUNCIL OF ZIMBABWE 2009 (1) ZLR 58 (S)

GURUVA v TRAFFIC SAFETY COUNCIL OF ZIMBABWE 2009 (1) ZLR 58 (S)

2009 (1) ZLR p58

Citation	2009 (1) ZLR 58 (S)
Case No	Judgment No. S-30-08
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza JA
Heard	21 January 2008
Judgment	27 January 2009
Counsel	Appellant in person <i>J Muchada</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Administrative law – review – grounds for – *audi alteram partem* rule – applicability to decision to transfer employee to another town – legitimate expectation to be heard before being transferred – employee being told of transfer without being heard but subsequently given opportunity to make representations – rule complied with and legitimate expectation fulfilled ^D

Employment – employee – transfer of to another town – employee's liability to be transferred – employer's discretion to transfer employee unless good cause shown

Headnote

The appellant was notified by the respondent, his employer, that he was to ^E be transferred to another town. He wrote back, making submissions against the transfer, and giving personal reasons for objecting to being transferred. A meeting of the employer's directorate was held to discuss the matter. The directorate notified the appellant that, after a thorough consideration of his submissions, the decision that he be transferred would stand. The appellant referred the matter to a labour relations ^F officer, who referred the matter for arbitration. The arbitrator held that the respondent had not observed the dictates of the *audi alteram partem* rule and declared that the transfer was unlawful and should be reversed. The respondent successfully appealed to the Labour Court. On appeal to the Supreme Court, the appellant argued that the respondent had not ^G observed the *audi alteram partem* rule, nor had it fulfilled his legitimate expectation of being heard before being transferred.

Held, that the appellant should have been granted a hearing before the decision to transfer him was made. However, the respondent had considered the appellant's submissions; it was not as if the respondent refused to hear him. It could not be said that, once the appellant made representations, ^H

2009 (1) ZLR P59

Cheda JA

^A the respondent should necessarily have made a different decision. It was still open to the respondent to arrive at the same decision even after hearing the appellant. The respondent may have erred in not giving the appellant a hearing in the very first place; but, since the respondent did not compel the appellant to go on transfer before he was heard, but deliberated on the issue before re-affirming its previous decision, his ^B legitimate expectation of being heard and the requirement of the *audi alteram partem* rule were complied with.

Held, further, that an employee who undertakes to work for an employer whose business is carried out at different places takes the risk of being sent to perform services for the employer wherever such services are ^C required, unless the employment contract stipulates that he is to be employed and remain at a specific place only. The right to transfer an employee from one place to another is the prerogative of the employer. It is the employer who knows better where the services of an employee are required. The employer's discretion in determining which employee should be transferred and to which point of the employer's operations ^D is not to be readily interfered with except for good cause shown. Good cause, while not easy to define, would include such matters as unfounded allegations, victimization of the employee and any action taken to disadvantage the employee.

Cases referred to ^E

Ngema & Anor v Min of Justice, Kwazulu & Anor 1992 (4) SA 349 (N)

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

Case information

Appellant in person

^F *J Muchada*, for the respondent

Judgment

CHEDA JA: The appellant is employed by the Traffic Safety Council of Zimbabwe as a regional manager. He was based at their Gweru office from where he was transferred to the Masvingo office.

The dispute which led to this case arose from his lateral transfer from Gweru ^g to Masvingo. On 14 November 2003, the respondent's Deputy Director, Finance and Administration, wrote a memorandum to the appellant advising him that he is transferred to Masvingo on a lateral transfer with effect from 1 January 2004, as result of a meeting which had been held by the Directorate of the respondent on 10 November 2003.

^h Reasons for the transfer were given in the memorandum as follows:

2009 (1) ZLR P60

Cheda JA

- (a) training of managers through job rotation and enrichment; ^a
- (b) that the Masvingo office was performing better than the Gweru office though the Masvingo office was apparently smaller;
- (c) that the transfer had been necessitated by a thorough consideration of the likely impact on production and consequent benefits thereto.

The appellant wrote back to the Director of Finance, making his submissions ^b against the transfer. The reasons that he gave were personal. He requested that the transfer to Masvingo be put on hold, but did not say for how long. It is common cause that after the appellant had made his submissions a meeting of the Directorate was held on Wednesday 19 November 2003 to deliberate on the representations made by the appellant. ^c

On 20 November 2003 the Deputy Director wrote to the appellant advising, among other things, as follows:

"The directorate held a meeting at 11.00 hrs to deliberate on the issues on Wednesday 19 November 2003. We sympathise with the personal circumstances in which you are. Also we note that you are doing some publications concerning Traffic Safety work which could be made easier in Gweru. Nevertheless, the directorate ^d realizes that each of us, 47 employees in all, have different personal circumstances, some of them could be much more taxing than yours. The directorate considers each case on its own merits but guided by the fact that the individual needs and goals are subordinate to those of Traffic Safety Council."

The letter ended with the following statement:

"Having made a thorough consideration of your submissions, the directorate ^e resolves that the earlier decision to transfer you to Masvingo with effect from 1 January 2004 still stands."

On 27 November 2003 the appellant wrote a long letter to the respondent, appealing against the decision to transfer him to Masvingo and asking that it be reversed. He did not succeed. He took the matter to the Labour Relations ^f office, alleging victimization and unfair transfer. The labour officer referred the matter to arbitration. The arbitrator held that the respondent had not observed the dictates of the *audi alteram partem* rule and declared that the transfer was unlawful and should be reversed. The Traffic Safety Council of Zimbabwe appealed against that decision at the Labour Court. The Labour Court upheld the appeal and confirmed the decision to transfer the appellant. ^g

The appellant now appeals against the decision of the Labour Court. The appellant's grounds of appeal are as follows:

- 1 The Labour Court made a total error of law in its interpretation of clause 8.5 of the Traffic Safety Council of Zimbabwe's conditions of service as regards the transfer of employees. ^h

2009 (1) ZLR P61

Cheda JA

- ^a 2. The Labour Court incorrectly interpreted the *audi alteram partem* principle and therefore wrongly applied the doctrine in finding that it was observed by the respondent.
3. The Labour Court erred in law in finding that his legitimate expectation to be heard was fulfilled by the respondent.

^b The appellant does not dispute the contents of the letter addressed to him on 20 November 2003. His contention is that the original decision of 10 November 2003 should never have been made without him being granted a hearing. He referred this court to the respondent's conditions of service, and to *Taylor v Minister of Higher Education & Anor* 1996 (2) ZLR 772 (S).

It is conceded by the respondent, and rightly so, that the appellant should ^c have been granted a hearing before the decision to transfer him was made. Indeed, that is the principle laid down in *Taylor's* case.

The appellant's attitude in his submissions is that, once that decision was unlawful, it should be set aside. If the matter had ended there, with that decision made in that manner, I would have no hesitation in holding that it ^D was improper to handle the transfer in that manner, although declaring it unlawful would remain an arguable issue depending on the circumstances of the case. However, that is not the position in this case. To begin with, the appellant made submissions – detailed submissions – in writing, against the transfer. As a result, the respondent's directorate held a meeting to deliberate on his submissions. It is not as if, the respondent refused to hear him. Can ^E it be said that once the appellant made representations the employer should necessarily have made a different decision? I do not believe that to be the position and the appellant cannot say that is the position either.

Secondly, it has not been shown that the respondent made its original decision on the basis of grounds which have since been proved to be incorrect. It was ^F still open to the respondent to arrive at the same decision even after hearing the appellant. It must be accepted that the right to transfer an employee from one place to another is the prerogative of the employer. It is the employer who knows better where the services of an employee are required. The employer's discretion in determining which employee should be transferred and to which point of the employer's operations is not to be readily interfered with except ^G for good cause shown. Good cause in the circumstances, while not easy to define, would include such matters as unfounded allegations, victimization of the employee and any action taken to disadvantage the employee. The reasons for transferring the appellant were given in its very first correspondence. It is not as if the reasons were made to counter the appellant's objections. ^H Even if the reasons had not been given in the first correspondence to him,

2009 (1) ZLR P62

Cheda JA

the reasons would still be valid as long as they are genuine. ^A

The employee who undertakes to work for an employer whose business is carried out at different places takes the risk of being sent to perform services for the employer wherever such services are required, unless the employment contract stipulates that he is to be employed and remain at a specific place only. See *Ngema & Anor v Minister of Justice, Kwazulu & B Anor* 1992 (4) SA 349 (N).

While the respondent may have erred in not giving the appellant a hearing in the very first place, I am satisfied that, since the respondent did not compel the appellant to go on transfer before he was heard, but deliberated on the issue before re-affirming its previous decision, the requirement of the *audi c alteram partem* rule was complied with.

There is nothing in the Labour Court's judgment which points at a wrong interpretation of clause 8:5 to 8:5.3. of the appellant's conditions of service. That clause deals with transfer costs and it is not the appellant's case that he was denied such costs. That ground of appeal is baseless.

Taylor's case, which appellant relied on in most of his submissions, while ^D emphasizing the need for an officer to be heard before transfer, cannot be said to set the precedent that a decision made after the officer has complained must necessarily be different. Further to that, in *Taylor's* case there was an allegation of victimization, and there was no indication that after he had complained there was any further consideration of the matter. He had also ^E asked for reasons for the transfer and they were never supplied. The court *a quo* in *Taylor's* case had interpreted the phrase "without his consent" in the Regulations as meaning that the employee had no right to be heard,

In the case before this court, it is my view that, although the employee has a right to be heard, and to make representation against the transfer, the final decision still lies with the employer. Once it is shown that the employer gave ^F consideration to the need to transfer an employee and gave that employee a hearing, the employer's decision cannot be held to be improper. In *Taylor's* case the appeal court went further and pointed out that, in some cases, an employer can still transfer an employee without giving him or her a hearing, depending on the special circumstances of the case, and that it would be ^G unworkable if every employee were to be consulted before a transfer or decision is made.

In conclusion, I am satisfied that even if the appellant in this case had not been given a hearing when the decision to transfer him was first made, once he complained and the directorate met and deliberated on the matter, his legitimate expectation to be heard was met, the *audi alteram partem* rule ^H

Cheda JA

A was complied with and the decision to transfer him cannot be set aside.

In the result, the appeal is dismissed with costs.

SANDURA JA and GWAUNZA JA concurred.

B *Dube, Manikai & Hwacha*, respondent's legal practitioners

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Document 11 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/SIBANDA v SIBANDA & ANOR 2009 (1) ZLR 64 (H)

SIBANDA v SIBANDA & ANOR 2009 (1) ZLR 64 (H)

2009 (1) ZLR p64

Citation	2009 (1) ZLR 64 (H)
Case No	Judgment No. HB-10-09
Court	High Court, Bulawayo
Judge	Cheda J
Heard	19 January 2009
Judgment	29 January 2009
Counsel	Ms <i>H Moyo</i> , for the applicant B <i>Ndove</i> , for the respondents
Case Type	Application for joinder
Annotations	No case annotations to date

Flynote

Practice and procedure – parties – joinder – principles – when party should be joined – need to consider possible adverse effect of non-joinder

Headnote

The applicant was suing her husband, the first respondent, for divorce. She alleged that, 1962 R & N 805 after the parties separated, but before the divorce action, the first respondent formed a trust, the second respondent, and donated the matrimonial assets to the trust. Her application to join the trust in the action was resisted on the grounds that this was a matrimonial action.

Held, that for a party to be joined in an action, it is necessary that the party should have a direct and substantial interest in the issues raised in the proceedings before the court and that his rights may be affected by the judgment of the court. Matrimonial matters are not excluded. What the court should consider is the effect of the joinder on both parties. Where liability is in dispute,

a joinder should be ordered as long as there is no prejudice to be suffered by the respondent. If the respondent unduly ^F suffers prejudice, his remedy will lie in costs against the plaintiff. It is also pertinent to enquire as to the consequences of a non-joinder. Joinder would be appropriate if there would otherwise be a lot of inconvenience, not only to the applicant, but to the court as well. A multiplicity of actions should be avoided if possible. ^G

Cases referred to

Ettling v Schiff (1887) 5 SC 131

Lewis NO v Schoeman NO & Ors 1951 (4) SA 133 (N)

Marais & Anor v Pongola Sugar Milling Co & Ors 1961 (2) SA 698 (N)

Morgan & Anor v Salisbury Municipality 1933 AD 167

Sieff v Wilhemina and Ors 1911 OPD 24 ^H

2009 (1) ZLR P65

Cheda J

Legislation considered ^A

High Court Rules 1971 (RGN 1047 of 1971), r 87(2)(b)

Case information

Ms *H Moyo*, for the applicant

B Ndove, for the respondents

Judgment

^B **CHEDA J:** This is an application for a joinder of second respondent. The applicant and the first respondent were married to each other according to the laws of Zimbabwe in October 1992. The marriage was blessed with two children and during the subsistence of the marriage the parties acquired a sizeable number of assets.

^c The parties' marriage encountered some problems which resulted in their separation. The applicant left the matrimonial home in September 2001. On 30 November 2007, the first respondent registered a notarial deed of trust under Matabezi Vuka Uzenzele Trust to which he is the settler and all the assets were donated to the Trust. The applicant issued summons on 7 May ^D 2008. After issuing summons, she then discovered that the matrimonial assets had been donated to the second respondent. The effect of this is that, left as it is, the assets do not form part of the matrimonial property.

It is for this reason that this application was filed.

The applicant's argument is that, in the absence of the second respondent ^E being joined as a party under case no. HC 997/08, she will be prejudiced, as the first respondent has, by transferring the property to the second respondent, intended to defeat her claim. This is the long and short of her argument.

On the other hand, the first respondent argues that it would be unprocedural for the second respondent to be joined as a party to the main action, as this is a matrimonial matter. Mr *Moyo* has urged the court to adopt a robust ^F approach in this matter. In support of that assertion reference was made to Order 13 r 87(2)(b) of the High Court Rules, which reads:

"(2) at any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application –

(a) ...

^G (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party"

This rule is all encompassing and covers all matters. The rationale behind it is to ensure that the court is better placed to deal with issues at hand. The ^H court is so placed if all the facts are before it. In *Marais & Anor v Pongola*

Cheda J

Sugar Milling Co & Ors 1961 (2) SA 698 (N), a two-tier approach was formulated in the determination of a joinder and is thus:

- "(1). that a party must have a direct and substantial interest in the issues raised in the proceedings before the court; and that
- (2) his rights may be affected by the judgment of the court."

The court went further and stated that, once an applicant has established the ^B above, then it can proceed to determine the matter of joinder in accordance with requirements of convenience and common sense. This is the legal position. The same principle was adopted in *Lewis NO v Schoeman NO and Ors* 1951 (4) SA 133 (N).

What the court should consider is the effect of the joinder on both parties. In a case where liability is in dispute, a joinder should be ordered as long as ^C there is no prejudice to be suffered by the respondent. In any event, in the event that the respondent unduly suffers prejudice, the respondent's remedy will lie in costs against the plaintiff. In *Ettling v Schiff* (1887) 5 SC 131, quoted with approval in *Lewis NO v Schoeman NO & Ors supra* and in *Sieff v Wilhemina & Ors* 1911 OPD 24, de Villiers CJ stated: ^D

"In a case of this sort (misjoinder), it seems to me that the court in which the trial takes place is the best judge of what would be convenient in the cause of its practice."

Mr *Ndove*, who appeared for the first and second respondents, argued that the applicant should have sought and obtained an amendment to her summons first, before she argued about joinder. He went into great lengths about this issue. ^E However, the main issue at hand is of the joinder and not the amendment. The issue of amendment is basically procedural, which can be dealt with at any time, and in any event it is not the crucial issue at all. With regards to the question as to whether the second respondent should be joined or not he was unable to cite any authorities in the first respondent's favour. ^F

The question which falls for determination, in my view, still remains as to whether or not the second respondent should be joined in these proceedings.

The applicant has been married to the first respondent for 15 years. It is her evidence that, when she married him, he was not possessed of such wealth as he is now. The first respondent is the only real beneficiary, as he has awarded ^G himself, together with the minor children, 80% and awarded the applicant 20% of the whole estate. For this reason, without more, she has direct and substantial interest in the issues raised in the proceedings and therefore her rights may be affected by the judgment of this court.

It is, therefore, pertinent to enquire as to the consequences of a non-joinder. The prejudice is there for anyone to see: there will be a lot of inconvenience, ^H

Cheda J

^A not only to the applicant, but to the court as well. No doubt this will result in the applicant being oppressed and, in an attempt to extricate herself therefrom, there will be a multiplicity of actions, a situation which should be avoided if possible. See *Morgan & Anor v Salisbury Municipality* 1933 AD 167.

The respondents' argument, therefore, has no merit and is accordingly rejected.

^B In the interests of justice, it will only be proper that the second respondent be joined to the main action in order to enable all the issues to be ventilated in court. It will be convenient and makes common sense to do so anyway.

The application succeeds and the following order is made:

1. The second respondent be and is hereby joined as the second defendant in the matrimonial action between the applicant and the first respondent ^C in Case No. HC 997/08.
2. The costs of this application be borne by the respondents jointly and severally, the one paying, the other being absolved.

^D *Lazarus and Sarif*, applicant's legal practitioners

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Document 12 of 52**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/S v HOVE 2009 (1) ZLR 68 (H)

S v HOVE 2009 (1) ZLR 68 (H)**2009 (1) ZLR p68**

Citation	2009 (1) ZLR 68 (H)
Case No	Judgment No. HB-53-09
Court	High Court, Gweru
Judge	Cheda J and Assessors
Heard	3 February 2009
Judgment	3 February 2009
Counsel	<i>L Masuku</i> , for the State <i>M Jaravaza</i> , for the accused (pro Deo)
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *crimes under Criminal Law Code – murder – c appropriate sentence – mercy killing of infant suffering from HIV-related diseases*

Headnote

The accused, a young unmarried mother, killed her five month old baby. The child had been ill from birth, having been diagnosed with HIV, ^o and had been hospitalized in various health institutions for a period of five months. The child had experienced excruciating pain as a result of gaping wounds and open sores all over the body and was always crying uncontrollably due to the endless pain. The accused had been told by medical personnel that there was no help they could offer the child and that the child was facing imminent death. ^e

Held, that the circumstances surrounding the commission of this offence, taken cumulatively, amounted to extenuating circumstances. The concept of mercy killing cannot escape the attention of the court in certain circumstances and as such will play a determining factor in sentencing. While murder *per se* is reprehensible, this case called for mercy and therefore the accused's moral blameworthiness was lower. While we are ^f all responsible for our actions, sight should not be lost of the fact that society has a duty to accommodate and counsel wrongdoers, thereby preventing the resultant fatal consequences which may flow from those who are mentally and physically distressed. Such persons should receive the court's sympathy rather than further condemnation. The accused ^g would be detained until the rising of the court.

Cases referred to

S v Hartman 1975 (3) SA 532 (C)

S v Mayer 1985 (4) SA 322 (ZH)

S v V 1972 (3) SA 611 (A) ^H

2009 (1) ZLR P69

Cheda J

Case information

^A *L Masuku*, for the State

M Jaravaza, for the accused (*pro Deo*)

Judgment

CHEDA J: This is a trial for murder. The accused, a woman of 22 years of age at the time of the commission of the offence, was charged with murder, to which charge she pleaded not guilty.

^B The genesis and background of this case is that on 7 January 2007 the accused carried the deceased on her back and took him to the Ngezi River. Upon arrival, she threw the baby into the flooded river, which act resulted in the baby drowning.

She pleaded not guilty to the charge. In her defence, she stated that she was ^C impregnated by one Gift Moyo who was a haulage truck driver. At the time of conceiving, she was employed as a maid at Mbalabala and her employer terminated her services after she had given birth.

She went to her rural home. On arrival, her father and step-mother chased her away, saying that they did not want her home with a fatherless child. ^D She left and went back to Mbalabala to try to make a living under destitute conditions. The accused, together with the deceased who had been ill from birth having been diagnosed with HIV, had been hospitalized in various health institutions for a period of five months.

According to the evidence submitted to the court, which was uncontradicted, the deceased had experienced excruciating pain as a result of gaping wounds ^E and open sores all over his body. As such, he was always crying uncontrollably due to this endless pain. This, therefore, resulted in both mental and physical stress and hopelessness of the accused.

In view of this torment, the accused braved her previous expulsion from her home by her father and again proceeded to her rural home. On arrival, her ^F father again chased her away.

It is at this stage that she felt alone, unloved, uncherished and discarded. Faced with this dilemma, she thought it best to throw the child into the river in the belief that this would ease the child's suffering.

The facts in this matter are largely common cause and a verdict of guilty of ^G murder with actual intent was returned.

In determining the existence or otherwise of extenuating circumstances the following factors were considered:

- (1) the accused was 22 years at the time of the offence;
- (2) she only went up to the lower level of primary education, due to her ^H mental inability to grasp basic learning concepts at that lower level;

2009 (1) ZLR P70

Cheda J

- (3) she was brought up by her step-mother who did not look after her well; ^A as a result of this, she went to work at an early age;
- (4) she formed a sexual relationship with a roving truck driver of no fixed abode; this resulted in the birth of the deceased who was HIV positive and she also tested HIV positive;
- (5) the father of the child could not be located; ^B
- (6) her father and step-mother expelled her from home on two occasions which resulted in her being destitute;

- (7) she had been hospitalized for a total of five months in various hospitals;
 (8) medical personnel had told her that there was no help they could offer the child and as such the child was facing imminent death. ^c

The circumstances surrounding the commission of this offence taken cumulatively amount to extenuating circumstances. Therefore, we find that extenuating circumstances exist in this case.

While our law does not distinguish between murder and mercy killing, I adopt the view expressed in *S v Hartman* 1975 (3) SA 532 (C) that the concept of ^d mercy killing cannot escape the attention of the court in certain circumstances and as such will play a determining factor in sentencing.

It is agreed by both the State and defence counsel that, while murder *per se* is reprehensible, this particular case calls for mercy and, therefore, the accused's moral blameworthiness is lower. This is a very difficult decision to make, ^e bearing in mind the loss of a life which these courts view with abhorrence.

The accused had been suffering with the deceased, there was no medical relief in sight, as medical personnel had advised her that there was nothing they could do to help the child live. Her parents expelled her from home with a sick child. She, therefore, felt condemned to die together with the child. ^f

This brings me to the question of social responsibility. While it is accepted that we are all responsible for our actions, in my view, sight should not be lost that society has a duty to accommodate and counsel wrongdoers, thereby preventing the resultant fatal consequences which may flow from those who are mentally and physically distressed. ^g

In my view, such persons should receive the court's sympathy, rather than receive further condemnation by the courts, which end up imposing very harsh sentences which in some cases can be capital punishment. *In casu*, no doubt the accused felt that the world had collapsed around her. The element of mercy exercised in *S v Hartman supra* and *S v Mayer* 1985 (4) SA 322 (ZH) is very persuasive and compelling in the present matter. ^h

2009 (1) ZLR P71

Cheda J

A Further, in *S v V* 1972 (3) SA 611(A) at 614, Holmes JA stated:

"Punishment should fit the criminal as well as the crime, be fair to the accused and to society and be blended with a measure of mercy."

This case is one deserving a blending of punishment with mercy. The following therefore, is the sentence:

^B The accused will be detained until the rise of this court.

^c *Dzimba Jaravaza and Associates*, accused's legal practitioners

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Document 13 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/CHIWAWA v MUTZURIS & ORS 2009 (1) ZLR 72 (H)

CHIWAWA v MUTZURIS & ORS 2009 (1) ZLR 72 (H)

2009 (1) ZLR p72

Citation	2009 (1) ZLR 72 (H)
Case No	Judgment No. HH-7-09
Court	High Court, Harare

Judge	Makarau JP
Heard	26 January 2009; 28 January 2009; 29 January 2009; 30 January 2009
Judgment	4 February 2009
Counsel	<i>H Zhou</i> , for the plaintiff <i>R M Fitches</i> , for the first to fourth defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Prescription — *interruption — by issue of process — court application being dismissed on procedural grounds — such application not interrupting prescription*

Headnote

The plaintiff entered into a verbal contract with the defendants to buy a ^d property from them. The initial verbal agreement was made in November 2002 and in July 2003 a written agreement was signed. Transfer was not effected. In 2004 she filed a court application to compel the defendants to transfer the property. That application was dismissed in May 2005. In November 2006 she issued summons, to compel the defendants to ^e pass transfer of the property to her. She also sought an order evicting the defendants and all those occupying through the defendant from the property in dispute. The defendants opposed the claim, arguing, *inter alia*, that the claim had prescribed, summons being issued more than three years after the cause of action arose, which at the latest was July ^f 2003. The plaintiff argued that prescription had been interrupted by the issue of process in 2004.

Held, that the plaintiff's cause of action arose when she concluded the agreement of sale with the first defendant. It was at that stage that she at law became entitled to receive transfer from the defendants against payment of whatever was due from her in terms of the agreement of sale. ^g

Held, further, that a civil action may be commenced by the filing of a court application and, in the absence of an appeal, it is finally brought to a conclusion by the judgment of the court on that application. One of the judgments which the court can return is a dismissal of that application on the grounds that it raises a dispute of fact that cannot be resolved on the basis of the affidavits filed. Such a ruling is a judgment disposing of ^h

2009 (1) ZLR P73

Makarau JP

^a the application filed (but not disposing of the matter between the parties). It follows that when the court dismisses an application on account of a dispute of facts arising, it finally disposes of that application and, although the applicant may be entitled to issue fresh process, the first action filed with the court is at an end and at an unsuccessful end at that. The unsuccessful application has no bearing on the prescription of the ^b debt and will act as if the applicant did nothing in the matter. In terms of s 19(3) of the Prescription Act [*Chapter 8:11*], the running of prescription may be interrupted by the service on the debtor of process; but unless the debtor acknowledges liability, the interruption of prescription will lapse and the running of prescription shall not be deemed to have been ^c interrupted if the creditor does not successfully prosecute the claim to final judgment. *In casu*, the defendants never acknowledged liability at any stage. The interruption of prescription by the filing of the court application thus lapsed and the running of prescription should not be deemed to have been interrupted as the plaintiff did not succeed in her prosecution of the claim in the court application proceedings

Cases cited ^D

Min of Police & Anor v Gasa 1980 (3) SA 387 (N)

Savanhu v PTC S-124-97

Shinga v General Accident Insurance Co (Zimbabwe) Ltd 1989 (2) ZLR 268 (H) ^E

Supreme Svc Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971 (1) RLR 1 (A)

van der Merwe v Protea Ins Co 1982 (1) SA 770 (E)

van Vuuren v Boshoff 1964 (1) SA 395 (T)

Legislation considered ^F

Prescription Act [*Chapter 8:11*], s 19(2) & (3)

Case information

H Zhou, for the plaintiff

^G *R M Fitches*, for the first to fourth defendants

Judgment

MAKARAU JP: On 29 November 2006, the plaintiff issued summons against the defendants seeking an order compelling the defendants to pass transfer of certain immovable property to her. She also sought an order evicting the defendants and all those occupying through the defendant, from the property ^H in dispute. As the basis for her claims, the details of which appear in paragraph

2009 (1) ZLR P74

Makarau JP

7 of her declaration, the plaintiff averred that from all the defendants, second ^A to fourth defendants being represented by the first defendant under a general power of attorney, she had purchased the property in dispute in July 2003 under a written agreement of sale. She further averred that she had paid all the amounts necessary to obtain rates clearance and tax clearance certificates in respect of the property. ^B

The suit was defended. The defendants denied having sold the property to the plaintiff and disputed the signatures appearing on the agreement of sale as theirs. Further, they averred that after the plaintiff had realized that there were problems attendant upon the alleged sale of the property, she sought and was refunded the amount she had paid as the purchase price for the property, thus compromising her claims under the agreement of sale. Finally, ^C and in the alternative, the defendants pleaded that the plaintiff's claim had prescribed by the date she issued summons in the matter.

The defendants also filed a counterclaim in which they sought an order declaring invalid the agreement of sale between the parties.

At the pre-trial conference of the matter, four issues were identified as being ^D the issues for trial. These were:

1. whether the plaintiff's claim had prescribed;
2. whether or not an agreement of sale was entered into between the plaintiff and the defendants;
3. whether the agreement of sale, if any, was cancelled by reason of the ^E plaintiff accepting a refund of the purchase price; and
4. whether the immovable property should be transferred to the plaintiff.

The plaintiff gave evidence at the trial of the matter. Her evidence-in-chief was to the following effect.

She was a businesswoman, specializing in the retail of ink and/or computer ^F cartridges. In or about 2002, she went to the offices of the defendants' legal practitioners, intending to have a will drafted for her. She gave instructions for the drafting of the will to a secretary, one Evelyn Saidi ("Evelyn"). After this had been done, she told Evelyn that she was looking for property to buy. At the time she

made the inquiry, the first defendant was present at ^G the lawyers' offices. He had a property to sell. He gave the address of the property to Evelyn, who in turn passed it to the plaintiff. The first defendant gave her directions to the property. She viewed the property and liked it. She returned to the offices of the legal practitioners and found the first defendant still present. She inquired as to the purchase price and the first defendant indicated that the sellers wanted £25 000. Evelyn then cross-rated the figure ^H

2009 (1) ZLR P75

Makarau JP

^A and advised her that it equated to Z\$15 million. She indicated then in the presence of the first defendant that she would bring the \$Z15 million the following day.

The following day, the plaintiff gave the sum of Z\$15 million cash to Evelyn. Evelyn was going to change the money into pounds. On the day, she did not ^B get a receipt for the payment she had made. When she asked for a receipt, she was told that the other secretary, presumably who was responsible for issuing receipts, was not in the office on the day. She went back the following day and was asked to come back the following week. It was only on 26 March 2003 that she was given an old receipt bearing, not her name, but her husband's, and recording a different transaction to the one in respect of ^C which she had made the payment. The receipt was dated 26 March 2003, the date when it was issued and not the date on which she made the payment. When she showed the receipt to her husband, he was of the opinion that it was insufficient to prove that she had purchased a property and advised her to request for an agreement of sale in addition. It took some time to have the agreement of sale prepared. Later she was called in to sign the agreement. ^D She signed the agreement on 3 July 2003. A few days later, she was called in to collect her copy. The agreement had been signed and witnessed on behalf of the first defendant. When she asked to move into the property purchased, she was informed that she could not do so before transfer was effected. To facilitate the transfer, she was asked to clear the rates and obtain ^E a rates clearance certificate and a tax certificate in respect of the property, which she proceeded to do. By 27 July 2003, she had made all the relevant payments and had given the rates and tax clearance certificates to Evelyn.

On one occasion, when transfer was taking long, she went to the lawyers' offices with someone from the Office of the President and Cabinet, who, during the course of talking to Evelyn, managed to get into his possession the ^F deed of transfer in respect of the property and advised Evelyn that he would not give this back as the plaintiff was entitled to transfer of the property.

She took the matter to a lawyer and instructed the lawyer to demand transfer of the property. The lawyer also used to do debt collection on her behalf as she was then in the money-lending business. She did receive a cheque ^G from the lawyer in the sum of \$15 million but this could not have been a refund of the purchase price as she had not instructed the lawyer to demand or accept the refund.

Under cross-examination, the plaintiff testified that, sometime in 2004, she filed a court application with this court for an order compelling transfer from ^H the four defendants. The application, which was defended, was dismissed on

2009 (1) ZLR P76

Makarau JP

26 May 2005. She also testified that she was unaware that Evelyn had been ^A charged with fraud and had absconded after being granted bail.

After giving evidence, the plaintiff closed her case without calling any other witness. This prompted Mr *Fitches* for the defendants to apply for absolution from the instance, relying on the long accepted test employed by our courts in such matters and as discussed in such cases as *Supreme Service Station B (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A). Mr *Fitches* submitted that taking the evidence of the plaintiff in totality, there was no evidence before me upon which I could make a reasonable mistake and give judgment for the plaintiff. In particular, he submitted that there was no evidence that the first defendant had signed the agreement of sale relied upon by the plaintiff. Secondly, he submitted that the agreement of ^C sale relied upon by the plaintiff was tainted with illegality in that the asking price was fixed in currency other than Zimbabwean currency. Finally, he submitted that on the evidence of the plaintiff, the plaintiff's claim, being a debt in terms of the Prescription Act [*Chapter 8:11*] ("the Act"), had been extinguished by prescription in that a period exceeding three years had lapsed ^D between the date the plaintiff's cause of action arose and the date summons were issued in the matter.

In response, Mr *Zhou* submitted that the matter before me was not a proper matter in which to grant absolution from the instance as it involved a counterclaim by the defendants. He also urged me to find that there was an oral agreement between the parties, concluded when they met in the offices ^Ε of the defendants' legal practitioners. In his submission, the oral agreement constituted *prima facie* evidence of an agreement of sale between the parties upon which I can make a reasonable mistake in favour of the plaintiff. I understood this submission to be an acknowledgment on his part that there may be difficulties in the cogency of the evidence led by the plaintiff in ^Γ respect of the written agreement of sale.

As his third submission, Mr *Zhou* argued that the plaintiff's claim has not prescribed as, prescription was judicially interrupted by the issuance of process in 2004 in the form of the court application which was filed on 11 June 2004 and was dismissed on 26 May 2005.

It is my intention to deal with his last submission first for, in my view, I can ^Δ dispose of this matter on this issue alone.

The plaintiff has approached this court on the basis that she has a valid contract of sale with the defendants. In her pleadings, she alleges that the parties had a written agreement. She further pleads that the agreement of sale was concluded on 26 March 2003 when she was issued with a receipt for Z\$15 ^Η

2009 (1) ZLR P77

Makarau JP

A million by Evelyn even though she had paid the sum in or about November 2002. Thus, according to the plaintiff, there are three possible dates as to when the parties concluded the agreement of sale. It could be in November 2002 as argued by Mr *Zhou*. It could be 26 March 2003 when she was issued with a receipt for the payment of the purchase price or finally, it could be 9 July 2003 when the first plaintiff purportedly signed the agreement of sale.

B At this stage I wish to point out that I agree with the observation by Mr *Zhou* that, at this stage in the trial, I may not make recourse to any findings I may have made on the credibility of the plaintiff as a witness. I also cannot determine the application for absolution on the basis of probabilities as I cannot justly arrive at these without hearing the other side. I take the view ^Ζ that the exercise I have to undertake at this stage is to simply but critically analyze the evidence adduced by the plaintiff and assess whether on the basis of such, without passing a judgment on whether I believe it or not, I can make a reasonable mistake and pass judgment in her favour.

Mr *Zhou* has submitted that the plaintiff's cause of action against the defendants arose when she obtained the last clearance certificate to facilitate transfer as ^Θ she had assumed these obligations in terms of the agreement between the parties. With respect, I cannot agree.

It may be pertinent at this stage to observe that the term "cause of action", as used by Mr *Zhou* above, has been the subject of many court decisions. It is now the settled position in our law, in my view, that the term refers to ^Ι when the plaintiff is aware of every fact which it would be necessary for him or her to prove in order to support his or her prayer for judgment. It is the entire set of facts that the plaintiff has to allege in his or her declaration in order to disclose a cause of action but does not include the evidence that is necessary to support such a cause of action. See *Shinga v General Accident Insurance Co (Zimbabwe) Ltd* 1989 (2) ZLR 268 (H) at 278 A-C.

Applying the above to the facts before me, it is my view that the plaintiff's cause of action arose when she concluded the agreement of sale with the first defendant. It is at that stage that she at law became entitled to receive transfer from the defendants against payment of whatever was due from her in terms of the agreement of sale. As indicated above, this could have been ^Κ as early as November 2002 or, at the latest, on 9 July 2003 when the written agreement of sale was allegedly signed.

It is my further view, that using all the possible dates upon which the agreement of sale could have been concluded, I am coming to the same conclusion, that by the time summons were issued in this matter, a period in excess of ^Λ three years had lapsed from such date.

2009 (1) ZLR P78

Makarau JP

Accepting, therefore, the submission by Mr *Zhou*, but without determining ^a the probabilities of the matter, that the plaintiff became aware that she had a cause of action against the defendants after she had paid for the rates and tax clearance certificate, I would hold that the plaintiff's claim had been extinguished by prescription at the time she issued summons in the matter. The plaintiff adduced evidence to the effect that she obtained the ^b tax clearance certificate last and that this is dated 27 July 2003. She only issued summons in this case on 29 November 2006. A period in excess of three years had clearly elapsed.

The period stipulated in the Act for the extinction of debts is peremptory. It cannot be waived. It is neither fixed in the discretion of court nor can the court extend the period for good cause shown. Like the sword of Damocles, ^c it falls on all uncollected debts and falls on a pre-determined date.

Mr *Zhou* argued that the filing of the court application in June 2004 had the effect of not only judicially interrupting prescription but of suspending the running of prescription as does the death of a party to litigation pending the appointment of an administrator to the deceased's estate. His argument was ^d that after the plaintiff filed the court application on 11 June 2004, prescription stopped running up to 26 May 2005 when judgment in the application was handed down. Prescription then continued to run after 27 May 2006 such that by the time summons was issued in November 2006, the claim was still within the prescription period. ^e

Again, with respect, I am unable to agree.

A civil action in this court may be commenced by the filing of a court application and, in the absence of an appeal, it is finally brought to a conclusion by the judgment of the court on that application. One of the judgments which this court can return on an application is a dismissal of that application because it raises a dispute of fact that cannot be resolved on the basis of the affidavits ^f filed of record. Such a ruling is a judgment disposing of the application filed, but not of the matter between the parties. It follows that when the court dismisses an application on account of a dispute of facts arising, it finally disposes of that application and, although the applicant may be entitled to issue fresh process, the first action filed with the court is at an end and ^g at an unsuccessful end for that. Whether or not an applicant who would have unsuccessfully prosecuted the first application is able to issue fresh process in the matter depends, in my view, on whether the new action can be commenced within three years of the date the cause of action arose. The unsuccessful application has no bearing on the prescription of the debt and will act as if the applicant did nothing in the matter. See *Minister of Police* ^h

2009 (1) ZLR P79

Makarau JP

^a & *Anor v Gasa* 1980 (3) SA 387 (N)); *van der Merwe v Protea Insurance Co* 1982 (1) SA 770 (E) and *Savanhu v PTC* S 124-97.

Mr *Zhou* has referred me to *van Vuuren v Boshoff* 1964 (1) SA 395 (T) as authority for the submission he made in the matter, to the effect that the service on the debtor of an unsuccessfully prosecuted process has the effect ^b of delaying the completion of prescription. In that matter, the learned judge had to deal with a provision of the then Prescription Act, 18 of 1943, whose s 6 provided that:

"extinctive prescription shall be interrupted by...

- (b) service on the debtor of any process whereby action is instituted.... and shall begin to run *de novo* from the date of when the interruption occurred." ^c (The emphasis is mine).

In that case, the learned judge came to the conclusion that the plaintiff's claim had not prescribed because, firstly, the plaintiff's cause of action was not complete when it was alleged that prescription had commenced to run and, secondly, on the fact that on the construction of the statute that was governing prescription in the matter before him, the process issued in the ^d matter prior was invalid, but not fatally defective, and prescription started running *de novo* from the date of service on the debtor of such process.

With respect, the wording of the statute under consideration in the *van Vuuren* matter and s 19 of the Prescription Act [*Chapter 8:11*] are different and the *obiter dicta* in that case cannot bind me in the circumstances.

^e I also note that the case was not followed in any of the other divisions in South Africa and that later decisions construing relevant provisions of the South African prescription legislation that are

similar to the provisions of our current legislation have not come to the same conclusion as was reached in the *van Vuuren* matter.

Further, it is my view that if the legislature intended to provide that the filing of court process would have the effect of delaying the completion of prescription, it would have provided for this in clear language as it did in s 17 of the Act where a list of circumstances delaying the completion of prescription are provided for. It would have provided as was specifically provided for in the South African Act of 1943, that prescription would commence to run *de novo* from the date of the interruption or that it would continue to run after the interruption had ended.

Section 19(2) and (3) of the Act reads:

"(2) The running of prescription shall, subject to subsection (3), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

2009 (1) ZLR P80

Makarau JP

- (3) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (2) shall lapse and the running of prescription shall not be deemed to have been interrupted, if the creditor —
- (a) does not successfully prosecute his claim under the process in question to final judgment; or
 - (b) successfully prosecutes his claim under the process in question to final judgment, but abandons the judgment or the judgment is set aside."

In my view, the language used in the section is quite clear. It provides that the running of prescription may be interrupted by the service on the debtor of process. This is trite. It then provides that unless the debtor acknowledges liability, the interruption of prescription will lapse and the running of prescription shall not be deemed to have been interrupted if the creditor does not successfully prosecute his or her claim to final judgment. I understand this to mean that the creditor has to obtain judgment in his favour on the process issued under subsection (2). Any other meaning would lead to an absurd result, for there would be no finality to litigation and the limitation imposed by the statute would be rendered nugatory if a litigant who loses a case can arrest prescription indefinitely by bringing suits within three years of each unfavourable judgment as long as he can avoid the plea of *res judicata*.

In casu, it is common cause that the plaintiff was unsuccessful in the earlier proceedings.

There is no evidence that the defendants acknowledged liability at any stage and thus the interruption of prescription by the filing of the court application lapsed, and the running of prescription should not be deemed to have been interrupted as the plaintiff did not succeed in her prosecution of the claim in the court application proceedings. Thus, on her own evidence, the plaintiff brought the current action outside the three year period from the date when her cause of action against the defendants arose.

It is my view that I do not have any *prima facie* evidence before me that the plaintiff's claim is still extant and has not been extinguished by prescription.

In view of the conclusion that I have arrived at on prescription, it is not necessary, in my view, that I consider the rest of the submissions made by counsel.

There is one other administrative issue that remains outstanding. It is the disposal of the original deed of transfer that was adduced into evidence by the plaintiff. Without in any way commenting on the manner in which she obtained the deed, it is my order that the deed be returned to the Deeds Registry as the legal custodian of all original copies of such documents. It is from this office that the parties may seek for copies in accordance with

2009 (1) ZLR P81

Makarau JP

the law and after having set out their respective rights to copies of the deed.

In the result, I make the following order:

1. The defendants are absolved from the instance.
2. The plaintiff shall bear the defendants' costs of suit.
3. The Registrar of this court is hereby directed to return into the safe custody of the Deeds Registry, Exhibit No 3 being the original deed of transfer No. 4530/76 in respect of Stand

12886 Salisbury Township of Salisbury Township Lands.

B Nyamusamba & Partners, plaintiff's legal practitioners.

c Granger & Harvey, defendants' legal practitioners.

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Document 14 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/ETHEREDGE v MINISTER OF STATE FOR LANDS & ANOR 2009 (1) ZLR 82 (H)

ETHEREDGE v MINISTER OF STATE FOR LANDS & ANOR 2009 (1) ZLR 82 (H)

2009 (1) ZLR p82

Citation	2009 (1) ZLR 82 (H)
Case No	Judgment No. HH-16-09
Court	High Court, Harare
Judge	Gowora J
Heard	4 February 2009
Judgment	4 February 2009
Counsel	<i>D P Drury</i> , for the applicant <i>P Ndhlovu</i> , for the first respondent <i>G M Mlotshwa</i> , for the second respondent
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

International law – *treaties* – *SADC Treaty* – *Protocol establishing SADC c Tribunal* – *effect* – *whether Tribunal superior to courts in contracting states*

Practice and procedure – *interdict* – *right to* – *applicant only entitled to interdict to protect legally enforceable right*

Property and real rights – *spoliation order* – *right to* – *unlawful occupier of d land* – *person occupying land which had been acquired by State* – *still entitled to protection against spoliation*

Headnote

The applicant sought a spoliation order against the second respondent. He and his sons occupied a farm, which had been gazetted by the Government ^εfor acquisition under the land reform programme. Various people moved forcibly onto the farm and evicted the applicant and his sons. The persons who moved onto the farm did so, allegedly on the instructions of the second respondent (the President of the Senate). The second respondent had been given a letter by the relevant Minister (the first respondent) ^ϕauthorizing her to move onto the farm. Possession and control of the farm had subsequently been restored through the efforts of the police and some of the stolen property had been recovered, but recovery of the same was an ongoing process. However, the applicant persisted with the application for a spoliation order. He also sought an

interdict restraining the second respondent from, in any way, interfering with the possession, ^g control and use of the farm or in any way interfering with the normal farming and business operations of the applicant.

The second respondent claimed that the applicant had no *locus standi*, on the grounds that he had lost his right to institute the proceedings, because the farm had been acquired by the Government. The applicant was, it was argued, committing an offence by occupying the land in excess of the ^h

2009 (1) ZLR P83

A period allowed him by the Gazetted Lands (Consequential Provisions) Act [Chapter 20:28]. The second respondent claimed, too, that the court had no jurisdiction because the matter was pending before the SADC Tribunal.

Held, that once the land is acquired, the former owner or occupier loses the ^b right to occupy or use the land. If he does so, he commits an offence. That did not mean, though, that the mere fact that a former owner still occupied gazetted rural land outside the requirements of a statutory provision, placed that particular occupier at the mercy of anyone who cared to come onto the land without due process. A spoliator is in no better position than the former owner or occupier, in the sense that, in ^c moving onto the land without due process, he or she is equally guilty of an infraction of the law. A former occupier still has to be evicted by lawful process. If it were the intention of the Legislature to deprive him of *locus standi* to protect his possession of the gazetted land from self-helpers and would-be spoliators, then the Legislature would have provided for such in specific terms. However, as the applicant had been ^d restored to possession by the police, he was not in a position to persist with the restoration of possession.

Held, further, that an interdict is an order from a court prohibiting or compelling the doing of a particular act, for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm, ^e and therefore it is appropriate only when future injury is feared. As the applicant had lost his ownership in the land by virtue of the acquisition process, and had lost his right legally to occupy the land, he had not established a right that would entitle him to seek an interdict against any future acts of spoliation on the part of the respondent.

Held, further, that the SADC Treaty made provision for the establishment of ^f a tribunal. The Protocol is the document that then sets up the Tribunal and provides for the powers of the Tribunal. The Protocol contains no reference to the courts of any of the countries within SADC. If the intention was to create a tribunal which would be superior to the courts in the subscribing countries, that intent was not manifest in the Protocol. The supreme law in this jurisdiction is the Constitution, which ^g has not made provision for the courts of Zimbabwe to be subject to the Tribunal. In any event, the nature of relief being sought in the Tribunal was different to what as being sought in the High Court, so there was no justification for the view that the applicant was seeking the same ^h relief in different *fora*.

2009 (1) ZLR P84

Gowora J

Cases cited ^a

Airfield Invstms (Pvt) Ltd v Min of Lands & Ors 2004 (1) ZLR 511 (S)

de Jager & Ors v Farah & Nedstadt 1947 (4) SA 28 (W)

Mutsotso & Ors v Commissioner of Police & Ors 1993 (2) ZLR 329 (H)

Stauffer Chemicals, Chemical Products Division of Cheeseborough Ponds (Pty) Ltd v Monsato Co 1988 (1) SA 805 (T) ^b

Case information

D P Drury, for the applicant

P Ndhlovu, for the first respondent

G M Mlotshwa, for the second respondent

Judgment

GOWORA J: In this application the applicant seeks relief in the form of a *mandament van spolie*, premised on an alleged act of spoliation by persons acting on behalf, and at the behest, of the second respondent, who is the President of the Senate. There was no substantive relief sought against the first respondent, the Minister, and as a consequence no papers were filed on his behalf. Mr *Ndlovu*, who appeared on behalf of the Minister, held a watching brief and took no part in the proceedings. Effectively, therefore, I only had one respondent and the second respondent will therefore be referred to as the respondent.

The day before the matter was to be argued before me, the applicant filed a supplementary affidavit in which he indicated that possession and control of the farm had been restored to him and his family through the efforts of the police, and that some of the stolen property had been recovered, but that recovery of the same was an ongoing process. The applicant further indicated that it appeared that there was a policy shift by the police from inaction to positive action. The respondent did not raise any objection to the admission of the supplementary affidavit, and it went in unopposed. The effect of the supplementary affidavit is that the status *quo ante* had been restored some time prior to the matter being argued before me. The applicant, however, persisted with the application and for relief connected thereto. There was no application to amend the order being sought.

The facts surrounding this dispute are as follows. The applicant and his sons occupy Stockdale Farm, which has since been gazetted by Government for acquisition under the land reform program. In June 2008 various persons moved forcibly onto the farm under the leadership of one George Moyo, in an effort to occupy the same. The applicant and his sons were forcibly evicted. The persons who moved onto the farm allegedly did this on the instructions of the respondent. An attempt to have the trespassers removed by the police having failed to yield results, the applicant approached this court

2009 (1) ZLR P85

Gowora J

On a certificate of urgency, for a *mandament van spolie* and ancillary relief thereto. It is common cause that an order for a *mandament van spolie* had been granted in favour of the applicant in the past against the respondent. It is also common cause that the respondent had been given what is commonly referred to as an "offer letter" by the responsible Minister, to move onto the farm under the land reform program. The respondent denies, however, that she was responsible for the latest attempt to remove the applicant forcibly from the farm and to occupy the same.

Before delving into the merits of the dispute, I would deal with the points *in limine* raised by the respondent. The first point raised was that the applicant had no *locus standi in judicio* to bring the application. It was argued by Mr *Mlotshwa*, on behalf of the respondent, that as the relief being sought by the applicant includes an interdict, the court would have to go beyond the question of the *mandament van spolie* and determine whether, in fact, the applicant has established the requisites for an interdict. The applicant is alleged to have lost his right by virtue of the acquisition of the farm by the Government. Mr *Mlotshwa* premised his submissions on the *dicta* in a number of judgments of this court which have been decided in relation to land disputes arising out of the distribution of land in terms of the Land Acquisition Act [Chapter 20:10]. Mr *Mlotshwa* contends that the applicant has lost his right to institute these proceedings because the farm has been acquired by the Government. The farm in question has been gazetted for acquisition.

On the papers before me there is no indication of the date of such gazetting, but it seems to be accepted by both parties that it was some time prior to the alleged acts of spoliation. The contention by the applicant is that he is entitled to possess the farm and that, until he is lawfully evicted from the same, no-one has the right to move onto the farm and despoil him of his possession through such occupation. He has submitted further, that where a possessor is violently despoiled of his property he is immediately clothed with *locus standi* to bring an application for the restoration of possession to that property.

What I have, therefore, is a situation where the applicant is alleging that the respondent has acted violently and dispossessed him of his farm, and in the same breath saying I should not concern myself with the merits of his entitlement to the land in question but look at the alleged dispossession. On the other hand, the respondent contends that, by virtue of the nature of his possession, the applicant does not have the *locus standi in judicio* to even bring the proceedings because, in terms of statute, the applicant is committing an offence by occupying the land in excess

of the period allowed him by the H Gazetted Lands (Consequential Provisions) Act [Chapter 20:28]. For this

2009 (1) ZLR P86

Gowora J

contention, the respondent has cited the following decisions as his authority: A *van der Merwe v Chirinda & Ors* and *J W Hall (Pvt) Ltd v Mliswa & Ors*, which are judgments of this court but which have not been made distributable. The respondent has also sought reliance on *Airfield Investments (Pvt) Ltd v Minister of Lands Agriculture & Rural Resettlement & Ors* 2004 (1) ZLR 511 (S).

All three matters are concerned with residual rights of a former owner of B rural land which has been acquired by the Government under the land reform program. In the *Airfield Investments* case *supra*, the court was discussing s 9 of the Land Acquisition Act [Chapter 20:10], para (b) of which then provided as follows:

“(b) in relation to any agricultural land required for resettlement purposes, the C making of an order in terms of subsection (1) of section 8 shall constitute notice in writing to the owner or occupier to cease to occupy, hold or use that land forty five days after the date of service of the order upon the owner or occupier, and if he fails to do so, he shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or imprisonment for a period not exceeding two years or to both such fine and such imprisonment: D

Provided that–

- (i) the owner or occupier of that land may remain in occupation of his living quarters for a period of not more than ninety days after the date of service of the order;
- (ii) the owner or occupier shall cease to occupy his living quarters after the period referred to in proviso (i) and, if he fails to do so, he shall E be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.”

In the *Airfield Investments* case *supra* at 515E-F the Supreme Court construed the subs (1) of s 9 in the following terms:

“The provisions of subs (1) of s 9 are subject to subs (3) of s 8, showing that the F rights embodied therein are a limitation to the exercise of rights of ownership by the acquiring authority and are reserved for the former owner or occupier of the expropriated land to the extent that the owner or occupier is there on the land to occupy, hold or use it and the living quarters thereon for the duration of the time prescribed. At the end of the maximum period of ninety days from the date of service of the order of acquisition, the rights of the former owner G or occupier cease to exist and by operation of law, he must leave the land or be evicted by order of court. Should the acquiring authority withdraw a letter of offer of the land to another person, the land reverts to the acquiring authority and not the former owner or occupier unless, of course, the acquiring authority also revokes the order of acquisition.”

Since the handing down of that judgment there have been further developments H

2009 (1) ZLR P87

Gowora J

A in the law, to wit the promulgation of s 16B of the Constitution, which section was brought into effect by Act 2 of 2005. The force and effect of that amendment was to immediately vest ownership in the State of rural land which has been gazetted in terms of s 5(1) of the Land Acquisition Act [Chapter 20: 10], either prior to 8 July 2005 or after 8 July 2005 but before 14 September 2005, which is the appointed date. What is clear, therefore, is B that once the land is acquired the former owner or occupier loses the right, after the period stipulated in the subsection, to occupy or use the land. This is by operation of law and, since the possession of land is premised on one's occupation of the same, once the right to occupy is extinguished by operation of law can an occupier of the same, who is precluded by law from C occupation, seek protection of the law in continued occupation of the land in issue? In *van Der Merwe v Chirinda supra* (which is unreported) Omerjee J, in discussing the rights of a former owner or occupier of agricultural land after it had been acquired by the acquiring authority, had this to say at p 6 of the judgment:

“In this regard, s. 3 is to the effect that once the acquiring authority has identified D and duly gazetted agricultural land i.t.o.s. 16B of the Constitution, the former owner or occupier of that land shall cease to occupy, hold or use such land within 45 days of the date of posting the *Gazette* notice, failure of which such former owner or occupier shall be guilty of an offence and liable to prosecution and punishment. This means that the former owner is dispossessed of any right to occupy, hold or otherwise utilize the farming

land within 45 days of the land ^ε being gazetted. It must be emphasized that the mere identifying and gazetting of a particular area of agricultural land, by the acquiring authority constitutes sufficient notice to the former owner or occupier of the fact that the State has immediately acquired the land and full rights therein are now vested in the State."

The learned judge went on to explain that the former owner or occupier had ^φ a grace period of 90 days, in total, after the notice to remain on the farm, but after the expiration of that period any continued occupation on his part constituted a criminal offence.

In casu, it would appear that at some stage criminal proceedings had been instituted against the applicant for an alleged contravention of the section. There was also some suggestion that the notice under which such prosecution ^ς had been commenced had been alleged to be defective. It is accepted now, that the land has been properly gazetted and that the ninety days allowed in terms of the Act has now expired. The land now belongs to the State and, by virtue of s 3 of the Act, the applicant has not only lost any right to hold, use or occupy the land but any continued occupation or use by him of the ^η same constitutes an offence. His right to possess has thus been extinguished

2009 (1) ZLR P88

Gowora J

by operation of law. *Locus standi* is predicated on the existence of a right, ^α or the claim of a substantial interest, in the subject matter of the litigation. The existence of any right on the part of the applicant has now been removed by operation of law.

However, it is trite that in spoliation proceedings the court should not enquire into the lawfulness or otherwise of the possession of the applicant in the ^β subject matter of the application. The applicant has referred this court to the matter of *Mutsotso & Ors v Commissioner of Police & Ors* 1993 (2) ZLR 329 (H), which was concerned with an application for a *mandament van spolie*. The parties to the dispute had agreed to have a provisional order issued by consent and Robinson J therefore did not have to decide the matter on the merits. However, when the respondent had initially responded to the ^γ application, he raised, as an issue, the lawfulness of the occupation of the farm by the applicants. Without going into the merits of the application, the learned judge discussed the basis upon which a spoliation order is sought and granted. This is what he had to say at 332H-333B:

"If, when this matter comes before it, the court were to find that the riot police ^δ had behaved towards the applicants in the manner alleged and that the applicants had thereby been cowed into leaving their dwellings and the farm against their will, so that they had been dispossessed of their dwellings and, in the case of certain of the applicants, their household goods through the duress applied by the servants of the first respondent, for the benefit of the second respondent, then the law to be applied in such a situation is clear. The general principle was stated by Innes CJ in *Nino Bonino v de Lange* 1906 TS 120 at 122 thus: ^ε

'It is a fundamental principle that no man is allowed to take the law into his own hands; no-one is allowed to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the status *quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.' ^φ

As explained by Millin J in *de Jager & Ors v Farah & Nedstadt* 1947 (4) SA 28 (W) at 35, a case where demolition of premises was undertaken without legal process:

'What the court is doing is to insist on the principle that a person in possession of property, however unlawful his possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his possession ^ς except by the due process of law, and if he is so interfered with, the court will restrain such interference pending the taking of action against him for ejectment by those who claim that he is in wrongful possession. The fact that the applicants have no legal right to continue to live in this slum and would have no defence to proceedings for ejectment, does not mean that proceedings for ejectment can be dispensed with, nor does it make any difference to the illegality of the respondents' conduct that the occupation ^η

2009 (1) ZLR P89

Gowora J

^α by the applicants carries with it penal consequences'. "

In casu, the law has stated that the right of the applicant has been extinguished by operation of law and he occupies in contravention of a statutory provision. By virtue of the provisions of s 3 of the Act, the applicant has lost the right to assert any pretension of possession of the land because such

possession is now precluded by law. In this instance that right has been extinguished ^Б by operation of law, and as a consequence the result is that the applicant no longer has the right to occupy or use the land in question. The question that then arises is whether, as a result of the statutory provision, even the right to protect himself from self-helpers has been lost to him. Any act of spoliation is an illegal act which the law ought to, and justifiably so, frown upon. Can ^С one say that the mere fact that a former owner still occupies gazetted rural land outside the requirements of a statutory provision lays that particular occupier at the mercy of any who cares to come onto the land without due process. The other aspect which Mr *Drury* did not fully ventilate before me is whether this court can grant an order the effect of which is to sanction a contravention of s 3 of the Act by the applicant. In *J W Hall (Pvt) Ltd v Mliswa* ^Д *supra* the court was alive to the consequences of granting a *mandament van spolie* to an applicant whose right to occupy had been removed by the gazetting of the farm in terms of s 3 of the Act. This is what Chitakunye J had to say at p 4 of his judgment:

"What the applicant prays for before this court should thus not be seen as a way of undoing what the law deems to be the position. In terms of s 3 of the Gazetted ^Е Land (Consequential Provisions) Act, the applicant's stay is now unlawful, hence his arrest and arraignment before the magistrate in Mhangura. By virtue of that Act, the applicant can now not be seen to be granted authority or an order by which to continue doing that which the law says is unlawful. This is akin to what Malaba JA observed in the *Airfield Investments* case *supra*, wherein at 520C-D he said:

^Ф Similarly the court *a quo* was being asked by the appellant to sanction the continued illegal farming operations and occupation of the living quarters on the land despite the clear and unambiguous language of the Act, to the effect that failure to cease occupation or use of the land at the end of forty-five days from the date of service of the order of acquisition and the living quarters at the end of ninety days of service of the order of acquisition constituted a criminal offence.'

^Г It is my view that a spoliator is in no better position than the former owner or occupier of farm land, in the sense that in moving onto the land without due process, he or she is equally guilty of an infraction of the law. As the law stands, a former occupier still has to be evicted by lawful process from the gazetted land and, if it were the intention of the legislature to deprive ^Н him of *locus standi* to protect his possession of the gazetted land from self

2009 (1) ZLR P90

Gowora J

helpers and would be spoliators, then the legislature would have provided ^А for such in specific terms. It did not do so. I do not, therefore, accept that the applicant has been denuded of his right to approach the court for an order of spoliation to restore the status *quo ante*. The relief of *mandament van spolie* is a common law remedy, and it is my view that its requirements have not been done away with by the promulgation of legislation to do with ^Б land acquisition. The applicant thus has *locus standi* to approach the court for a *mandament van spolie*. He is, however, not in a position to persist with the restoration of possession because the police have evicted the trespassers and he has been restored to possession of the farm. That part of the order sought therefore falls away.

However, as part of the interim relief sought, the applicant also sought an ^С interdict in the following terms:

"(b) That the respondent and all other persons claiming occupation and possession of Stockdale through them are interdicted from in any way interfering with the possession, control and use of Stockdale or of any property owned by or possessed by the applicant, his representatives, agents, employees or invitees or of in any way interfering with the normal farming and business ^Д operations of applicant, his employees, representatives or agents."

One of the requisites for a temporary interdict is the existence of a right, either a clear right or a *prima facie* right which may be open to doubt. The property in respect of which the interdict is sought is now vested in the State which, in the exercise of its rights of ownership, has given notice to the applicant that he no longer has the right to use, occupy or possess the ^Е land in question. The applicant has thus lost the right by operation of law. Apart from having owned the farm, he has no other residual rights that he can claim over the property. Even the right to occupy or possess has been taken away by law. In the *Airfield Investments* case *supra* Malaba JA stated:

"The threshold the appellant had to cross was the production of evidence which ^Ф established the existence in it of *prima facie* rights of ownership in the land at the time the application for interim relief was made. An interim interdict is not a remedy for past invasions of rights and will not be granted to a person whose

rights in a thing have already been taken away from him by operation of law at the time he or she makes an application for interim relief.”

An interdict is an order from a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm and therefore it is appropriate only when future injury is feared. In *Stauffer Chemicals v Monsanto Co* 1988 (1) SA 805 (T) at 809E-G, Harms J, discussing the nature and purpose of interdicts had this to say at 809F:

“As far as interdicts are concerned, the ordinary rules relating to interdicts apply. H

2009 (1) ZLR P91

Gowora J

A Terrell on *The Law of Patents* 13 ed at 419 correctly points out that the basis of an interdict is the threat, actual or implied, on the part of the defendant that he is about to do an act which is in violation of the plaintiff's right and that actual infringement is merely evidence upon which the court implies an intention to continue in the same course. I would have thought it axiomatic that an interdict is not a remedy for past invasion of rights. It is for the protection of an existing right. Cf *Meyer v Meyer* 1948 (1) SA 484 (T). It is therefore not strange that B *Saccharin Corporation Ltd v Quincy* 17 RPC 337 at 339 held that:

‘An injunction cannot be properly granted except in respect of a patent which the defendant has infringed, or threatened to infringe, and only during the continuance of that patent.’”

As the applicant has lost his ownership in the land by virtue of the acquisition C process and his right to occupy the same legally, he has not established a right that would entitle him to seek an interdict against any future acts of spoliation on the part of the respondent. The relief he seeks is therefore not available to him.

I turn now to deal with the question of *lis pendens* raised by Mr *Mlotshwa*. He submitted that the applicant is currently before the SADC Tribunal where D he and other farmers whose farms are the subject of acquisition orders have claimed certain relief from that body. In view of my findings above, it is not necessary that I consider this issue. The applicant cannot obtain an interdict on the papers before me, and to venture into a foray of the issues before the tribunal would be, in my view, an exercise in futility.

E Co-joined with this submission is a further submission that this court lacks the jurisdiction to hear the matter because of the process in the Tribunal and a judgment that was passed by the Tribunal against the Government of this country. An interim judgment has, indeed, been handed to me but it is not a judgment I can consider without reference to the protocol that brought the Tribunal into force, as well as the SADC Treaty. I note that in the heads of F argument, the submission of lack of jurisdiction is not premised on the same basis as it appears in the opposing affidavit. It is not clear, therefore, what argument the court should follow. I will therefore deal with both issues as one and the same.

The Treaty makes provision for the establishment of a tribunal. The Protocol G is the document that then sets up the Tribunal and provides for the powers of the Tribunal. I have examined the protocol very carefully and I have not observed therein any reference to the courts of any of the countries within SADC. If indeed the intention was to create a Tribunal which would be superior to the courts in the subscribing countries, that intent is not manifest in the document presented to me. The supreme law in this jurisdiction is our H Constitution and it has not made provision for these courts to be subject to

2009 (1) ZLR P92

Gowora J

the Tribunal. This court is a court of superior jurisdiction. It has an inherent A jurisdiction over all people and all matters in the country, and its jurisdiction can only be ousted by a statutory provision to that effect. I do not have placed before me any statute to that effect and the Protocol certainly does not do that. From a perusal of the interim judgment, it is clear that the nature of relief being sought in the Tribunal is different to what is sought before me, B and there is therefore no justification for the view that the applicant is seeking the same relief in different *fora*. I hold that this court has jurisdiction and that it has the capacity to determine the dispute between the parties.

In view of my earlier findings on the points *in limine*, there is no need to enquire into the merits of this application. The applicant is non-suited and the application is hereby dismissed with costs. C

Gollop & Blank, legal practitioners for the applicant.

Civil Division of the Attorney-General's Office, legal practitioners for the first respondent.

Antonio & Associates, legal practitioners for the second respondent. ▯

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Document 15 of 52

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S v MUKOKO 2009 (1) ZLR 93 (H)

2009 (1) ZLR p93

Citation	2009 (1) ZLR 93 (H)
Case No	Judgment No. HH-24-09
Court	High Court, Harare
Judge	Chitakunye J
Heard	4 February 2009
Judgment	4 February 2009
Counsel	<i>H Nkomo</i> , for the applicant <i>Mrs F Ziyambi</i> , with her M Dube, for the respondent
Case Type	Bail application
Annotations	No case annotations to date

Flynote

▮ **Criminal procedure** – *bail – application upon initial court appearance for bail – need to inform court of the charge against accused before court can consider the question of bail – initial court appearance – not competent to grant bail before deciding whether a remand is justified*

▮ **Words and phrases** – *"has appeared in court on a charge" – Criminal Procedure and Evidence Act [Chapter 9:07] – ss 116 and 117 – meaning of in relation to persons seeking bail*

Headnote

On 24 December 2008 the applicant appeared before a magistrate in Harare for an initial remand. At her insistence the initial remand proceedings ^ε were deferred pending the outcome of an application for release of the applicant that was pending in the High Court and was due to be heard on the same day. The High Court ordered that she should appear before a magistrate. On 30 December 2008 she was taken before a magistrate for the initial remand proceedings to be conducted. The proceedings were further deferred pending another application before the High Court for ^φ her release and a request for medical attention. This was followed by yet another urgent chamber application in the Supreme Court on 12 January 2009. Following the Supreme Court's rejection of the application (see *Mukoko v Commissioner-General of Police & Ors* 2009 (1) ZLR 21 (S), above in this volume), an application was successfully made to a ^ς

magistrate to refer the matter to the Supreme Court in terms of s 24(2) of the Constitution. Two weeks later she applied to the High Court for bail. The State argued that she had never been placed on remand, so the matter was not properly before the court. The issue for determination was when, in the context of ss 116 and 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a person is deemed to have appeared ^h in court on a charge so as to be able to invoke his entitlement to apply

2009 (1) ZLR P94

Chitakunye J

for bail. The applicant argued that she had appeared in court on a charge ^a that had been put to her by the investigating officer, and was in custody, so was properly before the court and her application must be entertained.

Held, that the term “has appeared in court on a charge”, as used in ss 116 and 117 of the Act, in relation to persons seeking bail, must be construed to mean “after the initial process of a criminal trial”, which is the initial ^b appearance in court before a judicial officer and after the legal justification for the person’s arrest and detention is presented to the judicial officer. To trigger the process of an application for bail, a person must make an initial appearance in court on a charge. The mere fact that one has passed through a court room does not mean that one “has appeared in court on a charge”. The initial process initiating a criminal trial must ^c be undertaken. The judicial officer before whom such person appears must be apprised of the charge for which he is appearing in court and the accused person must be informed why he has been brought to court. This is done by having the allegations against the accused person put to him before the judicial officer. To grant bail without the judicial officer first ascertaining whether there is legal justification for the accused person ^d to be placed on remand is incompetent.

Cases cited

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

Mukoko v Commissioner-General of Police & Ors 2009 (1) ZLR 21 (S) ^e

Shumba v Attorney-General 1997 (1) ZLR 589 (S)

S v Poli 1987 (2) ZLR 30 (H)

Legislation considered

Constitution of Zimbabwe 1980, ss 13 and 18 (2)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 116 and 117 ^f

Case information

H Nkomo, for the applicant

Mrs *F Ziyambi*, with her *M Dube*, for the respondent

Judgment

CHITAKUNYE J: The applicant applied to this court for bail pending trial. ^g The respondent opposed the application and raised a point *in limine* contending that the application is not properly before this court as the applicant has not been formally placed on remand. The respondent contended that on 24 December 2008 the applicant appeared before a magistrate at Harare magistrates’ court for an initial remand.

At the *applicant’s* insistence, the initial remand proceedings were deferred ^h

2009 (1) ZLR P95

Chitakunye J

^a pending the outcome of an application for release of the applicant that was pending in the High Court and was due to be heard on the same day.

The High Court ordered that the applicant appear before a magistrate. On 30 December 2008, the applicant was taken before a magistrate for the initial remand proceedings to be conducted. The

proceedings were further deferred pending another application before the High Court for her release ^B and a request for medical attention. This was followed by yet another urgent chamber application in the Supreme Court on 12 January 2009 seeking an order to depart from the Supreme Court Rules in regard to the set down of a Constitutional Court application made in terms of s 24(1) of the Constitution of Zimbabwe (an application for the hearing of the court application on an ^C urgent basis). The Chief Justice dismissed the application and ordered that the applicant should comply with the provisions of s 24 of the Constitution before the matter can be set down as a constitutional application. See *Mukoko v Commissioner-General of Police & Ors* 2009 (1) ZLR 21 (S).

An application for referral to the Supreme Court was subsequently made before a magistrate on 15 January 2009 who then referred the matter to the ^D Supreme Court in terms of s 24(2) of the Constitution.

The respondent argued that the initial remand proceedings were never conducted as the applicant contended that the constitutional issues she was taking before the Supreme Court be resolved first.

As far as respondent is concerned, it has always wanted to proceed with the ^E initial remand but has met with resistance by applicant. As the applicant has not been placed on remand she cannot apply for bail at this stage. The applicant can only apply for bail when she has been formally placed on remand.

The applicant, on the other hand, argued that she is properly before this court and that the applicant can in terms of both constitutional and statutory ^F provisions apply for bail in this court. In his argument, counsel for the applicant submitted that the question before this court is whether an accused person who has not been formally remanded can apply for bail in the High Court. He argued that the application is properly before this court. In that regard he referred to s 116 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Section 116 deals with the power to admit to bail and s 117 deals ^G with entitlement to bail.

Counsel conceded that, though the applicant appeared in court on 24 December 2008, no formal remand took place. He in fact did not deny the sequence of events as narrated by counsel for the State leading to the initial remand not being conducted up to this date.

^H From the submissions by counsel for both parties, it is apparent that counsel are

2009 (1) ZLR P96

Chitakunye J

not agreed on the proper interpretation of ss 116 and 117 of the Criminal ^A Procedure and Evidence Act [*Chapter 9:07*]. The basic issue is: "when is it deemed one has appeared in court on a charge to invoke one's entitlement to apply for bail". In other words, what constitutes appearing in court on a charge for purposes of applying for bail pending trial?

Counsel for respondent contended that that section must be construed to mean ^B that when one appears in court the charge is read out and one is informed of why they have been brought to court. When one has been informed of the allegations against them in court, and before a magistrate or judge, only then will one be entitled to apply for bail pending trial.

The applicant, on the other hand, argued that the mere fact of appearing in ^C court, coupled with the fact that the applicant had already been informed of the charge by the police, that sufficed for the purpose of applying for bail pending trial. In para 8 of his written submissions, counsel for the applicant succinctly put it thus:

"The applicant appeared in court on a charge that was put to her by the investigating officer, and is in custody and to that end she is properly before this court and ^D her application must be entertained."

In a bid to convince the court that that was the correct construction, the applicant's counsel referred to two cases, namely *In re Mlambo* 1991 (2) ZLR 339 (S) and *Shumba v Attorney-General* 1997 (1) ZLR 589 (S). A reading of those two cases shows that they dealt with the issue of when it is ^E deemed one has been charged in the context of s 18(2) of the Constitution. It was the term "charged" for purposes of determining the reasonableness of the delay in prosecution.

In *In re Mlambo supra* at p 346 Gubbay CJ said that:

"The time frame to be considered starts to run from the moment a person is charged. The key word is 'charged'. What does it mean in the context of s 18(2)? Does ^F the provision envisage only the situation where the accused is called upon in court to plead to a formal charge? To my mind, such a restrictive

construction has the effect of rendering the protection almost nugatory. It squares more with an arraignment ...

I have no hesitation in holding that the time frame is designed to relate far more to the period prior to the commencement of the hearing or trial than to whatever period may elapse after the accused has tendered a plea. This meaning is wholly consonant with the rationale of s 18(2) – that the charge from which the reasonable time enquiry begins, must correspond with the start of impairment of the individual's interests in the liberty and security of his person ..."

It was in this context that he went on to say that the word "charge" may be defined as the official notification given to an individual by the (appropriate) H

2009 (1) ZLR P97

Chitakunye J

A competent authority of an allegation that he has committed a criminal offence.

In *Shumba v Attorney-General supra* Gubbay CJ said that one of the issues to be decided therein concerned "the meaning to be given to the word 'charged' in s 18(2) of the Constitution." He confirmed that in both cases the meaning of the word "charged" was in the context of s 18(2) of the Constitution.

B Whilst in the cases cited the question was when is one deemed to have been charged in the context of s 18 (2) of the Constitution, *in casu* the question is when is one deemed to have appeared in court on a charge in the context of ss 116 and 117 of the Criminal Procedure and Evidence Act for one to apply for bail pending trial. Section 116 provides that:

"Subject to this section and sections 32 and 34, a person may, upon an application C made in terms of section 117A, be admitted to bail or have his or her conditions of bail altered –

- (a) in respect of any offence, by a judge D at any time after he or she has appeared in court on a charge and before sentence is imposed;
- (b) in respect of any offence, except an offence specified in the Third Schedule, by a magistrate within whose area of jurisdiction the accused is in custody at any time after he or she has appeared in court on a charge and before sentence is imposed."

Section 117, in subs (1) provides that –

"Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the E court finds that it is in the interest of justice that he or she should be detained in custody."

In both sections the time to apply for bail is stated as being "at any time after he or she has appeared in court on a charge and before sentence". I am of the view that, to trigger the process, one must make an initial appearance F in court on a charge. The magistrate or judge before whom he appears must be apprised of the charge the accused is appearing in court for and the accused must be informed why he has been brought to court. This is done by having the allegations against the accused put to him before the judicial officer. To say just because one has passed through a courtroom, therefore one has appeared in court on a charge, is missing the point. The initial G process initiating a criminal trial must surely be undertaken. It is during that initial process that after the allegations have been put to the accused and a preliminary inquiry done on the circumstances of the accused, such as why he was arrested and how he was treated after arrest, that the court will first determine whether there is legal justification to place the accused H on remand or not. Where there is no legal justification the court is enjoined

2009 (1) ZLR P98

Chitakunye J

not to place the accused on remand. Where the court finds that there is legal A justification to place the accused on remand, the next issue is should he be remanded in custody or not? It is during this process that the issue of bail arises. It is important that this process takes place, as it is during this process that the court, having been informed of the allegations against the accused, will be better positioned to consider the various factors in adjudicating on B the question of bail pending trial.

In *S v Poli* 1987 (2) ZLR 30 (H) Greenland J opined that the sections of the Criminal Procedure and Evidence Act which deal with arrest, detention and postponements of trials must be read in the light of the provisions of s13 of the Constitution. Section 13 of the Constitution provides that: C

“(4) Any person who is arrested or detained –

- (a) for the purpose of bringing him before a court in execution of the order of a court or an officer of a court; or
- (b) 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; ^D and if any person arrested or detained upon reasonable suspicion of his having committed or about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any other proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”

The judge, in my view, correctly held that “s 13 of the Constitution of ^E Zimbabwe 1980 makes it peremptory that a reasonable suspicion of the commission or imminent commission of an offence should exist before a person can lawfully be arrested, detained or remanded. If no such suspicion exists, even a remand on bail is incompetent”.

In casu, the applicant was arrested and detained on certain allegations. For ^F the court to place her on remand, the court must be satisfied that there exists reasonable suspicion that she committed the offence in question. The court can only assess this if the State is allowed to set the criminal trial in motion. Initial remand is the process that initiates the criminal trial. To grant bail without first ascertaining whether there is legal justification for the accused ^G to be placed on remand would be incompetent.

This is a procedure I am sure the applicant’s legal practitioners are aware of and, if that had been done, they would have curtailed the proceedings remarkably. The manner in which the applicant’s legal practitioners chose to act leaves one wondering whether it was for the applicant’s benefit or not. The fact that the applicant’s legal practitioners were provided with ^H

2009 (1) ZLR P99

Chitakunye J

A a copy of the Form 242 [Request for Remand] containing the allegations against the applicant, did not mean that the court before which she appeared should not be apprised of the reasons for bringing the applicant before it and to then decide whether, from the facts placed before it, there was legal justification for her to be placed on remand. As discernible from *S v Poli supra* an unconditional or conditional release of the applicant on remand ^B without ascertaining whether there was reasonable suspicion that she had or was about to commit an offence would have been incompetent. The proper procedure is, firstly, to found the basis of placing her on remand and then to proceed to consider the desirability of releasing her on bail. To seek to place her on bail before finding that there is legal justification for her to be placed ^C on remand is putting the cart before the horse. What the applicant is in fact saying to the State is that “having brought me to court and before you can tell the court why you have brought me I must be granted bail”. And to the court it is that “before you can hear why I have been brought before you and assess whether there is legal justification for my arrest, detention and remand, grant me bail”. Surely this would be improper for any court to do.

^D Whilst I am mindful of the fundamental right to liberty and that the courts should lean in favour of granting bail, I am of the firm view that this could have been achieved much faster by applicant following the proper procedure from the inception. I did not hear applicant’s counsel to advance any cogent reasons for avoiding the proper procedure save to say they wanted the constitutional issue to be resolved first. But surely the placing ^E of the applicant on remand would not have precluded the applicant from proceeding with the constitutional issue at all. I also did not hear counsel to submit that applicant would have suffered any prejudice in any way had the initial remand proceedings been conducted. As the situation stands, the flurry of applications that the applicant has embarked on has not speedily ^F resolved her predicament. If it was intended to clutter the justice system so that it is portrayed as failing to do justice to persons arrested and detained, that, unfortunately, has been at the expense of the applicant’s liberty.

The applicant should go through the initial remand hearing so that the magistrate before whom she appears may determine whether there is legal justification to place her on remand. The magistrate’s decision is crucial to ^G the applicant’s next course of action.

I am therefore of the view that the term “after a person has appeared in court on a charge” must be construed to mean after the initial process of a criminal trial, which is the initial appearance in court

before a judicial officer and the legal justification for his or her arrest and detention, is presented to the judicial officer.

2009 (1) ZLR P100

Chitakunye J

The application is therefore not properly before this court. It is thus dismissed on that preliminary point.

Mtetwa & Nyambirai, applicant's legal practitioners

Attorney-General's Office, respondent's legal practitioners. ⁸

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Document 16 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/ZIMBABWE OPEN UNIVERSITY v MAZOMBWE 2009 (1) ZLR 101 (H)

ZIMBABWE OPEN UNIVERSITY v MAZOMBWE 2009 (1) ZLR 101 (H)

2009 (1) ZLR p101

Citation	2009 (1) ZLR 101 (H)
Case No	Judgment No. HH-43-09
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	4 February 2009
Judgment	4 February 2009
Counsel	<i>A K Maguchu</i> , for the applicant <i>A Mugandiwa</i> , for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

^c **Practice and procedure** – application – use of one form for application when other would have been appropriate – not fatal – use of format not in compliance with either form – application fatally defective – rules of court – departure from – when may be condoned

Headnote

- The respondent had registered with the High Court an arbitral award made in his favour against the applicant. The applicant applied for rescission of judgment. In doing so, it did not use either of the forms prescribed by r 230 of the High Court Rules 1971. Instead, it used a format which tersely stated that it was applying for rescission of judgment and relied ^ε on an affidavit annexed to the application. The respondent argued that the applicant's application was fatally defective.

Held, that had the applicant used either of the forms prescribed in the Rules, the use of one form instead of another would not in itself constitute sufficient ground for dismissing the application, it being necessary for the court to conclude that some interested party had thereby suffered ^F prejudice which could not be remedied by directions for service on the injured party, with or without an order of costs. The court could have exercised its discretion under r 4C.

Held, further, that the form for a court application sets out a plethora of procedural rights that the respondent is alerted to, while the form for an *ex parte* application sets out a summary of the grounds of the application. ^G By contrast, the format used by the applicant did neither. The application was therefore fatally defective.

Held, further, that not only was the application defective, but the applicant's attention had been drawn to the fact by the respondent. The applicant should have applied for condonation. The applicant's failure to even ^H recognize the need to apply for condonation showed a cavalier approach

2009 (1) ZLR p102

Hlatshwayo J

to compliance with the rules of court, which should be discouraged by ^A an exemplary order of costs.

Cases referred to

Jensen v Acavalos 1993 (1) ZLR 216 (S)

Simross Vintners (Pty) Ltd v Vermeulen 1978 (1) SA 779 (T) ^B

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 4C, 229C & 230

Case information

A K Maguchu, for the applicant

A Mugandiwa, for the respondent ^C

Judgment

HLATSHWAYO J: The applicant seeks an order setting aside the registration of an arbitral award granted in favour of the respondent. The award was submitted for registration at the High Court in terms of the provisions of the Labour Act [*Chapter 28:01*] and was duly registered on 25 February 2008. ^D

The applicant submits that the registration of the award was defective in that it was done by way of a chamber application, without notice to the applicant, instead of a court application, which would have required notice to be served on the applicant. In response, the respondent maintains not only that it proceeded lawfully, but that the applicant, in its own application for the rescission of the registration of the award, failed to comply with the rules ^E of court in a manner fatal to its application for rescission.

I shall examine first the issue of the regularity or otherwise of the application before this court, i.e., the application for rescission of judgment. If the application is properly before this court, then the other issues will follow. If not, then *cadit quaestio*. ^F

Rule 230 of the High Court Rules (RGN 1047 of 1971, as amended) prescribes in mandatory terms that a court application shall be made in Form No. 29 or, where it is *ex parte*, in Form No. 29B, which latter form is generally used for chamber applications. It is common cause that the form used by the applicant for the rescission of judgment is neither of the above stated forms, that is, it is in neither the court application form nor the chamber application ^G form nor the hybrid *ex parte* court application form.

Now, r 4C gives the court or judge discretion to condone departures from the rules, while r 229C deals with a specific form of departure, viz., proceeding by way of court, instead of chamber, application and *vice versa*.

In terms of r 229C, the use of one form instead of another, of Form 29 instead of

2009 (1) ZLR p103

Hlatshwayo J

A of Form 29B, does not in itself constitute sufficient ground for dismissing the application, it being necessary for a court or judge to conclude that some interested party has thereby suffered prejudice which cannot be remedied by directions for service on the injured party, with or without an order of costs. In his submissions on behalf of the applicant, Mr *Maguchu* sought to rely on r 229C, arguing that the respondent had neither alleged nor demonstrated B any prejudice. However, the applicant's error in this instance was not one of using one form instead of another, but of using a completely different format from the authorized ones and, therefore, it falls directly under r 4C and not r 229C. (Ironically, it is the respondent's alleged breach of the rules – proceeding by way of chamber instead of court application in the registration C of the arbitral award – which falls squarely under r 229C.)

Lest an impression be formed that this is a sterile dispute about forms, I have deemed it necessary to outline in a summary way what each of the two forms contains, on the one hand, and the unique features of the format used by the applicant, on the other. In Form 29, the applicant gives notice to the respondents that he or she intends to apply to the High Court for an D order in terms of an annexed draft and that the accompanying affidavit/s and documents shall be used in support of the application. It goes on to inform the respondent, if he or she so wishes, to file papers in opposition in a specified manner and within a specified time limit, failing which the respondent is warned that the application would be dealt with as an unopposed application. E In Form 29B, an application is made for an order in terms of an annexed draft on grounds that are set out in summary as the basis of the application and affidavits and documents are tendered in support of the application. By contrast, the unique format used by the applicant consists of a heading: "Application for Rescission of Judgment" and the following terse statement: "Take notice that the Applicant, Zimbabwe Open University, hereby applies F for Rescission of Judgment. The annexed affidavit is used in support thereof."

Now, the format adopted by the applicant does not contain the plethora of procedural rights that the respondent is alerted to in Form 29, nor the summary of the grounds of the application required in Form 29B. Can this substantial departure from the rules be condoned under r 4C? Rule 4C states as follows:

- " G The court or judge may, in relation to any particular case before it or him, as the case may be –
- (a) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice; H
 - (b) give such directions as to procedure in respect of any matter not expressly

2009 (1) ZLR p104

Hlatshwayo J

provided for in these rules as appear to it or him, as the case may be, to be A just and expedient."

In *Simross Vintners (Pty) Ltd v Vermeulen, VRG Africa (Pty) Ltd v Walters T/A Trend Litho, Consolidated Credit Corporation (Pty) Ltd v van der Westhuizen* 1978 (1) SA 779 (T), the applicants, in three applications for compulsory sequestration, had used the notice of motion prescribed in Form 2 of the B South African Uniform Rules of Court, which was a form appropriate to *ex parte* applications. The applicant in the first application had not served the notice on the respondent, but the applicants in the other two applications had so served the notices on the respondents. It was held that in the first application the use of the Form 2 was perfectly in order, as the application was brought *ex parte*. However, as to the other two applications, it was held C that as they were not brought *ex parte*, the notices of motion used in these applications (i.e., the Form 2 notice) were nullities and their use could not be condoned and the applications had to be struck off the roll:

"...This applicant also relies on a *nulla bona* return, but it chose not only to address the Form 2 notice of motion to the respondent, but also to serve it on him. Hence it is not brought *ex parte* and r 6(5) applies. It was suggested in D some of the other applications which were eventually struck off the roll that this non-compliance might be condoned under r 27(3). I have considered that possibility in this case, but apart from the fact that no cause at all is shown why there should be condonation, the more fundamental difficulty arises that the document which purports to be a notice of motion is, as I have indicated above, a nullity, and I have grave doubt whether the court has power under this rule E to repair a nullity, a concept in law

which carries within itself all the elements of irreparability... In addition it must be emphasized that Form 2(a) contains a description of the procedural rights of the respondent after service of the notice of motion. These rights are considerable and substantial. How could a court, even if it were not a nullity, put a blue pencil through all these rights in the absence of the person in whom they reside and without notice to him that such an order which abrogates his rights might be made? This application is struck off the roll."

Our own Supreme Court has agreed with the above approach to non-compliance with mandatory rules of court. In *Jensen v Acavalos* 1993 (1) ZLR 216 (S) the court dealt with the non-compliance with provisions of r 29 of the Rules of the Supreme Court (RGN 380 of 1964) and said the following at 220A-D:

"The reason is that a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say, it is a nullity. It is not only bad but incurably bad and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs: *de Jager v Diner & Anor* 1957 (3) SA 567 (A) at 576 C-D. "

2009 (1) ZLR p105

Hlatshwayo J

A In *Hattingh v Pienaar* 1977 (2) SA 182 (O) at 183 Kloppe JP held that a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of Lord Denning in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 at 1172, 'every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it stay there. It will collapse'."

As if the non-compliance with the mandatory rules noted above was not bad enough, the applicant has not bothered to apply for condonation of its failure to comply with the Rules, in spite of such non-compliance having been drawn c to its attention as early as when the notice of opposition was served on it. In my considered view, where the errant party has not applied for condonation in spite of its awareness of its non-compliance, it suffices for the objecting party merely to point out the non-compliance for the application to be struck off. Furthermore, the applicant's failure to even recognize the need to apply for condonation shows a cavalier approach to compliance with the rules of D court, which must be discouraged by an exemplary order of costs.

Accordingly, this application is struck off the roll with costs on the legal practitioner and client scale.

Dube, Manikai & Hwacha, applicant's legal practitioners

E *Wintertons*, respondent's legal practitioners.

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Document 17 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/BGM TRAFFIC CONTROL SYSTEMS v MINISTER OF TRANSPORT & ORS 2009 (1) ZLR 106 (H)

BGM TRAFFIC CONTROL SYSTEMS v MINISTER OF TRANSPORT & ORS 2009 (1) ZLR 106 (H)
2009 (1) ZLR p106

Citation	2009 (1) ZLR 106 (H)
Case No	Judgment No. HH-12-09
Court	High Court, Harare
Judge	Makarau JP
Heard	11 February 2009
Judgment	12 February 2009

Counsel	<i>H Zhou</i> , for the applicant <i>N Mutsonziwa</i> , for the first respondent Second, third and fourth respondents in default
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Evidence — *statements from the bar — undesirability of — need for legal practitioners to give evidence in affidavit form*

Legal practitioner — *Attorney-General — need to comply with rules of D court on same basis as any other legal firm — no basis on which court can accept excuses from Attorney-General which it would not accept from other legal firms*

Legal practitioner — *conduct and ethics — statements from the bar — undesirability of — need for legal practitioners to give evidence in E affidavit form*

Headnote

Evidence led from the bar places both the court and the other legal practitioners at a distinct disadvantage, in that it can neither be countered nor tested by way of cross-examination. Effectively, the court and the other lawyers are compelled to accept the evidence, for to decline to do so has the effect F of calling into question the integrity of the lawyer testifying.

Where legal practitioners wish to place facts before the court, even facts that they believe are notorious, they must do so by way of affidavit, as an affidavit is sworn testimony. Where a response to such facts is deemed necessary, then an affidavit refuting the facts in the first affidavit is filed. G Anything short of this procedure will allow the proceedings to degenerate into social exchanges between counsel that are neither evidence nor submissions based on evidence, something that the legal practitioners can engage in outside the courtroom.

The Office of the Attorney-General competes on an equal footing with all other law firms in the land. It is not exempted from abiding by the rules H

2009 (1) ZLR p107

Makarau JP

A of court. Reports that there is an acute shortage of staff in the Attorney-General's Office, that staff attendance at work is erratic and control of support staff has become difficult in the circumstances, that the incidence of locked offices without staff in sight is now rampant and is common knowledge in the legal circles are not relevant. There is no basis upon which the courts can accommodate excuses from the Attorney-General's B Office that they do not in the ordinary course of events accommodate from any other firm of lawyers. To accept such explanations from the Attorney-General's Office as reasonable excuses would open the entire system to disorder and erratic filing of pleadings, to an extent where the system may collapse. Courts that bend over backwards to accommodate C excuses for ineptitude and complete disregard of its rules by the Attorney-General's Office open themselves up unnecessarily to suggestions that they are partial to the executive, the clients that are solely represented by that office.

Case cited

D *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A)

Case information

H Zhou, for the applicant

N Mutsonziwa, for the first respondent

Second, third and fourth respondents in default

Judgment

¶ **MAKARAU JP:** The first respondent is represented by the Civil Division of the Attorney-General's Office. In application proceedings between the parties, the respondent, through its representatives, was served with the applicant's heads of argument on 10 September 2008. In terms of the rules of this court, the respondent had to file its heads of argument within ten days ¶ of being served with the applicant's heads. No heads were filed on behalf of the first respondent until the morning of the set down date, that is on 11 February 2009.

In an application for the uplifting of the automatic bar against the first respondent, Mr *Mutsonziwa* declined to have the matter postponed for the § purposes of filing an affidavit explaining the reasons for the delay. He opted to make an oral application before the commencement of the hearing. He then proceeded, much to the discomfort of Mr *Zhou* and myself, to testify as to the difficulties that the officers in the Attorney-General's Office are experiencing currently due to the economic situation prevailing in the country. I say the testimony from Mr *Mutsonziwa* in this regard was much ¶ to our discomfort, as evidence led from the bar places both the court and

2009 (1) ZLR p108

Makarau JP

the other legal practitioners at a distinct disadvantage, in that it can neither A be countered nor tested by way of cross-examination. On the other hand, the court and the other lawyer are compelled to accept the evidence, for to decline to do so has the effect of calling into question the integrity of the lawyer testifying.

It is trite that where legal practitioners wish to place facts before the court, B even facts that they believe are notorious, they must do so by way of affidavit, as an affidavit is sworn testimony. Where a response to such facts is deemed necessary, then an affidavit refuting the facts in the first affidavit is filed. Anything short of this procedure will, in my view, allow the proceedings to degenerate into social exchanges between counsel that are neither evidence nor submissions based on evidence, something that the legal practitioners C can engage in outside the courtroom.

In explaining the delay of over five months that occurred in this matter, Mr *Mutsonziwa* advised that he was not given the file of the matter in time to enable him to settle the necessary heads of argument. He further advised that there is an acute shortage of staff in the Attorney-General's office, that staff D attendance at work is erratic and control of support staff has become difficult in the circumstances. He reports that the incidence of locked offices without staff in sight is now rampant and is common knowledge in the legal circles.

I have repeated in detail the report by Mr *Mutsonziwa* for the benefit of the Attorney-General, to whom I shall make this judgment available. I make no E finding as to whether or not I believe Mr *Mutsonziwa* in this regard.

The report in my view paints a grim picture of the Attorney-General's Office and, in my view, if the reports by Mr *Mutsonziwa* are true, one that should be corrected with all necessary speed. The Office of the Attorney-General competes on an equal footing with all other law firms in the land. It is not exempted from abiding by the rules of court. There is, in my view, F no basis upon which this court can accommodate excuses from that office that it does not, in the ordinary course of events, accommodate from any other firm of lawyers. To accept from the legal profession as reasonable the excuses that Mr *Mutsonziwa* attempted to proffer in this matter will, in my view, open the entire system to disorder and erratic filing of pleadings, to G an extent where the system may collapse. Courts that bend over backwards to accommodate excuses for ineptitude and complete disregard of its rules by the office of the Attorney-General open themselves up unnecessarily to suggestions that they are partial to the executive, the clients that are solely represented by this office.

In my view, the time is nigh that the office of the Attorney-General shapes up H

2009 (1) ZLR p109

Makarau JP

A or faces the legal consequences of its failure to discharge its constitutional duty efficiently and within the rules of the court.

Turning to the merits of the application, it is trite that, in considering an application of this nature, the court has a discretion in the matter. In addition to considering the reasonableness of the excuse

for the delay, the court also takes into account various factors, including the importance of the case, the respondent's interest in reaching finality in the matter, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. See *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720.

The main application in this matter is dealing with an alleged agreement of 2004. This was concluded five years ago and, according to the applicant's papers, the Permanent Secretaries in the first respondent's ministry have changed twice already. In my view, it is not in the interests of any of the parties that this matter be dragged out further by the granting of a technical default judgment in favour of the applicant which may be set aside by another court.

I also consider that the issues raised in the main application are important and that the matter should be resolved on its merits rather than on the technical basis that the office of the Attorney-General has been found wanting in terms of complying with the rules of court.

Therefore, despite my findings against the first respondent's legal practitioners, I would use my discretion to grant the application for condonation.

In the result, I make the following order:

1. The late filing of the first respondent's heads is hereby condoned.
2. The first respondent shall bear the costs of the application.
3. The Registrar of this court shall cause a copy of this judgment to be handed over to the Attorney-General.

Manase & Manase, applicant's legal practitioners

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

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Document 18 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/FLOWERDALE INVESTMENTS (PVT) LTD & ANOR v BERNARD CONSTRUCTION (PVT) LTD & ORS 2009 (1) ZLR 110 (S)

FLOWERDALE INVESTMENTS (PVT) LTD & ANOR v BERNARD CONSTRUCTION (PVT) LTD & ORS 2009 (1) ZLR 110 (S)

2009 (1) ZLR p110

Citation	2009 (1) ZLR 110 (S)
Case No	Judgment No. S-5-09
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Gwaunza JA
Heard	19 February 2008
Judgment	18 February 2009
Counsel	<i>J C Andersen SC</i> , for the appellants <i>E T Matinenga</i> , for the first respondent <i>No appearance</i> for second and third respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure – *res judicata* – tests for when a matter is *res judicata* – matter previously left open – cannot be said to be *res judicata* when raised again later ^D

Headnote

The second appellant had stood guarantor for the first appellant's debt to the third respondent, a bank. The third respondent obtained judgment against the first appellant and, as a result, the second appellant's property was sold at a public auction to the first respondent. The Sheriff, who was the second respondent, refused to confirm the first respondent as purchaser ^E and directed that the property be sold by private treaty.

The second appellant applied for the sale to be set aside on the grounds that the sale price was unreasonably low. The High Court determined the application on the basis that the issue before it was the price at which the property was sold and refused the application. In its notice of appeal, and during submissions, the second appellant contended that the sale in ^F execution was not *perfecta* by reason of the fact that the third respondent was never declared the purchaser in terms of r 356 of the High Court Rules, and that there was never confirmation of the sale in terms of r 360. The suggestion that the sale in execution was not *perfecta* arose from the report of the Sheriff to the court *a quo*. The Supreme Court declined ^G to consider this point, holding that the question of the adequacy of the sale was being raised for the first time on appeal, and upheld the High Court's finding that the second appellant had not discharged the *onus* of establishing that the property had been sold for an unreasonably low purchase price (see *Austerlands (Pvt) Ltd v Trade & Investment Bank Ltd & Ors* 2006 (1) ZLR 372 (S)). ^H

2009 (1) ZLR p111

^A The Sheriff understood the judgments of both the High Court and the Supreme Court to direct him to rescind his refusal to declare the first respondent the purchaser of the property, so he declared the first respondent the purchaser of the property in terms of r 356 of the High Court Rules. The appellants then filed an objection to the Sheriff's decision, in terms of r 359 (which had been amended after the original sale took place). ^B Rule 359 (as amended) vests in the Sheriff the power to confirm or deny confirmation of an auction sale in respect of which he has declared a purchaser in terms of r 356. The amended rule gives him a fairly wide discretion to confirm or deny confirmation of an auction sale – a discretion that was previously vested in the High Court before the ^C amendment of r 359. Various grounds for objection were filed, among them that the contract was not complete, that the bid was too low, that the first respondent had paid nothing towards the purchase price and that the judgment debt had since been satisfied. The Sheriff upheld the objection and refused to confirm the sale.

The first respondent applied to the High Court to have the Sheriff's ^D determination set aside on review, on the ground that the Sheriff had no jurisdiction to entertain the matter as it had been finalised by the Supreme Court and the High Court. It also contended that the Sheriff had erred in applying r 359 of the Rules, as amended, when the sale took place before the amendment. The High Court granted the application, ^E holding that the matter was *res judicata*. On appeal, several grounds were raised, but the deciding issue was whether the defence of *res judicata* should have prevailed.

Held, that while two of the elements of *res judicata* – that both applications concerned the same parties and the same subject-matter – were present, the third element – that the two actions must be founded upon the same ^F cause of action – was not. The first application had, as its cause of action, the averment that the auction sale price was unreasonably low. The second application has, as its cause of action, the averments set out in the appellants' objection filed with the Sheriff. The issue of the auction sale being incomplete or not was specifically left open. It would be a contradiction in terms to assert that an issue that has been left open ^G was determined, and was therefore *res judicata*. In spite of the Sheriff's understanding of the effect of the earlier judgments, those judgments did not set aside the Sheriff's determination in the first

instance. If the Sheriff's determination still stood, then the auction sale to the first respondent was *imperfecta*.

^H *Held*, further, that even if the Sheriff correctly rescinded his original

2009 (1) ZLR p112

Chidyausiku CJ

determination, his declaration of the first respondent as purchaser was ^A made after the amendment of r 359 had taken place. Consequently, it was proper for him to proceed in terms of the amended rule.

Held, further, that the Sheriff's decision was not previously adjudicated upon on the merits. There was nothing to suggest that the Sheriff misdirected himself in the exercise of his discretion or that his discretion was exercised ^B in a grossly unreasonable manner. There was thus no basis for possible judicial interference on review on the merits.

Cases cited

Bertram v Wood (1893) 10 SC 177

Hiddingh v Denyssen (1885) 3 Menz 424 ^C

Le Roux v Le Roux 1967 (1) SA 446 (A)

Mitford's Exors v Ebdens Exors 1917 AD 682

Pretorius v Barkly East Divisional Council 1914 AD 407

Legislation considered ^D

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

Case information

J C Andersen SC, for the appellants

E T Matinenga, for the first respondent

No appearance for second and third respondents ^E

Judgment

CHIDYAUUSIKU CJ: This is an appeal against a judgment of the High Court. The facts of this case are set out in some detail in a judgment of this court, S-92-05(not reported), which was an appeal involving the same parties. The following is a brief summary of the facts. On 23 September 1998 the third respondent obtained judgment against the first and second appellants over ^F a debt, consequent to which judgment the immovable property known as Stand 90 Bulawayo Township (hereinafter referred to as "the property") was offered for sale by public auction. The property in question belongs to the second appellant, who had stood as guarantor to the first appellant for the judgment debt. At the public auction sale, which took place on 11 November ^G 1999, the first respondent emerged the highest bidder for the property, having offered an amount of \$3.5 million. It was a requirement, in terms of r 356 of the High Court Rules ("hereinafter referred to as "the Rules") that the second respondent (hereinafter referred to as "the Sheriff") declare the first respondent (hereinafter referred to as "Bernard Construction") the purchaser to complete the auction sale. Rule 356 of the Rules provides as follows: ^H

2009 (1) ZLR p113

Chidyausiku CJ

^A "Declaration of purchaser by sheriff

If the Sheriff is satisfied that the highest price offered is reasonable, having regard to the circumstances of time and place and to the state of the property market, and that the sale was properly conducted, he shall declare the highest bidder to be the purchaser, subject to confirmation as hereinafter prescribed."

It was peremptory for the Sheriff to declare Bernard Construction the ^B purchaser to complete the auction sale. Failure by the Sheriff to declare Bernard Construction the purchaser rendered the auction sale incomplete or *imperfecta*. The Sheriff not only refused to declare Bernard Construction

the purchaser of the property but directed that the property be sold by private treaty. The Sheriff's report makes this point abundantly clear. In the first ^c application the Sheriff's position was equivocal. Bernard Construction has not disputed the alleged rejection of its bid by the Sheriff, nor has it disputed that the Sheriff directed that the property be sold by private treaty.

Following the rejection of Bernard Construction's bid, the second appellant applied to the High Court to have the sale set aside in terms of r 359 of the Rules, on the sole ground that the property had been sold at an unreasonably ^d low price. Rule 359 provided at the relevant time as follows:

"Setting aside sales

Any person having an interest in the sale may make a court application to have it set aside on the ground that the sale was improperly conducted or the property was sold for an unreasonably low sum or any other good ground. Any such person shall give due notice to the Sheriff of the application stating the grounds ^e of his objection to confirmation of the sale. On the hearing of the application the court may make such order as it deems just."

Rule 359 of the Rules has since been repealed and substituted by a new provision in SI 80 of 2000. I shall revert to this aspect of the matter later in this judgment.

^f It is quite clear, on the facts, that the second appellant's application to the High Court was misconceived, in that it assumed that the auction sale was complete. The High Court adjudicated the matter on the erroneous assumption that the auction sale was complete and that the only issue for determination was the reasonableness or otherwise of the purchase price. The High Court determined that the second appellant had not discharged the *onus* on it of ^g establishing that the purchase price was unreasonably low. The second appellant appealed to this court against the decision of the learned judge in the court *a quo*. At the hearing of the appeal, the second appellant sought to have the judgment of the court *a quo* set aside on two grounds, namely –

- (a) that the Sheriff had not declared Bernard Construction the purchaser ^h of the property in terms of r 356 of the Rules, and therefore the sale by

2009 (1) ZLR p114

Chidyausiku CJ

auction was incomplete or *imperfecta*; and ^a

- (b) that in the event of the Appeal Court holding that the auction sale was *perfecta* the court *a quo* had erred in concluding that the second appellant had not discharged the *onus* of proving that the purchase price was grossly unreasonable.

This court declined to determine the first ground of appeal because the issue ^b of the incomplete auction sale had been raised for the first time on appeal. It had not been raised in the court *a quo*. That ground of appeal was not dismissed, as it were. It was simply left open. A proper reading of judgment S-92-05 makes the above point very clear. The second ground of appeal was determined. This court agreed with the court *a quo* that the second appellant had not discharged the *onus* of establishing that the property had been sold ^c for an unreasonably low purchase price. It was on this basis that the appeal was dismissed.

The Sheriff understood the judgments of both the High Court and the Supreme Court to direct him to rescind his refusal to declare Bernard Construction the purchaser of the property. He then, in effect, rescinded his ^d previous determination and declared Bernard Construction the purchaser of the property in terms of r 356 of the Rules. I have some reservations regarding the correctness of the Sheriff's understanding of the judgments of the Supreme Court and the High Court. I will advert to these reservations later on in this judgment.

The Sheriff, after rescinding his previous determination, proceeded to declare ^e Bernard Construction the purchaser of the property in terms of r 356. He did this on 2 June 2006. On 19 June 2006 the appellants filed an objection to the Sheriff's declaration of Bernard Construction as the purchaser. The appellants' objection was in terms of r 359 of the Rules (as amended by SI 80 of 2000). ^f

Rule 359 (as amended) vests in the Sheriff the power to confirm or deny confirmation of an auction sale in respect of which he has declared a purchaser in terms of r 356, giving him a fairly wide discretion to confirm or deny confirmation of an auction sale. This discretion was previously vested in the High Court prior to the amendment of r 359. The second appellant objected ^g to the Sheriff's declaration of Bernard Construction as the purchaser on the following grounds –

- (a) the second appellant had since paid the judgment creditor and there was therefore no cause of action at the date of acceptance, i.e. 2 June 2006;

(b) Bernard Construction was never declared the highest bidder in terms of r 356 of the Rules;

2009 (1) ZLR p115

Chidyausiku CJ ^a

- (c) the said sale was never confirmed as is required by r 359 of the Rules; and
- (d) no payment at all was made by Bernard Construction towards the purchase price of the property.

Bernard Construction opposed the objection on the following grounds – ^b

- (i) the citation of the parties was wrong and the proceedings were procedurally wrong;
- (ii) the application cited both the old and the new Rules and this was fatal;
- (iii) the new Rules were not applicable in this case as our law does not allow retrospective effect; ^c
- (iv) the application was out of time; and
- (v) the second appellant had failed dismally to reverse the sale in both the High Court and the Supreme Court.

The Sheriff, after considering submissions by both parties, upheld the second appellant's objection to his declaration and refused to confirm the auction ^d sale. He declined to confirm Bernard Construction's bid for a number of reasons, which are set out in some detail in his Report. In brief, the Sheriff's reasons for declining confirmation are that –

- (1) Bernard Construction's bid for the property was too low;
- (2) the Sheriff himself had declined to confirm the auction sale and had ^e directed that the property be sold by private treaty;
- (3) Bernard Construction had not paid any of the purchase price to the Sheriff, despite demand for payment by the Sheriff; and
- (4) the appellants had since discharged their indebtedness to the judgment creditor.

^f Following the Sheriff's determination, Bernard Construction applied to the High Court to have his determination set aside on review, on the ground that the Sheriff had no jurisdiction to entertain the matter as it had been finalised by the Supreme Court and the High Court. Bernard Construction also contended that the Sheriff had erred in applying r 359 of the Rules as amended by SI 80 of 2000 when the sale in question took place prior to the amendment. The ^g learned judge in the court *a quo* upheld Bernard Construction's objection, and set aside the Sheriff's determination refusing to confirm the sale. His reasoning, in setting aside the Sheriff's determination, appears at p 3 of the judgment (HC 6463/06). The learned judge reasoned as follows:

"I am in agreement with the arguments advanced on behalf of the applicant. The ^h respondents have indeed revived issues that were finalised by the Supreme Court.

2009 (1) ZLR p116

Chidyausiku CJ

The sole issue upon which (the) third respondent challenged the sale before the ^a High Court and later on appeal to the Supreme Court was the price offered by the applicant. The first respondent had no jurisdiction to entertain the objection again. I cannot see how the second and third respondents can seek a reconsideration of the same subject-matter that was determined by the Supreme Court. In this case the subject-matter is the sale in execution of stand number 90, Bulawayo Township. One cannot select issues arising from the same subject-matter and ^b seek their resolution piecemeal. There is need to uphold the principle of finality to litigation.

For the above reasons I find merit in the application. "

The appellants now appeal against this judgment. The grounds of appeal are set out in the notice of appeal

[The six grounds of appeal were set out and then the learned Chief Justice ^c concluded as follows:]

Although the notice of appeal sets out several grounds of appeal, this matter turns on the one issue, namely, whether the Sheriff adjudicated upon and determined a matter that had already been finalised by this court and the High Court. In other words, the issue is whether the defence raised by the first ^d respondent of *res judicata* should have prevailed in this matter. The learned judge in the court *a quo* accepted Bernard Construction's contention that the dispute between the parties was

res judicata. I respectfully disagree with this conclusion. In my view, the defence of *res judicata* raised by Bernard Construction should not prevail. ^Ε

I disagree with the learned judge's conclusion for the following reasons. The essential elements of *res judicata* are –

- (a) the two actions must be between the same parties;
- (b) the two actions must concern the same subject-matter; and
- (c) the two actions must be founded upon the same cause of action. ^Ϝ

See *Hiddingh v Dennyssen* (1885) 3 Menz 424 at 450; *Bertram v Wood* (1893 10 SC 180; *Pretorius v Barkly East Divisional Council* 1914 AD 407 at 409; *Mitford's Executors v Elden's Executors & Ors* 1917 AD 682; *Le Roux v Le Roux* 1967 (1) SA 446 (A); and *Voet* 44.2.3.

I accept that both applications concern the same parties and the same subject ^Γ-matter. Accordingly, two of the three requirements for *res judicata* have been met. The third requirement has not been met, because the two actions are based upon two different causes of action. The first application had, as its cause of action, the averment that the auction sale price was unreasonably low. The second application had, as its cause of action, the averments set out in the appellants' objection. Among these is the averment that the auction ^Η

2009 (1) ZLR p117

Chidyausiku CJ

A sale was incomplete or *imperfecta*, in that Bernard Construction was never declared the purchaser of the property in terms of r 356 of the Rules, rendering the auction sale in the first instance incomplete.

A proper reading of the judgment No S-92-05 relating to the first application reveals that the issue of the auction sale being incomplete or not was specifically left open. It would be a contradiction in terms to assert that an issue that has ^Β been left open was determined and is *res judicata*.

According to the Sheriff's report, he rescinded his determination refusing to declare Bernard Construction as the purchaser in terms of r 356 of the Rules in the first instance, in compliance with the judgments of the High Court and this Court. That was his understanding of the two judgments. The ^Ϛ Sheriff's interpretation of the two judgments is open to doubt. I, however, do not wish to make a determination on the meaning of the judgments, because the parties did not canvass this issue on appeal. I merely wish to make the observation that it is common cause that the Sheriff initially declined to confirm Bernard Construction as the purchaser of the property in terms of ^Δ r 356 of the Rules. Having declined to do so, the Sheriff directed that the property be sold by private treaty. Why the property was not sold by private treaty, as directed by the Sheriff, is not clear on the record. It would appear that the appellants only became aware of the Sheriff's refusal to confirm the auction sale in the course of the first application upon reading the Sheriff's report. The appellants, in my view, should have then amended their pleadings ^Ε to include the newly discovered cause of action. They did not. Instead, they unsuccessfully sought to do this on appeal.

As I have already stated, the Sheriff refused to declare Bernard Construction the purchaser in terms of r 356 of the Rules, following which the second appellant launched an application seeking to set aside the auction sale, on ^Ϝ the ground that Bernard Construction's bid was unreasonably low. It is quite clear that the first application was misconceived for reasons I have already stated in this judgment. This court, and the High Court, determined the first application on the erroneous assumption that the auction sale was *perfecta*. The two judgments did not set aside the Sheriff's determination in the first instance. If the Sheriff's determination still stands, then the auction sale to ^Γ Bernard Construction is *imperfecta*. However, even if I were to proceed, as I will do, on the basis accepted by both parties in this application, that the Sheriff correctly rescinded his original determination, reconsidered the matter afresh and declared Bernard Construction the purchaser, I will arrive at the same conclusion.

^Η The Sheriff rescinded his original determination and declared Bernard

2009 (1) ZLR p118

Chidyausiku CJ

Construction the purchaser on 2 June 2006. The Sheriff accepted the ^Α objection of the appellants to his 2 June 2006 declaration on 19 June 2006. He adjudicated on the objection and declined to

confirm the auction sale. The fact that the auction sale had taken place prior to that date does not render r 359 of the Rules (as amended) inapplicable. The critical time, in my view, is the date of the relevant declaration, namely, 2 June 2006. Accordingly, ^b the issue of retrospectivity does not arise.

Finally, this matter was determined by the court *a quo* on the basis of *res judicata*. The merits of the Sheriff's determination, firstly, in refusing to declare Bernard Construction as the purchaser in the first instance and, secondly, his refusal to confirm the auction sale in terms of r 359 of the Rules (as amended) have never been adjudicated upon on the merits. This matter ^c has been going on for about ten years. Referring this matter back to the High Court for the purpose of determining the matter on the merits would not be in the interests of justice, as that would merely prolong litigation in this matter. Even more importantly, none of the parties has asked this court to refer the matter back to the High Court for determination on the merits. The need to bring finality to litigation in this matter is imperative. The High Court ^d would be in no better position to determine the application on review than this court. The facts of this matter are virtually common cause. Rules 356 and 359 of the Rules confer some measure of discretion on the Sheriff to declare and confirm purchasers in auction sales. The Sheriff exercised that discretion in terms of rr 356 and 359 of the Rules. There is nothing on the ^e record that remotely suggests that he misdirected himself in the exercise of that discretion. There is absolutely no basis for suggesting that that discretion was exercised in a grossly unreasonable manner. In short, there is no basis for possible judicial interference on review on the merits.

In the result, the appeal is allowed with costs. The judgment of the court *a quo* is set aside and substituted with the following – ^f

“The application is refused. The decision of the Sheriff in refusing to confirm the sale is allowed to stand. Costs follow the result.”

SANDURA JA and GWAUNZA JA concurred.

Chinamasa, Mudimu, Chinogwenya & Dondo, appellants' legal practitioners ^g

James Moyo-Majwabu & Nyoni, first respondent's legal practitioners ^h

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Document 19 of 52

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THE MASTER v MOYO NO & ORS 2009 (1) ZLR 119 (H)

2009 (1) ZLR p119

Citation	2009 (1) ZLR 119 (H)
Case No	Judgment No. HH-11-09
Court	High Court, Harare
Judge	Guvava J
Heard	23 January 2009
Judgment	19 February 2009
Counsel	<i>J Mambara</i> , for the applicant <i>L T Musekiwa</i> , for first respondent No appearance for the second and third respondents
Case Type	Civil application

Annotations

No case annotations to date

Flynote

Administration of estates – executor – removal of – application by Master of High Court – such application not to be undertaken lightly – application should be against executor personally and not in his official capacity – need to set out grounds for removal in application or heads of argument

▯ **Administration of estates** – Master of the High Court – office of Master – public office – must be seen to operate in an impartial, credible and transparent manner

Headnote

The removal of an executor should never be undertaken lightly. If the ^ε Master applies for the removal of an executor in terms of s 117(1) of the Administration of Estates Act [*Chapter 6:01*], the court must be satisfied that the executor had failed to perform satisfactorily any duty or requirement imposed on him by, or in terms of, the law. It would be desirable for the Master to set out in his application or heads of argument the grounds upon which he relies for the removal of the executor, rather ^ε than letting the grounds be ascertained from the founding affidavit.

The office of the Master is a public office which must, and must be seen to, operate in an impartial, credible and transparent manner in order to engender confidence in the mind of the general public.

Semble, that in an application by the Master for the removal of an executor, the executor should be cited in his personal capacity, not in his official ^ε capacity as executor. When an action is brought against an executor in his representative capacity, it is an action against the estate, rather than one against the individual.

Cases cited

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

2009 (1) ZLR p120

Guvava J

Karitawu v Karitawu & Ors 2007 (2) ZLR 64 (H) ^A

McNamee & Anor v Exors Est McNamee (1913) 34 NLR 428

Master of the High Court v Ferreira & Anor 1965 RLR 341 (G)

Siziba v Siziba HB-25-04

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

Vermaak & Anor v Nish NO HH-166-88 ^B

Legislation considered

Administration of Estates Act [*Chapter 6:01*], ss 32(1) and 117

Case information

J Mambara, for the applicant

L T Musekiwa, for first respondent ^c

No appearance for the second and third respondents

Judgment

GUVAVA J: This is an application by the Master of the High Court for the removal of the first respondent as executor of the estate of the late Willas Mukati Moyo. The application has been filed in terms of s 117 of the ^ε Administration of Estates Act [*Chapter 6:01*] ("the Act").

The facts upon which the applicant bases this application are as follows. The respondents are the surviving spouses of the late Willas Mukati Moyo (the deceased). The estate was registered with the Assistant Master in Gweru by the first respondent. She received a certificate of authority from the Assistant Master dated 15 June 2006 which empowered her to withdraw the balance £ which was in a Kingdom Bank account belonging to the deceased. She was also authorized to take transfer of a residential stand known as Photo Studio Stand Number 822 Gweru Township and a Mazda B1800 Registration Number 352 551G. Following the registration of the estate, the applicant received complaints that the first respondent was benefiting in the estate to the exclusion of the other beneficiaries. It was also common cause that the £ first respondent was operating a lodge as a business on the property and was receiving all the proceeds from the business for her own use. There was also a complaint that she was disposing of the deceased's movable assets. The applicant, on 31 August 2007, called a meeting at his office in order to resolve the dispute. G

Following this meeting, the applicant decided that the first respondent should be removed as executor and approached this court by way of chamber application in accordance with the provisions of s 117 of the Act. The first respondent opposed the application and, although such matters are normally dealt with by a judge in chambers, it was directed that the matter be set down on the opposed roll. H

2009 (1) ZLR p121

Guvava J

A In her opposing affidavit the first respondent raises the point that the application is defective, as it cites her in her official capacity when she should have been cited in her personal capacity. On the merits, she denies that at the time of deceased's death the second and third respondents were still married to the deceased. She states that second respondent left the matrimonial home in 1993 and the third respondent in 1998. They did not attend the deceased's B funeral and it was only after the estate was registered that she was approached by the respondents with proof of their existing marriages. She thus submits that her conduct is above reproach. She further states that her appointment was carried out by the Assistant Master in accordance with the Act and thus there is no basis for this application.

C The first respondent also states that the business of the lodge, which is being conducted on the premises, was established by her after the death of the deceased. She states that she established the business on her own in order to maintain herself following the death of the deceased. She denied that she had disposed of any movable property of the estate. She further denied that she was benefiting from the estate to the exclusion of the other beneficiaries. D She further states that the only dispute between her and the second and third respondents is over her vacation of the matrimonial home and her removal as executor of the deceased's estate.

At the hearing Mr *Musekiwa*, for the first respondent, in argument in respect of the preliminary point raised, submitted that the applicant had wrongly E cited the first respondent in her official capacity. He further submitted that on this basis the application should be dismissed. He relied on *Meyerowitz The Law and Practice of the Administration of Estates* 5 ed at p 90, where the learned author states as follows:

"An application for removal of an executor must be brought against him personally and not in his capacity as executor ..."

F In *McNamee and Another v Executors Estate McNamee* (1913) 34 NLR 428 this issue was determined by the South African courts. In dealing with an exception, which had been filed to the declaration on the basis that the executors had not been cited in their personal capacities, the court stated at p 432 as follows:

" G It will be seen that the defendants, as executors and trustees, are not called upon in any way to restate or modify their accounts. The conclusions of the summons are all personal to themselves as individuals – removal from office, forfeiture and refund of commissions and fees. But as the action is laid out against them in their representative capacity it is an action against the estate and not against the individual who alone can satisfy the judgment."

H Whilst the rationale for the decision is beyond reproach, it should be noted

2009 (1) ZLR p122

Guvava J

the Zimbabwean courts do not appear to have made a determination on the ^A matter. The various cases which have been brought before the court for the removal of an executor whether based on the common law or statute have cited the executor in both their official capacity and personal capacity. See *Bonsma v Meaker NO & Ors* 1973 (2) RLR 16 (G), *Vermaak & Anor v Nish NO* HH-166-88 and *Van Niekerk NO v Master of the High Court* 1996 (2) ZLR 105 (S). ^B These should be contrasted with cases also from this court where the executor was not cited in his official capacity. See *Master of the High Court v Ferreira & Anor* 1965 RLR 341 (G), *Siziba v Siziba & Anor* HB-25-04 and *Karitawu v Karitawu & Ors* HH-58-07.

In this case, although the point has been raised, it was not fully argued by the parties. In my view, it is not necessary to make a determination of the point ^C in this case as the applicant is alleging, for reasons set out hereunder, that the respondent was appointed through an error of his office rather than any misconduct on her part. The citation of the respondent would not affect the relief being sought in this matter as all that is being claimed is her removal from office. Had the applicant been claiming some other relief which would ^D require the respondent to do certain things to satisfy the judgment then it would have been fatal to the application. It seems to me however that the first respondent should have been cited in her personal capacity in this case.

The first respondent also raised a complaint regarding the representation of the applicant by Messers Mambara & Associates who, she stated, are ^E the second and third respondents' legal practitioner. The second and third respondents did not file opposing papers in this matter and, I assume, decided to abide by whatever decision is made by the court. Mr *Mambara* explained to the court that he only became involved in this matter as the applicants counsel following a request to do so by the applicant after he had received directions to file heads of argument. He stated that he accepted the brief as ^F he saw no prejudice in the matter since the applicants claim was essentially the same as that of his clients.

The office of the Master is a public office which must, and be seen to, operate in an impartial, credible and transparent manner in order to engender confidence in the mind of the general public. The representation by the Master by Mr ^G *Mambara* in this case, who is also the erstwhile legal practitioner of the second and third respondents, gives an impression of partiality on his part. It is for this reason that the representation of the Master by Mr *Mambara* was undesirable. Notwithstanding the absence of prejudice in this matter, such practice, in my view, should not be repeated.

I now turn to the merits of this matter. Section 117 of the Act provides as ^H

2009 (1) ZLR p123

Guvava J

^A follows:

"117 Master may apply for removal of executor, tutor or curator from office

(1) The Master may apply to a judge in chambers for the removal of an executor, tutor or curator from this office on the ground— ^B

- (a) that he was not qualified for appointment to such office or that his appointment was for any other reason illegal; or
 - (b) that he has failed to perform satisfactorily any duty or requirement imposed upon him by or in terms of any law; or
 - (c) that he is mentally or physically incapable of performing satisfactorily his duties; or ^C
 - (d) that in his opinion such person is no longer suitable to hold such office;
- and the judge may, upon such application, remove the executor, tutor or curator concerned from his office or make such other order as he sees fit.

(2) Where an executor, tutor or curator has been removed from his office the Master shall revoke any letters of administration or confirmation, as the case may be, which have been granted to such person."

^D It seems to me that in order for an application in terms of this provision to succeed, the applicant must establish that it falls under any one of the grounds set out in subsection (1). In *Van Niekerk NO v Master of the High Court* 1996 (2) ZLR 105 (S) the court was faced with a similar application and the court held that the removal of an executor should never be undertaken lightly. The ^E court held further that in order to justify a removal in terms of this section; the court must be satisfied that the executor had failed to perform satisfactorily any duty or requirement imposed on him by or in terms of the law.

The applicant in this case did not state in his application or heads of argument the grounds upon which he relied for the removal of the executor. Whilst it is not fatal to the application, as it can be ascertained from the facts in ^F the founding affidavit, I would think that it is desirable to do so. During the hearing, however, Mr *Mambara* submitted that he was relying on subs (1)(a) of the above section.

Mr *Mambara* submitted that the first respondent should be removed from office on the basis that her appointment was not in accordance with the law ^G as the estate was too large to be administered summarily in terms of s 32 (1) of the Act. Section 32 (1) of the Act provides as follows:

“(1) If any person dies whose estate is unrepresented and, in so far as the same is in Zimbabwe, appears to the Master to be under the value of such amount as the Minister may specify in terms of subsection (2), the Master may —

- (a) cause such estate to be administered and distributed in accordance with by ^H [*sic*] an executor dative, to be by him summarily appointed for that purpose;

2009 (1) ZLR p124

Guvava J

or A

- (b) dispense with the appointment of an executor dative and direct how such estate shall be administered and distributed.”

It seems to me that s 32(1) allows the Master to deal summarily with an estate if he considers it to be a small estate. In other words, where the Master determines that the estate is a small estate, an executor is appointed without ^B following the normal procedures incumbent upon such appointment nor is the executor required to carry out a full administration of the estate. In this case the Assistant Master, sitting at Gweru, made such an appointment. It seems to me, however, that in making the appointment he failed to comply with the provisions of the Act. In deciding whether or not an estate falls within the ambit of this section, the value of the estate must be below an ^C amount which is prescribed by the Minister from time to time by statutory instrument. In terms of the Administration of Estates (Specified Amount) Notice 1994, published in SI 155 of 1994, the prescribed amount is \$60 000. This statutory instrument has not been amended since 1994 in spite of the skyrocketing values of property in this country. It seems to me that, in view ^D of the values of the property market, no estate would ever fall within the ambit of this section. It is incumbent on the Minister to review the prescribed amount from time to time in the same manner that he reviews the value of an estate for which duty is payable. In this way, an unnecessary burden is not placed on the Master's office and the public by being obliged to provide full administration in what is essentially a small estate which should not ^E require full administration.

The estate before me involves an immovable property in the City of Gweru. It has been described as a residential property with a business of a lodge being conducted on its premises. It also involves a motor vehicle and some cash. Whilst no value of this estate has been given in the papers before me, it is quite apparent that such an estate as described could not have been valued ^F below \$60 000, even in 2006 when it was registered. Immovable property values at that time were already in the million dollar range. Such an estate cannot be defined as a small estate. The Assistant Master should, therefore, not have proceeded in terms of s 32 of the Act. It was submitted on behalf of the first respondent that at the relevant time there was a circular from the ^G applicant directing that all estates dealing with customary law marriages should be dealt with in terms of s 32. Unfortunately the circular was not placed before the court so that the court could determine the meaning of the circular for itself. It, however, seems to me that even if such a circular does exist it would not be in accordance with s 32 of the Act. The appointment of the first respondent as executor of the estate of the late Willas Mukati ^H

2009 (1) ZLR p125

Guvava J

A Moyo thus was unlawful.

In the result I make the following order:

1. The first respondent be and is hereby removed as executor dative of the estate of the late Willas Mukati Moyo.
2. The certificate of authority granted to the first respondent on 15 July ^B 2006 is hereby revoked.

3. There be no order as to costs.

J Mambara & Partners, applicant's legal practitioner

c Musekiwa & Associates, first respondent's legal practitioner

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Document 20 of 52

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/S v MOYO & ANOR 2009 (1) ZLR 126 (H)

S v MOYO & ANOR 2009 (1) ZLR 126 (H)

2009 (1) ZLR p126

Citation	2009 (1) ZLR 126 (H)
Case No	Judgment No. HB-21-09
Court	High Court, Bulawayo
Judge	Ndou J
Heard	19 February 2009
Judgment	19 February 2009
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal law – statutory offences – Copyright and Neighbouring Rights Act c [Chapter 26:05] – s 59 – selling of infringing copies of CDs and DVDs – need to allege which copyright is being infringed and who owner of copyright is – possession of equipment designed or adapted for making infringing copies – need to allege and prove that articles in question were specifically designed or adapted – ordinary computers not covered D

Statutes – Copyright and Neighbouring Rights Act [Chapter 26:05] – s 59 – selling of infringing copies of CDs and DVDs – need to allege which copyright is being infringed and who owner of copyright is – possession of equipment designed or adapted for making infringing copies – need to allege and prove that articles in question were specifically designed E or adopted – ordinary computers not covered

Headnote

On a charge of contravening 59(1)(a)(iv) of the Copyright and Neighbouring Rights Act [Chapter 26:05] (i.e. selling infringing copies of DVDs and CDs), it is necessary to allege and prove which copyright is allegedly infringed, who is the owner of such copyright and that such copyright F still subsists.

On a charge of contravening s 59(1)(b)(iii) of Act (possessing an article specifically designed for making copies of a copyright work), it is necessary to allege and prove that the equipment concerned was specifically designed or adopted for making infringing copies of CDs G and DVDs.

Mere possession of an ordinary computer capable of burning music CDs and DVDs cannot on its own constitute an offence.

Cases referred to

S v Dube & Anor 1988 (2) ZLR 385 (S)

S v Sikarama & Anor 1984 (1) ZLR 170 (H)^H

2009 (1) ZLR p127

Ndou J

Legislation considered^A

Copyright and Neighbouring Rights Act [*Chapter 26:05*], s 59(1)(a) and (b)

Judgment

NDOU J: Both accused persons were convicted by a Bulawayo magistrate in different trials. I propose to deal with both these matters under this judgment^B as the problem that I am concerned with is similar. I referred the matters to the office of the Attorney General and they indicated that they do not support the convictions in these matters.

The salient facts of these matters are the following. The members of an organisation going under the name of the Zimbabwe Anti-Piracy Organisation, ^C in conjunction with the Zimbabwe Republic Police, carried out raids at businesses that were selling copied compact discs (CDs) and digital video discs (DVDs). The accused persons were selling or displaying for sale these items, resulting in their arrest and prosecution for "selling or hiring out" (in respect of Moyo) and possession (in respect of Tshaba) infringed copies of DVDs and CDs in contravention of s 59 of the Copyright and Neighbouring ^D Rights Act [*Chapter 26:05*]. This is novel prosecution in this region for the protection of the creations of the human mind. This is a welcome development in our jurisdiction where copyright infringement is very rife but enforcement is extremely low. This scenario has resulted in the confusion of the public as to the source of the goods, products or service. In the circumstances, ^E intellectual property rights infringement has to be curbed with zeal and determination. Having said so, I should hasten to say that such a battle has to be within the confines of our procedural law. This then brings me to the procedural flaws in these two cases. In order to enhance the appreciation of the offences the accused persons were facing I propose to cite s 59, which creates the offences. Section 59 provides:

^F "(1) Any person shall be guilty of an offence if, at a time when copyright subsists in a work, he does any of the following things in Zimbabwe without the authority of the owner of the copyright in the work –

- (a) in relation to an article which is an infringing copy and which the person knows or has reason to believe is an infringing copy –
 - (i) he makes it; or ^G
 - (ii) otherwise than for his personal and private use, imports it into Zimbabwe or exports it from Zimbabwe; or
 - (iii) in the course of business, he possesses it or exhibits it in public or distributes it; or
 - (iv) he sells it or lets it for hire or offers or exposes it for sale or hire; or ^H
 - (v) otherwise than in the course of business, he distributes it to such an

2009 (1) ZLR p128

Ndou J

extent that the owner of the copyright is prejudicially affected; ^A

- (b) in relation to an article which is specifically designed or adopted for making copies of the work and which the person knows or has reason to believe is to be used for that purpose –
 - (i) he makes it; or
 - (ii) he imports it into Zimbabwe or exports it from Zimbabwe; or ^B
 - (iii) he possesses it in the course of business; or
 - (iv) he sells it or lets it for hire or offers or exposes it for sale or hire.

(2) Any person who causes a literary or musical work to be performed in public knowing that copyright subsists in the work and the performances constitutes an infringement of the copyright, shall be guilty of

an offence.

(3) ... c

(4) ...

(5) A person guilty of an offence under this section shall be liable to a fine not exceeding level ten or to imprisonment for a period not exceeding two years or both such fine and such imprisonment in respect of each article to which this offence relates."

In the Moyo case: D

The accused was charged in count 1 with contravening s 59(1)(a)(iv), i.e. selling infringing copies of DVDs and CDs. When the essential elements were canvassed this is what he was asked,

"Q Is it correct that on the 1st of February 2008 and at 42 Nicoz House, Bulawayo you offered E for sale or hire 50 blank CDs and 49 DVDs which were infringed copies without the owner's consent?

A -Yes

Q Correct that you had reason to believe that the DVDs were infringed copies?

A -Yes

Q -What was your intention? F

A -I wanted to raise money for my school

Q -Do you have any defence to offer

A -No

Q -Any lawful right?

A -No

Q Is your plea a genuine admission of the charge, facts and essential elements G as put to you?

A -Yes

Verdict: Guilty as charged."

There are several problems with this count. First, the charge sheet alleges the CDs and DVDs were blank. This implies that there was nothing copied H

2009 (1) ZLR p129

Ndou J

A in the CDs and DVDs. Without copying there is obviously no infringement if they are blanks, unless it is a trademark infringement under the Trade Marks Act [Chapter 26:04].

Second, there is no essential element canvassed on which copyright is allegedly infringed. Who is the owner of such copyright?

B Third, there is no essential element canvassed on the subsistence of copyright at time. The elements of the charge have not been satisfactorily explained and the conviction cannot stand – S v Svondo 1984 (1) ZLR 140 (H). It is trite that the trial magistrate must ensure that the accused fully understands the nature of the charge. To do this, he should examine the charge before it is put to the accused in order to remedy any defects and to clarify any obscure C points. The court must also ensure that several elements of the offence are understood and admitted by the accused: *Criminal Procedure in Zimbabwe* by J Reid Rowland at p 17-6; S v Sikarama & Anor 1984 (1) ZLR 170 (H) and S v Dube & Anor 1988 (2) ZLR 385 (S).

In count 2 the accused was charged with "possession of equipment designed D or adapted for making infringed copies" in contravention of s 59(1)(b)(iii). There are equally many flaws in this count. First, the penalty clause refers to *specifically* designed or adapted articles. The charge sheet and the facts do not allege that the articles in question were *specifically* designed or adapted. So one of the essential elements of the offence is missing from the charge sheet. Second, I am indebted to Mr W. Mabaudhi who made written E representations on behalf of the Attorney General. He stated:-

"The possession of an ordinary computer capable of burning music CDs and DVDs cannot on its own constitute an offence. Modern computers are being manufactured with those basic drives. From the reading of the record of the court *a quo* there is nothing peculiar about the computer that was taken as an exhibit and later forfeited to the state. No evidence was established from the F summary trial that it was used in the commission of any offence. It is for these reasons that the Attorney General's office will not support the convictions."

The essential elements explained to the accused in count 2 are not consistent with those in the offence created under s 59(1)(b)(iii).

In the Tshaba case

^G At least these were infringing copies. The only problem is that there is no evidence that copyright still subsisted. The trial magistrate made an erroneous assumption that the mere possession of non-original copies of work of art constituted an offence under this Act. It is vital that the charge should be framed pursuant to the provisions of the Act.

^H In view of the above, the convictions cannot stand.

2009 (1) ZLR p130

Ndou J

Accordingly, the convictions in these two matters are quashed and sentences set ^A aside. It is ordered that trials *de novo* take place before a different magistrate.

Kamocha J agrees. ^B

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Document 21 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/BORDER TIMBERS LTD v ZIMBABWE REVENUE AUTHORITY 2009 (1) ZLR 131 (H)

BORDER TIMBERS LTD v ZIMBABWE REVENUE AUTHORITY 2009 (1) ZLR 131 (H)

2009 (1) ZLR p131

Citation	2009 (1) ZLR 131 (H)
Case No	Judgment No. HH-13-09
Court	High Court, Harare
Judge	Makarau JP
Heard	30 September 2008; 1 October 2008; 3 November 2008
Judgment	25 February 2009
Counsel	<i>L Uriri</i> , for the plaintiff <i>A B Chinake</i> , for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Customs and excise — *duty — assessment of — public official miscalculating duty owed on imported items — whether duty of care owed to importer*

^D **Delict** — *Aquilian action — essentials — need to plead and prove both negligence and wrongfulness — public official miscalculating duty owed on imported items — whether duty of care owed to importer*

Headnote

The plaintiff was a company which specialized in the production and manufacture of timber and timber products. As part of its manufacturing ^ε processes, it used a certain resin that was imported into the country. Import duty was payable on this resin. Over a period of about ten years, the plaintiff imported the resin at a steady 5 per cent duty payable to the defendant. In February 2005, the defendant demanded 25 per cent duty on a shipment of resin. The plaintiff appealed to the High Court, which upheld its objection. The defendant appealed. Pending the determination ^ε of the appeal, a further shipment was imported. A year later, the Supreme Court decided the matter in favour of the plaintiff. By then the resin had expired and become unusable. The plaintiff issued summons, claiming damages for the replacement value of the expired resin, for the value of orders that were lost as a result of the plaintiff's failure to use the resin, and for lost business.

^g *Held*, that the plaintiff's cause of action was unclear. The plaintiff alleged a wrongful action leading to an economic loss, without grounding its claim in the *lex Aquilia*, which requires a mental element in the form of negligence or *dolus* before liability can be founded. Actions under the *lex Aquilia* are meant to compensate the plaintiff for the damages ^h occasioned by the wrongful act attributable to the defendant's fault. To

2009 (1) ZLR p132

succeed in a claim under the action, the plaintiff must prove a wrongful ^a act by the defendant, patrimonial or economic loss and fault on the part of the defendant. The plaintiff had not pleaded that the defendant acted negligently and gave no particulars of negligence, nor did it plead that the defendant acted intentionally and that it intended to cause loss to the plaintiff by its actions.

Held, further, that *culpa*, in the form of negligence, or *dolus*, like wrongfulness, ^b is an essential requirement for liability under the *Aquilian* action. While culpable conduct causing harm is not actionable unless it is also wrongful, conduct that is not negligently or intentionally caused but that results in harm is equally not actionable unless there was a duty to prevent the occurrence of harm to the plaintiff. Where the defendant ^c owes the plaintiff no legal duty, there is no wrongfulness. This means that despite the existence of blameworthy conduct on his or her part, the defendant enjoys immunity against liability for damages resulting from such conduct.

Held, further, that setting the tariff using an incorrect classification was not necessarily a breach of the duty imposed upon the defendant by statute. ^d Making an error in calculating duty is not *per se* gross negligence.

Held, further, that the inquiry as to wrongfulness in situations where the plaintiff has suffered pure economic loss as occurred in this matter involved a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without *culpa*. The inquiry ^e into whether or not the defendant owed the plaintiff a legal duty would be a matter for judicial judgment, involving criteria of reasonableness, policy and, where appropriate, constitutional norms. Having approached the court for an order redressing pure economic losses, the plaintiff had to persuade the court to make a value judgment to the effect that the defendant owed the plaintiff a duty not to cause it loss through the ^f incorrect calculation of duty. No evidence was led as to what a reasonable collector of revenue would have done in the circumstances and whether to hold the defendant liable in the circumstances of the matter would promote any social or economic norm that is consistent with current policies on revenue collection. ^g

Cases cited

Gouda Boerdery Bpk v Transnet 2005 (5) SA 490 (SCA)

van der Eecken v Salvation Army Property Co & Anor 2008 (4) SA 28 (T)

Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd 1985 (1) ZLR 358 (S); 1985 (4) SA 553 (ZS) ^h

2009 (1) ZLR p133

Makarau JP

Case information

^a *L Uriri*, for the plaintiff

A B Chinake, for the defendant

Judgment

MAKARAU JP: The plaintiff filed a delictual claim against the defendant, ^B seeking damages in the sum of US\$709 948. It was specifically alleged in the plaintiff's declaration that the defendant wrongfully and unlawfully sought to levy import duty on certain resin imported by the plaintiff for its manufacturing processes using an incorrect tariff, causing the plaintiff to litigate on the matter. By the time the litigation was resolved in favour of the plaintiff, the imported resin, which remained uncleared for customs ^C purposes, had become moribund and useless to the importer, thereby causing the total loss that was claimed in the summons, under various heads that I shall detail later.

The claim was defended primarily on the basis that in seeking to levy duty at a higher tariff than previously levied, the defendant was not acting with ^D malice and that its actions were not wrongful and unlawful to ground an action in delict. Further, it was denied that the containers of the imported resin were presented to the defendant for the purposes of customs clearance.

The facts giving rise to the suit between the parties are largely common cause.

The plaintiff is an established public company, specializing in the production ^E and manufacture of timber and timber products. It is listed on the local bourse. As part of its manufacturing processes, it uses a certain resin (hereinafter referred to as "the chemical"), that is imported into the country and import duty paid. Over a period of about ten years, the plaintiff imported this resin at a steady 5 per cent duty payable to the defendant.

In or about February 2005, the plaintiff received four containers of the imported ^F chemical. When it presented the chemicals to the defendant for clearance, duty was levied not at the usual and expected 5 per cent but at 25 per cent. The plaintiff approached this court for adjudication on the correct level of duty payable and its contentions were upheld. The defendant immediately noted an appeal against the decision of this court. In the meantime, the parties reached an agreement that the four containers be released upon the ^G plaintiff paying a deposit against the required duty. Again, in the meanwhile, in May 2005, the plaintiff imported into the country ten other containers of the chemical while the legal wrangle was still on. There is a dispute as to whether these ten containers were presented for customs clearance or not. I shall revert to this dispute in detail later.

^H On 7 April 2006, the Supreme Court handed down its judgment (*ZRA v Border*

2009 (1) ZLR p134

Makarau JP

Timbers Ltd S-11-06), upholding the High Court judgment and vindicating ^A the plaintiff's stance. In June 2006, the ten containers of the chemical were cleared by the defendant at 5 per cent duty. It was then discovered that the chemical had become moribund and valueless to the importer. On 27 September 2006, the plaintiff issued summons against the defendant as detailed above.

In the summons, the plaintiff claimed the sum of US\$285 123.76 as the ^B replacement value of the chemical that went moribund; US\$20 016.44 as the value of orders that were lost as a result of the plaintiff's failure to use the moribund chemical and the sum of US\$404 807.80 as damages for lost business.

At the trial of the matter, three issues had to be resolved by evidence. These were, firstly, whether the order issued by this court also covered the ^C ten containers, the subject of this dispute, and ,secondly, whether the ten containers were presented to the defendant for duty purposes. Thirdly, in issue was the quantum of damages that the plaintiff would be entitled to in the event that the defendant was found liable.

In support of its case, the plaintiff led evidence, firstly, from one Joseph ^D Chikwana. He was the plaintiff's purchasing manager at the time the dispute arose. His testimony was largely to reiterate the facts that are common cause in this dispute concerning the first four containers of the chemical. Regarding the ten containers forming the subject of this suit, he testified as follows.

These were imported about six months after the first four containers in ^E respect of which the parties were before this court, locked in litigation over the correct tariff to be used for calculating duty. The ten containers came through Beira and when they arrived in Mutare, the plaintiff sought to

have them cleared. The plaintiff did not submit any documents to the defendant as there was a pending case between the parties. The containers were placed in a bonded warehouse. ^F

When the customs clearance agent came back with the news of the stalemate between the parties, the witness personally visited the defendant's office and was attended to by a Mr Chamboko and a lady officer who was assisting Mr Chamboko. The discussions referred to the pending case and the parties felt that they could not move from that position due to the pending litigation. ^G The defendant demanded duty at the higher rate, which the plaintiff was not in a position to pay at the time.

The witness was involved in the formulation of the claims that the plaintiff finally brought against the defendant. He explained that the claim for \$22 billion was the fees that the plaintiff paid to the agent to have the containers released. ^H

2009 (1) ZLR p135

Makarau JP

^A During the period of the dispute the plaintiff had pending orders from its overseas customers. Because of the time it took to resolve the issue, the plaintiff was unable to meet the orders, resulting in the orders being cancelled. The value of the lost orders was captured in a spread sheet that the plaintiff's finance department generated. The spread sheet was adduced into evidence. The value of the lost orders was in the sum of US\$74 134.97. ^B Using a profit margin of 27 per cent, the plaintiff claimed damages in the sum of US\$20 016.44 under this head.

The chemicals expired whilst they were in the containers and awaiting clearance. The value of replacing the chemicals was in the sum of US\$285 123.76.

^C During the time that the parties were locked in the dispute, the plaintiff could not produce most of its products and thus lost business due to the unavailability of its products. It calculated this loss at US\$404 807.80. Another spread sheet was adduced into evidence through the witness, showing the plaintiff's calculation of the lost business.

^D The plaintiff tried to mitigate its damages by borrowing glue from other timber processing companies.

When the judgment of the High Court became available in November 2005, the witness took the judgment to the defendant, seeking release of the ten containers. He was informed that the defendant would appeal against the judgment, which they did. Pending determination of the appeal, the plaintiff ^E again approached the defendant for the release of the containers. The approach was not successful, leading the plaintiff to approach this court on a certificate of urgency. No judgment was handed down in the matter, which was heard on 8 December 2005.

In my view the witness is an articulate and confident man who fared well under ^F cross-examination. He was forthright in his answers to questions put to him under cross-examination and readily admitted to some of the shortcomings in the assumptions that had been used in calculating the damages claimed by the plaintiff. While I found the witness unnecessarily verbose in his responses, I have no reason to disbelieve his evidence.

The second witness to testify on the plaintiff's behalf was one Prince Nyemba. ^G At the time, he was the plaintiff's Finance Director. He joined the plaintiff's employment in August 2006 and was not yet with the plaintiff in May 2005 when the events forming the subject of this trial were unfolding. The plaintiff naturally keeps records of its transactions and the witness had access to these.

The witness then testified as to what the plaintiff's records revealed its loss to ^H be as a result of the delay in having the glue released to it by the defendant.

2009 (1) ZLR p136

Makarau JP

Under cross-examination, the witness admitted that the claims by the plaintiff ^A had been calculated without taking into account certain exigencies and variables such as changing exchange rates and fluctuating costs of production.

Due to the fact that the witness was not an employee of the plaintiff at the relevant time and also due to the concessions that he made under cross-examination that the plaintiff's claim was

aggressively, if not inaccurately ^b calculated, I shall place marginal probative value on his testimony and will only rely on it where it is corroborated by other reliable evidence.

After the testimony of this witness, the plaintiff closed its case.

The defendant opened its case by calling one Clements Kwenda. He is employed by the defendant as a team leader at Forbes Border Post, having ^cjoined the then Department of Customs and Excise in 1990.

The witness detailed the procedures that an importer of goods into the country has to observe before his or her goods can be cleared. Regarding the claim before the court, he testified as follows.

The plaintiff imported two separate lots of chemicals. Firstly, it imported ^d four containers of the chemicals. An entry for the four was submitted to the defendant. A dispute arose as the defendant called for duty at a rate higher than the plaintiff was offering. The matter was then referred to the courts. At a later stage and while the matter was pending before the court, the plaintiff paid a deposit for the release of the four containers.

As at 25 February 2005, the plaintiff was aware that it could have the ten ^e containers released upon payment of a deposit.

In respect of the ten containers, bills of entry for the ten were submitted to the defendant on 29 June 2006. The containers were all cleared on the same date. Prior to this, he was unaware of any letter that the plaintiff had written to the defendant seeking the release of the ten containers. He was aware ^f that a letter had been addressed to the defendant's Harare office though he had not seen it.

Under cross-examination, the witness could not dispute that for the previous eleven years the plaintiff had imported the chemical at 5 per cent duty. In his opinion, the officer who inspected the goods and asked for duty at a higher ^g rate was simply doing his work and did not err. He did not agree that the departure from the classification that had been used for the past eleven years had been done with an improper motive.

The witness gave his evidence well. I find that most of his testimony was on facts that are common cause. He was clear as to what transpired between the parties although his attempt to draw a distinction between the Harare ^h

2009 (1) ZLR p137

Makarau JP

^a and the Mutare offices of the defendant was without basis. On the main, I will rely on the testimony of this witness.

The defendant called the testimony of one Clifford Mubaiwa Chamboko next. He is the man in charge of the defendant's offices in Mutare.

On 17 February 2005, a meeting was held in his office pertaining to the ^b clearance of the four containers. The plaintiff's first witness and the clearing agent were in attendance. The tariff dispute between the parties was discussed.

At no stage did the defendant refuse to accept the entry relating to the ten containers. There was no meeting between the parties regarding the ten containers.

^c Under cross-examination, the witness maintained that the defendant was justified in re-classifying the imported chemicals. He pointed out that the classification of imports is a complex matter and that for that matter, errors would occur.

The witness gave his evidence in a very measured way, so measured was he that at times he appeared slow. Despite this, I have no reason to disbelieve his ^d evidence as in my view, there are few material disputes of fact in this matter.

After the testimony of this witness, the defendant closed its case.

At the pre-trial conference of the matter, eight issues were identified for trial as follows:

1. whether the declarator issued by Hungwe J under case no HC 838/05 ^e covered the four containers or the ten containers, which are the subject matter of this dispute;
2. whether the containers were declared for duty purposes;

3. what is the procedure to be followed by an importer of goods in circumstances where there is a dispute in relation to a consignment that F has been declared for duty purposes;
4. whether, in the absence of compliance with such procedure, any liability attaches to the defendant;
5. whether the defendant is liable to the plaintiff in respect of contents that became moribund, as well as the customs clearance, storage charges and G demurrage charges associated with the containers;
6. whether the defendant is liable to the plaintiff for special damages in respect of canceled orders and lost business;
7. in respect of all damages, the quantum of damages that may be awarded to the plaintiff if any and H
8. what order is to be made as regards costs.

2009 (1) ZLR p138

Makarau JP

In my view, the issue that falls for determination in this trial in the main is A whether or not the defendant's conduct was culpable under the *lex Aquilia*. If so, what damages did the plaintiff suffer?

I narrow down the issues in this manner, as in my view, resolution of issues 1 to 4, as settled at the pre-trial conference, will not resolve the dispute between the parties. Having listened to the evidence of the parties, it appears B clear to me that while the declarator by Hungwe J specifically dealt with the four containers in respect of which a dispute had been formally declared, his ruling, and that of the Supreme Court on the matter, would bind the parties in the importation of similar chemicals and would thus have a direct bearing on the importation of the ten containers. I also note that while the ten containers may not have been formally presented to the defendant for clearance, the C parties were locked in a dispute over the four containers in respect of the duty payable and, on a practical note, the defendant was most unlikely to accept duty at the lower tariff pending determination of the litigation that was then unfolding between the parties. The parties are all familiar with the procedures that have to be observed in relation to the importation of products and an D answer to this question will in my view not bring us nearer to the resolution of the matter than we were when we started off. I further form the view that the plaintiff has not approached this court because the defendant allegedly did not clear the ten containers of the chemical. The dispute between the parties relates to the defendant's insistence on the incorrect rate of duty after the High Court ruling and the issue that arises in my view is whether such E insistence, including the unsuccessful approach to the Supreme Court on the issue, is culpable and renders the defendant liable to the plaintiff in delict.

I now return to the issues as I see them.

In my view, the plaintiff's claim could have been pleaded with greater clarity to reveal the plaintiff's cause of action against the defendant. I must confess F that I am at a loss as to the cause of action that the plaintiff is raising against the defendant. I had hoped that the cause of action would become clear with the leading of evidence and the final submissions by counsel in the matter. Unfortunately it has not, as I shall show below.

The plaintiff has pleaded in its declaration that the defendant acted wrongfully G against the plaintiff, leading to the plaintiff incurring certain losses.

Reading through the plaintiff's declaration, I discern three possible actions by the defendant that the plaintiff appears to be terming "wrongful". Firstly, the plaintiff alleges in para 4 of the declaration that the defendant acted wrongfully and unlawfully when it demanded duty for the first four containers at 25 per cent. Secondly, it is alleged in para 6 that the defendant H

2009 (1) ZLR p139

Makarau JP

A acted wrongfully and unlawfully and with malice when it noted an appeal against the decision of this court. Finally, the plaintiff alleges in para 7 that the defendant acted wrongfully by refusing to clear the ten containers on duty other than the erroneously calculated 25 per cent.

As pleaded above, the plaintiff alleges wrongful action leading to an economic B loss without grounding its claim in the *lex Aquilia*, that requires a mental element in the form of negligence or

dolus before liability can be founded. It is my understanding of our law of delict that actions under the *lex Aquilia* are meant to compensate the plaintiff for the damages occasioned to him or her by the wrongful act attributable to the defendant's fault. Thus, for a successful prosecution of a claim under the action, a plaintiff must prove a ^c wrongful act by the defendant, patrimonial or economic loss and fault on the part of the defendant.

It is common cause that the plaintiff has not pleaded that the defendant acted negligently in the circumstances of this matter. No particulars of the negligence are pleaded. The plaintiff has not specifically pleaded that the ^d defendant acted intentionally and that it intended to cause loss to the plaintiff by its actions.

It is trite, in my view, that in an action founded on the *lex Aquilia*, the mental element status of the defendant must be specifically pleaded so that the defendant knows the case that it has to meet. Lack of such particularity, in my view, is fatal to the plaintiff's claim, as it does not disclose the plaintiff's ^e cause of action. On this basis alone, I would absolve the defendant from the instance.

However, I am somewhat handicapped by two events that did not occur in this matter. Firstly, the defendant did not except to the plaintiff's pleadings for the cause of action to be crystallized before the defendant pleaded thereto. ^f Secondly, the matter proceeded through a pre-trial conference where the parties appeared to have been agreed that what was being pleaded was the *lex Aquilia* and the real issue for determination was whether the defendant was liable to the plaintiff for the pure economic loss that resulted from the defendant's actions.

^g It is true in practice that evidence led at the trial to prove *culpa* under the *lex Aquilia* invariably proves the wrongfulness of the conduct. See *van der Eecken v Salvation Army Property Co & Anor* 2008 (4) SA 28 (T) at 37F-G. However, the correct legal position, in my view, is that *culpa*, in the form of negligence or *dolus*, like wrongfulness, is an essential requirement for liability under the Aquilian action. While culpable conduct causing harm is ^h not actionable unless it is also wrongful, conduct that is not negligently or

2009 (1) ZLR p140

Makarau JP

intentionally caused but that results in harm is equally not actionable unless ^a there was a duty to prevent the occurrence of harm to the plaintiff. Where the defendant owes the plaintiff no legal duty, there is no wrongfulness. This means that, despite the existence of blameworthy conduct on his or her part, the defendant enjoys immunity against liability for damages resulting from such conduct. ^b

I will therefore proceed to examine the evidence that was led at the trial to assess whether the evidence establishes both the *culpa* and the wrongfulness.

As indicated above, the plaintiff did not plead negligence. Similarly, the tenor of the evidence led at the trial was not suggestive of any negligent conduct on the part of the defendant. The essence of Chikwana's evidence was to the effect that the defendant simply refused to release all the containers of ^c chemicals on duty other than at the wrongly calculated 25 per cent. He did not proceed to suggest that such conduct by the defendant in this regard was negligent in any respect. In his evidence-in-chief, the plaintiff's main witness did not at all testify as to the defendant's state of mind in refusing to release the containers of the chemicals at 5 per cent duty. It was only in answer to ^d a question put to him in cross-examination that the witness was drawn into testifying that the actions by the defendant were malicious and deliberate, although the plaintiff had no complaints to make against the employees of the defendant. One clearly discerns a contradiction in the evidence so elicited from the witness. It is common cause that the defendant acts through the agency of its employees and if the plaintiff had no complaints about ^e the manner in which the defendant's employees had handled the matters, it is difficult to envisage in what way the defendant acted maliciously and intentionally against the plaintiff.

On the basis of the above, I would find that the plaintiff did not lead any evidence to show that the defendant's conduct, even if found wrongful, ^f was accompanied by such a mental element as to found liability under the *lex Aquilia*.

In his written submissions, the plaintiff's counsel makes a sweeping statement to the effect that the conduct by the defendant was in breach of a clear statutory provision and that such breach was without just cause. Counsel ^g proceeds to submit that at the very least, this constituted gross negligence.

With respect, I find myself unable to agree. Firstly, I am not convinced that setting the tariff using an incorrect classification was breach of the duty imposed upon the defendant by statute. Secondly, I am not persuaded that making an error in calculating duty is *per se* gross negligence. In any event, as discussed above, the plaintiff did not plead negligence and did not lead any ^h

2009 (1) ZLR p141

Makarau JP

A evidence to reveal any negligent behaviour on the part of the defendant. It is therefore idle of counsel to make such a submission in the circumstances.

Again, on the basis that the plaintiff failed to lead any evidence upon which I can find that the defendant behaved towards the plaintiff with the requisite mental element to found liability under the *lex Aquilia*, I would absolve the ^b defendant from the instance on this basis alone.

It appears to me that the plaintiff may have proceeded under the incorrect belief that wrongfulness is similar to and the same as *culpa* and that pleading wrongfulness on its own suffices to satisfy the requirements of the Aquilian action. It is not. The two are separate requirements that have to be satisfied in each suit, although the evidence led to prove one may be used to prove ^c the other. I can do no better than associate myself with the observations of Scott JA in *Gouda Boerdery Bpk v Transnet Ltd* 2005 (5) SA 490 (SCA) when he had the following to say in para 12 starting on p 499:

"It is now well established that wrongfulness is a requirement for liability under the modern Aquilian action. Negligent conduct giving rise to loss, unless also wrongful, is therefore not actionable. But the issue of wrongfulness is more often ^d than not uncontentious as the plaintiff's action will be founded upon conduct which, if held to be culpable, would be *prima facie* wrongful. Typically this is so where the negligent conduct takes the form of a positive act which causes physical harm. Where the element of wrongfulness gains importance is in relation to liability for omissions and pure economic loss. The inquiry as to wrongfulness will then involve a determination of the existence or otherwise of a legal duty ^e owed by the defendant to the plaintiff to act without negligence: in other words to avoid negligently causing the plaintiff harm. This will be a matter for judicial judgment involving criteria of reasonableness, policy and, where appropriate, constitutional norms. If a legal duty is found to have existed, the next inquiry will be whether the defendant was negligent. The test to be applied will be that formulated in *Kruger v Coetzee*, involving as it does, first, a determination of the issue of foreseeability and, second, a comparison between what steps a ^f reasonable person would have taken and what steps, if any, the defendant actually took. While conceptually the inquiry as to wrongfulness might be anterior to the enquiry as to negligence, it is equally so that without negligence the issue of wrongfulness does not arise for conduct will not be wrongful if there is no negligence. Depending on the circumstances, therefore, it may be convenient to assume the existence of a legal duty and consider first the issue of negligence. ^g It may also be convenient for that matter, when the issue of wrongfulness is considered first, to assume for that purpose the existence of negligence. The courts have in the past sometimes determined the issue of foreseeability as part of the inquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceeded to determine the second leg of the negligence inquiry, the first (being foreseeability) having already been decided. If this approach is adopted, *it is important not to overlook the distinction between negligence and ^h wrongfulness*" (the emphasis is mine).

2009 (1) ZLR p142

Makarau JP

Assuming that I have erred in finding that the plaintiff fatally failed to plead ^a and prove culpability on the part of the defendant, I now turn to consider whether the conduct by the defendant was wrongful.

In my view, the issue of wrongfulness in this matter takes centre stage as the loss that the plaintiff seeks to be redressed is pure economic loss. There is thus no physical damage to the property of the defendant giving rise to ^b the loss, which historically, would have led to the conclusion that the action of the defendant was *prima facie* wrongful if it was culpably caused. See *Gouda Boerdery Bpk v Transnet* (*supra*).

The inquiry as to wrongfulness in situations where the plaintiff has suffered pure economic loss, as occurred in this matter, involves a determination ^c of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without *culpa*. It has been held in a number of authorities that the inquiry into whether or not the defendant owed the plaintiff a legal duty will be a matter for judicial judgment involving criteria of reasonableness, policy and, where appropriate, constitutional norms. This has been a part of our law since the courts in this jurisdiction accepted

that the Aquilian ^D action was wide enough to apply to claims for pure economic loss. Thus, in *Zimbabwe Banking Corporation v Pyramid Motor Corp (Pvt) Ltd* 1985 (1) ZLR 358 (S), 1985 (4) SA 553 (ZS) at 562 I-J Gubbay JA (as he then was) had this to say:

"There is no general principle of delictual liability for economic loss negligently ^E caused. It must have been caused wrongfully as well as culpably. There must have been an infringement of a legally protected right, the determination of which requires the exercise of a judicial value judgment embracing all relevant facts, including matters of policy. See *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 833D-H. For whereas physical injury to person or corporeal property is *prima facie* unlawful, causing economic loss is not."

In casu, it is my view that the plaintiff approached this matter without realizing ^F that its claim called for more than evidence of what transpired between the parties. Having approached the court for an order redressing pure economic losses, it fell upon the plaintiff to persuade the court to make a value judgment to the effect that the defendant owed the plaintiff a duty not to cause it loss through the incorrect calculation of duty. This is a novel duty to which the ^G Aquilian action has not yet been extended by our courts. As such, great care had to be taken in leading evidence that would persuade the court to hold that the extension of the action to cover such incidences is proper and is in accordance with policy. No evidence was led before me as to what a reasonable collector of revenue would have done in the circumstances and whether to hold the defendant liable in the circumstances of the matter will ^H

2009 (1) ZLR p143

Makarau JP

A be promotive of any social or economic norm that is consistent with current policies on revenue collection.

Speaking for myself, I am reluctant to extend the action to hold liable a public body like the defendant for an error that occurs during the discharge of its statutory functions. I am also reluctant to hold liable a defendant for ^B pursuing a constitutional right in unsuccessfully noting an appeal to the Supreme Court, as to do so might be to stifle and in some cases completely negate such right. But these are just my views arrived at without the aid of argument from counsel. In reaching this conclusion, I have been influenced by the remarks by Gubbay JA in the *Zimbabwe Banking Corporation* case at 373-4 (564B-D of the South African report) when he had this to say:

" ^C Mr Chaskalson is, of course, correct in cautioning that in determining whether any norm of behaviour causing economic loss should be characterised as wrongful, the adoption of a conservative approach is required. (See the *Lillicrap* case *supra* at 500D-E and the authorities there cited.) Certainly there is need for 'care and circumspection' in the ascertainment of whether a particular type of action is one which will be confined within reasonable and manageable ^D bounds and is not fraught with what aptly has been described as 'overwhelming potential liability'. Each case must be assessed pragmatically on its own facts and merits, with primary weight being laid upon the policy of the law. The court must ask itself whether, paying due and proper regard to the notion of justice and the interests of the litigants balanced against the community as a whole, it is socially desirable to impose liability in the particular circumstances. See *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* 1982 (1) ZLR 47 (H); ^E 1982 (3) SA 55 (ZH) at 61F-H."

On the basis of the above, I would hold that the conduct complained of was not wrongful in the circumstances even if it was committed with the requisite culpability, which I have already found above not to have been proved.

In view of the finding that I make on the liability of the defendant, I do not ^F think it is necessary that I make a finding on the quantum of damages sought by the plaintiff in this matter. However, in keeping with the practice of this court, I shall proceed to do so for the benefit of the Supreme Court in the event that my decision is appealed against.

It has been my finding above that the evidence of the plaintiff's two witnesses in respect of the alleged loss was inconclusive in that under cross-examination, ^G the witnesses admitted that the claims by the plaintiff had been calculated without taking into account certain exigencies and variables such as changing exchange rates and fluctuating costs of production. As such, it is my view that the amounts claimed by the plaintiff in its declaration are somewhat exaggerated and are not a correct reflection of the loss actually suffered by ^H the plaintiff.

2009 (1) ZLR p144

Makarau JP

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

1. The defendant is absolved from the instance.
2. The plaintiff shall meet the costs of the defendant.

Honey & Blanckenberg, plaintiff's legal practitioners

Kantor & Immerman, defendant's legal practitioners ^B

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Document 22 of 52

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/HARRIS v HARRIS 2009 (1) ZLR 145 (H)

HARRIS v HARRIS 2009 (1) ZLR 145 (H)

2009 (1) ZLR p145

Citation	2009 (1) ZLR 145 (H)
Case No	Judgment No. HH-20-09
Court	High Court, Harare
Judge	Musakwa J
Heard	30 October 2008
Judgment	26 February 2009
Counsel	<i>P C Paul</i> , for the applicant <i>Mrs J B Wood</i> , for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Evidence – *civil matter – judicial notice – fact not subject of reasonable dispute – foreign law – reliance on law as stated in leading text book*

Family law – *child – abduction – return of child to country of habitual residence – parents having joint custody – one parent bringing child ^D to Zimbabwe – Zimbabwe not thereby becoming country of habitual residence – best interests of child – relevance of*

Headnote

The parties were married but separated. The applicant, the wife, and the respondent were resident in England. They entered into an agreement ^E in terms of the Childrens Act, 1989, of the United Kingdom in respect of their minor child. The agreement permitted the respondent to take the minor child to Harare pending the applicant's fulfilment of the conditions attaching to the agreement. In terms of the agreement, the child was to live with the respondent until such time as the mother had fulfilled certain conditions relating to acquiring a job, a place at school, ^F suitable housing and so forth. The respondent, in the meantime, had taken the child to Zimbabwe. The applicant averred that she had now fulfilled the conditions in the agreement and

sought an order declaring the continued retention of the child by the respondent unlawful and that the child should be returned to her custody. She contended that the ^G respondent's continued retention of the child constituted an unlawful retention in terms of the Child Abduction Act [Chapter 5:05] and, in particular, Article 3 to the Schedule to the Act. She contended that the retention of the child was wrongful in terms of that article, as such retention was in breach of her rights of custody under English law. An uncertified copy of the English Act was submitted.

^H The respondent argued that since the child was not brought to Zimbabwe

2009 (1) ZLR p146

Musakwa J

unlawfully, the applicant had to prove that the retention of the child ^A was in violation of Article 3(a). He also argued that the conditions of the agreement had not been fulfilled. It was also submitted that the English statute relied on by the applicant had not been authenticated in accordance with the provisions of the Act.

Held, that it could not be said that the habitual residence of the child was ^B Zimbabwe for the purposes of determining whether the child had been wrongfully retained in terms of Article 3. The agreement between the parties clearly stated that they had joint custody of the minor child. Those rights of custody would have continued to be exercised jointly in the United Kingdom had the child not been brought to Zimbabwe.

Held, further, that the issue was not the custody rights of the parties. That ^C issue was one for the jurisdiction of the country of habitual residence of the child. The purpose of the present proceedings was to secure the prompt return of the child to England, if it was proved that the child had been wrongfully detained. The matter could not be determined on the basis of the best interests of the child.

Held, further, that no reliance could be placed on the uncertified copy of the ^D English Act. However, in terms of ss 24 and 25 of the Civil Evidence Act [Chapter 8:01], the court can take judicial notice of any fact that is not the subject of reasonable dispute. In this respect, *Halbury's Laws of England* was authority for the proposition that both the parties had parental responsibility in respect of the child in accordance with English ^E law. This was what the agreement between the parties also stated.

Cases cited

Chief Family Advocate & Anor v G 2003 (2) SA 599 (W)

Secretary for Justice v Parker 1999 (2) ZLR 400 (H) ^F

Legislation considered

Child Abduction Act [Chapter 5:05], Schedule, arts 1, 3, 12 & 13

Civil Evidence Act [Chapter 8:01], ss 24 & 25

Case information

P C Paul, for the applicant

Mrs J B Wood, for the respondent ^G

Judgment

MUSAKWA J: The applicant is seeking an order declaring that the continued retention of their minor child by the respondent, who is her husband, is unlawful and that the minor child be returned to her custody within seven ^H days of the granting of the order, plus costs of suit.

2009 (1) ZLR p147

Musakwa J

^A The parties were married to each other in the United Kingdom in 2004 and the marriage still subsists, although the parties are separated. In her founding affidavit the applicant states that on 24 June 2007 she and the respondent entered into an agreement in terms of the Children's Act, 1989, of the UK (hereinafter referred to as "the Children's Act") in respect of the child. The ^B agreement

permitted the respondent to take the child to Harare pending the applicant's fulfillment of the conditions attaching to it. The crucial part of the agreement provides that:

"And upon the mother and father agreeing that [the child] shall only reside with his mother as set out below once the mother is able to provide a secure home for [the child] which it has been agreed will be once the mother has provided documentary evidence to the father that she has obtained tax credits for [the c child], found a nursery place for [the child], found a two bedroom property to live in and found employment in the local area and until this happens and not before 1 September 2007 in any event, [the child] will continue to reside with the father."

It is worthwhile to highlight other notable features of the agreement. It ^d states that both parties have parental responsibility for the child. There is a provision concerning the binding nature of the agreement and that it can only be varied by consent in writing or by order of court. There is also provision for the respondent's access to the child during school holidays.

In her founding affidavit, the applicant states that she has met the stipulated conditions. Documentary evidence in support of her claim that the conditions ^e were fulfilled was attached to the application. The documents consist of a letter from a nursery, a copy of a lease agreement and proof of employment, as well as proof of earnings. She further avers that, despite having fulfilled the conditions, the respondent has refused to return the child to her. She thus contends that the respondent's continued retention of the child constitutes ^f an unlawful retention in terms of the Child Abduction Act [*Chapter 5:05*], and, in particular, Article 3 of the Convention on the Civil Aspects of International Child Abductions, the text of which is set out in the Schedule thereof (hereinafter referred to as "the Convention"). In her answering affidavit, the applicant made the additional averment that both she and the respondent had joint custody prior to the child being brought to Zimbabwe.

^g In his opposing affidavit the respondent contends that the child has been in his sole custody since January 2007. He also contends that the applicant has not fully complied with the obligations imposed by the agreement. In particular, he points out that the applicant jointly leases residential accommodation with a third party such that, if her relationship with the third party was ^h terminated, she might not be able to afford the rent for the property. Apart

2009 (1) ZLR p148

Musakwa J

from contending that he is not in breach of the Child Abduction Act, the ^a respondent also contends that he did not bring the child to Zimbabwe in terms of the agreement with the applicant but he did so in his capacity as a co-guardian and custodian parent. He is also not satisfied with the contents of the annexures to the supporting affidavit. In addition, the respondent also contends that it is not in the interests of the child that it be returned to the ^b applicant. The rest of the opposing affidavit deals with the reasons thereto.

It was submitted by Mr *Paul* that the retention of the child is wrongful in terms of Article 3 of the Convention, as such retention is in breach of the applicant's rights of custody under English law. An uncertified copy of the Children's Act was annexed to the applicant's heads of argument. The respondent has taken issue with this and I will revert to it later. It was also ^c submitted that, since the current proceedings were commenced eight months after the wrongful refusal, the applicant is entitled to the prompt return of the child in terms of Article 12 of the Convention. This is because, in terms of Article 12 of the Convention, where proceedings are commenced within one year of the wrongful act the judicial or administrative authority shall order the child's return forthwith. It was also submitted that the respondent ^d has to show that a high degree of harm will result if the child's return is ordered or that a highly intolerable situation will result. Finally, it was also submitted that the purpose of the present proceedings is not to consider the best interests of the child, as if the court were determining the merits in a custody suit. Reference was made to *Secretary for Justice v Parker* 1999 (2) ZLR 400 (H). ^e

On the other hand, it was submitted by Mrs *Wood* that since the child was not brought to Zimbabwe unlawfully, the applicant has to prove that the retention of the child is in violation of Article 3(a) of the Convention. Since the purpose of the Convention is to return the child to the country of habitual residence, it was also submitted that the applicant has not proved ^f that the child was habitually resident in the UK. It was also submitted that the applicant must be bound by what she stated in her founding affidavit, as she only raised the issue of joint custody in her answering affidavit. As regards custody of the child whilst in the UK, it was submitted that it is the respondent who had custody from Mondays to Fridays, with the applicant ^g only exercising custody during weekends.

Reference is made to the agreement which spells out the specific details of the respective custody rights of the parties. The applicant's reliance on the Children's Act has been attacked on the ground that the statute was not adduced in accordance with Article 12 of the Convention. According to this argument, expert evidence is required before any reliance can be placed on a foreign statute. There was also the ^h

2009 (1) ZLR p149

Musakwa J

A contention that the applicant failed to prove that the child was habitually resident in the UK at the time the cause of action arose. As such, the argument was that the Convention does not apply to the facts of this case.

In respect of the terms of the agreement the following arguments were advanced by Mrs *Wood*. The first one was that the applicant did not provide ^b the tax credits in favor of the child. Secondly, it was that the applicant did not provide a secure home for the child. This is because the lease agreement is not in the applicant's sole name. Thirdly, it was that the applicant did not secure employment "in the local area" as required by the agreement. There was also the additional argument that it has to be shown that the agreement has legal effect in the jurisdiction of the child's habitual residence for ^c purposes of compliance with Article 3 of the Convention. In this respect, it was submitted that the applicant has failed to prove.

After arguments had been presented in this matter, I directed respective counsel to file additional heads of argument on the issue of whether the application is properly before this court. This has been adequately answered ^d by Mrs *Wood*. Although she did not file supplementary heads of arguments, in her note to the Registrar she pointed out that the issue is covered by Article 29 of the Convention. I am indebted to her for pointing out that provision which states that:

"This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of ^e Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention".

The Child Abduction Act gives effect to the Convention. Article 3 of the Convention provides that:

"The removal or the retention of a child is to be considered wrongful where – ^f

- (a) it is in breach of the rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal; and
- (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

^g The rights of custody mentioned in subparagraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

I am not persuaded by the argument advanced by Mrs *Wood* that, for purposes of resolving the present dispute, it must be accepted that the country of habitual residence of the minor child is Zimbabwe. The agreement between ^h the parties clearly states that they had joint custody of the minor child. Those

2009 (1) ZLR p150

Musakwa J

rights of custody would have continued to be exercised jointly in the UK had ^a the child not been brought to Zimbabwe. In this respect, see Article 3(b) of the Convention. I agree with Mr *Paul*'s submission that the term "habitual residence" must be accorded its ordinary meaning. I also agree with his submission (in the context of the facts of the present case) that it does not follow that, where one leaves one's country of habitual residence, then one ^b loses that residence. It cannot follow therefore, that the habitual residence of the child is Zimbabwe, for the purposes of determining whether the child has been wrongfully retained in terms of Article 3 of the Convention.

I agree with the submission that the issue for determination here is not the custody rights of the parties. That issue is for the jurisdiction of the country of habitual residence of the child. As I understand it, the purpose ^c of the present proceedings is to secure the prompt return of the child to a Contracting State, if it is proved that the child has been wrongfully retained. In this respect see

Articles 1 and 3 of the Convention. The matter cannot be determined on the basis of the best interests of the child. In this respect I agree with the reasoning of Devittie J in *Secretary for Justice v Parker supra*. Having made reference to Article 1 of the Convention, the learned ¹ judge had this to say at 405B:

“The clear purpose of the Convention, as the preamble and Article 1 indicate, is to provide a mechanism to deal with situations where children are wrongfully removed from a jurisdiction in which they are habitually resident. I am bound therefore to endeavour to give maximum force to the purposes of the Convention.” ²

It was also submitted by Mrs *Wood* that the foreign statute made available by the applicant has not been authenticated in accordance with the provisions of the Child Abduction Act. She submitted that this was the procedure that was followed in *Parker’s case supra*, where the Lord Chancellor’s Department provided an authenticated copy of the relevant statute when an application was made to the Secretary for Justice. I agree that no reliance can be placed ³ on the uncertified copy of the Children’s Act. However, to overcome this handicap, Mr *Paul* sought to rely on ss 24 and 25 of the Civil Evidence Act [*Chapter 8:01*]. He submitted that, in respect of s 24(3), the court can take judicial notice of any fact that is not the subject of reasonable dispute. In this respect he cited *Halsbury’s Laws of England*, 3 ed, as authority for ⁴ the proposition that both the applicant and the respondent had parental responsibility in respect of the child in accordance with English law.

Mr *Paul* submitted that the provisions of the Civil Evidence Act should be read in conjunction with Article 14 of the Convention. He further submitted that Article 14 of the Convention should prevail over the provisions of the Civil Evidence Act. In this respect, he submitted that the Convention is ⁵

2009 (1) ZLR p151

Musakwa J

⁶ concerned with the expeditious resolution of disputes concerning children. Mr *Paul* also submitted that in terms of s 24 of the Civil Evidence Act, the court may take judicial notice of certain matters that are not the subject of reasonable dispute. Thus, he urged the court to take into account *Halsbury’s Laws of England* 3 ed in respect of the law in the United Kingdom regarding custody rights.

⁷ The first paragraph of the agreement clearly states that both parties have parental responsibility over the child. This is a feature of English law as stated in *Halsbury’s Laws of England supra*. In *Chief Family Advocate & Anor v G* 2003 (2) SA 599 (W) the parties were married according to South African law. They had one child. They moved to the UK where they ⁸ subsequently separated, with the child staying with the father. Without the mother’s knowledge, the father took the child back to South Africa where he promptly enrolled it at a school. The mother then obtained an order from the Family Law Division of the High Court to the effect that the child remained a ward of the court. Spillg AJ held that, according to the Children’s Act, each parent has parental responsibility over a child born of their marriage. The ⁹ learned judge also noted that in the UK parent-child relations are no longer founded on the basis of control, but on the assumption of responsibilities. He further noted that this was well set out in *Halsbury’s Laws of England* 4 ed Vol 5 (3).

Although the respondent contends that the applicant has not fully complied ¹⁰ with the conditions of the agreement, there appears to be no basis for such argument. The agreement in respect of accommodation requires the applicant to secure a two-bedroomed property. It is immaterial that the applicant shares the property with her partner. In any event, that is an issue for determination by the court that determines who should have sole custody of the child should the dispute between the parties take that route. As regards the condition that ¹¹ the applicant must secure employment in the local area where she lives, the letter from the applicant’s employer states that she works from home on a full-time basis. In respect of child tax credit, the explanation is that the applicant cannot claim that until she starts living with the child. Apart from a generalized challenge, the respondent has not rebutted that explanation by ¹² way of any other contrary proof.

The return of a child may also be refused in terms of Article 13 of the Convention, which provides that:

“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return ¹³ establishes that –

2009 (1) ZLR p152

Musakwa J

- (a) the person, institution or other body having the care of the person of the A child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the B child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." c

The respondent did not invoke this provision and confined himself to the contention that the applicant did not comply with the terms of the agreement they signed.

In the circumstances I am satisfied that the requirements of the Convention have been met. The application is therefore granted in terms of the draft order. D

Wintertons, applicant's legal practitioners

Atherstone & Cook, respondent's legal practitioners E

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Document 23 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/ASHER v MINISTER OF STATE FOR LANDS, LAND REFORM AND RESETTLEMENT & ANOR 2009 (1) ZLR 153 (H)

ASHER v MINISTER OF STATE FOR LANDS, LAND REFORM AND RESETTLEMENT & ANOR 2009 (1) ZLR 153 (H)

2009 (1) ZLR p153

Citation	2009 (1) ZLR 153 (H)
Case No	Judgment No. HH-34-09
Court	High Court, Harare
Judge	Chatukuta J
Heard	18 February 2009
Judgment	26 February 2009
Counsel	<i>G Nyandoro</i> for the applicant <i>C Parenje</i> for the first respondent <i>G N Mlotshwa</i> for the second respondent
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Land – land compulsorily acquired by State – occupation by former owner of farm or any part thereof – eviction of former owner or occupier follows only upon his conviction – recipient of offer letter from the State D – recipient not entitled to take up occupation of farm until former owner or occupier has been evicted in terms of a court order – *Gazetted Lands (Consequential Provisions) Act [Chapter 20:28] – s 3(3)*

Property and real rights – spoliation order – application for – what applicant is required to prove – *locus standi* – ownership or lawfulness of possession E not relevant to question of *locus standi*

Property and real rights – spoliation order – unlawful occupier of land – person occupying land which had been acquired by State – person receiving offer letter from State in respect of such land – not entitled to deprive occupier of possession – need for occupier to be lawfully evicted before holder of offer letter entitled to occupy property

Headnote

F In determining an application for a spoliation order, a court is not concerned with the question of ownership or the lawfulness of the possession. Neither is relevant in determining whether an applicant has *locus standi* to bring such an application. All that the applicant has to prove is that he G was in peaceful and undisturbed possession of the *res* and that he was deprived of such possession forcibly or wrongfully against his consent.

A former owner or occupier of land which has been gazetted in terms of the *Gazetted Lands (Consequential Provisions) Act [Chapter 20:28]*, be it the entire land or the main homestead, and who continues to occupy, hold and use such land without lawful authority, is guilty of an H offence. Section 3(3) of the Act captures two scenarios: firstly where

2009 (1) ZLR p154

a former owner continues to occupy, hold and use the entire gazetted A land, including the homestead and, secondly, where a former owner or occupier has ceased to occupy, hold and use the land and has confined himself to the main homestead. In the first case, the owner or occupier would be in possession of the entire farm. In the second case, the owner or occupier would be in possession of the main homestead only, after B having voluntarily relinquished possession of the rest of the farm. In either case, the owner or occupier can only lose possession upon conviction and the issuance of an eviction order by the magistrate's court.

In order for the recipient of a letter from the State offering him the occupation and use of land, he must have vacant possession before he can utilize the offer. Vacant possession can only be achieved where the due process of C law, as set out s 3(5) of the *Gazetted Lands (Consequential Provisions) Act*, is followed. That section clearly provides that upon conviction of a person who has violated the provisions of the Act, the court shall issue an order to evict the person convicted from the land to which the offence relates. Until that is done, a former owner or occupier of gazetted land cannot be dispossessed, whether or not his possession of D the land is lawful.

Cases cited

Airport Game Park (Pvt) Ltd v Karidza & Anor 2004 (1) ZLR 391 (S)

Airfield Invstms (Pvt) Ltd v Min of Lands & Ors 2004 (1) ZLR 511 (S) E

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

Chisveto v Min of Local Govt and Town Planning 1984 (1) ZLR 248 (H)

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

Karori (Pvt) Ltd & Anor v Mujaji 2007 (1) ZLR 105 (H)

Magadzire v Magadzire S-196-98

Mereki v Bell In (Pvt Ltd & Anor HH-113-05 F

Matimbura v Matimbura S-173-98

van t'Hoff v van t'Hoff & Ors 1988 (1) ZLR 294 (H)

Legislation considered

Gazetted Lands (Consequential Provisions) Act [Chapter 20:28], s 3(1), G (3) and (5)

Case information

G Nyandoro for the applicant

C Parenye for the first respondent

G N Mlotshwa for the second respondent H

2009 (1) ZLR p155

Chatukuta J

Judgment

A **CHATUKUTA J:** The applicant seeks a spoliation order. He claims to have been in peaceful and undisturbed possession of 8 Welston Farm in the district of Mashonaland East Province (the farm). He alleges that the possession was disturbed by the second respondent on 5 February 2009, when a group of 10 youths drove to the farm when he was away for the day. The group, B acting under the instruction of the second respondent, took occupation of the farm and the main homestead and locked him out. The applicant submits that the second respondent did not have any lawful authority to despoil him.

Mr *Parenye*, for the first respondent, submits that the first respondent would abide by the court's decision. The second respondent submits that he does not dispute that he has taken occupation of the farm. He, however, raises C two issues *in limine*: that, by operation of law, the applicant does not have the *locus standi* to seek spoliation relief and the court does not have the jurisdiction to grant the relief sought. The second respondent contends that the applicant is occupying the farm in contravention of s 3(1) of the *Gazetted Lands (Consequential Provisions) Act* [Chapter 20:28] (*Gazetted Lands Act*). It has been submitted that any finding that the applicant has the D *locus standi* would be tantamount to sanctioning and facilitating an illegal act. Mr *Mlotshwa*, for the second respondent, has referred me, in support of this contention, to a number of cases such as *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S), *Mereki v Bell In (Pvt) Ltd* HH-113-05, *Airport Game Park (Pvt) Ltd & Anor v Karidza & Ors* E 2004 (1) ZLR 391 (S) .

Mr *Nyandoro*, for the applicant, submits that in determining an application for a spoliation order, the court is not concerned with the ownership of the farm or the lawfulness of the possession. He concedes that the farm was acquired by the State. He however contends that the applicant should only F be dispossessed by due process of the law.

Spoliation has been described as a wrongful deprivation of possession. The essential requirements for spoliation are set out in *Botha & Anor v Barrett* 1996 (2) ZLR 73 where at 79D-E, Gubbay CJ stated that:

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

- (a) that the applicant was in peaceful and undisturbed possession of the farm; and
- (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent."

Also see *van t'Hoff v van t'Hoff & Ors* (1) 1988 (1) ZLR 294 (H), *Chisveto H v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H),

2009 (1) ZLR p156

Chatukuta J

Davis v Davis 1990 (2) ZLR 136 (H), *Matimbura v Matimbura* S-173-98, A *Magadzire v Magadzire* S-196-98, and *Karori (Pvt) Ltd & Anor v Mujaji* 2007 (1) ZLR 105 (H).

I am in agreement with Mr *Nyandoro's* contention that it is not for this court to determine the ownership of the farm. It appears to me that the fact that the first respondent acquired the land and would therefore deal with it as it wishes B is not in issue. However, it is not relevant in determining the applicant's *locus standi*. The fact that the applicant is in occupation unlawfully is also not the issue. The issue is whether or not the applicant can prove, on a balance of probability, that he was in peaceful possession of the farm and the possession was unlawfully or wrongfully interrupted by the second respondent. I do not C believe that to do so would be to facilitate a perpetuation of an unlawful act. Section 3 of the *Gazetted Lands Act* provides what is required to be done in order to evict the applicant from the farm. The provision does not, in my view relate to the main homestead only. It appears it relates to the entire farm that has been gazetted. Section 3(3) reads:

"If a former owner or occupier of Gazetted land who is not lawfully authorised D to occupy, hold or use that land does not cease to occupy, hold or use that land after the expiry of the appropriate period referred to in subsection (2)(a) or (b), or, in the case of a former owner or occupier referred to in section 2(b), does not

cease to occupy his or her main homestead in contravention of proviso (ii) to section 2(b), he or she shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years ^E or to both such fine and such imprisonment."

My understanding of the section is that a former owner or occupier of gazetted land, be it the entire land or the main homestead, who continues to occupy, hold and use such land without lawful authority shall be guilty of an offence. Section 3(3) captures two scenarios: (1) where a former owner or occupier may continue to occupy, hold and use the entire gazetted land (including the ^F main homestead) and (2) where a former owner or occupier has ceased to occupy, hold and use the rest of the land and has confined himself or herself to the main homestead. In the first case, the owner or occupier would be in possession of the entire farm. In the second case the owner or occupier would be in possession of the main homestead only after having voluntarily ^G relinquished possession of the rest of the farm. In either case, the owner or occupier can only lose possession upon conviction and the issuance of an eviction order by the magistrates court.

It is my view that the cases referred to by Mr *Mlotshwa* do not assist the second respondent. It appears to me that *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors supra* and *Airport Game Park (Pvt) Ltd & Anor* ^H

2009 (1) ZLR p157

Chatukuta J

A v Karidza & Anor supra are distinguishable from the present case. In the first case, the appellant had sought an interim interdict against the State from proceeding with the compulsory acquisition of the appellant's land. In the second case the appellant sought an order for the ejectment of the first respondent from a farm that had been acquired by the State. In both cases, the appellants were required to establish the existence of some right. In the ^B case of spoliation, as indicated earlier, the applicant need only establish peaceful and undisturbed possession.

It is therefore my considered view that the applicant has the *locus standi* to bring this action. The second preliminary issue is premised on more or less the arguments advanced in support of the first issue. I find that I have ^C jurisdiction to hear the matter for the same reasons advanced above.

Turning to the merits, the definition of spoliation and the requirements for an order for spoliation have already been discussed above. The parties are agreed that the applicant was in peaceful and undisturbed possession of the farm. It is not in issue that the second respondent is in occupation of the ^D farm. Mr *Mlotshwa* has attempted to discredit the application. He submits that the applicant has not placed before the court proof that there had been some disturbances on the farm. He suggested that this would have been achieved by way of an affidavit by the person who witnessed the disturbances as the applicant was not at the farm at the relevant time. I am of the view that this is a red herring, as the second respondent has conceded in the ^E opposing affidavit and heads of argument that the applicant was in peaceful and undisturbed possession of the farm and was dispossessed by operation of law. The import of this concession is that the applicant's possession was disturbed. It is irrelevant whether or not the disturbance was peaceful or as a result of the youths whom applicant alleges locked him out of the property.

^F What in my view is in issue is whether or not the second respondent deprived the applicant of the possession wrongfully. Mr *Nyandoro*, for the applicant, submits that respondent deprived the applicant of his possession wrongfully, in that the due process prescribed in the Gazetted Land Act was not followed. The applicant does not dispute that the offer letter is lawful authority for the second respondent to take occupation. It is contended, however, that it must ^G be implemented lawfully.

Mr *Mlotshwa* contends that the second respondent is in lawful possession by operation of law. He submits that the second respondent was at all times acting lawfully in terms of the offer letter lawfully issued to him by the first respondent. It was further contended that the Gazetted Lands Act permits only ^H those persons with lawful authority to occupy, hold and use gazetted land.

2009 (1) ZLR p158

Chatukuta J

The applicant did not have the authority prescribed in the Gazetted Lands ^A Act to occupy, hold or use the farm. The second respondent is a holder of an offer letter. His attempt to occupy and use

the land cannot therefore be said to be unlawful. Mr *Mlotshwa* submitted that the offer letter was therefore a valid defence to spoliation.

It is my considered view that an offer letter cannot be a defence because of ^a the requirements of s 3(5) of the *Gazetted Lands Act*. As rightly conceded by both parties, s 3(1) of the Act precludes any person from holding, occupying or using gazetted land without lawful authority. An offer letter is such authority. It appears to me that in order for the recipient of the offer letter to enjoy occupation and use of that land he must have vacant possession. Vacant possession can only be achieved where the due process of law set ^c out in section 3(5) of the Act is followed. Section 3(5) clearly provides that upon conviction of a person who has violated the provisions of the *Gazetted Lands Act*, the court shall issue an order to evict the person convicted from the land to which the offence relates. It appears to me that until that is done, a former owner or occupier of gazetted land cannot be dispossessed, whether or not his or her possession of the land is lawful. ^d

Earlier on I alluded to Mr *Mlotshwa*'s submissions that the applicant is entitled to protection only in so far as the protection relates to the main homestead. It is my view that the main homestead cannot be separated from the entire farm by an order of this court. It is an integral part of the farm. The gazetted land is 8 Welston Farm in the district of Mashonaland. There has not been ^e any subdivision such that the main homestead stands alone. The homestead still constitutes Subdivision 8 of Welston. The second respondent's proposed draft order seems to acknowledge this fact. The draft order reads:

"Pending Applicant's eviction, by a competent Court, from Subdivision 8 of Welston, it is hereby declared that Applicant and/or his invitees is (*sic*) entitled to confine his and /or their presence on the said farm to the main homestead..." ^f

The draft order does not state that the applicant will be evicted from the main homestead. Had the position been that the applicant was dispossessed of the rest of the farm, excluding the main homestead, by operation of law, then the second respondent would have been seeking an order for the eviction of the applicant only from the homestead. The effect of the second ^g respondent's contention is that the applicant was evicted from the rest of the farm (excluding the main homestead) by operation of law. Had this been the intention of the legislature, it appears to me that the *Gazetted Lands Act* would have specifically stated so.

I am of the view that the applicant has established his case, on a balance of probability, that the *status quo ante* should be restored. The restoration of ^h

2009 (1) ZLR p159

Chatukuta J

^a the *status quo ante* in my view entails the removal of the second respondent from the farm. In this respect, the decision in *Airport Game Park (Pvt) Ltd & Anor v Karidza & Ors supra* would not apply. I however believe that, as the Zimbabwe Republic Police is not before me, it is not proper to order their involvement in the eviction of the second respondent.

^b In the result, it is ordered that:

Pending the determination of this matter, the applicant is granted the following relief, that:

1. The applicant's possession, use and occupation of 8 Welston Farm in the district of Mashonaland East Province be and is hereby restored, so ^c that the *status quo ante* is achieved.
2. The second respondent and all persons claiming occupation and possession through him be and are hereby ejected from 8 Welston Farm in the district of Mashonaland East Province.

Musunga & Associates, applicant's legal practitioners

^d *Civil Division, Attorney General's Office*, first respondent's legal practitioners

Antonio, Mlotshwa & Co, second respondent's legal practitioners

Document 24 of 52**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/MASHONALAND TURF CLUB v NYAMANGUNDA 2009 (1) ZLR 160 (H)

MASHONALAND TURF CLUB v NYAMANGUNDA 2009 (1) ZLR 160 (H)**2009 (1) ZLR p160**

Citation	2009 (1) ZLR 160 (H)
Case No	Judgment No. HH-21-09
Court	High Court, Harare
Judge	Mtshiya J
Heard	13 November 2008; 28 November 2008; 23 December 2008
Judgment	4 March 2009
Counsel	<i>D Halimani</i> , for the plaintiff <i>S Mawere</i> , for the defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Clubs and voluntary associations – *capacity to institute legal proceedings – rules of club not followed – proceedings void*

Practice and procedure – *parties – voluntary association – club – capacity to institute legal proceedings – rules of club not followed – proceedings void* ^D

Headnote

The plaintiff club wished to sue for the eviction of the respondent from portion of its premises. In terms of its rules, the plaintiff could sue and be sued in its own right provided it had the necessary authority granted under the relevant clause. The defendant raised the question of whether the plaintiff was properly before the court, as it had not followed its own ^E rules relating to the institution of legal proceedings.

Held, that while the plaintiff had capacity to institute legal proceedings, it did not comply with its own rules in order to be able to acquire the capacity to institute these particular proceedings. Failure to adhere to existing and established procedures in any operating system negates the whole purpose ^F of ever putting the procedures in place. The plaintiff's failure to comply with the relevant provisions of the rules meant that, in law, the plaintiff never instituted any legal proceedings at all against the defendant. This procedural irregularity was fatal and accordingly the plaintiff was not properly before the court. The proceedings were a nullity. ^G

Case referred to

Mugwebie v Seed Co Ltd & Anor 2000 (1) ZLR 93 (S)

Case information

D Halimani, for the plaintiff

S Mawere, for the defendant ^H

Mtshiya J

Judgment

A **MTSHIYA J**: This is an action for the eviction of the defendant *and* all those claiming occupation through her from the plaintiff's premises situate at the Borrowdale Park Race Course, Harare.

It is common cause that on 23 April 2007 the plaintiff entered into a lease agreement with a company called Lunar Graphics Products (Pvt) Ltd (Lunar B Graphics). The plaintiff was represented there in by Mr Howard Mukundu (Mr Mukundu), who gave evidence *in casu*. Clause 6 of the lease agreement allowed the lessee to sublet part of the premises to a licensed bookmaker, such as the defendant.

On 31 January 2007 the plaintiff, represented by a Mr Shingirai Tanyanyiwa, c entered into an agreement of lease which, in clause 1, provided as follows:

"The lessor hereby lets and the subtenant hereby hires a portion of the lessor's property commonly known as the Zimbabwe Betting and Sport at the Borrowdale Park Race Course".

The defendant signed the agreement as "the sub-tenant". The 12 months agreement, which commenced on 1 January 2007 was, in terms of clause D 3 thereof, renewable.

It is not clear whether, in entering this agreement directly with the defendant, the plaintiff was doing so on behalf of Lunar Graphics in terms of clause 6 of the agreement signed between the plaintiff and Lunar Graphics on 23 April 2007. The agreement between the plaintiff and the defendant is silent E on that aspect. However, in paras 4.1 and 4.2 of its declaration the plaintiff states as follows:

"4.1. Accordingly on the strength of clause 6.1 of the lease agreement Lunar Graphics Products (Pvt) Ltd sublet the premises to the defendant.

4.2. Further to the above referred sublease agreement between Lunar Graphics Products (Pvt) Ltd and the defendant, the plaintiff formally acknowledged F the subtenant through a memorandum signed to that effect. A copy of the memorandum is hereto attached for case of reference marked as 'B'."

On 27 August 2007 the plaintiff gave Lunar Graphics notice of termination of the agreement of 23 April 2007. Lunar Graphics duly vacated the plaintiff's premises on 31 December 2007.

G On 29 August 2007, two days after signing the notice to Lunar Graphics, the plaintiff also gave notice to the defendant in the following terms:

"Att: Michelle Nyamangunda
Borrowdale Park Race Course
Box 376
Harare
H Dear Madam

Mtshiya J

Re: Termination of sub-lease A

Please be advised that three months notice to terminate the principal lease agreement between Mashonaland Turf Club and Lunar Graphics has been given. The notice period shall run from the 1st September 2007 and shall terminate on the 30th November 2007. You are accordingly expected to vacate the property on or before 30th November 2007 following the termination of the principal lease. The three calendar months notice period is in line with clause 14 of the B sub-lease agreement.

Should you have any queries concerning the contents of this letter, please kindly contact the undersigned within the next few days so that any issues arising may be discussed.

Yours faithfully
S. TANYANYIWA c
Mashonaland Turf Club"

The defendant did not comply with the above notice and on 28 September 2007 she wrote to the plaintiff in the following terms:

"Mashonaland Turf Club
Borrowdale Race Course D

Borrowdale
HARARE
ATTENTION: MR S TANYANYIWA
Dear Sir

REF: RENEWAL OF SUBLEASE AGREEMENT

In terms of Clause 3.1. of our Lease Agreement, I hereby notify you of our intention to renew our Sub Lease Agreement for another year to run from 1 January 2008 to December 2008.

Yours faithfully
M Nyamangunda
Bookmaker"

The above letter was followed by another one from the defendant's legal practitioners dated 27 November 2007. The letter was for the attention of Mr Mukundu and it read as follows:

"Dear Sir

Re: MICHELLE NYAMANGUNDA: TERMINATION OF SUB-LEASE

We refer to the above matter. We thank you for furnishing us with the various documents which we had requested to enable us to respond to your letter to our client dated 29 August 2007. This is our response:

- 1 Contrary to what is stated in your letter aforesaid, our client's occupation of the premises namely the premises commonly known as the Zimbabwe Betting and Sport at Borrowdale Park Race Course is not in terms of any sub-lease with Lunar Graphics. It is actually in terms of an agreement of lease between yourselves and our client. We attach hereto a copy of the

2009 (1) ZLR p163

Mtshiya J

A said agreement of lease for your information.

2. It is clear in the premises that our client's rights in the lease agreement do not flow from any sub lease with Lunar Graphics but from the lease with yourselves. In the premises whether or not the lease agreement between yourselves and Lunar Graphics has been terminated or is being terminated, is not a factor in determining our client's right to occupation of the premises.
3. The lease agreement that you have with our client is for a specific period of twelve months terminating on 31 December 2007. At the expiry of the lease agreement our client has an option to renew for a further year commencing on 1 January 2008 to 31 December 2009. Our client has already given your notice of her intention to exercise her right to renew the lease agreement. A copy of her letter to yourselves dated 28 September 2007 is attached hereto for ease of reference.
4. As far as our client is concerned, clause 14 which provides for the termination of the lease agreement on three calendar months' notice contradicts the provisions of clauses 2 and 3 of the same lease. Clause 14 is therefore clearly not enforceable in the premises.

In the premises, our client does not recognise your notice as valid. Our client will therefore not be vacating the premises as demanded by yourselves on the 30 November 2007. Any action which you may want to take to eject our client from the premises will be strongly resisted. To that end we write to advise that we have the authority to receive service of summons on our client's behalf should you think of suing her for eviction.

Yours faithfully
Mawere & Sibanda
T. Mawere"

The defendant's position reflected in the above letter is what led to the issuance of a summons by the plaintiff on 21 January 2008 claiming:

- (a) That defendant and all those claiming right of occupation through her be evicted from plaintiff's premises within seven days from the date of this order being served upon her.
- (b) That plaintiff shall be entitled to holding over damages from 1 January 2008 to the date of vacation (*sic*)
- (c) Interest in the sum calculated in (b) above at the prescribed rate from 1 January 2008 to the date of payment.
- (d) Costs of suit at the attorney and client scale".

Before and during the trial the defendant raised a preliminary issue. The issue, which is incorporated in the joint pre-trial conference minute, is:

"Whether or not the plaintiff is properly before the court".

In support of the point *in limine*, Mr *Mawere* for the defendant submitted that the defendant had raised the preliminary issue before the commencement of ^h the trial and during the trial. He said whereas the plaintiff had the capacity

2009 (1) ZLR p164

Mtshiya J

to sue, the issue *in casu* was whether or not the plaintiff was properly ^a before the court and/or was the plaintiff indeed being represented by the persons empowered to institute or defend legal proceedings on its behalf. He said the plaintiff had failed to comply with the provisions of clause 6 of its own Rules and Bye-Laws (the Rules). There was no resolution from the plaintiff confirming that those instituting legal proceedings had its authority ^b as required by clause 6 of the plaintiff's Rules. Furthermore, the plaintiff's representative, Mr Mukundu, had confirmed under oath that he was neither a trustee nor steward.

Mr *Mawere* pointed out that in *Mashonaland Turf Club v Dunvale Investments (Pvt) Lrd* HC 1013/08 the court had not at all dealt with the issue of whether or not the plaintiff was properly before the court. The issue was not before ^c the court then. He urged the court not to rely on that case for its ruling. The plaintiff, he argued, had failed to demonstrate through evidence that it was properly before the court. This was so despite the fact that the plaintiff had ample time to do so. He therefore urged the court to dismiss the plaintiff's claim on the ground that it was not properly before the court. ^d

In response to the defendant's submissions on the preliminary issue, Mr *Halimani*, for the plaintiff, argued that the plaintiff, a voluntary association, had legal capacity to institute and defend proceedings in court. He said the plaintiff had recently done so in the recent case (i.e. *Mashonaland Turf Club v Dunvale Investments (Pvt) Ltd* HC 1013/2008 where Makarau JP had disregarded that argument. He therefore urged the court to be guided ^e accordingly.

I shall start by confirming that a reading of Makarau JP's judgment in *Mashonaland Turf Club v Dunvale Investments (Pvt) Ltd* does not reveal that the same issue before me was raised. I can only assume that the decision to proceed in that case was based on the fact that the plaintiff has capacity ^f to institute legal proceedings. In the absence of a challenge such as the one before me, I have no reason to question whether or not clause 6 in that case was complied with.

Clause 6 of the plaintiff's rules spells out how that capacity can actually come by. The said clause 6 provides as follows: ^g

"Legal Proceedings

The club may sue and be sued in any court of Law in its name. It shall be represented in any legal proceedings by the Trustees for the time being, who shall have power to institute and defend any legal proceedings on behalf of the club when authorised to do so by the stewards."

My reading of clause 6 of the plaintiff's rules, as read together with clauses ^h

2009 (1) ZLR p165

Mtshiya J

^a 22 to 24 therein, leaves me with no doubt that the plaintiff did not comply with its own Rules in order to be able to acquire capacity to institute these proceedings. The power of stewards is spelt out in clauses 22 to 24. Clauses 22 to 24 provides as follows (i.e. relevant portions of the sections):

- "22. The Stewards shall in addition to the powers and authorities by these Rules specially conferred upon them have the entire management and control of ^b all the affairs of the Club, but subject to any resolution passed at a general meeting of members enjoying voting rights, PROVIDED that no resolution of the members enjoying voting rights in general meeting shall invalidate any prior act of the Stewards which would have been valid if such resolution had not been passed.
- 23. Without prejudice to the general powers conferred by the last preceding ^c clause and the powers conferred by these presents, it is hereby expressly declared that the Stewards shall have the following powers, that is to say:
 - (a) ...
 - (b) ...
 - (c) ... ^d
 - (d) ...
 - (e) ...

- (f) To institute, conduct, defend, compound or abandon any legal proceedings by and against the Club or its officers or otherwise concerning the affairs of the Club.
- (g) To authorise the execution of all deeds, powers of attorney and other documents for and in the name of the Club which they may from time to time think necessary, PROVIDED, however, that every instrument executed on behalf of the Club shall be signed by the Chairman or the Deputy Chairman, or another Steward, duly authorised thereto by a meeting of the Stewards, and by the Secretary of the Club or such other executive officer appointed in terms of Rule 26 hereof, who has been duly authorised thereto by a meeting of the Stewards or by some duly authorised person acting in the capacity of either Secretary or of such Executive officer.
- (h) ...
- (i) ...

24, The Stewards shall have the power from time to time to make, amend or repeal any by-laws for giving better effect to any of the Rules of racing, and for regulating their own proceedings as they may deem expedient, PROVIDED that such bye-laws shall not be inconsistent with these Rules or with the Rules and Regulations of the Jockey Club under whose authority and in accordance with whose rules and race meetings and other functions referred to in Rule 52 are held (in these Rules referred to as "The Jockey Club").

There is no argument that, in terms of clauses 6 of its rules, the plaintiff

2009 (1) ZLR p166

Mtshiya J

can sue and be sued in its own right, provided it has the necessary authority granted under that clause.

It is unfortunate that submissions by the plaintiff's counsel on the point *in limine* were primarily based on whether or not the plaintiff could institute legal proceedings in its own name. That was not the issue before me. The issue before me was whether or not in instituting the proceedings before me the plaintiff followed its own rules. The answer is no. All Mr Mukundu could tell the court was that he believed that his Chief Executive, who had authorised him to represent the plaintiff, had authority from the trustees. Under cross-examination, he testified that, although he had not seen the authority from the stewards, he believed it was in existence. He said he had confidence in the systems followed by the plaintiff.

It should be noted that notwithstanding the fact that this issue was raised before the trial commenced, Mr Mukundu maintained that the authority for him to proceed with the legal action "was at the office". In the circumstances, I am satisfied that no such authority ever existed. Mr Mukundu and his Chief Executive were not trustees. They were acting on their own and therefore outside the requirements of clause 6 of the plaintiff's own rules. This finding invalidates the proceedings before me. The finding also disables me from proceeding to consider the merits of the case.

The plaintiff has a clear procedure that it set for itself regarding instituting legal process. The plaintiff has, *in casu*, violated its own procedures. Setting out clear procedures regarding the process of instituting legal proceedings is a highly commendable action by the plaintiff, but violating these same procedures is legally deplorable. The purpose of setting them is lost.

I find Sandura JA's finding in *Mugwebie v Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S) applicable to this case. This was a finding made in a labour dispute where the employer, in suspending an employee, had failed to follow its own code of conduct. For the sake of clarity, I quote here below extensively from Sandura JA's judgment at 96-97.

"In the first place, the appellant was suspended by the company's marketing manager who was not the company's designated officer. This was in breach of para 4.2. of the code, which provides that it is the designated officer who suspends an employee whom he suspects to have committed an offence. It should be noted that in terms of para 4.2 of the code the power to suspend an employee only arises when the penalty for the alleged offence is dismissal. In terms of Part IV of the code the penalty for fraud is dismissal.

Secondly, Mr Mupotaringa was appointed the company's designated officer and instructed to proceed against the appellant on 5 March 1999, about four months after the appellant had been suspended by the company's marketing manager.

2009 (1) ZLR p167

Mtshiyi J

A He should have been appointed before the appellant was suspended. In fact, in terms of para 4 of the code, no disciplinary proceedings can be instituted against any employee unless it appears to a designated officer that the employee in question has committed an offence. Even then, it is the designated officer, and no-one else, who is empowered by the code to notify the employee in writing of the nature of the alleged offence and the impending investigations. And it is B he, and he alone, who is empowered to suspend the employee and determine whether such suspension is with or without pay, where the penalty for the alleged offence is dismissal.

The question which now arises is whether the appellant's suspension was valid. There is no doubt in my mind whatsoever that it was null and void. It was a complete nullity. I can do no better than quote what Lord Denning said in C *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172:

'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. *There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so.* And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse' (emphasis is mine).

D In my view, these comments apply to the facts of the present case with equal force. The suspension of the appellant was a nullity and all the subsequent proceedings were of no force or effect. It is, therefore, unnecessary to consider the effect of the failure to give a decision within fourteen days.

As the appellant's suspension was a nullity, there was really no need for a court order to set it aside, though it was convenient to have the court declare it null E and void so that the parties knew their respective positions".

In my view, the above case emphasizes the importance of adhering to existing and established procedures in any operating system. Failure to do so negates the whole purpose of ever putting the procedures in place.

Applying the above principles of law to the case before me, it is clear that F failure to comply with clause 6 of its rules as read together with the relevant parts of clauses 22, 23 and 24, means that, in law, the plaintiff never instituted any legal proceedings at all against the defendant.

The procedural irregularity *in casu* was therefore fatal and accordingly the plaintiff is not properly before the court. Even if one were to invoke the principle of substantial compliance, the plaintiff's omission cannot be G saved. The proceedings are a nullity. As already stated, I cannot, under the circumstances, proceed to deal with the merits of the case.

The plaintiff's claim is dismissed with costs.

Wintertons, plaintiff's legal practitioners

H *Mawere & Sibanda*, defendant's legal practitioners

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Document 25 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/KWINDIMA v MVUNDURA 2009 (1) ZLR 168 (H)

KWINDIMA v MVUNDURA 2009 (1) ZLR 168 (H)

2009 (1) ZLR p168

Citation	2009 (1) ZLR 168 (H)
Case No	Judgment No. HH-25-09
Court	High Court, Harare
Judge	Makarau JP

Heard	23 February 2009
Judgment	4 March 2009
Counsel	<i>O Mutero</i> , for the plaintiff <i>A Nyamupfukudza</i> , for the defendant
Case Type	Civil action
Annotations	Link to case annotations

Flynote

Practice and procedure — *judgment — currency in which judgment may be expressed — judgment may be expressed in currency which will redress loss suffered — local currency rendered worthless due to inflation — D appropriate to give judgment in foreign currency*

Headnote

The plaintiff sought damages arising out of the failure of the defendant to transfer to her certain immovable property. A valuator fixed the value of the property in US dollars. It was argued that the United States ^E dollar and other foreign currencies from the region had become the *de facto* currencies of Zimbabwe, the local currency having been rendered valueless by inflation. The issue was whether a claim for damages may be redressed in foreign currency where it has been felt in both the local and the foreign currency but the local currency has been ravaged by inflation and is *de facto* valueless. ^F

Held, that where a loss has been suffered and can be calculated in both the local and in a foreign currency, the court has a discretion to award judgment in the currency that will redress the injury suffered and adequately compensate the plaintiff for the loss. Where that currency is the foreign currency as opposed to the local currency, then judgment should be in ^G the foreign currency, as to award damages in the local currency, where the local currency has been rendered valueless by inflation, might be to deny the plaintiff the redress that he seeks.

Cases cited

Elgin Brown & Hamer (Pvt) Ltd v Dampskibsselskabet Torm Ltd 1988 ^H

2009 (1) ZLR p169

Makarau JP

^A (4) SA 671 (N)

Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe 1988 (2) ZLR 482 (SC)

National Food Distributors v Weltman 1985 (2) ZLR 310 (H)

Owners of the MV Eleftherotria v Owners of the MV Despina R [1979] 1 All ER 421 (HL)

Case information

^B *O Mutero*, for the plaintiff

A Nyamupfukudza, for the defendant

Judgment

MAKARAU JP: The plaintiff issued summons against the defendant on 19 May 2007, seeking an order for the payment of damages in the sum of ^C \$20 billion. In her declaration, she averred that she had purchased from the defendant certain immovable property situate in the district of Kariba for the sum of \$180 billion, which she paid in full. At the time of the agreement of sale, the defendant had already sold the same property to a company going by the name of Woolwork

Investments (Pvt) Ltd. On account of this prior sale, ^D the plaintiff further averred that the sale to her was a fraud as the defendant knew he had disposed of his rights in the property and had none to sell to the plaintiff. Thus, she claimed damages from the defendant.

The claim was defended. The matter proceeded to a pre-trial conference where, due to the plea that had been taken by the defendant, the issues for ^E trial were settled as follows:

1. whether the plaintiff and the defendant entered into an agreement of sale in respect of House No 52 Beira, Mahombekombe, Kariba;
2. whether the defendant breached the agreement of sale by failing to transfer the property to the plaintiff;
3. whether as a result of the breach, the plaintiff is entitled to consequential ^F damages and if so, the quantum thereof;
4. whether the plaintiff is entitled to costs on a legal practitioner and client scale.

At the trial of the matter, the parties advised that the defendant was no longer defending the claim and that the sole issue that fell for determination in this ^G matter is the quantum of damages due to the plaintiff. The parties further narrowed down the issue between them to one of establishing the current market value of the property. The defendant agreed that such would represent the quantum of damages due to the plaintiff.

It is pertinent at this stage to note that prior to the matter being set down for ^H hearing, the plaintiff had applied to amend her declaration to increase the

2009 (1) ZLR p170

Makarau JP

amount of damages sought to US\$35 000. No objection having been raised ^A against the amendment, I duly granted it with the consent of the defendant.

The plaintiff called the evidence of one Emmanuel Mutambirwa. He is employed by the City of Harare as a Chief Valuations Officer. He holds a diploma in quantity surveying, a Bachelor of Banking and Commerce degree and an MBA, amongst his qualifications, all of which are set out in the report ^B that he compiled on the value of the property in dispute. In or about October 2008, he visited the property in question and formed the opinion as to the value of the property. He revisited his opinion on 12 February and taking into account the trends in the property market, revalued the property at US\$35 000.

The witness, who in my view is well qualified to give values of properties, ^C gave his evidence well. He was understandably excited at having to be the first to testify in the matter and at times would be unnecessarily argumentative in his responses to questions put to him in cross-examination. All in all, I have little difficulty in accepting that he gave me his honest opinion on the value of the property in dispute. ^D

The defendant also testified as to the value of the property.

He averred that he purchased the property from his employer on a date that he cannot recall for the sum of \$150 000. In his opinion, if he were to sell the property on the date of the trial, he would not ask for more than US\$5 000.

Clearly the defendant is not an expert in the field and his opinion as to the ^E value of the property is of marginal probative value.

The issue that has exercised my mind in this matter is not so much the current market value of the property in dispute but rather, whether in the circumstances of this matter, I can award damages sounding in foreign currency. In his address, Mr *Mutero* for the plaintiff was of the view that I can, following the decision in *Makwindi Oil Procurement (Pvt) Ltd v F National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC). On his part, Mr *Nyamupfukudza* for the defendant confined himself to arguing that the plaintiff had not sufficiently proved her claim.

Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe was a ground breaking decision, seeking to reconcile two conflicting ^G judgments of this court. In 1985 Mfalila J in *National Food Distributors v Weltman* 1985 (2) ZLR 310 (H) had held that, in the face of exchange control restrictions, Zimbabwean courts could not freely give judgments in foreign currency, even where

the proper law of contract is foreign law. Anyone seeking redress in Zimbabwean courts would have to state their claim and have their judgment in Zimbabwean currency. In 1988 Adam J ^H

2009 (1) ZLR p171

Makarau JP

A took a different position in the *Makwindi Oil Procurement Company* matter, a decision that was then taken on appeal.

After reviewing the trend in English and South African cases on the issue, Gubbay CJ was of the view that, in the absence of any legislative enactments which require our courts to order payment in local currency only, the B innovative approaches taken in England and in South Africa, in making orders in foreign currency, had to be adopted. This would bring Zimbabwe into line with many foreign legal systems.

Specifically regarding the award of damages in foreign currency, the learned Chief Justice appears to have fully endorsed the approach taken by the House of Lords in two appeals, held concurrently, where they were unanimous that C the approach taken earlier would also apply to claims for damages.

In allowing the appeal that was before them, Gubbay CJ held, on the facts of the matter before the court, that the plaintiff, a company that conducted business in this country and was subject to exchange control regulations, and had to purchase its foreign currency using local currency, had failed to D persuade him that its loss was in United States dollars. He was of the view that the loss of foreign currency was felt or borne by the national foreign currency reserve and not by the plaintiff itself.

From his judgment, it appears to me that Gubbay CJ was approving the approach by Lord Wilberforce in *Owners of the mv Eleftherotria v Owners E of the mv Despina R* [1979] 1 All ER 421 (HL) at 427d where he stated:

"It appears to me that a 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 F which his loss is felt, and is the currency which it is reasonably foreseeable he will have to spend."

In the same year that the Supreme Court handed down its judgment in the *Makwindi* case, a similar approach was taken in South Africa in *Elgin Brown and Hamer v Dampskibsselskabet Torm (Pty) Ltd* 1988 (4) SA 671 (N). G After citing the passage I have cited above from the *Despina R* case, Leon J proceeded to hold that the court has a discretion which currency to award the judgment in and, with refreshing clarity, had this to say about claims for damages at 674G:

"Where a loss is in fact suffered in a foreign currency there is, as I see it, no reason not to assess and quantify the damages in that currency — indeed not to H do so might be to deny a plaintiff the amount of his actual loss."

2009 (1) ZLR p172

Makarau JP

In the matter before him, the learned judge observed that the main heads A under which the loss was suffered by the plaintiff were either in the sense of money actually expended or money not received. These amounts were all in foreign currency and, in the opinion of the learned judge, the plaintiff's loss was felt in foreign currency. That being so, the only way the plaintiff could be compensated properly for its loss was to grant judgment in foreign currency. B

A review of the authorities on the matter appears to me to indicate that, where there is no statutory bar, the courts can award judgments sounding in foreign currency. For damages claims, the plaintiff must prove that his or her loss was suffered in foreign currency or, put in the language of Leon J in the *Elgin Brown* case, the plaintiff must prove that he or she felt the loss in a foreign currency. C

In casu, the plaintiff has approached the court for damages arising out of the failure of the defendant to transfer to her certain immovable property. I am persuaded that the property may command a purchase price of the amount of the claim by the plaintiff. However, it has not been argued before me that the property does not have a value in local currency. I would want to D believe that it still has but as implicit in Mr *Mutero's* submissions, the United States dollar and other

foreign currencies from the region have become the *de facto* currencies of Zimbabwe. The local currency has been rendered valueless by inflation.

In my view, the facts of this matter and the challenges posed by the hyperinflationary environment under which Zimbabweans now find ^ε themselves operating present a *res nova* that was not envisaged by the decisions that I have referred to above. The issue that arises is whether a claim for delictual damages may be redressed in foreign currency where it has been felt in both the local and the foreign currency but the local currency has been ravaged by inflation and is *de facto* valueless. ^ϕ

The authorities seem to suggest that where the loss has been suffered in a particular currency, there is no good reason why the court should not award damages in that currency. They do not seem to me to proceed further to hold that where a loss has been suffered, the plaintiff may choose that currency in which he or she would like the loss to be redressed.

In my view, the facts of this matter present a situation where a loss has ^g indeed been suffered. The loss so suffered has been calculated in one foreign currency as opposed to the local currency for the reasons given by Mr *Mutero*.

It appears to me that the issue I have to determine is whether to extend the approach that has been taken in the *Makwindi* case and be innovative to enough to suggest that where a loss has been suffered and can be calculated ^h

2009 (1) ZLR p173

Makarau JP

^a in both the local and in a foreign currency, the court has a discretion to award judgment in that currency that will redress the injury suffered and adequately compensate the plaintiff for the loss. It would then follow that where that currency is the foreign currency as opposed to the local currency, then judgment should be in the foreign currency, for to award damages in the local currency, where the local currency has been rendered valueless by ^b inflation, might be to deny a plaintiff the redress that he or she seeks.

I must confess that I find this approach attractive. It is not in violation of any statutory provision governing exchange control. It does not render the local currency any less legal tender than do other judgments expressed in foreign currency. It is simply an act of applying the approach to a situation ^c that has arisen due to the ravages of inflation and one that could not have been anticipated when the *Makwindi* case was decided. Like the Law Lords in 1975, I am merely opting for a more realistic approach to the current economic conditions prevailing in the country and, as Gubbay CJ observed in the *Makwindi* case at 492B:

“That the majority of the Law Lords succeeded in surmounting [such] an obstacle ^d and opted for a more realistic approach to modern economic conditions, is strongly illustrative of the concept, never to be overlooked, that the law is a living system that adapts to the necessities of present times and is to be given new direction where on principle and in reason it appears right to do so.”

In the result, I make the following order:

^ε Judgment with costs is hereby entered for the plaintiff in the sum of US\$35 000.

Sawyer & Mkushi, plaintiff’s legal practitioners.

^ϕ *Phiri & Partners*, defendant’s legal practitioners.

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Document 26 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/NYIKADZINO v ASHER & ORS 2009 (1) ZLR 174 (H)

NYIKADZINO v ASHER & ORS 2009 (1) ZLR 174 (H)

2009 (1) ZLR p174

Citation	2009 (1) ZLR 174 (H)
Case No	Judgment No. HH-36-09
Court	High Court, Harare
Judge	Makarau JP
Heard	12 March 2009
Judgment	13 March 2009
Counsel	<i>G Mlotshwa</i> , for the applicant <i>G Nyandoro</i> , for the first, second and third respondents <i>C Parenyi</i> , for the fourth respondent
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

Appeal – leave – when required – provisional order – leave to appeal required – spoliation order – not necessarily a final order – when granted as a provisional order, leave to appeal required

Headnote

The applicant was the second respondent in an application for a spoliation ^D order (see *Asher v Min of State for Lands & Anor* HH-34-09, reported at p *** of this volume). He noted an appeal against the grant of the order. The first respondent (the applicant in the previous case) instructed the Deputy Sheriff to enforce the provisional order restoring possession of the farm to him, having been advised that the appeal noted in the ^ESupreme Court was a nullity, as prior leave to appeal had not been obtained as required by s 43(2)(d) of the High Court Act [*Chapter 7:06*], and in view of the fact that the provisional spoliation order issued was a simple interlocutory order.

The applicant urgently sought an order staying execution of the provisional order pending determination of the appeal. It was argued on his behalf ^F that the order, although granted as a provisional order, was final in effect. Secondly, it was argued that the granting of the order had the effect of assisting the first respondent to remain in occupation of the farm in violation of a specific provision of the law regulating land acquisition and reform. The issue was whether or not the spoliation order was a final ^G order, thereby obviating the need for the applicant to apply for leave before noting an appeal in the matter.

Held, that a provisional order granted under the Rules is always subject to confirmation or discharge before it becomes final. Confirmation or discharge is in open court and is on a balance of probabilities. In a provisional order, the power of the court to vary, discharge or confirm its ^H

2009 (1) ZLR p175

Makarau JP

^A earlier decision is reaffirmed, in that it calls upon the respondent to show cause why the provisional order may not be confirmed. A provisional order cannot be final in its effect. The order previously granted, although it pronounced on the right to possession and the unlawfulness of the applicant's actions, did so only on a *prima facie* basis. The applicant was ^B not precluded from mounting a challenge to the court's findings upon the matter being set down for the confirmation and discharge of the order.

Cases cited

Mankowitz v Lowenthal 1982 (3) SA 758 (A)

van Rooyen v Burger 1961 (1) SA 154 (O)

Legislation considered ^c

High Court Act [Chapter 7:06], s 43(2)(d)

High Court Rules 1971 (RGN 1047 of 1971), r 246(2)

Case information

G Mlotshwa, for the applicant

^d *G Nyandoro*, for the first, second and third respondents

C Parenyi, for the fourth respondent

Judgment

MAKARAU JP: The applicant and the first respondent were before this court on 18 February 2009. Then their roles were reversed. The first respondent ^e was applicant in a matter in which, on 26 February 2009, this court issued a provisional order in his favour, restoring occupation of certain farming land to him, occupation of which had been forcefully taken by the applicant.

The facts giving rise to the dispute between the parties are common cause. I set them out as follows. The first respondent carries on farming on 8 Welston farm in Mashonaland East. The farm was gazetted by the Government under ^f the land acquisition programme. In due course, occupation of the farm was granted to the applicant under an offer letter. Despite the gazetting of the farm, the first respondent did not vacate the farm after the expiry of the periods set out in the law. On 5 February 2009 the applicant approached the farm in the company of others and took occupation of the farm during the absence of ^g the first respondent. It was on this basis that the first respondent approached this court, claiming that he was in peaceful possession of the farm prior to the applicant's occupation and had thus been despoiled. This court, having heard argument in the matter, issued an order as follows:

"Pending the determination of this matter, the applicant is granted the following relief, that: ^h

1. The applicant's possession, use and occupation of 8 Welston Farm in the

2009 (1) ZLR p176

Makarau JP

District of Mashonaland East Province be and is hereby restored, so that ^a the *status quo ante* is achieved.

2. The second respondent and all persons claiming occupation and possession through him be and are hereby ejected from 8 Welston Farm in the District of Mashonaland East Province."

Unhappy with the order of the court, the applicant filed an appeal with the ^b Supreme Court challenging the correctness of the provisional order issued on certain grounds that are not material to this decision. In noting the appeal, the applicant formed the very firm view that the provisional order issued by this court was in the nature of a final order, and thus the provisions of the law requiring leave before an appeal can be noted against an interlocutory order did not apply. Notwithstanding the noting of the appeal, the first ^c respondent instructed the Deputy Sheriff to enforce the provisional order restoring possession of the farm to him. He was advised that the appeal noted in the Supreme Court was a nullity, as no prior leave of this court had been obtained, and in view of the fact that the provisional order issued is indeed a simple interlocutory order. Again unhappy with the turn of events, the applicant approached this court on a certificate of urgency, seeking an ^d order staying execution of the provisional order pending determination of the appeal. The application was opposed by the first to third respondents, with the fourth respondent, the Minister of State for Lands and Rural Resttlement, maintaining a watching brief in the matter.

It is not in dispute between the parties that the order issued by this court was ^e provisional. While the written order does not specify that the relief granted is in the interim pending confirmation or discharge of the provisional order, the parties understand it in this light. The difficulty that the applicant has in the matter is two fold. Firstly, he is of the view that the order, although granted as a provisional order, is final in effect. Secondly, he is also of the view that the granting of the order

has the effect of assisting the first respondent to F remain in occupation of the farm in violation of a specific provision of the law regulating land acquisition and reform.

It is quite clear and not in dispute that the interim order issued by this court on 26 February 2009 was a spoliation order, simply restoring possession of the farm to the first respondent, without going into the merits regarding G lawfulness or otherwise of such possession. In my view, Mr Mlotshwa correctly identified the issue that falls for my determination in this application. It is not whether or not there is an extant appeal before the Supreme Court but whether or not the order granted by this court was a final order, thereby obviating the need on the applicant's part to apply for leave before noting an appeal in the matter. In support of his argument, Mr Mlotshwa makes one H

2009 (1) ZLR p177

Makarau JP

A broad submission. He argues that a spoliation order, by its very nature, is a final order. In reliance, he cites the cases of *Mankowitz v Lowenthal* 1982 (3) SA 758 (A) and *van Rooyen v Burger* 1961 (1) SA 154 (O), authorities that are cited in Silberberg & Schoeman's *Law of Property* 4 ed at p 270.

I am in full agreement with this view.

B It is however worth noting that in the *Mankowitz* case *supra*, the court was dealing with the question of costs that had been reserved for decision in an action involving ownership of certain paintings that were the subject of the dispute between the parties, whose possession had been restored to the applicant in the spoliation proceedings. It was in that context that the court pronounced that spoliation is a final order, and that the question of costs in C the spoliation proceedings should have been determined by the trial court, as there was nothing interlocutory about the order that it had issued. Again it is to be noted that the spoliation order that was appealed against in the *van Rooyen* case *supra*, was clearly a final order granted after a full hearing in the matter.

D The issue that has exercised my mind in this matter is whether a spoliation order granted as interim relief in a provisional order under the rules of this court is a final order for the purposes of s 43(2)(d) of the High Court Act [Chapter 7:06].

It is trite that a provisional order granted under r 246(2) of the High Court Rules, 1971 is granted upon the judge, sitting in chambers, being satisfied that E the papers filed disclose a *prima facie* case. It is also trite that the burden of proof in all civil matters is proof on a balance of probabilities. A provisional order granted under the High Court Rules is always subject to confirmation or discharge before it becomes final. Confirmation or discharge is in open court, and is on a balance of probabilities. In a provisional order, the power F of the court to vary, discharge or confirm its earlier decision is reaffirmed, in that it calls upon the respondent to show cause why the provisional order may not be confirmed.

It is because of the above attributes of a provisional order that I am of the view that orders granted by this court in the form of a provisional order can G hardly be final in their effect. In my further view, a provisional order cannot be the basis of a plea of *res judicata* during the proceedings to confirm or discharge the order. *In casu*, Mr Mlotshwa has sought to argue that the wording of the order granted in this matter makes it final in effect, in that it has already pronounced on the right to possession and the unlawfulness of the applicant's actions. Indeed it has, but only on a *prima facie* basis. The H applicant is not precluded from mounting a challenge to these findings upon

2009 (1) ZLR p178

Makarau JP

the matter being set down for the confirmation and discharge of the order. A He may argue that the first respondent has not proved his entitlement to a spoliation order on a balance of probabilities, or that the applicant has a defence to the application for a spoliation order. No issues are *res judicata* as yet in the matter, and the High Court, in my view, is still seized with the matter and may correct, vary, set aside or confirm its earlier decision. B

On the basis of the foregoing, I am satisfied that the order issued by this court on 26 February 2009 is an interlocutory matter and that the High Court is still seized with the matter. In the result, I make the following order:

1. The application is dismissed.
2. The applicant is to bear the respondents' costs. c

Antonio, Mlotshwa & Co, applicant's legal practitioners.

Musunga & Associates, first, second and third respondents' legal practitioners

Attorney-General's Office, fourth respondent's legal practitioners. d

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Document 27 of 52

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CHITENGWA v MANASE 2009 (1) ZLR 179 (S)

2009 (1) ZLR p179

Citation	2009 (1) ZLR 179 (S)
Case No	Judgment No. S-14-09
Court	Supreme Court, Harare
Judge	Cheda JA, Ziyambi JA & Malaba JA
Heard	2 June 2008
Judgment	16 March 2009
Counsel	<i>E W W Morris</i> , for the appellant <i>R M Fitches</i> , for the respondent
Case Type	Application to file further evidence
Annotations	No case annotations to date

Flynote

Appeal – evidence on appeal – when such evidence may be led – appellant making serious allegations of fraud and dishonesty against respondent – such allegations not made at trial – respondent permitted to lead evidence refuting allegations

Headnote

- d The appellant, in his heads of argument, raised serious allegations of fraud and dishonesty against the respondent, a senior legal practitioner. The allegations had not been made previously. The respondent applied to lead evidence at the appeal to rebut the allegations.
- e *Held*, that the respondent should be allowed to lead such evidence. It would not be appropriate to deprive him of the opportunity to lead the evidence to show, if he so wished, that there was no fraud on his part. It was the appellant who had made the allegations and the new evidence did not prejudice his case in any way.

Cases referred to f

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

Case information

E W W Morris, for the appellant

R M Fitches, for the respondent

Judgment

G CHEDA JA: On the date set for the hearing of this appeal we found that the respondent had filed an application for leave to file further evidence in connection with the matter. After hearing submissions on the application we made an order that the appeal be postponed *sine die* pending our decision on the application. This judgment deals with that application.

H The respondent obtained an order at the High Court for the eviction of the

2009 (1) ZLR p180

Cheda JA

appellant from certain premises which the respondent purchased when the ^A property was sold by the sheriff. The appellant noted an appeal against the High Court's decision on the matter.

Although he had complained earlier about the manner in which the sale and transfer of the property was handled, in his heads of argument for the appeal, the appellant has made allegations of fraud and imputed very dishonest conduct ^B against the respondent. He said the property was transferred into the name of the purchaser, who is a brother of the respondent, before the purchase price was paid. He said the conveyancer appeared before the Registrar of Deeds on 27 November 2001 and the purchase price was only paid on 24 January 2002. He said that fraud was committed and false statements were made to the effect that the price had been paid and secured and the statement ^C was made to mislead and prejudice or potentially prejudice the Sheriff and the creditors of the appellant, as well as the appellant himself. He also said that the price was inadequate. He submitted that proper procedures were not followed.

In response to this, the respondent now seeks leave to file an affidavit from ^D Mr Tanser, a legal practitioner, to give the history of the transaction and how it was conducted, in order to counter the allegation of fraud made against the respondent by the appellant.

The allegations made by the appellant against the respondent, who is a legal practitioner, are very serious. While the respondent may have had this information about the transaction available at the trial, it does not seem to ^E be clear that the appellant, while questioning the transaction, intended to make such serious allegations of fraud against the respondent.

Furthermore, the evidence sought to be led is not intended, as is often the case, to prove or support the case of the respondent concerned, but to rebut the serious allegations made. ^F

The appellant did complain against the Deputy Sheriff's handling of the matter but did not at the time, accuse the respondent of dishonesty and fraud. He has now made very clear accusations, as opposed to a general complaint.

In my mind, it would not be appropriate to deprive the respondent of an opportunity to lead the evidence to show if he so wishes, that there was no ^G fraud on his part. It is the appellant who has made the allegations and I do not think the new evidence prejudices his case in any way.

The points made in the case of *Warren-Codrington v Forsyth Trust (Pvt) Ltd*, 2000 (2) ZLR 377 (S) are, in my view, not exhaustive. The points refer to the appellant's diligence in obtaining the evidence, the credibility of the evidence, the influence on the result of the case and whether conditions ^H

2009 (1) ZLR p181

Cheda JA

^A have since changed after the trial. They do not deal with a situation where one party makes serious allegations of fraud against the other on appeal.

It is mainly for this reason that I consider it appropriate to grant to the respondent leave to file further evidence on appeal, without going into the details of the background as that would entail

going into the merits of the main application.

Accordingly, leave is granted for the respondent's further evidence to be admitted on appeal.

Costs will be costs in the cause.

c ZIYAMBI JA and MALABA JA concurred.

Gill, Godlonton & Gerrans, appellant's legal practitioners

d *Manase & Manase*, respondent's legal practitioners

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Document 28 of 52

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/DODHILL (PVT) LTD & ANOR v MINISTER OF LANDS AND RURAL RESETTLEMENT & ANOR 2009 (1) ZLR 182 (H)

DODHILL (PVT) LTD & ANOR v MINISTER OF LANDS AND RURAL RESETTLEMENT & ANOR 2009 (1) ZLR 182 (H)

2009 (1) ZLR p182

Citation	2009 (1) ZLR 182 (H)
Case No	Judgment No. HH-40-09
Court	High Court, Harare
Judge	Bere J
Heard	10 March 2009
Judgment	16 March 2009
Counsel	Miss <i>F Mahere</i> , for the applicants <i>K Gutu</i> , for the first respondent <i>W Bherebhende</i> , for the second respondent
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

Constitutional law – *Constitution of Zimbabwe, 1980 – Declaration of Rights – s 16B – farm evictions – remedy of spoliation not removed by s 16B*

Practice and procedure – *application – urgent application – no standard formula for determining whether or not an application is urgent* d

Property and real rights – *spoliation order – locus standi – unlawful occupier of land – person claiming right to land not entitled to evict occupier without legal process – possession of offer letter does not negate the right of an unlawful occupier to seek a spoliation order*

Property and real rights – *spoliation order – ownership of property not relevant in an application for such order – lawfulness of possession similarly irrelevant*

Headnote

In urgent High Court applications, there is no standard formula which determines the issue of urgency. Every case must be looked at within ^F its own context.

The applicants were the former owners of a farm which had been expropriated by the State. The second respondent had received an offer letter in respect of the land and, although the applicants were still occupying the farm, had entered the farm and started farming operations. The applicants sought a spoliation order. The second respondent argued that the applicants ^G had no *locus standi* because they were there unlawfully, and that s 16B of the Constitution of Zimbabwe, 1980, as well as s 3 of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], had taken away the remedy of spoliation from the common law.

Held, that the grant of a spoliation order does not depend on the lawfulness of possession. The purpose of the order is to preserve law and order and ^H

2009 (1) ZLR p183

^A to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the status *quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party. The lawfulness or otherwise of the applicants' possession of the property does not fall for considerations at all. To accept the second respondent's argument would be to re-define ^B the very basic requirements of a *mandament van spolie*, which is not concerned with the legality or otherwise of the possession itself. To deny the applicants *locus standi* would be to sanction and encourage self-help exercise by those in the position of the second respondent. Such a position would be tantamount to perpetuating an infraction of the law by ^C the second respondent without following due process of law. The courts must be careful not to encourage lawlessness in our farms by subtly condoning, by implication or inference, the conduct of land beneficiaries who believe they have a legitimate right to occupy land which hitherto belonged to those farm owners who choose to remain on the farm after they should have vacated. It is not a question of weighing who, between ^D the former owner and a beneficiary, has a preferred or a more appealing right. It is simply a question of encouraging due process of law. This is not achieved by giving court orders which give the impression that holders of letters of offer can themselves carry out eviction processes.

Held, further, that it was certainly not the intention of the legislature to give ^E those persons armed with an offer letter, like the second respondent, powers of evicting defiant former farm owners, like the applicant.

Held, further, that once the applicants' possession had been established and there was proof of dispossession without reference to due process, the applicants' *locus standi* was established.

Held, further, granting the applicant a provisional order, that s 16B of the ^F Constitution of Zimbabwe, 1980, as well as s 3 of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], had not removed the remedy of spoliation from the common law in matters relating to farm evictions.

Cases cited ^G

Airfield Investments (Pvt) Ltd v Minister of Lands & Ors 2004 (1) ZLR 511 (S)

Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977 (1) SA 230 (E)

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

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

Ferrera & Anor v Nhandara HC-3995/08

^H *Manga v Manga* 1991 (2) ZLR 251 (S)

2009 (1) ZLR p184

Bere J

Mereki v Bell In (Pvt Ltd HH-113-05 ^A

Mutsotso & Ors v Commr of Police & Anor 1993 (2) ZLR 329 (H)

Nino Bonino v de Lange 1906 TS 120

Parker v Mobil Oil Southern Africa (Pvt) Ltd 1979 (4) SA 250 (NC)

Pondoro (Pvt) Ltd & Anor v Nemakonde & Anor 2008 (1) ZLR 6 (H)

Sillo v Naude 1929 AD 21 ^B

Shiriyekutanga Bus Svcs (Pvt) Ltd v Total Zimbabwe (Pvt) Ltd 2008 (2) ZLR 37 (H)

Legislation considered

Constitution of Zimbabwe 1980, s 16B

Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], s 3 ^C

Case information

Miss *F Mahere*, for the applicants

K Gutu, for the first respondent

W Bherebhende, for the second respondent

Judgment

BERE J: The first applicant is Dodhill (Pvt) Ltd, a company with limited ^D liability duly registered in accordance with the laws of Zimbabwe. The second applicant is the director and shareholder of first applicant.

The first respondent is the Minister of Lands and Rural Resettlement, cited in his capacity as the acquiring authority and is responsible for the administration and implementation of the Land Acquisition Act [*Chapter 20:10*] and other ^E allied pieces of legislation currently in force.

The second respondent is Nyasha Chikafu who, in terms of the Land Acquisition Act [*Chapter 20:10*], is the beneficiary of subdivision 1 of Dodhill in Chegutu District, Mashonaland West Province, which incidentally the applicants claim to have a legitimate right over. For purposes of this ^F judgment I will refer to the property in question as Dodhill Farm.

The background

From the papers filed of record coupled with the submissions made by the two legal practitioners representing the applicants and the second respondent, there are conflicting perceptions as regards the current status of Dodhill ^G Farm. The applicants feel very strongly that annexure "2" confirms their legitimate possession of the property. Annexure "2" is a court order which was consented to at a time when the other portions of the property were voluntarily conceded to the State for purposes of agricultural resettlement following the formal gazetting of the applicants' farm in January of 2005.

The second respondent's position is that, following the promulgation of the ^H

2009 (1) ZLR p185

Bere J

^A 17th amendment to the Constitution by Act 5 of 2005, Dodhill Farm was properly allocated to her by first respondent.

I accept the position adopted by the second respondent that annexure "2" was overridden by the subsequent promulgation of 17th amendment to the Constitution, which culminated in the introduction of, *inter alia* s 16B(2)(a) ^B (i) of the Constitution of Zimbabwe 1980, which conferred the ownership of the farm in question firmly in the hands of first respondent. I will therefore proceed on the basis that Dodhill Farm was indeed allocated to the second respondent.

The applicants' case

^C The applicants' case is predicated upon the *mandament van spolie*. Their argument is that on the evening of Thursday, 5 February 2009, the second respondent, without the applicants' prior knowledge and consent, summarily entered Dodhill Farm and set up a camp near the main security gate housing the applicants' residence, barns and other buildings. A tent was put up, as well as a makeshift shelter. The allegations went further to say that the ^D second respondent introduced or brought with her some youths who camped in the premises.

On 20 February 2009 the second respondent commenced ploughing in the applicants' fields where tobacco had just been harvested and on which the applicants had intended to plough an onion crop, in conformity with the ^ε applicants' programme of rotational cultivation.

The applicants outlined other incidents which amounted to the second respondent's summary occupation of Dodhill farm. The applicants sought the services of the police to have the status *quo ante* restored but to no avail. According to the applicants, when the second respondent was confronted she said she had a right to occupy Dodhill farm on the strength of her offer ^ϕ letter, a copy of which is marked annexure "3" in the papers filed of record.

The second respondent's case

The second respondent's response to the allegations of unlawful dispossession were basically three-pronged, *viz* lack of urgency in this matter, lack of *locus standi* on the part of the applicants in bringing this application and, ^ς in the alternative, a complete denial of the allegations levelled against her by the applicants.

In order for one to effectively deal with the second respondent's two main defences, one must consider whether the allegations by the applicants are true or not. If they are not, the two main defences would fall away.

^η If the allegations are found to be true, the court must then proceed to deal

2009 (1) ZLR p186

Bere J

with those allegations in so far as they impact on the defences of lack of ^α urgency and *locus standi* on the applicants

The allegations by the applicants

In her notice of opposition, the second respondent has emphasized the point that the ownership of Dodhill farm now vests in first respondent and the fact that her offer letter authorizes her to stay on the farm in question to carry ^β out agricultural activities.

I wish to re-affirm the accepted legal position that, in applications for a spoliation order, the question of ownership of the property in issue does not arise. As I will demonstrate later in this judgment, lawfulness to possession of the farm is equally irrelevant. ^ς

There are numerous aspects which can be gleaned from the second respondent's notice of opposition which confirm the allegations levelled against her, not only on a balance of probabilities, but beyond reasonable doubt.

Firstly, despite her attempt to paint the picture that the applicants consented to her occupation of the farm, the second respondent gives a completely ^δ different picture when she states, at para 13 of her opposing affidavit:

"... Applicants seem to be complaining that I should have sought their permission first before ploughing and that they wanted to plant onions on the land which I ploughed. I am advised which advice I accept that I have the lawful authority to carry out agricultural activities at the farm in the form of an offer letter. Since applicants do not own the farm *there is no reason at all for me to seek their ^ε permission to do that which is lawful.*

In any event the applicants have no right whatsoever to continue carrying out agricultural activities at the farm since doing so amounts to a criminal offence. I intend to allow applicants to finish harvesting their crops before I commence to prepare the land ..." my emphasis.

In my view, the above averments confirm the point made by the applicants ^ϕ that the second respondent simply moved on to Dodhill farm without their consent because in her view (of course as advised by her counsel) the applicants have no right to be on the farm.

It is inconceivable that given her perception of the law as advised by her counsel, the second respondent would have sought the consent of the applicants ^ς before occupying the disputed property.

Further, in her affidavit the second respondent confirms that there were fights between her own employees and those of the applicants, which culminated in some employees being arrested by the

police from Chegutu.

If the second respondent had occupied the farm in question by consent there would have been no cause to have such running battles on the farm between ^H

2009 (1) ZLR p187

Bere J

A the two groups of employees.

All in all, I am satisfied that a cursory perusal of the second's respondent's affidavit lends credence to the allegations raised by the applicants. I have absolutely no doubt in my mind that the second respondent acted in the manner complained of by the applicants.

B The question of urgency

If the court accepts the allegations as raised by the applicants (which the court is inclined to accept) for reasons already outlined, then it was inevitable that this matter be brought to court on an urgent basis.

There is no standard formula which determines the issue of urgency. Every ^C case must be looked at within its own context. This is one case where urgency is justifiable because of the manner in which the second respondent took occupation of Dodhill farm.

It must be understood that the applicants' initial decision to involve the police was both natural and reasonable in the circumstances. It was only ^D when the police could not assist that the applicants thought of lodging the instant application.

In any event, our courts have held in some cases that delays in instituting *mandament van spolie* proceedings do not necessarily amount to acquiescence in the dispossession: see *Manga v Manga* 1991 (2) ZLR 251 (S) at 255.

^E Locus standi

The issue of *locus standi* on the part of the applicants cannot be looked at in a vacuum. It must be looked at in the light of the legal position governing the principle of the *mandament van spolie*.

The legal position

^F There can be no doubt that spoliation as a remedy has its core value or objective, the protection to possession of property against unlawful dispossession. This is a remedy that has been recognized in our jurisdiction and beyond for over decades. In *Amler's Precedents of Pleadings* 3 ed by L T C Harms and J H Hugo at pp 276-77, it is stated: "unlawfulness in this context means a dispossession without plaintiff's consent or due legal process". This time ^G honoured principle of our law has been enunciated in a plethora of cases in our jurisdiction and beyond. See, for example, *Nino Bonino v de Lange* 1906 TS 120 at 122, *Sillo v Naude* 1929 AD 21, *Mutsotso & Ors v Commissioner of Police & Anor* 1993 (2) ZLR 329 (H) and *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H).

^H In the classic and leading case of *Nino Bonino supra* Innes CJ had this to say:

2009 (1) ZLR p188

Bere J

"It is a fundamental principle that no man is allowed to take the law into his own ^A hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute"

In *Chisveto supra* Reynolds J remarked as follows at 250A-D:

"Lawfulness of possession does not enter into it. *The purpose of the mandament ^B van spolie is to preserve law and order and to discourage persons from taking the law into their own hands.* To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party ... *The lawfulness or otherwise of the applicant's possession of the property does not fall for consideration at all.* In fact the classic generalization is sometime made that in ^C respect of spoliation actions ... even a robber or thief is entitled to be restored possession of the stolen property" (my emphasis)

Counsel for the second respondent passionately argued that the applicants had no *locus standi* to bring an application for spoliation. The main thrust of his argument was that, because the applicants had exceeded the 45 and 90 day statutory maximum periods which allow them to remain on the farm and the homestead respectively,¹ therefore the applicants must not be protected by this court.

In counsel's view, which borrowed heavily from the position adopted by my brother Uchena in *Ferrera & Anor v Nhandara* HC 3995/08, that if this court accepted *locus standi* on the part of the applicants, then the court would be sanctioning an illegal stay on Dodhill farm by the applicants since the applicants are occupying that farm in complete violation of the law.

There was also an attempt by the second respondent's counsel to seek to rely on the decision by their Lordships in one of the much celebrated land cases in this country, viz *Airfield Investments (Pvt) Ltd v Minister of Lands, Agricultural and Rural Resettlement & Ors* 2004 (1) ZLR 511 (S).

Simplified, the argument as put forward by second respondent's counsel was that because the applicants' hands are tainted with their illegal occupation of Dodhill farm, the court could not entertain them let alone grant them an order that would perpetuate their continued stay on the farm. ^g

The applicants' counsel held a different view. She argued that once the applicants' possession is established and there is proof of dispossession without reference to due process, the applicants' *locus standi* is thereby established. I agree with this position.

2009 (1) ZLR p189

Bere J

^a The position adopted by the second's respondent's counsel is fraught with many challenges. Firstly, his approach would be an attempt to re-define the very basic requirements of a *mandament van spolie* which is not concerned with the legality or otherwise of the possession itself. See the remarks of Reynolds J in *Chisveto's case supra*.

^b I am fully cognisant of other decisions from South Africa which have attempted to shift from the orthodox approach in dealing with spoliation matters. One such matter is the case of *Parker v Mobil Oil Southern Africa (Pvt) Ltd* 1979 (4) SA 250 (NC) at 255 where van den Heever J stated as follows;

"Moreover, the rule that goods dispossessed against the will or the possessor must be restored forthwith, is not an absolute one. The reason for the rule is, ^c 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 disputes. 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 admits that he has no right vis-à-vis the ^d respondent to the possession he seeks to have restored to him" (my emphasis).

Commenting on *Parker's* case and another similarly decided case of *Coetzee v Coetzee* 1982 (1) SA 933 (C), Makarau J (as she then was), in the recent case of *Shiriyekutanga Bus Service v Total Zimbabwe* 2008 (2) ZLR 37 (H) remarked as follows at 41:

"With respect, the weight of authority appears to be against the learned judge. ^e It has not been established as part of our law in any other decided case that an application 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 the possession of the applicant. (See *Coetzee v Coetzee, (supra)*. I hold a different ^f 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 & Anor v Barrett (supra)* and *Coetzee v Coetzee (supra)*" (my emphasis).

^g I entirely associate myself with the position adopted by Makarau J that in an application for a spoliation order an applicant does not have to prove some reasonable or plausible claim to the property, let alone the legality or otherwise of his possession of the property in question.

With extreme due deference to Uchena J, I do not agree with the approach he ^h seems to have adopted in the *Ferrera* case (*supra*) when he made a finding

2009 (1) ZLR p190

Bere J

that because the applicant in that case had defiantly continued to be on the A farm in question, therefore he could not be granted spoliation.

In my view, the learned judge prematurely dealt with the rights of the parties to the farm when in fact this was not the issue at stake. It does seem to me that all the learned judge was supposed to consider was whether or not the applicant had been in peaceful and undisturbed possession of the farming B land prior to the alleged dispossession and not to consider who was legally supposed to have been in possession of the farming land at the time of the alleged dispossession by the offeree. In any event, such an approach in my view went against the weight of decades of precedent in spoliation matters.

The second challenge, which is apparent from the position adopted by the second respondent's counsel, is the failure to appreciate that, by denying C the applicants' *locus standi*, the court will be sanctioning and encouraging a self-help exercise by those in the position of the second respondent. In my view, such a position would be tantamount to perpetuating an infraction of the law to the dispossession by the second respondent without following due process of law. D

I hold a very strong view that it was certainly not the intention of the legislature to give those armed with offer letters, like the second respondent, powers of evicting defiant former farm owners like the applicants. Such a scenario would create chaos in our farms.

Our courts must be careful not to encourage lawlessness in our farms by subtly E condoning, by implication or inference, the conduct of land beneficiaries who believe they have a legitimate right to occupy land which formerly belonged to those farm owners who choose to stubbornly or defiantly remain on the farm at a time they should have vacated. It is not a question of weighing who between the former owner and a beneficiary has a preferred or a more appealing right. It is simply a question of encouraging due process of law. F This is not achieved by giving court orders which give the impression that offerees can themselves carry out eviction processes.

The legislature was quite conscious that there would be defiant former farm owners who would endeavour to continue with farming operations after the lapse of the 90 day statutory period. In its wisdom, the legislature G created a specific procedure to deal with such errant or defiant farmers. This procedure is well spelt out in s 3(5) of the *Gazetted Lands (Consequential Provisions) Act [Chapter 20:28]*. My brother Hungwe correctly summed up the procedure in *Pondoro (Pvt) Ltd & Anor v Nemakonde & Anor* 2008 (1) ZLR 6 (H) when he stated:

"There is a specific procedure for eviction in respect of land acquired in H

2009 (1) ZLR p191

Bere J

A terms of the *Gazetted Lands (Consequential Provisions) Act [Chapter 20:28]*. The right to claim eviction in only exercisable by the acquiring authority. That process is not initiated by a beneficiary under the land reform programme or by an officer of the acquiring authority."

Consistent views were also echoed by my brother Bhunu in *Mereki v Bell B In (Pvt) Ltd & Anor* HH-113-05 when he stated:

"Although the applicant is entitled to occupy the land he is not entitled to evict the former owner ... because he does not own the land and has not at any stage acquired possession.

It is now settled law that a lessee who has not acquired vacant possession cannot evict anyone from the property. It is the prerogative of the acquiring authority to evict the first respondent".

C I note with extreme discomfort that the second respondent's counsel has referred to the *Airfield Investment (Pvt) Ltd* case (*supra*) as authority for the proposition that applicants have no *locus standi* in this case. With respect, that case has been quoted out of context. That case is quite distinguishable from the instant case. In that case, the focus was on considering the requirements D of an interim interdict, as opposed to the instant case, which is primarily focused on considering the requirements of a *mandament van spolie*. These two principles are quite distinct and cannot be mistaken for each other.

Counsel for the second respondent also argued that, according to his understanding, s 16B of the Constitution of Zimbabwe, as well as s 3 of the E *Gazetted Lands (Consequential Provisions) Act (supra)*, have taken away the remedy of spoliation from our common law. I have painstakingly perused the cited sections. I do not agree with such sentiments.

In the final analysis, I am more than satisfied that the applicants have *locus standi* to bring this action and, having accepted their allegations against the second respondent, I am inclined to grant the provisional order sought in F terms of the papers filed.

Gollop & Blank, applicants' legal practitioners

K Gutu, for first respondent

G *Mavhunga & Sigauke*, second respondent's legal practitioners

[1](#) Section 3 of Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]

[1](#) Section 3 of Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]

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Document 29 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/GUTE v JUMBE 2009 (1) ZLR 192 (H)

GUTE v JUMBE 2009 (1) ZLR 192 (H)

2009 (1) ZLR p192

Citation	2009 (1) ZLR 192 (H)
Case No	Judgment No. HH-31-09
Court	High Court, Harare
Judge	Uchena J
Heard	15 January 2009; 22 January 2009
Judgment	18 March 2009
Counsel	<i>S Gahadzikwa</i> , for the applicant <i>T L Machina</i> , for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Property and real rights — *spoliation order* — *when may be granted* — *property leased to respondent and not returned* — *spoliation order not appropriate*

Headnote

The applicant and the respondent entered a lease agreement in respect of a D business premises. The lease agreement included the use of some of the equipment, which had to be returned at the end of the lease. When the lease ended, the respondent vacated the premises but took away some of the equipment. E The applicant sought a spoliation order in respect of the equipment.

Held, that a spoliation order could not be granted. The *mandament van spolie* is premised on the unlawful taking of property from another who should be in peaceful and undisturbed possession at the time of being despoiled. Here, the applicant had not resumed possession of the equipment at the time the respondent took it away from the butchery. The respondent could not therefore be said to have unlawfully dispossessed ^F the applicant. If the application were granted, the applicant would regain possession of the property he lawfully handed over to the respondent at the commencement of the lease. He would through the *mandament van spolie* regain possession he did not lose by an unlawful taking, but by the act of leasing it to the respondent. He should have instituted a ^G vindicatory action instead.

Cases referred to

African Ice Co v Kalk Bay Fisheries 1907 TH 263

Boomporet Investments (Pty) Ltd and Another v Paardekraal Concession Store (Pty) Ltd 1990 (1) SA 347 (A) ^H

2009 (1) ZLR p193

Uchena J

^A *Burnham v Neumeyer* 1917 TPD 630

Crause v Ryersbach (1882) 1 SAR 50

Dawood v Robb & Co 1933 CPD 178

Erasmus v Dorsyd Farms (Pty) Ltd 1982 (2) SA 107 (T)

S v Singiswa 1981 (4) SA 403 (C)

Case information

^B *S Gahadzikwa*, for the applicant

T L Machina, for the respondent

Judgment

UCHENA J: The applicant owns No 10 Ziko Township in Chitungwiza, on which he operates a butchery. On 1 November 2007 he entered into a lease ^C agreement with the respondent, in terms of which the respondent leased the butchery together with equipment listed in the lease agreement. At the termination of the lease, the equipment was to be surrendered back to the applicant together with the premises. When the lease came to an end, the respondent surrendered the premises and other equipment. He however took with him a hanging scale, digital scale and deep freezer.

^D It is common cause that the respondent signed the lease agreement acknowledging receipt of equipment, including the hanging scale, digital scale and deep freezer. He cannot now claim that the equipment he took from the butchery belongs to him.

The applicant applied for an order directing the respondent to return the ^E property in dispute to him. His application has aspects which tend to show that he was not only applying for a spoliation order. In para 2 of the draft order he seeks the following order:

“Failure of (*sic*) returning the actual assets. The respondent replaces and returns the nearest equivalent of the listed items to the satisfaction of the applicant ^F within the aforesaid period.”

This order cannot be granted in an application for a spoliation order, which merely seeks to restore the *status quo*. In an application for a spoliation order the court can only order the restoration of the *status quo* without determining the parties’ respective rights. Mr *Gahadzikwa* applied for an amendment of the draft order by the deletion of para 2. I granted the amendment, and will ^G now determine whether or not the applicant was despoiled.

Mr *Gahadzikwa* referred me to *Crause v Ryersbach* (1882) 1 SAR 50, *African Ice Co v Kalk Bay Fisheries* 1907 TH 263, *Burnham v Neumeyer* 1917 TPD 630, *S v Singiswa* 1981 (4) SA 403 (C), and *Erasmus v Dorsyd Farms (Pty) Ltd* 1982 (2) SA 107(T). He submitted that the cases prove that ^H a lessee can despoil the landlord by refusing to return the leased property.

2009 (1) ZLR p194

Uchena J

Mr *Machinga*, on the other hand, submitted that the law on this aspect is not settled as some of the authorities state that a lessee despoils the landlord if at the end of the lease agreement he refuses to return leased property. See *Dawood v Robb & Co* 1933 CPD 178 and *Crause v Ryersbach (supra)*. He however referred the court to *Boomporet Investments (Pty) Ltd v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) in which the South African Appellant Division suggested a contrary view. Van Heerden JA said at 353 D-F:

"When a lessor has given occupation of property to a lessee, there is, of course, no question of an unlawful deprivation of possession. If, at the expiration of the lease, the lessee refuses to return the property to the lessor, his continued possession thereof may or may not be unlawful, depending on whether he has acquired an independent title to the property. In any event, in such a case it cannot be said that the lessee is taking the law into his own hands or that he is committing a breach of the peace. Having regard to the fundamental principle of the *mandament van spolie* there must consequently be considerable doubt whether the remedy is at all apposite when a lessee is sued for ejectment at the termination of the lease."

It is common cause that the South African Supreme Court did not deal with this issue directly but did so by way of *obiter dictum*. The issue has therefore not been settled. It is, however, my considered view that the exposition of the law is correct in respect of an application for the ejectment of a lessee who is still in possession of the leased property, and is merely refusing to hand it back to the lessor. ^ε

Mr *Gahadzikwa* submitted that this case can be distinguished from the case of *Boomporet (supra)*.

It is true that the facts of this case can be distinguished from those of the *Boomporet* case (*supra*), but the distinction is of no benefit to the applicant. The applicant's relationship with the respondent is no longer that of lessor ^φ and lessee. That relationship came to an end at the termination of the lease. In terms of the lease agreement the property was to be surrendered back to the lessor. The respondent surrendered the premises and other movable property, but did not surrender the property in question. He took it away from the butchery he was leasing from the applicant without his consent. He claims, contrary to the lease he signed, that the property belongs to him. If it ^α does he would be entitled to take it away. Even if it does not he lawfully took possession of it at the commencement of the lease agreement. He from that time became a lawful possessor of the leased property. The *mandament van spolie* is premised on the unlawful taking of property from another who should be in peaceful and undisturbed possession at the time of being despoiled. In this case, the applicant had not resumed possession of the property in dispute ^η

2009 (1) ZLR p195

Uchena J

^α at the time the respondent took it away from the butchery. He cannot therefore be said to have unlawfully dispossessed the applicant. He simply converted the property to his own use instead of surrendering it back to the applicant. The conversion, though probably insufficient to bestow ownership, does not constitute an unlawful taking from the applicant who had not resumed possession of the property. A spoliation order is aimed at restoring the *status quo*. The despoiled person must be allowed to regain possession. In this case the *status quo* is that the respondent was the possessor, and the applicant the owner who intended to regain possession. If the applicant's application for a spoliation order succeeds, he would regain possession of the property he lawfully handed over to the respondent at the commencement of the lease. He would, through the *mandament van spolie*, regain possession he did not ^α lose by an unlawful taking, but by the act of leasing it to the respondent.

The *mandament van spolie* is therefore not applicable in this case. The applicant should institute a vindicatory action. He therefore used an incorrect procedure.

^δ In the result the applicant's application is dismissed with costs.

Gahadzikwa & Mupunga, applicant's legal practitioners.

^ε *Machinga & Partners*, respondent's legal practitioners.

Document 30 of 52**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/CHIRENJE v VENDFIN INVESTMENTS (PVT) LTD & ORS 2009 (1) ZLR 196 (S)

CHIRENJE v VENDFIN INVESTMENTS (PVT) LTD & ORS 2009 (1) ZLR 196 (S)**2009 (1) ZLR p196**

Citation	2009 (1) ZLR 196 (S)
Case No	Judgment No. S-13-09
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Malaba JA
Heard	12 November 2007
Judgment	19 March 2009
Counsel	<i>P Machaya</i> , for the appellant <i>C F Dube</i> , for the respondents
Case Type	Civil appeal
Annotations	None
	No case annotations to date

Flynote

Contract – *stipulatio alteri* – formation – need for offer to be made to and accepted by third party – third party not entitled to sue upon contract before then

Headnote

The appellant and a number of other people had contracted to buy residential ¹stands in Harare from the third respondent at a stated price. Before the stands could be transferred, the property of which the stands formed sub-divisions was sold in execution to the first respondent, the nominee company of the second respondent. A legal dispute between the third respondent and the second respondent ended with a consent order and ²an agreement between the two parties, in terms of which the second respondent was to offer the stands to the appellant and his co-purchasers at the original price within seven days of the date of the agreement. This offer was not communicated to the appellant and his co-purchasers, and a month later the second and third respondents amended their agreement ³as they were entitled to in terms of the agreement) to offer the stands at a price over three times higher than the original price. The new price was the market value at the time. This second offer was communicated to the appellant and his co-purchasers, who, having become aware of the amendment, applied for an order compelling the second respondent to sell the stands at the original price. The court *a quo* dismissed the ⁴application. On appeal:

Held, that the agreement entered into between the second and third respondents was a contract for the benefit of a third party. In such a contract, the beneficiary third party's right to sue and the obligation to be sued under such contract accrue upon the offer being communicated to and accepted by the third party in terms of the contract. It is the communicating of ⁵

2009 (1) ZLR p197

Chidyausiku CJ

^A the offer and the acceptance of the offer that creates the *vinculum juris*, which in turn creates the entitlement to sue and the obligation to be sued. As no offer was ever made to the appellant and his co-applicants, no *vinculum juris* was ever created entitling the applicants to sue the promisor (the second respondent) on the undertaking to sell the property at the original price in terms of the agreement before it was amended. ^B The third respondent, as a party to the agreement, could have sued him to make good that offer before it expired. Had he communicated the offer to the applicants and sought to withdraw the offer prior to the expiry date of the offer, the applicants might have had a cause of action. Without the offer being communicated to the applicants and the applicants accepting ^C such offer, the applicants could not sue or be sued upon the contract between the second and third respondents.

Cases cited

McCullogh v Fernwood Estate Ltd 1920 AD 204

Salisbury Bottling Co (Pvt) Ltd v Lomagundi Distributors (Pvt) Ltd ^D 1965 RLR 268 (G); 1965 (3) SA 503 (SR)

Case information

P Machaya, for the appellant

C F Dube, for the respondents

Judgment

^E **CHIDYAUSIKU CJ**: This is an appeal against the judgment of Bhunu J, in which he dismissed an application for a provisional order by the appellant and 23 other applicants. I shall refer to the appellant and his co-applicants as “the applicants” hereinafter. The facts of this case are very ably summarised by the learned judge in the court *a quo*. The applicants’ counsel, in his heads of argument, recapitulates and accepts those facts. The following are the ^F relevant facts, as summarised by the learned judge.

The applicants bought serviced individual residential stands, being subdivisions of Stand 399 Highlands Estate of Welmoed Township, Harare, (“the property”) from the third respondent, Divine Homes (Pvt) Ltd (hereinafter referred to as “Divine Homes”) some time in or around ^G 2001. Before title could pass to the applicants, the same property was sold in execution by the Deputy Sheriff and title was transferred to the first respondent, Vendfin Investments (Pvt) Ltd (hereinafter referred to as “Vendfin”). Vendfin is a nominee of H S M Ushewokunze (hereinafter referred to as “Ushewokunze”). The transfer triggered fierce legal battles between Divine Homes as the applicant and the Sheriff of Zimbabwe and Ushewokunze as ^H the first and second respondents respectively under case no. HC 1721/03.

2009 (1) ZLR p198

Chidyausiku CJ

The protracted legal battles culminated in the following consent court order ^A dated 4 May 2005:

“IT IS ORDERED BY CONSENT THAT:

1. The applicant hereby withdraws its application against the respondents.
2. The first respondent be and is hereby authorised/ ordered to effect transfer (of) Lot 399 Highlands Estate of Welmoed, Harare, to the second respondent, ^B H S M Ushewokunze, upon compliance with the terms of the agreement between (the) first and second respondent(s) in respect of 399 Highlands Estate of Welmoed.
3. This order incorporates an agreement signed by the parties regulating their interest, rights and obligations.
4. Each party bears its own costs.” ^C

The parties’ agreement, referred to under para 3 of the court order, was filed of record. The applicants were not a party either to the court order or the agreement mentioned therein. The agreement was between Divine Homes and Ushewokunze.

The applicants became aware that Vendfin was selling the property and was ^D inviting the applicants to purchase the property at a price to be advised. The applicants, who had somehow become aware

of the court order and the attached agreement, were invited by Vendfin to purchase the property at \$200 000 per square metre and not the \$60 000 per square metre stipulated in the original agreement. This was not acceptable to the applicants and they launched an application with the High Court for a provisional order in which ^E they sought the following relief:

"1. TERMS OF FINAL ORDER SOUGHT

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

- a) That the first respondent shall address and cause to [be] delivered to the ^F applicants or their legal practitioners formal offers in terms of Clause 4 of the Agreement annexed to the Order in case number 1721/03 Ref HC 523/03 within 10 days of service of this order upon them.
- b) That the first respondent pay the costs of this application at a higher scale.

2. INTERIM RELIEF GRANTED

- a) Pending the return date the first respondent be and is hereby interdicted ^G from disposing [of] or in any way alienating or encumbering its (interest) in the various stands that the applicants had previously bought from the third respondent which are subdivisions of stand 399 Highlands of Welmoed, Salisbury."

The applicants sought an interim interdict prohibiting Vendfin from disposing of or in any way alienating the disputed properties pending the outcome of ^H

2009 (1) ZLR p199

Chidyausiku CJ

A the main action, in which they sought an order compelling Vendfin to make them an offer to purchase the property at \$60 000 per square metre as provided for in the original agreement. The applicants claimed that they had acquired the right to be offered the property at that price under the contract between Divine Homes and Ushewokunze. In the main action, they sought an order compelling Ushewokunze to offer the property to them at the stipulated price ^B of \$60 000 per square metre. As I have already stated, the applicants were not a party to the agreement between Divine Homes and Ushewokunze. The applicants however argued that clause 4 of the agreement conferred on them the right to be offered to purchase the property at \$60 000 per square metre.

Clause 4 of the agreement between Divine Homes and Ushewokunze ^C provides as follows:

- "4. H S M Ushewokunze has, on behalf of the parties, agreed to offer the 62 purchasers [the applicants then, now the appellants] whose names appear on annexure 'A' to this agreement the stands which relate to their agreements of sale with Divine Homes (Pvt) Ltd in an amount of \$60 000 per square metre, which offer shall be subject to the following terms: ^D
 - a) the offer shall be open for a period of seven (7) working days, whereupon if the offeree has not accepted the offer it shall lapse and the stand shall be offered to the public on the terms and conditions in clause 5 hereunder;
 - b) upon acceptance of the offer, an agreement of sale shall be entered into which shall stipulate that the maximum period of payment of the full purchase price shall be ninety (90) days from the date of acceptance. ^E
- 5. If the offers or such part of the offers as in clause 4 hereof have not been accepted by the stipulated date, i.e. after seven (7) working days of the offer being made in terms of clause 4, such stands shall be offered for sale to the public at the same price as the price in clause 4 or such other price as the parties to this agreement shall from time to time fix. However, at all times the parties shall act and agree so as to sell the stands to best advantage guided always by the market prices prevailing at the time."

^F Clause 9 of the same agreement provided that the parties to the agreement had an unfettered right to amend or vary the terms of the agreement. On a proper reading, clause 9 provides that the agreement can be altered without any reference to third parties. The only requirement for the validity of any ^G amendment was that it be reduced to writing and signed by the parties to the agreement. Clause 9 provides as follows:

- "9. This agreement forms the whole agreement between the parties. Any variation, change, alteration or anything that affects the implementation of its contents shall not be valid unless (the) same is reduced into writing and signed by the parties whose signatures have been affixed to this agreement."

^H On 21 and 28 June 2005 Divine Homes and Ushewokunze signed an

Chidyausiku CJ

addendum to the agreement in terms of clause 9, amending the offer price. ^A The amendment was reduced to writing and duly signed by both parties in compliance with clause 9 of the agreement. The addendum reads in part as follows:

"ADDENDUM TO AGREEMENT AS PER PARAGRAPH 9

Made and entered into by and between ^B

DIVINE HOMES (PVT) LTD (of the first part)

AND

H S M USHEWOKUNZE (of the other part)

WHEREAS

4. HERBERT SYLVESTER MASIYIWA USHEWOKUNZE has on behalf ^C of the parties agreed to offer the 62 purchasers whose names appear on annexure 'A' to this agreement the stands which relate to their agreements of sale with Divine Homes (Pvt) Ltd at \$60 000 per square metre or the prevailing market price, whichever is higher at the time of acceptance of the offer, which offer shall be subject to the following terms:
 - a) The offer shall be open for a period of seven (7) working days, whereupon if the offeree has not accepted the offer it shall lapse and ^D the stand shall be offered to the public on the terms and conditions in clause 5 hereunder;
 - b) Upon acceptance of the offer, an agreement of sale shall be entered into which shall stipulate that the maximum period of payment of the full purchase price be ninety (90) days from the date of acceptance;
 - c) The parties have agreed to amend the principal agreement." ^E

It is common cause that Ushewokunze, acting in terms of the amended agreement, offered to sell the property to the applicants for \$200 000 per square metre. The applicants do not dispute that \$200 000 per square metre was the prevailing market value of the property at the time of the offer. The offer to the applicants was through an advertisement in the press and an ^F explanation at the offices of the respondents' legal practitioners.

The applicants objected to the revised purchase price of \$200 000 per square metre. The applicants contended that Ushewokunze was legally obliged to offer them the property at \$60 000 per square metre as per the original agreement. The applicants argued that the amendment to the agreement was illegal as it amounted to an illegal variation of a court order. The learned ^G judge in the court *a quo* rejected this argument and concluded as follows:

"I find that there is absolutely no merit in that argument because the court order incorporates the agreement, which agreement envisages valid amendments or alterations to the original agreement. What that means is that once a valid amendment is made in terms of clause 9 before acceptance by the applicants it becomes part of the valid court order. ^H

Chidyausiku CJ

^A The applicants could not validly accept the original tentative offer price because it was not a firm offer to them. Even if we were to assume for one moment that it constituted a firm offer, an offer can be amended, varied or altered (at) any time before acceptance.

Having come to that conclusion, I find that there is no merit in this application. The applicants have failed to establish a *prima facie* right."

^B I respectfully agree with the conclusion of the learned judge.

It is common cause that the agreement entered into between Divine Homes and Ushewokunze is what is generally known as a contract for the benefit of a third party. In terms of clause 4 of the agreement (before the amendment) Ushewokunze agreed to offer to sell to the applicants the property at the ^C purchase price of \$60 000 per square metre. It is now settled law that in a contract for the benefit of a third party, the beneficiary third party's right to sue and the obligation to be sued under such contract accrue upon the offer being communicated to and accepted by the third party in terms of the contract. It is the communicating of the offer and the acceptance of the offer that creates the *vinculum juris*, which in turn creates the entitlement ^D to sue and the obligation to be sued. See *McCulloch v Fernwood Estate Ltd* 1920 AD 204 at 206.

The applicants are no doubt the beneficiary third party in the contract between Divine Homes and Ushewokunze. In terms of clause 4 of the agreement between the two contracting parties Ushewokunze was to offer ^ε the applicants the property for sale at the purchase price of \$60 000 per square metre. He undertook to make the offer to the applicants within seven days of the agreement. On the applicants' version of the facts, no offer was ever communicated to the applicants within the seven days stipulated in the contract. Indeed no offer was ever made to the applicants before the amendment of the agreement in June 2005. As no offer was ever made to the ^ε applicants, on the authority of *McCulloch's case supra* no *vinculum juris* was ever created entitling the applicants to sue the promisor (Ushewokunze) on the undertaking to sell the property for \$60 000 per square metre in terms of the agreement before it was amended. Divine Homes, as a party to the agreement, could have sued Ushewokunze to make good that offer before it expired. Had Ushewokunze communicated the offer to the applicants ^g and sought to withdraw the offer prior to the expiry date of the offer, the applicants might have had a cause of action. On the facts of this case, as set out by the applicants themselves, no offer was ever communicated to the applicants for the purchase of the property at \$60 000 per square metre. Consequently no such offer was ever accepted by them. Without the offer ^h being communicated to the applicants and the applicants accepting such

2009 (1) ZLR p202

Chidyausiku CJ

offer, the applicants cannot sue or be sued upon the contract between Divine ^a Homes and Ushewokunze. See *Salisbury Bottling Co (Pvt) Ltd v Lomagundi Distributors (Pvt) Ltd* 1965 RLR 268 (G), 1965 (3) SA 503 (SR) at 510. Ushewokunze, after the June 2005 amendment to the agreement, offered to sell the property to the applicants at \$200 000 per square metre. That offer was never accepted by the applicants. Consequently no cause of action can ^b arise from that offer.

The applicants in this case sought an interim interdict pending the finalisation of the main action between the parties. Before a court can grant an interim interdict, it is necessary for the applicant to establish a *prima facie* case, that is to say, the applicants must aver facts which if proved in the main action will constitute a cause of action. The facts that the applicants intend to prove ^c in the main action are incapable of constituting a cause of action even if they were proved. On this basis, I agree with the learned judge in the court *a quo* that the applicants failed to establish a *prima facie* case entitling them to an interim interdict pending the finalisation of the main action.

The other argument of the applicants, that the original agreement between ^d Divine Homes and Ushewokunze was part of an order of the court and therefore cannot be altered, does not merit any detailed consideration. That argument is simply untenable. The express language of the agreement itself confers on the contracting parties the unfettered power to amend the agreement in the manner prescribed or provided for in the agreement. This unfettered power to amend the agreement is incorporated into the court order ^e itself. The amendments to the agreement can only be impugned on the basis of lack of compliance with the terms of the agreement. The amendment was in accordance with the agreement itself and is therefore valid.

In the result, the appeal is dismissed with costs. ^f

SANDURA JA and MALABA JA concurred

Makoni Legal Practice, appellant's legal practitioners

Dube, Manikai & Hwacha, respondents' legal practitioners ^g

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Document 31 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/THANDAZO RETAIL & MARKETING (PVT) LTD v MAIN MOTORS (PVT) LTD & ANOR 2009 (1) ZLR 203 (H)

THANDAZO RETAIL & MARKETING (PVT) LTD v MAIN MOTORS (PVT) LTD & ANOR 2009 (1) ZLR 203 (H)

2009 (1) ZLR p203

Citation	2009 (1) ZLR 203 (H)
Case No	Judgment No. HB-41-09
Court	High Court, Bulawayo
Judge	Ndou J
Heard	13 March 2009
Judgment	19 March 2009
Counsel	<i>N Mazibuko</i> , for the applicant <i>L Mjico</i> for the first respondent <i>S S Mazibisa</i> , for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Landlord and tenant – lease – sub-lease – expiry of main lease – sub-lessee having no right to continue in occupation and cannot claim protection of statutory tenancy

Headnote

▯ The first respondent was the lessee in a lease agreement with the second respondent. In terms of the lease, the first respondent was entitled to sub-let the premises, which it did, to the applicant. The lease agreement between the respondents ended with effluxion of time and the applicant ^E and the other sub-tenants were informed of the fact. The others moved out but the applicant argued that it was a statutory tenant and refused to vacate the premises.

Held, that a “lessor”, in relation to commercial premises, includes a lessee who has sub-let the premises, and a “lessee” includes any sub-lessee. To establish a statutory tenancy under s 22(2) of the Commercial Premises ^F (Rent) Regulation 1983 (SI 676 of 1983), the lessor, as defined, must have some contractual relationship with the sub-lessee, as defined. A sub-lessee does not enjoy the protection of a statutory tenant where the lessee has surrendered any right of occupation under the head lease. The owner cannot be deprived of its property merely because the lessee did ^G not give the sub-lessee adequate notice to vacate the premises.

Cases referred to

Bright v Triumph Garage (Pty) Ltd 1949 (3) SA 352 (C)

Hamza v Bailen 1949 (1) SA 933 (C)

Omarshah v Karasa 1996 (1) ZLR 584 (H)

^H *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A)

2009 (1) ZLR p204

Ndou J

Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) ^A

Union Govt & Fisher v West 1918 AD 556

Utaumire & Anor v Kadzunge & Ors HB-82-06

Legislation considered

Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), ss 3(1) ^B and 22(2)

Case information

N Mazibuko, for the applicant

L Mjico for the first respondent

S S Mazibisa, for the second respondent ^C

Judgment

NDOU J: The facts of the matter are generally common cause, with the dispute revolving more on a question of law, *viz.*, do the applicant's statutory rights in terms of the Commercial Premises (Rent) Regulations 1983 (the Regulations) extend beyond the first respondent to apply as against the second respondent; alternatively, did the applicant at any stage become a statutory tenant of the ^D second respondent? The facts of the matter can be summarized as follows. The first respondent and second respondent had a fixed term lease for the period 1 October 1998 to 31 December 2001. The parties also concluded an addendum to the lease. In terms of the addendum (to the main lease) the lease was extended to 31 December 2003 and, further, the first respondent ^E was given the right to sublet part or the whole of the property, subject to a condition that the first respondent should remain fully liable to the owner for all obligations and liabilities in terms of the lease, notwithstanding any such subletting. The first respondent sublet the premises to the applicant. After the expiry of the main lease between the first and second respondents, the said parties duly agreed to the mutual termination of the main lease agreement. ^F The applicant and other sub-tenants were told by the first respondent that the main lease had, or was coming to, an end. The other sub-tenants vacated the premises, but the applicant did not. The refusal to vacate gave rise to these proceedings. The applicant claimed that it was a statutory tenant against the second respondent and refused to vacate, despite notices by the first and second respondents. The second respondent filed a counter claim in which it ^G sought eviction of the applicant from the premises. It is common cause that the applicant has no contractual relationship with the second respondent, who is the owner of the premises.

In *Omarshah v Karasra* 1996 (1) ZLR 584 (H) at 588B-C, Gillespie J stated:

"The rights of a sub-tenant as against a landlord are co-terminous with those of ^H

2009 (1) ZLR p205

Ndou J

A the lessee. No greater rights may be acquired by her than those enjoyed by the lessee under the head lease ... This position is applied in our law to the extent that a sub-lessee does not enjoy the protection of a statutory tenant where the lessee has surrendered any right of occupation under the head lease."

This judgment was criticized as being "wrong by law" by Mr *Mazibuko*, for the applicant. He referred me to the South African cases of *Bright v B Triumph Garage (Pty) Ltd* 1949 (3) SA 352 (C) and *Hamza v Bailen* 1949 (1) SA 933 (C).

This case has to be determined on the definitions of "lessee" and "lessor" in the Regulations. Section 3(1) of the Regulations has the following definitions:

"Lessee", in relation to commercial premises includes any sub-lessee thereof;

" ^C Lessor", in relation to commercial premises, includes the owner thereof, the person to whom the rent therefore is normally paid, a lessee who has sub-let the premises or part thereof and any other agent of lessor.

To appreciate what Gillespie J *supra* meant, one has to understand the said definitions in the context of the provision which creates statutory tenancy ^D i.e s 22(2) of the Regulations. Section 22 provides as follows:

"(1) ...

(2) No order for the recovery of possession of commercial premises or 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 – ^ε

(a) *continues to pay the rent due*, within seven days of due date; and

(b) *performs the conditions of the lease*;

unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that:

(i) the lessee has declined *to agree to an increase* in rent; or ^φ

(ii) the lessor wishes to lease the premises to some other person” (emphasis added).

The phrases (or words) highlighted clearly indicated that the “lessor” defined, must have some contractual relationship with the “sub-lessee”, as defined in s (3)1. In other words, s 3(1) must be read with s 22 to contextualize the position of the lessor *vis-a-vis* the sub-lessee. The sub-lessee does not enjoy ^ς statutory protection where the head lessee has given up his occupation. For these reasons I associate myself with the conclusion reached by Gillespie J *supra*.

Coming to the counterclaim, I dismissed the point *in limine* raised by the applicant *ex tempore* and indicated that this judgment will provide reasons ^η for that conclusion. The applicant is raising a technical objection. It is trite

2009 (1) ZLR p206

Ndou J

that technical objections to the less than perfect procedural steps should ^α not be permitted, in the absence of prejudice, to interfere with expeditious and if possible, inexpensive decision of cases on their real merit: *Trans African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278G; *Union Government & Fisher v West* 1918 AD 556 at 573; *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) ^β at 673B-C and *Utaumire & Anor v Kadzunge & Ors* HB-82-06. Mr Mazibuko, for the applicant, conceded that there is prejudice suffered by the applicant. That is clearly the case. The counterclaim gave sufficient details on what it is all about. In fact, it arises from the same facts and issues as the main application. The applicant (as respondent in the counterclaim) filed detailed opposing papers. Both parties filed heads of argument on the issue. ^ς The matter is ready for argument, so there is no prejudice to the applicant. It is for that reason I dismissed the point *in limine* raised by the applicant. Coming to the merits of the counterclaim, the owner cannot be deprived of its property merely because the lessee did not give the sub-lessee adequate notice to vacate the premises. This was clearly stated in *Omarshah v Karasa* ^δ *supra* at 588F in the following terms:

“If the sub-lessee cannot enforce a statutory tenancy in the circumstances of the precedents cited, then *a fortiori* he cannot remain in occupation of the premises in defiance of the landlord on the grounds that the sub-lessee did not give sufficient notice to quit or has breached the sub-lease.”

This really should be the end of the matter and the applicant must vacate the ^ε second respondent’s premises. In light of the above-mentioned precedent, the applicant should have foreseen this result and as such, I agree with the respondents that the costs should be awarded on an enhanced scale on the main application.

Accordingly, it is ordered that:

1. The (main) application be and is hereby dismissed, with costs on an ^φ attorney and client scale.
2. The counterclaim be and is hereby granted, with costs against the respondent (applicant in the main application) in favour of the applicant (second respondent in the main application) in the following terms:
 - 2.1 That it is declared that the applicant (i.e. the second respondent in ^ς the main application) is entitled to vacant possession of stand 142 of the northern portion of stand 143B previously leased to the first respondent (in the main application)
 - 2.2 That the respondent (i.e. the applicant in the main application) is ordered to vacate the premises which it currently occupies situated ^η

2009 (1) ZLR p207

Ndou J

^α on the above-mentioned property within fourteen days of the date on which this order is served on it.

Calderwood, Bryce Hendrie & Partners, applicant’s legal practitioners

Lazarus & Sarif, first respondent's legal practitioners

B Cheda & Partners, second respondent's legal practitioners

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Document 32 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/S v PARAGON REAL ESTATE & ANOR 2009 (1) ZLR 208 (H)

S v PARAGON REAL ESTATE & ANOR 2009 (1) ZLR 208 (H)

2009 (1) ZLR p208

Citation	2009 (1) ZLR 208 (H)
Case No	Judgment No. HH-35-09
Court	High Court, Harare
Judge	Uchena J & Assessors
Heard	8 October 2008; 26 November 2008
Judgment	20 March 2009
Counsel	Mrs C M Dube, for the State C Mhike, for the first accused J M Mafusire, for the second accused
Case Type	Criminal trial: exception and application to quash indictment
Annotations	No case annotations to date

Flynote

Criminal procedure – plea – pleas open to accused – case subject of previous civil trial – not permissible to rely on *exceptio rei judicatae* and plead *autrefois acquit*

Headnote

The accused were charged with fraud arising from the sale of a house. The D same matter had been the subject of a civil trial involving the same parties. The accused excepted to the indictment on the grounds of *res judicata*.

Held, that if the current proceedings were of a civil nature, there would have been no dispute as to whether or not the principles of the *exceptio rei judicatae* are applicable. However, criminal and civil proceedings E belong to two different fields of procedural and substantive law. In civil proceedings, the *exceptio* cannot, in spite of the name, be raised by way of exception, but must be raised as a special plea. In criminal proceedings, the courses open to the accused when he is asked to plead to a charge are set out in s 180(1) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The accused can object on the ground that he was not duly served F with a copy of the indictment, summons or charge; he can apply to have the indictment, summons or charge quashed in terms of s 178; he can plead to the charge; or he can except to the charge on the ground that it does not disclose an offence cognizable by the court. One possible plea is that he

has already been convicted or acquitted of that charge. While *res judicata* in civil procedure plays a role equivalent to that played by the plea of *autrefois acquit* or *autrefois convict* in criminal procedure, this does not mean that one can be substituted for the other. For a plea of *autrefois acquit* or *autrefois convict* to succeed, three elements must be satisfied: firstly, that the court was competent to try him for the offence; secondly, that the trial was upon a good indictment on which a valid

2009 (1) ZLR p209

Uchena J

A judgment of conviction could be entered; thirdly, that the acquittal was on the merits. With regard to the first element, the High Court, as constituted to conduct a civil trial, is not properly constituted for a criminal trial, which requires that the court consists of a judge and two assessors. With regard to the second element, there was no valid indictment at the civil trial and the accused were in no jeopardy of conviction, so there could have been no acquittal on the merits.

Case cited

R v Manasewitz 1933 AD 165

Legislation considered

Criminal Procedure and Evidence Act [Chapter 9:07], ss 178 & 180(1)

High Court Act [Chapter 7:06], s 3

Case information

Mrs *C M Dube*, for the State

C Mhike, for the first accused

J M Mafusire, for the second accused

Judgment

UCHENA J: The accused were jointly charged with the crime of fraud, it being alleged that they misrepresented to the complainant that the second accused had ready cash with which she could buy the complainant's house. It thereafter turned out that the second accused was not a cash buyer, as she was buying through a bank loan. The State alleges that the sale to the second accused caused prejudice to the complainant.

The accused raised exceptions to the indictment and applied for its quashing. The indictment the accused excepted to reads as follows:

" That Paragon Real Estate, duly represented by Robson Kundaba, and Noreen Mutepha are guilty of fraud In that sometime on 6 July 2001 and at Paragon Real Estate, Jay Kandiwo, an employee of Paragon Real Estate, misrepresented to Janetha Magori that one Noreen Mutepha had committed herself to purchase her house which was on sale and that the money was readily available. On the strength of this misrepresentation, Janetha Magori was made to sign an agreement of sale which the other parties had already signed. Whereas in truth and in fact, when Janetha Magori was made to sign the agreement of sale, the money was not readily available, thereby prejudicing Janetha Magori of her house. Paragon Real Estate submitted fraudulent documents to the High Court of Zimbabwe, which documents formed the basis upon which Janetha Magori was evicted from her house."

The first accused's grounds of exception are mainly as follows:

2009 (1) ZLR p210

Uchena J

1. On the *exceptio rei judicatae*, which means that the issues in dispute have already been determined by a court of competent jurisdiction, between the same parties or their privies, counsel for accused 1 submitted that the facts on which the indictment is based have already been determined by the High Court in civil proceedings between the accused persons and the complainant in HC 8320/01, HC 7186/04 and HC11310/04, and
2. That the indictment does not allege that the first accused intended to deceive the complainant.

The second accused's exception is also based on the allegation that the alleged misrepresentation has already been determined by the High Court in the cases referred to above. It was also alleged, on her behalf, that neither the indictment nor the summary of evidence mentions any of the basic elements of the crime of fraud against her. In particular the following was raised:

- (a) What is it that the second accused allegedly misrepresented?
- (b) When and where was the alleged misrepresentation by the second accused?
- (c) To whom was the alleged misrepresentation made by the second accused?
- (d) What was the nature of the alleged misrepresentation by the second accused?

It is not in dispute that the cases of the complainant and the accused were heard and determined by the High Court sitting as a civil court. It is agreed between the accused and the State that the civil cases related to the house which is the subject of this prosecution, and to the agreement which resulted in the house being transferred into the second accused's name. It is common cause that the complainant was subsequently evicted from the house on the basis of one of the decisions of the High Court sitting as a civil court. I have, despite searches by the Registry and requests to the accused's counsel, not been able to find copies of the judgments on which the exception on the basis of *rei judicata* is being raised. Mr Mafusire, who first advised the court that the records in question had been removed from the criminal record, has not been able to assist, despite reminders sent to him after the case was postponed for judgment. I will therefore proceed on the basis that the judgments are judgments *in rem* (final and definitive judgments by competent courts, based on the merits of the cases, which are binding on the whole world on the decided issues). I take this position because the State, in spite of the accused's allegation that the judgments are judgments *in rem*, did not say that they are not. It merely argued that they were judgments in civil proceedings and can not be used as a bar to criminal proceedings.

2009 (1) ZLR p211

Uchena J

A Mr Mhike and Mr Mafusire submitted that the accused can not be brought to trial on issues which have already been decided by the High Court. They submitted that, as the judgments are *in rem*, they are binding on the whole world, and that that should include the Attorney-General. Mrs Dube submitted that the special plea of the *exceptio rei judicatae* is not part of the law of criminal procedure.

B Res judicata

If the current proceedings were of a civil nature and the facts were as has been stated above, there would have been no dispute as to whether or not the principles of the *exceptio rei judicatae* are applicable. It must, however, be stated from the outset that criminal and civil proceedings belong to two different fields of procedural and substantive law. Mr Mafusire and Mr Mhike premised their submissions on Amler's *Precedents of Pleadings* 3 ed at pp 257-258, Beck's *Theory and Principles of Pleadings in Civil Actions* 4 ed at p 42, and *R v Manasewitz* 1933 AD 165 at 168.

The textbooks on which counsel for the accused relied discuss civil procedure and compare it, where appropriate, with criminal procedure. Amler's *Precedents of Pleadings* at pp 257-258 discusses circumstances under which the special plea of the *exceptio rei judicatae* can be raised. He stresses the point that, though it is at common law known as an *exceptio*, it can not be raised by way of exception, but must be raised as a special plea. He points out that for the special plea to succeed, there must be a final judgment by a competent court on the same thing or grounds, and the issues determined in the previous litigation must have been between the same parties or their privies. I agree with the learned author's exposition of the circumstances under which the special plea of the *exceptio rei judicatae* can be raised as a bar to subsequent civil proceedings. The exposition of the law by the learned author does not, however, deal with the following

- (i) whether or not the Attorney-General can be the complainant's privy;
- (ii) whether a civil order evicting the complainant from the house in dispute or confirming the second accused's title to the house can be said to be the same as a prosecution for an alleged fraud committed in the process of acquiring the house.

C The application of the *exceptio rei judicatae* to criminal procedure is, in my view, excluded by the provisions of s 180(1) and (2) of the Criminal Procedure and Evidence Act [Chapter 9: 07] (hereinafter called the CP&E Act). [The learned judge set out the provisions of the section and then continued:]

In terms of s 180(1) of the CP&E Act, an accused person has the following options, he or she can –

2009 (1) ZLR p212

Uchena J

- (i) object, on the grounds that he or she was not duly served with a copy ^A of the indictment, summons or charge;
- (ii) apply to have the indictment, summons or charge quashed; or
- (iii) plead to the indictment, summons, or charge; or
- (iv) except to the indictment, summons or charge on the ground that it does ^B not disclose an offence cognizable by the court.

The listing of the available options means these are the only options the legislature intended to give to an accused person. The accused cannot, therefore, introduce an option not found in s 180(1) of the CP&E Act.

Subsection (1) of s 180 makes it clear that an exception to an indictment or charge can only be on the ground that it does not disclose any offence ^C cognizable by the court. If the accused does not except in the prescribed manner, he has to plead in any one or more of the ways prescribed by subs (2) of that section. It is, in my view, not permissible to raise the *exceptio rei judicatae* as an exception as the grounds on which an exception can be raised are prescribed by s 180(1). The plea of the *exceptio rei judicatae* is in fact ^D not part of our law of criminal procedure. It was introduced into the law of criminal procedure as the plea of *autrefois acquit* or *convict*. It cannot be pleaded in any other way.

Defence counsel for the accused, relying on the *Manasewitz* case *supra*, submitted that the plea of *res judicata* is equivalent to the plea of *autrefois acquit*. It is true that when confined to civil procedure it plays a role equivalent ^E to that played by the plea of *autrefois acquit* or *convict* in criminal procedure. That does not mean, however, that one can substitute the other. It merely means it is the parallel civil procedure which deals, within civil procedure, with a situation dealt with by the plea of *autrefois acquit* in criminal procedure. An analysis of what Wessels CJ said at p 168 in *Manasewitz* case *supra* ^F will illustrate the difference. He said:

"There is no doubt whatever that by our law an accused person, when once acquitted of an offence, may not be tried again for the same offence if he was in jeopardy on the first trial — 'He was so in jeopardy if (1) the court was competent to try him for the offence, (2) the trial was upon a good indictment on which a valid judgment of conviction could be entered, and (3) the acquittal was on ^G the merits, i.e. by verdict on the trial or in summary cases by dismissal on the merits followed by a judgment or order of acquittal.'" (*Russell on Crimes* 8 ed at p 1818.) ... The reason why a former acquittal can be pleaded in a second trial is based in English law on the maxim *nemo debet bis vexari si constat curiae quod sit pro una et eadem causa*, and this maxim is derived from the Roman law of the *exceptio rei judicatae*. A plea of *autrefois acquit* is in fact equivalent to a plea of the *exceptio rei judicatae* in our law." ^H

2009 (1) ZLR p213

Uchena J

^A The reference to the *exceptio rei judicatae* being equivalent to the plea of *autrefois acquit* could have led defence counsel to the submission that the former is applicable across the divide between civil procedure and criminal procedure. However, an examination of the three elements for the applicability of the plea of *autrefois acquit* should have dissuaded them from pursuing that argument to the extent they did. The first element is the competence of ^B the court to try the accused for the offence. The three judgments relied on by defence counsel were delivered by civil courts presided over by judges of the High Court. While it is true that judges of the High Court can preside in both civil and criminal courts, civil courts are, in terms of s 3 of the High Court Act [*Chapter 7:06*] constituted differently from criminal courts. Section ^C 3 provides as follows:

"Subject to section *four*, the High Court shall be duly constituted —

- (a) for the purpose of exercising its original jurisdiction in any civil matter, if it consists of one or more judges of the High Court;
- (b) for the purpose of hearing a criminal trial, if it consists of one judge of the High Court and two assessors; ^D
- (c) for the purpose of exercising its powers to review the proceedings or decision of any inferior court, tribunal or administrative authority, if it consists of one or more judges of the High Court;

- (d) for the purpose of exercising its appellate jurisdiction in any matter, if it consists of not less than two judges of the High Court.”

Civil trials are, therefore, presided over by one or more judges of the High Court, while criminal courts are presided over by a judge sitting with two assessors. Therefore, the civil courts which delivered the three judgments relied upon by defence counsel could not, while presided over by a judge sitting alone, have been competent courts for purposes of presiding over the criminal case of fraud.

The second element is on the trial being upon a good indictment on which a valid judgment of conviction could be entered. There were no good indictments in the three civil cases relied upon. No conviction could have been entered in any of the three civil cases. The courts, as already said, were not properly constituted for the purposes of hearing criminal cases and delivering a valid verdict on a criminal indictment.

The third element is on the acquittal being on the merits. It is obvious that there were no criminal indictments presented before the civil courts.

I would therefore find that the accused persons never stood in jeopardy of being convicted on an indictment of fraud when their cases were heard by the civil courts. In the result I can not uphold the accuseds’ exceptions to the indictment on the ground of the *exceptio rei judicatae*.

2009 (1) ZLR p214

Uchena J

The exception ^A

The accuseds’ exception to the indictment is also premised on the ground that it does not disclose against them an offence cognizable by the court.

Accused 1

Mr *Mhike* submitted that the indictment does not fully spell out the elements ^B of fraud since the accused’s intention to deceive was not alleged. The last part of the indictment, in my view, indirectly makes that allegation. It reads as follows:

“Whereas in truth and in fact when Janetha Magori was made to sign the agreement of sale the money was not readily available, thereby prejudicing Janetha Magori of her house. Paragon Real Estate submitted fraudulent documents to the High Court of Zimbabwe, which documents formed the basis upon which Janetha Magori was evicted from her house.”

This part of the indictment indirectly alleges that the complainant was intentionally given misleading information about the money being readily available so that she would sign the agreement. It also alleges that the first accused submitted fraudulent documents. This cannot be for any reason ^D other than that of deceiving the complainant. In my view, the indictment discloses a cognizable offence against the first accused. As suggested by Mrs *Dube*, it should, however, be amended by adding to it the words “with intent to deceive.” The accused, will not suffer any prejudice if the indictment is amended. The indictment will, for the sake of clarity, be amended in the ^E second line of the second paragraph by inserting the words “with intent to deceive”, between the words “Magori” and “that”. The exception can therefore not succeed. The issue of the first accused’s representation by an officer who has left the company can be cured by an amendment substituting him with another officer of the first accused.

Accused 2. ^F

Mr *Mafusire* raised questions as to when, where and how his client is alleged to have made any misrepresentation, and the nature of such misrepresentation. The indictment does not disclose that the second accused played any part in the misrepresentation alleged against Kandiwo, the first accused’s employee. It also does not allege that the second accused was present when the first ^G accused made the misrepresentation, nor does it allege that she was aware of the misrepresentation and co-operated with Kandiwo’s misrepresentation of the facts. The charge as it stands does not therefore disclose a cognizable offence against the second accused. Mrs *Dube* conceded the inadequacy of the indictment against accused two. She, however, sought a postponement to enable her to consider the way forward. When the hearing of the application ^H

Uchena J

A resumed, she sought the court's permission to allow her to amend the charge so that it can make the necessary allegations against the second accused. Mr *Mafusire* objected to the amendment, alleging that the amendment would prejudice the second accused. Prejudice for which an application to amend can be refused is one which affects the accused's defence. In this case, Mr *Mafusire* objected on the ground that the complainant has, in documents used B in the civil cases referred to, admitted that she signed the agreement. He also submitted that the State witnesses' summaries are at variance with the proposed amendments. An examination of the State witnesses' summaries confirms Mr *Mafusire*'s submission. The State's summary does not allege that the second accused participated in the misrepresentations made C by Kandiwo. It does not say the second accused was present when the misrepresentations were made. The complainant's summary does not in any way implicate the second accused. The summaries of other State witnesses do not allege any wrongdoing by the second accused. I would therefore agree that an indictment which alleges that the second accused did things which the State's own summary and witnesses' summaries say D or imply he did not do, is prejudicial and embarrassing to the accused's defence. I am therefore satisfied that neither the original indictment nor the proposed amended indictment discloses an offence cognizable by the court, against the second accused.

The defects in the indictment were raised by Mr *Mafusire* two years ago. The E State promised to amend the charge but did not do so until now. It is obvious that the State has not efficiently prepared for the prosecution of this case.

Application to quash.

It was also contended on behalf of both accused that the indictment should be quashed as it is calculated to prejudice or embarrass them in their F defence. An accused person must, in his application, show how he will be so prejudiced or embarrassed. The prejudice must relate to his defence to the indictment preferred against him or her. If an accused person opts to quash the indictment, he can only do so in terms of s 178 of the CP&E Act, which provides as follows:

- "(1) The accused may, before pleading, apply to the court to quash the indictment, G summons or charge on the ground that it is calculated to prejudice or embarrass him in his defence.
- (2) Upon an application in terms of subsection (1), the court may quash the indictment, summons or charge or may order it to be amended in such manner as the court thinks just or may refuse to make any order on the application.
- (3) If the accused alleges that he is wrongly named in the indictment, summons H or charge, the court may, on being satisfied by affidavit or otherwise of the error,

Uchena J

order it to be amended." A

As already stated above, Mrs *Dube* applied for an adjournment of the applications, after which she presented a proposed amendment to the indictment. The proposed amended indictment reads as follows:

"In that sometime in 2001 and at Paragon Real Estate, Jay Kandiwo, an employee of Paragon Real Estate, and Noreen Mutepha misrepresented to Janetha Magori B that second accused had committed herself to purchase her house which was on sale and that the money was readily available. On the strength of this misrepresentation Janetha Magori was asked to sign a paper which she was not given a copy of. Janetha Magori did not proceed to enter into an agreement of sale with first and second accused. A forged agreement of sale which purports to have Janetha Magori's signature was later submitted by second accused in the High Court, together with other papers filed of record. The documents formed C the basis upon which Janetha Magori was evicted from her house, whereas in truth and in fact the agreement of sale was forged as it had not been signed by Janetha Magori, thereby prejudicing, the said Janetha Magori of her house."

The court can grant an amendment if doing so does not prejudice or embarrass the accused person in his defence. In this case, the accused are still to plead and give their defences to the indictment. There would D ordinarily be no prejudice if the accused can plead and give their defences without being prejudiced or embarrassed by the amended indictment.

Mr Mafusire submitted that the complainant has taken certain positions in the civil litigation, on how she signed the agreement of sale. It was also contended on behalf of the second accused that the proposed amended ^Ε indictment will contradict the State's summary and its witnesses' summaries as to how the alleged events took place. The State's summary does not allege that the second accused participated in the misrepresentations made by Kandiwo. It does not say that the second accused was present when the misrepresentations were made. The complainant's summary does not in any way implicate the second accused. The summaries of the other State ^Φ witnesses do not allege any wrong doing by the second accused. I would therefore agree with Mr Mafusire that the proposed amendment by the State would amount to manufacturing evidence against her, as it contradicts the State's and the witnesses' summaries. That, in my view, would prejudice and embarrass the second accused in her defence. ^Γ

As regards the first accused, the proposed amendment does not add anything new against it. The amendment was meant to include the second accused's alleged involvement. If the indictment against the second accused is quashed, there will be no need for the proposed amended indictment. As already indicated, there are allegations that the complainant, in the civil litigation already referred to above, agreed to having signed the ^Η

2009 (1) ZLR p217

Uchena J

^Α agreement of sale. That is a matter of evidence which, in my view, will not prejudice the first accused, but may in fact give it an advantage when it comes to the cross-examination of the complainant. I would, therefore, as already indicated under exceptions, hold that the first accused will not suffer any prejudice if the original indictment is amended.

^Β In the result

- 1 The indictment against the second accused is quashed.
- 2 The first accused's exception and application to quash the indictment is dismissed.
- 3 The indictment against the first accused is amended by the insertion, ^ϸ in the second line of the second paragraph, of the words "with intent to deceive", between the words "Magori" and "that." and the substitution for the words "Stephen Mudzudzu its Managing Director," of the words, "Robson Kundaba, its Sales Director."

Atherstone & Cook, first accused's legal practitioners.

^Δ *Scanlen & Holderness*, second accused's legal practitioners.

Attorney General's Criminal Division, respondent's legal practitioners.

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Document 33 of 52

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CITY OF HARARE v ZVOBGO 2009 (1) ZLR 218 (S)

2009 (1) ZLR p218

Citation	2009 (1) ZLR 218 (S)
Case No	Judgment No. S-04-09
Court	Supreme Court, Harare
Judge	Ziyambi JA, Gwaunza JA and Garwe JA
Heard	4 September 2007

Judgment	2 April 2009
Counsel	<i>H Zhou</i> , for the appellant <i>Mrs S F Jarvis</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Administrative law – *administrative decisions and acts – validity – acts performed by commission running affairs of city – commission effectively running affairs although its term had expired and its reappointment was unlawful – Kelsen’s theory of effectiveness inapplicable – such decisions cannot be legitimated in terms thereof* ^D

Administrative law – *review of administrative actions – distinction between review procedure and appeal procedure*

Appeal – *stare decisis – binding effect of previous decision of Supreme Court*

Jurisprudence – *Kelsen’s theory of effectiveness – applicability – controversial* ^E *theory – only applicable in extreme situations – does not apply to domestic law*

Local government – *urban council – senior employee – dismissal of – dismissal must be approved by Local Government Board – decision to dismiss not a decision of the Board – not necessary to cite Board in proceedings arising out of dismissal* ^F

Local government – *urban council – senior officials – defects in election or appointment – validation of acts by such officials – such validation not applicable to commission appointed in place of entire council – not applicable where election of entire council in question*

Headnote

The main difference between an appeal and a review is that in the case ^G of the former what is in question is the substantive correctness of the original decision, whereas on review the High Court is not delving into the substantive correctness of the decisions, but is only determining whether there were any reviewable procedural irregularities or any action which was reviewable because it was *ultra vires* the powers allocated to ^H

2009 (1) ZLR p219

^A the tribunal. A review can be brought before the proceedings have been completed, whereas an appeal can only be brought after the original case has been finalized.

Section 86 (2) of the Urban Councils Act [*Chapter 29:15*] was intended to protect a council or committee from a defect only in the appointment of some of its members. The section was not intended to cater for a ^B situation where the appointment of the entire council or committee was found to be wanting.

The respondent and 17 other employees of the appellant were suspended from duty, following the findings of a committee of inquiry set up by the Minister of Local Government in terms of the Urban Councils Act ^C [*Chapter 29:15*]. At the time of the suspension of the respondent and the other employees, the appellant’s affairs were under the management of a commission appointed by the Minister in terms of s 80 of Act, following the suspension of the elected councillors. The appointment of the commission in terms of s 80(3) of the Act was for a period of six months. In spite of this limitation, the Minister kept reappointing the ^D commission. During the first six months of its tenure, the commission resolved to appoint a special committee to inquire into the allegations faced by the 18 suspended employees. After the expiry of the first six month period, the commission (which was still in office) appointed a committee in accordance with the resolution. The committee was dissolved and ^E another appointed, which then commenced inquiries into the allegations of misconduct by the respondent in spite of objections raised by him about the legitimacy of its actions. Thereafter the respondent sought an order from the High Court setting aside the actions of the committee of inquiry as void. In argument before the High Court, the appellant accepted that it was illegal for the commission to continue in office after ^F six months. It argued however, that since the commission was the only the only authority running

the affairs of the City of Harare, its otherwise illegal acts must be legitimized on the basis of Hans Kelsen's theory or doctrine of effectiveness. The High Court rejected this argument (see *Zvobgo v City of Harare & Anor* 2005 (2) ZLR 164 (H), *per* Makarau J, as she then was)

On appeal to the Supreme Court, the appellant advanced the same argument based upon the Kelsenian theory of effectiveness. It also submitted that the reappointment of the committee was not illegal, notwithstanding its concession before the High Court and a judgment to the contrary in *Stevenson v Minister of Local Government & Ors* 2002 (1) ZLR 498 (S),^h which, it submitted, was merely *obiter dicta*. Any illegality, so it

2009 (1) ZLR p220

submitted, associated with the extension and reappointment of subsequent commissions would not affect the legality of administrative actions and decisions done by any such subsequent commissions. It further submitted that the dismissal of the respondent was a separate act by a separate body, namely, the Local Government Board, and therefore the Board should have been cited as a party^b

Held, that the committee was appointed after the commission had exhausted its legal tenure. The fact that the committee was appointed by an illegal commission in pursuance of a resolution passed during the lawful period of office of the commission did not clothe the committee with legitimacy, as the passing of the resolution and the appointment of the committee were two separate juristic acts. Both must emanate from a commission^c or council lawfully in office.

Held, further, that the illegality of the commission had already been decided by the Supreme Court in *Stevenson v Minister of Local Government & Ors* (*supra*). The decision was not *obiter dicta* and there was no basis for re-visiting that decision.

Held, further, that before terminating the services of a senior official, the^d approval of the Local Government Board must first be obtained, in terms of s 140(2) of the Act. However, the Board does not itself terminate the employment of a senior official. It is the council that does so. It was thus unnecessary to cite the Board.

Held, further, dismissing the appeal, that the decision of the High Court that^e Kelsen's theory of effectiveness, which is in any event controversial, does not apply to domestic law, because there is no change in the *grundnorm*, was clearly correct. Domestic law is itself not the fundamental law and needs no independent validation other than that which the *grundnorm* confers on it. Vacuums created by the domestic law should be filled by making reference to the *grundnorm* and applying domestic remedies.^f The theory cannot be invoked to destroy the *grundnorm* by legitimising acts that are illegal under the *grundnorm*. Any vacuum that may have arisen clearly arose, not because of the absence of laws in the domestic arena, but rather because the provisions of some of the domestic laws were ignored. This case was not concerned with any attempted shift^g in the *grundnorm* but rather with people ignoring its administrative statutes. The theory should only apply in extreme situations where there is a change in the *grundnorm*.

Cases cited

Madzimbamuto v Lardner-Burke NO & Anor 1968 (1) RLR 203 (A); 1968 (2) SA 284 (RA)^h

2009 (1) ZLR p221

Garwe JA

^a *Stevenson v Minister of Local Government & Ors* 2002 (1) ZLR 498 (S)

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

Legislation considered

Urban Councils Act [Chapter 29:15], ss 80(5), 86(2) and 140

Case information

^b *H Zhou*, for the appellant

Mrs *S F Jarvis*, for the respondent

Judgment

GARWE JA: This is an appeal against the decision of the High Court Harare ^c declaring null and void the disciplinary proceedings of a special committee set up by a commission that had been established to manage the affairs of the City of Harare.

The facts of this case are to a large extent not in dispute. The respondent, together with 17 other employees of the City of Harare ("the appellant"), were suspended from duty on 24 June 1999 following the findings of a committee ^d of inquiry set up by the Minister of Local Government and National Housing, in terms of the Urban Councils Act [*Chapter 29:15*] ("the Act"). At the time, the affairs of the appellant were under the management of a commission headed by one Elijah Chanakira, which commission had been appointed by the Minister on 8 March 1999 in terms of s 80 of the Act, following the ^e suspension of elected councillors on 25 February 1999. In terms of the Act, a commission so appointed was empowered to act as the council and would hold office for a maximum period of six months. On an unknown date, but after the first six months of its appointment, the commission appointed a committee to inquire into alleged misconduct on the part of the respondent. That committee was dissolved before it conducted any inquiry. A second ^f committee was then constituted. At the commencement of the disciplinary proceedings before that committee in October 2000, the respondent raised the issue of lack of jurisdiction on the part of the committee on the basis that the committee had been appointed by a commission whose own tenure of office was illegal. That objection was overruled, as a result of which the respondent filed an application with the High Court seeking an order declaring ^g the disciplinary proceedings null and void.

At the hearing of the application the High Court accepted that the illegality of the commission was common cause. The court further concluded that the Kelsenian theory of efficiency, as enunciated in *Madzimbamuto v Lardner-Burke NO & Anor NO* 1968 (1) RLR 203 (A); 1968 (2) SA 284 (RA), was ^h only applicable in revolutionary situations where a sitting régime was

2009 (1) ZLR p222

Garwe JA

toppled by another, thereby creating a shift in the *grundnorm*; but was not ^a applicable in the context of domestic law where there has been no change in the *grundnorm*. The court also allowed an amendment to the draft order sought by the respondent declaring the subsequent dismissal of the respondent null and void.

In its notice of appeal, the appellant has attacked the decision of the High ^b Court on the following grounds:

1. The court erred in not holding that the committee was appointed in pursuance of a resolution passed during the first six months of the life of the first commission and was therefore not tainted with any illegality that may be associated with any future or subsequent commission. ^c
2. The court erred in impliedly allowing the respondent's amendment of its draft order to include a declaration that the subsequent dismissal of the same was null and void.
3. The court erred in ignoring the fact that the dismissal of the respondent was a separate act by a separate body, namely the Local Government Board and therefore *a fortiori* the Local Government Board, should ^d have been cited as a party to the proceedings.
4. The court grossly erred in ignoring the fact that any illegality associated with the extension and re-appointment of subsequent commissions would not affect the legality of administrative actions and decisions done by any such subsequent commissions. ^e

Shortly before the hearing of the appeal the appellant filed a notice of amendment to introduce two additional grounds. These are:

1. That the court *a quo* erred at law by determining that the commission running the affairs of the appellant was not a legal authority capable of running the affairs of the City of Harare and bringing about legal ^f consequences; and
2. That the court *a quo* erred in coming to the conclusion that the re-appointment of the commissioners after the first six months rendered the commission illegal.

In its heads of argument, the appellant raised two further issues. These were, ^g firstly, whether the Minister of Local Government and National Housing should have been cited and, secondly, whether it was permissible for the respondent to institute review proceedings before conclusion of the proceedings.

It is clear from the grounds of appeal and from the appellant's heads of argument that there are a number of issues that call for determination. I will deal with each of these in turn, starting with those matters in respect of ^h

2009 (1) ZLR p223

Garwe JA

^a which preliminary points have been raised.

Whether the Local Government Board should have been cited

This issue has been raised for the first time on appeal. It is the appellant's contention that the employment of the respondent was terminated by the Local Government Board and that therefore the Board should have been cited.

^b Section 140(1) of the Act provides that, subject to subs (2), a council may at any time discharge a senior official summarily on the ground of misconduct, negligence or any other ground that would in law justify discharge without notice.

Subsection (2) provides that a council shall not discharge a senior official ^c unless the discharge has been approved by the Local Government Board. What this means is that before terminating the services of a senior official the approval of the Board must first be obtained.

It is clear from the provisions of s 140 of the Act that the Board does not itself terminate the employment of a senior official. It is the council that does ^d so, but, in doing so, the council must first seek the approval of the Board. The involvement of the Board was meant to ensure that no senior authority was removed unless the Board – an independent body – also confirmed or approved such dismissal.

In these circumstances it cannot be suggested that the Board should have been cited. The Board merely approves. The act of actually discharging the ^e official is left to the council.

This submission must fail.

Whether the Minister should have been cited

It is the appellant's contention that, since the commission derives its legitimacy from the Minister of Local Government, then any challenge on its legality ^f must necessarily entail that the Minister be cited as party to the proceedings. This was not done in this case.

It is important that sight is not lost of the fact that there have been other proceedings involving the Minister and that this court has, in the past, declared the re-appointment of the commission to be illegal: see *Stevenson g v Minister of Local Government & Ors* 2002 (1) ZLR 498 (S). Indeed, when this matter was heard in the High Court, the illegality of the commission was not in issue. The appellant did not seek in those proceedings to rely on any action taken by the commission after its re-appointment as it accepted that the re-appointment of the commission was illegal.

^h This submission has no merit and must also fail.

2009 (1) ZLR p224

Garwe JA

Whether the matter could be reviewed before the conclusion of the ^a inquiry proceedings

It is the appellant's contention that when the respondent raised the question of jurisdiction of the inquiry committee, and when the committee dismissed the technical objection raised, the matter should have continued until conclusion of the proceedings. Only then could the respondent raise the issue of lack ^b of jurisdiction as one of his grounds of appeal.

A review differs from an appeal, which can only be instituted after conclusion of the proceedings.

As stated by Prof Geoff Feltoe in *A Guide to Zimbabwean Administrative c Law* 3 ed (1998) at p 14:

"The main difference between the two remedies is that in an appeal what is in question is the substantive correctness of the original decision, whereas on review the High Court is not delving into substantive correctness of the decisions, but is only determining whether there were any reviewable procedural

irregularities or any action which was reviewable because it was *ultra vires* the powers allocated to the tribunal ...".

The learned author continues on the same page:

"A review can be brought even before the proceedings have been completed, whereas an appeal can only be brought after the original case has been finalized ...".

The submission raised in this regard must therefore fail. ^Ε

Whether the amendment should have been granted

At the hearing of the matter before the court *a quo*, the respondent sought an amendment to his draft order in order to include a declaration that his subsequent dismissal was null and void. The respondent opposed the amendment on the basis that this would introduce a new cause of action. The ^Ε court *a quo*, at 170C, allowed the amendment on the basis that:

"The subsequent dismissal of the applicant was directly predicated on the proceedings that have been challenged and in the event that such are found *void ab initio*, then the dismissal will fall away by way of domino effect as anything resting on the void proceedings will have to fall with the proceedings. In this regard the amendment is not necessary ... and does not seek to introduce a new ^Γ cause of action."

Clearly the amendment did not seek to introduce a new cause of action. Indeed, if it was found that the proceedings were not in accordance with the law, then the subsequent dismissal would be null and void.

This submission must also fail. ^Η

2009 (1) ZLR p225

Garwe JA

A Whether s 86 validates the actions of the Commission

It is the appellant's submission that s 86(2) of the Act protects the validity of any action taken by the council, or any person acting as mayor, chairman, town clerk or treasurer. That section provides as follows:

"No proceedings of a council or any committee and no action taken by any person ^Β acting as mayor, chairman, councillor, town clerk, treasurer or auditor, as the case may be, shall be invalid or illegal solely on account of any defect in the election, appointment or qualification of any such person."

On the face of it, the wording of s 86(2) appears to validate the actions of the commission. On closer scrutiny and on a proper interpretation of the section, it is clear that the provision does not go so far as to cover the present case. ^Θ Admittedly, a commission that has been lawfully appointed exercises the powers of a council. The section does not, however, make reference to an interim body, such as the commission in this case. Further, the commission does not fall within the definition of a council or a committee, nor can its members be said to be acting as mayor, chairman, councillor, town clerk, ^Δ treasurer or auditor.

I agree with the respondent that s 86(2) was intended to protect a council or committee from a defect only in the appointment of some of its members. The section was not intended to cater for a situation where the appointment of the entire council or committee was found to be wanting. I would also agree with the respondent that the provisions of s 80 of the Act are quite ^Ε brief and consistent with the intention to create a caretaker body. For this reason, no provision has been made for the commission to fill the role of an elected mayor or an executive committee.

I find therefore that the provisions of s 86 were not intended to cover the activities of an interim body such as a commission.

^Ε The submission in this regard must therefore fail.

Whether the inquiry committee was constituted by the resolution of 20 June 1999

At the hearing of this matter before the High Court, it was not in dispute that the special committee in question was appointed after the term of six months ^Γ for which the commission could hold office in terms of the Act.

Another special committee had previously been appointed but was, however, dissolved before it had commenced the inquiry proceedings. It was also not in dispute that the initial decision to set up various inquiry committees was made on 30 June 1999, i.e. during the period of six months for which the **h** commission had been appointed to hold office.

2009 (1) ZLR p226

Garwe JA

It is the appellant's submission that the inquiry committee was created by **a** resolution of 30 June 1999 and the fact that, administratively, the inquiry committee may have been constituted in September 1999 does not render that appointment null and void.

By the time of the hearing of the matter before the High Court, two decisions – one of the High Court and the other of the Supreme Court – had held that the **b** extension of the lifetime of the commission beyond six months was illegal.

In dealing with the question whether the inquiry committee was constituted by the resolution of 30 June 2009, the court *a quo* remarked as follows at 169E-170A:

"The fact that the resolution to appoint a committee of inquiry into the alleged misconduct of the applicant was passed during the lawful tenure of the commission **c** was not relied upon in oral argument as making the proceedings of the committee legitimate. Although no reason was given for abandoning the argument, it is my view that such abandonment was proper. It is common cause that the committee presided over by the second respondent was appointed after the commission had exhausted its lawful tenure. It is my view that the fact that the committee was appointed by an illegal commission in pursuance of a resolution passed **d** during the lawful years of the commission does not clothe the committee with legitimacy as the passing of the resolution and the appointment of the committee are two separate juristic acts. Both must emanate from a commission or council lawfully in office. In law, one cannot envisage a situation where the resolution of a legal entity, lawfully constituted, can lawfully be carried into effect by an unlawful body, and in the absence of some validating procedure, create, and **e** confer legal rights and obligations on the parties concerned."

I agree entirely with the above remarks. In any event, it appears that the submission, though raised in the papers, was not pursued during oral argument before the court *a quo*. Indeed, the court *a quo* reached the conclusion that the submission had been abandoned but had nevertheless proceeded to deal with it. Despite this, the matter has again been raised as one of the grounds **f** of appeal before this court. I am in no doubt at all that the court *a quo* was correct in coming to the conclusion that the appointment of the inquiry committee is a separate juristic act that must be performed by a commission lawfully in office.

The appellant's submission in this regard must therefore fail. **g**

Whether the re-appointment of the Commission was legal

In the proceedings before the court *a quo*, it was accepted by all parties that the re-appointment of the Commission was illegal. This followed the decision of this court in *Stevenson v Minister of Local Government & Ors supra*. The court *a quo* in its judgment remarked that the illegality of the commission **h** after the first six months of its lifetime was not in issue.

2009 (1) ZLR p227

Garwe JA

a The appellant has now changed its position in this regard and now argues that, as a question of law, the conclusion that the re-appointment of the commissioners was *per se* illegal was clearly wrong.

Section 80(5) of the Act provides:

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

The appellant argues that the above provision expressly empowers the Minister to re-appoint commissioners and that that is what the Minister did in this case. Therefore, so the argument goes, the re-appointment cannot **c** be said to be illegal and the concession made before the court *a quo* to this effect was not properly made.

In *Stevenson v Minister of Local Government & Ors supra*, this court had occasion to consider whether the re-appointment of the Commissioners was legal. At pp 505B-H and 506A Sandura JA remarked:

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

In any event, in terms of s 80(4) of the Urban Councils Act, before the termination of office of a commissioner, the commissioner is obliged to cause an election to be held on such date as he may fix to fill the vacancies on the council as if they were special vacancies. As the commissioners were appointed in March 1999, their term of office was due to expire in September 1999. Before the expiration of their term of office, they should have caused an election to be held to fill the vacancies on the council as if they were special vacancies. However, they did not do so.

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

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

2009 (1) ZLR p228

Garwe JA

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

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

That this issue has been settled by this court is clear. This court specifically held that the re-appointment of the commissioners in these circumstances was illegal in view of the fact that the Minister must have been aware that the next general election of councillors was due in August 1999. The Minister should have ensured that the commissioners whom he had appointed carried out their obligation to cause an election to be held before their term of office expired in September 1999.

I see no basis upon which this finding can be re-visited. The commission referred to by Sandura JA is the same commission which appointed the inquiry committee, whose decision was the subject of the application proceedings before the High Court. The finding that the re-appointment of the commissioners was illegal has been settled.

The suggestion that the above remarks by Sandura JA were in any event *obiter dicta* cannot be accepted. In order to determine who should pay costs, one of the issues before the court was whether the Minister could avoid a general election of councillors by continually re-appointing the commissioners. It had become necessary for the court to determine the issues raised in the application in order to determine which party should pay the costs of the application in the court *quo*. At the time of the hearing of the appeal, mayoral and council elections had been held in March 2002 and the basis for the application had therefore fallen away. The remarks made by Sandura JA were, therefore, not simply *obiter*. They constituted one of the bases upon which the court made a decision on the issue of costs, the reason for the application having fallen away with the holding of mayoral and council elections.

I see no basis, as suggested by the appellant, for revisiting the decision of this court in *Stevenson v Minister of Local Government & Ors supra*.

The suggestion that the re-appointment of the commission was legal must also fail.

Garwe JA

A Whether the activities of the Commission are valid on the basis of the doctrine of effectiveness

It is the appellant's submission that on the basis of the Kelsenian doctrine of efficacy the activities of the commission can be validated purely on the basis of the doctrine of effectiveness. The Kelsenian theory was considered ^b at great length in this jurisdiction in *Madzimbamuto v Lardner-Burke NO & Anor NO supra*. In that case, the fact that the rebel Rhodesian government was in effective control after ousting the 1961 Constitution was accepted as a basis for recognizing the government.

It is clear from a reading of the authorities that the doctrine of effectiveness applies in situations where one régime has been toppled by another and a ^c new set of laws is introduced to replace the old laws. Nowhere has it been suggested that the doctrine could be extended so that it applies in domestic law.

In dealing with this issue Makarau J remarked at p 172:

- "29. From the above, it appears to me that the theory of efficacy has found expression mainly in international law situations to avoid vacuums created by the toppling of one *grundnorm* by another. It is therefore in my view ^d only applicable in situations where the *grundnorm* has been suspended or has become defunct and a vacuum has thereby been created and will remain if the court does not validate the new *grundnorm*.
30. It further appears to me to have been applied in cases of revolutionary changes to entire governmental régimes where such change is deemed successful, the measure of success being the response of the governed people ^e to the coup and the fact that there is no other government in opposition to the new order.
31. It further appears to me to be nothing other than a useful weapon in the arsenal of that court which intends to capitulate or seek to recognize the illegal régime as the other option would be for the court to fearlessly declare the law as he or she sees it to be, whatever the future consequences will be, ^f a course that Beadle CJ and other judges in *Madzimbamuto* shied away from. (See p 329 of the judgment)."

On whether the theory can be extended to domestic law, she continued at p 173:

- "33. The first hurdle that the theory faces in domestic law is the absence of a change in the *grundnorm*. Domestic law itself finds expression and validity under a fundamental law. It is itself not the fundamental law and needs no ^g independent validation other than that which the *grundnorm* confers on it. In the absence of a change in the *grundnorm*, the theory cannot be invoked to validate illegal acts done under domestic law.
34. The theory is not meant to fill all vacuums of power no matter how created and particularly, cannot fill vacuums created by the domestic law as such vacuums should be filled by making reference to the *grundnorm* and applying ^h domestic remedies. The theory has been invoked to fill vacuums created at

Garwe JA

national level where one régime has been ousted from power in a manner ^a not anticipated or provided for in the *grundnorm*.

35. It cannot be invoked to destroy the *grundnorm* by legitimising acts that are illegal under the *grundnorm*. Thus, an unconstitutional act cannot in my view be declared valid and legitimate by invoking the theory as this will lead to unprecedented anarchy and self help in domestic law. Illegal bodies may set themselves up without reference to central governments on the ^b flimsy reason that they are effective, the people accept their mandate, and there is no other equivalent body opposing them in the sphere of society they chose to operate in. One need not think beyond the operations of the black market in foreign currency in this country presently to realize the potentially dangerous precedent that may unwittingly be set by upholding the contentions that permanence, efficacy and general acceptance by the ^c public are the only determining features of validating an illegal authority under domestic law.
36. It is my further view that the court is not placed in a dilemma by the existence of a perceived vacuum in domestic law. Its omnipotence granted and guaranteed by the *grundnorm* is not rendered impotent by a vacuum in domestic law, as is the situation when there is a vacuum at

international law. Thus, the need for the court to recognize and validate the illegal in exchange for its continued existence and recognition does not arise.

37. In arriving at this finding, I find some support in the *dicta* of Lord Reid in *Madzimbamuto v Lardner-Burke* [1969] AC 645 where the Privy Council rejected the application of the doctrine to give legitimacy to the usurping authority in the then Rhodesia. In disposing of the matter, the House of Lords held that there was no vacuum in Rhodesia triggering the application of the doctrine, as the whole of its existing laws remained intact and of full force. It is therefore my view that the doctrine as applied to give legitimacy to revolutionary governments in the past, has no application in the domestic law domestic sphere (*sic*) but remains a political tool used at international law to lag power vacuums created by revolutions and rebellions. Whether the principle can be further developed and adapted for application in some aspects of domestic law is an issue that I need not consider in this matter.”¹

I agree entirely with the above remarks and am satisfied that the decision of the trial court cannot be impugned in any way. Any vacuum that may have arisen clearly arose not because of the absence of laws in the domestic arena, but rather because the provisions of some of the domestic laws were

2009 (1) ZLR p231

Garwe JA

A ignored. As stated by the respondent, the present case is not concerned with any attempted shift in the *grundnorm*, but rather with people ignoring its administrative statutes.

I am satisfied that this theory, which is controversial, should apply only in extreme situations where there is a change in the *grundnorm* and not in a situation such as the present. I also agree that if such a line were not drawn, then a situation would arise where people would do that which is illegal and, because they were in effective control, seek legitimacy on the basis of this doctrine. Clearly this court cannot endorse such a situation.

The submission in this regard cannot succeed.

Conclusion

c There is no merit in this appeal.

It is accordingly dismissed with costs.

ZIYAMBI JA and GWAUNZA JA concurred.

▫ *Manase & Manase*, appellant’s legal practitioners

Atherstone & Cook, respondent’s legal practitioners

¹ This paragraph is not the same as that in the judgment that appears in the Law Reports. The version supplied to the editors of the Reports read as follows:

“It is thus my view that the theory as presently formulated and developed has no application in domestic law. Whether the principle can be further developed and adapted for application in some aspects of domestic law is an issue that I need not consider in this matter.”

– Editor.

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Document 34 of 52

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GONYE v GONYE 2009 (1) ZLR 232 (S)

Citation	2009 (1) ZLR 232 (S)
Case No	Judgment No. S-15-09
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Malaba JA
Heard	25 March 2008
Judgment	2 April 2009
Counsel	<i>O O Takaindisa</i> , for the appellant <i>J R Tsivama</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Company – corporate veil – lifting of – matrimonial matter – “one man” company run by one of the spouses – when assets and proceeds of company may be treated as spouse’s own assets

Family law – husband and wife – divorce – division of property following divorce – order for division, apportionment or distribution of assets of the spouses – what assets may be the subject of an order – all assets owned at time of divorce may be considered – assets acquired before marriage or during period of separation not excluded – company run by one spouse – when assets and proceeds of company may be treated as spouse’s

Headnote

A court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment or distribution of the assets of the spouses in divorce proceedings. Section 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] provides that the court may make an order ^F with regard to the division, apportionment or distribution of “the assets of the spouses, including an order that any asset be transferred from one spouse to the other”. The rights claimed by the spouses under s 7(1) are dependent upon the exercise by the court of the broad discretion. The section refers to “assets of the spouses” and not “matrimonial ^G property”. This is important, because the adoption of the concept “matrimonial ^G property” often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise. The concept “the assets of the spouses” is clearly intended to have the assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered ^H

Malaba JA

^A when an order is made with regard to the division, apportionment or distribution of such assets. To hold that, as a matter of principle, assets acquired by a spouse during the period of separation are to be excluded from the division, apportionment or distribution a court is required to make under s 7(1) of the Act is to introduce an unnecessary fetter to a very broad discretion, on the proper exercise of which the rights of the ^B parties depend. The object of the exercise must be to place the spouses in the position they would have been in had a normal marriage relationship continued between them.

Where the issue arises of whether the property rights, a proportion of the value of which is claimed by the one of the spouses, in reality lay with ^C the other spouse or a company run by him, it is

permissible to “lift the corporate veil” in order that justice could be done in the apportionment of the assets in terms of s 7(1) of the Act. Where the company can be said to be the spouse’s *alter ego*, the company’s assets and proceeds can be said to be the spouse’s and thus can be the subject of an order under s 7(1).

Cases referred to ^D

Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S)

Cattle Breeders Farm (Pvt) Ltd v Veldman (2) 1973 (2) RLR 261 (A); 1974 (1) SA 163 (RA)

^E *Shipping Corp of India Ltd v Evdomon Corp & Anor* 1994 (1) SA 550 (A)

Van Niekerk v Van Niekerk & Ors 1999 (1) ZLR 421 (S)

Wachtel v Wachtel [1973] 1 All ER 829 (CA)

Legislation considered

Matrimonial Causes Act [*Chapter 5:13*], s 7(1) & (4)

Case information

^F *O O Takaindisa*, for the appellant

J R Tsivama, for the respondent

Judgment

MALABA JA: This is an appeal against part of the judgment given by the ^G High Court on 22 February 2006 in an action for a decree of divorce and ancillary relief commenced by the appellant against the respondent. The question for determination is whether, in making the order with regard to the division, apportionment or distribution of the assets of the spouses, the court *a quo* failed to judicially exercise the discretion conferred upon it under s 7(1) of the Matrimonial Causes Act [*Chapter. 5:13*] (“the Act”) as ^H alleged in the grounds of appeal.

2009 (1) ZLR p234

Malaba JA

The marriage, which was dissolved by the court *a quo* on 22 February 2006, ^A had been solemnized by the parties on 20 May 1972 in terms of the African Marriages Act [*Chapter 238 of 1974*] (now the Customary Marriages Act [*Chapter 5:07*]). It was a potentially polygamous marriage relationship. For a period of thirty-five years the parties enjoyed a happy marriage relationship which was blessed with four children, two girls and two boys. The children ^B are all adults. In 2002 irreconcilable differences developed between the parties leading to a voluntary separation on 7 October.

On 13 April 2004 the appellant, who had taken another wife, issued out of the High Court summons commencing action in which he claimed against the respondent a decree of divorce and the division of the assets in the manner he considered would be just and equitable. The respondent conceded that ^C the marriage relationship had irretrievably broken down. She claimed the division of the assets in the manner she too considered would be just and equitable. She also claimed periodical payment of maintenance at the rate of \$2 000 000 per month until she died or re-married.

At the end of the trial the court *a quo* made an order in the following terms: ^D

- “1. That a decree of divorce be and is hereby granted in terms of the plaintiff’s claim.
2. That the defendant be awarded all the household movable assets except the Imperial upright freezer and a washing machine which are awarded to the plaintiff.
3. That the defendant be awarded: ^E
 - (a) 25% of the value of the Mazda 626 and No. 12 Lomagundi Road which shall be valued by a valuer from the Master’s Office’s list of valuers.
 - (b) That the defendant be awarded 25% of the value of the Domboshava house.
4. That the farm (Wonder Valley Farm), the farm equipment, farm movables including the herd of cattle be shared at the rate of 70% for the plaintiff ^F and 30% for the defendant.
5. That the defendant is awarded 25% of the value of Wonder Valley (Pvt) Ltd.

6. That the value of the assets to be shared under 3(b), 4 & 5 shall be obtained by adding the plaintiff's and the defendant's valuation and dividing that figure by two. ^g
7. That the plaintiff shall maintain the defendant at the rate of \$2 000 000 per month until she dies or re-marries.
8. That the plaintiff is granted the option to buy out the defendant in respect of Orders 3, 4 and 5 by not later than 30 July 2006.
9. That the plaintiff shall pay the defendant's costs."

The appeal was noted against the orders in paras 3, 4, 5 and 7. At the hearing ^h

2009 (1) ZLR p235

Malaba JA

^a of the appeal Mr *Takaindisa* indicated that the appellant was abandoning the appeal against the orders in para 4 and 5. He also said that he was unable to point to any misdirection on the part of the learned judge to support the ground of appeal against the order awarding the respondent periodical payments of maintenance in the sum of \$2 000 000 per month until she died or re-married.

^b In arriving at the decision to order periodical payments of maintenance in the amount fixed, the court *a quo* exercised a broad discretion. For this court to interfere with the exercise of discretion by the court *a quo*, it had to be shown that one of the grounds upon which an appellate court may interfere with the exercise of discretion by a trial court existed.

In *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A Gubbay ^c CJ said:

"These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes ^d the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution provided always it has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court."

As the court *a quo* was not shown to have made any of the errors referred to ^e in the *Barros* case *supra*, this court has no ground on which it can interfere with the determination of the question of the liability of the appellant to make periodical payments of maintenance to the respondent until she died or re-married.

The order in para 3 directing the appellant to pay the respondent 25 per cent ^f of the value of the Mazda 626 registration No. 843-703S and 25 per cent of the value of Domboshava house was appealed against on the ground that the learned judge misdirected himself in treating these assets as "matrimonial property". The contention was that the appellant acquired the motor vehicle and completed the construction of the house long after the parties had separated. The same argument was advanced in respect of Stand No. 12 Lomagundi ^g Road, Mount Pleasant. It was argued further that the immovable property was registered in the name of a third party. The effect of the contention was that the court in the exercise of the broad discretion conferred on it under s 7(1) of the Act should not have granted the respondent the right to a portion of the value of property purchased by the appellant when the parties were separated.

^h The Mazda 626 motor vehicle was, indeed, purchased by the appellant

2009 (1) ZLR p236

Malaba JA

and registered in his name in 2003. He completed the construction of the ^a Domboshava house in 2004. The construction commenced when the parties were still living together. The intention had been to use the house as a matrimonial home whenever they visited the communal area. Stand No. 12 Lomagundi Road, Mount Pleasant was purchased in July 2004. He registered the property in the name of his new wife. ^b

It was also common cause at the trial that in 1994 the appellant formed a company called Wonder Valley (Pvt) Ltd ("the company"). The company had four shares of \$1 each, which the appellant allotted to the respondent, two sons and himself. The nominal shareholders did not pay for the shares. The object of the company was to carry on farming business on Wonder Valley Farm ("the farm"). The farm was owned by the appellant, so were ^c all the equipment and implements used at

the farm. The appellant took full responsibility of managing the farming business, which involved growing cotton and maize. The respondent joined her husband at the farm in March 1987. She, however, did not play an active role in the management of the farming business. She looked after the matrimonial house and the children. ^d She started a poultry project and generated income which she used as she pleased.

The respondent claimed 25 per cent of the value of the Mazda 626 and the immovable properties on the ground that the money used to purchase the assets in question came from the proceeds of the farming operations. The contention was that the money belonged to the company in which she had ^e an interest. She said that the appellant had no other source of income besides the farming business. The appellant did not deny that the money he used to purchase the assets in question came from the sale of farm produce.

The learned judge found that the money used by the appellant to purchase the Mazda 626, Stand No. 12 Lomagundi Road, Mount Pleasant and for ^f the construction of the Domboshava house belonged to the company. On the basis that the respondent had an interest in the company, he held that she was entitled to 25 per cent of the value of each property. Whilst Mr *Takaindisa* argued that the learned judge misdirected himself in approaching the question of the apportionment of the proceeds used to purchase these ^g assets on the basis that the respondent had a right to claim company property, he nonetheless confessed that he was unable to go so far as to contend that the resultant apportionment was in effect not just and equitable when viewed in a situation where the corporate veil has been lifted.

It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment ^h

2009 (1) ZLR p237

Malaba JA

^a or distribution of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the court may make an order with regard to the division, apportionment or distribution of "the assets of the spouses including an order that any asset be transferred from one spouse to the other". The rights claimed by the spouses under s 7(1) of the Act are dependent upon the exercise by the court of the broad discretion.

^b The terms used are the "assets of the spouses" and not "matrimonial property". It is important to bear in mind the concept used, because the adoption of the concept "matrimonial property" often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise. ^c The concept "the assets of the spouses" is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.

To hold, as the court *a quo* did, that as a matter of principle assets acquired by a spouse during the period of separation are to be excluded from the division, ^d apportionment or distribution a court is required to make under s 7(1) of the Act is to introduce an unnecessary fetter to a very broad discretion, on the proper exercise of which the rights of the parties depend.

It must always be borne in mind that s 7(4) of the Act requires the court, in making an order regarding the division, apportionment or distribution of the ^e assets of the spouses, and therefore granting rights to one spouse over the assets of the other, to have regard to all the circumstances of the case. The object of the exercise must be to place the spouses in the position they would have been in had a normal marriage relationship continued between them. As was pointed out by Lord Denning MR in *Wachtel v Watchel* [1973] 1 All ER 829 (CA) at p 842: ^f

"In all these cases it is necessary at the end to view the situation broadly and see if the proposals meet the justice of the case."

Each case must depend on its own facts.

I accept the contention by Mr *Takaindisa* that, having found that the money used to purchase the Mazda 626, Stand No. 12 Lomagundi Road, Mount ^g Pleasant and for the construction of the Domboshava house belonged to the company, the learned judge erred in holding that the respondent was entitled to make a claim to a share of company property. A company, being a legal *persona*, owns its own property. Shareholders do not own company property.

Whilst accepting the principle that company property does not belong to the shareholders and that only officials duly authorized by resolutions can

2009 (1) ZLR p238

Malaba JA

claim company property from third parties, Mr *Tsivama* argued that this was a proper case where the circumstances justified the lifting of the corporate veil in order that justice could be done in the apportionment of the assets in terms of s 7(1) of the Act. In other words, the court *a quo* was faced with the question whether the property rights, a proportion of the value of which was claimed by the respondent, in reality lay with the appellant or the company. ^B

In *Shipping Corp of India Ltd v Evdomon Corp & Anor* 1994 (1) SA 550 (A) at 566C-E, quoted with approval by Sandura JA in *Van Niekerk v Van Niekerk & Ors* 1999 (1) ZLR 421 (S) at 427H-428A, Corbett CJ said:

"It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law, occurs in those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil. ... I do not find it necessary to consider, or attempt to define, the circumstances under which the court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs."

In *Cattle Breeders Farm (Pvt) Ltd v Veldman* (2) 1973 (2) RLR 261 (A); ^D 1974 (1) SA 163 (RA) the husband used the company to claim an eviction of his wife from a matrimonial house leased by the company. It was found that the company was a "one man company". The husband was its sole effective shareholder. The court was prepared to pierce the corporate veil to do justice to the wife. Beadle CJ said that the husband owned the company ^E and its mind was his.

The learned Chief Justice went on say at p 267C-D that:

"In the circumstances of this particular case it seems to me that the appellant company was nothing more than Veldman's *alter ego*, and that the appellant company possessed no greater rights to eject the respondent than Veldman ^F himself possessed ... I propose to examine this application on the basis that it was Veldman himself who brought the application because I cannot see on the facts of this case how it can be held that the appellant company could have any greater rights than Veldman himself possessed."

Had the corporate veil not been lifted, Veldman would have succeeded in using the company to avoid the duty he owed to his wife to provide her with suitable ^G alternative accommodation before evicting her from the matrimonial house.

In this case, the respondent did not take any active part in the administration of the affairs of the company. For all practical purposes the company was a "one-man company". The appellant was the sole active director. He used his own land, implements and labour to generate the income which he used to purchase the properties, the proportion of the values of which the ^H

2009 (1) ZLR p239

Malaba JA

^A respondent claimed. The three assets which belonged to him constituted the income producing assets. The share held by the respondent was not an income producing asset. In other words, there was no share capital invested by the respondent in the company which contributed to the production of the money used to purchase the properties in question.

^B Stripped of the corporate veil, the proceeds from the farming operations belonged to the appellant. The company was nothing more than the appellant's *alter ego*. It had no greater right to the money than he possessed.

The question is whether, considering all the circumstances of the case, the apportionment of the values of these assets ordered by the court *a quo* produced a just and equitable result. In other words, did the apportionment achieve ^C the main purpose of the exercise, which is to place the parties in the position they would have been in had a normal marriage relationship continued? I am proceeding on the basis that the proceeds from the farming operations belonged to the appellant and would have fallen within the category of the "assets of the spouses".

▫ The Mazda 626 motor vehicle and the Domboshava house belonged to the appellant at the time the court *a quo* made the order with regard to the apportionment of their values. The fact that the assets were acquired or created during the period the spouses were separated does not put them outside the category of the “assets of the spouses”. Mr *Takaindisa* properly conceded the fact that when all the circumstances of the case are taken into account ▮ the granting to the respondent of the right to 25 per cent of the value of each of these assets was a proper exercise of discretion by the court *a quo*.

The 25 per cent share in the proceeds from the farming operations which came into the possession of the appellant before he used it to purchase Stand No. 12 Lomagundi Road, Mount Pleasant would have been a benefit ▮ to which the respondent would have been entitled had a normal marriage relationship between the spouses continued. It is a benefit she lost as a result of the breakdown of the marriage. Section 7(4)(f) of the Act enjoins a court to have regard to the value of such a benefit. To place the spouses in the position they would have been in had a normal marriage relationship continued, it was just and equitable to award the respondent 25 per cent of ▮ the value of Stand No. 12 Lomagundi Road, Mount Pleasant.

The real rights in the house vested in the new wife. The respondent did not claim a share in the house. She claimed an amount of money equivalent to 25 per cent of the value of the immovable property. The claim did not affect the interests of the new wife in the property. The value of the property is ▮ necessary only for the purpose of fixing the amount of money the appellant

2009 (1) ZLR p240

Malaba JA

would be obliged to pay to the respondent. Since the respondent would have ▮ no right to enforce the order by executing against the immovable property owned by the third party, it was inappropriate for the learned judge to give the appellant the right of option in para 8 to buy out the respondent in respect of Stand No. 12 Lomagundi Road, Mount Pleasant. The property does not belong to him. ▮

The order in para 8 must be read as excluding any reference to Stand No. 12 Lomagundi Road, Mount Pleasant. It is also necessary to extend the time within which the option to buy out the respondent in respect of the other assets referred to in para 8 of the order may be exercised to 30 July 2009.

The appeal is otherwise dismissed with costs. ▮

SANDURA JA and ZIYAMBI JA concurred.

Scanlen & Holderness, appellant’s legal practitioners

Chihambakwe, Mutizwa & Partners, respondent’s legal practitioners ▮

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Document 35 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/MUTIZHE v GANDA & ORS 2009 (1) ZLR 241 (S)

MUTIZHE v GANDA & ORS 2009 (1) ZLR 241 (S)

2009 (1) ZLR p241

Citation	2009 (1) ZLR 241 (S)
Case No	Judgment No. S-17-09
Court	Supreme Court, Harare
Judge	Malaba DCJ (in chambers)

Heard	11 February 2009
Judgment	2 April 2009
Counsel	<i>J Samkange</i> , for the applicant <i>G Gafu</i> , for the respondent No appearance for the second and third respondents
Case Type	Civil application
Annotations	None No case annotations to date

Flynote

Appeal – late noting of – application for condonation and for extension of time – reasons for failure to note appeal in time – delay due to not finding out when judgment appealed against was to be delivered – applicant and legal practitioner not being diligent – not acceptable excuse

Headnote

To provide a reasonable explanation for non-compliance with the rules of court, it is generally necessary to say why the applicant or his legal representative failed to act in a manner in which a diligent litigant or his legal practitioner would reasonably have been expected to act. Where a trial court *a quo* has reserved judgment at the end of hearing of evidence, the applicant and his legal practitioner are under a duty to make regular inquiries with the Registrar as to when the judgment would be given. A vigilant litigant interested in the speedy outcome of the application would satisfy himself that the legal practitioners made regular inquiries for the judgment. Lack of knowledge of a judgment due to the 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 the court. An applicant cannot remain inactive until notification of the judgment is given by the Registrar. Where notification of the judgment is given by the Registrar in a court roll of cases to be dealt with on that day, and the applicant and his legal practitioner do not avail themselves of the official source of the information on the delivery of the judgment, the applicant cannot escape the consequences of failure to diligently pursue a judgment.

Cases cited

H Bishi v Secretary for Education 1989 (2) ZLR 240 (H)

2009 (1) ZLR p242

Malaba DCJ

de Kuszaba-Dabrowski et Uxor v Steel NO 1966 RLR 60 (A) A

Director of Civil Aviation v Hall 1990 (2) ZLR 354 (S)

Maheya v Independent African Church S-58-07

Metro International (Pvt) Ltd v Old Mutual Property Investment Corp (Pvt) Ltd S-31-08

P E Bosman Transport Works Committee & Ors v Piet Bosman Transport B (Pty) Ltd 1980 (4) SA 794 (A)

Legislation considered

Supreme Court Rules 1964 (RGN 380 of 1964), rr 29(1) (d) & 30(a)

Case information

J Samkange, for the applicant *c*

G Gafu, for the respondent

No appearance for the second and third respondents

Judgment

MALABA DCJ: (in chambers, in terms of r 31 of the Supreme Court Rules 1964):

This is an application for an extension of time in which to note an appeal *d* against the whole judgment of the High Court given on 27 February 2008.

The applicant and the third respondent were married to each other until the High Court granted him a decree of divorce on 22 February 2005 in case No. HC 8877/03. The High Court made an order with regard to the division *e* of the assets of the spouses.

Of relevance to the determination of this application is the fact that the third respondent was awarded 80 per cent of the market value of the matrimonial house situated at Stand No. 2711 Mahogany Circle, New Marlborough, Harare ("the property"). The applicant was awarded 20 per cent of the market value of the matrimonial house. *f*

The order further directed that:

- "5. If the parties cannot agree on the value of the matrimonial home within ten (10) days of the date of this order, the property is to be evaluated within 30 days thereafter by a registered Estate Agency agreed upon by the parties' legal practitioners or failing such agreement by an Estate Agent nominated by the Registrar of this Court. *g*
6. The costs of evaluation are to be borne by both parties in equal shares.
7. The plaintiff shall pay to the defendant on or before 1 November 2005, 20 per cent of the net value of the property.
8. Failing compliance with the provisions of clause 7 above, the matrimonial home shall be sold on the open market to the best advantage and the net proceeds therefrom to be shared between the parties as set out in the *h*

2009 (1) ZLR p243

Malaba DCJ

A paragraph above."

On 16 June 2004 the applicant had obtained from the High Court an interdict prohibiting the second respondent from registering transfer of the property without her prior written consent.

On 11 August 2005 the first respondent entered into an agreement of sale *b* with the third respondent in terms of which he sold and she purchased the property for \$750 000 000. She paid the purchase price to the third respondent's conveyancers. At the time she entered into the agreement of sale, the first respondent was not aware of the court order awarding the applicant 20 per cent of the value of the property. When she subsequently got to know of the order she raised the question of its possible effect on the *c* sale of the property. The third respondent assured her that the order would not affect transfer of the property into her name provided the applicant was paid the 20 per cent share of the value of the property. Upon request by the third respondent, she authorized the release of \$150 000 000, which was 20 per cent of the purchase price, into his bank account for payment to the applicant. The applicant confirmed in the founding affidavit that an amount *d* of \$149 000 000 was paid into her bank account.

After the payment of the purchase price by the first respondent, the applicant instituted an appeal against the order of the High Court. A perusal of the record in case No. HC 8877/03 shows that the appeal had been noted out of time. It appears that there was an application for an extension of time in *e* which to note the appeal which was granted.

The notice of appeal, however, remained fatally defective for non-compliance with r 29(1)(d) of the Rules. Under the heading "Grounds of Appeal" it is stated as follows:

- "1. With new evidence before the court, the court *a quo*'s apportionment of *f* shares in the matrimonial house called House No. 2711 Mahogany Circle, New Marlborough, Harare is amendable.
2. Without all evidence the court *a quo* failed to award Stand 6839 Borrowdale."

By no stretch of imagination can it be said that what is stated constitutes grounds of appeal against the order given by the court *a quo* on 22 February 2005 in case No. HC 8877/03.

^g In light of the appeal which the applicant had purported to institute, the third respondent sought to cancel the agreement of sale. The first respondent rejected the cancellation and commenced action in case HC 1545/06 claiming an order against the third respondent of specific performance of his obligation to transfer the property into her name. She also claimed an order of upliftment ^h of the caveat of 16 June 2004 and eviction of the applicant and all those

2009 (1) ZLR p244

Malaba DCJ

claiming the right of occupation of the property through her. ^a

The third respondent did not appear at the trial to oppose the claim. A default judgment was entered against him. That had the effect of confirming the third respondent's right to transfer of the property. The court *a quo* found that the first respondent had adduced sufficient evidence to establish her entitlement to an order of upliftment of the bar. It granted the order. The decision took into ^b account the fact that the applicant had not adduced evidence in opposition to the granting of the order.

The applicant had defended the claim on the ground that the order of 22 February 2005 gave her a real right in the property. The court held that her right was to have 20 per cent of the proceeds of the sale of the house. It held that the right was enforceable against the third respondent and could ^c not operate to defeat the transfer of the property to the first respondent in terms of the agreement of sale.

The judgment was given on 27 February 2008. The Registrar had given notice to the parties through the roll of the court relating to unopposed matters for that day that the judgment was to be handed down. Whilst the ^d legal representative of the first respondent attended court to note the handing down of the judgment, neither the applicant nor her legal practitioner attended. No appeal was instituted against the judgment within 15 days as is required by r 30(a) of the Rules.

The applicant averred in the founding affidavit that she had knowledge of the ^e judgment for the first time on 22 August 2008 when a copy of it was served on her by the Deputy Sheriff. On 26 August she filed a notice of appeal with the Registrar. The document contained all the formalities required by r 29 to be stated in a notice of appeal. Strict compliance with the mandatory requirements of the provision of r 29 suggests that the applicant had read the relevant Rules before noting the appeal. ^f

The notice of appeal was, however, fatally defective because it was filed six months after the date the judgment appealed against was given. Rule 30(a) had not been complied with. No application for condonation of failure to institute the appeal within 15 days of the date the judgment was given and extension of time in which to appeal was made in terms of r 31 of the Rules. ^g

The explanation given by the applicant for non-compliance with the Rules was that she was a self-actor. She said she did not know that she was required to make an application for condonation of non-compliance with r 30(a) and extension of time in which to appeal. She said she did not know that the notice of appeal was defective.

On 13 November 2008 the first respondent's legal practitioners wrote to the ^h

2009 (1) ZLR p245

Malaba DCJ

^a Registrar drawing her attention to the defective notice of appeal. The letter was copied to the applicant. Notwithstanding the fact that the letter made it clear that the effect of the defective notice was that there was no appeal against the judgment, the applicant did not act to regularize the situation.

On 25 November 2008 the Registrar wrote to the first respondent's legal ^b practitioners accepting the contention that there was no appeal against the judgment of the High Court given on 27 February 2008. The letter was copied to the applicant. She did not act immediately to secure compliance with the rules of court. It was 16 days later that the applicant made an application for extension of time in which to appeal.

The explanation for failure to act after having been made aware of the defective ^c notice of appeal and consequences thereof was again that the applicant was a self-actor. She pleaded ignorance of the requirements of r 31.

The factors a court has to consider in the determination of an application for condonation and extension of time in which to appeal have been stated in numerous decisions of this court and the High Court. In *Maheya v Independent African Church* 2007 (2) ZLR 319 (S) at 323B-C it is stated that:

"In considering 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 weighed one against the other are: the degree of non-compliance; the explanation therefor; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the court and avoidance of unnecessary delays in the administration of justice."

See *de Kuszaba-Dabrowski et Uxor v Steel* NO 1966 RLR 60 (A) at 62B-E; *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H) at 242D-243C; *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (S).

The period of time marking the delay by the applicant in taking steps to note a valid appeal is nine months. The right to appeal is now dependent on the exercise of the court's discretion. The application was made on 8 December 2008. The inordinate delay may be divided into three parts. The first part extended from 27 February to 26 August 2008. The second extended from 27 August to 25 November. The last part extended from 26 November to 7 December 2008.

The applicant gave different explanations for her inaction during each of the three periods of delay. In relation to the first period of delay, she said that she had no knowledge that the judgment had been given on 27 February. In respect of her inaction in the second part of the period of delay, she said as a self-actor she was not aware of the requirements of r 30(a). She said she

2009 (1) ZLR p246

Malaba DCJ

was also not aware of the provisions of r 31 providing a remedy to a party who would have failed to exercise the right to appeal against a judgment of the High Court timeously. She had no explanation for her inaction during the last part of the period of delay.

Is the explanation of the delay reasonable? Apart from saying she did not know that the judgment had been delivered on 27 February 2008 the applicant did not say why steps were not taken by her or her legal practitioners which would have enabled her to acquire that knowledge. The court *a quo* had reserved judgment at the end of hearing of evidence in the trial of the action. The applicant and her legal practitioners were under the duty to make regular inquiries with the Registrar as to when the judgment would be given. To provide a reasonable explanation for compliance with rules of court it is generally necessary to say why the applicant or his legal representative failed to act in a manner a diligent litigant or his legal practitioner would reasonably have been expected to act.

In *Metro International (Pvt) Ltd v Old Mutual Property Investment Corporation (Pvt) Ltd* 2008 (2) ZLR 257 (S) the applicant company could not explain why its legal representative failed to take necessary steps to get knowledge of when the judgment it sought to appeal against had been given. At p 260G-261A it was stated that:

"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 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 the 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."

In this case, notification of the judgment given on 27 February 2008 was given to the parties by the Registrar in a court roll of cases to be dealt with on that day. The applicant and her legal practitioner did not avail themselves of the official source of the information on the delivery of the judgment. In my view, she cannot escape the consequences of failure to diligently pursue a judgment that befell the applicant in *Metro International's* case *supra*.

The explanation of failure to apply for an extension of time in which to appeal when the applicant got to know of the date the judgment was given is also unacceptable. The applicant could not have been ignorant of the requirements of r 30(a) when she drew up a notice of appeal which contained

Malaba DCJ

^A all the necessary formalities of a valid notice of appeal prescribed under r 29.

The letters of 13 and 25 November drew the applicant's attention to the fact that no appeal was pending before the Supreme Court because none had been instituted within 15 days of the date the judgment was given. She was advised of the need to make an application for extension of time in which ^B to appeal if she wished to have the situation regularized. To plead ignorance of the Rules in the circumstances on the ground that one is a self-actor is unlikely to persuade any reasonable court to hold that the applicant was not culpable for the consequences of her own inaction.

There was no explanation for the failure to apply for extension of time in which to appeal for 16 days after the applicant received the letter of 25 ^C November 2008. In *Director of Civil Aviation v Hall supra* at p 358B-C Gubbay CJ cited with approval from *Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799D-E where Muller JA said:

"Where there has been a flagrant breach of the rules of this court in more than ^D one respect, and where in addition there is no reasonable explanation for some periods of delay and indeed, in respect of other periods of delay, no explanation at all, the application should ... not be granted whatever the prospects of success may be."

As I am unable in this case to go so far as to hold that the applicant was in flagrant breach of the rules of this court, I have considered the question ^E whether there are good prospects of the appeal succeeding despite the finding that there is no reasonable explanation for the inordinate delay in making the application for extension of time in which to appeal.

The grounds of appeal were stated as being that:

- "1. The court *a quo* erred at law and in fact in failing to uphold that the appellant's ^F appeal in HC 8877/03 had an effect of suspending the whole judgment of the High Court in the divorce proceedings.
2. The court *a quo* erred in fact and at law by holding that the appellant had no real rights over the disputed property known as stand 2711 Marlborough Township of Stand 2575 Marlborough Township.
3. The court *a quo* misdirected itself by failing to regard the appellant's ^G evidence that the interdict obtained by the appellant on 16 June 2004 had an effect of interdicting any transfer of the disputed property pending the determination of the appeal in case no. HC 8877/03.
4. The court *a quo* erred in fact and at law by failing to uphold that the cancellation of the agreement of sale by the third respondent was valid and lawful."

^H One looks at the founding affidavit for evidence of the facts stated as grounds

Malaba DCJ

of appeal. Considering these facts together with the reasons for the judgment ^A appealed against and applying the relevant law, one can decide whether there are good prospects of success on appeal.

All that is stated in the founding affidavit on the grounds of appeal is this. The applicant said:

- "20. I strongly believe that there are prospects of success on appeal. I say so ^B because
- 1.1. As appears from the Notice of Appeal I insist that there was a valid and lawful cancellation of the agreement of sale.
 - 1.2. I was also not satisfied by the court's ruling that the issue between me and the first respondent was whether or not I had a real right to the property. ^C
 - 1.3. For instance if the appeal court in case No. HC 8877/03 were to up my share from the 20 per cent given by the court *a quo* to a higher percentage, this would affect the issues of enforceability of the judgment. This aspect is normally addressed by way of giving one party a time frame within which to pay out the other party of its share failing which that property can be sold and the proceeds are shared. ^D
 - 1.4. Assuming the transfers were to be done to the so called innocent buyer, and then the appeal court were to up my share, such court order would be difficult to enforce. The house in a case of this nature is a surety that one gets their share."

Nothing is said in the founding affidavit about the first ground of appeal. What was stated in the notice of appeal against the judgment of 22 February 2005 ^E did not constitute grounds of appeal

required under r 29(1)(d) of the Rules. There would be no valid appeal pending in the Supreme Court against the judgment in case HC 8877/03. In any case the appeal would not have been instituted against the whole judgment of the court *a quo*. There was no appeal against the order granting the decree of divorce. The court *a quo* could not have erred in failing to hold that the appeal suspended the whole judgment ^F in case HC 8877/03 when in fact the appeal could not have had that effect.

It is clear from the founding affidavit that the applicant took issue with the fact that the court *a quo* perceived the question in dispute between her and the first respondent as having been whether she had real rights in the property. Contrary to the contention advanced in argument on her behalf ^G by Mr *Samkange*, the applicant was not even claiming that the order of the court in case HC 8877/03 gave her real rights in the property. She did not challenge the fact that the right she was given was 20 per cent of the share of the value of the house. Her view was that 20 per cent of the value of the property was too low. These facts do not render any support to ground No. 2 of the defective notice of appeal. ^H

2009 (1) ZLR p249

Malaba DCJ

^A The law is to the effect that the person in whose name immovable property is registered is *prima facie* its owner. The order of the court *a quo* did not alter the fact that, as the third respondent was the person in whose name the house was registered, he was the sole holder of the real rights in it. It must be borne in mind that the rights of spouses in the division, apportionment or distribution of assets upon dissolution of marriage, are dependent upon ^B discretionary remedies. In this case, in the exercise of the broad discretion conferred on it, the court in case HC 8877/03 gave the applicant a right to 20 per cent of the value of the property as opposed to 20 per cent share of the real rights in the property. It was not a share in a joint ownership of the house. The third respondent could sell the property to a third party without ^C the consent of the applicant provided he paid her 20 per cent of the proceeds. That right did not give her power to veto the exercise by him of the right to dispose of all the real rights he alone held in the house as long as the sale met the conditions prescribed by the order. There is no basis in fact on which the allegation in ground No. 2 of the defective notice of appeal could be established.

^D On the third ground the interdict did not in fact have the effect the court *a quo* was accused of having disregarded. It preceded the judgment in HC 8877/03 and did not interdict transfer of the property pending determination of the appeal against that judgment. What the interdict prohibited was the registration of transfer of the property without prior written consent of the applicant. In other words the interdict would have given the applicant an absolute right ^E to veto the transfer of the property even when the subsequent order gave her the right to 20 per cent of value of the property with no power to veto the sale of the property to best advantage. So even if the applicant adduced evidence it would not prove that the interdict had the effect of prohibiting transfer of the property *pending the determination of the appeal in case No. F HC 8877/03* (the emphasis is mine).

Nothing of substance was said in the founding affidavit on ground No. 4. Cancellation of a contract is lawful when it is in accordance with the terms and conditions of the contract between the parties. It is also lawful where there has been a repudiation of the contract which is accepted by the innocent party as a breach relieving him from future performance of his obligations, ^G otherwise the innocent party has a right to elect to accept or reject the unilateral act by the other party to try and bring a contract to an end. If he rejects the repudiation as a breach of contract, the innocent party can hold the other party to his side of the bargain, provided he discharges his own obligations under the contract.

^H The court *a quo* found that the third respondent had not shown that the

2009 (1) ZLR p250

Malaba DCJ

cancellation was in terms of the agreement of sale. It accepted the evidence ^A of the fact that the first respondent had elected to reject the cancellation of the contract by the third respondent as a breach. The first respondent was found to have held the third respondent to his side of the bargain. The applicant did not place before me facts on the basis of which a determination could be made to the effect that there were good prospects of ground No. 4 ^B succeeding on appeal.

The application is accordingly dismissed with costs.

Byron Venturas & Partners, applicant's legal practitioners
Scanlen & Holderness, first respondent's legal practitioners c

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Document 36 of 52

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/NYONI v ELMISSING & ANOR 2009 (1) ZLR 251 (H)

NYONI v ELMISSING & ANOR 2009 (1) ZLR 251 (H)

2009 (1) ZLR p251

Citation	2009 (1) ZLR 251 (H)
Case No	Judgment No. HB-38-09
Court	High Court, Bulawayo
Judge	Cheda J
Heard	10 March 2009
Judgment	2 April 2009
Counsel	<i>C Dube</i> , for the applicant <i>T Mangena</i> , for the respondents
Case Type	Application for directions
Annotations	No case annotations to date

Flynote

Costs – *de bonis propriis* – when appropriate – legal practitioner advising client to disobey court order

Legal practitioner – conduct and ethics – duty of honesty towards court – practitioner advising client to disobey court order – costs *de bonis propriis* ordered

Headnote

A legal practitioner must avoid all conduct which, if known, could damage his reputation as an honourable citizen. He has a duty to act honestly and fairly at all times. In addition, he must always be truthful and candid in all his dealings. Lawyers, as officers of the court, have an unfailing duty to obey court orders and should not be seen to be assisting litigants in disobedience. Where this occurs, costs *de bonis propriis* against the practitioner are appropriate.

Case referred to

¶ *Lewis v Great Western Railway Co* (1877) 3 QBD 195

Case information

C Dube, for the applicant

T Mangena, for the respondents

Judgment

CHEDA J: This is an application for directions in the execution of the ^g provisional order.

The salient facts of the matter are that the applicant entered into a lease agreement with the respondents wherein he leased shop number 10 Njube Trading in 2003 and another shop in 2005 known as Jika Jika Bar, Restaurant and Grocery. At the beginning of 2008 a rent dispute arose, which resulted ^h in this application.

2009 (1) ZLR p252

Cheda J

I granted the provisional order on 5 January 2009 and the Deputy Sheriff ^a effected service on both respondents. On 6 January 2009, the respondents filed a notice of opposition and served it on the applicants' legal practitioners on 7 January 2009. On the same day, 7 January 2009, the respondents filed a notice of appeal to the Supreme Court against the interim relief.

On the advice of their legal practitioner that the appeal to the Supreme Court ^b suspended the provisional order, the respondents disregarded the provisional order. Upon receipt of this information, the applicants' legal practitioners contacted Mr *Mangena*, who is the respondent's legal practitioner, on 12 January 2009 in an attempt to resolve the misconception regarding the effect of their "appeal".

It is conceded by Mr *Mangena* that he gave an undertaking to Mr *Dube* that ^c the Deputy Sheriff would be advised to proceed with the removal of the respondents from the property, thereby giving the applicant vacant possession. Mr *Dube* had brought to his attention that he was due to leave the country. On 13 January 2009, Mr *Mangena* wrote a letter to Mr *Dube's* legal firm, the contents of which are as follows: ^d

"13 January 2009

Messrs Dube-Banda, Nzarayapenga and Partners

Legal Practitioners

Bulawayo

Dear Sirs

RE: GREENFIELD NYONI VS MRS. L. P EMISSIRY AND ANOTHER ^e HC 02/09, SC 02/09 AND HC 32/09.

We are of the view that you used the wrong procedure in obtaining a hearing date for HC 02/09. Your application was for directions yet your intention and draft order was to anticipate the matter. Be that as it may, the matter did not take off on the said date.

We are also of the view that if you are aggrieved with the Notice of Appeal filed by ourselves, you will have to file a separate application challenging it. It is our ^f respectful view that the said Notice of Appeal cannot be dealt with within

HC 02/09.

We filed our Notice of Opposition in HC 02/09. If the matter is to continue, we believe you should file your answering affidavit. However in our view, until the appeal is dispensed with, it is not possible for HC 02/09 to be heard.

If you believe our client is in contempt of court, we believe you know the ^g procedure.

Yours faithfully

(signed)

CHEDA AND PARTNERS"

Mr *Dube* has urged the court to give a directive in view of Mr *Mangena's* conduct, as he has assisted his client to be in contempt of court. The said ^h

2009 (1) ZLR p253

Cheda J

^a contempt is based on the following facts which are not in dispute:

1. the appeal is a nullity;
2. the order he appealed against is not appealable without the leave of the court;
3. did not approach him for a set down date as per the court order; ^b
4. to date he has not taken steps to prosecute the appeal;

5. he has not paid the security costs;
6. his clients remain in defiance of a court order;
7. he has remained defiant up to date.

c In response to this, Mr *Mangena* initially became defiant until, at a later stage of the proceedings, he admitted that he did not act properly as he misled his client and consequently expressed sorrow for what he did.

The fact that the respondents are in contempt of court admits of no doubt. The law is clear in this point: a person who is in contempt remains so until he purges that contempt. Such a person cannot be heard until the contempt d is purged.

Mr *Dube* has urged the court to find Mr *Mangena* guilty of misconduct. In my view, the misconduct complained of was willful. In *Lewis v Great Western Railway Co* (1877) 3 QBD 195 at 206 Bramwell LJ defined it as follows:-

“‘Willful misconduct’ means misconduct to which the will is a party, something e opposed to accident or negligence; the misconduct, not the conduct, must be willful. It has been said, and that, I think, correctly, that, perhaps, one condition of ‘willful misconduct’, must be that the person guilty of it should know that mischief will result from it”.

The golden rule for misconduct for all legal practitioners is clearly set out f in E A L Lewis *Legal Ethics* at p 8 where the learned author states:

“A practitioner must avoid all conduct which, if known, could damage his reputation as an honourable citizen.”

A legal practitioner has a duty to act honestly and fairly at all times. In addition to this, he must always be truthful and candid in all his dealings.

Mr *Mangena* was not honest with his colleague when he misled him into g believing that he would implement the agreement that he would advise the Deputy Sheriff to execute the provisional order. In fact, all the complainants listed by Mr *Dube* are correct. All I can say, without more, is that this type of conduct is deplorable and reprehensible. Legal practitioners are warned to desist from this type of conduct, lest their professional careers stand the h risk of being brought to a complete halt.

2009 (1) ZLR p254

Cheda J

Lawyers, as officers of the court, have an unfailing duty to obey court orders a and should not be seen to be assisting litigants in the said disobedience. I find that Mr *Mangena* actively and persistently assisted his clients to do so.

Mr *Dube* has urged the court to award costs against Mr *Mangena de bonis propriis* in view of his misconduct. I find favour in this submission. In fact Mr *Mangena* at a very late stage of the proceedings conceded that he had b ill-advised his clients to disobey the court order.

I am of the opinion that this is an appropriate case for costs of this nature in order to show the court’s indignation at such willful misconduct by a legal practitioner.

The following order is made:

- 1) The provisional order issued by this court on 15 January 2009 should c be executed within 48 hours of this order; and
- 2) Mr *Mangena* should pay costs of today’s hearing *de bonis propriis*.

Dube-Banda, Nzarayapenga & Partners applicant’s legal practitioners d

Cheda & Partners, respondents’ legal practitioners

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Document 37 of 52

Source:

AGRO CHEM DEALERS (PVT) LTD v GOMO & ORS 2009 (1) ZLR 255 (H)**2009 (1) ZLR p255**

Citation	2009 (1) ZLR 255 (H)
Case No	Judgment No. HH-71-09
Court	High Court, Harare
Judge	Gowora J
Heard	11 February 2009
Judgment	6 April 2009
Counsel	<i>O Mutero</i> , for the applicant <i>H Zhou</i> , for the first respondent <i>T Hussein</i> , for the second respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Contract – waiver – when may be inferred – innocent party abiding by contract in spite of breach by other party – very belatedly seeking to enforce right in contract – conduct indicative of waiver of right

▫ **Land** – ownership – registration of ownership – effect – right to alienate and vindicate property

Property and real rights – land – registration of ownership – effect – registered owner's real rights in property – right to alienate and vindicate property

Headnote

- ¶ In 1995 the applicant bought an undeveloped stand from the second respondent, the city council. It was a condition of the sale that, within six months of the date of sale, the applicant should have commenced developments of a stipulated minimum value and that those developments should be complete within twelve months. The contract provided that in the event of the applicant failing to do so, the council would be entitled to ^Fcancel the sale or to claim re-transfer of the stand. Seven months after the date of the sale agreement, no developments had begun; nonetheless the council transferred the stand to the applicant. The stand was duly registered in the name of the applicant in terms of the Deeds Registries Act [*Chapter 20:05*]. There were no conditions attached limiting the vesting of title in the applicant.
- ¶ In 2008, it came to the notice of the applicant that some developments were taking place on the stand. Enquiries revealed that these were being made by the first respondent, a former employee of the council. The council and the first respondent had concluded an agreement of sale in respect of the land in May 2008. The applicant sought the eviction of ^Hthe first respondent. The application was opposed, the first and second

2009 (1) ZLR p256

Gowora J

respondents arguing that the council had cancelled the agreement of ^Asale with the applicant, because of the applicant's non-performance, and re-possessed the stand. The council claimed that it had written to the applicant stating that it had cancelled the sale and demanding that the title deeds be handed over to it. The applicant denied receiving such correspondence. ^B

Held, that the registration of title in one's name constitutes the registration of a real right in the name of that person. A real right is a right in a thing which entitles the holder to vindicate his right, i.e. to enforce his right in the thing for his own benefit as against the world; that is against all persons whatsoever. The effect of registration of a person's name as the owner of a piece of land is that he is the owner of the land, including c the permanent buildings on it, in the absence of fraud, error or other exceptional cases. Since an owner cannot be deprived of his property against his will, he is entitled to recover his property from anyone who possesses the property without his consent. When an owner of property delivers the property sold and has the capacity of alienation, or if he is d not the owner but has the consent of the owner to alienate, the effect of delivery is to transfer to the purchaser the property in the thing sold, provided the purchaser has paid for the property or has been granted credit by the seller. Once the council had sold and transferred the *dominium* in the stand, it lost any right to treat the property as its own. It could sell the stand to the first respondent as it did, but it could not transfer e the *dominium* in the stand as it had lost it when it sold and transferred the stand to the applicant.

Held, further, that the council should have taken legal steps to have the contract cancelled. The mere demand by it of the return of the deed of transfer did not, in itself, reverse ownership in the stand from the applicant to itself. Equally, the lack of response to the alleged letters of f cancellation did not, in itself, show that the applicant had accepted that the property had changed hands.

Held, further, that any attempt on the part of the council to seek cancellation and retransfer would be met with the defence of prescription and there would be no factor available to counter it. g

Held, further, that if the innocent party to a contract, with full knowledge of his rights, performs an unequivocal act from which a reasonable person would necessarily infer that he has elected to affirm the contract, he would be bound by his act. Although the applicant had breached the sale agreement, the council elected to abide by the contract and discharged its obligations in terms of the agreement by transferring the stand to the h

2009 (1) ZLR p257

Gowora J

a applicant. The council's conduct created an impression that not only was it affirming the contract, it was complying with all its obligations under the contract of sale. Transfer to the applicant could not have been effected without the specific authorization of the seller. In spite of knowing that the conditions had not been complied with, it took the council almost thirteen years before it called up the agreement. If such b dilatoriness in seeking to enforce a right in a contract is not indicative of a waiver of a right to cancel, it would be difficult to imagine what else such conduct constitutes.

Held, further, that the registered owner has a right to vindicate his property against anyone unless a lawful defence is presented against the claim. c No such defence had been established and therefore the applicant had established a claim for the eviction of the first respondent from the stand.

Cases cited

Bako & Anor v Bulawayo City Council 1996 (1) ZLR 232 (S)

Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd 1996 (2) SA 537 (C) d

Chetty v Naidoo 1974 (3) SA 13 (A)

Guardian Security Svcs (Pvt) Ltd v ZBC 2002 (1) ZLR 1 (S)

Harris v Buissinne's Trustee (1840) 2 Menz 105

Jena v Min of Lands 1955 (2) SA 380 (A)

e *Multilateral Motor Vehicle Accidents Fund v Meyerowitz* 1995 (1) SA 23 (C)

Segal v Mazzur 1920 CPD 634

Willoughby's Consol Co Ltd v Copthall Stores Ltd 1913 AD 267

Legislation considered

¶ Deeds Registries Act [*Chapter 20:05*], s 14

Urban Councils Act [*Chapter 29:15*], s 154

Case information

O Mutero, for the applicant

H Zhou, for the first respondent

¶ T Hussein, for the second respondent

Judgment

GOWORA J: In 1995 the applicant, hereinafter referred to as "Agro Chem", purchased an undeveloped stand, hereinafter referred to as "the Stand" from the second respondent, hereinafter referred to as "City of Harare". The full purchase price was paid. In terms of the agreement, Agro Chem was ¶ enjoined to undertake certain minimum developments on the Stand within a

2009 (1) ZLR p258

Gowora J

stipulated period after the purchase. It is common cause that no development ^A has been undertaken on the Stand by Agro Chem. Sometime in June 2008 it came to the attention of officials in Agro Chem that developments were being undertaken on the Stand. After investigations, it emerged that the first respondent, hereinafter referred to as "Gomo", had moved onto the Stand. He had purchased it from City of Harare. A copy of the agreement has been ^B attached to papers filed on his behalf. The contract between the two was concluded on 12 May 2008. There seems to be some dispute as to whether or not the parties did conclude an agreement of sale or whether, in fact, the Stand was awarded to Gomo as a retrenchment package. It is common cause that Gomo is a former employee of City of Harare. I do not believe that it matters for the purposes of the resolution of this dispute what the nature of ^C the transaction was. I will therefore accept that Gomo purchased the Stand from City of Harare. Agro Chem had the Stand transferred into its name before the developments envisaged in the agreement were effected. It has now approached the court seeking the eviction of Gomo from the Stand.

Gomo and City of Harare have opposed the relief being sought by Agro ^D Chem. Gomo is opposed to the relief on the basis of his agreement with City of Harare. He is also of the view that Agro Chem has now lost its title to the Stand because City of Harare had cancelled the agreement. The view of City of Harare is that Agro Chem failed to undertake developments within the period set in the agreement and that as a result it, City of Harare, had cancelled the agreement and repossessed the Stand. It is pertinent to note ^E at this juncture that, although City of Harare wrote letters to Agro Chem, there is no other action that has been taken by it to repossess the Stand. As a result of certain submissions made by Mr Zhou and Mr Hussein, I requested that additional heads of argument be filed in relation to those submissions.

Before I go into the merits of the application, it is only pertinent that I examine ^F the basis upon which Agro Chem seeks the eviction of Gomo and discuss the legal status of the Stand as matters stand presently. It is not in dispute that the Stand is registered in the name of Agro Chem, such title having been registered in favour of Agro Chem on 20 November 1995. Registrations of title in land are made in terms of the Deeds Registries Act [*Chapter 20:05*]. Section 14 of that Act provides as follows: ^G

"Subject to this Act, or any other law –

- a) the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by a registrar;
- b) other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by a registrar: ^H

2009 (1) ZLR p259

Gowora J

^A Provided that attestation by a notary public shall not be necessary in respect of the conveyance of real rights acquired under a mortgage bond."

The registration of title in a person's name constitutes the registration of a real right in the name of that person. A real right is a right in a thing which entitles the holder to vindicate his right, i.e. to enforce his right in the thing for his own benefit as against the world; that is against all persons whatsoever. ^b See *Wille's Principles of South African Law* 8 ed at 259. Another definition of a real right is that it is a right in a thing which confers on the holder of the right an exclusive benefit in the thing, which benefit is indefeasible by any other person. What, then, are the consequences attendant upon the acquisition of a real right of this nature? The effect of registration of a ^c person's name as owner of a piece of land is that he is the owner of the land including the permanent buildings on it, in the absence of fraud, error or other exceptional cases. Thus it is a principle of our law that the *dominium* in immovable property remains in the seller until the same is registered in the name of the purchaser. It follows, therefore, that an owner of property cannot be deprived of his property against his will. Consequently, no person ^d who is not the owner can transfer ownership in anything, whether or not such transferor was acting in good faith or *mala fide*. Since an owner cannot be deprived of his property against his will, conversely, such owner is entitled to recover his property from anyone who possesses the property without his consent. I am fortified in this view by the comments of Jansen JA in *Chetty* ^e v *Naidoo* 1974 (3) SA 13 (A) at 20A-E to the following effect:

"... It may be difficult to define *dominium* comprehensively (cf. *Johannesburg Municipal Council v Rand Townships Registrar and Ors* 1910 TS 1314 at 1319), but there can be little doubt (despite some reservations expressed in *Munsamy v Gen-gemma* 1954 (4) SA 468 (N) at 470H-471E) that one of the incidents is the right of exclusive possession of the *res*, with the necessary corollary that the ^f owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some enforceable right against the owner (e.g. a right of retention or contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner, and that the defendant is holding the *res* – the *onus* being on the defendant to allege and ^g establish any right to continue to hold against the owner (cf. *Jeena v Minister of Lands* 1955 (2) SA 380 (A) at 382E-383). It appears to be immaterial whether in stating his claim, the owner dubs the defendant's holding 'unlawful' or 'against his will' or leaves it unqualified (*Krugersdorp Town Council v Fortuin* 1965 (2) SA 335 (T)). But if he goes beyond alleging merely his ownership and the defendant being in possession (whether unqualified ^h or described as 'unlawful' or 'against his will' other considerations come into play."

2009 (1) ZLR p260

Gowora J

With the exception of certain instances, such as where title may have been ^a acquired through fraud, the transfer of ownership in a piece of land transfers *dominium* in such land from the holder to the purchaser and thus bestows on the transferee rights to control and possession of the land, which rights are completely unfettered except as may be subject to conditions in the deed of transfer. In *Willoughby's Consolidated Co. Ltd v Copthall Stores Ltd* 1913 AD 267, ^b Lord de Villiers CJ stated at 276:

"... There is no principle more clearly established in our law than that a clean transfer of land *coram lege loci*, which is in the nature of a semi judicial act, passes the *dominium* to the transferee, and that, except perhaps in the case of ownership acquired by prescription, the title appearing on the title deed is conclusive in favour of a *bona fide* purchaser, to whom such transfer has been ^c effected. Even when land has been acquired by prescription, the practice is for the party who has so acquired it to institute an action for duly registering his acquired rights in the Deeds Office."

When an owner of property delivers the property sold and has the capacity of alienation, or if he is not the owner but has the consent of the owner to alienate, the effect of delivery is to transfer to the purchaser the property in ^d the thing sold, provided the purchaser has paid for the property or has been granted credit by the seller. On delivery, the purchaser obtains a *ius in re*, a real right in the thing sold. With respect to immovable property, delivery is achieved through registration in the Deeds Office, as was decided in *Harris v Buissinne's Trustee* (1840) 2 Menz 105. The pertinent passage from the judgment is as follows: ^e

"By the law of Holland the *dominium* or *ius in re* of immovable property can only be conveyed by transfer made *coram lege loci*, and this species of transfer is essential to divest the seller of, and invest the buyer with, the *dominium* or *ius in re* of the immovable property, as actual tradition is to convey the *dominium* of movables and that the delivery of the actual possession of immovable property has no force or legal effect whatever in transferring its *dominium* ^f."

A passage to the same effect is found in *Norman's Purchase and Sale in South Africa* 4 ed by C I Belcher, quoting from Pothier, *Vente*, 319 *et seq*:

"When the vendor is the owner of the thing sold and has a capacity of alienation, or, if he is not, when he has the consent of the owner, the effect is to transfer to the person of the purchaser the property in the thing sold provided the purchaser has paid the price or the vendor has given him credit for it. The contract of sale by *g* itself cannot produce this effect. Contracts can only make personal engagements between the parties. It is only delivery made in pursuance of the contract which can transfer the property in the thing sold according to the rule *traditionibus et usucapionibus domina rerum non nudis pactis transferantur*."

Once the City of Harare had sold and transferred the *dominium* in the Stand, it lost any right to treat the property as its own. It could sell the Stand to *h*

2009 (1) ZLR p261

Gowora J

A Gomo, as it purported to do, but it could not transfer the *dominium* in the same as it had lost *dominium* when it sold and transferred the same to Agro Chem. The purchaser has the right to defend his rights in the property against the world at large. The two respondents have, however, sought to oppose the application on the basis that the contract of sale to Agro Chem has been cancelled and that not only does the City of Harare have the right *b* to sell it, it (the City of Harare) can deal with the Stand in any manner it deems appropriate. I will therefore examine the defences mounted by the respondents to the application. To put matters in context, it is appropriate to start with the second respondent, City of Harare.

It is contended on behalf of both respondents, both in the opposing affidavits *c* and in the supplementary heads of argument, that not only had the City of Harare cancelled the agreement of sale, it had also commenced the process of re-transfer in terms of clause 12 of the agreement of sale. Both make reference to two letters allegedly sent to Agro Chem by the City of Harare, dated 26 February and 20 June 2008, respectively. The deponent to the answering affidavit filed on behalf of Agro Chem denies having received *d* the letters in question. According to the respondents, Agro Chem did not respond to the letter of 20 June which required that it surrender the title deeds to the legal practitioners of the City of Harare as demanded and therefore its silence meant that it had not challenged the process of re-transfer that had been started by the City of Harare. The submission is also made that the cancellation of the agreement of sale had also not been challenged. I am *e* being entreated by the respondents to enquire into the agreement and the terms and conditions of the same.

Both respondents contend that the agreement between the City of Harare and Agro Chem was cancelled due to non-performance of its contractual obligations by the latter, and that therefore City of Harare was entitled to sell *f* the Stand anew to Gomo. Although both respondents talk of the agreement as having been cancelled, it seems that of the two, Gomo was certainly alive to the need to have something done about the agreement and to have the transfer to Agro Chem set aside before any meaningful action could be taken in having the Stand transferred to him. It seemed that this necessary legal process completely escaped City of Harare. The mere demand by it of *g* the return of the deed of transfer does not in itself reverse ownership of the Stand from Agro Chem to itself. Equally the lack of response to the alleged letters of cancellation does not, in itself, exhibit that Agro Chem has accepted that the Stand has changed hands as contended on behalf of the respondents.

According to the City of Harare, when the parties signed the agreement *h* both were aware that ownership would be determined only upon the

2009 (1) ZLR p262

Gowora J

development of the property. I have not been referred to any authority that *a* would convince me to accept this submission and find that ownership of the Stand, notwithstanding the transfer to Agro Chem, would still be uncertain. I have examined the deed of transfer that is attached to the papers and it does not have any conditions in which there is any limitation on the vesting of title in the title holder. Mr *Hussein* has referred me to *s* 154 of the Urban *b* Councils Act [*Chapter 29: 15*] which provides as follows:

"Conditions of title to land transferred by municipal council

In the case of land granted to a municipality in trust for the inhabitants of the municipality, such area being known as municipal township land, which was granted subject to the conditions that –

- (a) the British South Africa Company or the Governor of Southern Rhodesia c shall have the right to resume ownership of, and to retake possession of, the said land or any portion thereof on payment of such compensation as may be mutually agreed upon or, failing such agreement, as may be determined by arbitration; and
- (b) the right to all minerals in or the power to make grants of the right to prospect for minerals on that land was reserved, either to the British South Africa d Company or to the Governor of Southern Rhodesia;

any such land which is or has been transferred whether before or after the date of commencement of this Act, by the municipality or by any successor-in-title to the municipality shall be deemed to have been transferred and shall be held, notwithstanding anything to the contrary in any other law, subject to the conditions referred to in paragraphs (a) and (b) which were applicable to the municipal e township land concerned, save that any reference to the British South Africa Company or the Governor shall be construed as a reference to the President, and subject to any other conditions that may be imposed by the municipality or any subsequent owner of the land."

It is correct, as contended on behalf of the City of Harare, that in terms of the said section local authorities have been accorded the right to impose f conditions on the transfer of lands falling within municipal township lands which would have devolved upon such local authorities by way of grants from central government. The deed of transfer exhibited to me does not contain conditions apart from a servitude registered in favour of the municipality and the further requirement that any transfer from the title holder will require its prior written consent. I will assume that the reservation for resumption of g title and the right to prospect for minerals provided for in the said s 154 are also applicable. Other than these remarks, I find no relevance in the section referred in relation to the current dispute. The title deed does not impose any conditions other than those that are stated on the same and we are not, in this dispute, dealing with a resumption of ownership by the State or a dispute relating to mineral rights. Mr *Hussein* made the submission that h

2009 (1) ZLR p263

Gowora j

A the conditions referred to in clause 12 of the agreement did not have to be mentioned in the deed of transfer. I am not sure if by that submission he meant that the section he quoted gives his client the right to expropriate summarily any municipal land. To begin with, his client is a local authority and cannot be equated under any circumstances to the President, as provided for in the quoted section. In any event, the City of Harare has not set in motion any b legal process to reclaim the Stand, apart for the alleged letters that I have made reference to above. The view I take is that the attempt to rely on s 154 of the Urban Councils Act does not assist his client's position at all.

I do not have before me the issue of the cancellation of the agreement between City of Harare and Agro Chem and I am mindful that it is therefore incumbent c upon me to tread very carefully in this inquiry lest I compromise any future proceedings in connection with this matter. However, it appears to be the position of the respondents that the agreement between Agro Chem and the City of Harare has been cancelled and it is therefore virtually impossible to decide the dispute without considering the position they have adopted. The point was made by Mr *Hussein* that, upon receipt of the letters allegedly d sent to it, Agro Chem should either have complied with the demand to hand over the title deeds or sought a declaratory order raising its entitlement to the claimed property. I have already dealt with the lack of co-operation to return the title deeds and I will deal here with the suggestion that Agro Chem should have sought a declaratory order.

This was apparently to deal with the conflict between the agreement e and the title deed. If the City of Harare finds that there is a conflict in the agreement and the title deed, then it would be within its rights to have such conflict resolved by the court. However, it has not seen fit to do that and has instead been content to defend a vindictory action brought by the title holder to evict a claimant to the Stand. A court cannot resolve a dispute that has not f been brought before it for specific relief.

In so far as the contention that the agreement was cancelled is concerned, the attitude of Agro Chem is that any claim by the City of Harare to cancel it has now prescribed. The agreement was concluded in 1995 and transfer to the purchaser was effected before the year was up. In terms of s 15(d) of g the Prescription Act [*Chapter 8: 11*], a debt shall prescribe after a period of three years. "Debt", in that Act, is defined as, without limiting the meaning of the term, including anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise. It therefore goes without saying that the claim for cancellation of the agreement of sale

falls within the definition of a debt, which then would prescribe within three years. Although this submission was made in the heads of argument filed on

2009 (1) ZLR p264

Gowora J

behalf of Agro Chem, the issue was not discussed by the local authority. My *a prima facie* view is that any attempt on the part of the City of Harare to seek cancellation and retransfer will be met with the defence of prescription and I cannot fathom any factor that may be available to counter it.

It is trite that where cancellation of a contract is lawful and justified on account of breach, it takes effect from the time that the innocent party communicates the breach to the defaulting party. For this proposition, see *Bako & Anor v Bulawayo City Council* 1996 (1) ZLR 232 (S) at 240F, wherein Gubbay CJ stated the following:

"Thus, it is those actions and events which occurred after 23 March 1992 to which regard must be had in determining whether the resistance to the cancellation was justified in law; for cancellation takes effect from the time it is communicated to the other party. See *Swart v Vosloo* 1965 (1) SA 100 (A) at 105 (G); *Phone-A-Copy World-wide (Pty) Ltd v Orkin & Anor* 1986 (1) SA 729 (A) at 752A-C."

It is common cause that the letter in which the local authority sought to cancel the agreement of sale was written on 26 February 2008, which was a period well in excess of twelve years after the contract was concluded. I do not think that it can be argued that Agro Chem did not breach the agreement. It did not perform part of the obligations imposed on it in the agreement, in that it failed to construct buildings of a minimum standard and value as demanded by the agreement. It is not in dispute that prior to the letter of 26 February 2008, there was no intimation on the part of the City of Harare that it was cancelling the agreement due to the breach. The local authority, therefore, was within its rights to elect to cancel the agreement due to the breach. It is common cause that, instead of acting on the breach, the City of Harare went on to have transfer of the Stand registered in the name of Agro Chem. In his heads of argument, Mr Hussein took issue with the date on the power of attorney that was prepared in respect of the transfer to Agro Chem. This averment, which is evidentiary in nature, is made as a submission in the heads of argument. If indeed there was issue to be taken on the date on the power of attorney, the appropriate manner of bringing it to the attention of the parties was by averment under oath in the opposing affidavit, which was not done. Indeed, one would have expected that the document itself would have been exhibited to the court as part of the papers used by the City of Harare in opposing the application. In any event, why would the City of Harare question the authenticity of the power of attorney when transfer is not being challenged? The moot point, however, is that in all this debacle City of Harare has never sought to have the transfer reversed, even if one were to accept that it was effected in an irregular manner.

Again, in the heads of argument, it is submitted that City of Harare waived

2009 (1) ZLR p265

Gowora J

its rights to claim cancellation of the contract. According to Christie *The Law of Contract* 3 ed at 488, there is a presumption against waiver of contractual rights, even in some cases strongly suggesting the same. Thus there is a heavy evidentiary burden on the party alleging waiver to establish the same on a balance of probabilities. In considering the question of waiver, I am reminded that the issue was brought up in written submissions and was not raised as an averment in the papers filed by the parties. An examination of the facts as presented on the papers may throw some light as to whether, despite not having raised it on the papers, Agro Chem can rely on the issue of waiver as submitted in the heads of argument. In the opposing affidavit filed on behalf of the City of Harare, there is an acceptance that the Stand was transferred to Agro Chem and that demand of the deed of transfer was made by a letter dated 26 February 2008. This is the cancellation that is being relied on to defeat the claim for eviction. It seems to me that by transferring the Stand to Agro Chem, the City of Harare elected to abide by the contract. It in fact discharged its obligations in terms of the agreement between the parties. If the innocent party to the contract elects to abide by the contract, he cannot thereafter rescind it for the original breach, even though a subsequent breach may give rise to a fresh right to cancel. Thus a tacit election to affirm the contract may be viewed as a form of waiver. As to what amounts to an election, this is what Sandura JA said in *Guardian Security Services (Pvt) Ltd v ZBC* 2002 (1) ZLR 1 (S) at 7A-B:

"... It is clear that election generally involves a waiver. One right is waived by choosing to exercise another right which is inconsistent with the former."

What is referred to as the doctrine of election was discussed in the earlier case of *Segal v Mazzur* 1920 CPD 634 at 644-5 by Watermeyer AJ in the following terms:

"Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but once he has made his election he is bound by that election and cannot afterwards change his mind. When he has made an election one way or another is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct...."

The evidence I have to consider is none other than the deed of transfer in favour of Agro Chem as well as the agreement of sale itself, specifically the latter, the pertinent part of which is as follows:

"12a) THE PURCHASER shall effect or cause to be effected on the stand

2009 (1) ZLR p266

Gowora J

principal buildings designed for industrial, manufacturing, factory or A other purposes permitted by the Municipality to the minimum value of \$750 000.00

- b) Such buildings shall be commenced on the Stand within six months from the date of sale and shall be duly completed within twelve months from such date. If such buildings have not been commenced or completed as aforesaid then in either case the Municipality shall *ipso facto* be B entitled to cancel the sale of the Stand or claim retransfer as the case may be. If the sale of the Stand is cancelled or the Stand is claimed in terms of this clause for default in the payment of the balance of the purchase price or any interest thereon or by mutual consent, then the Municipality shall refund to the purchaser the amount paid in respect of the purchase price of the Stand plus compensation for any buildings C or other permanent improvements."

The agreement was concluded on 29 March 1995. When regard is had to clause 12 (a) and (b) thereof, the building of improvements with a minimum value of \$750 000.00 should have commenced within six months of the date of conclusion of the agreement. Transfer to Agro Chem was effected on 20 November 1995, which is a period just short of seven months after the D agreement was concluded. It was obvious at that date that no improvements had been effected on the Stand and that the purchaser might be *in mora* in the performance of its obligations. There is no suggestion on the papers that it sought an extension of time within which to comply with that particular obligation, yet, notwithstanding this failure to abide by the conditions set in the contract, the Stand was transferred to the purchaser. This failure to E build on the Stand is the reason that the City of Harare seeks to rely on in alleging cancellation of the contract. In my view, an event entitling the City of Harare to seek cancellation occurred before the transfer was effected, yet it elected to discharge the last of its obligations in terms of the contract. I will not dwell on the suggestion by Mr Hussein that, in view of the date of F the power of attorney, the transfer must have been fraudulent. I take judicial notice of the fact that apart from a power of attorney, other documents are submitted for purposes of transfer and if indeed it was felt that the transfer had been irregular, something would have been done by now to set it aside on the basis of such irregularity.

It was decided by Sandura JA in *Guardian Security Services (Pvt) Ltd v ZBC* G *supra*, that in determining whether or not the facts established an intention to waive a right in a contract a court had to apply the objective test. The learned Judge of Appeal had this to say at 7D-H:

"I find support for my views in a number of South African cases. In *Palmer v Poulter* 1983 (4) SA 11 (T) at 20C-D, Ackerman J, in delivering the judgment of the Full Bench, said: H

2009 (1) ZLR p267

Gowora J

A 'If the appellant, with full knowledge of the facts, has so conducted herself that a reasonable person would conclude that she had waived her accrued right to cancel the agreement or had affirmed the agreement, a mental reservation as to the contrary will not avail her'.

The objective test therefore prevailed. That decision was followed by the full bench of the Cape Provincial Division in *Multilateral Motor Vehicle Accidents Fund v Meyerowitz* 1995 (1) SA 23 (C) at 27. Subsequently, in *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) at 543J-544A, Friedman JP, in delivering the judgment of the full court, said:

"If the innocent party with full knowledge of his rights performs an unequivocal act from which a reasonable person would necessarily infer that he has elected to c affirm the contract, he would be bound thereby, whatever subjective reservations he might have had. On the other hand, if the act on which it is sought to rely for the existence of an election is not unequivocal, regard must be had to the subjective considerations which motivated the party concerned in order to determine whether the act in question does in fact constitute an election or not".

Applying these principles to the facts of this matter, it leaps to the mind that, d from the conduct displayed on the part of the officers of the City of Harare, an impression was created that not only was it affirming the contract, it was also complying with all its obligations under the contract. A transfer to Agro Chem could not have been effected without the specific authorization of the seller. Documents necessary for such transfer would have been drawn up and e signed by authorized signatories on behalf of City of Harare. At the time the decision to transfer title to Agro Chem was made, there must have been an awareness that there had been no compliance with the requirement to effect the minimum improvements on the Stand as required by the agreement of sale. Notwithstanding the knowledge that the conditions had not been complied with, it took City of Harare almost thirteen years before it called up the f agreement. If such dilatoriness in seeking to enforce a right in a contract is not indicative of a waiver of a right to cancel, it would be difficult to imagine what else such conduct constitutes. In *Guardian Security supra*, Sandura JA considered that a period of twelve months before an innocent party decided to terminate an agreement based on an alleged breach of the same by the g other party to the contract is not a reasonable period. *In casu*, more than a decade went by before City of Harare decided to do something. Even then, its attempt to enforce its rights under the agreement cannot even be termed half-hearted. They are virtually non-existent. Having had transfer of the Stand registered in the name of the purchaser it cannot have escaped notice that what was required, if at all it was still possible, was an effort to have the h transfer set aside. It has not done so and would, in all probability, not have

2009 (1) ZLR p268

Gowora J

come to court to allege cancellation of the agreement if the purchaser had a not dragged it to court in a bid to evict Gomo. From the facts established on the papers, it is my view that City of Harare never reserved its rights under the contract, and that if it did those reservations were never communicated to Agro Chem. It is my finding that it elected to abide by the agreement notwithstanding the default by Agro Chem to construct improvements as b required by the agreement. I find, therefore, that there was waiver on the part of City of Harare and it cannot now rely on cancellation to seek to prop up the defence proffered by Gomo to defend the claim mounted for his eviction from the Stand.

I turn now to consider the opposition mounted by Gomo against the claim for eviction. It seems to me that the strength of his defence to the claim is c wholly dependent on how successful City of Harare is in defending its own position in this dispute. The basis of the defence was that the agreement had been cancelled. I have found that there was no cancellation because, by the time City of Harare sought to cancel the agreement, transfer had been effected, the result of which was to vest *dominium* in the Stand in Agro Chem. d

It was contended on behalf of Gomo that an aggrieved party to a contract of sale has the option of not only cancelling the agreement of sale, but can also claim cancellation and restitution of what he has paid over, or transferred, under the contract. *In casu*, cancellation was communicated more than 12 years after the default occurred and there has been no effort on the part of the seller to claim re-transfer of the Stand. Apart from an excerpt from Kerr, I was e not referred to any authority to bolster the contention that after the transfer of real rights to it, Agro Chem could be compelled to transfer the Stand to another on the basis of a breach which occurred prior to the registration of real rights in its name. In the supplementary heads of argument filed on behalf of Gomo, it was contended that the reversal of transfer was in terms f of clause 12(a) of the agreement of sale between Agro Chem and City of Harare. Unfortunately for Gomo, there has been no process filed to have the transfer set aside and Agro Chem therefore remains the registered owner of the Stand. It is a correct statement of the law that a seller has an option to cancel and to

claim restitution of *merx*, even where there has been delivery. The question I posed to Mr *Zhou* was whether, in fact, a seller, after having ^g transferred land and authorized its registration in the name of the purchaser, can cancel the contract and obtain retransfer. I have not been pointed to any authorities on the issue in question. The only authorities I have had occasion to read are those where either movables were the subject of the sale or, if an immovable was the subject matter, then cancellation would be before transfer of rights to the purchaser. ^h

2009 (1) ZLR p269

Gowora J

^a In this regard, I have been invited by Gomo to look at the conditions of the agreement, which conditions he contends were not performed by Agro Chem. It was contended further that the court *in casu* could not ignore the agreement of sale as it recorded the intention of the parties vis-à-vis the transfer. It was further contended that the election to claim rescission of a contract and the return of the thing sold is available to a seller where the ^b contract contains a clause (*a lex commissoria*) providing for rescission in the circumstances in question. Indeed the agreement which gave rise to this application does contain a clause for rescission, but City of Harare, apart from the letters I have mentioned above, has not sought to have the sale set aside and the Stand transferred back to itself.

^c The arguments being presented by Gomo would be more properly and appropriately made if they were being presented on behalf of City of Harare. As Gomo was not a party to the agreement, I cannot accept that he has even a modicum of standing to make submissions in relation to the dilatoriness on the part of Agro Chem in the performance of its obligations under the agreement. There is before me no application for a reversal of the transfer ^d and to embark on this inquiry appears to be a futile exercise. I also find that the suggestion that the court look at the intention of the parties to the contract is ill-conceived. A party who was not privy to a contract which is the subject matter of a dispute cannot make submissions in relation to the intention of the parties to the contract with any conviction. Any suggestion of what the parties thereto may have intended can at best be described as conjecture. ^e Only the parties to the contract can speak to the terms and conditions thereof, and whether or not such terms accord with the intentions of the parties at the time the contract was concluded. In any event, the agreement of sale was antecedent to the transfer and once transfer was effected, the court cannot revert to the agreement except in certain exceptional circumstances not ^f pertinent to this dispute.

It was further contended on behalf of Gomo that what was before this court was a situation which is akin to a double sale, and that therefore the principles applicable to a double sale should be applied in determining this dispute. I do not see how the situation I am dealing with can be akin to a double sale. City of Harare sought to sell to Gomo what was no longer its property. It ^g is correct, as submitted by Mr *Zhou*, that a person can sell property that belongs to someone else. The only problem is that the effect of registration of rights in land is that the registered owner has the right to defend his right in the property against the world at large. Gomo cannot get title because the vendor had no title to pass to Gomo.

^h It is not necessary, in my view, to embark on another exercise as to whether

2009 (1) ZLR p270

Gowora J

or not Agro Chem was in possession of the Stand. It is for the trespasser to ^a establish a right to be on the Stand. In *Chetty v Naidoo* 1974 (3) SA 13 (N) at 20C, Jansen JA, quoting with approval the *dicta* in *Jeena v Minister of Lands* 1955 (2) SA 380 (A), stated thus;

"... The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the ^b *res* – the onus being on the defendant to establish any right to continue to hold against the owner (cf. *Jeena v Minister of Lands* 1955 (2) SA 380 (A) at pp 382E, 383). It appears to be immaterial whether, in stating his claim, the owner dubs the defendant's holding 'unlawful' or 'against his will' or leaves it unqualified (*Krugersdorp Town Council v Fortuin* 1965 (2) SA 335 (T))."

The right claimed by Gomo cannot withstand a claim by the owner for eviction, ^c the former not having proffered a justifiable reason for being on the Stand. The registered owner has a right to vindicate his property against anyone, unless a lawful defence is presented against the claim. No

such defence has been established on these papers and it is my finding that Agro Chem has established a claim for the eviction of Gomo from the Stand.

In the premises I make an order in the following terms: **D**

It is ordered that:

- (a) The first respondent and any person claiming occupation through him **be** and are hereby ordered to vacate Stand 404 Willowvale Township of Willowvale, situate in the District of Salisbury, within ten days of the date of service of this order and in the event of the **E** first respondent or any person claiming occupation through him failing or refusing to vacate the Stand in question, then the Sheriff for Zimbabwe or his lawful Deputy **be** and is hereby authorized to evict them from the same and give vacant possession to the applicant.
- (b) The costs of this application shall be borne by the first and second respondents jointly and severally, the one paying the other being **F** absolved.

Sawyer & Mkushi, legal practitioners for the applicant

Hussein, Ranchod & Co, legal practitioners for the first respondent

Gill, Godlonton & Gerrans, legal practitioners for the second respondent **G**

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Document 38 of 52

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BECKFORD v BECKFORD 2009 (1) ZLR 271 (S)

2009 (1) ZLR p271

Citation	2009 (1) ZLR 271 (S)
Case No	Judgment No. S-25-09
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA and Gwaunza JA
Heard	26 November 2007
Judgment	27 April 2009
Counsel	<i>A P de Bourbon sc</i> , with him <i>E T Matinenga</i> , for the appellant <i>J C Andersen sc</i> , with him <i>J B Colegrave</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal — findings of fact by trial court — credibility of witnesses — appellate court will not readily interfere with such findings — when court will interfere

Evidence — witness — credibility — findings by trial court with regard to credibility of witness — such findings not readily interfered with on **D** appeal — when court will interfere — failure to make full and frank disclosure — adverse inference drawn by court

Family law — husband and wife — divorce — division of assets following divorce — failure by husband to make full and frank disclosure of his assets — adverse inference drawn by court — no proper basis of complaint *€* available to husband in such circumstances

Headnote

Where a judge, at first instance, makes specific findings of fact with regard to the credibility of the parties and their witnesses, an appellate court will not readily interfere with such findings. That is so because the advantage enjoyed by a trial court of observing the manner and demeanour of *£* witnesses is very great.

The appellant in divorce proceedings appealed to the Supreme Court, *inter alia*, against the judgment of the High Court, in which his former wife, the respondent, had been granted certain proprietary rights relating to immoveable property owned by him. The judge *a quo* had made strong adverse findings of fact against the appellant, describing him as evasive, *£* dishonest and bent on denying respondent her entitlement. In the view of the court, he had failed to make a full and frank disclosure of his business transactions. The respondent, on the other hand, was found to have been an honest and credible witness. The point which faced the Supreme Court was whether there was any basis for interfering with *£* the proprietary awards of the judge *a quo*.

2009 (1) ZLR p272

Sandura JA

Held, that on the facts, there was no such basis. It could not be said that no *£* judge could have drawn the inferences or made the awards made by the judge *a quo*.

Held, further, that the appellant could not complain if the trial court explored what was before it and drew inferences which may turn out to be less fortunate than they might have been had he been frank and disclosed *£* his assets.

Cases cited

Arter v Burt 1922 AD 303

Baker v Baker [1995] 2 FLR 829 (CA)

Germani v Herf & Anor 1975 (4) SA 887 (A) *c*

National Employers Mutual General Insurance Assn v Gany 1931 AD 187

Case information

A P de Bourbon SC, with him *E T Matinenga*, for the appellant

J C Andersen SC, with him *J B Colegrave*, for the respondent

Judgment

SANDURA JA: On 20 December 2006 the High Court (Kudya J) granted *£* a decree of divorce and other ancillary relief in a divorce action in which Mr Beckford was the plaintiff and Mrs Beckford the defendant. Aggrieved by part of the order, Mr Beckford appealed to this court.

The notice of appeal, in relevant part, reads as follows:

"The appellant appeals against paragraphs 2, 3, 9, 10, 12 (only insofar as it relates *£* to the respondent), 14, 15 (insofar as the time for payment by the appellant is required), 16, 17, 18, 19 (only insofar as it imposed upon the appellant the obligation to deliver such property to the respondent at his cost), 22 and 23 of the order given by the High Court of Zimbabwe."

Before the appeal was heard, Mrs Beckford filed a court application in this court for leave to adduce further evidence on appeal. The evidence consisted *£* of the following – (a) the evidence presented by her as to the re-mortgaging and the sale-in-execution of the property at 45 Leinster Avenue, London; (b) the record in the urgent chamber application filed by her in the High Court in case no. HC 1417/2007, an application for an order preventing the sale-in-execution of the property at 45 Leinster Avenue, London, and which *£* was dismissed on 24 March 2007; and (c) the correspondence that passed between the legal practitioners for Mr and Mrs Beckford after 24 March 2007.

The application for leave to adduce further evidence on appeal was opposed by Mr Beckford.

However, as this appeal can be determined without the need for the additional evidence sought to

be introduced, it will not be necessary for this court to deal with the application. ^h

2009 (1) ZLR p273

Sandura JA

^A The parties were married to each other in Blackpool, Lancashire, England, on 26 November 1994. Two children were born of the marriage. These are Elsbeth Bridie Beckford, born on 7 August 1996, and Theodore Hugh Beckford, born on 9 February 1999. Both children were born in the United Kingdom.

At the pre-trial conference the issues were identified as follows – ^B

- “1. Whether it is in the best interests of the minor children that custody be awarded to (the) plaintiff or (the) defendant, or that an award of joint custody be made.
2. Dependent upon the award of custody the quantum of maintenance payable in respect of the children.
3. What order should be made in respect of the children’s schooling? ^C
4. The quantum of maintenance payable by (the) plaintiff to (the) defendant and the period thereof;
5. What assets constitute the matrimonial estate?
6. The apportionment thereof;
7. Costs.”

^D After a trial which lasted eight days the learned trial judge prepared a long judgment in which he carefully considered the issues before him.

I now wish to consider those paragraphs of the order of the court *a quo* which are challenged on appeal, and determine whether the learned trial judge erred in any way.

^E Paragraph 2

In terms of this paragraph, the learned trial judge granted the custody of the two minor children of the marriage to Mrs Beckford. In this regard the learned judge relied mainly on the evidence of Mrs Beckford and that of Mr Jean-Francois Desvaux de Marigny (“Mr de Marigny”), a clinical psychologist ^F with much experience in the psychological aspects of custody of and access to minor children after divorce.

Although Mr Beckford originally sought sole custody of the two minor children, he finally sought joint custody of them. However, Mrs Beckford, who sought sole custody of the children, maintained that joint custody was a practical impossibility in this case because it would not work. The learned ^G judge found that Mrs Beckford gave her evidence well and was an honest and fair witness.

In his evidence, Mr de Marigny said that, although joint custody was the “first prize” if it was a practical possibility, he did not believe that the necessary ingredients for joint custody, such as trust and the ability to communicate ^H with each other in a mature manner, existed in this case. It was his view

2009 (1) ZLR p274

Sandura JA

that Mrs Beckford was the more appropriate custodian of the two parties. ^A

Kudya J accepted Mr de Marigny’s evidence and commented as follows at pp 38-39 of the judgment (HH-124-06¹):

“I have dealt at length on Mr Marigny’s testimony because, in my view, it was delivered in a professional and impartial manner. His opinion was based on a credible methodology. He conducted in depth interviews with a wide array of ^B collaterals, the plaintiff, the defendant, the children and Dr Bester He carried out a first class appraisal of the issues and the facts. He was alive to the thirteen criteria for custody considerations set out in *McCall v McCall* 1994 (3) SA 20 (C) (*sic*) at 204-205 and the views expressed by de Vos J, in *Krugel v Krugel* 2003 (6) SA 220 (W), on joint custody.

He was commissioned by the plaintiff. He conducted himself well and with ^C dignity in the witness-box. ...

I am satisfied that he told the truth. I believe his evidence in its totality.”

It is pertinent to note that in the heads of argument prepared on behalf of Mr Beckford, no challenge is made to Mr de Marigny’s evidence and his reports. That, in my view, supports the learned judge’s

view of the manner in which Mr de Marigny gave his evidence and the substance of that evidence. [Ⓓ] The learned judge made adverse findings on the credibility of Mr Beckford and his two witnesses, Mr Austin and Mrs Middleton, on the issue of the custody of the minor children.

Commenting on Mr Beckford's evidence, the learned judge said the following at p 43 of the judgment: [Ⓔ]

"The plaintiff's conduct after he filed for divorce both before and after the consent order painted him as a manipulator. He manipulated his character, his wife's character, his money and the prevailing circumstances to his advantage. His evidence failed to convince me that the defendant was unsuitable to wear the mantle of a custodian parent."

Mr Austin was the managing director of the company which operated [Ⓕ] Heritage Primary School, the school at which the two minor children were pupils. When Mr Austin was cross-examined it emerged that Mr Beckford had provided a pavilion for the benefit of the school. It was also significant that when Mr Beckford was seeking sole custody of the children he was supported by Mr Austin, and that when he shifted his ground and sought joint [Ⓖ] custody of the children, Mr Austin similarly shifted his ground and supported him. In the circumstances, the learned judge concluded that Mr Austin could not escape from the criticism that he was biased in favour of Mr Beckford. [Ⓗ]

2009 (1) ZLR p275

Sandura JA

[Ⓐ] Mrs Middleton, the headmistress of Heritage Primary School, was similarly found by the learned judge to have given evidence which was biased in favour of Mr Beckford. The learned judge was of the view that Mrs Middleton had allowed herself to be "manipulated" by Mr Beckford.

It is quite clear that the learned judge made specific findings of fact with [Ⓑ] regard to the credibility of the parties and their witnesses. As has been stated in a number of cases, an appellate court would not readily interfere with such findings. That is so because the advantage enjoyed by a trial court of observing the manner and demeanour of witnesses is very great. See *Arter v Burt* 1922 AD 303 at 306; *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199; and *Germani v Herf and Anor* [Ⓒ] 1975 (4) SA 887 (A) at 903 A-D.

It seems to me that in the present case there is no basis for interfering with the learned judge's findings of fact on the credibility of the parties and their witnesses in respect of the custody of the minor children. There is, therefore, no basis for interfering with the order granting the custody of the two minor [Ⓓ] children to Mrs Beckford.

Paragraph 3

In terms of this paragraph the learned judge granted to Mrs Beckford leave to remove the minor children from Zimbabwe to the United Kingdom permanently on or after 31 July 2007.

[Ⓔ] In granting this order, the learned judge said the following at p 388 of the reported judgment:

"The defendant sought to remove the minor children permanently from Zimbabwe after 31 July 2007. The plaintiff who submitted that it was premature to seek such relief did not seriously oppose it.

[Ⓕ] In her testimony the defendant justified the need to prepare the girl for middle school in England. She demonstrated that she did not have any support system in this country. She also cited the deteriorating economic environment in this country.

In paragraph 15 of his draft order, the plaintiff postulates the possibility of either party relocating to the UK with the minor children, with the consent of this court. It is clear to me that at one point the plaintiff contemplated such a move. The defendant would like to do so. She has taken into account the recommendation [Ⓖ] of the educationists and Mr de Marigny. The plaintiff has already prepared the children for relocation by showing them a house they may live in (in) the UK. That the children have lived in Zimbabwe for the greater part of their existence is not in doubt. They were both born in the UK. Indeed, after the defendant conceived the boy, the parties temporarily moved to the UK for her to be closer to both their families. Clearly the parties have close links to the UK and have [Ⓗ] always contemplated the possibility of going back home."

2009 (1) ZLR p276

Sandura JA

In my view, the learned judge's reasoning is unassailable. It was common ^a cause that Mrs Beckford, a qualified graphic designer, did not have a work permit in respect of Zimbabwe, and could not support herself or the children in this country. The need to relocate to the United Kingdom was, therefore, obvious. Having been awarded the custody of the minor children, it followed that the children had to go with her. ^b

Paragraphs 9, 10 and 12

These paragraphs read as follows:

- "9. The plaintiff shall pay the following household and other expenses incurred in the running of 62A Steppes Road, Chisipite, Harare, direct to the suppliers thereof strictly by due date: electricity, water, rates, Tel-One telephone c account, vet bills, DS TV subscriptions, insurance of house and contents, third party insurance, licensing and reasonable maintenance and repairs costs together with the procurement and payment of 200 litres of diesel per month of the motor vehicle in the defendant's possession, security guard costs, wages of two domestic workers at the prescribed rate.
10. The plaintiff shall pay maintenance for the defendant and the children in the sum of ZW\$30 000 per month (as revalued at 1 August 2006) with effect ^d from 1 September 2005, such maintenance to be subject to review every three months by reference to the increase in the Consumer Price Index for the preceding three months produced by the Central Statistical Office.
11. ...
12. The plaintiff shall at his cost retain the children and the defendant on a ^e local medical aid scheme and pay all medical and dental shortfalls incurred under such scheme and furthermore the plaintiff shall be solely responsible for any emergency medical treatment the defendant and the children may require outside the country."

Paragraph 12 was challenged by Mr Beckford only insofar as it related to Mrs Beckford. ^f

In terms of the provisions of para 14 of the order granted by the learned judge, paras 4 to 13 only applied during the period that Mrs Beckford and the children were in Zimbabwe pending their permanent relocation to the United Kingdom. Therefore, Mr Beckford's obligation to meet the expenses set out in paras 9, 10 and 12 applied during that period only. ^g

It is pertinent to note that the provisions in paras 9, 10 and 12 are the same as those in paras 7, 8 and 10 of the order granted by the High Court on 26 July 2005, with the consent of Mr and Mrs Beckford ("the consent order"), apart from the fact that in para 9 of the order of the court *a quo*, there is the additional requirement that Mr Beckford was to purchase 200 litres of diesel per month for use by Mrs Beckford. ^h

2009 (1) ZLR p277

Sandura JA

^a The consent order regulated, *inter alia*, custody of, access to and maintenance for the minor children, as well as Mrs Beckford's maintenance, until the conclusion of the divorce proceedings. In addition, the consent order provided that Mr Beckford was to vacate the matrimonial home at 62A Steppes Road, Chisipite, Harare, and that he was to continue paying all the household and other expenses incurred in the running of the matrimonial home.

^b In granting the orders set out in paras 9, 10 and 12 the learned judge had this to say at pp 51-53 of the original judgment:

"The defendant sought maintenance for her and the children and prayed that it be regulated in terms of paras 7, 8, 9, 10 and 11 of the consent order until her departure to the UK. ...

^c She seeks that for as long as she remains in Zimbabwe her personal maintenance should be regulated in terms similar to those found in the consent order. I see no reason to discard her reasoning as it is based on a workable, tried and tested formula which has been in operation since 26 July 2005. That formula takes into account the loss in the value of our currency. ...

The defendant is not able to work in this country. Throughout the greater part ^d of her marriage she has been supported by the plaintiff. She has established the need for personal maintenance. I will thus make an order for her personal maintenance in the terms that she seeks.

The plaintiff has accepted that he be bound by (the) consent order on the maintenance of the minor children. That concession is noted and an award along those lines will be made.

^e The other issues that relate to the educational, medical and holiday needs of the children were agreed to by the parties in their respective counsels' submissions. These will be regulated, as agreed between the parties, in terms of the consent order of 26 July 2005.

The defendant co-joined her claim for maintenance with a prayer that the plaintiff be ordered to supply her with 200 litres of diesel every month until she relocates ^F to the UK. The plaintiff did not seriously contest her claim in this regard. His only concern was that the cost of the diesel be incorporated into one lump sum monthly figure. ... She highlighted the agony she faces in searching for fuel and compared it with the ease with which the plaintiff manages to acquire it. She further stated that the price of fuel is always changing, hence the formulation of her claim in the manner that she did.

^G It seems to me that since the order of maintenance that I will make will be in terms similar to those that are found in the consent order and, since the maintenance order and her request for fuel are for the limited duration of her stay in this country, I will accede to her prayer for the delivery of 200 litres of diesel to her every month."

In my view, the learned judge's reasoning is unassailable. Consequently, I ^H cannot see any basis for interfering with paras 9, 10 and 12 of the order of

2009 (1) ZLR p278

Sandura JA

the court *a quo*. ^A

Paragraph 14

This paragraph reads as follows:

"Clauses 4 to 13 of this order shall only apply during the period that the defendant and the children remain in Zimbabwe pending their permanent relocation to the United Kingdom, and thereafter the plaintiff's rights of access to the minor ^B children and the rights of the minor children and the defendant to maintenance shall be by agreement between the parties or failing which by order of a court of competent jurisdiction."

In my view, it seems clear from the wording of paras 4 to 13 of the order that these paragraphs were meant to be operative only during the period that Mrs Beckford and the minor children were in Zimbabwe before their permanent ^C relocation to the United Kingdom. Paragraph 14 merely reinforces that.

For example, in terms of para 4 of the order, in respect of which there was no appeal, Mr Beckford was to vacate the matrimonial home, and Mrs Beckford and the children were to have the unfettered right to continue living in the matrimonial home. It goes without saying that the unfettered right to live ^D in the matrimonial home could only be exercised by Mrs Beckford and the minor children before their permanent relocation to the United Kingdom.

By providing, in para 14, of the order, that after Mrs Beckford and the minor children have permanently relocated to the United Kingdom, Mr Beckford's rights of access to the minor children, and the rights of the minor children ^E and Mrs Beckford to maintenance would be by agreement, failing which, by order of a court of competent jurisdiction, the learned judge in the court *a quo* took into account the fact that after Mrs Beckford and the minor children have permanently relocated to the United Kingdom, different considerations would apply to the issues of Mr Beckford's right of access to the children, and the rights of Mrs Beckford and the minor children to maintenance. ^F

Once again, I find the learned judge's reasoning unassailable. There is, therefore, no basis for interfering with para 14 of the order.

Paragraph 15

This paragraph reads as follows:

"Upon the permanent departure of the children and the defendant in terms of ^G clause 3 of this order –

- 15.1 The house situated at 62A Steppes Road, Chisipite, Harare, or the shares in the company holding such property, shall be valued within thirty days of this order by an independent valuer to determine the likely market value of the shares or the property, and the plaintiff shall elect within fourteen days of such a determination whether to sell the shares or the property or ^H

2009 (1) ZLR p279

Sandura JA

^A to do neither.

- 15.1.1 If the shares (are) or the property is sold, the defendant shall receive 50% of the gross proceeds of the sale (less any assessed payment in respect of capital gains tax and the cost of the independent valuer).
- 15.1.2 If the plaintiff elects not to sell (the) shares or the property, he shall pay to the defendant 50% of the market value of the shares or the property within thirty days of such a determination by the valuator, whichever is the greater, as assessed by the independent valuer (less the costs of the independent valuer).

15.2 The defendant shall sell the contents of this property for their market value and the proceeds of the sale shall be divided equally between the parties."

c Mr Beckford's objection to para 15 of the order was set out by his counsel, Mr *de Bourbon*, in paras 38 and 39 of his heads of argument as follows:

- "38. Although para 15 of the order ... seems to deal with the disposal of the matrimonial property at 62A Steppes Road, Chisipite, Harare, as at the date of the permanent departure of Mrs Beckford and the children to the United Kingdom, the learned judge directed the valuation to take place d within thirty days of the order, and required Mr Beckford to make an election within fourteen days of the determination of the value as to whether to sell the shares or the property or do neither. He gave no reason for this direction, nor why (that) could not take place closer to the time of the departure of Mrs Beckford.
- 39. But, more importantly, the learned judge directed in para 15.1.2 ... that e having made the election (in effect within forty-four days of the judgment) he then had to pay half the value of the shares or the property to Mrs Beckford within a further sixteen days if he elected then not to sell the shares or the property.

It is respectfully pointed out that this leads to the absurd position that within forty-four days of the judgment Mr Beckford must decide whether upon the f eventual departure of Mrs Beckford and the children to the United Kingdom he is going to sell the shares or the property, and if he made the decision at that point in time not to sell, then within a further sixteen days he must pay half the value to her, even though she continues to live in Zimbabwe and might never leave."

In the circumstances, Mr *de Bourbon*, quite correctly in my view, submitted that in para 15.1 the learned judge should have directed that the valuation g of the immovable property at 62A Steppes Road, Chisipite, Harare, or the shares in the company holding such property, was to be carried out, not within thirty days of the order, but within thirty days of the permanent departure of Mrs Beckford and the minor children for the United Kingdom. Mr *Andersen*, who appeared for Mrs Beckford, did not disagree with that submission.

h Paragraph 15.1 will, therefore, be amended accordingly.

2009 (1) ZLR p280

Sandura JA

Paragraphs 16, 17, 18 and 19 a

These paragraphs read as follows:

- "16. The plaintiff shall transfer against payment by him of the transfer costs his rights, title and interest in the property situated at 45 Leinster Avenue, London SW14 7JW, Title Number SGL 67648, to the defendant free of any encumbrances, mortgages or other obligations duly existing or duly b registered by law over the property.
- 17. The plaintiff shall transfer against payment by him of the transfer costs his rights, title and interest in the property situated at 390 Sutton Road, Sutton, SM3 9PH, Title Number SGL 637408, held under the name of Glencora Resources Limited to the defendant free of any encumbrances, mortgages or other obligations duly existing or duly registered by law over the property.
- 18. The defendant shall receive all the funds presently held in a bank account c in the joint names of RBM Davies and Partners, and Fladgate Fielder Solicitors, such funds being the net proceeds of the sale of the property at 265 Lonsdale Road, Barnes, London SW139QL.
- 19. The defendant be and is hereby awarded all the movable items that were formerly at the Lonsdale Road, Barnes, London, property and it is further directed that they shall be delivered by the plaintiff at his cost to such d address as may be designated by her in London."

Paragraph 19 was challenged by Mr Beckford only insofar as it imposed upon him the obligation to deliver the property to Mrs Beckford at his cost.

Thus, in terms of paras 16 to 19 of the order Mrs Beckford was awarded (1) the immovable property at 45 Leinster Avenue, London ("the Leinster E property") free from encumbrances and mortgages; (2) the immovable property at 390 Sutton Road, Sutton ("the Sutton property") free from encumbrances and mortgages; and (3) the net proceeds from the sale of the immovable property at 265 Lonsdale Road, Barnes, London, and all the movable items that were formerly at that property.

In arriving at these awards the learned trial judge was guided to a great extent F by his findings of fact in respect of the credibility of Mr Beckford on the one hand, and the credibility of Mrs Beckford on the other hand.

Commenting on the credibility of Mr Beckford on the issue of his assets, the learned trial judge said the following at p 68 of the judgment p 389 of the Report): G

"It seemed to me that the plaintiff was an evasive and dishonest witness. He simply was not prepared to disclose his assets fully. I agree with (the) observations of Mr Andersen that the plaintiff was an utter liar who manipulated the situation and avoided producing documents such as the completion statements. He appeared bent on denying the defendant her entitlement."

On the other hand, the learned trial judge commented as follows on the H

2009 (1) ZLR p281

Sandura JA

A credibility of Mrs Beckford at p 76 of the judgment:

"In my estimation, she was an honest and credible witness ...".

It is significant that these findings were not challenged on appeal. In any event, an appellate court would not readily interfere with findings of fact made by a trial judge. See, for example, *Arter v Burt supra* at 306; *National B Employers Mutual General Insurance Association v Gany supra* at 199; and *Germani v Herf and Anor supra* at 903A-D.

In my view, there is no basis in the present case for interfering with the findings of fact made by the learned trial judge on the credibility of the parties. No such basis was established by Mr Beckford.

Having rejected Mr Beckford's evidence in respect of the proprietary rights C of the parties, the learned trial judge said the following at pp 81-82 of the original judgment (p 393C-H of the Report):

"I, however, find that the plaintiff did not disclose all his assets and income, especially after he instituted these proceedings. The consequences of his attitude are summed up in the English Court of Appeal by Butler-Sloss LJ in *Baker D v Baker* [1995] 2 FLR 829 (CA) at 835, in these words:

'Mr Posnansky pointed to an utterly false case and asked us to consider why the husband was lying and what did he have to hide. If the cupboard was bare, it was in his interests to open it and display its meager contents. But on the contrary, the husband, despite his protestations to the contrary, continued to live the life of an affluent man. I agree with the submissions from Mr Posnansky that if a court finds that the husband has lied about E his means, and failed to give full and frank disclosure, it is open to the court to find that beneath the false presentation, and the reasons for it, are undisclosed assets.'

I will use this fact against him in distributing the assets that he disclosed. It is fair, just and equitable that I award to the defendant all the money that is held in the joint account of their respective English solicitors. I have agonized over F the appropriate order to make concerning the distribution of the immovable properties that the plaintiff disclosed which are registered in England.

In making the order that I have come to, I have been influenced in great measure by the plaintiff's failure to make full and frank disclosure, the size of the business transactions that were carried out by Coralsands and the concomitant income that must have accrued to him, the benefit that accrued to him from the disposal G of 7A Granville Road to Nicky Morris on 10 November 2005, the concerted programme that he undertook in asset stripping the matrimonial estate to his benefit and to the impoverishment of the defendant of which the registration of a charge in favour of his parents for £67 000 against 390 Sutton Common Road was part of, his financial acumen and resourcefulness and his apparent disdain for the integrity of the legal process. I will order that the two disclosed properties be transferred into the defendant's name while the plaintiff shall remain H responsible for the discharge of all the encumbrances, such as the mortgages

2009 (1) ZLR p282

Sandura JA

and restrictions registered against them.” A

The issue which now arises is whether there is any basis for interfering with the proprietary awards made by the learned trial judge in favour of Mrs Beckford in terms of paras 16 to 19 of the order. I do not think there is.

In *Baker v Baker supra* Otton LJ, who concurred with Butler-Sloss LJ who prepared the main judgment, said the following at 837: B

“Accordingly, the husband cannot complain if the judge following authority explored what was before him and drew inferences which may turn out to be less fortunate than they might have been had he been more frank and disclosed his affairs more fully. Such inferences must be properly drawn and reasonable. On appeal it may be possible for either party to show that the inferences or the award were *unreasonable in the sense that no Judge faced with the information c before him could have drawn the inferences or awarded the figures that he did*. I am satisfied that the appellant has not succeeded in demonstrating that the figures Ward J awarded were in any regard unreasonable or unjustified.” (emphasis added)

In the present case, I am not prepared to say that no judge could have drawn the inferences or made the awards made by the learned trial judge. There is, D therefore, no basis for interfering with the awards made.

It was submitted by Mr *de Bourbon*, on behalf of Mr Beckford, that the law governing the distribution of the matrimonial assets was the law of Zimbabwe, and not the law of England, and that the learned trial judge was mistaken as to what the English law on the distribution of matrimonial assets was. E However, this submission is at variance with the submissions made by the same counsel in the court *a quo*.

It was common cause in the court *a quo* that English law should be applied. In fact, in his heads of argument in the court *a quo*, counsel set out what the English law on the issue was, and made the following submission, which F appears at p 512 of Vol II of the record:

“It is respectfully submitted that if this Honourable Court decides to apply the law of England, then a 50:50 split of the value of assets shown in Exhibit 6 can be made only if this Honourable Court finds that the defendant could not have done more to create or contribute to the matrimonial estate.”

Stating the English law on the distribution of matrimonial assets, the learned G trial judge said the following at p 79 of the judgment (p 391F of the Report):

“... a spouse needs only to show that he or she could not have done more than he or she did to create or contribute to the matrimonial estate, before he or she can be awarded at least a one-half share in the estate.”

In the circumstances, I am satisfied that the learned trial judge properly applied the English law governing the division of matrimonial assets. H

2009 (1) ZLR p283

Sandura JA

A Paragraphs 22 and 23

These paragraphs read as follows:

“22. The plaintiff’s claim be and is hereby dismissed.

23. The plaintiff shall pay the defendant’s costs of suit including any costs reserved for determination in this matter, and the qualifying fees and B expenses of Mr de Marigny.”

The reasons for granting these two orders were set out by the learned trial judge at pp 82 and 83 of the judgment as follows (p 394 of the Report):

“It seems to me that the two most contentious issues between the parties revolved around custody and the disclosure of matrimonial assets. The defendant’s case on both these issues has largely been vindicated. She has not been in employment C for the past nine years and has been dependant on the plaintiff for her livelihood except for the period from April 2003 to July 2005 when she survived on the largesse of her parents and grandmother. It was also essential that she call the expert opinion of Mr de Marigny, which was invaluable to this court in the determination of the custody issue.

In my view, she is entitled to her costs of suit for both the main and counter- D claims, including the qualifying expenses of Mr de Marigny.

It is for these reasons that I would dismiss the plaintiff’s claim.”

In my view, the learned trial judge's reasoning cannot be faulted. In any event, as far as the issue of the costs of suit is concerned, this is a matter within the discretion of the learned trial judge.

In the circumstances, the following order is made –

1. Subject to para 2 below, the appeal is dismissed with costs.
2. Paragraph 15.1 of the order of the court *a quo* is amended so that it reads as follows –
 “The house situated at 62A Steppes Road, Chisipite, Harare, or the shares in the company holding such property, shall be valued within thirty days of such departure by an independent valuer to determine the likely market value of the shares or the property, and the plaintiff shall elect within fourteen days of such a determination whether to sell the shares or the property or to do neither.”

ZIYAMBI JA and GWAUNZA JA concurred.

^G *Honey & Blanckenberg*, appellant's legal practitioners

^H *Atherstone & Cook*, respondent's legal practitioners

¹ The judgment is reported in 2006 (2) ZLR 377 (H), but the reported judgment omits the learned judge's lengthy analysis of the facts, of which the passages quoted on this page were part. – *Editor*.

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Document 39 of 52

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/BRUCE v ECONET WIRELESS (PVT) LTD & ANOR 2009 (1) ZLR 284 (H)

BRUCE v ECONET WIRELESS (PVT) LTD & ANOR 2009 (1) ZLR 284 (H)

2009 (1) ZLR p284

Citation	2009 (1) ZLR 284 (H)
Case No	Judgment No. HH-52-09
Court	High Court, Harare
Judge	Omerjee J
Heard	18 March 2009
Judgment	6 May 2009
Counsel	<i>C Venturas</i> , for the plaintiff <i>H Nkomo</i> , for the first defendant <i>D Kanokanga</i> , for the second defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Local government – urban council – alienation of council land – subsequent use of land by person to whom alienated – subject to requirements of Regional, Town and Country Planning Act [Chapter 29:12]

Town and country planning – appeal – to Administrative Court – what decisions are subject to appeal to Administrative Court – decision by council to alienate council land – not such a decision

Town and country planning – development – what constitutes – building on land or changing use of land – permit required under Regional, Town and Country Planning Act [Chapter 29:12] E

Headnote

The first defendant leased a piece of land from the second defendant, the City of Harare. On the land it erected a cellular telephone base station. The piece of land was next door to the plaintiff's land in a Harare suburb. The plaintiff was unaware of the council's proposal to lease the land or of the first defendant's proposal to erect a base station until F construction had started. He brought an action to declare the lease to be invalid and to require the first defendant to remove the base station. In the alternative, he sought an order requiring the defendants to comply with the requirements of Part V of the Regional, Town and Country Planning Act [Chapter 29:12]. The issues for determination were (1) whether the first defendant was required by the law to obtain a development permit; G and (2) whether the plaintiff was given the required notice to object to the development. The defendants objected *in limine* that the court lacked jurisdiction to hear the matter because s 38 of the Act stipulates that any person aggrieved by a decision of a local planning authority has one month in which to lodge an appeal with the Administrative Court. *In casu*, they argued, the plaintiff, apart from instituting proceedings in H

2009 (1) ZLR p285

A the wrong forum, was also now out of time.

Held, that an appeal lies with the Administrative Court only if the decision being challenged is one listed in s 38 of the Act. The present matter concerned a decision that was not made, nor could it be deemed to have been made, in terms of the Act. The council's decision to lease the land was made in terms of s 152 of the Urban Councils Act [Chapter 29:15].

Held, further, that the fact that a local authority, such as the City of Harare, is empowered by s 152 of the Urban Councils Act to alienate any land it owns through sale, exchange, lease, donation or otherwise to dispose of or permit the use of the land should not be construed as exempting it or any other person from complying with the requirements of Part V of C the Regional, Town and Country Planning Act. This includes applying for a planning permit in terms of s 26 of that Act.

Held, further, that the erection of the base station by the first defendant constituted the carrying out in, on, over or under the land of building operations and thus was "development" as defined in s 22 of the Regional, Town and Country Planning Act. Consequently, the construction of the D mast was subject to the requirements of Part V of the Act.

Held, further, that the leased stand was part of a piece of land designated for use as a recreational park. Section 22(1)(b) stipulates that the altering of the character of the use of land constitutes "development", unless the new use and the old use both fall within the same prescribed group E of land uses. The erection or construction of a cellular mast on land designated for use as a recreational park could not be described as a simple change of use falling within the same prescribed group of uses of land. It amounted to the altering of the character of the use of land and therefore was "development". Section 24 proscribes the carrying out of any development unless permitted in terms of a development order F or in accordance with a permit issued in terms of s 26. The erection of the cellular mast was not carried out in terms of any development order nor was it done in accordance with a permit issued in terms of s 26 of the Act. Accordingly, it was an illegal structure.

Held, further, that this did not mean that the mast had to be demolished. Section 27 of the Act allowed an application to be made to regularise any G development that has been carried out without the requisite development order.

Case referred to

H *Mutare City Council v Wildlife Soc of Zimbabwe* 2001 (2) ZLR 275 (S)

2009 (1) ZLR p286

Omerjee J

Legislation considered ^A

Regional, Town and Country Planning Act [*Chapter 29:12*], ss 22(1)(b), 24, 26, 27 and 38

Urban Councils Act [*Chapter 29:15*], s 152

Case information

C Venturas, for the plaintiff

H Nkomo, for the first defendant ^B

D Kanokanga, for the second defendant

Judgment

OMERJEE J: The plaintiff is a private person, residing at Stand 64 of Lot 7A Colne Valley, commonly known as No. 5 Wellburn Drive, Ballantyne Park, Harare. The first defendant is Econet Wireless (Pvt) Ltd, a company duly incorporated in accordance with the laws of Zimbabwe, and the second defendant is the authority responsible for, and in charge of, the council area within the city of Harare.

On 8 January 2008 the plaintiff issued summons and a declaration against both defendants seeking an order – ^D

- “(a) Declaring the lease agreement entered into, on or about 27 February 2007, between first and second defendants to be of no force or effect.
- (b) Requiring first defendant, on the basis that its cell phone base station encroaches on his land and constitutes a nuisance to:
 - i. vacate stand 648 Ballantyne Park.
 - ii. remove its cell phone base station. ^E
 - iii. restore stand 648 to the condition it was in, prior to erecting the base station.

ALTERNATIVELY:

Requiring first and second defendants to comply with the requirements of Part V of the Regional, Town and Country Planning Act [*Chapter. 29:12*] ^F (“the Planning Act”).

- (c) Costs of suit..”

The facts bringing rise to this suit can conveniently be summarised as follows:

1. Sometime in January 2006, the first defendant approached the second defendant with a view to leasing, from the latter, a certain piece of land ^G measuring 140 square metres, known as Stand No. 648 Ballantyne Park, Colne Valley, Harare (“the Stand”).
2. The first defendant wished to lease the Stand for purposes of erecting and subsequently operating a cellular base station (“mast”) thereon.
3. In compliance with the provisions of s. 152(2) of the Urban Councils Act [*Chapter 29:15*] the second defendant caused to be published ^H

2009 (1) ZLR p287

Omerjee J

^A notices of its intention to lease the Stand to the first defendant, in both the *Business Herald* and *The Herald* newspapers of 13 and 20 October 2006 respectively.

4. The 21-day limit for lodging objections as required by s 152(2)(b) having elapsed without receipt of any objections, the first and second defendants, ^B on or about 27 February 2007, proceeded to conclude a lease agreement pertaining to the Stand.
5. Of significance, clause 5 of the lease agreement stipulated that the Stand was to be used for the installation and operation of a cellular base station.
6. On the basis of this lease agreement the first defendant commenced to ^C construct or erect a mast on the Stand.
7. When the plaintiff, whose premises are directly adjacent to the Stand, noticed what was transpiring, he addressed letters of protest, dated 24 April 2007, to, *amongst others*, the second defendant and in particular for the attention of the Acting Town Planner, a Mr. A Kasiwamhura. This letter read:

^D “Re: Cellphone Mast in Ballantyne Park

I note with concern that a cellphone mast is being erected in Ballantyne Park adjacent to my boundary wall. I have not had any notification of this at all and I have checked with the two neighbours directly opposite who say they have not been notified either.

I would like work on this structure stopped with immediate effect as correct E procedures have obviously not been followed. This structure also extends within the building line on my boundary wall.

Further to this, there are severe health hazards caused by EMR [electromagnetic radiation] associated with cellphone masts and they should not be erected in such close proximity to residential properties, especially if these house children.

F I should be grateful if you would give this matter your urgent attention."

8. Neither defendant was moved by these protestations, as both held the view that adherence to, and compliance with, all the necessary legal formalities had been met and, therefore, under the circumstances, halting the erection of the mast was not warranted.

Faced with this scenario, the plaintiff, on 8 June 2007, filed with this court, G what he purported to be an urgent chamber application seeking interim relief compelling the removal of the mast and restoration of the Stand to its original condition by the first defendant.

The matter was placed before my brother Hlatshwayo who, in declining to hear it on an urgent basis, ruled that:

H "the matter is not urgent because of the delay in instituting legal proceedings

2009 (1) ZLR p288

Omerjee J

after the encroachment was noticed and because of the final nature of the interim A relief sought. The matter should be set down on the normal opposed roll."

This prompted the plaintiff to enrol it on the opposed roll of 31 October 2007, using the same set of papers as originally filed.

In his initial papers the plaintiff had predicated his case on an alleged non-compliance with the provisions of s 152 of the Urban Councils Act, B but subsequently, in his answering affidavit, he introduced the matter of non-compliance with the requirements of the Planning Act. My brother Chitakunye, who presided over the opposed application, ruled that this latter aspect be struck out on the basis that it introduced a new cause of action. He proceeded to dismiss the application in its original form on the grounds, *inter c alia*, that it was incapable of resolving without hearing evidence.

Following this the plaintiff, on or about the 8 January 2008, filed this action predicated on the ground that was earlier struck out, namely, that the defendants had failed to comply with , or had totally ignored, the requirements of the Planning Act.

At a pre-trial conference held on 23 October 2008, the following issues were D identified as requiring determination:

1. Was the first defendant required by the law to obtain a development permit?
2. Was the plaintiff given the required notice to object to the development?
3. Does the first defendant's base station constitute a nuisance? E

Prior to the commencement of the trial the parties agreed that issues 1 and 2 predominately involved questions of law and would not therefore require the adduction of evidence. In addition, the plaintiff, on his own volition, formally withdrew the third issue. The result was that the case effectively proceeded on the basis of an opposed application. F

On the date of hearing the first and second defendants raised certain points *in limine* that, in my view, can more conveniently be dealt with together as opposed to separately.

My understanding of the points raised *in limine* is as follows:

- a. That this court lacks jurisdiction to hear the matter because s 38 of the G Planning Act stipulates that any person aggrieved by a decision of a local planning authority has one month in which to lodge an appeal with the Administrative Court. *In casu*, the plaintiff, apart from instituting proceedings in the wrong fora, was also now out of time to appeal against the decision made by the second defendant.
- b. That even if it were accepted that this court possesses review jurisdiction H

Omerjee J

A over decisions made by inferior bodies, *in casu* the court is precluded from exercising its review powers by reason of non-compliance with Order 33 of the Rules of Court.

I consider that both points *in limine* are ill conceived and without merit. Firstly, an appeal lies to the Administrative Court *only* if the decision being B challenged is one which was made, or deemed to have been made, in terms of the Planning Act. Put differently, not all challenges against decisions made by a local authority lie with the Administrative Court unless they are made in terms of the Planning Act. This is made abundantly clear when regard is had to the wording of s 38. It reads in relevant part -

"(1) Any person C

(a) Who is aggrieved by any decision made or deemed to have been made by a local authority in connection with an application for -

(i) a permit or preliminary planning permission; or

(ii) any permission required in terms of a development order, building preservation order or tree preservation order; or D

(iii) an extension of time as contemplated in paragraph (d) of subsection (1) of section twenty-two or subparagraph (ii) of paragraph (a) of subsection (2) of section twenty-four

may, within one month from the notification of such decision, ... , appeal to the Administrative Court ..."

All the matters stated in subparas (i) to (iii) above are provided for by the E Planning Act i.e., s 26 provides for a planning permit, s 24 for a development order, ss.30 and 31 for building and tree preservation orders, respectively.

It is not in dispute that what transpired *in casu* is that the second defendant, by virtue of the powers conferred on it by s 152 of the Urban Councils Act, took a decision to lease the Stand to the first defendant. It is obvious that this decision was neither made, nor can it be deemed to have been made, in F terms of the Planning Act.

In my understanding, the plaintiff is not complaining against the decision made by the second defendant to grant a lease to the first defendant, but rather that after obtaining the lease, the first defendant, in complete disregard of the mandatory requirements of the Planning Act, went ahead to erect or G construct a mast on the Stand. It is in this latter respect that the plaintiff is seeking redress.

Needless to say, this is not the type of complaint contemplated by s 38 of the Planning Act and therefore no appeal can be said to lie to the Administrative Court.

H The above also puts paid to the second point *in limine* in that the plaintiff has

Omerjee J

not alleged any procedural irregularity in the manner the second defendant A arrived at its decision to grant the lease, but simply alleges that, by omission and commission, he has been deprived of his rights through the defendants disregard of the mandatory requirements of the Planning Act.

In the circumstances, it cannot be said that the plaintiff is asking this court to review the decision made by the second defendant. It must here be remembered B that a review pertains to an alleged irregularity or illegality that is said to have occurred or been occasioned during the decision-making process of a body inferior to the High Court (s 27 of the High court Act).

Before dealing with the merits of the case, I wish to make the following observation. A local authority, such as the City of Harare, is empowered by C s 152 of the Urban Councils Act to alienate any land it owns through sale, exchange, lease, donation, or otherwise dispose of, or permit the use of it. In doing so, the local authority is obliged to comply with the requirements as stipulated in that provision.

In casu, this is exactly what the second defendant did and no criticism can D be warranted in that regard. However, it must be remembered that the fact that a local authority or council is so empowered should not be construed as exempting it or any other person from complying with the requirements of Part V of the Planning Act. Thus, where it is intended to develop the land alienated

by a local authority, all provisions of Part V aforesaid must be adhered to. This includes applying for a planning permit in terms of s 26 E of the Planning Act.

I now turn to determine the case on the merits.

The first issue for determination is whether the first defendant was by law required to obtain permission to erect or construct the mast? The resolution of this issue depends on whether the erection or construction of the mast F constitutes development as defined by the Planning Act.

Part V thereof provides for the control of development of land and buildings and s 22 defines what is meant by the term "development". In terms of subs (1)(a) thereof, the carrying out on land of any building constitutes development and, in terms of subs (1)(b) the altering of the character of the use of any G land also constitutes development.

The facts *in casu* show that the first defendant erected a cellular base station or mast on the Stand. To my mind, a structure such as this falls within the definition of a building as provided for by the Planning Act. In this regard s 2 thereof defines "building" as including "*any structure or erection or part thereof, including a swimming pool*". H

2009 (1) ZLR p291

Omerjee J

A It thus follows that by virtue of subpara (a) of subs (1) of s 22 of the Planning Act, the construction of the mast constituted development and was therefore subject to the requirements of Part V of the Planning Act.

Additionally, and in any event, the facts, as can be gleaned from the papers, reveal that the Stand, measuring 140 square metres, is part of a piece of land B that is designated for use as a recreational park. As already alluded to, s 22(1)(b) stipulates that the altering of the character of the use of land constitutes development within the meaning of that term in the Planning Act, save if the new use and the old use both fall within the same prescribed group of land uses (subpara (b)(i)).

The erection or construction of a cellular mast on land designated for use as C a recreational park can hardly be described as simply change of use falling within the same prescribed group of uses of land. It is more than that. It amounts to the altering of the character of the use of land and therefore is development as defined by the Planning Act. See generally, *Mutare City Council v Wildlife Society of Zimbabwe* 2001 (2) ZLR 275 (S).

D What this means is that, *in casu*, the first defendant was required by law to obtain a planning permit in terms of s 26 of the Planning Act

Section 24 thereof proscribes the carrying out of any development unless permitted in terms of a development order or in accordance with a permit issued in terms of s 26. I therefore find that the erection of the cellular mast E on the Stand was not carried out in terms of any development order, nor was it done in accordance with a permit issued in terms of s 26 of the Planning Act.

It follows that the cellular mast erected by the first defendant on the Stand is an illegal structure and ought not to have been erected without first obtaining a development order or planning permit.

From the foregoing it is obvious that the second triable issue as identified at F the pre-trial conference must be answered in the negative. This is so because, on receipt of an application for a planning permit, s 26(3) obliges the local planning authority to require the applicant to give public notice of his application and to serve notice of the application on every owner of property adjacent to the land to which the application relates. None of this was done.

G The appropriate remedy

The plaintiff seeks as the main remedy the removal of the mast and restoration of the Stand to its original condition before the impugned development took place. In my view, such an order is, at this stage, both incompetent and pre-mature. This is so because s 27 of the Planning Act permits for an application H to be made to regularise any development that has been carried out without

2009 (1) ZLR p292

Omerjee J

the requisite development order. It reads: A

"27 Regularisation of buildings, uses or operations

Where any development has been carried out in contravention of section *twenty-four* an application may be made in terms of section *twenty-six* in respect of that development and the local planning authority shall deal with that application in terms of that section but any permit granted thereunder shall take effect from the date on which the buildings were constructed, the operations were carried out or the use was instituted, as the case may be."

The first defendant, therefore, has open to it recourse to this provision. It is for this reason that, although finding in favour of the plaintiff, I decline to issue the main order sought but instead will issue the alternative order prayed for.

In the result the application succeeds and it is ordered as follows – c

1. That first and second defendants comply with the requirements of Part V of the Regional, Town and Country Planning Act [*Chapter 29:12*].
2. That first and second defendant jointly and severally, the one paying the other to be absolved, shall pay the costs of suit. d

Byron Venturas & Partners, for plaintiff

Mtewa & Nyambirai, for first defendant

Kanokanga & Partners, for second defendant e

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Document 40 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/CHIKAFU v DODHILL (PVT) LTD & ORS 2009 (1) ZLR 293 (S)

CHIKAFU v DODHILL (PVT) LTD & ORS 2009 (1) ZLR 293 (S)

2009 (1) ZLR p293

Citation	2009 (1) ZLR 293 (S)
Case No	Judgment No S-28-09
Court	Supreme Court, Harare
Judge	Chidyausiku CJ (in chambers)
Heard	7 May 2009
Judgment	7 May 2009
Counsel	<i>W Bharebende</i> , for the applicant <i>F Mahere</i> , for the first and second respondents No appearance for the third respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

c **Appeal** – leave – prospects of success – point of law – divergence of authority – desirability of having point settled by Supreme Court – leave should be granted – provisional order – order having hallmarks of a final order – leave to

appeal not required

Headnote

- The applicant had been refused leave to appeal by a judge of the High Court, who granted a provisional order against him (see *Dodhill (Pvt) Ltd & Anor v Minister of Lands & Anor supra* at p 182 of this volume). The judge was of the view that as the order was a provisional one, leave was required; and that, as there was no prospect of success, leave should be refused. The applicant applied to the Supreme Court for leave to appeal.
- *Held*, that the point of law on which the trial judge ruled against the applicant was one on which there was a divergence of authority, both in Zimbabwe and elsewhere. The fact that different judges of the High Court had come to different conclusions on the same issue created uncertainty in the law, a situation that is totally undesirable. A judge faced with this situation ^F should facilitate the resolution of the issue by the highest court in the land.
- Held*, further, that although the judge labelled his order as a provisional order, the judgment had all the hallmarks of a final judgment. There was nothing interlocutory about the judgment apart from the label. In the event, the applicant's appeal was a right and did not need the leave of the judge.

Case information

^G *W Bherebende*, for the applicant
^F *Mahere*, for the first and second respondents
 No appearance for the third respondent

Judgment

CHIDYAUSIKU CJ: This is an application for leave to appeal against a ^H provisional order granted by Bere J against the applicant in the High Court,

2009 (1) ZLR p294

Chidyausiku CJ

such application for leave to appeal against the provisional order having first ^A been made to and refused by Bere J.

The facts of this matter are briefly as follows.

Dodhill (Pvt) Ltd (hereinafter referred to as "Dodhill") owns Dodhill Farm ("the farm"). Dodhill and the Minister of Lands and Rural Resettlement ("the Minister") were involved in litigation concerning the compulsory acquisition ^B of the farm by the Minister. The litigation culminated with an agreement between Dodhill and the Minister. In terms of that agreement the farm was divided into two portions. The one portion of the farm was acquired by the Minister for agricultural purposes and the other portion was left in the ownership of Dodhill. This agreement was made part of the court order by ^C consent of the Administrative Court. Notwithstanding the agreement and court order, the Minister subsequently acquired or purported to acquire that portion of the farm which the Minister had agreed to leave in the hands of Dodhill. The Minister acquired the farm in terms of s 16B(2)(a) (i) of the Constitution of Zimbabwe ("the Constitution"). Having acquired the farm, the Minister, in terms of an offer letter, allocated the farm to the applicant ^D (hereinafter referred to as "Chikafu").

Upon acquisition, Dodhill was required to terminate farming operations within forty days of the notice and vacate the farm within ninety days. It is common cause that both periods have expired, but Dodhill continues to occupy the farm contrary to the provisions of the Land Acquisition Act ^E [Chapter 20:10] ("the Act") and therefore unlawfully. Chikafu moved onto the farm and Dodhill sought to have him removed from the farm and launched an urgent chamber application in the High Court. The learned judge in the court *a quo* concluded –

1. That the farm had been legally acquired by the Minister and legally ^F offered to Chikafu; and
2. That although Chikafu had been legally offered the farm, he could not move onto the farm without due process in terms of the Act.

Chikafu was dissatisfied with the judgment and applied for leave to appeal to this court. The application for leave to appeal was refused on the ground that ^G Chikafu had no prospects of success

on appeal. Chikafu now appeals against the refusal to grant him leave to appeal. The issue that falls for determination in this application is whether Chikafu has prospects of success in an appeal against the judgment of Bere J.

I concluded that Chikafu had prospects of success on appeal. I accordingly granted leave to appeal.
H

2009 (1) ZLR p295

Chidyausiku CJ

A I granted Chikafu leave to appeal for two reasons. Firstly, it is common cause that decided cases in this and other jurisdictions support both Dodhill and Chikafu. In other words, there was a divergence of authorities on the issue that fell for determination by the court *a quo*. Given this divergence of decided cases, whichever party lost had prospects of success on appeal. Secondly, a proper reading of the judgment of the court *a quo* reveals that it interdicted B Chikafu from occupying the farm until Dodhill had been removed from the farm in terms of the Act. The judgment is not interlocutory: it is definitive, in which case Chikafu is entitled to appeal as of right.

The learned judge in the court *a quo* analysed the factual dispute between the parties and concluded that the farm belonged to the Minister. Dodhill C does not, according to its counsel, accept that conclusion. There is, however, no cross-appeal against that conclusion. The probabilities are that Dodhill, having succeeded in keeping Chikafu out of the farm, did not see much point in taking up this issue.

After reaching a conclusion on the facts, the learned judge in the court *a quo* analysed the legal position. The learned judge's analysis of the legal position D was thorough and detailed. This is what he had to say at 187E-188F:

"THE LEGAL POSITION

There can be no doubt that spoliation as a remedy has (as) its core value or objective protection to possession of property against unlawful dispossession.

This is a remedy that has been recognised in our jurisdiction and beyond for E over decades.

In dealing with the principles of spoliation I find the views of Herbstein J quite apposite when the learned judge stated:

'... two allegations must be made and proved, namely, (a) that (the) applicant was in peaceful and undisturbed possession of the property, and (b) that the respondent deprived him of the possession forcibly or wrongfully against F his consent.' (*Bennet Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E) at 233)

In *Amler's Precedents of Pleadings* 3 ed by L T C Harms and J H Hugo at pp 276-277) it is stated 'Unlawfulness in this context means a dispossession without (the) plaintiff's consent or due legal process'.

This time honoured principle of our law has been enunciated in a plethora of cases G in our jurisdiction and beyond. See, for example, *Nino Bonino v de Lange* 1906 TS 120 at 122, *Silo v Naude* 1929 AD 21, *Mutsotso and Ors v Commissioner of Police and Anor* 1993 (2) ZLR 329 (H), [and] *Chisveto v Minister of Local Government and Town Planning* (1984 (1) ZLR 248 (H).

In the classic and leading case of *Nino Bonino supra* Innes CJ (as he then was) had this to say:

' H It is a fundamental principle that no man is allowed to take the law into his

2009 (1) ZLR p296

Chidyausiku CJ

own hands; no one is permitted to dispossess another forcibly or wrongfully A and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute.'

In *Chisveto's* case *supra* Reynolds J remarked as follows at 250A-D:

'Lawfulness of possession does not enter into it. *The purpose of the mandament B van spolie is to preserve law and order and to discourage persons from taking the law into their own hands.* To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party. ... *The lawfulness or otherwise of the applicant's possession of the property does not fall for consideration at all.* In fact the classic generalisation is C sometimes made that in respect of spoliation actions ... even a robber or thief is entitled to be restored possession of the stolen property.'

Counsel for the second respondent (Chikafu) passionately argued that the applicants (now the first and second respondents) had no *locus standi* to bring an application for spoliation. The main thrust of his argument was that because the applicants had exceeded the 45 and 90 day statutory maximum periods which (allow) them to remain on the farm and the homestead respectively (s 3 of the D Gazetted Land (Consequential Provisions) Act [Chapter 20:28]), therefore the applicants must not be protected by this court.

In counsel's view, which borrowed heavily from the position adopted by my brother Uchena in *Ferrera & Anor v Nhandara* HC 3995/08, if this court accepted *locus standi* on the part of the applicants, then the court would be sanctioning an illegal stay on Dodhill Farm by the applicants since the applicants are occupying E that farm in complete violation of the law.

There was also an attempt by the second respondent's (Chikafu's) counsel to seek to rely on the decision by their Lordships in one of the much celebrated land cases in this country, viz *Airfield Investments (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement & Ors* 2004 (1) ZLR 511 (S).

Simplified, the argument as put forward by the second respondent's counsel was F that because the applicants' hands are tainted with their illegal occupation of Dodhill Farm, the court could not entertain them let alone grant them an order that would perpetuate their continued stay on the farm."

Dodhill argued that once its possession was established and there is proof of dispossession without reference to due process, Dodhill's *locus standi* was established. The learned judge was persuaded by Dodhill's argument. He rejected Chikafu's contention. In doing so he reasoned as follows (at 188H-189H):

"Firstly, his (Chikafu's) approach would be an attempt to re-define the very basic requirements of a *mandament van spolie* which is not concerned with the legality or otherwise of the possession itself. See the remarks of Reynolds J in *Chisveto's case supra*. H

2009 (1) ZLR p297

Chidyausiku CJ

A I am fully cognisant of other decisions from South Africa which have attempted to shift from the orthodox approach in dealing with spoliation matters. One such matter is the case of *Parker v Mobil Oil Southern Africa (Pvt) Ltd* 1979 (4) SA 250 (NC) at 255, where van den Heever J stated as follows:

'Moreover, the rule that goods dispossessed against the will (of) the possessor must be restored forthwith, is not an absolute one. The reason B 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 disputes. Despite generalisations 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 admits that he has no right vis-à-vis the respondent to the possession C he seeks to have restored to him.' (my emphasis)

Commenting on *Parker's case supra* and another similarly decided case of *Coetzee v Coetzee* (1982 (1) SA 933) Makarau J (as she then was) in the recent case of *Shiriyekutanga Bus Services (Pvt) Ltd v Total Zimbabwe* remarked as follows:

'With respect, the weight of authority appears to be against the learned judge. It has not been established as part of our law in any other decided case D that an (applicant) for (a) 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 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 E to the learned judge. The decided cases referred to by Gubbay CJ in *Botha and Anor v Barrett supra* 1996 (2) ZLR 73 (S) 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 Anor v Barrett supra* and not to follow *Mobil v Parker supra* and *Coetzee v Coetzee supra*.' (my emphasis)

I F entirely associate myself with the position adopted by Makarau J that in an application for (a) spoliation order an applicant does not have to prove some reasonable or plausible claim to the property, let alone the legality or otherwise of his possession of the property in question.

With extreme due deference to Uchena J, I do not agree with the approach he seems to have adopted in the *Ferrera case supra* when he made a finding that because the applicant in that case had defiantly continued to be on the farm in G question, therefore he could not be granted spoliation."

Can unlawful occupation constitute a defence to a claim for *mandament van spolie*? It is quite clear that the authorities are divergent on this issue. One line of authorities, which includes judgments of

the High Court of Zimbabwe, supports the contention that unlawful occupation can be a defence; while ^H other authorities, that include High Court of Zimbabwe judgments as well,

2009 (1) ZLR p298

Chidyausiku CJ

are to the effect that unlawful occupation is irrelevant. Given this situation, ^A whichever party lost in the High Court had prospects of success as its contention is supported by a line of decided cases.

Apart from this, the fact that different judges of the High Court have come to different conclusions on the same issue creates uncertainty in the law, a situation that is totally undesirable. A judge faced with this situation should ^B facilitate the resolution of the issue by the highest court in the land.

Although the learned judge has labelled his order as a provisional order, the judgment has all the hallmarks of a final judgment. I have some difficulty envisaging what would happen on the return day of the so-called provisional order. A proper reading of the judgment reveals that the learned judge has interdicted or barred Chikafu from the farm until such time as Dodhill ^C has been removed from the farm in terms of the Act. There is nothing interlocutory about the judgment, apart from the label. If my understanding of the judgment is correct, then Chikafu can appeal as of right and does not need the leave of the judge.

When I granted the leave to appeal, I overlooked setting the period within ^D which the appeal has to be filed. I hereby rectify that oversight. The notice of appeal has to be filed within 15 days of the handing down of these reasons for judgment.

Mavhunga & Sigauke, applicant's legal practitioners

Gollop & Blank, first and second respondents' legal practitioners ^E

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Document 41 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/DHLAMINI & ORS v ATTORNEY-GENERAL 2009 (1) ZLR 299 (H)

DHLAMINI & ORS v ATTORNEY-GENERAL 2009 (1) ZLR 299 (H)

2009 (1) ZLR p299

Citation	2009 (1) ZLR 299 (H)
Case No	Judgment No. HH-56-09
Court	High Court, Harare
Judge	Mtshiya J
Heard	8 May 2009
Judgment	11 May 2009
Counsel	<i>A Muchadehama</i> , for the applicants <i>C Mutangadura</i> , for the respondent
Case Type	Details not supplied
Annotations	No case annotations to date

Flynote

Criminal procedure – bail – application – accused indicted for trial before High Court – need for new bail application to High Court – previous bail revoked

Headnote

The applicants had been arrested on various charges and remanded in custody. They were granted bail by the High Court, against which the Attorney-^o General appealed. The appeal not having been noted within the requisite time, the applicants were released from custody. The Attorney-General caused their re-arrest and subsequently had them indicted for trial before the High Court. The magistrate remanded them in custody, in accordance with s 66(2) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The applicants applied again to the High Court for bail, arguing that ^e changed circumstances existed. The Attorney-General argued that they could not bring a fresh application for bail and were not properly before the court. It was argued that, as far as the issue of bail was concerned, they did not fall within the ambit of s 66, because, following the appeal to the Supreme Court, the High Court's order which granted them bail was automatically suspended. That being the case, they were in lawful custody at the time of their indictment. There was, therefore, no need for the lower court to have issued an order for their commitment to prison.

Held, that in terms of s 66(2), even if the applicants were on bail before their indictment, such bail fell away as a result of the indictment. That would place them in the same position as someone who had been denied bail. ^g In terms of that provision, the applicants could not avail themselves of the pre-indictment bail unless the High Court extended that bail.

Held, further, that an accused person can, however, upon indictment, make a fresh bail application before the High Court. It then becomes the prerogative of the High Court, taking into account the contents of the ^h indictment papers, either to extend the pre-indictment bail or to grant

2009 (1) ZLR p300

Mtshiya J

new bail or even to deny bail completely. ^a

Held, further, that any decision of the Supreme Court arising out of the appeal by the Attorney-General would be academic, having been overtaken by the fact that the applicants were indicted.

Legislation considered

Criminal Procedure and Evidence Act [Chapter 9:07], s 66 ^b

Case information

A Muchadehama, for the applicants

C Mutangadura, for the respondent

Judgment

MTSHIYA J: The applicants, who are all members of the Movement for ^c Democratic Change-Tsvangirai (MDC-T), face charges of insurgency, banditry, sabotage or terrorism under s 23(1)(a)(i) (ii) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] or, alternatively, aggravated malicious damage to property in terms of s 143 of the same Act.

On 4 May 2009 the applicants were indicted for trial in the High Court in ^d terms of s 66 of the Criminal Procedure and Evidence Act [Chapter 9:07] hereinafter referred to as "the Act". The lower court then correctly proceeded to commit the applicants to prison, as required by subs (2) of s 66 of the Act. On 9 April 2009, prior to their being indicted for trial, this court had granted the applicants bail. The respondent, however, appealed against this court's decision to grant the applicants bail and the appeal is still pending in ^e the Supreme Court. On 17 April 2009, the same date when the respondent was granted leave to appeal against this court's order of 9 April 2009, the applicants were released from custody on the basis that the respondent had not filed its appeal within seven

days, as stipulated in s 121 of the Act. The respondent, however, contested the release of the applicants and caused their re-arrest on 22 April 2009.

Following their indictment, the applicants now approach this court for fresh bail on the basis of changed circumstances. In response to the application, the respondent has raised a point *in limine*, arguing that, pending the determination of the appeal against bail filed in the Supreme Court by the respondent on 17 April 2009, the applicants cannot bring a fresh application for bail. The applicants, it is argued, are therefore not properly before the court. Furthermore, the respondent argues that, as far as the issue of bail is concerned, the applicants do not fall within the ambit of s 66 of the Act. This, the respondent submits, is because, following the appeal to the Supreme Court, this court's order of 9 April 2009, which granted the applicants bail, was automatically suspended. That being the case, argues the respondent, ^h

2009 (1) ZLR p301

Mtshiya J

^a the applicants were in lawful custody at the time of their indictment. There was, therefore, in the view of the respondent, no need for the lower court to issued an order for their committal to prison.

In response to arguments in support of the point *in limine*, the applicants submit that, following the release of the applicants from custody on 17 April 2009, the respondent has not been able legally to reverse the act of their ^b release. The applicants, therefore, submit that at the time of their indictment they were still on bail, which bail was only revoked upon their indictment for trial in the High Court in terms of s 66 of the Act. The applicants further submit that the new circumstances brought about by the indictments against them necessitate that they make fresh applications for bail. The applicants ^c argue that, even if the Supreme Court were to rule in their favour, the operation of s 66 of the Act would not afford them the benefit of the bail granted by this court on 9 April 2009. That bail, having been granted prior to indictment, would not escape automatic cancellation or revocation under s 66(2) of the Act.

^d It is, in my view, quite clear that the point *in limine* arises out of different interpretations being given to s 66 of the Act. The relevant subsections, namely subss (1) and (2), provide as follows:

“(1) If the Attorney-General is of the opinion that any person is under reasonable suspicion of having committed an offence for which the person may be tried in the High Court, the Attorney-General shall cause written notice to be served on ^e

- (a) a magistrate for the province within which the person concerned resides or for the time being is present; or
- (b) any magistrate before whom the trial of the offence could be held in respect of the offence concerned;

informing the magistrate of his or her decision to indict the person concerned ^f for trial before the High Court and of the offence for which the person is to be tried.

(2) On receipt of a notice in terms of subsection (1), the magistrate shall cause the person concerned to be brought before him or her and, notwithstanding any other provision of this Act, *shall forthwith commit the person for trial before the High Court and grant a warrant to commit him or her to prison, there to be detained till brought to trial before the High Court for the offence specified in the warrant or till admitted to bail or liberated in the course of law*”. (my own ^g emphasis).

The language in the above provisions is quite clear and, in my view, leads to no ambiguity. My clear understanding of the above provisions is that, in terms of s 66(2) of the Act, even if the applicants were on bail prior to their indictment on 4 May 2009, such bail fell away as a result of the indictment ^h i.e bail was revoked. That would place the applicants in the same position

2009 (1) ZLR p302

Mtshiya J

as one who had been denied bail. The respondent has correctly conceded ^a that the invocation of s 66(2) of the Act automatically cancels any existing bail. Furthermore, s 66(2) of the Act also compels the magistrate to grant a warrant for his or her committal to prison till brought to trial. Even if the person is already in custody or prison, the magistrate is, in my view, under a legal obligation to pronounce that the indicted person shall remain in ^b prison till brought to trial before the High Court. This, it was submitted and not disputed, is what actually happened *in casu*. The wording in s 66(2), “till admitted to bail or liberated in the course of law”, can only be taken advantage of by an indicted person in the court before which that person has been indicted. In this

case it is the High Court, and indeed the High Court can consider a fresh bail application if the person committed to prison makes c such a fresh application for his or her liberation. In this regard, it is important to note that, subject to the provisions of s 117 of the Act, the law allows for any person who is in custody to apply for bail at any time.

It appears to me that when the Attorney-General makes a decision in terms of s 66 of the Act, a totally new situation is ushered in. The parties accept d that position. Once indicted, as already stated, any existing bail is revoked. Accordingly, my assessment of the position is that the anticipated ruling of the Supreme Court on bail, either way, would not affect the mandatory operation of s 66(2). In terms of that provision of the Act, the applicants cannot avail themselves of the pre-indictment bail unless the High Court extends that bail. For the purposes of this application, therefore, the appeal in the Supreme e Court is rendered academic. This is so because the pre-indictment bail has been overtaken by events. As the position stands now, my understanding of the legal position is that the applicants, like all other persons who are immediately committed to prison upon indictment, can only be liberated on the basis of fresh application(s) for bail. The applicants cannot, therefore, await a decision which they know, even if in their favour, will not give them f their liberty in the sense that, in terms of s 66(2), the bail that is the subject of appeal in the Supreme Court would not apply to the new situation unless extended by the High Court. The order which granted them bail only applied to the period prior to indictment, namely 9 April to 4 May 2009. This position is fortified by the fact that the operation of s 66(2) would, in all cases, lead g to the revocation of any bail granted prior to indictment.

My clear understanding of the meaning of s 66(2) of the Act is that any bail granted by any court to an accused person prior to indictment, unless extended by the High Court, ceases to operate as soon as the accused person is indicted for trial. The accused person can, however, upon indictment, make a fresh bail application before the High Court. Upon application by the indicted person, h

2009 (1) ZLR p303

Mtshiya J

A it then becomes the prerogative of the High Court, taking into account the contents of the indictment papers, either to extend the pre-indictment bail or to grant new bail or even to deny bail completely. The Act, in my view, envisages this fresh application, hence the phrase "till admitted to bail or liberated in the course of law".

There can be no doubt, therefore, that the very process of indictment ushers b in new circumstances which entitle an accused person who, through the indictment papers, now knows what awaits him or her on the trial date, to re-assess his or her position properly. This includes his or her suitability as a candidate for bail under the changed circumstances. To that end, the applicants in *casu* are exercising their legal right to make fresh bail application(s) under c the changed circumstances. The applicants are fully aware that, in terms of s 66(2) of the Act, their pre-indictment bail, which is the subject of appeal in the Supreme Court, will not in any way save them from the strict operation of s 66(2) of the Act, so as to grant them their liberty. In *casu*, therefore, other than merely relying on the question of changed circumstances as ordinarily applicable in bail situations, the applicants are approaching the d court upon the dictates of s 66(2) of the Act. The applicants can only do so through this court, which is now seized with their trial. As already pointed out, the Supreme Court's ruling, either way, will not affect their committal to prison. They can only seek their liberation through making a fresh application before the High Court where they have been indicted for trial. Accordingly, I do not agree that, in the circumstances of this application, the applicants e are necessarily estopped by the pending appeal in the Supreme Court from proceeding to make fresh application(s) for bail. As I have already stated elsewhere in this ruling, that appeal, in my view, has become of academic interest due to its having been overtaken by events.

In view of the foregoing, my finding is that the applicants are properly before f the court and can therefore proceed to argue their case for bail. Accordingly the point *in limine* is dismissed.

Mbidzo Muchadehama & Makoni, applicants' legal practitioners

g *Attorney-General's Office*, respondent's legal practitioners

Document 42 of 52**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/MURAWO v GRAIN MARKETING BOARD 2009 (1) ZLR 304 (S)

MURAWO v GRAIN MARKETING BOARD 2009 (1) ZLR 304 (S)**2009 (1) ZLR p304**

Citation	2009 (1) ZLR 304 (S)
Case No	Judgment No. S-27-09
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA and Gwaunza JA
Heard	22 January 2008
Judgment	11 May 2009
Counsel	<i>C Kwaramba</i> , for the appellant <i>A Moyo</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal – appeal to the Supreme Court on a question of law – meaning of “question of law”

Employment – codes of conduct – interpretation – *eiusdem generis* rule not applicable D

Employment – code of conduct – proceedings under – penalty – dismissal – when appropriate – misconduct inconsistent with fulfillment of conditions of service – usually will justify dismissal unless shown to be trivial

Interpretation of statutes – *eiusdem generis* rule – applicability – a mere presumption – applicability to employment codes of conduct E

Headnote

The appellant had attended a workshop organised for the respondent, his employer. Employees of certain senior ranks were eligible; the appellant was not of such a rank, nor was he invited to attend. When his presence was noticed, his head of department told him to leave immediately. He did not do so, but delayed for several hours on a pretext. He was charged F under the employer’s code of conduct on two counts and dismissed. The Labour Court upheld his appeal on one of the counts, but dismissed it on the second count, which was one of “activities inconsistent with the express or implied condition of his contract of employment”. The relevant section of the code of conduct specified, as acts of misconduct, “incitement, G intimidation, indulging in disorderly behaviour or activities inconsistent with the express or implied condition of his contract of employment”. It was argued on his behalf that the *eiusdem generis* rule should apply and that the activities inconsistent with the express or implied condition of an employee’s contract of employment envisaged in the section must be activities in the same *genus* or class as incitement, intimidation and H

2009 (1) ZLR p305

Sandura JA

A indulging in disorderly behaviour. The question also arose whether the appeal was one on a point of law and therefore properly before the court.

Held, that the term “question of law” is used in three distinct, though related, senses. First, it means a question which the law itself has authoritatively answered, to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what it considered to be the truth and ^B justice of the matter. Second, it means a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true law is on a certain matter. And third, any question which is within the province of the judge instead of the jury is called a question of law (*dicta per* ^C Gubbay CJ in *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S) at 220 D-F, followed).

Held, further, that where a list of items which form a *genus* or class is followed by a general expression, the general expression is, in the absence of a contrary intention in the statute, construed *eiusdem generis* to include only other things of the same class as the particular words. The *eiusdem* ^D *generis* rule is not a rule of general application. It has to be applied with caution and not pushed too far. It is a mere presumption, in the absence of other indications of the intention of the legislature.

Held, further, that the rule is only one of many rules of construction and is not to be invoked automatically whenever general words follow particular ^E words. The rule does not apply to the interpretation of employment codes of conduct because, in general, such codes are not drafted with the same expertise and precision required for the drafting of statutes. Almost invariably, employment codes of conduct are drafted by laymen with little or no knowledge of law. The *eiusdem generis* rule should not, in any event, be invoked in circumstances where it would result in ^F an absurdity, as would be the case here. Invoking the rule would mean that “activities inconsistent with the express or implied condition of his contract of employment”, which are in the same *genus* or class as “incitement, intimidation (and) indulging in disorderly behaviour”, would constitute acts of misconduct, whilst other “activities inconsistent with the express or implied condition of his contract of employment”, which ^G are not in the same *genus* or class as “incitement, intimidation [and] indulging in disorderly behaviour”, but which could be more serious activities, would not constitute acts of misconduct.

Held, further, that there is no fixed rule of law defining the degree of misconduct which will justify dismissal. There may be conduct by a servant which ^H will not justify dismissal, but, on the other hand, misconduct inconsistent

2009 (1) ZLR p306

Sandura JA

with the express or implied conditions of service will justify dismissal. ^A The seriousness of the misconduct is to be measured by whether it is inconsistent with the fulfillment of the express or implied conditions of the employee’s contract. If it is, then it is serious enough *prima facie* to warrant summary dismissal. Then it is up to the employee to show that his misconduct, though technically inconsistent with the fulfillment of ^B the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted.

Cases cited

Muzuva v United Bottlers (Pvt) Ltd 1994 (1) ZLR 217 (S) ^C

S v Makandigona 1981 ZLR 408 (A); 1981 (4) SA 439 (ZA)

R v Nolte 1928 AD 377

Tobacco Sales Floors Ltd v Chimwala 1987 (2) ZLR 210 (S)

Case information

C Kwaramba, for the appellant ^D

A Moyo, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the Labour Court which dismissed an appeal by the appellant (“Murawo”) against the termination of his contract of employment by the respondent (“the GMB”).

The background facts are as follows. Murawo was employed by the GMB ^E as a safety, health and environment officer. Between 4 March and 7 March 2004 the GMB held a strategic planning workshop ("the workshop") at Troutbeck Inn, Nyanga. Those eligible to attend the workshop were divisional heads and departmental heads. Officers below departmental heads could also attend the workshop if invited. Murawo was neither a divisional head ^F nor a departmental head.

On 5 March 2004 Murawo attended the workshop and presented his paper. However, it later turned out that Murawo's attendance at the workshop had not been authorised by the GMB directorate. He was, therefore, asked to leave the workshop.

On 6 March 2004 Murawo left the workshop and checked out of the hotel, ^G but remained within the hotel premises because he had a cheque to give to Mrs Zemura ("Zemura"), the GMB's public relations manager, who was participating in the workshop.

However, Murawo's continued presence at the hotel offended the GMB directorate. Consequently, the directorate called upon Mhonde, Murawo's head ^H

2009 (1) ZLR p307

Sandura JA

^A of department, to ensure that Murawo left the hotel premises. Subsequently, Murawo left Troutbeck Inn after giving Zemura the cheque that he was supposed to give her.

Thereafter, on 8 March 2004, Murawo was suspended without pay and benefits on the ground that he had committed two acts of misconduct in ^B terms of the GMB Code of Conduct ("the Code"). In relevant part, the letter of suspension written by Mhonde reads as follows:

"On Wednesday the third of March 2004 you communicated to me that the Marketing Director had invited you to the Strategic Planning Workshop. This, however, turned out to be untrue.

On Saturday morning at about 08.30 am on the 6th March 2004, I told you to ^C leave the Troutbeck Inn immediately as you were not invited to the meeting. However, up to lunchtime you were still at the premises and now purporting to have been tasked by the A/CEO to discuss issues related to workers with the Union representatives, Mr Munodawafa and Mr Mhunza, and present them in the Seminar. This also turned out to be untrue.

Given the scenario explained above, Management has decided that you be ^D suspended without pay and benefits with immediate effect, and you are being charged in line with the GMB Code of Conduct as follows:

1. Category I section 1:

'Insubordination – wilful and unreasonable disobedience of a lawful order from a superior'.

2. Category I section 5:

^E '... activities inconsistent with the express or implied condition of his contract of employment.' ...

In keeping with the provisions of our Code of Conduct you are required to reply in writing answering to the above charges ...

Your reply must of necessity cover the following aspects: ^F

- a) Admit or deny the charges.
- b) Facts to be taken into account if you admit the charges.
- c) If you deny the charges, offer an explanation of the basis of your defence ...".

On 9 March 2004 Murawo replied to the letter of suspension. His letter, in relevant part, reads as follows:

^H "I confirm that I did not receive a written invitation to present a paper at the Troutbeck Retreat. I, however, thought in good faith that since this was an important strategic planning session of the organisation our department could take advantage of the gathering of eminent people in the organisation to market the Health and Safety portfolio, which was launched some eight months ago. I prepared a document for presentation. Initially, the presentation was short and just a small section of the presentation of the Engineering Department. I,

2009 (1) ZLR p308

Sandura JA

however, developed a longer presentation which I thought could be incorporated ^A in the Engineering Report.

I thought I was contributing to the organisation's cause. I did not know that in doing so I was contravening any section of the GMB Code of Conduct. Therefore if at all I contravened category I section 1

and 5 of the Code, the contravention was not wilful.

When I was excused from the activities of the 6th of March 2004, I checked out ^b of the hotel. I, however, realised that I had forgotten to give a cheque I had been asked to bring to Mrs Zemura. As the morning session had already started, I thought it was not wise to disturb the session. I waited for an opportune moment to give the cheque to Mrs Zemura. That moment presented itself at lunchtime and I duly handed over the cheque to Mrs Zemura. At the same time some apples and potatoes I had ordered away from the hotel after checking out were only ^c delivered to me around the same time. I then left for Harare ...".

On 18 March 2004 Murawo appeared before a disciplinary hearing committee which found him guilty on both counts, and recommended his dismissal. He was subsequently dismissed with effect from the date of his suspension, i.e. 8 March 2004.

Thereafter, on 3 May 2004 Murawo appealed to the acting chief executive ^d officer ("Muvuti") against the dismissal. In that appeal he alleged that he had attended the workshop because Mhonde had indicated to him that he (Mhonde) would be comfortable if he (i.e. Murawo) attended the workshop and presented his own paper as an addendum to his (i.e. Mhonde's) report. He also denied being ordered by Mhonde to leave Troutbeck Inn. Nevertheless, ^e on 30 May 2004, Muvuti dismissed the appeal. Aggrieved by that decision, Murawo appealed to the Labour Court.

After hearing evidence and considering written submissions filed on behalf of the parties, the Labour Court allowed the appeal in respect of the first count, i.e. the count alleging "wilful and unreasonable disobedience of a lawful order ^f from a superior", but dismissed the appeal in respect of the second count, i.e. the count alleging that Murawo committed "activities inconsistent with the express or implied condition of his contract of employment". Dissatisfied with that result, Murawo appealed to this court.

The first issue for consideration is whether this appeal raises any question of ^g law. The issue is important, because in terms of s 92F(1) of the Labour Act [*Chapter 28:01*] ("the Act") the only appeal against a decision of the Labour Court which lies to the Supreme Court is an appeal on a question of law.

What is a question of law was considered by this court in *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S). At 220D-F Gubbay CJ said the following: ^h

2009 (1) ZLR p309

Sandura JA

^a "The twin concepts, questions of law and questions of fact, were considered in depth by E M Grosskoff JA in *Media Workers' Association of South Africa and Ors v Press Corporation of South Africa Ltd (Perskor)* 1992 (4) SA 791 (A). Approving the discussion of the topic in Salmond on Jurisprudence 12 ed at 65-75, the learned Judge of Appeal pointed out at 795D-G that the term 'question of law' is used in three distinct though related senses. First, it means 'a question which the law itself has authoritatively answered to the exclusion of the right ^b of the court to answer the question as it thinks fit in accordance with what it considered to be the truth and justice of the matter'. Second, it means 'a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter'. And third, any question which is within the province of the judge instead of the jury is called a question of law. This division of judicial ^c function arises in this country in a criminal trial presided over by a judge and assessors."

Applying those principles to the facts of the present case, I have no doubt that the appeal raises a question of law. I say so because one of the issues for determination in this appeal is whether the *eiusdem generis* rule of statutory interpretation applies to the interpretation of the act of misconduct specified ^d in s 5 of category I offences, the act of misconduct which Murawo was found guilty of. That, in my view, is a question of law within the second sense of the term "question of law" set out above.

As the appeal raises a question of law, the matter is properly before this court.

The main issue in this appeal is whether Murawo was properly found guilty ^e of "activities inconsistent with the express or implied condition of his contract of employment".

However, before dealing with that issue, I would like to consider a submission by Murawo's counsel in his heads of argument. The submission was that the Labour Court erred in its interpretation of the act of misconduct specified ^f in s 5 of category I offences, and that, in terms of the *eiusdem generis* rule of statutory interpretation, the conduct complained of by the GMB does not constitute the act of misconduct specified in s 5.

The act of misconduct specified in s 5 reads as follows:

"Incitement, intimidation, indulging in disorderly behaviour or activities inconsistent with the express or implied condition of his contract of employment."

^g As already indicated, Murawo was charged with "activities inconsistent with the express or implied condition of his contract of employment".

The submission by Murawo's counsel was that the activities inconsistent with the express or implied condition of an employee's contract of employment envisaged in s 5, must be activities in the same *genus* or class as incitement, ^h intimidation and indulging in disorderly behaviour.

2009 (1) ZLR p310

Sandura JA

Gail-Maryse Cockram states the *eiusdem generis* rule as follows at p 153 ^a of her work *The Interpretation of Statutes* 3 ed:

"Where a list of items which form a *genus* or class is followed by a general expression, the general expression is, in the absence of a contrary intention in the statute, construed *eiusdem generis* to include only other things of the same class as the particular words."

I should now determine whether the *eiusdem generis* rule applies to the ^b interpretation of employment codes of conduct. I do not think it does. I say so because, in general, employment codes of conduct are not drafted with the same expertise and precision required for the drafting of statutes. Almost invariably, employment codes of conduct are drafted by laymen with little or no knowledge of law. ^c

However, even if the *eiusdem generis* rule applied to employment codes of conduct, I am of the view that the rule should have no application in the present case because it would lead to an absurdity. It would mean that "activities inconsistent with the express or implied condition of his contract of employment", which are in the same *genus* or class as "incitement, ^d intimidation (and) indulging in disorderly behaviour", would constitute acts of misconduct, whilst other "activities inconsistent with the express or implied condition of his contract of employment", which are not in the same *genus* or class as "incitement, intimidation (and) indulging in disorderly behaviour", which could be more serious activities, would not constitute acts of misconduct. ^e

In any event, the *eiusdem generis* rule is not a rule of general application, and has to be applied with caution. This point was made by Solomon CJ in *R v Nolte* 1928 AD 377 at 382, where the learned Chief Justice said:

"Moreover, the rule itself is one that has to be applied with caution, and is not of general application. Thus Lord Esher, in *Anderson v Anderson* [1895] ^f 1 QB 752, in commenting upon the rule, said: 'I am not surprised to find that the modern tendency of the courts has been to construe general words in their ordinary sense' ...".

Similar views were expressed by Baron JA in *S v Makandigona* 1981 ZLR 408 (A) at 413; 1981 (4) SA 439 (ZA) at 443H-444A as follows:

"It must be remembered that the *eiusdem generis* rule is only one of many rules ^g of construction; it is not to be invoked automatically whenever general words follow particular words. Thus Craies on Statute Law 7 ed says at 181:

'The *eiusdem generis* rule is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being what it is, a mere presumption, in the absence of other indications of the intention of the legislature.'" ^h

2009 (1) ZLR p311

Sandura JA

^a In the circumstances, I am satisfied that the Labour Court did not err in its interpretation of the act of misconduct specified in s 5 of category I offences. I am also satisfied that the conduct complained of by the GMB constitutes the act of misconduct specified in s 5.

I now wish to determine whether Murawo was properly found guilty of the ^b act of misconduct specified in s 5. I have no doubt in my mind that he was.

In the Labour Court, four people gave evidence and were cross-examined. These were Murawo, the GMB marketing director ("Makwenda"), Mhonde and Zemura.

Murawo alleged that he attended the workshop at Troutbeck Inn because he had been invited to do so by Mhonde. That allegation was denied by Mhonde, c who said that Murawo had told him that he had been invited to the workshop to present his report by Makwenda. On the understanding that Makwenda had invited Murawo to attend the workshop, Mhonde authorised Murawo's travel arrangements. Makwenda denied that he had invited Murawo to the workshop.

d Zemura said that, although initially Murawo was not part of the group of people going to attend the workshop, he subsequently told her that he had been asked to attend the workshop by Mhonde, and present his report. Acting on that information, she booked him into the hotel.

In his judgment, the Senior President of the Labour Court said the following e at pp 24-25 of the judgment (judgment no. LC/H/51/2006):

"On the issue of inconsistent conduct, I am persuaded to agree with the respondent's submissions that the appellant lied and conducted himself in a manner not befitting an officer of his status. The first lie relates to the issue of who actually invited the appellant to the workshop. I do not believe that Mr Mhonde ever invited the appellant. The appellant would have said so in his response to the allegations contained in the letter of suspension. Instead the appellant told the f truth by stating the following:

'I confirm that I did not receive a written invitation to present a paper at the Troutbeck Retreat. I, however, thought in good faith that since this was an important strategic planning session of the organisation our department could take advantage of the gathering of eminent people in the organisation to market the Health and Safety portfolio, which was launched some eight g months ago. I prepared a document for presentation. ...'

The above constitutes the truth on the issue of invitation. Any departure from the above cannot be true. If that were not the case I would have expected the appellant to go further and say 'You verbally invited me to present my ten page report as an addendum to yours'. The appellant does not say so because he knows that he had told his boss that Mr Makwenda had invited him. That was a lie."

h And at p 26 the Senior President continued as follows:

2009 (1) ZLR p312

Sandura JA

"All arrangements for the appellant's attendance at the workshop were based a on lies from himself. The lie to Mrs Zemura was that the technical manager (Mhonde) had authorised him to attend, and the lie to Mr Mhonde was that Mr Makwenda had invited him to present a detailed paper on the safety, health and environment programme. Both officers had then in good faith proceeded to facilitate the appellant's attendance at the workshop. ...

My finding therefore is that the appellant attended the workshop without authority b and that he lied about his invitation. Such conduct was therefore inconsistent with the express and implied conditions of his contract of employment i.e. a violation of the expected degree of honesty and integrity."

It is clear, therefore, that the learned Senior President made specific findings of fact on the credibility of the four people who testified before him. He found that Murawo had lied, and that the witnesses who testified on behalf c of the GMB had told the truth.

As stated by Herbstein and van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at 916:

"It has repeatedly been laid down that in view of the advantages enjoyed by the trial court in seeing and hearing the witnesses and in being steeped in the d atmosphere of the trial, an appeal court is in general reluctant to disturb the findings of a trial court on questions of fact."

In the present case, I can find no reason for disturbing the findings of fact made by the Labour Court. In my view, the conclusions reached by the Senior President cannot be described as being so outrageous in their defiance of logic that no sensible person applying his mind to the questions to be decided e could have arrived at such conclusions.

Finally, I wish to deal with the submission made by Murawo's counsel that a penalty less than dismissal ought to have been imposed. The issue of the appropriate penalty for misconduct inconsistent with the fulfilment of the express or implied conditions of a contract of employment was considered f by this court in *Tobacco Sales Floors Ltd v Chimwala* 1987 (2) ZLR 210 (S). At 218D-219A McNally JA said:

"In *Halsbury's Laws of England* 4 ed vol 16 para 642 it is said:

'Misconduct inconsistent with an employee's proper discharge of the duties for which he was engaged is good cause for his dismissal, but there is no fixed rule of law defining the degree of misconduct which will justify g dismissal.'

That passage is based on a dictum by Lord James of Hereford in *Clouston & Co Ltd v Corry* [1906] AC 122 at 129 (PC), cited with approval in *Laws v London Chronicle (Indicator Newspapers Ltd) Ltd* [1959] 2 All ER 285 (CA) at 287H as follows:

'Now the sufficiency of the justification depended upon the extent of the

2009 (1) ZLR p313

Sandura JA

a misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be conduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.'

I consider that the seriousness of the misconduct is to be measured by whether it is 'inconsistent with the fulfilment of the express or implied conditions of his contract'. If it is, then it is serious enough *prima facie* to warrant summary dismissal ... Then it is up to the employee to show that his misconduct, though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted."

c In the present case, Murawo's misconduct can hardly be described as "so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted". On the contrary, the misconduct was serious and premeditated, and called for the penalty of dismissal.

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

CHEDA JA and GWAUNZA JA concurred.

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners

e *Kantor & Immerman*, respondent's legal practitioners

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Document 43 of 52

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MBAYIWA v CHITAKUNYE & ANOR 2009 (1) ZLR 314 (S)

2009 (1) ZLR p314

Citation	2009 (1) ZLR 314 (S)
Case No	Judgment No. S-20-09
Court	Supreme Court, Harare
Judge	Cheda JA, Ziyambi JA & Malaba JA
Heard	4 March 2008
Judgment	18 May 2009
Counsel	<i>J Sibanda</i> , for the appellant <i>H Zhou</i> , for the respondents
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Contract – performance – tender – tender of performance by one party – such tender not in accordance with terms of contract – other party entitled to treat tender as a breach of contract

Headnote

The appellant sold agricultural equipment to the respondents. The agreed ^D method of payment was that they would pay \$20 million of the total price of \$195 million as a deposit and the rest would be paid by electronic transfer within 3 banking days of the day of the agreement. On the last day for payment, the first respondent told the appellant that \$150 million had been paid by electronic transfer and the rest would be paid later to ^E him in person later that day. The appellant told the first respondent that he was cancelling the agreements of sale because they had not paid the balance of the purchase price. The respondents obtained an order from the High Court for specific performance, the basis of their claim being that the payment of the sum of \$150 million and a tender of payment of ^F \$25 million had been made within the time limit of three banking days.

Held, that for a tender of performance to be valid, it must comply with all the requirements of a valid performance, since the basis of the effect which the law gives to a valid tender of performance is that the debtor was correct in thinking that what he was attempting to achieve amounted to proper performance and that it was due to no fault of his own that he ^G was unable to achieve it. Therefore, when performance has to be made at a specified time and place, a tender will not be valid unless it is made at that time and place.

Held, further, that the respondents, as the debtors, had to show that they had been able and willing to perform their obligations in terms of the contracts with the appellant. They had to show that they had performed ^H

2009 (1) ZLR p315

Malaba JA

^A their obligations as far as they were able to do so, but had been prevented from completely performing the contract by the refusal of the appellant to accept their performance.

Held, further, that it was clear from the terms of the contracts and surrounding circumstances that performance *in forma specifica* was stipulated in the contracts. The contracts specified that the balance of the purchase price ^B should be paid by electronic transfer into the appellant's bank account before close of business on the third day after the contract was concluded. Thus, payment of the balance of the purchase price to the appellant in person was not a valid performance of the respondents' obligations under the agreements of sale. That mode of payment had not been agreed upon by the parties, and the appellant was not under any obligation to accept ^C payment which was not in terms of the contracts. He was entitled to treat the breach as repudiation of contracts by the respondents, releasing him from the duty to further perform his obligations under the contract.

Case information

J Sibanda, for the appellant

^D *H Zhou*, for the respondents

Judgment

MALABA JA: On 18 August 2005 the appellant entered into two separate oral agreements with the first and second respondents. In terms of the agreement with the first respondent, the appellant sold and the first respondent purchased a Massey Fergusson MF 185 tractor for \$180 million. The second respondent ^E had represented the first respondent in the negotiation of the terms of the agreement of sale between the two parties. The second respondent also entered into an agreement of sale with the appellant in her personal capacity in terms of which the appellant sold and the second respondent purchased a bowser for \$15 million. The respondents dealt with the appellant as if there was a ^F single purchase price for two movables from a single source of payment.

The total purchase price for the two items of property was \$195 million. The parties agreed that of this amount a deposit of \$20 million be paid to the appellant on the date of the agreements. The deposit was paid on 18 August. It was not refundable if the respondents failed to pay the balance of the purchase price within the time agreed upon for the completion of the ^g contracts.

The parties agreed that the balance of the purchase price in the sum of \$175 million was to be paid within three banking days reckoned from the date of the agreements. The appellant banked with Agribank Bulawayo. The balance of the purchase price had to be paid into the appellant's bank account by ^h electronic transfer before the close of banking business of his bank on 22

2009 (1) ZLR p316

Malaba JA

August 2005. ^a

On 20 August the first respondent, acting on behalf of himself and the second respondent, paid \$150 million of the balance of the purchase price into the appellant's bank account by electronic transfer. In paras 9 and 10 of the founding affidavit, the first respondent, speaking for the second respondent as well, averred as follows: ^b

- "9. That on Saturday 20 August 2005 and *through an agreed method of paying the rest of the purchase price*, I caused an electronic transfer of \$150 million to be effected into respondent's account held with Agribank, within the agreed three (3) banking days, as will more appear fully from Annexure "A" hereto [the emphasis is mine].
10. That on Monday 22 August 2005, which was the last day of the three banking ^c days agreed for the payment of the full purchase price, arrangements were made by me and second applicant to settle the outstanding balance."

What had happened is that in the morning of 22 August 2005 the first respondent contacted the appellant by telephone. He advised the appellant of the fact that he had paid \$150 million into his bank account by means of an electronic transfer as he was unable to verify the payment from his bank ^d account as the computer at his bank was down. The first respondent sent the appellant a copy of the electronic transfer by facsimile. During the telephone conversation, the first respondent told the appellant that the balance of the purchase price in the sum of \$25 million would be paid to him later that day.

Later that day the first respondent contacted the appellant telephonically and ^e told him that they wanted to collect the tractor and bowser and pay to him the sum of \$25 million. The appellant told the first respondent that he was canceling the agreements of sale because they had not paid the balance of the purchase price. He refused to accept the payment of \$25 million which the first respondent had said they would give to him at the place where they were to collect the tractor and bowser. ^f

On 7 September 2005 the respondents made an application to the High Court for an order in the following terms:

- "1. That the agreement of sale between the first applicant and the respondent on 18 August 2005 for the sale of a Massey Fergusson MF 185 tractor be and is hereby declared to be valid and binding on the parties;
2. That the agreement of sale between the second applicant and the respondent ^g on 18 August 2005 for the sale of a water bowser be and is hereby declared to be valid and binding on the parties
- 3 That it is hereby ordered that the respondent delivers the said tractor and water bowser to the applicants against payment of the balance of the purchase price within fourteen (14) days of this order, failing which the Deputy Sheriff of Bulawayo be and is hereby directed to attach, remove ^h

2009 (1) ZLR p317

Malaba JA

^a and deliver the said tractor and water bowser to the applicants.

4. That the respondent pays the costs of suit on a higher scale."

The claim of an order for specific performance against the appellant was made on the basis that the payment of the sum of \$150 million and a tender of payment of \$25 million had been made within the time limit of three banking ^b days. The contention was that the appellant was under an obligation to accept the payment of the balance of the purchase price tendered. The respondents were said to have performed their sides of the contracts. The refusal by the appellant to accept the payment

tendered was said to have constituted a breach which the respondents were entitled to reject as amounting to a repudiation releasing them from further performance of their contractual obligations. c It was argued that they were entitled to hold the appellant to his side of the bargains and seek an order of specific performance against him.

It was argued on behalf of the appellant in the court *a quo* that there was no question of him having prevented performance by the respondents when he refused to accept payment of the sum of \$25 million. The basis of the d contention was that the payment of \$25 million by the respondents to the appellant in person at a place where they were to collect the tractor and bowser was equivalent to performance of their obligations.

The appellant's defence to the claim by the respondents was summarized by Mr Sibanda in the heads of argument before this court. He said:

"4.5. But in the circumstances of this case, it is submitted that it would not be e a defence available to the respondents to say they were prevented from paying the balance because they could simply have transferred the money into the appellant's bank account without having to obtain his permission. Had they done so within the agreed time, the appellant would not have had even a ground to oppose the application.

..... f

6. The learned judge *a quo* held that the appellant prevented the respondents from fulfilling their side of the agreement, and further held that the respondents fictionally fulfilled their obligations when the first respondent indicated to the appellant in a telephone conversation that the balance of \$25 000 000 would be paid later in the day.

6.1. It is, however, submitted that the learned judge did not explain how g the appellant prevented the respondents from effecting payment.

6.2. Further, it has been pointed out in para 4.5 above that the respondents could have electronically transferred the balance into the appellant's account, as they had done with the bulk of the payment.

6.2.1. No reason has been advanced by them as to why they did not utilize this mode of payment, which, with respect, seems to have been the one h anticipated by the parties.

2009 (1) ZLR p318

Malaba JA

6.2.2. Such a payment method would not have required the appellant's A co-operation."

The respondents, as the debtors, had to show that they had been able and willing to perform their obligations in terms of the contracts with the appellant. They had to show that in fact they performed their obligations as far as they were able to do so but were prevented from completely performing the contract B by the refusal of the appellant to accept their performance. The effect of the contention advanced by Mr Zhou for the respondents was that the payment tendered by them to the appellant and refused by him was valid performance by the respondents' of the contracts. The argument by Mr Sibanda was that the payment tendered was not in terms of the contracts.

It is clear from the terms of the contracts and surrounding circumstances that c performance *in forma specifica* was stipulated in the contracts. The learned judge misdirected himself in holding that the payment of the balance of the purchase price in the sum of \$25 million to the appellant in person tendered by the respondents was a valid performance of their obligations under the agreements of sale. That mode of payment had not been agreed upon by d the parties.

The parties had agreed that the payment of the balance of the purchase price had to be made by the respondents within three banking days by electronic transfer into his bank account.

The appellant was not under any obligation to accept payment which was e not in terms of the contracts he entered into with the respondents.

In *Anson's Law of Contract* 26 ed at p 425 it is pointed out that:

"Tender of payment to be a valid performance ... must observe exactly any special terms which the contract may contain as to time, place and mode of payment."

In *Halsbury's Laws of England* vol 9 para 523 it is stated that:

"A tender of performance which is not in accordance with the terms of the contract f may be withdrawn and may not preclude the promisor from subsequently making, within the time limited, a tender of performance in a proper manner; but this will not be the case where the incorrect tender is to be construed as a repudiation of the contract."

R H Christie *The Law of Contract in South Africa* 3 ed at p 448 states that: ^g

“To be a valid tender it must comply with all the requirements of a valid performance, since the basis of the effect which the law gives to a valid tender of performance is that the debtor was correct in thinking that what he was attempting to achieve amounted to proper performance and that it was due to no fault of his own that he was unable to achieve it. Therefore, when performance has to be made at a specified time and place, a tender will not be valid unless it is made at that time and place.” ^h

2009 (1) ZLR p319

Malaba JA

^a The balance of the purchase price was payable to the appellant by the respondents effecting electronic transfer of the money into his bank account at a bank before close of banking business on 22 August 2005. The money had to be paid into the appellant’s bank account by electronic transfer within the time limited for payment for valid performance of the contracts by the respondents to have occurred. The terms of payment were specific ^b and it appears to me that, in making the time within which payment had to be made by reference to hours of normal banking business operations, the intention of the parties was that the method of payment specified had to be specifically complied with for there to be valid performance of the contracts by the respondents.

^c The payment of the balance of the purchase price to the appellant in person as tendered by the respondents would clearly not have constituted valid performance of the contracts. The tendered payment was not in terms of the contracts. The parties made the time and mode of payment of the balance of the purchase price of the essence of the contracts. As the respondents failed to make a valid tender of the payment of the balance of the purchase ^d price, there was no attempt by them at effecting valid performance of their obligations. The appellant was entitled to treat the breach as repudiation of contracts by the respondent in each case releasing him from the duty to further perform his obligations under the contract.

The appeal is allowed with costs. The judgment of the court *a quo* is set ^e aside and in its place substituted the following order –

“The application is dismissed with costs.”

CHEDA JA and ZIYAMBI JA concurred.

Job Sibanda & Associates, appellant’s legal practitioners

^f *James, Moyo-Majwabu & Nyoni*, respondents’ legal practitioners

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Document 44 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/SAVANHU v MARERE NO & ORS 2009 (1) ZLR 320 (S)

SAVANHU v MARERE NO & ORS 2009 (1) ZLR 320 (S)

2009 (1) ZLR p320

Citation	2009 (1) ZLR 320 (S)
Case No	Judgment No. S-22-09
Court	Supreme Court, Harare
Judge	Malaba DCJ, Cheda JA, Garwe JA
Heard	20 January 2009
Judgment	18 May 2009

Counsel	<i>S Chihambakwe</i> , for the appellant <i>M V Chizodza</i> , for the first respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Contract – *breach* – *remedies* – *specific performance* – *when order for specific performance may be granted* – *principles to be followed*

Headnote

A party to a contract has in an appropriate case a right to claim specific performance, but it is in the discretion of the court either to grant such an order or not. The right to claim specific performance of a contract by the plaintiff is premised on the principle that the plaintiff must first show that he has performed all his obligations under the contract or that he is ready, able and willing to perform his own side of the bargain or that he has been prevented from doing so by the defendant. The court will not decree specific performance where the plaintiff has himself broken the contract or made a material default in the performance

Cases cited

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

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

Industrial & Mercantile Corp v Anastassiou Bros 1973 (2) SA 601 (W)

Min of Public Construction v Zescon (Pvt) Ltd 1989 (2) ZLR 311 (S)

Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

Ranch International Pipelines (Pvt) Ltd v LMG Construction (City) (Pvt) Ltd 1984 (3) SA 861(W) ^G

Shakinovsky v Lawson & Smulowitz 1904 TS 326

Wolpert v Steenkamp 1917 AD 493

Case information

S Chihambakwe, for the appellant

M V Chizodza, for the first respondent ^H

2009 (1) ZLR p321

Malaba DCJ

^A No appearance for the second and third respondents

Judgment

MALABA DCJ: This is an appeal from a judgment of the High Court given on 9 March 2006, dismissing with costs an application for an order compelling the first respondent to transfer Stand 151 of Plot 216 of Good Hope Township ^B of Good Hope into the appellant's name in terms of an agreement of sale entered into between the appellant and the late Robert Mubayiwa Marere on 30 October 1998.

The appellant and the late Robert Mubayiwa Marere ("the deceased") entered into a written contract on 30 October 1998 in terms of which the latter agreed to sell and the former agreed to purchase Stand 151 of Plot 216 of Good ^C Hope Township of Good Hope ("the property") for \$230 000.

The parties provided for two alternative methods of payment of the purchase price under clauses 12 and 7. Under clause 12 they agreed that the purchase price would be paid as follows:

- "1. The sum of \$50 000 (fifty thousand dollars) to be paid to ERS REALTY'S TRUST ACCOUNT on signing of this Agreement of Sale. ^d
2. The balance of \$180 000 (one hundred and eighty thousand dollars) to be paid at the rate of \$30 000 (thirty thousand dollars) per month commencing on the 1st of July 1998 with interest at the rate of 25% effected if the purchaser does not meet the deadline of 30 December 1998."

Under clause 7, headed "TRANSFER", the parties agreed that:

£ "Transfer shall be effected by the seller's conveyancers and the purchaser shall, within a period of fourteen days, pay or furnish a Bank or Building Society guarantee for payment of the purchase price against transfer. If such payment or guarantee shall not be furnished to the seller's conveyancers the purchase price shall bear interest at 19% per annum from the expiry of such period of fourteen (14) days until transfer shall be effected."

£ The details of payment provided for under clause 7 are so different from those under clause 12 that an inference must be drawn, as a matter of construction from the terms used, that the parties intended that the appellant would have to decide which of the two methods of payment to follow and be bound by the terms.

Under clause 10 the parties agreed that in the event of the purchaser failing ^g to pay any sum owing under the agreement on the due date, or in the event of any breach of any other condition of the agreement, the seller had to give the purchaser written notice to remedy the breach within 14 days of the posting of such notice, failing which the seller would be entitled to cancel and terminate the agreement of sale or, alternatively, have the option to institute ^h legal proceedings against the purchaser for the balance of the purchase price

2009 (1) ZLR p322

Malaba DCJ

then owing under the agreement. ^a

Lastly, they agreed under clause 11 that the agreement of sale constituted the entire contract between them and no variation of it would be valid unless reduced to writing and signed by or on behalf of the parties.

No payment of the sum of \$50 000 was made by the appellant on signing of the agreement on 30 October 1998 in terms of clause 12(1) of the contract. ^b An amount of \$50 000 had been paid to ERS Realty on 21 May 1998. The receipt states that the money was paid as a deposit of the purchase price in respect of stand 21G of Lot 216 of Good Hope Township. Mr *Chihambakwe* argued on appeal that Stand 21G of Lot 216 was in fact the same as Stand 151 of Lot 216 of Good Hope Township. Whilst that may be the case, there ^c was nothing said by the appellant in the founding affidavit to support the contention. Similarly, the founding affidavit was silent as to whether Stand 21G of Lot 216 of Good Hope Township, in respect of the purchase price of which an instalment of \$30 000 was paid to ERS Realty on 31 July 1998, was the same as Stand 151 of Lot 216 of Good Hope Township.

Five receipts of payments of \$30 000 made by the appellant to Manase & ^d Manase, a firm of legal practitioners appointed as the seller's conveyancers, were annexed to the founding affidavit. The payments were all made between 31 March and 12 October 1999. Each receipt states that the payment was a deposit for the purchase price for an unidentified piece of land. The payment is said to be to the credit of an entity called Nyika Engineering.

Mr *Chihambakwe* suggested in argument on appeal that Nyika Engineering ^e was a company owned by the deceased. There was no reference to Nyika Engineering in the founding affidavit. Even if it is a company, there was no explanation given as to why it received payment of the money in terms of a contract to which it was not a party.

The respondent, who became the executrix ^f dative in her husband's estate on 24 October 2003, denied that the estate received any of the sums of money paid by the appellant to ERS Realty and Manase & Manase for the property. She denied knowledge of any relationship between Nyika Engineering and the deceased in his lifetime. She went on to aver in para 2 of the opposing affidavit that:

"It is also telling that the applicant has not been able to take vacant possession of ^g the said stand since 1998 and has not claimed it until well after my husband's death and has not sought to enforce his rights to take transfer. This is so because my husband repeatedly informed him that he had not received the

purchase price. It is therefore apparent that the applicant knows of the problems associated with this sale and wishes to take his chances with me.”

The court *a quo* held that payment of the instalments of \$30 000 per month ^H

2009 (1) ZLR p323

Malaba DCJ

^A to Manase & Manase constituted a breach of clause 12(2) of the agreement of sale as the appellant was bound to pay the money to ERS Realty. As a result, the application was dismissed with costs.

The contention on appeal was that the learned judge misdirected herself in making the finding that the payment of the instalments to *Manase & Manase* ^B was in breach of clause 12(2) of the agreement of sale. It was argued in the alternative that, even if the payment was a breach of contract, the learned judge ought not to have dismissed the application because the deceased or the first respondent had not initiated and completed the procedure agreed on by the parties under clause 10 of the agreement of sale for termination of the contract.

^CTo determine the correctness of the contention that the court *a quo* misdirected itself in holding that payment to Manase & Manase was in breach of clause 12(2), it is necessary to decide the question as to which of the two methods of payment of the purchase price the appellant was found to have decided to follow. It is clear that the learned judge took the view that the ^D appellant followed the method of payment provided for under clause 12 of the contract. Mr *Chihambakwe* argued that the payments of the instalments were made in terms of clause 7 of the agreement of sale.

The fact that there was in fact no payment of the deposit of \$50 000 on signing of the agreement of sale on 30 October 1998 in terms of clause 12(1) of the contract would suggest that the appellant decided to pay the purchase ^E price in terms of clause 7. It is, however, clear from the facts of the case that, although the payment of \$50 000 to ERS Realty by the appellant on 21 May 1998 was at law not payment in terms of the agreement of sale, he believed that it was payment towards the purchase price of the property. Although he produced no evidence to support the allegation, the appellant had his case ^F argued on the basis that Stand 21G of Lot 216 of Good Hope Township, for the purchase price of which \$50 000 was paid, was in fact Stand 151 of Lot 216 of Good Hope Township.

The learned judge was correct in finding on the facts that the appellant believed he had made the payments in terms of clause 12 of the agreement of sale. I, however, do not agree with the finding by the learned judge that ^G if the payment to *Manase & Manase* was indeed in respect of Stand 151 of Lot 216 of Good Hope Township it was in breach of clause 12(2) because it ought to have been made to ERS Realty.

The appellant was specifically required under clause 12(1) of the agreement of sale to pay \$50 000 of the purchase price to ERS Realty on signing of ^H the contract. That exclusive mandate did not extend to the payment of the

2009 (1) ZLR p324

Malaba DCJ

balance of \$180 000. Clause 12(2) relating to the payment of the balance is ^A silent as to whom the payment was to be made. It therefore had to be made to the deceased.

Payment of the instalments of the purchase price to Manase & Manase in terms of clause 12(2) of the agreement would not be in breach of the contract provided the appellant made sure that the deceased received the money. It ^B is clear from the facts that the appellant failed to prove that the payments he made were in terms of the contract. He failed to show that there was payment of \$50 000 to ERS Realty on signing of the agreement. There was no term in the agreement of sale by which the parties acknowledged payment of \$50 000 before the signing of the contract. There was no evidence at all in the papers to show that the deceased received any of the payments ^C made either to ERS Realty before the signing of the agreement of sale or to Manase & Manase after the signing of it. The first respondent denied that the deceased received any of the payments. All that the appellant could say in the answering affidavit was that the question whether the deceased received the money in terms of the contract was not for him to answer. ^D

The appellant chose to proceed by way of a court application to claim the order of specific performance against the first respondent. As the proceedings were by way of a court application and there were disputes of fact, the final relief could only have been granted if the facts stated by the first respondent together with the admitted facts in the appellant's affidavit justified such an order: *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635B. ^ε

As the court *a quo* was not satisfied as to the inherent credibility of the factual averments in the appellant's affidavit, and the first respondent's denial was not found to have been patently false, it correctly held that it could not grant the order sought. ^φ

The appellant had applied for an order of specific performance by the first respondent of the deceased's contractual obligation to transfer the property into his name. That a party to a contract has in an appropriate case a right to claim specific performance is not in doubt.

In *Shakinovsky v Lawson & Smulowitz* 1904 TS 326 Innes CJ said at p 330: ^ς

"Now a plaintiff has always the right to claim specific performance of a contract which the defendant has refused to carry out, but it is in the discretion of the court either to grant such an order or not."

See also *Farmers Co-operative Society (Reg) v Berry* 1912 AD 343; *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at p 378; *Industrial & Mercantile v Anastassiou Bros* 1973 (2) SA 601 (W) at 607H-609A; *Ranch* ^ς

2009 (1) ZLR p325

Malaba DCJ

^α *International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 (3) SA 861 (W) at 879D-I; *Minister of Public Construction v Zescon (Pvt) Ltd* 1989 (2) ZLR 311 (S) at 318 C-G.

The right to claim specific performance of a contract by the other party is premised on the principle that the appellant must first show that he has ^β performed all his obligations under the contract or that he is ready, able and willing to perform his own side of the bargain. Wessels *The Law of Contract in South Africa* vol 11 para 3135 states that:

"The court will not decree specific performance where the plaintiff has himself broken the contract or made a material default in the performance on his part (*Lawson*, s. 472, p.522).

^γ A plaintiff is not entitled to succeed against a defendant in an action for breach of contract unless he can show that he has performed his part or is ready to do so, and therefore he cannot ask for specific performance unless he has either performed his part of the contract or unless he has been prevented from doing so by the defendant."

See also *Wolpert v Steenkamp* 1917 AD 493 at p 499.

^δ The effect of the finding by the court *a quo* was that the appellant failed to show that he had fulfilled his own obligations under the contract. The view I have taken of the facts is also that the appellant failed to show on the papers that he had paid the purchase price of the property in terms of the agreement of sale. There was no payment of the sum of \$50 000 on signing of the agreement of sale. There was no proof that the monies paid ^ε to Manase & Manase were received by the deceased. Even if these sums of money could have been paid to the credit of the deceased, they were paid after the date by which the appellant would have been bound to complete the purchase of the property under clause 12(2) of the agreement of sale. The interest which would have been due and owing would not have been ^φ paid. The appellant did not tender any payment to show that he was ready, able and willing to fulfil his own obligations under the contract. By his own conduct the appellant disentitled himself to claim specific performance of the contract by the first respondent.

The appeal is accordingly dismissed with costs.

^ς CHEDA JA and GARWE JA concurred

Chihambakwe, Mutizwa & Partners, appellant's legal practitioners

^η *M V Chizodza-Chinounye*, first respondent's legal practitioners

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Document 45 of 52**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/ZIMBABWE EXPRESS SERVICES (PVT) LTD v NUANETSI RANCH (PVT) LTD 2009 (1) ZLR 326 (S)

ZIMBABWE EXPRESS SERVICES (PVT) LTD v NUANETSI RANCH (PVT) LTD 2009 (1) ZLR 326 (S)**2009 (1) ZLR p326**

Citation	2009 (1) ZLR 326 (S)
Case No	Judgment No. S-21-09
Court	Supreme Court, Harare
Judge	Garwe JA, Gwaunza JA & Ziyambi JA
Heard	27 November 2006
Judgment	19 May 2009
Counsel	<i>E Matinenga</i> , with him <i>H Zhou</i> , for the applicant <i>R M Fitches</i> , for the respondent
Case Type	Details not supplied
Annotations	Link to case annotations

Flynote

Contract – *breach – remedies – specific performance – court's discretion c – when specific performance may be refused – order operating harshly on defendant – plaintiff being unjustly enriched due to inflation*

Contract – *cancellation – how notice of cancellation must be conveyed to other party – cancellation by conduct – cancellation by conduct may be inferred from circumstances*

Contract – *performance – time – no time specified for performance – demand by creditor necessary to place debtor in mora – time of the essence – demand still necessary*

Headnote

The respondent was one of the largest cattle breeders in the country. During ^ε2003, the respondent experienced acute cash flow problems as a result of which a decision was taken to dispose of some of the cattle in order to raise money. The respondent entered into a written agreement with the appellant in terms of which the respondent sold to the appellant a total of four hundred cattle at a stated rate per kilogram. The appellant ^φ paid the agreed deposit. In terms of the agreement, the balance of the purchase was payable four days later, or after the animals had been weighed and delivered, whichever occurred later. The cattle were not weighed by the stated date and consequently the balance was not paid by that date. They were weighed a few days later, a fact of which the appellant was made aware, but it did not make any further payment. ^ς The following month, the respondent advised the appellant that it could collect one hundred and twenty steers, which the respondent said was equivalent to the deposit previously paid.

The appellant claimed for specific performance. The High Court found that the respondent had, by implication, cancelled the contract. On appeal:

Held, that when a contract does not fix a time for performance there can be no ^η

2009 (1) ZLR p327

Garwe JA

^A *mora ex re*, only *mora ex persona*, so a demand by the creditor is necessary in order to place the debtor in *mora*. When no time for performance is fixed but time is of the essence, the debtor is not *in mora* and the creditor cannot cancel for non-performance unless a proper demand for performance has been made. If no time is fixed, there can be no breach by non-performance, whether or not time is of the essence, until the ^B creditor has informed the debtor when he maintains performance is due.

Held, that order for specific performance is at the discretion of the court and there are circumstances in which a court may refuse to grant such an order. The order which the court makes should not produce an unjust result which would be the case, for example, if, in the particular ^C circumstances, the order would operate unduly harshly on the defendant. This would be the case if the plaintiff were to be unjustly enriched by being able to acquire something that was worth a great deal by paying virtually nothing, the value of the money having being severely eroded by inflation by the time the case was adjudicated.

Held, further that notice of cancellation of a contract must be clear and ^D unequivocal and takes effect from the time it is communicated to the other party. A notice of intention to cancel must be such that the other party, is or ought to, be aware of its nature, but it is not necessary to use the word "cancellation". The intention to cancel may be made sufficiently clear in other ways. The decision to cancel a contract may also be by conduct. Repudiation of a contract by the defaulting party may be by ^E words or conduct justifying cancellation by the aggrieved party. If the defaulting party can repudiate by words or conduct, the aggrieved party should be able to terminate the contract by conduct too. As in all cases, the circumstances must be such that that is the only reasonable inference that may be reached.

Cases cited ^F

Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A)

du Plessis v Govt of Republic of Namibia 1995 (1) SA 603 (NH)

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

Case information

^G *E Matinenga*, with him H Zhou, for the applicant

R M Fitches, for the respondent

Judgment

GARWE JA: This is an appeal against the decision of the High Court dismissing with costs the appellant's claim for delivery of 200 heifers and 200 steers.

^H The background to this matter is as follows. At the relevant time, Nuanetsi

2009 (1) ZLR p328

Garwe JA

Ranch (Pvt) Ltd ("the respondent") was one of the largest cattle breeders in the ^A country. During 2003, the respondent experienced acute cash flow problems as a result of which a decision was taken by management to dispose of some of the cattle in order to raise money. On or about 7 May 2003 the respondent entered into a written agreement with the appellant, in terms of which the respondent sold to the appellant a total of 400 cattle consisting of 200 heifers ^B and 200 steers. The purchase price was agreed at Z\$450 per kilogram for the heifers and Z\$500 per kilogram for the steers. The appellant paid the agreed deposit of Z\$15 million on 8 May 2003. In terms of the agreement the balance of the purchase was payable "on Monday 12 May 2003 or after the animals have been weighed and delivered whichever occurs later". The cattle were not weighed by 12 May 2003 and, consequently, the balance was ^C not paid by that date. In June 2003 the respondent then advised the appellant that it could collect 120 steers, which the respondent said was equivalent to the deposit of Z\$15 million previously paid.

At the hearing of the matter before the court *a quo*, the court found that the cattle had been weighed on 16 May 2003 and that, although the appellant ^D had been advised of this fact, no payment had been forthcoming, despite numerous visits and telephone calls by the respondent's managing director. The court also found that the respondent had cancelled the contract and that it

had done so by implication. Consequent upon these findings the court *a quo* dismissed the appellant's claim with costs. It is against this order that ^ε the appellant has appealed to this court.

In its grounds of appeal, the appellant has raised various issues. These are that the court *a quo* erred:

- (1) in finding that the cattle were weighed on 16 May 2003 and that the appellant was advised of this fact and the need to pay;
- (2) in finding that the respondent cancelled the contract between the parties ^ϕ by implication;
- (3) in not making a finding whether or not the respondent placed the appellant *in mora*;
- (4) in declining to grant the appellant an order of specific performance.

I propose to deal with the first two grounds together as they are inter-related ^ϑ and arise from the same set of circumstances. There is a dearth of evidence as to what happened exactly after the payment of the deposit of Z\$15 million was made. The respondent says the cattle were weighed on 16 May 2003 after which the appellant was then advised of the fact. How the appellant was advised was never clarified during the trial. The witnesses who gave evidence for the respondent told the court *a quo* that the invoice was faxed to ^η

2009 (1) ZLR p329

Garwe JA

^α the appellant. A copy of the fax slip was, however, not produced to confirm this. The witnesses further told the court that the invoice had been sent by fax and the original by post, and that one Betty Mudenge had done so. Betty Mudenge was not called to testify to this fact. At the end of the day, therefore, all that was before the court *a quo* was an unsubstantiated claim that an invoice had been forwarded to the appellant on or about 16 May 2003.

^β On the basis of such evidence the court *a quo* had no basis for finding that the invoice was forwarded to the appellant on or about 16 May 2003, and that the appellant, having seen the invoice, failed or refused to pay. Clearly there was no such evidence before the court *a quo*.

There was evidence, however, that there were numerous visits and telephone ^γ calls by the respondent's managing director ^δ to the appellant's offices. I agree with the trial court that the cattle were, in fact, weighed at some stage and that, as a result, the respondent's managing director then made numerous calls in order to get payment. It is unlikely that the respondent's managing director would have behaved in such a fashion if, in fact, the cattle had not been weighed. However, it is unclear when he made the calls or paid visits to the appellant's offices.

The evidence on record shows that what happened next was that the respondent wrote to the appellant on 12 June 2003. In that letter the respondent advised the appellant that the deposit it had paid was equivalent to 120 steers and that an invoice to that effect was attached to that letter. The letter was received ^ε and responded to by Mr D G Lupepe, appellant's managing director. In his response, Mr Lupepe accepted the 120 steers, but rejected the suggestion that there should be a fresh quotation in respect of the remainder of the cattle.

I am prepared to find, on the evidence, that the cattle must have been weighed and the appellant notified on an unknown date, but before 12 June 2003. The ^ϕ appellant, it is common cause, did not pay.

The question that now arises is whether the contract was properly cancelled. It was the evidence of the respondent's managing director that the cancellation was implied from the letter of 13 June 2003. In other words, it was accepted that the respondent did not explicitly cancel the contract. In its submissions, the appellant says cancellation by implication is unknown at law. The ^ϑ respondent disagrees.

It is clear that in its letter of 13 June 2003 the respondent was suggesting that it was prepared to let the appellant take delivery of 120 steers against the deposit of \$15 million previously paid. The remark by the respondent that "If you need more cattle, you are free to contact us and we give you a ^η fresh quotation" suggests that the respondent considered at that stage that

2009 (1) ZLR p330

Garwe JA

the contract was no longer in existence. The appellant's immediate reaction ^A was that the contract was still in force and that the respondent should comply with that contract.

The position is now settled that:

"Notice of cancellation must be clear and unequivocal and takes effect from the time it is communicated to the other party ...". ^B

R H Christie *Law of Contract in South Africa* 3 ed at p 597. See also *du Plessis v Government of the Republic of Namibia* 1995 (1) SA 603 (NH) at 605E.

A notice of intention to cancel must be such that the other party is or ought to be aware of its nature, but it is not necessary to use the word "cancellation". The intention to cancel may be made sufficiently clear in other ways: Kerr *c Principles of the Law of Contract* 4 ed p 462.

On the evidence, the respondent did not cancel the agreement in clear and unequivocal terms. Indeed, this is common cause. The respondent's evidence was that the cancellation was implicit from its letter of 13 June 2003. In that letter the respondent wrote:

"Find attached your receipt for the 120 steers which you purchased from Nuanetsi ^D Ranch.

If you need more cattle, you are free to contact us and we give you a fresh quotation."

This letter clearly implied that the contract was no longer in existence and that, if the appellant required to purchase more cattle, a fresh quotation would ^E have to be provided. Indeed, the appellant understood the letter to mean that the contract was no longer in existence and for that reason wrote back to say that, as far as the appellant was concerned, the contract was still binding.

The question that now arises is whether in law a contract can be cancelled by conduct. Although the appellant has submitted that cancellation by implication is unknown to law, the question really is whether cancellation ^F can be by conduct.

In *du Plessis v Government of the Republic of Namibia supra* at 605C-D, the Namibian High Court accepted that a summons claiming damages was an implied notice of cancellation. The decision to cancel a contract may also be by conduct: see Kerr *op cit* at p 552. ^G

Indeed, repudiation of a contract by the defaulting party may be by words or conduct, justifying cancellation by the aggrieved party: Kerr *op cit* at p 435. If the defaulting party can repudiate by words or conduct, surely the aggrieved party should be able to terminate the contract by conduct too. Suppose that the defaulting party has evinced an intention to repudiate the contract. Suppose, too, that the aggrieved party accepts such repudiation and, by his ^H

2009 (1) ZLR p331

Garwe JA

^A conduct, clearly evinces his view that the contract has terminated. Would one not talk of termination in such a case? The answer, in my view, is in the affirmative. As in all cases, the circumstances must be such that that is the only reasonable inference that may be reached. In such a case, I would have no difficulty in describing the contract as having been terminated by conduct.

^B Considering the circumstances of this case, I would have no difficulty in concluding that the respondent's managing director was, in fact, saying the contract had come to an end and that if the appellant wished to buy more cattle, then it would have to enter into a new agreement. I find therefore that the respondent did in fact cancel the agreement, although it did not do so expressly.

^C The question that now falls for determination is whether the respondent lawfully terminated the agreement and, in particular, whether the appellant had been placed *in mora*.

It is clear from all the facts of the case that the respondent was in financial dire straits and required payment as a matter of urgency. Clearly, therefore, ^D this was a contract in which time was of the essence. However, since the cattle were not weighed by 12 May 2003, no time had been fixed within which payment had to be made.

In cases such as the present, the general rule is that:

"When the contract does not fix a time for performance there can be no *mora ex re*, only *mora ex persona*, so a demand by the creditor is necessary in order to place the debtor in *mora* ..."

Christie *op cit* p 555.

The view has been expressed in several decided cases that no demand is necessary to place the debtor *in mora* when no time for performance was stipulated, but it is clear that immediate performance was contemplated: *Christie loc cit*. This view does not appear to correctly reflect the law as it currently stands.

The present position is that:

"When no time for performance is fixed but time is of the essence, the debtor is not *in mora* and the creditor cannot cancel for non-performance unless a proper demand for performance has been made. ... the concept of time of the essence relates to the consequences of a breach and not to the breach itself, so if no time is fixed there can be no breach by non-performance, whether or not time is of the essence, until the creditor has informed the debtor when he maintains performance is due": *Christie op cit* p 562.

In the present case it is clear that the appellant was never placed *in mora*. The respondent proceeded to cancel the agreement but did not place the

2009 (1) ZLR p332

Garwe JA

respondent *in mora*. In the circumstances the contract was not lawfully terminated and therefore continued to subsist.

Having come to the conclusion that the contract between the two parties continues to subsist, the issue that falls for determination is whether the appellant would, in the circumstances, be entitled to an order of specific performance. It is not in dispute that the decision by the respondent to sell part of its herd had been triggered by the precarious financial position that the company found itself in. The stipulation in the agreement, that a deposit of Z\$15 million was payable immediately and the balance within five days, underscored the urgency with which the respondent treated the situation. Whilst it is unclear when the cattle were weighed and the date on which the appellant was advised of this fact, there is nothing on record to suggest that the appellant itself was in a hurry to perform its side of the agreement. The appellant does not appear to have done much after the payment of the deposit. In June 2003 the respondent advised the appellant that if it wanted more cattle then a fresh quotation would be prepared. The appellant objected to this, maintaining that a valid contract was still in existence. What this meant was that the appellant wanted to buy the cattle some three months later, at the contract price of Z\$450 per kilogramme for heifers and Z\$500 for steers. This court can take judicial notice of the fact that inflation has been a problem in our economy for some time, including the year 2003. Indeed, on two occasions the monetary authorities have had to slash zeros from our currency to enable financial transactions to continue. A price of Z\$450 or Z\$500 per kilogram weight of beef in 2003 would have been a trifling sum in 2005, when the High Court was called upon to adjudicate over the dispute.

Were specific performance to be granted, the effect would be that the appellant would take delivery of 280 heifers and steers for a very small amount of money. In other words, the appellant would be entitled to take possession of a herd of cattle worth a considerable sum of money for which it would have paid virtually nothing. In these circumstances, specific performance cannot be granted.

The general rule is that:

"*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract": *per Innes JA in Farmers' Cooperative Society v Berry* 1912 AD 343 at p 350.

An order of specific performance is, however, at the discretion of the court and there are circumstances in which a court may refuse to grant an order of specific performance. The discretion is:

"[not] completely unfettered. It remains, after all, a judicial discretion and

2009 (1) ZLR p333

Garwe JA

A from its very nature arises from the requirement that it is not to be exercised capriciously, nor upon a wrong principle (*Ex p Neethling supra* at 335). It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the court makes should not produce an unjust result which will be the case, e.g. if, in the particular circumstances, the order will operate unduly harshly on the defendant":

^B per Hefer JA in *Benson v South Africa Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 783C-D.

The contract that gave rise to the proceedings in the High Court was entered into in May 2003. That was more than two years before the High Court gave its decision, and almost six years to the time this court will determine the appeal. Naturally, a lot has happened since the signing of the agreement. There is a somewhat unsubstantiated suggestion by the respondent, in its heads of argument, that it no longer had steers of the age and weight required by the appellant. Most importantly, however, as this court has found, an order of specific performance would no doubt operate unduly harshly on the respondent and would undoubtedly result in the appellant being unjustly ^D enriched at the expense of the respondent. The finding of the court *a quo* to this effect cannot be impugned. Whilst accepting that the agreement was not lawfully terminated, an order of specific performance would not, in these circumstances, be appropriate.

In the circumstances, the appeal cannot succeed. It is accordingly dismissed ^E with costs.

ZIYAMBI JA and GWAUNZA JA concurred.

Gill, Godlonton & Gerrans, appellant's legal practitioners

^F *Coghlan, Welsh & Guest*, respondent's legal practitioners

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Document 46 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/ZIMPOST (PVT) LTD v COMMUNICATIONS & ALLIED WORKERS' UNION 2009 (1) ZLR 334 (S)

ZIMPOST (PVT) LTD v COMMUNICATIONS & ALLIED WORKERS' UNION 2009 (1) ZLR 334 (S)

2009 (1) ZLR p334

Citation	2009 (1) ZLR 334 (S)
Case No	Judgment No. S-23-09
Court	Supreme Court, Harare
Judge	Cheda JA, Ziyambi JA and Malaba JA
Heard	11 February 2008
Judgment	19 May 2009
Counsel	<i>E T Matinenga</i> , for the appellant <i>L T Biti</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment – code of conduct – disciplinary proceedings under – code of conduct not prohibiting act or employment inconsistent with express or implied conditions of employment – right of employer to proceed under ^D s

12B(2)(b) of Labour Act [Chapter 28:01]

Employment – disciplinary action – unlawful collective job action by employees – employer not precluded from charging each employee individually – employer not obliged to charge all employees together

Employment – strike – unlawful collective job action – disciplinary proceedings arising from – job action over before disposal order issued – employer's right to take disciplinary action – protection of rights of parties affected by unlawful collective job action – Labour Act [Chapter 28:01] – ss 106 and 107 – primary purpose of sections – powers of Labour Court – when appropriate for Court to exercise such powers

Headnote

A group of the appellant's employees, who were represented by the respondent F trade union, took part in an unlawful strike for 6 days. When the strike was over, the appellant took disciplinary action against each of the employees individually. They were each charged with conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment, in that he had taken part in the unlawful collective job G action, in contravention of s 12B(2)(b)(1) of the Labour Act [Chapter 28:01]. The disciplinary hearings were conducted in terms of s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations (SI 130 of 2003). The employees were found guilty of the misconduct charge and dismissed from employment.

The respondent took up the case with a labour officer on the ground that the H

2009 (1) ZLR p335

A dismissal constituted an unfair labour practice. The contention was that the appellant should not have charged the employees individually with conduct they committed collectively as a group; disciplinary proceedings ought to have been commenced against the employees as a group on the ground that they took part in an unlawful collective job action in terms of the provisions of Part XIII of the Act. The labour officer referred B the matter to an arbitrator, who determined that the appellant ought to have proceeded in terms of ss 106 and 107 of the Act and charged the employees as a group with having taken part in an unlawful collective job action. The Labour Court upheld the arbitrator's determination. It held that the appellant had failed to observe the requirements of ss 104, C 106 and 107 of the Act, which fall within Part VIII.

Held, that there is no provision in Part XIII of the Labour Act [Chapter 28:01] (which deals with collective job action in labour matters) to the effect that an employer who wishes to take disciplinary action against an employee who took part in an unlawful collective job action, must institute disciplinary proceedings against all the employees involved in D such action and charge them all with having taken part in the collective action. That being so, the employer is not precluded from taking such disciplinary action under the Act and charging the employees individually with acts of misconduct connected with or arising from the collective job action.

E Held, further, that specific procedures and remedies for the protection of the rights for parties affected by unlawful collective job action are provided for under ss 106 and 107 of the Labour Act (Chapter 28:01), the primary purpose of which is to provide procedures and remedies for the disposal of unlawful collective job actions. In terms of those sections, the Labour Court may issue a disposal order directing that a collective job action be F determined, postponed or suspended. It may also give the employer the right to dismiss the employees concerned. The procedure and remedies under these two sections are, however, applicable to the disposal of an unlawful collective job action being threatened or engaged in at the time a show cause order is made by the Labour Court. They are not applicable to an unlawful collective job action which has ended on its own without G a disposal order having been issued in respect of it.

Held, further, that an employer is entitled to dismiss summarily an employee in terms of a code of conduct or on any of the grounds set out in s 12B(2)(b) of the Labour Act. Thus, if an employer's code of conduct does not have a section prohibiting, as an act of misconduct, an act or conduct H inconsistent with the fulfilment of the express or implied conditions

2009 (1) ZLR p336

Malaba JA

of the employee's contract of employment, the employer may dismiss A him in terms of the statutory provision.

Case cited

Net-One Cellular (Pvt) Ltd v Communications & Allied Svcs Workers Union of Zimbabwe & Ors S-89-05 B

Legislation considered

Labour Act [*Chapter 28:01*], ss 12B(2), 12B(3), 104, 106, and 107

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 2003 (SI 130 of 2003), s 2 c

Case information

E T Matinenga, for the appellant

L T Biti, for the respondent

Judgment

MALABA JA: This is an appeal from a judgment of the Labour Court upholding a decision of an arbitrator setting aside the dismissal of the D appellant's employees who had been found guilty of an act or conduct inconsistent with the fulfilment of express or implied conditions of contracts of employment in that they had taken part in an unlawful collective job action.

The appellant's employees were members of the respondent. They engaged in an unlawful collective job action from 4 to 23 October 2006. It is common cause that, at the time the employees engaged in the collective job action on E 4 October 2006, they had not given the fourteen days' written notice of their intent to resort to such action on that day. They had not satisfied the other matters required under s 104(2) of the Labour Relations Act [*Chapter. 28:01*] ("the Act").

After the unlawful collective job action ended, the appellant commenced F disciplinary proceedings against each employee who had taken part in the collective job action. On 8 December 2006 the employees were individually charged with conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment in that he had taken part in the unlawful collective job action.

The allegation was that the employees had contravened s 12B(2)(b)(1) of the G Act. The disciplinary hearings were conducted in terms of s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations SI 130 of 2003 ("the Regulations"). The employees were found guilty of the misconduct charge and dismissed from employment.

The respondent took up the case of the dismissal of the employees with a H

2009 (1) ZLR p337

Malaba JA

A labour officer on the ground that the dismissal constituted an unfair labour practice. The contention was that the appellant should not have charged the employees individually with conduct they committed collectively as a group. The argument was that disciplinary proceedings ought to have been commenced against the employees as a group, on the ground that they took part in an unlawful collective job action in terms of the provisions of Part B XIII of the Act.

The appellant accepted that the employees had taken part in an unlawful collective job action. It denied the accusation that in instituting disciplinary proceedings against each employee on the charge that he had committed an act or conduct inconsistent with the fulfilment of the express or implied C conditions of the contract of employment, in that he had taken part in an unlawful collective job action, it committed an unfair labour practice. The argument was that there was no provision in Part XIII of the Act to the effect that an employer, who wishes to take disciplinary action against an employee for having taken part in an unlawful collective job action, can only do so in disciplinary proceedings commenced against the employees who took part D in such action as a group. The Labour Officer failed to conciliate the dispute and referred the case for arbitration in terms of s 93(5) of the Act.

The arbitrator heard the case and determined that the appellant ought to have proceeded in terms of ss 106 and 107 of the Act and charged the employees as a group with having taken part in an unlawful collective job action. The E dismissal of the employees was adjudged an unfair labour practice. It was set aside and an order of reinstatement or payment of damages in lieu thereof

made. On appeal to the Labour Court, the decision of the arbitrator was upheld, hence the appeal to this court.

The question that falls for determination is whether there is a provision ^F in Part XIII of the Act, to the effect that an employer who wishes to take disciplinary action against an employee who took part in an unlawful collective job action, must institute disciplinary proceedings against all the employees involved in such action and charge them with having taken part in an unlawful collective job action. The contention that the appellant ought to have charged the employees as a group with having taken part in ^G an unlawful collective job action and proceeded in terms of the provisions of Part XIII of the Act, was based on the interpretation of s 8 of category 4 of the appellant's employment code ("the code").

A list of what is considered to be serious acts of misconduct is given under category 4 of the code. In s 8 the following is stated: ^H

"8. Instigating and/or taking part in an unlawful job action – to be handled in

2009 (1) ZLR p338

Malaba JA

terms of Labour Relations Act [*Chapter. 28:01*]." ^A

There is, of course, no specific reference to Part XIII of the Act in s 8 of category 4 of the code. Even if the appellant had decided to charge the employees with having taken part in an unlawful collective job action, there would have been nothing in the provisions of s 8 compelling it to conduct the disciplinary proceedings in terms of the provisions of Part XIII of the Act. ^B

Part XIII is headed "Collective Job Action". It contains ss 102 to 112, the provisions of which deal with matters relating to or arising from a collective job action. The sections said to contain the provisions which the appellant was found to have unlawfully failed to observe are ss 104, 106 and 107.

Section 104(1) gives all employees, workers committees and trade unions the ^C right to resort to collective job action to resolve disputes of interest. The right is given subject to specific conditions of its exercise prescribed under subs (2). A collective job action resorted to without the mandatory requirements for a lawful exercise of the right prescribed under the subsection having been strictly satisfied is an unlawful collective job action.

Specific procedures and remedies for the protection of the rights for the ^D parties affected by the unlawful collective job action are provided under ss 106 and 107. Section 106 provides that when a workers' committee or trade union, for example, "threatens, recommends, encourages, incites, organizes or engages" in an unlawful collective job action, the Minister, acting on his own initiative or upon the application of any person affected or likely to be ^E affected by the unlawful collective job action, may issue an order calling upon the workers' committee or trade union concerned ("the responsible person") to appear before the Labour Court to show cause why a disposal order should not be made in relation to the unlawful collective job action. The show cause order must specify the date, time and place at which the responsible person must appear before the Labour Court. The order may ^F direct that, pending the issuance of the disposal order, the unlawful collective job action concerned be *terminated, postponed or suspended*.

Section 107 provides that, on the return day, the Labour Court must inquire into the matter and may, after the inquiry, issue a disposal order directing that the unlawful collective job action be terminated, postponed or suspended. ^G (the emphasis is mine). Section 107(3) provides that the disposal order may provide for the employer, in his discretion, to dismiss summarily specified employees or categories of employees engaged in the unlawful collective job action or provide for the dismissal of specified employees or categories of employees engaged in the unlawful collective job action.

The inquiry the Labour Court is required to carry out before issuing a ^H

2009 (1) ZLR p339

Malaba JA

A disposal order, as well as the right it may give to the employer to dismiss employees found to be threatening or engaging in an unlawful collective job action, implies that the show cause order may take the place of a charge of misconduct in disciplinary proceedings and the inquiry, the hearing

thereof. The disciplinary action, which the Labour Court may order or may authorize the employer to take against the employees, is not the primary object of the provisions of ss 106 and 107 of the Act.

The primary purpose of the provisions of ss 106 and 107 is to provide procedures and remedies for the disposal of an unlawful collective job action. The right given to an employer under s 107(3) of the Act to dismiss specified employees or categories of employees who threaten or engage in an unlawful collective job action is dependent upon the discretionary remedies. It is up to the Labour Court to decide whether to provide, under the disposal order, for the dismissal of specified employees or categories of employees. It is also up to the Labour Court to decide whether to give the employer, under the disposal order, the right to dismiss specified employees or categories of employees who threaten or engage in an unlawful collective job action. The right to dismiss is dependent upon the exercise of discretion by the Labour Court. Without the initiation of the procedure leading to the issuance of the disposal order and the exercise of discretion by the Labour Court in his favour, an employer would have no right to dismiss employees who threaten or engage in an unlawful collective job action in terms of any of the provisions of Part XIII of the Act.

The procedure and remedies under ss 106 and 107 of the Act are, in my view, applicable to the disposal of an unlawful collective job action being threatened or engaged in at the time the show cause order is made. There is nothing in the language of the relevant provisions of the Act to show that the intention of the legislature is that the procedure and remedies prescribed thereunder be applied to an unlawful collective job action which has ended on its own without a disposal order having been issued in respect of it. One can hardly think of such action, which ceased on its own, being made a subject of a show cause order or disposal order directing that it be *terminated, postponed or suspended*.

The unlawful collective job action engaged in by the appellant's employees ended on 23 October 2006 without a show cause order having been issued in terms of s 106 of the Act. The disciplinary proceedings against the employees commenced on 8 December. The provisions of ss 106 and 107 of the Act were clearly not applicable to the determination of the appellant's right to dismiss the employees concerned.

2009 (1) ZLR p340

Malaba JA

Where, then, did the appellant derive the right to dismiss the employees? The appellant did not charge the employees with having taken part in the unlawful collective job action. It charged each employee with an act or conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment, in that he had taken part in an unlawful collective job action. The charge was in terms of s 12(B)(2)(b)(i) of the Act, as read with s 2 of the Regulations, which recognize the common law right of an employer to charge an employee with such conduct.

Section 12B of the Act provides that:

- “(1) Every employee has the right not to be unfairly dismissed.
- (2) An employee is unfairly dismissed –
 - (a) if, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or
 - (b) if in the absence of an employment code the employer fails to show that when dismissing the employee he had good cause to believe that the employee was guilty of –
 - (i) any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract –
 - (ii) ...”.

Subsection (3) of s 12B makes provision for cases of constructive dismissal.

Section 2 of the Regulations provides that:

- “(2) For the avoidance of doubt it is declared that no employer shall summarily or otherwise terminate a contract of employment with an employee unless –
 - (a) the termination is in terms of an employment code which is registered in terms of s 101 of the Act; or
 - (b) ...; or
 - (c) ...; or

(d) the employee is dismissed on any of the grounds specified in para (b) of s 12B of the Act.”

The employment code did not have a section prohibiting, as an act of misconduct, an act or conduct inconsistent with the fulfilment of the express or implied conditions of the employee’s contract of employment. For an employer to have good cause to believe that an employee is guilty of the act or conduct specified in s 12B(2)(b)(i) of the Act, he has to charge the employee with having committed that act or conduct, give him an opportunity to answer the charge, hold a disciplinary hearing and make a finding of facts on which he believes the employee is guilty as charged.

The contention advanced by Mr *Biti*, on behalf of the respondent, was not that participating in an unlawful collective job action was wrongly found

2009 (1) ZLR p341

Malaba JA

A to be an act or conduct inconsistent with the fulfilment of the express or implied conditions of the contract of each employee charged with that act of misconduct. I agree with Mr *Matinenga* that taking part in an unlawful collective job action could not be a valid defence to the charge preferred against each of the employees.

B The act of misconduct alleged against each employee in the charge was proved following a full hearing of evidence. At the time the employer dismissed each employee, it had good cause to believe that he was guilty of an act or conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment. The appellant had the right under s 12B(2)(b)(i) of the Act, as read with s 2 of the Regulations, to dismiss the employees.

C Mr *Matinenga* relied on *Net-One Cellular (Pvt) Ltd v Communications and Allied Services Workers Union of Zimbabwe & Ors* S-89-05. Net-One, like the appellant, is a successor company to the Posts and Telecommunications Corporation. It was using the same employment code as the appellant at the time its employees embarked on an unlawful collective job action.

D The employees in the *Net-One* case were charged individually with having been absent from work for a period of five or more working days without leave or reasonable cause. The employment code had s 2 of category 4, which made it an offence for an employee to be absent from work for a period of five or more working days without reasonable cause. In charging the employees, Net-One cited s 12B(2)(b)(v) of the Act. A full disciplinary hearing was conducted, at the end of which each employee was found guilty as charged and dismissed from employment.

It was contended on appeal that in charging the employees under s 12B(2)(b)(v) of the Act and not s 2 of the Code, Net-One had committed an unfair labour practice. At p 8 of the judgment Chidyausiku CJ said that participating in an illegal collective job action could not have been a defence to the charge faced by the employees. He went on to say the following:

“The appellant charged the employees individually with absence from work for five consecutive days without reasonable excuse or cause. I pause to point out that the employees were not charged with taking part in or inciting an unlawful collective job action, a charge that falls squarely under clause 8 of the Code. The employees were charged with absence from work for more than five consecutive days an offence under clause 2 of the code and s 12B of the Act.

Disciplinary hearings were conducted in respect of each individual employee. At the conclusion of the disciplinary hearing each of the fifty-six employees was found guilty and dismissed. It was not in dispute that due process was followed in respect of each of the employees. In this regard the appellant, however, purported to act in terms of s 12B of the Act as read with SI 130 of 2003.”

2009 (1) ZLR p342

Malaba JA

The learned Chief Justice held that, in citing s 12B(2)(b)(v) of the Act instead of clause 2 of the code in charging the employees, Net-One was not guilty of unfair labour practice as due process was nonetheless followed in the dismissal of the employees.

The unlawful collective job action in which the employees in the *Net-One* case *supra* had taken part, had ended without a show cause order having been made in terms of s 106 of the Act at the time disciplinary proceedings were commenced against individual employees. The case supports the contention that the provisions of Part XIII of the Act do not, in the circumstances, preclude an employer wishing to take disciplinary action against employees, who took part in an unlawful

collective job action, from charging them individually with acts of misconduct connected with or arising from the c collective job action.

In this case, the offence of an act or conduct inconsistent with the fulfilment of the express or implied conditions of the contract of employment could be established in respect of each employee by proving that he took part in an unlawful collective job action. There was no similar offence under the d employment code. As the unlawful collective job action had ended at the time disciplinary proceedings were commenced, the appellant could not have acted in terms of any of the provisions of Part XIII of the Act. The appellant derived the right to dismiss the employees from the disciplinary proceedings it conducted in terms of s 12B(2)(b)(i) of the Act, as read with s 2 of the Regulations. e

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

“The appeal against the decision of the arbitrator succeeds with costs. The decision is set aside.”

CHEDA JA and ZIYAMBI JA concurred. f

Dube, Manikai & Hwacha, appellant’s legal practitioners

Honey & Blanckenberg, respondent’s legal practitioners g

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Document 47 of 52

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TRUST CORPORATION SECURITIES (PVT) LTD v GABILO & ANOR 2009 (1) ZLR 343 (H)

2009 (1) ZLR p343

Citation	2009 (1) ZLR 343 (H)
Case No	Judgment No. HH-59-09
Court	High Court, Harare
Judge	Uchena J
Heard	22 January 2009
Judgment	3 June 2009
Counsel	<i>D Mundia</i> , for the applicant <i>T Biti</i> , for the second respondent
Case Type	Opposed application
Annotations	None
	No case annotations to date

Flynote

Arbitration – arbitrator – challenge to – procedure – not necessary for parties to agree on procedure – procedure to follow where parties have not agreed – how aggrieved party's application for recusal may be presented **o** – failure by arbitrator to respond to challenge – remedies available

Headnote

During the hearing of an arbitration between the applicant and the second respondent, the first respondent, who was the arbitrator, made a comment which indicated that he had discussed the matter with the second **e** respondent. The arbitrator did not respond to a query by the applicant's counsel about when such a conversation had taken place. The day after the hearing, the applicant's lawyer wrote to the second respondent's lawyer and to the arbitrator, indicating an intention to impeach the arbitrator. No response was received. The applicant's lawyer then wrote to the arbitrator, asking the arbitrator to recuse himself because of the **f** applicant's doubts about his impartiality. The arbitrator did not respond, but proceeded to make an award. He did so without first rejecting the challenge. The applicant sought an order terminating the arbitrator's appointment and providing for fresh arbitration proceedings to commence within a fortnight. In limine, the second respondent argued, *inter alia*, that **g** in terms of article 13(1) of the Schedule to the Arbitration Act [*Chapter 7:15*], the parties should have agreed upon a method of challenging the arbitrator. Not having done so, the applicant could only apply to have the award set aside in terms of article 34.

Held, that article 13(1) states that the parties are free to agree on a procedure for challenging the arbitrator. It does not say that they have to do so. **h** An alternative procedure to be used if the parties do not agree on the

2009 (1) ZLR p344

Uchena J

procedure is provided in article 13(2). In terms of that provision, the **a** party seeking the recusal of the arbitrator must, within 15 days, send to the arbitrator a written statement stating the reasons for the challenge. All that is needed is a simple statement which informs the arbitrator of the reasons why his recusal is being sought. There is no need for the challenging party to submit an application accompanied by an affidavit **b** in which the reasons for recusal are stated. The arbitrator is bound to respond to the challenge; he cannot ignore the challenge and proceed with the arbitral proceedings as if his appointment has not been challenged. If he rejects the challenge, then article 13(2) and (3) permit him to continue with the proceedings in spite of the challenge and the challenging party's course is to request that the High Court determines the challenge. **c**

Held, further, that here, the arbitrator was required to deal with the challenge before proceeding with the proceedings before him; However, the issue was whether or not the applicant was properly before the court. The court can in terms of article 13(3) only decide on a challenge *after* its rejection by the arbitrator. In this case, the failure by the arbitrator to reject the challenge before making the award made the procedure under article 13(3) **d** inapplicable, as the court can only be requested to intervene when the challenge has been rejected. This meant that, in this case, an application in terms of article 34(1) to set aside the award was the only procedure through which the applicant could seek a remedy from the court. The applicant's grounds for applying for the recusal of the first respondent **e** and the setting aside of his award was that he heard submissions from the second respondent outside the arbitral proceedings. That, if proved, would be contrary to the rules of natural justice and entitle the applicant to the setting aside of the award in terms of article 34.

Legislation considered **f**

Arbitration Act [*Chapter 7:15*], First Schedule, arts 13(1), (2) & (3) and 34

Case information

D Mundia, for the applicant

T Biti, for the second respondent

Judgment

UCHENA J: The applicant is a company duly registered in terms of the laws of Zimbabwe. The second respondent is its employee with whom it has had labour disputes leading to this application. The second respondent was suspended from employment pending the resolution of the dispute between her and her employer. The first respondent is an arbitrator who was duly appointed to arbitrate in the labour dispute between the applicant and the

2009 (1) ZLR p345

Uchena J

A second defendant.

The applicant and the second respondent filed written submissions with the first respondent. The first respondent thereafter called them for a hearing which was not finalised. He called them again to clarify the issue of whether or not the second respondent had secured employment during the period of her suspension. On 26 June 2007, while Mr *Biti* for the second respondent was making submissions at the hearing, the first respondent said the second respondent had "told him about how she suffered during the years". The applicant's counsel asked him to clarify where this conversation took place, but the first respondent did not respond to that inquiry.

That hearing was adjourned without a clarification of the first respondent's comments. The applicant's counsel followed it up by letter to the second respondent's counsel dated 27 June 2007. The letter was copied to the first respondent. It reads as follows:

"We refer to the arbitration hearing before Mr *Gabilo* on 26 June 2007.

As you will no doubt be aware, the arbitrator made some remarks indicating that he had granted audience to the claimant and heard certain evidence from the claimant outside the framework of a hearing. The writer sought an explanation as to how this had occurred and the arbitrator gave no response.

Our client is concerned that the arbitrator may have acted improperly as a result of which his impartiality may be in doubt. In this regard, the respondent is entitled to impeach the arbitrator and have the matter referred to another arbitrator.

Please can we have your client's explanation in this regard not later than 29 June 2007."

The second respondent's counsel did not respond within the stipulated period. The first respondent did not respond, even though the letter was copied to him. The applicant's counsel then wrote to the first respondent on 4 July 2007. The letter reads as follows:

"We refer to our letter of 27 June 2007 addressed to the claimant's legal practitioners and copied to you. We have not heard from the claimant's legal practitioners.

Our client has instructed us in the circumstances to address its request for your recusal as arbitrator in this matter on the grounds that the respondent entertains serious doubts as to your impartiality or independence as arbitrator. As indicated in our letter of 27 June 2007, the respondent believes that you have entertained representations from the claimant outside the framework of the arbitration hearing. When we requested that you explain the circumstances in which the claimant had made representations to you, you did not answer that question.

In the circumstances, the respondent seeks your recusal as arbitrator immediately. Accordingly you are to refer the matter to the Labour Officer who referred the matter to you for a fresh appointment of an arbitrator. Regrettably, should you not recuse yourself the respondent shall seek the intervention of the High

2009 (1) ZLR p346

Uchena J

Court"(emphasis added).

The first respondent did not respond to the challenge, but proceeded to make an award without first rejecting the challenge. The applicant thereafter applied to this court for an order terminating the first respondent's mandate to arbitrate, and ordering that fresh arbitration proceedings be held within a fortnight. The applicant is being represented by Mr Shoko, the Group Chief Executive of Trust Holdings Ltd. The applicant is a subsidiary of Trust Holdings. The first respondent did not oppose the application. The second respondent opposed the application, and raised two points in *limine*. She claimed that Mr Shoko does not have the applicant's authority to institute these proceedings, as the applicant's board of directors was dissolved in 2005, and could not have authorised him to institute this application. She also claimed that the applicant's application does not comply with the provisions of article 13 of the Schedule to the Arbitration Act [Chapter 7:15] (hereinafter called "the Act").

Locus Standi

Mr *Biti*, for the second respondent, submitted that the applicant did not pass a resolution authorizing Mr Shoko to file this application on its behalf. He argued that the resolution Mr Shoko relied on was passed by Trust Holdings Ltd, which described itself in the resolution as a holder of 60 per cent equity in the applicant. He submitted that the resolution was issued by the applicant's majority shareholder instead of the applicant's directors. This argument is supported by the resolution, which clearly states that the applicant's board was dissolved in 2005, pending the applicant's voluntary liquidation. This means the applicant does not have a board of directors with authority to resolve that Mr Shoko can represent it. When a company goes into voluntary liquidation and its board of directors is dissolved, its management and authority to act rests in its liquidator. Its shareholders have no authority to perform the functions of the dissolved board of directors.

Mr *Mundia*, for the applicant, conceded that Trust Holdings cannot pass resolutions on behalf of the applicant, but argued that Mr Shoko has always acted for the applicant, and can depose an affidavit on the basis of the knowledge he has about the labour dispute between the parties. My understanding of the second respondent's objection is not that the affidavit was deposed by an unqualified person, but that the proceedings were instituted by a person without *locus standi*. In para 2.1 of her opposing affidavit the second respondent said:

"I am aware that Gift Shoko has not been authorised by the applicant's board to bring these proceedings against myself. In fact I am aware that there is no valid board of the applicant that exists. Shoko thus acted without authority and

2009 (1) ZLR p347

Uchena J

therefore there is absolutely no basis and foundation of the present application."

It is therefore clear that the issue is Shoko's authority to institute these proceedings, not his authority to depose to an affidavit supporting the application. In other words, the second respondent is saying there is no valid application before the court. Mr *Mundia* submitted that Mr Shoko ⁸ represented the applicant in previous proceedings between the applicant and the second respondent. That does not clothe Mr Shoko with authority to institute proceedings on behalf of the applicant without a valid resolution of the applicant authorizing him to do so. I am therefore satisfied that Shoko does not have authority to institute these proceedings.

Compliance with Article 13 of the Act

^c Mr *Biti* also raised the issue of procedure, arguing that the applicant's application does not comply with article 13 of the Arbitration Act. He submitted that in terms of article 13(1), the parties should have agreed on the procedure to be used in challenging the arbitrator. He also submitted that the notice of challenge was defective, because no evidence was attached to it. ^d He therefore argued that the application does not comply with the procedure through which a challenge to the arbitrator's appointment can be brought to this court. He further submitted that the arbitrator has already made his award, and in the circumstances the applicant should have proceeded in terms of article 34 of the Act. He submitted that the applicant could not apply to this court in terms of article 13, because the parties had not agreed on the ^e procedure for challenging the arbitrator. Mr *Mundia*, for the applicant, argued that the application was properly made in terms of article 13, as failure to agree on the challenge procedure is not a bar to any challenge arising from what happens during the arbitral proceedings. He further submitted that the letter to the first respondent contains all the information which should be in a ^f statement of challenge and should therefore be accepted as a valid challenge to the arbitrator. Article 13 of the Act provides as follows:

"(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral ^g tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging ^h party may request, within thirty days after having received notice of the decision

Uchena J

rejecting the challenge, the High Court to decide on the challenge, which decision A shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award."

The wording of para (1) of article 13 favours Mr *Mundia's* interpretation. It states that the parties are free to agree on a procedure for challenging the arbitrator. It does not say that they have to. It further states that the provision B is subject to para (3) of this article. Article 13(3) mentions two procedures which can be used for challenging the arbitrator. They can use the agreed procedure or the procedure prescribed by para (2). Article 13(2) provides for a procedure to be followed if the parties do not agree on a procedure to be followed. It specifically states that "failing such agreement, a party C who intends to challenge an arbitrator shall ...". This means that para (2) procedure is an alternative procedure to be used if the parties do not agree on the procedure to be used. I would therefore agree with Mr *Mundia* that the application does not depend on whether or not the parties agreed on the challenge procedure. It depends, in my view, on whether or not the applicant correctly followed the procedure prescribed by para (2) of article 13. D

An analysis of article 13(2) reveals the requirements which should be complied with before a party can request this court to decide on a challenge. They are as follows:

1. The party who seeks to challenge the arbitrator must, within fifteen days of becoming aware of the reason for the challenge E
2. send to the tribunal or arbitrator a written statement
3. stating the reasons for the challenge.
4. The challenged arbitrator can withdraw from his office, or the other party can agree to the challenge; and
5. if the arbitrator does not withdraw, and the other party does not agree F with the challenge, then the arbitrator must decide on the challenge.

In terms of article 13(3) the rejection of the challenge by the arbitrator leads to the following:

1. The challenging party may, if he is not satisfied by the rejection G
2. within thirty days of the rejection request the High Court
3. to decide on the challenge.

While the challenge is pending in the High Court, the challenged arbitrator or tribunal can continue with the arbitral proceedings and make an award.

In this case, the arbitrator did not respond to the challenge, but proceeded to make an award without dealing with the challenge. In terms of article 13(2), H

Uchena J

A he was bound to decide on the challenge. Mr *Mundia* for the applicant argued that this entitles this court to hear the applicant's application. Mr *Biti*, for the second respondent, argued that, once the award is made, it can only be set aside by the High Court in terms of article 34(2)(b)(ii) of the Act.

As already indicated, the procedure under article 13(2) does not require the parties to first agree on the challenging procedure. The words "failing B such agreement" in article 13(2) means "in the absence of an agreement". The applicant's application cannot therefore be dismissed just because the parties had not agreed on the challenging procedure. The application must, however, comply with the alternative procedure under article 13(2) and (3), which requires the applicant within 15 days of becoming aware of the C circumstances on which the challenge is premised, to send a written statement to the tribunal in which the reasons for the challenge will be stated. Mr *Biti* for the second respondent submitted that the applicant's statement was not accompanied by reasons for the challenge. Mr *Mundia* submitted that the letter the applicant wrote to the arbitrator satisfies the requirements of article 13. I agree with Mr *Mundia*, as a reading of the article gives the impression D that what is required is a simple statement which informs the tribunal or arbitrator of the reasons why its or his recusal is being sought. If the intention was for the challenging party to submit an application accompanied by an affidavit in which the reasons for recusal would be stated, the legislature would have required the challenging party to apply for recusal instead of sending a

statement. The letter to the first respondent clearly states why his ^E recusal was being sought. It therefore satisfies the requirements of article 13. I am therefore satisfied that the applicant's application cannot be dismissed for failure to give separate reasons for the arbitrator's recusal.

On receipt of a challenge, the arbitrator can either withdraw from his office or decide on the challenge. The other party can agree to the challenge, in ^F which case the arbitrator cannot proceed with the arbitration proceedings. The tribunal or arbitrator cannot ignore the challenge and proceed with the arbitral proceedings as if its or his appointment has not been challenged. If the challenge is not successful, the challenging party must, within 30 days of receiving the arbitrator's determination on the challenge, request the High Court to decide the challenge.

^G In this case, the applicant sent a statement of his challenge to both the arbitrator and the other party within the stipulated period. The other party did not agree, and the arbitrator did not respond. Article 13(3) does not provide for an application to this court until after the arbitrator has given the challenging party notice of his decision rejecting the request to recuse ^H himself. This therefore means the applicant's application does not comply

2009 (1) ZLR p350

Uchena J

with the provisions of article 13(3). ^A

The arbitrator has already made an award which the applicant wants to be declared null and void because of the alleged impartiality. Article 13(2) and (3) permits the arbitrator to continue with the proceedings in spite of the challenge which he will have rejected and the challenging party's request that the High Court determines the challenge. In this case, he proceeded ^B without first rejecting the applicant's challenge. This was an irregularity on his part, as article 13(3) allows an arbitrator to continue with the proceedings *after* notifying the challenger of the rejection of the challenge. Mr *Mundia* submitted that the award should be set aside on the basis that it does not even deal with the challenge. I agree with him that the arbitrator was required to deal with the challenge before proceeding with the proceedings before ^C him, but the issue in this case is whether or not the applicant is properly before this court. This court can in terms of article 13(3) only decide on a challenge after its rejection by the arbitrator. In this case, the failure by the arbitrator to reject the challenge before making the award makes the article 13 procedure inapplicable, as this court can only be requested to intervene when ^D the challenge has been rejected.

I am therefore satisfied that Mr *Biti's* submission that the applicant is not properly before this court is correct. The applicant is, however, not without a remedy. Mr *Biti* correctly pointed out that in the circumstances of this case the applicant should have applied for the setting aside of the award in terms ^E of article 34(2)(b)(ii) of the Act. The applicant could ordinarily have taken the arbitrator's failure to decide on the challenge on review, but article 5 of the Act provides that "no court shall intervene except where so provided in this Model Law". This means this court's intervention in terms of article 13 must be strictly in compliance with the provisions of that article. The Act does not provide for review and article 34(1) provides that an application ^F to set aside the award is the only available remedy. Article 34(1) provides as follows:

"Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article."

This means in the circumstances of this case an application in terms of ^G article 34(1) is the only procedure through which the applicant can seek a remedy from this court.

Article 34(2)(b)(ii) provides for the setting aside of the award on the ground that it is contrary to the public policy of Zimbabwe. Article 34(5) defines the circumstances under which an award can be said to be contrary to the public policy of Zimbabwe. It provides as follows:" ^H

2009 (1) ZLR p351

Uchena J

^A For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if –

- (a) the making of the award was induced or effected by fraud or corruption, or
- (b) a breach of the rules of natural justice occurred in connection with the making of the award."

^B The applicant's grounds for applying for the recusal of the first respondent and the setting aside of his award is that he heard submissions from the second respondent outside the arbitral proceedings.

That, if proved, would be contrary to the rules of natural justice and entitle the applicant to the setting aside of the award in terms of article 34. I am therefore satisfied c that the applicant should in the circumstances of this case have applied for the setting aside of the award in terms of article 34(2)(b)(ii) of the Act. Its application in terms of article 13 of the Act must therefore be dismissed.

In the result, the applicant's application is dismissed with costs.

▯ *Gill Godlonton & Gerrans*, applicant's legal practitioners

Honey & Blanckenberg, second respondent's legal practitioners

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Document 48 of 52

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/SAI ENTERPRISES (PVT) LTD v GIRDLE ENTERPRISES (PVT) LTD 2009 (1) ZLR 352 (H)

SAI ENTERPRISES (PVT) LTD v GIRDLE ENTERPRISES (PVT) LTD 2009 (1) ZLR 352 (H)

2009 (1) ZLR p352

Citation	2009 (1) ZLR 352 (H)
Case No	Judgment No. HB-62-09
Court	High Court, Bulawayo
Judge	Ndou J
Heard	14 May 2009
Judgment	4 June 2009
Counsel	Ms <i>H M Moyo</i> , for the applicant P <i>Ncube</i> , with him Ms <i>E Sarimana</i> , for the respondent
Case Type	Application for rescission
Annotations	None
	Link to case annotations

Flynote

Practice and procedure – judgment – default judgment – rescission – application for – time limits – need for application to be heard and determined within 30 days of the date on which the applicant became ▯ aware of the judgment – need for condonation to be applied for

Headnote

In terms of r 63(1) of the High Court Rules 1971, a party against whom a default judgment has been given may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside. The making of an application for rescission of ▯ a default judgment occurs when the application is set down and heard, not merely when it is filed with Registrar of the court. Consequently, if an application for rescission of judgment is not heard

and determined within thirty days of the date on which the applicant had knowledge of the default judgment, the applicant must first seek an indulgence or ^F condonation before the application for rescission is heard, no matter that there is no practical way that such an application can be filed, heard and determined within a thirty day period and the delay is set down beyond the thirty day period is beyond the applicant's control.

Cases referred to

Dube & Anor v Zondo & Anor HB-28-09 ^G

Fisher v Commercial Union Assurance Co of SA Ltd 1977 (2) SA 499 (C)

Forestry Commission v Moyo 1997 (1) ZLR 254 (S)

Highline Motor Spares (1933) (Pvt) Ltd & Ors v Zimbank Corp Ltd 2002 (1) ZLR 514 (S)

Mlondiwa v Regional Director of Education (Midlands Province) & Anor HB-19-94 ^H

2009 (1) ZLR p353

Ndou J

Murwara v Valeta 1996 (1) ZLR 67 (S) ^A

Peters v Union & National South British Ins Co Ltd 1978 (2) SA (D)

Sibanda v Ntini 2002 (1) ZLR 264 (S)

Talbert v Yeoman Products (Pvt) Ltd S-111-99

^B *Theunissen v Payne* 1940 TPD 680

Tladi v Guardian National Ins 1992 (1) SA 76 (T)

Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd 1988 (2) ZLR 249 (S)

Legislation considered

^c High Court Rules 1971 (RGN 1047 of 1971), r 63(1)

Case information

Ms *H M Moyo*, for the applicant

P Ncube, with him Ms *E Sarimana*, for the respondent

Judgment

NDOU J: This is an application for rescission of judgment. The default ^D judgment was entered on 26 July 2007 in favour of the respondent. The applicant states that he became aware of the judgment on 31 July 2007. This application was filed on 16 August 2007. By 30 August 2007, the application had not been set down by the applicant. In fact, over a year and half later, the applicant had still not set down the application. Even this set down was ^E at the behest of the respondent. The respondent has raised a point *in limine* that the application is not properly before this court, in that it has not been heard and determined within 30 days of the default judgment being granted. The respondent is saying that the application should have been heard within 30 days of the date on which the applicant had knowledge of the default judgment or that an application for condonation of non-compliance with ^F r 63(1) has been made and granted. In other words, the point raised by the respondent is that the application for rescission has been made outside the 30 day period set under Order 9 r 63(1) High Court Rules 1971. The respondent's case is that the interpretation and impact of Order 9 r 63(1) was put to rest by the Supreme Court in *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1988 (2) ZLR 249 (S); *Sibanda v Ntini* 2002 (1) ZLR 264 (S) ^G and *Highline Motor Spares (1933) (Pvt) Ltd & Ors v Zimbank* 2002 (1) ZLR 514 (S). See also *Theunissen v Payne* 1940 TPD 680 at 685 and *Dube & Anor v Zondo & Anor* HB-28-09.

Ms *Moyo*, for the applicant, submitted that there is no need for an application for condonation. She reasoned that the respondent's argument is not in tandem ^H with the rules of the court which are peremptory and ought to be complied

2009 (1) ZLR p354

Ndou J

with by the applicant. It is argued that the Rules require that all applications ^A have to comply with Order 32, rr 226(1), 230, 231, 232 and 234. The pith and marrow of the argument are that there is no way an application of this kind can be filed, heard and determined within a 30 day period. In other words, the periods referred to in Order 32, *supra*, exceed 30 days. Further, such set down is the province of Deputy Registrar and the judge allocated the ^B application. In other words, it is argued that the delay in set down beyond the thirty day period is beyond the applicant's control. The applicant's counsel has put forward an appealing and impressive argument in this regard. But the Supreme Court had decided to follow the interpretation in *Theunissen v Payne supra* that the making of the application is when the application is set down and heard and not merely when it is filed with Registrar of the ^C Court: *Sibanda v Ntini supra* at 267C-D and *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd supra* at 251C-E. With this in mind, the law is now settled that if the application for rescission is not heard and determined within thirty days, the applicant must first seek an indulgence or condonation before the rescission is heard. This court is bound by the precedents set by the Supreme Court. Arguing against such clear decisions ^D of the Supreme Court is province of academics and not this court. Ms Moyo's submissions are in line with decisions in some South African cases: *Fisher v Commercial Union Assurance Co of SA Ltd* 1977 (2) SA 499 (C); *Peters v Union and National South British Insurance Co Ltd* 1978 (2) SA (D) and *Tladi v Guardian National Insurance* 1992 (1) SA 76 (T). These ^E cases preceded the above-mentioned Supreme Court cases. So our highest court in the land had access to these cases and were not persuaded to follow the reasoning therein. In light of the above, I find that the applicant has to apply for condonation before this application is heard. Without a substantive application for condonation, I cannot even indulge the applicant no matter how sympathetic I am: *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) ^F at 260; *Mlondiwa v Regional Director of Education (Midlands Province) & Anor* HB-19-94; *Talbert v Yeoman Products (Pvt) Ltd* S-111-99 and *Murwara v Valeta* 1996 (1) ZLR 67 (S).

In casu, this point *in limine* was taken as early as December 2007. Over one and half years later, the applicant has not applied for condonation. It is not ^G clear whether this was out of ignorance, arrogance or negligence. Be that as it may, there is no application for leave in terms of r 63. If the applicant was out of time by a short period, I would have considered a postponement as was done by the Supreme Court in *Murwara v Valeta supra*. But where a litigant does not seek indulgence for over one and half years without even explaining the cause of such delay, I feel a dismissal will be a judicious ^H

2009 (1) ZLR p355

Ndou J

^A exercise of my discretion: *Sibanda v Ntini supra*. Instead of pursuing a hopeless legal argument, the applicant should have strived to regularize the procedural flaws in its case. This cavalier approach calls for costs on an enhanced scale. There is no need to deal with other points raised.

Accordingly, the application is dismissed with costs on a legal practitioner ^B and client scale.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners

^C *Coghlan & Welsh*, respondent's legal practitioners

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Document 49 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/EBI ZIMBABWE (PVT) LTD v OLD MUTUAL UNIT TRUSTS (PVT) LTD & ANOR 2009 (1) ZLR 356 (H)

EBI ZIMBABWE (PVT) LTD v OLD MUTUAL UNIT TRUSTS (PVT) LTD & ANOR 2009 (1) ZLR 356 (H)

2009 (1) ZLR p356

Citation

2009 (1) ZLR 356 (H)

Case No	Judgment No. HH-55-09
Court	High Court, Harare
Judge	Patel J
Heard	19 March 2009
Judgment	9 June 2009
Counsel	<i>H Zhou</i> , for the applicant <i>R M Fitches</i> , for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Arbitration – *arbitrator – challenge to – procedure in High Court – court confined to same grounds of challenge presented to arbitrator – court not restricted to hearing same submissions as were presented to arbitrator* ^D – *prescription of right to challenge arbitrator – alleged misconduct continuous, extending over a period – prescription running from time when justifiable doubts are formed*

Headnote

An arbitrator may be challenged in terms of art 13(2) of the First Schedule to the Arbitration Act [Chapter 7:15]. If he rejects the challenge, ^Ethe challenging party may request the High Court to decide on the challenge. The High Court is confined to determining the challenge on the grounds presented to the arbitrator and cannot entertain any fresh ground of challenge. However, art 13(3) does not narrow the scrutiny of the court, when examining and ventilating the issues before it, to the ^Fsame submissions that were presented to the arbitrator, for a number of reasons. Firstly, although the challenge before the High Court may be likened to an appeal, it is not described as such and cannot therefore be regarded as an appeal *stricto sensu*. Even if it were to be so treated, it does not invariably follow that a party to an appeal cannot make fresh submissions on the grounds of appeal or the issues that constitute the ^Gsubject-matter of the appeal. Secondly, art 13(3) does not define or fetter the powers of the court as to the procedure to be followed. In practice, the procedure that is adopted in the referral of arbitral matters to the court is by way of ordinary application and there is nothing in the Rules of Court to preclude the filing of submissions by any party to the arbitration proceedings in question. Last, but not least, to construe art 13(3) in a ^H

2009 (1) ZLR p357

Patel J

^Aa restrictive manner would operate to constrict and offend the common law right to be heard which vests in every interested party – as embodied in the *audi alteram partem* rule – as well as the constitutional right to a fair hearing guaranteed by s 18(2) of the Constitution.

In terms of art 13(2) as read with art 12(2), the challenging party must raise his challenge within 15 days after becoming aware of any circumstance ^Bthat gives rise to justifiable doubts as to the arbitrator's impartiality or independence. The partiality of an arbitrator may not always manifest itself immediately as a single act committed on one specific occasion. More often than not, it will be evinced by a series of acts at different times or continuing conduct which, when pieced together, demonstrates ^Chis lack of impartiality. In this context, the aggrieved party may only be in a position to form justifiable doubts as to the arbitrator's impartiality towards the end of such continuing conduct rather than at its inception.

Cases cited

International Airport Authority of India v Bali & Anor [1988] LRC D (Comm) 583

Koh Bros Bldg & Civil Engineering Pvt Ltd v Scotts Development (Saraca) Pvt Ltd [2003] 3 LRC 111

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

Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor 1998 (2) ZLR 547 (H)

The Elissar [1984] 2 Lloyd's Rep 84

Legislation considered

Arbitration Act [Chapter 7:15] First Schedule (The Model Law) arts F 12 (2), 13(2)(3)

Constitution of Zimbabwe 1980 s 18(2)

Case information

H Zhou, for the applicant

R M Fitches, for the first respondent

Judgment

PATEL J: In May 2004 the applicant and the first respondent entered into a software licensing agreement. Following a dispute that arose between the parties in January 2006, the matter was referred to an arbitrator (the second respondent) for arbitration.

On 23 June 2008, the applicant challenged the impartiality of the arbitrator H in terms of Article 13(2) of the First Schedule to the Arbitration Act [Chapter

2009 (1) ZLR p358

Patel J

7:15] (the Model Law). On 28 June 2008, the arbitrator rejected this challenge A and his decision was communicated to the applicant on 3 July 2008. The challenge was then referred to this court for determination on the first of August 2008 in terms of art 13(3) of the Model Law.

The issues

The issues for determination in this matter are as follows: B

- (1) The nature of the challenge before this court.
- (2) Was the challenge before the arbitrator prescribed in terms of art 13(2)?
- (3) Did the arbitrator fail to act impartially *in casu* and, if so, is his conduct such as to warrant his removal as arbitrator? C

Challenge to continuation of arbitrator

Article 12 of the Model Law provides as follows:

“(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay D disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only E for reasons of which he becomes aware after the appointment has been made.”

Article 13 sets out the procedure for challenging an arbitrator in the following terms:

“(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator F shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral

tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under ^a the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the *High Court* to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.” ^h

2009 (1) ZLR p359

Patel J

A Nature of challenge before the court

Mr *Zhou*, for the applicant, submits that the arbitrator *in casu* decided the challenge before him without any substantive submissions having been made by the first respondent. He therefore contends that the latter is now estopped from making fresh submissions though its opposing papers before this court. ^b In other words, this court must determine the challenge in the same form as was presented to the arbitrator, viz. without the benefit of any submissions from the first respondent.

Article 13(3) enjoins the court “to decide on the challenge” referred to it by the challenging party, without elaborating the procedure to be followed. Be that as it may, I have no doubt that the court is confined to determining the ^c challenge on the *grounds of challenge* presented to the arbitrator and cannot entertain any fresh ground of challenge. However, I am not persuaded that art 13(3) narrows the scrutiny of the court, when examining and ventilating the issues before it, to the same submissions that were presented to the arbitrator.

I am not so persuaded, for several reasons. Firstly, although the challenge ^d before this court may be likened to an appeal, it is not described as such and cannot therefore be regarded as an appeal *stricto sensu*. Even if it were to be so treated, it does not invariably follow that a party to an appeal cannot make fresh submissions on the grounds of appeal or the issues that constitute the subject-matter of the appeal. Secondly, art 13(3) does not define or fetter the powers of the court as to the procedure to be followed. In practice, the ^e procedure that is adopted in the referral of arbitral matters to the court is by way of ordinary application and there is nothing in the Rules of Court to preclude the filing of submissions by any party to the arbitration proceedings in question. Last but not least, to construe art 13(3) in a restrictive manner would operate to constrict and offend the common law right to be heard ^f which vests in every interested party – as embodied in the *audi alteram partem* rule – as well as the constitutional right to a fair hearing guaranteed by s 18(2) of the Constitution. For all of these reasons, I am satisfied that the *procedure for challenge* before this court cannot be curtailed in the manner propounded by Mr *Zhou*.

Prescription of challenge before the arbitrator

^g The applicant *in casu* challenged the arbitrator on 23 June 2008. In this respect, Mr *Fitches*, for the first respondent, submits that the applicant was precluded from challenging any conduct of the arbitrator that occurred at any stage before the 15 days preceding the date of challenge. He contends that art 13(2) does not contemplate continuing conduct and that unless the ^h challenge is raised within 15 days of the specific act complained of it must

2009 (1) ZLR p360

Patel J

be treated as having prescribed and become technically otiose. ^a

As against this, Mr *Zhou* submits that the conduct giving rise to the challenge in the present case began on 30 May 2008 and continued until 9 June 2008. This continuing conduct displayed the arbitrator’s partiality and the challenge thereto was filed timeously on 23 June 2008, within the stipulated 15 day period. ^b

I fully concur with the stance taken by Mr *Zhou*. In terms of art 13(2) as read with art 12(2), the challenging party must raise his challenge within 15 days after becoming aware of any circumstance that gives rise to justifiable doubts as to the arbitrator’s impartiality or independence. In my view, the partiality of an arbitrator may not always manifest itself immediately as a single act committed on one specific occasion. More often than not, it will ^c be evinced by a series of acts at different

times or continuing conduct which when pieced together demonstrates his lack of impartiality. In this context, the aggrieved party may only be in a position to form justifiable doubts as to the arbitrator's impartiality towards the end of such continuing conduct rather than at its inception. ^D

The specific acts complained of *in casu* fall precisely into to the category of continuing conduct that I have described above. I accordingly take the view that the challenge before the arbitrator in this case was timeously lodged and has not prescribed as contended by Mr *Fitches*.

Impartiality of the arbitrator ^E

It is generally accepted that in evaluating bias or partiality on the part of an arbitrator the test to be applied is an objective one. See *The Elissar* [1984] 2 Lloyd's Rep 84 at 89, where Ackner LJ enunciated the test as follows:

"Do there exist grounds from which a reasonable person would think that there was a real likelihood that the arbitrator could not or would not fairly determine the relevant issue on the basis of the evidence and arguments to be adduced ^F before him."

In *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 275A, Korsah JA stated that:

"A common theme which runs through the authorities is, therefore, that the test to be applied is an objective one. One does not enquire into the mind of the person challenged to determine whether or not he was or would be actually ^G biased. Thus the character, professionalism, experience or ability as to make it unlikely, despite the existence of circumstances suggesting a possibility of bias arising out of some conflict of interest, that he would yield to infamy, do not fall for consideration."

In *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 (H) at 549-550, Smith J adopted the same objective approach: ^H

2009 (1) ZLR p361

Patel J

A "In an application for recusal, the test to be applied is not easily defined since decided cases are not entirely consistent, with some judges favouring the view that the test is whether, as a matter of fact, there is a real likelihood of bias, whilst others accepted a reasonable belief that a real likelihood of bias existed as being sufficient. To my mind, however, there is no real difference between the two approaches since, unless there were a real likelihood of bias, a reasonable or right-thinking man would not believe that there was such likelihood."

^B The twofold nature of the test to be applied was elaborated by Mukharji J in a decision of the Supreme Court of India in *International Airport Authority of India v Bali & Anor* [1988] LRC (Comm) 583 at 587h-588g:

"It is well said that once the arbitrator enters into an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative ^C of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but of what effect it might possibly have produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected by it, and was in reality just; the arbitrator must not do anything which is not in itself fair and impartial. ...

It is well settled that there must be a real likelihood of bias and not mere ^D suspicion of bias before the proceedings can be quashed on the ground that the person conducting the proceedings is disqualified by interest. ... There must be reasonableness in the apprehension of bias in the mind of the party. The purity of administration requires that the party to the proceedings should not have apprehension that the authority is biased and is likely to decide against the party. But we agree with the learned judge of the High Court that it is equally true that it is not every suspicion felt by a party which must lead to the conclusion ^E that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on the mere apprehension of any whimsical person."

Similarly, in a decision of the High Court of Singapore in *Koh Bros Building and Civil Engineering Pvt Ltd v Scotts Development (Saraca) Pvt Ltd* [2003] ^F 3 LRC 111 at 119-120, Prakash J observed as follows:

"No actual bias or partiality need be shown as long as the court is satisfied from the conduct of the arbitrator, either by his words, his action or inaction or his handling of the proceedings, that he displayed a real likelihood that he might not be able to act judicially."

The present challenge

^g Turning to the instant case, the conduct that the applicant complains of herein – and which falls within the time limit stipulated by art 13(2) of the Model Law – began towards the end of May 2008 and appears from various e-mail messages communicated by the arbitrator. More specifically, it is averred that:

- On 30 May, without first having heard the parties, he took the decision ^h not to recuse himself.

2009 (1) ZLR p362

Patel J

- On 3 June, he admitted to having communicated directly with the ^a applicant rather than its legal representative in the arbitration.
- On the same date, his response to the applicant's legal representative's earlier query regarding the application of the so-called Old Mutual Implied Rate was somewhat sarcastic and made in bad taste.
- On 3 June and again on 9 June, he unilaterally decided that if the additional ^b costs fixed by him were not paid, he would dismiss the applicant's defence and counter-claim.
- From 3-9 June, even though he had been advised that the applicant's legal representative would be out of the country until 9 June, he insisted on hearing argument on the question of additional costs on 11 June. ^c

The respondents dispute these allegations of impropriety and it is submitted on behalf of the arbitrator that:

- He declined to recuse himself, after having received written representations by e-mail from both parties, because this court had already dismissed the applicant's previous challenge and in order to reach finality without ^d further delays.
- In the context of the case, it was not partial or unfair for him to have communicated directly with the applicant in order to expedite the matter.
- There was nothing malicious or biased in his response concerning the Old Mutual Implied Rate, inasmuch as that rate had become part of ^e daily commercial dealings in this country.
- He recalculated the security for costs which the applicant had been ordered to pay by this court in Case No. HC 2597/07. He then invited the applicant, if it objected to the recalculation, to show cause why the security for costs should not be recalculated in the manner indicated and why the recalculated amount should not be paid by 11 June, and ^f failing which why the applicant's defence and counterclaim should not be dismissed.
- Having regard to the fact that the applicant's legal representative was away, he rescheduled the dates of arbitration to 16 to 19 June and fixed 11 June as the date for hearing the question of costs. These dates ^g were flexibly fixed in order to accommodate the applicant and its legal representative.

On balance, taking a broad view of all the allegations of misconduct and the explanations proffered by the respondents, I am inclined to agree with the respondents' submissions. It seems to me that the arbitrator did not act in any manner indicative of partiality or bias in favour of the first respondent ^h

2009 (1) ZLR p363

Patel J

^a and against the applicant. On the contrary, his robust approach in certain respects appears to have been necessitated by the dilatoriness of the applicant and its legal representative in bringing the matter to finality. I am of the view that his actions were not improper but generally designed to expedite the arbitral proceedings in accordance with his arbitral brief and, in particular, with the provisions of art 25(d) of the Model Law, which empowers him to ^b "give directions, with or without conditions, for the speedy determination of the claim".

In short, the applicant has failed to establish the existence of grounds from which a reasonable person would think that there was a real likelihood of bias and that the arbitrator could not or would not fairly determine the ^c issues before him. The applicant's challenge is flimsy and without any real substance. It cannot be sustained on the evidence before me. This application is accordingly dismissed with costs.

Mawere & Sibanda, applicant's legal practitioners

▷ *Scanlen & Holderness*, first respondent's legal practitioners

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Document 50 of 52

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/MATANDA (PVT) LTD v GOTORE MAKONI J 2009 (1) ZLR 364 (H)

MATANDA (PVT) LTD v GOTORE MAKONI J 2009 (1) ZLR 364 (H)

2009 (1) ZLR p364

Citation	2009 (1) ZLR 364 (H)
Case No	Judgment No. HH-94-09
Court	High Court, Harare
Judge	Makoni J
Heard	27 May 2009
Judgment	17 June 2009
Counsel	<i>N Chikomo</i> , for the applicant <i>E Jena</i> , for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Court – *contempt – failing to obey court order – need to show that person knew of court order – unless person was in court when order was pronounced, order must be served on him*

Headnote

The High Court granted a provisional order on 3 October 2007 in favour ▷ of the applicant. The respondent was not present in court when the order was handed down, but his legal practitioner was. The respondent failed to comply with the order. The applicant instituted proceedings for contempt of court. The respondent pleaded that he was not aware of the provisional order. ◻

Held, that in order for the conduct of a party to constitute contempt of court, such conduct must be wilful or intended and calculated to impair the dignity or reputation of the court. The conduct complained of must be in violation of an obligation imposed on such person by a court of competent jurisdiction to obey a court order until its discharge. It must be shown that the person against whom it is sought to apply the ◻ sanction of the law of contempt has sufficient notice of the terms of the judgment or order which it is alleged he has disobeyed. This necessarily demands that the terms of the order be expressed in clear unambiguous language and, in so far as possible, that the person should know with complete precision what it is he is required to do. This can be achieved ◻ if the defaulting party is served with the court order, unless he was present when the order was pronounced. It is not enough that his legal representative was present at that time.

Cases cited

Lindsay v Lindsay 1995 (1) ZLR 296 (S) ^H

2009 (1) ZLR p365

Makoni J

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

Scheelite King Mining Co (Pvt) Ltd v Mahachi 1998 (1) ZLR 173 (H)

Case information

N Chikomo, for the applicant

E Jena, for the respondent

Judgment

^B **MAKONI J:** On 3 October 2007, this court granted a provisional order in favour of the applicant. The litigants were not present but were represented by counsel. On 23 November 2007 the applicant instituted the present proceedings for contempt of court.

The applicant avers that the respondent has defied the provisional order. He ^C was legally represented when the order was granted. It is its belief that the provisional order was communicated to him or a copy of the order was sent to him. The respondent admits that the order was granted in the presence of his legal practitioner. He, however, avers that his legal practitioner advised him that he would be served with the order. Up to the time of filing his ^D opposing papers he had not been served with the court order.

It was submitted, on behalf of the applicant, that the conduct of the respondent was intended to, and indeed does, undermine the authority of this court. The court was urged to redeem its dignity, reputation and authority by imposing an appropriate penalty on the respondent. It was further submitted that, if the court were to accept the respondent's defence, it should still find him to be in ^E contempt of court. He has since been served with the order at the time that he was served with the present application. He has not purged his contempt. Contempt of court is continuous until it is purged by compliance. The court should therefore find him to be in contempt of court based on this fact.

It was submitted on behalf of the respondent that, in order for the conduct ^F of a party to constitute contempt of court, such conduct must be willful or intended and calculated to impair the dignity or reputation of the court. The conduct complained of must be in violation of an obligation imposed on such person by a court of competent jurisdiction to obey a court order until its discharge. The respondent was not served with the order. His conduct cannot be said to be unlawful, intentional and wilful.

^G The provisional order had a provision to the effect that leave was granted to the Deputy Sheriff to serve the provisional order upon the respondent. It is clear from the applicant's papers that no such service took place. In terms of r 42B(1)(a) of the High Court Rules, where service has been effected by the Sheriff or his deputy, proof of service shall be by return of service in Form ^H No. 5A or by endorsement on the process concerned. There is no such proof

2009 (1) ZLR p366

Makoni J

attached to the applicant's papers. The applicant advances the argument that ^A the respondent must have been aware of the terms of the provisional order as his legal practitioner was present when it was granted. This argument cannot succeed. As I have already alluded to, the provisional order had to be served on the respondent.

It appears that cases whereby parties institute contempt of court proceedings ^B where the order in issue has not been served are on the rise. There might be need to re-state the elementary requirement in relation to service of court orders. The need for sufficient notice of the terms of the order being put in issue cannot be over emphasized. This point was made by C J Miller *Contempt of Court* 2 ed p 423 when the learned author wrote:

"In all cases it must be shown that the person against whom it is sought to apply ^c the sanction of the law of contempt has sufficient notice of the terms of the judgment or order which it is alleged he has disobeyed".

The need for sufficient notice of the terms of the order becomes clearer when one looks at the essential elements in contempt proceedings. Gillespie J, in *Scheelite King Mining Co (Pvt) Ltd v Mahachi* 1998 (1) ZLR 173 (H), at ^d 177H-178A had this to say:

"Before holding a person to have been in contempt of court, it is necessary to be satisfied both that the order was not complied with and that the non-compliance was wilful on the part of the defaulting party."

See also *Lindsay v Lindsay* 1995 (1) ZLR 296 (S) at 299B.

For one to establish wilfulness, one must establish that the defaulting party ^e was fully aware of the terms of the court order and that he or she chose not to comply with the order. As C J Miller *op cit* puts it at p 424:

"In so far as possible that person should know with precision what it is he is required to do or to abstain from doing".

Chidyausiku CJ in *Minister of Lands & Ors v Commercial Farmers Union* ^f 2001 (2) ZLR 457 (S) made the same point and quoted from the same author at 453 to 424:

"Before a finding of contempt can be made, it is necessary to determine whether there has been a factual breach of an order or understanding on the part of the body or person brought before the court. This necessarily demands that the terms of the order be expressed in clear unambiguous language and, in so far ^g as possible, the person should know with complete precision what it is he is required to do".

This can be achieved if the defaulting party is served with the court order unless if he or she was present when the order was pronounced. *In casu*, the respondent was not present when the order was pronounced and was not served with the order as was ordered by the court. The applicant has not ^h

2009 (1) ZLR p367

Makoni J

A therefore established wilfulness on the part of the respondent.

The applicant further contends that the respondent should be found to be in contempt of court as he has now been served with the provisional order and has not purged his contempt. It is my view that, to date, the provisional order has not been served on the respondent. What was served on the respondent was the court application in this matter to which the provisional order was ^b attached as an annexure. That cannot constitute service of the order as is required by the provision of service in the order itself. In any event, the facts establishing contempt after the alleged service have not been placed before me. The respondent has not been given an opportunity to comment. The applicant's argument in that regard can therefore not succeed.

^c Accordingly, I make the following order:

- (1) The application is dismissed.
- (2) The applicant is to pay the respondent's costs.

Mhiribidi Ngarava & Moyo, applicant's legal practitioners

^d *C Mpame & Associates*, respondent's legal practitioners

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Document 51 of 52

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 1/BUE RANGES ESTATES (PVT) LTD v MUDUVIRI & ANOR 2009 (1) ZLR 368 (S)

BLUE RANGES ESTATES (PVT) LTD v MUDUVIRI & ANOR 2009 (1) ZLR 368 (S)

2009 (1) ZLR p368

Citation	2009 (1) ZLR 368 (S)
Case No	Judgment No. S-29-09
Court	Supreme Court. Harare
Judge	Malaba DCJ (in chambers)
Heard	20 May 2009
Judgment	16 June 2009
Counsel	<i>D P Drury</i> , for the applicant <i>G Mlotshwa</i> , for the first respondent No appearance for the second respondent
Case Type	Application to strike appeal off roll
Annotations	Link to case annotations

Flynote

Appeal – *Rules of Supreme Court* – departure from – discretion given to judge in terms of r 4 – cannot be used to give single judge jurisdiction which he would not otherwise have

Appeal – striking out – application for striking out made to single judge of D Supreme Court in chambers – judge in chambers not having jurisdiction to strike out appeal

Practice and procedure – order – nature of – when order is interlocutory or final – need to examine effect of order, not its form

Property and real rights – spoliation order – nature of – spoliation order E final in effect – cannot be granted unless clear right established in applicant's favour

Headnote

The applicant obtained a spoliation order from the High Court against the respondents, who filed a notice of appeal. The application for the spoliation order had been in the form of one seeking interim relief. F The notice of appeal was filed timeously and contained all the matters required in terms of r 29 of the Supreme Court Rules 1964 for a valid notice of appeal. The applicant applied to a judge of the Supreme Court, in chambers, for the notice of appeal to be struck out on the grounds that no appeal was pending before the Supreme Court, because the order G appealed against was an interlocutory one, and leave of the judge *a quo* or of a judge of the Supreme Court was required. The respondent argued that a judge in chambers had no jurisdiction to strike out an appeal for failure to comply with the Rules and that the application should have been a court application in terms of r 39 of the Rules. The respondent also argued that, although the High Court's order was interlocutory in H

2009 (1) ZLR p369

A form, it was final and definitive. The applicant argued that a judge in chambers constituted "the court" for the purposes of r 39 and, further, that r 4 gave the judge discretion to condone a departure from the Rules in the interests of justice.

Held, that a single judge of the Supreme Court sitting in chambers has no power, derived from any provision of the relevant statutes, to make an B order striking off the roll an appeal pending in the Supreme Court. Section 43(1) of the High Court Act [Chapter 7:06] provides that an appeal in any civil case shall lie to the Supreme Court from any judgment (which includes any order) of the High Court. The Supreme Court is the body endowed with the power to hear and determine the appeal. In terms of s 3 C of the Supreme Court Act [Chapter 7:13], three is the minimum number of judges required to duly constitute the Supreme Court when exercising its power to hear and determine an appeal. This effectively precludes a single judge sitting in chambers or in open

court from exercising the power conferred on the court under s 21 of the Act, which gives the court to hear and determine appeals in civil cases. It is for the Supreme Court ^D duly constituted to make a finding that no appeal lies to it against the order and to strike the appeal from the roll. An order striking the appeal off the roll could only be made following a finding on the nature of the order from which relief was being sought on appeal.

Held, further, that a judge cannot use the discretion conferred on him under ^E r 4 to direct a departure from a rule in order to assume jurisdiction which he does not have over a matter.

Rules of court are made under s 34 of the Act for the purpose of regulating proceedings of the Supreme Court and facilitate the proper dispatch by the court of its business. The rules cannot be used to usurp the court's jurisdiction under s 21 of the Act.

Held, further, that to determine whether the order was interlocutory or final, ^F one has to look at the nature of the order and its effect on the issues or cause of action between the parties, not at its form. An order is final and definitive when it has the effect of a final determination on the issues between the parties in respect to which relief is sought from the court. When the applicant made the application for the order to the High Court, it placed three issues of fact before the court. All these facts in ^G issue had to be determined in favour of the applicant for the spoliation order to have been made in the applicant's favour. A clear right in the applicant to be restored to the possession of the property had to have been established. A spoliation order cannot be granted on evidence of a *prima facie* right only. Once the order was made and fully executed it ^H was discharged. Accordingly, the first respondent had the right to appeal

2009 (1) ZLR p370

Malaba DCJ

to the Supreme Court against the spoliation order without first obtaining ^A the leave of the judge.

Cases referred to

Chikafu v Dodhill (Pvt) Ltd & Ors HH-41-09

Croc Ostrich Breeders of Zimbabwe v Best of Zimbabwe Lodgers (Pvt) B Ltd S-13-99

Mankowitz v Lowenthal 1982 (3) SA 758 (A)

Nienaber v Stuckey 1946 AD 1049

Nyikadzino v Asher & Ors 2009 (1) ZLR 174 (H)

Pretoria Racing Club v van Pietersen 1907 TS 687 ^C

Legislation considered

High Court Act [*Chapter 7:06*], s 43(1)

Supreme Court Act [*Chapter 7:13*], ss 3 and 21

Supreme Court Rules 1964 (RGN 380 of 1964), rr 3, 4, 29, 39, 41 ^D

Case information

D P Drury, for the applicant

G Mlotshwa, for the first respondent

No appearance for the second respondent

Judgment

MALABA DCJ: On 9 March 2009 the High Court made a spoliation order ^E for the restoration of peaceful and undisturbed possession of Twyford Estate in Chegutu to the applicant, at the same time directing the first respondent and all those claiming possession of the property through him to vacate the farm forthwith failing which the Deputy Sheriff be authorized to remove them. The spoliation order was issued in the form of a provisional order.

It provided as follows:

"TERMS OF THE ORDER MADE ^F

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

1. The applicant's right to quiet undisturbed, possession of Twyford Estate Chegutu district as further particularized in the High Court orders annexed to *g* this application as Annexures '2' and '3' and all movables thereon including livestock (hereinafter called "the property") be and is hereby confirmed. That it is further declared that such right shall continue to subsist until such time as the applicants – should it become necessary or expedient – are lawfully evicted from the property through a competent order of court having final effect.
- 2 It be and is hereby declared that the conduct of the second respondent and *h*

2009 (1) ZLR p371

Malaba DCJ

A all other persons acting in common purpose or association with him on or about the property from 6 February 2009 until their removal, resulting in dispossession of applicants from their property is unlawful for want of compliance with due process to obtain vacant possession of the property and accordingly constitutes an unlawful spoliation of applicants' property.

3. Respondents pay the costs of this application jointly and severally, the one *B* paying the other to be absolved.

INTERIM RELIEF

That pending determination of this matter the applicants are granted the following relief:

- (a) It be and is hereby ordered that the *status quo ante* to applicants' possession control and occupation of Twyford Estate in the district of Chegutu prior *c* to second respondent and all other persons acting through him summarily occupying the property on 6 February 2009 be and is hereby restored.
- (b) The second respondent and all other persons claiming occupation and possession of the property and/or all other persons not being representatives, employees or invitees of applicants are directed to forthwith vacate the property removing all movable property that may have been introduced *D* by them onto the property.
- (c) To the extent that it becomes necessary or expedient, the Deputy Sheriff is hereby authorized and empowered to attend to the removal of the second respondent and all other persons acting through him from the property so that the provisions of this order are executed and implemented in full."

It is common cause that the order made by the learned judge in the form of *E* interim relief is a spoliation order. On 11 March 2009 the first respondent, who was the second respondent to the application, appealed to the Supreme Court against the order. The notice of appeal contained all the matters required under *r* 29 of the Rules of the Supreme Court 1964 (RGN 380 of 1964) ("the Rules") for a valid notice of appeal. It stated that the order from which relief *F* was being sought was a final and definitive order.

On 22 April the applicant made an application to a single Judge of the Supreme Court sitting in chambers for an order striking the appeal off the roll on the ground that, in terms of *s* 43(2)(d) of the High Court Act [*Chapter 7:06*] ("the High Court Act"), the order made by the learned judge was an interlocutory order in respect to which no appeal lay to the Supreme Court without the *G* leave of the judge who made the order or, if that was refused, without the leave of a judge of the Supreme Court. Leave of the learned judge had not been sought before the appeal was noted. The contention was that no appeal was pending before the Supreme Court.

The first respondent opposed the application on two grounds. The first point *H* taken *in limine* was that a single judge of the Supreme Court sitting in chambers

2009 (1) ZLR p372

Malaba DCJ

has no power to grant the relief sought by the applicant. The contention *A* was that an appeal, the noting of which complied with the requirements of the rules, is pending hearing by the Supreme Court until "the court", in the exercise of its jurisdiction, decides that in terms of the enactment creating the right of appeal no appeal lies against the order from which relief is sought.

The first respondent said that if the applicant intended to have the appeal *B* struck off the roll it should have applied to the Supreme Court for the relief on a court application as required under *r* 39. It could also have raised the matter by way of a preliminary objection to the exercise by the court of its jurisdiction to hear the appeal in terms of *r* 41 of the Rules.

Rule 39 provides that:

"Subject to the provisions of rules 31, 36, 37 and 38, applications shall be by court c application signed by the applicant or his legal representative and accompanied by an affidavit setting out any facts which are relied upon."

Rules 31, 36, 37 and 38 relate to matters in respect to which it is specifically provided that relief can be sought by application to a judge of the Supreme Court sitting in chambers or open court. Striking an appeal off the roll is not d one of the matters provided for under any of these rules.

Rule 41 provides that:

" A party to an appeal who intends to rely on a preliminary objection to any proceedings or to the use of any document shall give notice in writing of the objection to the registrar and to the opposite party. If the objection is to be e taken at the hearing of an appeal three copies of the notice shall be given to the registrar."

The second point taken by the first respondent on the application was on the merits. He averred that the order made by the learned judge was a final and definitive order, despite the fact that it is interlocutory in form. He said that, because of the nature of the order, an appeal lay to the Supreme Court f in terms of s 43(1) of the High Court Act without the leave of the judge who granted the order.

In reply to the point *in limine*, the applicant contended that a judge of the Supreme Court sitting in chambers constituted "the court" with power to grant the relief sought. On the allegation that there was non-compliance with g r 39 or r 41, the applicant said that r 4 of the Rules gives the judge discretion to condone non-compliance with any rule of court if it is in the interests of justice to do so. The argument was that I should exercise the discretion under r 4 to condone applicant's failure to make an application to court in terms of r 39 for the relief it sought on the application to a judge in chambers.

The argument was that it was in the interests of justice that I hear and h

2009 (1) ZLR p373

Malaba DCJ

A determine the application. A copy of an unspeaking order made by the late Muchechetere JA in chambers on 26 January 1999 in *Croc Ostrich Breeders of Zimbabwe v Best of Zimbabwe Lodgers (Pvt) Ltd* S-13-99 was produced to support the proposition that a single judge of the Supreme Court, sitting in chambers, has power to grant an order striking an appeal off the roll. The order declared that the notice of appeal filed by the respondent on 20 November b 1998 in the Supreme Court was invalid for want of the appellant thereto having applied for and been granted leave to appeal against the judgment of the High Court in Case No. HC 7118/98, as provided in s 43(2)(d) of the High Court Act [Chapter 7:06].

On the second point raised by the first respondent, the applicant persisted in c the contention that the order made by the learned judge was interlocutory. In support of the contention, reference was made to decisions of the High Court in *Chikafu v Dodhill (Pvt) Ltd & Ors* HH-41-09 and *Nyikadzino v Asher & Ors* 2009 (1) ZLR 174 (H). In *Chikafu supra* Bere J made a spoliation order in the form of a provisional order couched in terms similar to those used in the provisional order made in this case. The applicant, who was aggrieved by d the order, applied to the learned judge for leave to appeal, believing that the order was interlocutory. The learned judge found as a fact that he had made a spoliation order. He held that the order was interlocutory and refused leave to appeal on the ground that there were no prospects of success on appeal.

In *Nyikadzino v Asher supra* a spoliation order was also made in the form e of a provisional order the terms of which were also similar to those used in this case. The applicant, who was also aggrieved by the order, appealed to the Supreme Court. The respondent nonetheless instructed the Deputy Sheriff to execute the order, on the advice of its legal practitioners that the order was interlocutory and as no leave had been sought and obtained from the judge who granted it, no appeal lay to the Supreme Court for an order f staying execution of the order pending appeal.

The learned Judge President heard the opposed application. She found as a fact that the order made "was a spoliation order, simply restoring possession of the farm to the first respondent without going into the merits regarding lawfulness or otherwise of such possession". She went on to hold that a g spoliation order granted in the form of an interim relief was an interlocutory order not appealable without the leave of the judge who made the order or, if that has been refused, without

the leave of a Judge of the Supreme Court. The learned Judge President dismissed the application after saying that:

"A provisional order granted under the rules is always subject to confirmation or discharge before it becomes final. Confirmation on discharge is in open court ^h and is on a balance of probabilities. In a provisional order, the power of the

2009 (1) ZLR p374

Malaba DCJ

court to vary, discharge or confirm its earlier decision is re-affirmed in that it ^A calls upon the respondent to show cause why the provisional order may not be confirmed.

It is because of the above attributes of a provisional order that I am of the view that orders granted by this court in the form of a provisional order, can hardly be final in their effect."

I now turn to determine the issues raised in the application. On the first point ^B, I agree with Mr *Mlotshwa* that a single judge of the Supreme Court sitting in chambers has no power, derived from any provision of the relevant statutes, to make an order striking an appeal pending in the Supreme Court off the roll. The answer to the question whether a single judge sitting in chambers has power to hear and determine an application for an order striking an appeal ^C off the roll lies in the relevant provisions of the statute in terms of which the Supreme Court was created and the rules regulating its proceedings. It is also necessary to take into account provisions of the enactments by which the right of access to the Supreme Court on appeal is given.

Section 43(1) of the High Court Act provides that, subject to the exceptions specified thereunder, an appeal in any civil case shall lie to the Supreme ^D Court from any judgment (which includes an order) of the High Court. The right of appeal lies to the Supreme Court which is the body endowed with the power to hear and determine the appeal.

The Supreme Court was created by s 80(1) of the Constitution as a final court of appeal for Zimbabwe, without original jurisdiction, except when ^E constituted as a constitutional court to hear and determine applications under s 24(1) of the Constitution alleging violation of the declaration of rights. The Supreme Court consists of the Chief Justice, the Deputy Chief Justice, such other judges of the Supreme Court, being not less than two, as the President may deem necessary and such other judges as have been appointed acting ^F judges of the Supreme Court.

As a court of appeal, the jurisdiction of the Supreme Court, exercised by the judges of whom it consists, is to hear and determine appeals which in terms of the enactments granting the rights of appeal lie to it. Jurisdiction is conferred on the Supreme Court in any civil case by s 21 of the Supreme Court Act [*Chapter 7:13*] ("the Act") which provides that: ^G

"(1) The Supreme Court shall have jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which in terms of any other enactment, an appeal lies to the Supreme Court."

There is a minimum number of judges required to duly constitute the Supreme Court when exercising its power to hear and determine an appeal. It shall be properly constituted for the purpose of exercising its jurisdiction before not ^H

2009 (1) ZLR p375

Malaba DCJ

^A less than three judges sitting at the fixed time and place with the assistance of its appropriate officers, such as legal practitioners. That is clear from the provisions of s 3 of the Act which state that:

"For the purpose of exercising its jurisdiction in any matter, the Supreme Court shall be duly constituted if it consists of not less than three judges."

^B A court of law will not entertain proceedings such as an appeal unless it is satisfied that it is competent to do so and that the proceedings have been instituted in the proper form. In providing that, for the purpose of exercising its jurisdiction over any matter, the Supreme Court shall be duly constituted if it consists of no less than three judges, s 3 of the Act effectively precludes a single judge sitting in chambers or open court from exercising the power ^C conferred on the court under s 21.

The words "any matter" in s 3 of the Act include the question whether the terms of the enactment, giving the right of appeal from a particular court, limit the power of the Supreme Court to hear the

appeal in respect of the order from which relief is sought by the aggrieved party. It is for the Supreme Court, duly constituted, to make a finding that no appeal lies to it against the order and strike the appeal from the roll. As a single judge of the Supreme Court cannot determine the matter, he or she cannot make the order striking an appeal off the roll. If the appellant intended to have a decision made as to whether the order from which relief was sought by the first respondent was appealable without the leave of the judge, it should have approached the Supreme Court by way of a court application as required by r 39. It could also have raised the matter by way of a preliminary objection to the exercise of jurisdiction by the court.

In *Pretoria Racing Club v van Pietersen* 1907 TS 687 the respondent's legal practitioners took the point that no appeal lay to the Transvaal Provincial Division in the case because the spoliation order made by the judge was, in terms of s 22 of Proclamation 14 of 1902, an interlocutory order not appealable without the leave of the judge who made it. The full court, consisting of Innes CJ and Smith and Curlewis JJ, accepted that it was for the court in which the appeal was noted to decide on the facts of each case what the nature of a particular order is in order to determine whether it fell within the category of final or interlocutory orders. At p 493 Smith J, writing for the full court, said:

"The point, in my opinion would have been more properly raised as preliminary to the hearing of this appeal when a decision upon it would have been necessary."

It is clear that as the question would have turned on the construction of the terms of the enactment creating the right of appeal, which in this case

2009 (1) ZLR p376

Malaba DCJ

is s 43(1) read with s 43(2)(d) of the High Court Act, it would have been a matter within the competence of the Supreme Court to decide in terms of s 21 of the Act. The order striking the appeal off the roll could only be made following a finding on the nature of the order from which relief was being sought on appeal. The order made by the late Muchecheere JA in the *Croc Ostrich Breeders* case *supra* is of no assistance in the determination of the question raised by this application. It is an unspeaking order which does not disclose the facts on which it was based. It states, on the face of it, that it was made in a chamber application in terms of r 39 of the Supreme Court Rules. Rule 39 would not permit of an application for that relief to be made to a single judge sitting in chambers. The order simply declared that the notice of appeal filed by the respondent on 20 November 1998 in the Supreme Court was invalid for want of the appellant thereto having applied for and granted leave to appeal against the judgment of the High Court as provided in s 43(2)(d) of the High Court Act [Chapter 7:06]. It did not strike the appeal off the roll. One gets the impression that it may have been common cause that the order from which relief had been sought on appeal was an interlocutory order.

Mr Mlotshwa argued that a judge cannot use the discretion conferred on him or her under r 4 of the Rules to direct a departure from a rule in order to assume jurisdiction which he or she does not have over a matter. I agree. Rules of court are made under s 34 of the Act for the purpose of regulating proceedings of the Supreme Court and facilitate the proper dispatch by the court of its business. The rules cannot be used to usurp the court's jurisdiction under s 21 of the Act. Rule 4 of the Rules is not applicable to the facts of this case.

I would accordingly dismiss the application on the point *in limine* alone. Just in case I am wrong in the conclusion on that point, I have decided to express my views on the question whether the order made by the learned judge is an interlocutory order not appealable in terms of s 43(2)(d) of the High Court Act without the leave of the judge who made it.

To determine the matter one has to look at the nature of the order and its effect on the issues or cause of action between the parties and not its form. An order is final and definitive because it has the effect of a final determination on the issues between the parties in respect to which relief is sought from the court. An order for discovery or extension of time within which to appeal, for example, is final in form but interlocutory in nature. The reason is that it does not have the effect of determining the issues or cause of action between the parties.

2009 (1) ZLR p377

Malaba DCJ

A In this case, it was common cause that the order made by the learned judge was a spoliation order. When the applicant made the application for the order to the High Court, it placed three

issues of fact before it for determination. The first was that it was in peaceful and undisturbed possession of the property at the time the first respondent appeared on the scene. The second was that the first respondent deprived it of such possession unlawfully (without due ^B legal process) and without its consent. In other words, the first respondent arrogated to himself the right to take property out of the possession of the applicant. The third was that it was entitled to be restored to the possession of the farm.

All these facts in issue had to be determined in favour of the applicant for ^C the spoliation order to have been made in applicant's favour. The issue between the parties was therefore whether there was spoliation. By making the spoliation order the learned judge confirmed that, on the affidavit evidence placed before her, she found that the three elements of spoliation had been established. The spoliation order was the authority for the restoration of the applicant to the possession of the property.

^D The finding of the fact in issue was a final and definitive determination of the fact in question. There would have been no other final determination of the issue of spoliation on the return day. A clear right in the applicant to be restored to the possession of the property would have been established. A spoliation order cannot be granted on evidence of a *prima facie* right.

^E If the learned judge was not satisfied or was somehow doubtful that the affidavit evidence established a clear right in the applicant to be restored to the possession of the property, she should not have made the spoliation order. Once the order was made and fully executed, it was discharged. There would have been no order to discharge on the return day. The fact that the order was in the form of an interim relief is irrelevant to the consideration of ^F the question whether it is final or interlocutory. The issue of an order in the form in which it was applied for does not make the order itself a provisional order. For an order to have the effects of an interim relief it must be granted in aid of, and as ancillary to the main relief which may be available to the applicant on final determination of his or her rights in the proceeding.

^G It has been the realization of the fact that a spoliation order disposes of the issue or portion thereof between the parties that authorities say that it is a final and definitive order. Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed state at p 1064 that:

"A *mandament van spolie* is a final order although it is frequently followed by further proceedings between the parties concerning their rights to the property in ^H question. The only issue in the spoliation application is whether there has been

2009 (1) ZLR p378

Malaba DCJ

a spoliation. The order that the property be restored finally settles that issue as ^A between the parties."

In *Pretoria Racing Club supra*, the contention was that the spoliation order from which relief was sought on appeal was an interlocutory order not appealable without the leave of the judge who made it. It was also argued that to allow an appeal from a spoliation order would render useless the remedy intended to be granted to the person despoiled.

Disposing of the argument, Smith J, writing for the full bench of the Transvaal Provincial Division, said at p 697:

"In order to decide whether such an order is final or not I think the test must be arrived at by considering what the object of the proceedings is as a matter of substance. See the judgment of Romer LJ in *Re Herbert Reeves & Co* [1902] 1 Ch 29.

Now the substantial matter in dispute in the present application was the right of the respondent to the present possession of certain property: if an act of spoliation was established then his right was clear. That was the matter and the only matter decided by the learned judge, the consideration that legal proceedings might be subsequently instituted to test whether the possession could be legally sustained appears to me to be foreign to the question at issue, and the order made was in my opinion a final order within the meaning of the Rules of Court.

We were pressed on behalf of the respondent to say that the order was interlocutory from a consideration of the consequences which would follow if an appeal from it was allowed. It was pointed out that if an appeal from a spoliation order is allowed the result will be to keep the matter in suspense so long that the remedy may become useless. With regard to this argument I would say, in the first place, that if the order is in its nature a final order the court would not hold it to be otherwise merely because its execution might be stayed, and the remedy granted by it be delayed."

Nienaber v Stuckey 1946 AD 1049 is authority for the principle that the right to the restoration of possession of the property must be established as a clear right and not a *prima facie* right before a spoliation order can be made. The right must not be open to doubt. At p 1053-4 Greenberg JA said:

“The learned judge in the court below followed what was said by Bristowe J in *Burnham v Neumeyer* 1917 TPD 630 at p 633, viz: ‘Where the applicant asks for a spoliation order he must make out not only a *prima facie* case, but he must prove the facts necessary to justify a final order – that is, that the things alleged to have been spoliated were in his possession and that they were removed from his possession forcibly or wrongfully or against his consent.’

I agree with what was there said as to the cogency of the proof required. Although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the *status quo* be restored, it is to that extent a final order and the same amount of proof is required as for the granting of a final interdict and not

2009 (1) ZLR p379

Malaba DCJ

a temporary interdict.”

The last case I want to refer to on the subject is *Mankowitz v Lowenthal* 1982 (3) SA 758 (A). When dealing with the question whether the court *a quo* was correct in *awarding* costs to the party in whose favour a spoliation order was made, Jansen JA adopted with approval the following statement of law at 767G-H:

“Now a spoliation order is a final determination of the immediate right to possession. It may not resolve the ultimate rights of the parties but it is the last word on the restoration of possession *ante omnia*. An application for spoliation is thus not an interlocutory application and, save in special circumstances, the costs should follow the event, and should not be made to depend on the outcome of some other action or application, even if such concerns the ultimate rights of the parties to the property or thing in dispute.”

It is clear from the authorities that Bere J in *Chikafu v Dodhill (Pvt) Ltd* and Makarau JP in *Nyikadzino v Asher supra* used the wrong test of considering the form of the order to determine whether it is final and definitive or interlocutory. Many orders which are final in form are in fact interlocutory whilst some which are interlocutory in form are in fact final and definitive orders. The test is whether the order made is of such a nature that it has the effect of finally determining the issue or cause of action between the parties such that it is not a subject of any subsequent confirmation or discharge. In this case, the first respondent had the right to appeal to the Supreme Court against the spoliation order made by the learned judge on 9 March 2009 without first obtaining the leave of the judge.

The application is accordingly dismissed with costs.

Gollop & Blank, applicant’s legal practitioners

Antonio, Mlotshwa & Co, first respondent’s legal practitioners

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Document 52 of 52

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GUWA & ANOR v WILLOUGHBY’S INVESTMENTS (PVT) LTD 2009 (1) ZLR 380 (S)

2009 (1) ZLR p380

Citation	2009 (1) ZLR 380 (S)
Case No	Judgment No. S-31-09
Court	Supreme Court, Harare

Judge	Garwe JA (in chambers)
Heard	16 June 2009
Judgment	24 June 2009
Counsel	<i>K Gama</i> , for the applicants <i>T Mpofu</i> , for the respondent
Case Type	Application for declaratory order
Annotations	Link to case annotations

Flynote

Court – *Supreme Court – powers – declaratory order – court not empowered to determine application for such order*

Practice and procedure – *declaratory order – application for such order made to Supreme Court – court having no jurisdiction to determine application*

Headnote

The applicants sought an order from the Supreme Court, declaring that the notice of appeal filed by the respondents was a nullity, the notice having been filed out of time and not having specified whether the whole or part ^ε of the judgment of the court *a quo* was being appealed against.

Held, that there was no doubt that the notice was null and void, but the Supreme Court, as a creature of statute, derives its jurisdiction specifically from the Supreme Court Act [*Chapter 7:13*] and other legislative provisions. Although it is the highest court in the land, its powers are regulated strictly by statute. It is not a court of first instance, having no original ^ϕ jurisdiction. It has only appellate jurisdiction, since it was created by statute purely as a court of appeal. Nowhere in the Act or in the Rules of the Court is the Supreme Court given jurisdiction to entertain, in the first instance, an application for a *declaratur*. Except where specifically empowered, the Supreme Court has no jurisdiction to hear or determine any matter and may only exercise powers in respect of an appeal in ^g terms of the provisions of the Act and the Rules. The High Court, on the other hand, has jurisdiction to hear all matters except where limitations are imposed by law. In other words, whilst the Supreme Court may do nothing that the law does not permit, the High Court may do anything that the law does not forbid. Accordingly, the application should have been filed in the High Court. ^h

2009 (1) ZLR p381

Garwe JA

Cases referred to ^A

Jensen v Avacalos 1993 (1) ZLR 216 (S)

Legislation considered

Constitution of Zimbabwe 1980, s 80

High Court Act [*Chapter 7:06*], s 14

^B Supreme Court Act [*Chapter 7:13*], ss 9, 21 and 25

Case information

K Gama, for the applicants

T Mpofu, for the respondent

Judgment

c **GARWE JA:** In this application, the applicants seek an order declaring the notice of appeal filed by the respondent with the Registrar of the Supreme Court to be null and void.

The facts giving rise to this application are common cause. On 29 September 2008 the applicants filed a court application in the High Court. The respondent d in this matter was also the respondent in that matter. The application was heard by the High Court on 21 January 2009 and judgment delivered the following day i.e. 22 January 2009. On 17 February 2009, well outside the fifteen day period within which an appeal can be noted, the applicants filed with the Registrar of the Supreme Court a notice of appeal. The notice of appeal did not state whether the appeal was against the whole or part only e of the judgment appealed against.

The applicants have now applied to me in chambers for an order declaring the notice to be null and void. The respondent has in its papers opposed the relief sought. At the hearing of this matter in chambers, the respondent conceded that the notice of appeal did not comply with the rules of this court f and was therefore null and void.

There can be no doubt that the notice of appeal is null and void. Firstly, as has been observed, it did not specify whether the whole or part only of the judgment was being appealed against. Secondly, the notice of appeal was filed out of time and no condonation for the late filing of the notice of appeal or for an extension of time within which to appeal had been sought and granted.

g In *Jensen v Avacalos* 1993 (1) ZLR 216 (S) this court had occasion to consider the effect of non-compliance with, *inter alia*, r 29(1)(c) of the rules of this court, which requires that a notice of appeal shall state whether the whole or part only of the judgment is appealed against. At p 220 Korsah JA remarked that:

h "... a notice of appeal which does not comply with the rules is fatally defective

2009 (1) ZLR p382

Garwe JA

and invalid. That is to say, it is a nullity. It is not only bad but incurably bad, a and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs: *de Jager v Diner & Anor* 1957 (3) SA 567 (A) at 574C-D.

In *Hattingh v Pienaar* 1977 (2) SA 182 (O) 182 at 183, Kloppe JP held that a fatally defective compliance with the rules regarding the filing of appeals cannot b be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of Lord Denning in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I, 'every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay c there. It will collapse.'"

Clearly therefore the notice of appeal filed with the Registrar is a nullity. There is therefore no notice of appeal before the Supreme Court.

The interesting point of law that now arises is whether in these circumstances a judge of this court has the jurisdiction to declare the notice of appeal null d and void. During submissions, Mr *Gama* for the applicants indicated that the Registrar had intimated that, unless an order to the contrary was received, he would continue to regard the notice of appeal as valid. For this reason the applicants have made this chamber application seeking a *declaratur* that the notice of appeal is null and void.

Whilst the applicants may well be entitled to such a declaration, I am of the e view that the Supreme Court does not have the jurisdiction to make such a declaration in the first instance.

In terms of s 80 of the Constitution of Zimbabwe, both the Supreme Court and High Court shall have jurisdiction and powers as may be conferred upon them by or in terms of the Constitution or any Act of Parliament. f

The Supreme Court Act [*Chapter 7:13*] has in ss 9 and 21 provided that the Supreme Court shall have jurisdiction to hear and determine an appeal in any criminal or civil case from the judgment of any court or tribunal and that unless provision to the contrary is made in any other enactment, the Supreme Court shall hear and determine and exercise powers in respect of g an appeal in accordance with the Act.

It is clear from these provisions that the Supreme Court is a creature of statute and that it derives its jurisdiction specifically from the Supreme Court Act and other legislative provisions. In other

words, although it is the highest court in the land, its powers are regulated strictly by statute. It is not a court of first instance. It has no original jurisdiction but only appellate, since it ^H

2009 (1) ZLR p383

Garwe JA

A was created by statute purely as a court of appeal.

Nowhere in the Supreme Court Act nor in the Rules of the Court is the Supreme Court given jurisdiction to entertain, in the first instance, an application for a *declaratur*. Whilst, in terms of s 25 of the Supreme Court Act, every judge of the Supreme Court shall have the same review power and authority as are ^B vested in the High Court to review proceedings, no person has the right to institute any review in the first instance before the Supreme Court.

The High Court, however, is different from the Supreme Court in that it has, in terms of the High Court Act [*Chapter 7:06*] full original civil and criminal jurisdiction over all persons and over all matters within Zimbabwe, subject only to limitations placed either by the Act itself or by any other law. In ^C terms of s 14 of the High Court Act, the High Court may inquire into and determine any existing, future or contingent right or obligation, including the granting of a *declaratur*.

In terms of jurisdiction, the distinction between the Supreme Court and the High Court may be summarized as follows. Except where specifically ^D empowered, the Supreme Court has no jurisdiction to hear or determine any matter and may only exercise powers in respect of an appeal in terms of the provisions of the Act and Rules of the Court. The High Court, on the other hand, has the jurisdiction to hear all matters except where limitations are imposed by law. In other words, whilst the Supreme Court may do nothing that the law does not permit, the High Court may do anything that the law ^E does not forbid.

The necessary corollary to the above is that a Judge of the Supreme Court has no jurisdiction, in the first instance, to hear and determine an application for a declaration of nullity in respect of an appeal that is not before it. In respect of matters before it, the Supreme Court does have inherent jurisdiction to ^F make orders.

In the result, therefore, whilst there may well be substance to the application filed by the applicants, the application cannot succeed. It has been filed in the wrong court.

On the question of costs, I am of the view that there be no order as to costs. ^G In the normal course of events, the application would have been dismissed with costs. However, the respondent opposed the application on grounds that are wrong at law. The respondent only formally conceded at the hearing of the application that the notice of appeal was null and void and that therefore there was no appeal pending before the Supreme Court. In the circumstances, I consider that the most appropriate order would be that there should be no ^H order as to costs.

2009 (1) ZLR p384

Garwe JA

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

1. The application be and is hereby dismissed.
2. There will be no order as to costs.

Madzivanzira, Gama & Associates, applicant's legal practitioner

Mutumbwa, Mugabe & Partners, respondent's legal practitioners ^B
