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MOVEMENT FOR DEMOCRATIC CHANGE & ANOR v JUDGE PRESIDENT & ANOR 2009 (2) ZLR 1 (S)

Citation	2009 (2) ZLR 1 (S)
Case No	Judgment No. S-55-09
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Malaba JA, Gwaunza JA & Garwe JA
Heard	17 May 2007
Judgment	17 May 2007

Counsel *S V Hwacha*, for the applicants
S Maposa, with him *N Mutsonziwa*, for the respondents

Case Type Constitutional application

Annotations No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – s 24 – allegation of contravention of Declaration of Rights – matter arising during proceedings in lower court – right to apply directly to Supreme Court* D *for relief – such right subject to provisions of s 24(3) – provisions of s 24(2) not to be ignored – no application made for referral to Supreme Court – application to Supreme Court in terms of s 24(1) not permissible*

Headnote

The applicant political party had notified the police of its intention to hold a party rally. The police officer concerned purported to prohibit the E rally. The applicant obtained a court order restraining the police officer, the Commissioner of Police and the Minister of Home Affairs from prohibiting, disrupting or interfering in any way with the applicant's rally. The order was served on all the respondents. In spite of this, the police officer went to the rally venue, prevented the rally from taking place and publicly tore up his copy of the court order. The applicant F filed an urgent chamber application with the High Court, seeking to have the respondents committed for contempt of court. The judge declined to hear the application on the grounds that r 388 of the High Court Rule 1971 required that the application should have been in the form of a court application. The applicant brought an urgent application G to the Supreme Court in terms of s 24(1) of the Constitution, claiming that its rights to the protection of the law had been denied by the High Court through its rigid adherence by the court to the rule of court. The second respondent argued that the application was not properly before the Supreme Court because the issue for determination should not have been brought in terms of s 24(1), but should have been referred by the H High Court in terms of s 24(2).

2009 (2) ZLR p2

Sandura JA

Held, that the right to apply directly to the Supreme Court under s 24(1) A of the Constitution of Zimbabwe 1980, alleging a contravention of the Declaration of Rights, is made subject to the provisions of subs (3) of that section. An applicant may not during the course of proceedings in the High Court or any court subordinate thereto simply ignore the provisions of s 24(2), which require the person presiding in that court, B upon the applicant's request, to refer that matter to the Supreme Court, save where the application is merely frivolous or vexatious. The applicant must make such request before applying to the Supreme Court.

Case cited

Jesse v Attorney-General 1999 (1) ZLR 121 (S) C

Legislation considered

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

High Court Rules 1971 (RGN 1047 of 1971), r 388

Case information

S V Hwacha, for the applicants D

S Maposa, with him *N Mutsonziwa*, for the respondents

Editor's note: although the decision was given on 17 May 2007, the reasons were not handed down until late 2009.

Judgment

SANDURA JA: This was an urgent court application brought in terms of E s 24(1) of the Constitution of Zimbabwe ("the Constitution"). The applicants alleged that they had been denied the effective protection of the law by the strict enforcement by the High Court of r 388 of the High Court Rules, 1971 ("the Rules"), which lays down the manner in which contempt of court F proceedings should be instituted.

Before the application was argued, Mr *Mutsonziwa*, who appeared with Mr *Maposa* for the respondents, raised a point *in limine* and submitted that the application was not properly before us because the issue for determination should not have been brought before this court in terms of s 24(1) of the G Constitution, but should have been referred to this court by the High Court in terms of s 24(2) of the Constitution.

After hearing the submissions made by counsel for the parties, we were of the unanimous view that the point *in limine* raised by Mr *Mutsonziwa* was a valid one. Accordingly, the matter was struck off the roll with no order as to costs. I now set out the reasons for that decision. H

2009 (2) ZLR p3

Sandura JA

A The background facts in this matter are as follows. The first applicant ("the MDC") is a registered political party, and the second applicant ("Tsvangirai") is the President of the MDC. The third applicant ("Makone") is the MDC's National Secretary for Elections.

On 8 February 2007, Elias Mudzuri ("Mudzuri"), the National Organising B Secretary of the MDC, acting in terms of s 24(1) of the Public Order and Security Act [*Chapter 11:17*] ("the Act"), wrote to Chief Superintendent Jangara ("Jangara"), the Officer Commanding Police, Harare South District, notifying him that the MDC would hold a rally at Zimbabwe Grounds in Highfield Township ("the venue") on 18 February 2007.

On 15 February 2007, three days before the rally was held, Jangara wrote C to Mudzuri objecting to the holding of the rally on 18 February 2007, and requesting that the rally be postponed to a date in March 2007. Mudzuri was later informed that Jangara had in fact prohibited the holding of the rally on 18 February 2007.

Consequently, on 16 February 2007, the MDC filed an urgent chamber D application in the High Court against Jangara, the Commissioner of Police and the Minister of Home Affairs, seeking an order restraining the respondents "from unlawfully prohibiting, disrupting or interfering in any way with the applicant's rally to be held on 18 February 2007 at Zimbabwe Grounds, Highfield". That order was granted on 17 February 2007, with the respondents E being ordered to bear the costs of the application. The order was served on Jangara and on the Commissioner of Police.

Nevertheless, according to the MDC, on 18 February 2007 Jangara went to the venue where he publicly tore up a copy of the court order issued on 17 February 2007 and, together with his officers, wrongfully and unlawfully prevented the holding of the rally.

F Thereafter, the MDC filed an urgent chamber application in the High Court against Jangara, the Commissioner of Police and others, seeking the order that the respondents in that case be found guilty of contempt of court and be sentenced to imprisonment for thirty days.

When the urgent chamber application was subsequently placed before a G judge of the High Court he declined to hear it, the main reason being that in terms of r 388 of the Rules, the proceedings should have been instituted in the form of a court application.

Rule 388 of the Rules reads as follows:

> "The institution by a party of proceedings for contempt of court shall be made H by court application."

2009 (2) ZLR p4

Sandura JA

Aggrieved by the learned judge's refusal to hear the urgent chamber A application, the applicants filed a court application in this court against the Judge President and the Commissioner of Police in

terms of s 24(1) of the Constitution, alleging the following:

> "Through rigid adherence by the High Court to a rule regarding contempt of court, we have been denied the effective protection of the law." B

The Judge President did not oppose the application, but indicated that she would abide by this court's decision. However, the Commissioner of Police opposed the application.

Subsections (1), (2) and (3) of s 24 of the Constitution, in relevant part, read as follows:

> "(1) If any person alleges that the Declaration of Rights has been, is being or C is likely to be contravened in relation to him … then, without prejudice to any other action with respect to the same matter which is lawfully available, that 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 D Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.
>
> (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 E of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1)."

In the present case, there can be no doubt that the question as to whether the applicants had been denied the effective protection of the law arose in proceedings in the High Court. Although the learned judge declined to hear F the urgent chamber application, the proceedings were in the High Court when the question arose. All that the learned judge had indicated was that the proceedings should be in the form of a court application before they could be dealt with.

Accordingly, the applicants should have proceeded in terms of s 24(2) of the Constitution and requested the learned judge in the court *a quo* to refer G the constitutional question to this court.

Having failed to do that, the applicants were barred by s 24(3) from proceeding in terms of s 24(1) of the Constitution.

A similar issue arose in *Jesse* v *Attorney-General* 1999 (1) ZLR 121 (S). In that case Jesse was on trial in the regional magistrate's court on various H

Sandura JA

A criminal charges. Before the prosecution closed its case, Jesse filed a court application in this court in terms of s 24(1) of the Constitution, alleging that the statutory provisions under which he was charged offended against the presumption of innocence.

At 122C-E of the judgment Gubbay CJ said the following:

> B "At the inception of this hearing, a preliminary procedural point was raised by the court. It was whether the applicant was entitled to have recourse to s 24(1) of the Constitution since he had omitted to request the regional magistrate to refer the alleged constitutional questions to the Supreme Court in terms of s 24(2). Put differently, whether an applicant may, during the course of proceedings in the High Court or in any court subordinate to it, simply ignore the provisions of s 24(2) and utilise the procedure laid down in s 24(1).
>
> C I entertain not the slightest doubt that the resort by the applicant to s 24(1) of the Constitution was impermissible.
>
> The right to apply directly to the Supreme Court under subs (1) of s 24 is made 'subject to the provisions of subsection (3)' …".

In the present case, the applicants had no right to proceed in terms of s 24(1) D of the Constitution and the application was, accordingly, struck off the roll.

CHIDYAUSIKU CJ, MALABA JA, GWAUNZA JA and GARWE JA concurred.

E *Jessie Majome & Co*, applicants' legal practitioners

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

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S v HAKURERWI; S v SHARARA 2009 (2) ZLR 6 (H)

Citation	2009 (2) ZLR 6 (H)
Case No	Judgment No. HH-78-09
Court	High Court, Harare
Judge	Chitakunye J
Heard	2 July 2009
Judgment	2 July 2009
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *general principles - community service – period within which community service must be completed – period must allow for weekends, public holidays and leave of absence*

Headnote

In terms of the guidelines on community service, supervisors are empowered to use their discretion and grant time off to probationers on good cause D shown. Where a probationer is given time off, he must be made to understand that the time lost will have to be made up. If the period stipulated by the court is so calculated as to entail the probationer rendering service for eight hours per day without any break, it means the supervisor has been denied the discretion and the probationer can in fact not be granted time off. Any time off granted in these circumstances E would require the probationer to apply to court for an extension of the stipulated period within which to complete the community service. The granting to supervisors of the discretion to grant time off was meant, among other things, to obviate the need to approach the court whenever a probationer needed time off. It is therefore imperative that the period within which a probationer must complete community service must not F be calculated to tally with the period the hours come to an end if the probationer worked non stop at eight hours per day. Courts must always stipulate a period that takes into account public holidays, weekends and leave of absence that the supervisor may grant on good cause shown. G

Cases cited

S v Sithole & Anor HH-101-03

Judgment

CHITAKUNYE J: The two accused persons were charged and convicted by the same magistrate in separate trials and on different charges.

In case number CRB NY626/08, the accused was an eighteen year old female H

Chitakunye J

A first offender. In August 2008 she stole $900 (re-valued) from her employer's bedroom. The money was all recovered. She was convicted on her own plea of guilty and was sentenced to six months' imprisonment which was wholly suspended on condition that she performed 210 hours of community service at a rate of eight hours per day.

B In case number CRB NY657/08 the accused was a 32 year old male adult employed as a security guard by the complainant. On a date in September 2008 he stole a pocket of potatoes which had fallen off a moving tractor. He was arrested and arraigned before the courts. He readily pleaded guilty and was duly convicted. The potatoes were valued at $3 000. He was a first offender. He was sentenced to 12 months' imprisonment of which six C months were suspended for five years on condition of good behaviour and the remaining six months were suspended on condition that he completed 210 hours of community service at a rate of eight hours per day.

As is the norm, in each case the magistrate indicated that the supervisor may on good cause grant leave of absence, which shall not count as part of the service to be performed. The community service in each case had to be D completed within six weeks.

The regional magistrate before whom the proceedings were placed for scrutiny queried the short period within which the community service had to be completed, as it tallied with a mathematical calculation of the time it would take the accused to complete 210 hours at eight hours per day without E any leave of absence. He thus asked the trial magistrate whether he should not have given more time than the actual period mathematically required in order to accommodate the unforeseen eventualities where the probationer may need to get leave of absence from the supervisor.

The trial magistrate responded by defending his manner of calculating the F period. He contended that to grant more time within which the probationer must complete community service would tend to encourage requests for time off. The trial magistrate's response showed a clear misunderstanding of the query raised and the provisions of the guidelines on this aspect.

In terms of the guidelines on community service, supervisors are empowered to use their discretion and grant time off to probationers on good cause G shown. The guidelines go on to state that where a probationer is given time off "he must be made to understand that the time lost will have to be made up. Remember too that the privilege of time off cannot be abused because the total number of community service hours must always be completed within the period stipulated by the court."

H This entails that the supervisor can only grant time off where the probationer

Chitakunye J

will be able to still complete the hours of community service within the A period given by the court. If, therefore, the time stipulated by the court is so mathematically calculated as to end at the time the 210 hours end at eight hours per day without any break, it means the supervisor has been denied the discretion and the probationer can in fact not be granted time off. Any time off granted in these circumstances would require the probationer to apply B to court for an extension of the stipulated period within which to complete the community service. The granting of the discretion to grant time off to supervisors was meant, among other things, to eliminate the need to approach the court whenever a probationer needed time off.

It is therefore imperative that the period within which a probationer must complete community service must not be mathematically calculated to tally C with the time when the hours come to an end if the probationer worked non-stop at eight hours per day. Courts must, as of principle, always stipulate a period that takes into account public holidays, weekends and leave of absence that the supervisor may grant on good cause shown.

The trial magistrate was wrong in his approach to the calculation of the D period within which the community service had to be completed in each of the above cases.

See *S* v *Sithole* & *Anor* HH 101-2003.

Accordingly the latter part of the community service order in each case is hereby amended to read: E

"The community service must be completed within eight weeks."

Kudya J agrees F

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MUCHAKA v ZHANJE & ANOR 2009 (2) ZLR 9 (H)

Citation	2009 (2) ZLR 9 (H)
Case No	Judgment No. HH-68-09
Court	High Court, Harare
Judge	Patel J
Heard	26 March 2009
Judgment	7 July 2009
Counsel	*N Madya*, for the applicant *D Mundiye*, for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Arbitration – *award – setting aside of – allegation that award went beyond scope of submission to arbitration – no formal submission to arbitrator of specific issues to be decided – not going beyond scope of submission – allegation that award contrary to public policy – restrictive construction* D *of what is contrary to public policy*

Headnote

The applicant and the first respondent ran a business in partnership for approximately two to three years until a dispute arose between them. The applicant then instituted proceedings in the High Court, seeking an E order dissolving the partnership and appointing a liquidator to realise the assets of the partnership, to liquidate its liabilities, to prepare a final account and to distribute the net assets of the partnership. The first respondent's lawyers proposed a possible settlement of the dispute, failing which the matter should be referred to arbitration. The applicant's lawyers rejected the proposed settlement and agreed to the referral of F the matter to arbitration by the second respondent. There was no formal submission by the parties of the specific issues to be determined by the arbitrator. The arbitrator, having found that the applicant had not brought any assets into the partnership, proceeded to make his award. In essence, taking into account the first respondent's material contribution to the G partnership, he awarded the remaining assets of the partnership in a manner that was more favourable to the first respondent. He also issued specific directions to the liquidator in drawing up the accounts of the partnership. Each party was

ordered to bear its own costs in connection with the arbitration and each party was to pay half of the arbitration fee.

The applicant sought an order setting aside the award, arguing (a) that the H arbitrator went beyond the issues referred to him for determination, as

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2009 (2) ZLR p10

Patel J

set out in the applicant's statement of claim, in that he proceeded to A apportion the assets of the partnership as between the parties; and (b) that, in apportioning the assets, the arbitrator acted without the benefit of any valuation of the partnership assets or partnership accounts or submissions on apportionment and also disregarded the law of partnership. In so doing, he acted in a manner that was grossly unreasonable and B therefore contrary to public policy.

Held, that the public policy argument under Article 34(2)(b)(ii) of the Model Law is to be restrictively construed so as to preserve and recognise the basic objective of finality in the arbitration process. An award cannot be held to be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. C

Held, further, that, given that there was no formal submission by the parties of the specific issues to be determined by the arbitrator, it could not be said that the arbitrator dealt with a dispute not contemplated by or not falling within the submission to arbitration, or that his award contained decisions on matters beyond the scope of the submission to arbitration. The essential purpose of the reference to arbitration was to resolve the D dispute between the parties as to the assets of the partnership and the respective rights and interests of the parties in those assets upon the dissolution of the partnership. Therefore, given that the partnership was not intended to continue but was to be dissolved, the apportionment of assets at that stage could not logically be contrary to the law of partnership. E

Cases referred to

Pamire & Ors v Dumbutshena NO & Anor 2001 (1) ZLR 123 (H)

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

Legislation considered F

Arbitration Act [*Chapter 7:15*], First Schedule, art 34(2)

Case information

N Madya, for the applicant

D Mundiye, for the first respondent

Judgment

PATEL J: The background to this case is as follows. The applicant and the G first respondent ran a real estate business in partnership for approximately two to three years until a dispute arose between them. The applicant then instituted proceedings in this court in Case No. HC 2521/05. In order to expedite the resolution of the matter, the dispute was referred to the second respondent (the arbitrator) for determination. The arbitrator delivered his H

2009 (2) ZLR p11

Patel J

A award in January 2007. The applicant now challenges that award under article 34(2)(a)(iii) and 34(2)(b)(ii) of the First Schedule to the Arbitration Act [*Chapter 7:15*] (the Model Law).

The Law

Article 34(2) of the Model Law, in its relevant portions, provides as follows:

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

(a) the party making the application furnishes proof that —

(i) …; or

(ii) …; or

(iii) the award deals with a dispute not contemplated by or not falling within C the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) …; or

D (b) the High Court finds that —

(i) …; or

(ii) the award is in conflict with the public policy of Zimbabwe."

The circumstances in which an award may be held to be in conflict with public policy were considered in *ZESA* v *Maphosa* 1999 (2) ZLR 452 (S) E at 465-466. It was held, *per* Gubbay CJ, that:

> "The substantive effect of an award may also make it contrary to public policy. For example, an arbitral award which, after a consideration of the merits of the dispute, endorsed an agreement to break up a marriage, or the dealing in dangerous drugs or prostitution, on any view of the concept would be in conflict with the public policy of Zimbabwe.
>
> What has to be focused upon is whether the award, be it foreign or domestic, is F contrary to the public policy of Zimbabwe. If it is, then it cannot be sustained no matter that any foreign forum would be prepared to recognise and enforce it.
>
> In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law G or morality or justice is violated …
>
> An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside.
>
> Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having H regard to what it considers should have been the correct decision. Where,

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Patel J

> however, the reasoning or conclusion in an award goes beyond mere faultiness A or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.
>
> The same consequence applies where the arbitrator has not applied his mind to B the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."

In *Pamire & Ors* v *Dumbutshena NO & Anor* 2001 (1) ZLR 123 (H) it was noted that an award of damages for breach of contract is intended to put the parties in the position they would have been had the contract been properly performed. Accordingly, Makarau J (as she then was) held that to grant C full damages to a party in spite of its own failure to meet all its obligations under the contract would violate elementary notions of justice and would thus be contrary to public policy.

The Challenged Award

Having found that the applicant had not brought any assets into the partnership, D the arbitrator proceeded to make his award. In essence, taking into account the first respondent's material contribution to the partnership, he awarded the remaining assets of the partnership in a manner that was more favourable to the first respondent. He also issued specific directions to the liquidator in drawing up the accounts of the partnership. Each party was ordered to bear its own costs in connection with the arbitration and each party was to pay E half of the arbitration fee.

Submissions

Mr *Madya* for the applicant submits that the arbitrator's award must be set aside for two reasons. Firstly, the arbitrator went beyond the issues referred to him for determination, as set out in the applicant's statement of claim, in F that he proceeded to apportion the assets of the partnership as

between the parties. Secondly, in apportioning the assets, he acted without the benefit of any valuation of the partnership assets or partnership accounts or submissions on apportionment and also disregarded the law of partnership. In so doing, he acted in a manner that was grossly unreasonable and therefore contrary G to public policy.

Mr *Mundiye* for the first respondent submits that the dispute between the parties is properly reflected in the pleadings filed in case No. HC 2521/05. It is the issues in that case that were referred to the arbitrator, as appears in a letter dated 5 December 2005 from the first respondent's lawyers to the applicant's lawyers, and as amplified in the applicant's statement of claim H

A and the first respondent's response thereto. The arbitrator was therefore at large to resolve the dispute in whatever manner he considered fair, reasonable and lawful and to apportion the assets of the partnership.

Disposition

The relief sought by the applicant in case No. HC 2521/05 was an order B dissolving the partnership and an order appointing a liquidator to realise the assets of the partnership, to liquidate its liabilities, to prepare a final account and to distribute the net assets of the partnership. In their letter of 5 December 2005, the first respondent's lawyers proposed a possible settlement of the dispute, failing which the matter should be referred to arbitration. The applicant's lawyers responded on 3 January 2006, rejecting the proposed C settlement and agreeing to the referral of the matter to arbitration by the second respondent. Thereafter, there was no formal submission by the parties of the specific issues to be determined by the arbitrator.

Given this background, I find it difficult to discern how it can be said that the arbitrator dealt with a dispute not contemplated by or not falling within the D submission to arbitration, or that his award contained decisions on matters beyond the scope of the submission to arbitration. In short, I am unable to accept the applicant's contention that the arbitrator's award went beyond his remit under the broad submission to arbitration.

Turning to the substance of the award, it is clear that the essential purpose of the reference to arbitration was to resolve the dispute between the parties as E to the assets of the partnership and the respective rights and interests of the parties in those assets upon the dissolution of the partnership. Therefore, given that the partnership was not intended to continue but was to be dissolved, the apportionment of assets at that stage cannot logically be contrary to the law of partnership. In any event, even assuming the correctness of the F applicant's contention in that regard, I cannot see any justification for setting the award aside *in casu*.

As the case authorities show, the public policy argument under article 34(2)(b)(ii) of the Model Law is to be restrictively construed so as to preserve and recognise the basic objective of finality in the arbitration process. An award G cannot be held to be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. Moreover, even if it were to be found that the arbitrator's decision was erroneous as contended by the applicant, I am not persuaded that his reasoning or conclusions were so flawed as to violate some fundamental principle of the law or morality or justice. In my view, the challenged award does not constitute a palpable H inequity that is so far reaching and outrageous in its defiance of logic or

accepted moral standards that a sensible and fair minded person would A consider that the conception of justice in Zimbabwe would be intolerably hurt by the award.

Accordingly, the applicant has not succeeded in justifying either of the grounds of challenge that he has mounted *in casu*. In the result, this application is dismissed with costs. B

Wintertons, applicant's legal practitioners

Gill, Godlonton & Gerrans, first respondent's legal practitioners C

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/CHRISTIAN FAITH TABERNACLE v SPARROWS NEST MINISTRIES 2009 (2) ZLR 15 (H)

CHRISTIAN FAITH TABERNACLE v SPARROWS NEST MINISTRIES 2009 (2) ZLR 15 (H)

Citation	2009 (2) ZLR 15 (H)
Case No	Judgment No. HH-69-09
Court	High Court, Harare
Judge	Patel J
Heard	13 May 2009
Judgment	7 July 2009
Counsel	*T Kufaruwenga*, for the plaintiff *D Nkomo*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Church – *constitution – interpretation of – whether voluntary association created – whether right to sue and be sued created*

Practice and procedure – *parties – locus standi – voluntary association –* D *church – constitution of – whether right to sue or be sued created*

Headnote

The parties were both Christian church organisations. They had a dispute concerning a property in Mkoba, Gweru, which the defendant occupied; the plaintiff was seeking its eviction. At the trial the defendant, at the close of the plaintiff's case, sought absolution from the instance on E the sole ground that the plaintiff lacked the requisite *locus standi* to sue in the matter. The defendant contended that the plaintiff had no valid constitution and was therefore not a common law *universitas*. Additionally, it contended that even if a valid constitution dids exist, it did not endow the plaintiff with legal capacity to sue in its own name.

The principal witness for the plaintiff produced in evidence a document F which, he stated, was the amended constitution of the plaintiff. At a later stage of the trial, the second witness produced another document which he testified was the original constitution of the plaintiff. The judge was satisfied that one of the documents was the original constitution of the plaintiff and that the other was an amended version thereof. However, the provisions contained in the two versions were virtually identical.

G *Held,* that the *locus standi* of a voluntary association derives from the provisions of its charter or constitution, either expressly or impliedly. For the power to sue to be implied, it must be incidental to the express powers as being absolutely requisite for the due carrying out of the

express objects of the association. The two principal characteristics of the H capacity of a *universitas* to sue are perpetual succession, *viz.* continued

2009 (2) ZLR p16

Patel J

existence or identity of the association despite changes in its membership, A and the capacity to acquire rights and incur obligations independently of its members, in particular, the capacity to own property. Where the constitution of a church shows that the membership of the church is open to all persons meeting the prescribed spiritual qualifications and that the composition of its executive body is subject to change under B specified circumstances, this clearly demonstrates the separate existence or identity of the church, notwithstanding changes in its leadership or general membership. Where the constitution endows the church with the capacity to do everything necessary to effectuate its objectives, including by implication the power to advance and protect its property rights, the power to sue must perforce be implied as being necessarily incidental C to its express powers for the due carrying out of its express objects. The biblical injunction against recourse to temporal, as opposed to spiritual, authority cannot be invoked in the realm of human affairs to preclude the administration and application of the general law through the secular courts. This is so particularly where the issues that call for resolution centre on proprietary interests and their assertion in the material world. D

Cases cited

Bantu Callies Football Club v Mothlamme & Ors 1978 (4) SA 486 (T)

Ward S 19 Council v Premier, Western Cape Province & Ors 1998 (3) SA 1056 (C) E

Case information

T Kufaruwenga, for the plaintiff

D Nkomo, for the defendant

Judgment

PATEL J: Both parties in this matter are Christian church organisations with specific missionary objectives. Regrettably, as often happens in difficult times, F their spiritual vision has been blurred by the material struggle for property. The specific object of their contestation in this case is Stand 7525, Mkoba, Gweru, which the defendant presently occupies and from which the plaintiff seeks the defendant's eviction.

At the trial of this matter, at the close of the plaintiff's case, the defendant G sought absolution from the instance on the sole ground that the plaintiff lacked the requisite *locus standi* to sue in this matter. The defendant contends that the plaintiff has no valid constitution and is therefore not a common law *universitas*. Additionally, it is contended that, even if a valid constitution does exist, it does not endow the plaintiff with legal capacity to sue in its own name. H

2009 (2) ZLR p17

Patel J

A The principal witness for the plaintiff, Zakeo Moyo, produced in evidence a document (Exhibit 1) which he stated was the amended constitution of the plaintiff. This document was purportedly signed by Apostle Peter Moyo, the deceased founder of the plaintiff's church. However, it is fairly clear from other documentary evidence before the Court as well as the testimony of the plaintiff's second witness, Tapiwa Mutonhodza, that the signature on B the document is that of Zakeo Moyo and not of Peter Moyo. The former has obviously signed the document on behalf of his deceased brother. In any event, at a later stage in the trial, Mutonhodza produced another document (Exhibit 10) which he testified was the original constitution of the plaintiff. Regrettably, this document is incomplete with a few pages missing *in fine*.

C Having regard to all the relevant evidence, I am satisfied that Exhibit 10 is the original constitution of the plaintiff and that Exhibit 1 is the amended version thereof, albeit with a signature that clearly does not belong to the deceased, Peter Moyo. The provisions contained in the two versions are virtually identical. In my view, both versions should be read together to ascertain the legal standing of the plaintiff and, in the event of any inconsistency, the D original version should prevail.

Under the common law, the *locus standi* of a voluntary association derives from the provisions of its charter or constitution, either in express terms or by way of implication. For the power to sue to be implied, it must be incidental to the express powers as being absolutely requisite for the due carrying out E of the express objects of the association. See *Bantu Callies Football Club* v *Mothlamme & Ors* 1978 (4) SA 486 (T). The two principal characteristics of the capacity of a *universitas* to sue are perpetual succession, *viz.* continued existence or identity of the association despite changes in its membership, and the capacity to acquire rights and incur obligations independently of its members, in particular, the capacity to own property. See *Ward S 19 Council* F v *Premier, Western Cape Province & Ors* 1998 (3) SA 1056 (C).

Turning to the constitution of the plaintiff, Articles I, V and VII, as read together, show that the membership of the plaintiff is open to all persons who meet the prescribed spiritual qualifications and that the composition of its executive body, the Board of Directors, is subject to change under specified G circumstances. These elements clearly demonstrate the separate existence or identity of the plaintiff notwithstanding changes in its leadership or general membership. The objects of the plaintiff are set out in Article II and include, *inter alia*, the erection and maintenance of immovable property and the collection of funds, gifts and subscriptions, as well as the acquisition and disposal of real property and chattels. In this respect, Article V empowers H the Board of Directors to manage and control investments and to build and

repair property. In addition, Article II specifically enables the plaintiff to A exercise all powers that are necessary or convenient to give effect to any of the purposes for which the church is organised.

One further aspect that calls for consideration is the argument put forward on behalf of the defendant relating to the essentially Christian character of the plaintiff. The argument is to the effect that it is not in the nature of Christian B communities to approach secular courts for the resolution of their disputes. It derives from canonical scripture, in particular the New Testament in 1 Corinthians 6:1 (Authorized Version):

> "Dare any of you, having a matter against another, go to law before the unjust, and not before the saints? Do you not know that the saints shall judge the world?"

While I cannot profess to be versed in doctrinal matters, I would venture to C postulate that the biblical injunction against recourse to temporal, as opposed to spiritual, authority must be understood in its peculiar historical and political context. Moreover, notwithstanding the undeniable significance of Christian doctrine in the conduct and regulation of church affairs, it cannot, in our present time and circumstance, be invoked in the realm of human affairs to D preclude the administration and application of the general law through the secular courts. This is so particularly where the issues that call for resolution, as in the present case, centre on proprietary interests and their assertion in the material world.

Having regard to all of the foregoing, it seems clear that the plaintiff meets the requisite criteria for a duly constituted *universitas*, *viz.* a body endowed E with perpetual succession and the capacity to acquire and own movable and immovable property. It is also endowed with the capacity to do everything necessary to effectuate its objectives including, by implication, the power to advance and protect its property rights. In this regard, the power to sue must perforce be implied as being necessarily incidental to its express powers for F the due carrying out of its express objects.

It follows that the plaintiff is an association properly vested with *locus standi in judicio*. The defendant's application for absolution from the instance therefore fails and must be dismissed. It is ordered that the matter proceed to the defendant's case. G

Dzimba, Jaravaza & Associates, plaintiff's legal practitioners

Donsa-Nkomo & Mutangi Legal Practice, defendant's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/S v MAHOVE & ORS 2009 (2) ZLR 19 (H)

S v MAHOVE & ORS 2009 (2) ZLR 19 (H)

Citation	2009 (2) ZLR 19 (H)
Case No	Judgment No. HH-83-09
Court	High Court, Harare
Judge	Chitakunye J
Heard	8 July 2009
Judgment	8 July 2009
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C **Criminal procedure (sentence)** – *general principles – uniformity of sentence – discretion of court – no place for a tariff of sentences in respect of any crime where discretion is not fettered by statute – all facts and circumstances to be considered in arriving at a just sentence – sentences must be tailored to the particular offender – failure to do so a misdirection*

D **Criminal procedure (sentence)** – *general principles — suspension of portion of sentence – first offender – where possible first offender should not be sentenced to effective imprisonment – no rule of law that first offenders who are imprisoned should have portion of sentence suspended – first offender sentenced to short periods of imprisonment – portion of any* E *such short period of imprisonment should be suspended*

Headnote

The 12 accused were all convicted in separate trials of housebreaking and theft. They all received the same sentence of two years' imprisonment, although there were several differences between the cases, such as the ages of the accused, the value of the goods stolen, and the value F recovered. No portion of the sentence was suspended, although they all pleaded guilty. On review:

Held, that there can be no place in criminal cases for a tariff sentence in respect of any crime in respect of which the court's discretion is not fettered by statute law.

G *Held*, further, that it is the responsibility of each judicial officer to consider all the facts and circumstances placed before him in arriving at a just sentence. The sentence must be tailored to the particular offender. Failure to tailor the sentence in this way is a misdirection. It makes a mockery of the reasons for sentence that the judicial officer purports to have taken into account in assessing the sentence.

H *Held*, further, though it is not a rule that first offenders who are being imprisoned

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Chitakunye J

are entitled to have a portion of their sentence suspended, failure to A give reasons for not suspending portions of the sentences on suitable conditions, where the sentences are not long, is a misdirection. The courts have time and time again emphasized the need to give first offenders the chance to reform by not sending them to effective imprisonment. Where, for good reasons, imprisonment cannot be avoided, and then at B least a portion of the sentence must be suspended so that they serve no more than is absolutely necessary.

Cases cited

S v Chirara & Ors 1990 (2) ZLR 156 (H)

S v Dube & Anor 1995 (2) ZLR 321 (S) C

S v Gorogodo 1988 (2) ZLR 378 (S)

S v Mayberry 1985 (1) ZLR 192 (H)

S v Mugwenhe & Anor 1991 (1) ZLR 66 (H)

S v Munukwa 2002 (1) ZLR 169 (H)

S v Mururo & Ors HH-198-00 D

S v Reddy 1975 (3) SA 757 (A)

Judgment

CHITAKUNYE J: The above cases were all presided over by the same trial magistrate at Mt Darwin. In cases 1 to 11 the accused persons were convicted of the crime of unlawful entry into premises and theft. In case 12 the accused was convicted of the crime of theft. E

The accused were all convicted on their own pleas of guilty. The convictions were proper and are thus confirmed. I however have misgivings on the sentences imposed in each case. In each of the cases of unlawful entry into premises and theft, the accused was sentenced to two years' imprisonment. Where there were two or more counts the accused was sentenced to two F years' imprisonment for each count. For the theft case the accused was also sentenced to two years' imprisonment.

The uniform sentence of two years was imposed regardless of the circumstances of each case. No portion of the sentence was suspended on any condition, despite the fact that all the accused were first offenders who readily pleaded guilty. In many of the cases the accused were youthful first G offenders aged between 19 and 22 years who deserved a chance to reform.

In some cases all the stolen property was recovered, whilst in other cases part of the property was recovered. There were also cases were no property was recovered.

In his reasons for sentence, the trial magistrate referred to *S* v *Mururo* & H

Chitakunye J

A *Ors* HH 198-2000 as his authority for imposing the sentences of two years' imprisonment. The magistrate clearly misunderstood what the judge said in that case. Upon perusal of that case, I did not understand the judge to be laying down a single sentence for offences of unlawful entry and theft. I also did not understand the judge to be laying a foundation for not suspending a portion of the sentence or for that matter treating young first offenders the B same as mature first offenders. At p 1 of the judgment the judge said:

> "House breaking normally attracts sentences of two or three years effective imprisonment even where no unusual aggravation is present."

That, in my view, did not mean that invariably anyone convicted of house breaking offences had to be imprisoned for two years with no other conditions C ,irrespective of the individual circumstances of each case. In any case, these courts have on a number of occasions emphasized the need to avoid a tariff approach to sentencing. In *S* v *Dube and Anor* 1995 (2) ZLR 321 (S) at 326 B-C Korsah JA had this to say:

> "It has been said time and again in our courts that the punishment should not only fit the crime, it should fit the person as well. If that is to be, there can be D no place for a tariff sentence in respect of any crime with regard to which the courts' discretion is not fettered by statute law; for the circumstances of the

> offender and other factors of mitigation or aggravation may vary infinitely. Be it as serious as murder, the sentencing authority is enjoined to consider all factors, both in aggravation and mitigation of sentence and, in the exercise of its discretion, to impose a just punishment. A sentence based on a tariff is indicative E of an abortion of judicial discretion, which is tantamount to a misdirection."

See also *S* v *Mayberry* 1985 (1) ZLR 192 (H) at 194-5.

In *S* v *Mugwenhe & Anor* 1991 (2) ZLR 66 Ebrahim J cited with approval the words of Botha JA in *S* v *Reddy* 1975 (3) SA 757 (A) at 759H wherein he said that:

> F "Though uniformity of sentences, that is of sentences imposed upon accused persons in respect of the same offence, or in respect of similar offences of a kindred nature, may be desirable, the desire to achieve such uniformity cannot be allowed to interfere with the free exercise of his discretion by a judicial officer in determining the appropriate sentence in a particular case in the light of the relevant facts in that case and the circumstances of the person charged."

G In short, it is the responsibility of each judicial officer to consider all the factors and circumstances placed before him in arriving at a just sentence. The sentence must be individualized to the particular offender. Failure to individualize the sentence is a misdirection. It makes a mockery of the reasons for sentence that the judicial officer purports to have taken into account in assessing the sentence, yet time and again these courts have strongly warned H judicial officers against paying lip service to mitigatory features. It is an act

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of dishonesty to tell an accused person that the court has considered their A personal mitigatory features when in fact and in truth no such features have been considered.

In casu, the trial magistrate abdicated his responsibility to exercise judicial discretion in assessing sentence. Had he exercised judicial discretion and applied appropriate sentencing principles as enunciated by these courts in B various cases, he would certainly have arrived at varying sentences.

It is trite that, in considering sentence, such factors as the value of the property stolen and recovered be considered. The circumstances of the recovery are also important in assessing what weight to attach to the aspect of the recovery.

In the present series of cases, there are some where all the stolen property C was recovered intact, yet the accused were given same sentences as in those cases were none of the property was recovered.

The sentences imposed did not take into account the value of the property stolen or the manner of the break-ins and theft, yet these are key factors in the assessment of sentence. It is my view that, had the trial magistrate exercised his judicial discretion in a judicious manner, he would no doubt D have come up with different sentences on a case to case basis.

It is pertinent to point out that the trend in our jurisdiction has been to spare first offenders from effective imprisonment unless the circumstances are such that imprisonment is the only suitable option. See *S* v *Munukwa* 2002 (1) ZLR 169 (H). E

Another disconcerting aspect is that in all the above cases none of the accused had any portion of their sentences suspended on any condition. The trial magistrate did not consider suspending any portion of the sentences. No reason or explanation was given for such failure. Though it is not a rule that first offenders who are being imprisoned are entitled to have a portion of their sentence suspended, as was stated in *S* v *Gorogodo* 1988 (2) ZLR 378 (S), F I am of the firm view that failure to consider or to give reasons for not suspending portions of the sentences on suitable conditions, where the sentences are not long, is a misdirection. These courts have time and again emphasized the need to give first offenders the chance to reform by not sending them to effective imprisonment. Where, for good reasons, imprisonment G cannot be avoided, then at least a portion of the sentence must be suspended so that they serve what is absolutely necessary.

In *S* v *Dube & Anor supra* at p 327D Korsah JA said that:

> "It is a salutary practice of our courts to suspend, in appropriate cases, a portion of the custodial sentence imposed on young first offenders, on condition of good behavior, so as to operate as a deterrent of a personal nature." H

Chitakunye J

A See also *S* v *Chirara & Ors* 1990 (2) ZLR 156 (H).

A term of imprisonment may also be suspended on condition of restitution. In the above cases no investigation was made on the desirability of restitution and the ability of the accused to make good the loss to complainants. This was a misdirection on the part of the trial magistrate.

B Whilst confirming the convictions in all the above cases I am unable to do the same with the sentences. Due to the areas of misdirection pointed to above, the sentences will be set aside.

Accordingly the sentences are hereby set aside and are substituted by the following sentences: C

1. *S* v *Morisha Mahove & Anor* CRB D119-20/09

   The two counts as one for sentence; 24 months' imprisonment of which four months' imprisonment is suspended for five years on condition that the accused does not within that period commit any offence involving dishonesty and for which he is sentenced to a term of imprisonment without the option of a fine. D

2. *S* v *Evans Chikonya* CRB 135/09

   For three counts of unlawful entry and theft, each count: two years imprisonment. Total six years' imprisonment, of which 1½ years is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and E for which he is sentenced to a term of imprisonment without the option of a fine.

3. *S* v *Elizabeth Chaora & Anor* CRB 152-3/09

   Each accused: Twenty-four months' imprisonment of which six months is suspended for five years on condition that the accused does not within F that period commit any offence of which dishonesty is an element and for which he/she is sentenced to a term of imprisonment without the option of a fine.

4. *S* v *Moses Sande* CRB 116/09

   Eighteen months' imprisonment of which 6 months' imprisonment is G suspended for five years on condition the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

5. *S* v *Finish Dzinzi* CRB D1581/08

   H Eighteen months' imprisonment of which four months' imprisonment is

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Chitakunye J

suspended for five years on condition that the accused does not within A that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

6. *S* v *Rodrick Sumburero* CRB D1621/08

   Twenty-four months' imprisonment of which six months is

   Suspended B for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

7. *S* v *Prosper Mangororo* CRB D1515/08

   Eighteen months' imprisonment of which six months' imprisonment is C suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to imprisonment without the option of a fine.

8. *S* v *Patrick Baranda & Anor* CRB D1571-2/08

   Each accused: twenty-four months' imprisonment of which four months' imprisonment is suspended for five years on condition that the accused D does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

9. *S* v *John Mangare & 3 Ors* CRB D1550-3/08

   Each accused: twenty months' imprisonment of which four months' E imprisonment is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

10. *S* v *Brian Chinengundu & Anor* CRB D1569-70/08 F

    Each accused: twenty-four months' imprisonment of which six months' imprisonment is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty is

an element and for which he is sentenced to a term of imprisonment without the option of a fine.

11. *S* v *Luckson Kapesa* CRB D111/09 G

Count 1: Eighteen months' imprisonment.

Count 2: Four months' imprisonment.

Total: twenty-two months' imprisonment of which six months' imprisonment is suspended for five years on condition that the accused does not within that period commit any offence of which dishonesty H

2009 (2) ZLR p25

Chitakunye J

A is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

12. *S* v *Owen Santrau* CRB D17/09

Twenty months' imprisonment of which six months' imprisonment is suspended for five years on condition that the accused does not within B that period commit any offence of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine.

C Kudya J agrees.

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Source:
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CABS v RUGWETE 2009 (2) ZLR 26 (S)

2009 (2) ZLR p26

Citation	2009 (2) ZLR 26 (S)
Case No	Judgment No. S-30-09
Court	Supreme Court, Harare
Judge	Sandura JA, Gwaunza JA & Garwe JA
Heard	18 February 2008
Judgment	9 July 2009
Counsel	*E T Matinenga*, for the appellant *R Harvey*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment – *code of conduct – disciplinary proceedings under – charges arising from unlawful job action – code not specifying such action as an offence – employer's right to prefer charges under code where evidence supports such charge* D

Headnote

An employer is entitled to prefer charges of misconduct specified in its code of conduct in respect of acts arising out of an unlawful job action even where the code has not specified such industrial action to be an offence. Similarly, obtaining a disposal order in terms of the Labour Act does not bar an employer from taking disciplinary action against an employee in E terms of the code. There is nothing in the Act to the effect that a disposal order grants immunity from the unlawful collective job action referred to in it. Even in the case of a person who engages in a lawful collective job action, he cannot, for example, resort to sabotage or damage of his employer's property and still claim immunity. F

Cases cited

*Net*One Cellular (Pvt) Ltd v Communications & Allied Workers Union of Zimbabwe & Anor* S-89-05

Zimbabwe Iron and Steel Co Ltd v Dube & Ors 1997 (2) ZLR 172 (S)

Legislation considered G

Labour Act [*Chapter 28:01*], ss 107, 108(2) and 109

Case information

E T Matinenga, for the appellant

R Harvey, for the respondent H

Garwe JA

Judgment

A **GARWE JA**: This is an appeal from a decision of the Labour Court refusing the appellant permission to dismiss the respondent from its employment on allegations that she had committed acts of sabotage, violence and other related offences. The appellant had appealed to the Labour Court from a decision of the National Employment Council for the Commercial Sectors ordering the B reinstatement of the respondent without loss of salary and benefits.

The facts of this case were to a large extent common cause before the court *a quo*. On 7 March 2003 the respondent was part of a group of employees who engaged in an unlawful collective job action with other employees of the appellant. On 21 March 2003 the appellant suspended the respondent without pay and invited her to attend a disciplinary hearing to answer two alleged C breaches of the governing code of conduct. These were: (1) sabotage, it being alleged that the respondent had wilfully interfered with the normal operations of CABS business by interrupting services necessary to its operations; and (2) violence and other related offences, the allegation being that she had engaged in or incited others to engage in riotous or violent behaviour. On 25 March 2003, and following the issuance of a show cause order, the court D *a quo* issued an interim disposal order terminating the collective job action. Thereafter the respondent was invited to attend a disciplinary hearing on 1 April 2003. She did not do so and was subsequently convicted *in absentia* and dismissed from employment.

The finding of the Labour Court was that "the offence, if any had been E committed, was engaging in an unlawful job action". The court *a quo* consequently came to the conclusion that the appellant had erred in preferring charges under the governing code of conduct since that code did not make provision for the offence of engaging in a collective job action and did not categorize illegal industrial action as an offence. The court further found that the appellant should more properly have proceeded in terms of Part XII of F the Labour Act [*Chapter 28:01*] and that it was improper and unlawful for the appellant to prefer charges of sabotage and violence outside the context of a collective job action. The court was of the view that:

> "If the employer is going to look at issues of violence it must do so within the context of an industrial action. The employer cannot simply ignore the factual circumstances and proceed to ignore that there was a collective job action".

G The court *a quo* also found that on the facts the offences of sabotage and violence (and other related offences) had not in any event been proved.

The appellant has appealed against the decision of the Labour Court on a number of grounds set out in the notice of appeal. These grounds essentially raise two issues which require determination. These are, firstly, whether the H court *a quo* was correct at law in coming to the finding that the appellant

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Garwe JA

was not in the circumstances empowered to proceed against the respondent A in terms of its registered code of conduct, and, secondly, whether the court *a quo* was correct, at law, in coming to the conclusion that the facts as proven did not constitute the offences of sabotage and violence preferred against the respondent.

Turning to the first issue, it is common cause that at the relevant time the B NECCS Employment Code of Conduct and Grievance Procedures ("the Code of Conduct") was applicable to the commercial sector and in particular to the appellant as employer and its employees. It is also common cause that the two offences preferred against the respondent are listed as number 4 and 9 of the Group IV offences, a contravention of which would entitle the C appellant to dismiss an employee convicted of such offence.

The question that arises is whether the appellant was entitled, in these circumstances, to prefer charges under the Code of Conduct and whether the appellant should have proceeded under the Act, purely because the charges arose out of an unlawful collective job action, which is catered for under Part XIII of the Act. Put differently, can an employer prefer charges D of misconduct specified in its code of conduct in respect of acts arising out of an unlawful job action where such code of conduct has not specified such industrial action to be an offence?

In *Zimbabwe Iron and Steel Co Ltd* v *Dube & Ors* 1997 (2) ZLR 172 (S), this court had occasion to deal with this issue. At p 175F Gubbay CJ remarked: E

> "The disciplinary proceedings held by the appellant were predicated on infringements by the respondents of the code of conduct consequential upon engaging in an unlawful strike and other activity related to it (one of the gross infractions listed is illegal industrial action); and not on the validity or otherwise of the disposal order. There is nothing in the code itself that precludes the taking of disciplinary measures even where a disposal order validly made has directed F that unlawful collective job action be terminated."

The learned Chief Justice continued at 176C-E:

> "The real point to decide, so it seems to me, is whether it was the legislative intention that employees who have taken part in unlawful collective job action are only dismissable under the direction of a disposal order – such conduct not being subject to a code of conduct. Put differently, that ss 104 to 108 in Part G XIII of the Act are specifically designed to deal with all forms of collective job action.
>
> This was the main and most weighty argument that Mr *Nherere* advanced on behalf of the respondents. Acknowledging that the bringing of disciplinary proceedings under a code of conduct would be permissible where the charges resulted from the taking of collective job action, as for instance theft or wilful destruction of the employer's property, counsel submitted that such conduct H

Garwe JA

> A was not dependent on the unlawfulness or otherwise of collective job action.
>
> It is true, as was emphasized, that Part XII of the Act is concerned with the determination of disputes and unfair labour practices; Part XIII with collective job action. But these Parts are not mutually exclusive …
>
> Accordingly, it is my view, that a disposal order made pursuant to s 107(5)(a) of the Act, in which the dismissal of specified employees had not been B ordered by the appropriate authority, does not bar the employer under a code of conduct which categorised 'illegal industrial action' as a dismissal offence, from subsequently charging that offence and applying the prescribed penalty to those employees found guilty …"

In Net-One Cellular (Private) Limited v Communications and Allied Workers Union of Zimbabwe & Ors S-89-05 Chidyausiku CJ remarked as follows at C p 18-19 of the judgment:

> "Clause 8, cited above, provides that instigating and/or taking part in an unlawful job action should be handled in terms of the Labour Relations Act. In my view, clause 8 of the code does not bar the appellant from charging employees with the offence of absence from work without cause in terms of clause 2 of the code. The employees *in casu* were not charged with instigating or taking part D in an unlawful collective job action, which would have required the matter to be dealt with in terms of clause 8 of the code and Part XIII of the Act.

This court has held that proceeding in terms of Part XIII of the Act does not bar an employer from taking disciplinary action against an employee in terms of the code. In *Zimbabwe Iron and Steel Co* v *Dube & Ors* 1997 (2) ZLR 172 (S), this court held:

> '… a disposal order in terms of s 107(5)(a) of the Labour Relations Act in which the dismissal of striking employees had not been ordered by the appropriate authority, does not bar the employer from subsequently taking disciplinary action against such employees under a registered code of conduct which makes it a dismissible offence to take illegal industrial action. There is no provision in Part XIII of the Act to the effect that a disposal order grants immunity from the unlawful collective job action referred to in it.'

By parity of reasoning, there is nothing in Part XIII of the Act which bars the appellant from taking disciplinary action against employees for absenting themselves from work for a period in excess of five consecutive days in terms of clause 2 of the code, which is precisely what the appellant did in this case, or in terms of s 12B where no code of conduct exists."

There can be no doubt that the above cases correctly reflect the law and that the court *a quo* misinterpreted these decisions. The fact that the governing code of conduct did not include an unlawful job action in its schedule of offences was irrelevant. The employer was entitled to prefer charges of misconduct in terms of the Code of Conduct if the facts and circumstances justified such a course. Alternatively, the matter could have proceeded under Part XIII and a disposal order made by the Labour Court as provided in s 107 of the Act.

Garwe JA

The court *a quo* remarked that it would be unfair and contrary to the interests of justice for an employer to:

> "charge employees who have engaged in an unlawful job action with other offences prescribed in terms of the code for example can an employer bring charges of absence from duty or refusal to obey orders."

For the reasons already given, the above remarks cannot be correct and contradict the decisions of this court in the cases already cited.

Part XIII of the Act makes it clear that it is possible to engage in a lawful job action and that where that happens no liability shall attach to any person engaging in such action and his employment cannot be terminated. To the contrary, persons who engage in an unlawful collective job action may not only be the subject of disposal orders but also risk criminal prosecution under s 109 of the Act. It is clear that even in the case of a person who engages in a lawful collective job action, he cannot, for example, resort to sabotage or damage of his employer's property and still claim immunity – see the *proviso* to s 108(2) of the Act.

I am satisfied that the appellant was empowered to prefer charges of sabotage, violence and other related charges under its code of conduct.

The question that now arises is whether the court *a quo* erred in reaching the conclusion that the facts did not disclose the offences with which the respondent had been charged. The appellant has in its heads of argument filed before this court implicitly attempted to challenge the court *a quo*'s findings on the facts. This the appellant cannot do, as its appeal is confined to issues of law. The only issue of law is whether on the basis of the findings of fact made by the court *a quo*, the two charges of sabotage and violence and other related offences were sustainable.

The court *a quo* found that the evidence given by witnesses against the appellant was the following:

- one said the respondent had been the choir master;
- another said she was the lead vocalist;
- another said she was "one of the singing people";
- another said the respondent was part of the crowd.

The offences with which the respondent had been charged were sabotage and violence and other related offences. "Sabotage" is defined in the Code of Conduct as:

> "Any wilful act by an employee to interfere with the normal operations of the employer's business by damaging any plant, machinery, equipment, raw materials or products or by interrupting any supplies of power, fuel, materials or services necessary to the operations."

Garwe JA

A Violence and other related offences are defined as:

> "Riotous behaviour, meaning in concert with two or more persons engaging in or inciting a group of persons to engage in violent behaviour or willful damage the employer's property.
>
> Sexual Harassment
>
> Any violence towards members of staff or the public such as assault."

B The court *a quo* reached the conclusion that there was no evidence justifying a conviction on these two offences. The court remarked as follows:

> "Of all the witnesses, not one of them alleges a single act of violence. The representative for CABS in her submissions says the singing was highly disruptive. But the statement on p 27(d) says the group was gathered outside C and she merely intended to close the doors to shut out the noise.
>
> On p 33 of the record, CABS alleges that Rugwete used abusive language and rampaged through several departments interrupting services. The evidence is simply not there. Singing, as alleged by the witnesses, and standing in a group cannot be said to amount to sabotage.
>
> Similarly, there is no evidence from the witnesses to say that Rugwete acted in D a riotous manner resulting in the working staff locking themselves away. No evidence was led to prove that the singing was intimidating and instilling fear. In short, no evidence in support of the charge of violence was available to support the employer's conclusion of facts."

Taking into account the definition of the two offences with which the respondent was charged, I find no basis upon which it could be argued that E those offences were proved or that the court *a quo* erred in arriving at the conclusion that the offences had not been proved.

At best the evidence pointed towards disorderly behaviour under Group II Offences defined as:

> "Indulging in rough and unruly behaviour or practical jokes whether or not such F behaviour endangers the safety or health of others or the smooth running of the work place."

However, that was not the offence with which the respondent was charged and it cannot at this stage be substituted.

I reach the overall conclusion therefore that, whilst the appellant was entitled G to prefer charges under its code ofconduct, the charges so preferred were not proved and accordingly the ultimate decision of the court *a quo* cannot be impugned.

The appeal is therefore dismissed with costs.

H SANDURA JA and GWAUNZA JA concurred.

Garwe JA

Gill, Godlonton & Gerrans, appellant's legal practitioners A

R Harvey, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/MBISVA v RAINBOW TOURISM GROUP LTD 2009 (2) ZLR 33 (S)

MBISVA v RAINBOW TOURISM GROUP LTD 2009 (2) ZLR 33 (S)

Citation 2009 (2) ZLR 33 (S)

Case No Judgment No. S-32-09

Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Malaba JA
Heard	25 March 2008
Judgment	15 July 2009
Counsel	*L T Biti*, for the appellant *A K Maguchu*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Appeal** – *Labour Court – appeal limited to question of law – what is a question of law – question as to whether a document constituted a valid legal agreement – such issue a question of law – grounds on which Labour Court may set aside arbitral award – not limited to public policy grounds*

D **Arbitration** – *award – setting aside of – by Labour Court on appeal under Labour Act [Chapter 28:01] – grounds on which Labour Court may set aside award – not limited to question of whether award offended against public policy*

Employment – *Labour Court – appeal to – appeal limited to question of* E *law – what is a question of law – question as to whether a document constituted a valid legal agreement – such issue a question of law – grounds on which Labour Court may set aside award – not limited to question of whether award offended against public policy*

Headnote

The appellant worked for the respondent hotel. Due to deteriorating working F relationships between the parties, the hotel dismissed the appellant. Discussions were held with the appellant's trade union to determine a severance package, but no agreement was reached. Finally, the appellant, who needed money, signed a document entitled "Memorandum of Agreement" (MOA), whereby he agreed to accept a lump sum payment and to withdraw any claims he might have against the hotel. The G appellant's legal practitioners then referred the matter of the appellant's dismissal to a labour officer who, having failed to settle the dispute, referred the matter for compulsory arbitration, the questions for decision being whether the agreement was valid or not and what damages, if any, were payable to the appellant. The arbitrator concluded that the H agreement was not valid. The hotel appealed to the Labour Court, which

Sandura JA

set aside the arbitrator's decision. The appellant appealed to the Supreme A Court, the grounds of appeal being that the Labour Court should not have heard the matter, there being no point of law at issue; and in any event, should have decided the appeal purely on the question of whether the arbitrator's award offended against public policy, as enunciated in art 34 of the Schedule to the Arbitration Act [*Chapter 11:15*]; and that B the MOA was not binding, being signed under duress.

Held, that in terms of s 98(10) of the Labour Act [*Chapter 28:01*] the right to appeal against an arbitrator's decision is restricted to questions of law only. The issue before the Labour Court was whether or not the memorandum was an agreement in terms of the law. That was a question of law, in the sense of being a question of what the law is, and the matter C was thus properly before the Labour Court.

Held, further, that art 34 of the Schedule to the Arbitration Act does not apply to an appeal against an arbitral award, brought to the Labour Court in terms of s 98(10) of the Labour Act. The article only deals with and limits the power of the High Court to set aside an arbitral award, and does not in any way deal with or limit the power of the Labour Court D to set aside an arbitral award challenged in terms of s 98(10) of the Labour Act. The Labour Court therefore did not have to be

satisfied that the arbitral award was in conflict with the public policy of Zimbabwe before setting it aside.

Held, further, on the facts, that the Labour Court found that the appellant E did not sign the MOA under duress; and this matter, being a question of fact only, was not appealable.

Cases referred to

Hama v NRZ 1996 (1) ZLR 664 (S)

Muzuva v United Bottlers (Pvt) Ltd 1994 (1) ZLR 217 (S) F

*Net*One Cellular (Pvt) Ltd v Communications & Allied Svcs Workers Union & Ors* S-89-05

Legislation considered

Arbitration Act [*Chapter 7:15*], First Schedule, art 34(2) G

Labour Act [*Chapter 28:01*], s 98(10)

Case information

L T Biti, for the appellant

A K Maguchu, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the Labour Court H

Sandura JA

A which set aside an arbitral award made in favour of the appellant.

The background facts may be tabulated conveniently as follows:

1. The appellant ("Vimbai") was employed by the respondent ("the Hotel") as a supervisor.
2. On 18 January 2005 the Hotel wrote to Vimbai informing him that his B contract of employment had been terminated. The letter reads as follows:

> "Please be advised that effective 1 January 2005 your employment contract with Sheraton Harare Hotel and Towers has been terminated. You are no longer required to register for duty physically, on standby or in any other form.
>
> C The decision has been taken by management as a last resort after futile attempts to resolve the matter amicably and through further attempts to settle the matter through arbitration. Management and yourself are of the opinion that the employment relationship has deteriorated to non-productive levels.
>
> As a way forward, Sheraton Harare Hotel is willing to resolve the D matter through arbitration provided both parties agree on terms of reference to be presented before the arbitrator."

3. Vimbai took the letter to his trade union, the Zimbabwe Catering and Hotel Workers' Union ("the Union") which, on 20 January 2005, wrote to the Hotel indicating that Vimbai's dismissal would be challenged. E
4. On 21 January 2005 the Hotel wrote to the Union as follows:

> "… Vimbai Mbisva's contract of employment has been terminated due to deterioration in the working relationship between Sheraton Harare Hotel and himself. As stated in our previous correspondence, we are willing and able to engage in dialogue that will result in F the resolution of this matter. We are in addition willing to accept a determination from a body with appropriate authority to settle the matter.
>
> The hotel welcomes intervention from the Zimbabwe Catering and Hotel Workers' Union provided such intervention assists in a settlement of the above matter." G

5. Thereafter, the Union proposed that Vimbai be given a severance package equivalent to his salary for a period of two-and-a-half years, but the Hotel rejected that proposal.
6. Subsequently, the Union and the Hotel entered into negotiations on the best way forward, but the negotiations did not yield any positive results. H
7. Then on 25 January 2005 Vimbai went to the Hotel where he signed a

Sandura JA

Memorandum of Agreement ("the MOA") which reads as follows: A

> "I Vimbai Mbisva … hereby acknowledge that I have entered into an agreement with Sheraton Harare Hotel, under the following terms of which I have agreed:
>
> 1. to accept payment of the sum of Z$17 001 880.46 (Z$ seventeen million one thousand eight hundred and eighty dollars and B forty-six cents) as full and final settlement of all claims that I have against Sheraton Hotel Harare, its directors, subsidiaries, associated companies and operations. I acknowledge that I have received Z$17 001 880.46 (Z$ seventeen million one thousand eight hundred and eighty dollars and forty-six cents) in full.
> 2. to withdraw all claims, complaints and statements made (by) C me relating to Sheraton Hotel Harare, whether with my legal advisors, any legal advisors, any government body, any court, tribunal or to (*sic*) any other organisation.
>
> I acknowledge that I have no further claims against Sheraton Hotel Harare, its directors, subsidiaries, associated companies and D operations, whether for damages or otherwise. I have entered into this agreement of my own free will and I confirm that my signature appears on this agreement. I undertake to file a copy of this agreement with my legal advisors and any other organisation whose assistance I had sought."

8 On 2 February 2005 Vimbai's legal practitioners referred the issue of E Vimbai's unlawful dismissal to a labour officer for conciliation. The labour officer failed to settle the dispute and, accordingly, on 15 April 2005 issued a certificate of no settlement.

9. On 9 May 2005 the labour officer referred the dispute to compulsory arbitration, and identified the issues for arbitration as: F

> "(1) Whether the agreement of 25 January 2005 between V Mbisva and Sheraton Hotel is valid or not.
>
> (2) If not, what damages are payable to Mr Mbisva."

10. On 3 June 2005 Vimbai and the Hotel's Human Resources Director ("Makoni") appeared before the arbitrator with their legal practitioners. G Both Vimbai and Makoni gave oral evidence and were cross-examined. After addresses by the legal practitioners, the arbitrator reserved his decision.

11. On 18 July 2005 the arbitrator gave his decision, which was that the MOA signed by Vimbai on 25 January 2005 was not binding on the parties because it was not an agreement in the legal sense H .

Sandura JA A

12. Aggrieved by that decision, the Hotel appealed to the Labour Court in terms of s 98(10) of the Labour Act [*Chapter 28:01*] ("the Act").

13. On 5 April 2007 the Labour Court allowed the appeal and set aside the arbitral award granted on 18 July 2005.

14. Dissatisfied with that result, Vimbai appealed to this court, leave to B appeal having been granted in terms of s 92F(2) of the Act.

The grounds of appeal set out in the notice of appeal are as follows:

> "1. The court *a quo* grossly erred as a question of law overturning the decision of the arbitrator on ordinary common law [principles] and not on the [principles] of public policies [enunciated] and captured in Article [34] of the UNCITRAL Model Law as incorporated in our Arbitration Act C [*Chapter 11:15*]. Put simply, [in] overturning the decision of the arbitrator, the court was obliged to consider whether the award in itself offended public policy.
>
> 2. Even assuming that the matter had to be determined purely and squarely on the basis of s 98(10) of the Labour Act [*Chapter 28:01*], the court *a quo* grossly erred (in) overturning [a] finding of fact by the arbitrator. Put D simply, there [were] no questions of law in the appeal pending before the Labour Court, and for that reason, the Labour Court had no good reason to interfere with the finding of fact that [had] been made by the arbitrator.
>
> 3. Put simply, the Labour Court grossly misunderstood its functions, the court dealing specifically with questions of law under s 98(10) of the Labour Act [*Chapter 28:01*]. E
>
> 4. Even assuming, without conceding, that [there were] questions of law in the appeal before the Labour Court, the Labour Court itself grossly erred in holding that [the] document executed

> on 25 January 2005 was binding, and ignored that the same had been executed under protest. In any event, to show that the appellant was not agreeing with the same he had left a settlement cheque with the respondent."

F Although four grounds of appeal are set out in the notice of appeal, there are in fact only three grounds because the second and third grounds raise the same issue, i.e. whether there were questions of law in the appeal pending before the Labour Court.

I shall deal with grounds 2 and 3 first, and then with grounds 1 and 4.

G **Did the appeal to the Labour Court involve a question of law?**

This question is important because, in terms of s 98(10) of the Act, the right to appeal against the arbitrator's decision is restricted to questions of law only. The section reads as follows:

> "An appeal on a question of law shall lie to the Labour Court from any decision H of an arbitrator appointed in terms of this section."

Sandura JA

What is a question of law was considered by this court in *Muzuva* v *United* A *Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S). At 220D-F Gubbay CJ said:

> "The twin concepts, questions of law and questions of fact, were considered in depth by E M Grosskopf 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 B 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 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 C 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 function arises in this country in a criminal trial presided over by a judge and assessors."

Applying these principles to the Hotel's appeal to the Labour Court, there is no doubt in my mind that the appeal involved a question of law. I say so D because, in its notice of appeal filed in the Labour Court, the Hotel based the appeal on the following ground of appeal:

> "… the arbitrator erred grossly at law and on the facts in holding that the Memorandum of Agreement is not [an] agreement in terms of the law."

The issue before the Labour Court was, therefore, whether the MOA was an E agreement in terms of the law. That, in my view, is a question of law within the second sense of the term "question of law" set out above.

There is, therefore, no substance in the second and third grounds of appeal.

Does Article 34(2)(b)(ii) of the Model Law apply to appeals brought to the Labour Court in terms of s 98(10) of the Act? F

This issue arises because, in the first ground of appeal, it is submitted that the Labour Court should not have set aside the arbitral award unless it had been satisfied that the award was in conflict with the public policy of Zimbabwe, in terms of article 34(2)(b)(ii) of the Model Law set out in the First Schedule to the Arbitration Act [*Chapter 7:15*]. G

Article 34 of the Model Law, in relevant part, reads as follows:

> "(1) 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.
>
> (2) An arbitral award may be set aside by the High Court only if –
>
> (a) … H

Sandura JA A

> (b) the High Court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or

(ii) the award is in conflict with the public policy of Zimbabwe.

(3) …".

B The issue set out above was considered by this court in *Net*One Cellular (Pvt) Ltd* v *Communications and Allied Services Workers Union of Zimbabwe & Ors* S-89-05. In that case this court ruled that art 34 of the Model Law did not apply to an appeal against an arbitral award, brought to the Labour Court in terms of s 98(10) of the Act.

In my view, it is quite clear, from a careful reading of art 34, that the article C only deals with and limits the power of the High Court to set aside an arbitral award, and does not in any way deal with or limit the power of the Labour Court to set aside an arbitral award challenged in terms of s 98(10) of the Act.

I cannot, therefore, see any reason for departing from this court's decision in the *Net*One* case *supra*.

D Consequently, the Labour Court did not have to be satisfied that the arbitral award was in conflict with the public policy of Zimbabwe before setting it aside.

There is, therefore, no merit in the first ground of appeal.

Was the Memorandum of Agreement binding on Vimbai?

E In the fourth ground of appeal it is submitted that the Labour Court erred in holding that the MOA was binding on Vimbai, and ignored the fact that it was signed under duress.

However, this ground of appeal was not dealt with in the heads of argument filed on behalf of Vimbai. Nevertheless, I will deal with it.

F The issue raised in this ground of appeal is whether the MOA was signed under duress.

As already stated, both Makoni and Vimbai gave evidence before the arbitrator and were cross-examined. After consideration of that evidence, the arbitrator said the following:

> " G In one way or the other, after the dismissal of the claimant, the parties contacted each other, resulting in the claimant and Mr Makoni (from Sheraton) meeting to 'finalise' the matter. At this penultimate meeting, the employer presented a document that would put the matter to rest. The claimant knew that if he continued to challenge his dismissal, he would get nothing from the employer. He therefore pretended to be accepting his terminal benefits, but requested that they be split into two parts, with the first part incorporating largely the January H salary and (the) other part the rest of the other terminal benefits.

Sandura JA

> The claimant then wrote 'U.P.' after his signature to signify that he was accepting A the benefits 'Under Pressure'.
>
> This was not explained to the employer. The employer acknowledges that he (it?) was not aware that the claimant had signed the document under pressure. …
>
> The claimant hoodwinked the employer into believing that he was consenting to the termination of employment and to the acceptance of terminal benefits. B This was done with the sole aim of accessing the January salary.
>
> The claimant's conduct is … deplorable. He was understandably desperate for cash but he used unorthodox methods to get what he wanted. …
>
> He lied that he was accepting the benefits of his own free will, and that his acceptance was in full and final settlement of [the] claims that he had against the respondent. No wonder the respondent's agent kept referring to him as a trickster.
>
> Had it not been for my findings regarding the MOA I would have ruled that the C claimant be bound by [his] signature, never mind the invented 'U.P'."

It is quite clear from what the arbitrator said that he was satisfied that Vimbai had not signed the MOA under duress.

The Labour Court was of the same view and said the following:

> "It may very well be true that he was under financial pressure which forced him D to accept a deal that he did not like. But the fact remains that he need not have accepted the deal. It is not like his will was

> overborne by [the] appellant's to the extent that he had no choice in the matter. He had a choice. He could have rejected the whole deal and pursued other remedies. The fact that he now feels that he should have got more than the deal offered is no ground for breaking the deal." E

The finding by the Labour Court that Vimbai did not sign the MOA under duress is a finding of fact, which is not appealable unless it can be said to be irrational in the sense set out in *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-E, where Korsah JA said:

> "The general rule of law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact F unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion: *Bitcon* v *Rosenberg* 1936 AD 380 at 395-7; *Secretary of State for Education and Science* v *Metropolitan Borough of Tameside* [1976] 3 All ER 665 (CA) at 671 E-H; G *CCSU* v *Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 951 A-B; *PF-ZAPU* v *Minister of Justice (2)* 1985 (1) ZLR 305 (S) at 326 E-G."

In the present case, I am not prepared to say that, having regard to the evidence placed before the arbitrator and the Labour Court, the finding complained of is irrational in the sense set out above. Consequently, the finding that Vimbai did not sign the MOA under duress is not appealable, and the fourth ground H

Sandura JA

A of appeal, therefore, falls away.

In my view, the Labour Court correctly determined the matter. The MOA was a declaration by Vimbai that the dispute between him and the Hotel had been settled on the terms and conditions set out in the MOA. That conclusion is logically consistent with what happened in this case before 25 January 2005.

B Vimbai was dismissed by the Hotel. He reported the matter to the Union and a labour dispute ensued. Negotiations aimed at settling the dispute commenced between the Union and the Hotel. The Union proposed that Vimbai be given a severance package equivalent to his salary for a period of two-and-a-half years, but the Hotel rejected the proposal. As he badly needed some money, Vimbai went to the Hotel on 25 January 2005 and signed the MOA, declaring C that the labour dispute had been settled on the terms and conditions set out therein. In my view, that declaration is binding on him.

In the circumstances, the appeal is dismissed with costs.

D ZIYAMBI JA and MALABA JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

E *Dube, Manikai & Hwacha*, respondent's legal practitioners"

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Source:
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SAFARI OPERATORS ASSOCIATION OF ZIMBABWE v ZIMBABWE TOURISM AUTHORITY & ORS 2009 (2) ZLR 42 (H)

Citation 2009 (2) ZLR 42 (H)

Case No Judgment No. HH-81-09

Court	High Court, Harare
Judge	Patel J
Heard	26 March 2009
Judgment	21 July 2009
Counsel	*H Zhou*, for the plaintiff *O O Takaindisa*, for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Statutes – *Tourism Act [Chapter 14:20] – Tourism (Designated Tourist Facilities) (General) Regulations, 1996 (SI 107 of 1996) – levies paid to Tourism Authority on facilities provided at a registered tourist facility* D *– money paid by hunters for trophies – whether trophies are a "facility" in terms of the Regulations*

Headnote

The Zimbabwe Tourism Authority, which administers the Tourism Act [*Chapter 14:20*], issued a circular to hunting operators instructing them to pay a 2% levy on all trophy fees received by them. The applicant sought E an order declaring that the instruction was *ultra vires* the Act. In terms of s 35 of the Act, the Minister had declared that services or facilities provided to tourists by hunting operators would be "designated tourist facilities". Under s 55 of the Act, the Minister may require levies to be paid in respect of registered tourist facilities and may require the person F operating such a facility to include the levy in the price charged for tourist facilities. The Tourism (Designated Tourist Facilities) (General) Regulations, 1996 (SI 107 of 1996) require that a levy of 2% be charged to the tourist making use of any facility provided at the designated tourist facility concerned.

The hunting operators charged the levy in respect of all services, facilities and G amenities provided, including hunting operations. In addition, a tourist is charged a further variable amount depending on the type of animal to be hunted. The trophy charge is not separately invoiced but is added to the daily rate charged and forms part of the gross amount realised by the operator for hunting and all other services rendered to the tourist. Where the tourist fails to kill any animal, he would be refunded the H

Patel J

A additional amount paid. If the tourist is successful, the trophy belongs to him exclusively, and the extra payment is retained by the hunting operator. The applicant argued that the trophy *per se* did not constitute a service or facility provided by the operator. The issue was whether a hunting trophy was a "facility" in terms of the Regulations.

Held, that hunting operations and safaris are "facilities" as defined in the B legislation. The trophy fee paid by a tourist to a hunting operator is a sum paid to be able to hunt using the hunting facilities provided by the operator. If the tourist succeeds in killing an animal, he has to pay the additional charge for his trophy, which he has acquired solely by dint of the facilities provided by the hunting operator. It follows that the hunting C operation affords the means by which the tourist is able to access the trophy. The trophy is quite clearly an intrinsic and inseparable part of the hunting services provided by the operator and could not, in ordinary usage, be extricated from the service or facility provided by the operator.

Legislation considered

Tourism Act [*Chapter 14:20*], ss 2, 35 & 55

Tourism (Designated Tourist Facilities) (Declaration and Requirements for Registration) Regulations, 1996 (SI 106 of 1996), ss 3, 18,19 & 20(1); First Schedule, Item (c)(ii)

Case information

H Zhou, for the plaintiff

O O Takaindisa, for the first respondent

Judgment

PATEL J: The applicant is an association that comprises licensed tour and safari operators and represents their interests. The first respondent is the Zimbabwe Tourism Authority (hereinafter referred to as the "ZTA") which is established under the Tourism Act [*Chapter 14:20*] and is primarily responsible for administering that Act.

Towards the end of 2007 the ZTA issued Circular No. ZTF/1/2007 addressed to all hunting operators requiring them to pay a 2% levy on all trophy fees received by them. The applicant challenges the legality of that directive. It seeks a *declaratur* that its members are not liable to pay any levy or surcharge on trophy fees paid by tourist hunters in designated tourist facilities. It also seeks an order restraining the respondents and their employees from taking any coercive action to enforce the levy.

Initially, in its opposing papers, the ZTA questioned the *locus standi* of the applicant, as well as the propriety of the declaratory order sought by the applicant. However, at the hearing of this matter, Mr *Takaindisa,* for

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Patel J

the ZTA, did not persist with these ancillary issues. The sole question for determination is whether the levying of the two percent surcharge on trophy fees is *intra vires* the Act and the regulations made thereunder.

Section 2 of the Act defines a "designated tourist facility" as meaning "any service, premises, place or thing which the Minister has declared to be a designated tourist facility in terms of section *thirty-five*". Section 35 of the Act provides that:

> "The Minister, after consultation with the Board, may by statutory instrument declare that —
>
> (a) any service whatsoever provided for tourists; or
>
> (b) any premises or place in or on which a service referred to in paragraph (a) is provided, or
>
> (c) any premises, place or thing whatsoever which, in the Minister's opinion, affords an amenity to tourists;
>
> shall be a designated tourist facility."

The declaration of designated tourist facilities by the Minister was effected through the Tourism (Designated Tourist Facilities) (Declaration and Requirements for Registration) Regulations, 1996 (SI 106 of 1996) (hereinafter referred to as "the Registration Regulations"). In terms of s 3 of the Regulations, "the services, premises or places specified in the First Schedule are declared to be designated tourist facilities". Item (c)(ii) of the First Schedule specifically lists as designated tourist facilities:

> "services or facilities provided to tourists by ... hunting operators".

Section 55 of the Act enables the fixing of levies and surcharges and provides, in its relevant portions, as follows:

> "(1) After consultation with the Minister responsible for finance and the Board, the Minister may make regulations in terms of section *fifty-seven* prescribing levies to be paid by any class of registered tourist facilities or licensed persons.
>
> (2) In prescribing any levy in terms of subsection (1), the Minister —
>
> (a) shall prescribe …; and
>
> (b) may —

(i) require any person conducting or operating a registered tourist facility to include in the price of any services rendered by him a surcharge at G such rate as may be prescribed, and may require him to collect such surcharge;

(ii) fix any other basis on which the levy shall be calculated."

The levy envisaged by s 55 of the Act is prescribed in the Tourism (Designated Tourist Facilities) (General) Regulations, 1996 (SI 107 of 1996) (hereinafter referred to as "the General Regulations"). Section 18 of the General Regulations H

2009 (2) ZLR p45

Patel J

A requires the payment of a levy "in respect of all registered designated tourist facilities". Section 19 of the General Regulations provides that:

> "The levy shall be at the rate of 2 *per centum* of the gross amount, excluding sales tax or any other tax or duty, charged to that [*sic*] tourist making use of any facility provided at the designated tourist facility concerned."

Section 20(1) of the General Regulations makes the operator of every B designated tourist facility responsible for the payment and collection of the levy and subs (2) provides that:

> "The operator of a designated tourist facility shall add to the charge for accommodating each tourist thereat a surcharge equal to the amount of the levy payable in respect of the tourist concerned."

C According to the applicant, its members charge their clients the stipulated 2% in respect of all services, facilities and amenities provided, including hunting operations. Furthermore, the tourist in question is charged an additional variable amount depending on the type of the animal to be hunted. Where the tourist fails to kill any animal, he or she is refunded the additional amount paid. If the tourist is successful in killing the animal, the trophy belongs to D him or her exclusively, and the additional amount paid is retained by the hunting operator. In these circumstances, the applicant's position is that the trophy *per se* does not constitute a service or facility provided by the operator.

According to the ZTA, the hunting tourist is charged a predetermined refundable fee for the right to hunt a specified animal, which right forms E part of the facilities and services offered by the hunting operator. The trophy charge is not separately invoiced but is added to the daily rate charged and forms part of the gross amount realised by the operator for hunting and all other services provided to the tourist. In short, the hunting services for which trophy fees are charged cannot be separated from the other services provided by the operator.

F The central question for determination *in casu* is this: does a hunting trophy constitute a "facility" within the meaning of s 35 of the Act and the Registration Regulations so as to attract the levy and surcharge imposed by s 55 of the Act and the General Regulations.

The word "facility" is defined in *Black's Law Dictionary* (5 ed) and in G *Webster's New Twentieth Century Dictionary* (2 ed) to mean:

> "the easiness of access, the means by which something can be more easily done".

It is common cause that hunting operations and safaris are facilities as defined in the legislation. It is also not in doubt that the trophy fee paid by a tourist to a hunting operator is a sum paid to be able to hunt using the H hunting facilities provided by the operator. It follows that a hunting operation

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2009 (2) ZLR p46

Patel J

affords the means by which the tourist is able to access the trophy. On this A analysis, the trophy is quite clearly an intrinsic and inseparable part of the hunting services provided by the operator. It cannot, in ordinary usage, be extricated from the service or facility provided by the operator. To do so would be tantamount to pure artifice.

As I perceive it, access to a trophy by a hunting tourist is analogous to the B items provided in so-called mini-bars in hotel rooms. The tourist is charged a fixed rate by the hotel for the use of the room, including the mini-bar, as part of the facilities provided by the hotel. The tourist is at large, should he or she so desire, to consume items from the mini-bar. If they do, they are then required to pay an additional charge for the specific items that they consumed. A hunting trophy, in my view,

is no different. If the tourist succeeds C in killing an animal, he must pay the additional charge for the trophy which he acquired solely by dint of the facility provided by the hunting operator.

It follows from the foregoing that a hunting trophy constitutes a "facility" as envisaged in the Act and the Registration Regulations and is therefore subject to the levy and surcharge imposed thereunder. In the result, the applicant is D not entitled to the *declaratur* and interdict that it seeks and this application must be dismissed with costs.

Scanlen & Holderness, applicant's legal practitioners

Gula-Ndebele & Partners, first respondent's legal practitioners E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/SHEASBY v CHIEF IMMIGRATION OFFICER & ANOR 2009 (2) ZLR 47 (H)

SHEASBY v CHIEF IMMIGRATION OFFICER & ANOR 2009 (2) ZLR 47 (H)

Citation	2009 (2) ZLR 47 (H)
Case No	Judgment No. HB-77-09
Court	High Court, Bulawayo
Judge	Cheda J
Heard	18 June 2009
Judgment	23 July 2009
Counsel	*A J Sibanda,* for the applicant *T N Maguma*, for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Domicile – *domicile of origin and domicile of choice – distinction between – domicile of origin invested at birth – how domicile of origin can be changed to one of choice*

Domicile – *domicile of choice – intention in question of domicile is subjective* D *– must be decided on a person's state of mind*

Immigration – *domicile – loss of – when domicile in Zimbabwe is lost – Immigration Act [Chapter 4:02] – s 3(4)*

Headnote

The applicant was born and grew up in Zimbabwe. After his tertiary education E in South Africa, he was granted residence in Australia, where he stayed continuously for 3 years. He acquired Australian citizenship and thereby lost his Zimbabwean citizenship. He did not surrender his Zimbabwean passport and used it on numerous occasions to enter and leave Zimbabwe. When he first did so, he declared that he was a returning resident. The respondent argued that he was an

alien and had lost his domicile in F Zimbabwe. The applicant argued that he had not lost his domicile of origin as he still had an immovable property in Zimbabwe and continued to pay rates and taxes like all Zimbabweans.

Held, that everyone is born with a domicile, being that of origin which he or she can later change by choice. Domicile of origin is that which he G or she is invested at birth. He retains it until he chooses another, which becomes his domicile of choice.

Held, further, that domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the intention of continuing to reside there for an unlimited time. There must be a residence freely chosen, H and not prescribed or dictated by any external necessity, such as the

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Cheda J

duties of office, the demands of creditors or relief from illness and it A must be residence fixed, not for a limited period or particular purposes, but general and indefinite in its future contemplation (*dicta per* Lord Westbury in *Udny* v *Udny* (1869) LR 1 HL Sc & Div 441 followed).

Held, further, that the determination of intention in the question of domicile "must be a subjective question. It may be evidenced by outward B circumstances but must be decided on the simple fact of his state of mind" (*dicta per* Tredgold J in *Fenner* v *Fenner* 1943 SR 188 at 191 followed).

Held, further, that under s 3(4) of the Immigration Act [*Chapter 4:02*], a person can lose his domicile of origin by voluntary departure from Zimbabwe and residence outside Zimbabwe with an intent of making C his home outside Zimbabwe. The applicant voluntarily departed for Australia and he chose and assumed Australian citizenship. His conduct could lead to one irresistible conclusion: that he intended to abandon his domicile of choice. He had a definite intention (*animus manendi*) to permanently remain in Australian as opposed to a "floating intention", being the desire to return to his domicile of origin upon the happening D of a certain event.

Cases cited

Udny v Udny (1869) LR 1 HL Sc & Div 441

Fenner v Fenner 1943 SR 188 E

Legislation considered

Immigration Act [*Chapter 4:02*], s 3

Case information

A J Sibanda, for the applicant

T N Maguma, for the first respondent F

Judgment

CHEDA J: This is an application for a confirmation of the provisional order issued at this court by my brother Ndou on 8 December 2008. The provisional order is couched as follows:

> "INTERIM RELIEF GRANTED
>
> Pending the return day, the applicant is hereby granted the following interim relief:- G
>
> (a) The first and second respondents be and are hereby interdicted and prohibited from taking any action whatsoever to effect the deportation of the applicant from Zimbabwe and in particular shall not arrest or cause the arrest, detention and forced removal of the applicant and/or any member of the applicant's immediate family from Zimbabwe, and where such action had already been taken, the first and second respondents be and are hereby ordered H

Cheda J

> A and directed to immediately re-admit the applicant back into Zimbabwe on such temporary terms as may be appropriate in the circumstances and to renew such permit from time to time pending and until finalization of this matter by this Honourable Court.

(b) Service of this Order shall be effected by the applicant's legal practitioners upon the Principal Immigration Officer in Bulawayo or a responsible person B at the Bulawayo office for and on behalf of the first respondent, and upon the second respondent by the Deputy Sheriff of the High Court in terms of the rules of this Honourable Court."

The genesis and historical background as well as the facts of this case are captured below. The applicant was born in Zimbabwe in 1970 and is therefore a Zimbabwean by birth. He completed his secondary education in Zimbabwe C and went on to study for a Bachelor of Commerce degree in South Africa, thereafter joined a firm of Chartered Accountants, Deloitte and Touche in Bulawayo. In 2004 he left for Australia. Upon arrival in Australia he was granted an indefinite stay and was issued with an Australian passport, thereby becoming an Australian citizen. He, in fact, elected to become an Australian. However, upon acquiring the Australian citizenship he did not surrender his D Zimbabwean passport to the Zimbabwean authorities as Zimbabwe's laws do not permit dual citizenship. The applicant returned to Zimbabwe on 6 April 2007 using the Zimbabwean passport and declared that he was coming back as a returning resident. Since his arrival, he continued to use his Zimbabwean passport which he did on 22 occasions, the latest being on 29 November 2007. He first used his Australian passport on 2 August 2007 and has done so on 33 occasions. The applicant was using his passports interchangeably, that is, as and when it was convenient for him.

The applicant has argued that he is a Zimbabwean and therefore he has not lost his domicile of origin as he still has an immovable property in Zimbabwe and continues to pay rates and taxes like all Zimbabweans. He further argued that the reason why he declared that he was a returning resident was as a result of the advice from a friend. This excuse, with all due respect, does not make sense. The applicant is an educated and professional person, in my view, and there is no way he would seek advice on such an important issue from a friend and not from a lawyer.

On the other hand, the first respondent's argument is that applicant has not been honest, in that he misrepresented facts when he declared that he was a returning resident, yet, in fact and in truth, he was now an alien in terms of Zimbabwe's laws by virtue of the fact that he had now acquired Australian citizenship and his passport was stamped with the words "indefinite stay."

The question which falls for determination is whether or not the applicant

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Cheda J

has now lost his domicile of origin to Zimbabwe. Perhaps, the first question to ask is, what is domicile? According to *Chambers Concise Dictionary* (1988), "domicile" is defined as

> "a dwelling place, one's legally recognized place of residence."

It is therefore a term used to define one's status, capacity and rights. Every person has a domicile, it can either be a domicile of origin or of choice.

Basically everybody is born with a domicile, being that of origin which he/she can later change by choice. Domicile of origin is that which he/she is invested at birth. He retains it until he chooses another, which becomes his domicile of choice: see *Encyclopaedia of the Laws of England vol 4* (1897) 339-344. Domicile of choice was described in the leading and celebrated English case of *Udny* v *Udny* (1869) LR 1 HL SC and Div 441 where Lord Westbury stated:

> "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the intention of continuing to reside there for an unlimited time … There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or relief from illness and it must be residence fixed, not for a limited period or particular purpose, but, general and indefinite in its future contemplation."

The question which falls for determination is whether or not applicant lost his domicile of origin or not when he acquired the Australian citizenship?

Section 3 of the Immigration Act [*Chapter 4:02*] states:

> **"3. Domicile**
>
> (1) Subject to this section, a person shall be regarded, for the purposes of this Act, as being domiciled in a country if —
>
> (a) he resides permanently in that country; or
>
> (b) that country is the country to which he returns as a permanentresident.

(2) A person who resides in Zimbabwe by virtue of the fact that —

(a) he has been allowed to enter or remain in Zimbabwe through error, oversight, misrepresentation or a contravention of this Act or a repealed Act; or

(b) it has not been discovered that he is a prohibited person or an alien;

shall not acquire a domicile in Zimbabwe."

Further, section 3(4) reads:

"4. Subject to subsection (5)—

(a) a person shall, for the purposes of this Act, lose his domicile in Zimbabwe if he —

Cheda J

(i) has voluntarily departed from and resides outside Zimbabwe with the intention of making his home outside Zimbabwe; or

(ii) is absent from Zimbabwe for a continuous period of seven years or such longer period as the Minister may, at his request, fix before the expiry of that period:

Provided that the Minister may, in special circumstances, fix a longer period in terms of this subparagraph after the expiry of the period of seven years;

(b) the fact that a person has taken up residence outside Zimbabwe shall be *prima facie* evidence of his intention of making his home outside Zimbabwe and the onus of proving otherwise shall be on the person who (*sic*) status is in question;

(c) the fact that a person who was domiciled in Zimbabwe has made any statement, whether for the purposes of this Act or any other enactment or otherwise, to the effect that he is no longer a resident or no longer regards himself as a resident of Zimbabwe shall be *prima facie* evidence that he has lost his domicile in Zimbabwe."

It is clear, therefore, that a subject can lose his domicile of origin by either voluntary departure from Zimbabwe and residence outside Zimbabwe with an intent of making his home outside Zimbabwe or alternatively, is absent from Zimbabwe for a continuous period of seven years. The applicant was away for a period of two years only, therefore the alternative is not subject to debate. The question here is the nature of his departure and his intention when he did so. The intention of a subject can either be express or implied E by his actions.

The applicant voluntarily departed to Australia. Upon arrival he chose and assumed Australian citizenship. He resided and undertook his studies there. His intention was not expressed. It can only be read from his conduct, that is,

(1) his voluntary departure from Zimbabwe, and

F (2) his election to assume Australian citizenship coupled with his physical presence thereat for an indefinite period.

In *Fenner* v *Fenner* 1943 SR 188 at 191, Tredgold J (as he then was), in dealing with the question of the determination of intention in the question of domicile, stated:

"The determination of a man's intention must be a subjective question. It may G be evidenced by outward circumstances but must be decided on the simple fact of his state of mind."

The applicant's conduct, in my opinion, can only lead to one irresistible conclusion, being that he intended to abandon his domicile of choice. In other words, he had a definite intention (*animus manendi*) to permanently H remain in Australian as opposed to a "floating intention", being the desire

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Cheda J

to return to his domicile of origin upon the happening of a certain event as A observed by Lord Westbury *supra.*

The applicant has argued that he is a Zimbabwean by birth and that despite his voluntary departure he had always maintained contacts with Zimbabwe, namely, that he did not relinquish his shares at Deloitte and Touche and that he did not sell his house at Fortunes Gate, Bulawayo. While this may be B so, this is nothing more than a moral argument as the issue of ownership of assets in Zimbabwe is not proof that a subject who has voluntarily departed from Zimbabwe and assumed a foreign citizenship has not lost his domicile of origin. It is common international commercial

practice that one can have assets in various countries without assuming domicile of the said countries.

Further, the applicant has been guilty of dishonesty since his arrival in C Zimbabwe. He holds both Zimbabwean and Australian passports and was using them only when it was convenient for him to do so. He also lied about the reasons for his arrival in Zimbabwe, that is, that he was a returning resident when he knew fully well that he was now a holder of Australian passport. His use of these passports interchangeably was not by accident, but a well thought out plan clearly designed to contravene the Immigration D Act and thus to dupe the authorities.

In light of the above, I find that the applicant lost his domicile of origin and assumed his domicile of choice, being Australia.

Accordingly, the provisional order issued by this court on 8 December 2008 E be and is hereby discharged.

Joel Pincus, Konson and Wolhuter, applicant's legal practitioners

Civil Division, Attorney General' Office, respondents' legal practitioners F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/HUBERT DAVIES EMPLOYEES TRUST (PVT) LTD & ORS v CROCO HOLDINGS (PVT) LTD 2009 (2) ZLR 53 (S)

HUBERT DAVIES EMPLOYEES TRUST (PVT) LTD & ORS v CROCO HOLDINGS (PVT) LTD 2009 (2) ZLR 53 (S)

Citation	2009 (2) ZLR 53 (S)
Case No	Judgment No. S-35-09
Court	Supreme Court, Harare
Judge	Malaba JA, Gwaunza JA & Garwe JA
Heard	8 February 2008
Judgment	24 July 2009
Counsel	*L T Biti*, for the appellants *J C Andersen* SC, for the respondents
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Appeal – *notice – validity – notice not complying with requirements of r 29 of Supreme Court Rules – notice fatally defective – course open to appellant*

Headnote

D A notice of appeal which does not comply with the requirements of r 29 of the Supreme Court Rules 1964 is fatally defective. Unless the court is prepared to grant an application for an extension of time within which to comply with the relevant rule and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs.

Cases cited E

Guwa & Anor v Willoughby's Investments (Pvt) Ltd 2009 (1) ZLR 380 (S)

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

Legislation considered

F Supreme Court Rules 1964 (RGN 380 of 1964), r 29

Case information

L T Biti, for the appellants

J C Andersen SC, for the respondents

Judgment

GARWE JA: This is an appeal against a provisional order granted by the G High Court, Bulawayo directing the appellants to grant the respondent full access to the Bulawayo Branch of the second appellant and to account to the respondent daily on the status of the second appellant's bank account. The order also interdicted the respondent from disposing of any assets except in the ordinary course of business.

H The background to this matter is as follows. The second appellant is a wholly

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owned subsidiary of the first appellant. The first appellant's shareholders A consist of the third to the fifth appellants, one Mark Greene and other employees of the first appellant. Following an agreement between the third appellant and the respondent, the respondent paid the sum of Z$150 million which was part of the purchase price for the entire shareholding of the first appellant in the second appellant. Thereafter a dispute arose as to the exact B terms of the agreement. The respondent then filed a chamber application in the High Court alleging the existence of a contract in terms of which the first appellant's shareholding in the second appellant was sold to it by the third appellant. The respondent further alleged that the appellants were now unjustifiably seeking to repudiate the contract. One of the material terms of the agreement, so the respondent alleged, was that it was entitled to take C interim charge of the second appellant's Bulawayo Branch. The respondent also alleged *inter alia* that the appellants were obliged to account daily on the status of the second appellant's bank account.

The application was served on the appellants between 26 and 27 October 2006. On 27 October 2006 the High Court granted an order against the appellants. That order forms the subject of what purported to be a notice of D appeal to this court.

The notice of appeal reads as follows:

> "TAKE NOTICE THAT the appellants hereby note an appeal against the judgment of Bere J held down in chambers on 7 November 2006.
>
> The grounds of appeal are as follows: E
>
> 1. The court *a quo* erred in issuing a provision (*sic*) order *ex parte* without setting the matter down to enable the respondents in the application to make submissions.
> 2. The court *a quo* erred in implicitly holding that the respondent had a *prima facie* right or a clear right entitling it to the interim relief granted.
> 3. Further to the extend (*sic*) that para 1, 2 and 3 of the interim relief granted F were of a final nature, the court *a quo* erred in granting such a final order without notice and *ex parte*.
>
> TAKE NOTICE THAT the appellants pray that this appeal succeeded with costs and the decision of the court *a quo* is upturned to read as follows:
>
> 'In the circumstances the chamber application is dismissed with costs'.

TAKE NOTICE THAT the address of service is care of the undersigned legal G practitioners of record and registered postal address is P O Box 85 Harare.

DATED AT HARARE THIS 9TH DAY OF NOVEMBER 2006

HONEY & BLANKENBERG."

The appellants and the respondents have in their heads of argument raised various issues. Subsequent to the filing of the heads of argument, the H

Garwe JA

A respondent also filed an application to lead further evidence on appeal. For reasons that follow shortly it will not be necessary to deal with the various issues that have been raised because there is in fact no valid appeal before the Supreme Court.

In its submissions the respondent has taken the point that the notice of appeal B filed is defective in that it does not indicate whether it is the whole judgment or part only that is appealed against. The respondent has submitted that in the circumstances the notice of appeal is a nullity.

I agree with the respondent that the notice of appeal before this court is a nullity.

C Rule 29 of the Supreme Court Rules provides as follows:

"29. Entry of appeal

(1) Every civil appeal shall be instituted in the form of a notice of appeal signed by the appellant or his legal representative, which shall state -

(a) the date on which, and the court by which, the judgment appealed against was given; D

(b) if leave to appeal was granted, the date of such grant;

(c) whether the whole or part only of the judgment is appealed against;

(d) the grounds of appeal in accordance with the provisions of rule 32;

(e) the exact nature of the relief which is sought;

(f) the address for service of the appellant or his legal practitioner.

E (2) The notice of appeal shall be served on the Registrar, the Registrar of the High Court, and the respondent."

This court has on a number of previous occasions stated that non-compliance with r 29 has the effect of nullifying a notice of appeal. In *Jensen* v *Acavalos* 1993 (1) ZLR 216 (S), Korsah JA considered the effect of the failure to state whether the whole or part only of the judgment is appealed against. F At p 220 he remarked:

"… 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 G 574C-D.

In *Hattingh* v *Pienaar* 1977 (2) SA 182 (O) 182 at 183, Klopper 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 H the words of Lord Denning in *McFoy* v *United Africa Co Ltd* [1961] 3 All ER

Garwe JA

1169 (PC) at 11721, 'every proceeding which is founded on it is also bad and A incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse'."

See also the recent decision in *Guwa & Anor* v *Willoughbys Investments (Pvt) Ltd* 2009 (1) ZLR 380 (S).

There can be no doubt that the notice of appeal filed with the Registrar of B this court is fatally defective and that consequently there is no appeal before this court. Both parties should have been asked to address this court on this aspect before dealing with the other issues raised in the papers. Had that been done it would have been clear that there was in fact no appeal before this court and consequently the matter should simply have been struck off the roll.

It follows from what I have said above that the application to lead further C evidence on appeal cannot be entertained for the reason that there is no appeal before this court.

In the result, therefore, the following order is made:

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

MALABA JA and GWAUNZA JA concurred

Honey & Blankenberg, appellants' legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/DIOCESAN TRUSTEES, DIOCESE OF HARARE v CHURCH OF THE PROVINCE OF CENTRAL AFRICA 2009 (2) ZLR 57 (H)

DIOCESAN TRUSTEES, DIOCESE OF HARARE v CHURCH OF THE PROVINCE OF CENTRAL AFRICA 2009 (2) ZLR 57 (H)

Citation	2009 (2) ZLR 57 (H)
Case No	Judgment No. HH-166-09
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	23 July 2009
Judgment	24 July 2009
Counsel	*G C C Chikumbirike*, for the applicant *E W W Morris*, with him *H Zhou*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Courts – *judicial officer – recusal – application for – need for formal written application to be made – recusal – principles – objective test applicable – irrelevance of judge's subjective view that he would not be biased*

D **Practice and procedure** – *plea – lis alibi pendens – requirements – court's discretion to order or refuse stay of proceedings – matters to be considered*

Practice *and procedure – pre-trial conference – whether judge conducting pre-trial conference may deal with application proceedings in same matter*

Headnote

E A formal written application should be made for the recusal of a judicial officer. A formal application is necessary, because certain issues raised informally in the preliminary stages of a

recusal request could have fallen away and more pertinent points assumed prominence. The formal application, like pleadings, "fixes" or joins issues, so that the proceedings F do not become a snowballing roller-coaster of complaints and allegations.

Although the judge's own subjective belief that he would not be biased is increasingly regarded as irrelevant, the application itself should be *bona fide*. A mere suspicion of bias is not enough. The fact that the judge indicated the desirability of the parties reaching a settlement is not proof of bias.

G A judge should disqualify himself from participating in any proceedings in which he is unable to decide the matter impartially or in which it may appear to a reasonable observer that he is unable to decide the matter impartially. There still exists a tension – which should not be ignored – between acceding too readily to requests for recusal, on the one hand, H and the duty to sit where one is not disqualified on the other. The judge's

duty to sit where he is not disqualified is as compelling as the duty not A to sit where he is disqualified.

The plea in abatement of *lis alibi pendens* is raised by a party that is able to establish the following prerequisites:

(a) the litigation is pending;

(b) the other proceedings are between the same parties or their privies;

(c) the pending proceedings are based on the same cause of action, and B

(d) the pending proceedings are in respect of the same subject matter. However, even if a party satisfies all the requisites, the court still has discretion to order or refuse a stay of proceedings on the grounds of *lis alibi pendens*, and in the exercise of that discretion it will have regard to the equities and to the balance of convenience in the matter. The exception is available even where the matters in issue are not brought by the same C party, and indeed even where the prior or later matters consist of more than one suit. Considerations of convenience and equity must underpin the exercise of any discretion whether or not to allow the defence of *lis pendens*. The case which is allowed to proceed must not necessarily be the one that was instituted first. The question is whether justice will not D be done without the double remedy.

The High Court's tradition of prohibiting a pre-trial judge from conducting the trial itself seeks to prevent the mischief of a judge's assessment of evidence in the actual trial being coloured by proceedings at the pre-trial conference stage. That risk does not exist in application proceedings. E

Cases referred to

ANZ & Anor v Diamond Ins Co (Pvt) Ltd 2001 (1) ZLR 226 (H)

Baldwin v Baldwin 1967 RLR 289 (G)

Breytenbach's Est v Breytenbach 1945 TPD 264

Chizura v Chiweshe 2003 (2) ZLR 64 (H)

Diocese of Harare v Church of the Province of Central Africa & Anor F 2008 (1) ZLR 112 (H)

Diocese of Harare v Church of the Province of Central Africa & Anor 2008 (1) ZLR 139 (S)

Forbes v Uys 1933 TPD 362

Geldenhuys v Kotzé 1964 (2) SA 167 (O) G

Independent African Church v Maheya 1998 (1) ZLR 552 (H)

Indra v Slovakia ECHR judgment dated 1 February 2005

Irving & Co v Dreyer 1921 CPD 185

Re *JRL*: ex p *CJL* (1986) 161 CLR 342 (High Court of Australia)

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

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A *Michaelson v Lowenstein* 1905 TS 324

Mhungu v Mtindi 1986 (2) ZLR 171 (S)

New York Shipping Co (Pty) Ltd v EMMI Eqpt (Pty) Ltd & Ors 1968 (1) SA 353 (SWA)

R (Donoghue) v County Cork Justices [1910] 2 IR 271

Richtersveld Community v Aleskor Ltd & Anor 2000 (1) SA 337 (LCC)

B *Soffiantini v Mould* 1956 (4) SA 150 (E)

Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor 1998 (2) ZLR 547 (H)

Steytler NO v Fitzgerald 1911 AD 295

Thorsen v Coopsamy 1936 NPD 636

Case information

C *G C C Chikumbirike*, for the applicant

E W W Morris, with him *H Zhou*, for the respondent

Judgment

HLATSHWAYO J: The two matters HC 4327/08, which is a court application, and HC 2792/09, which is an urgent chamber application, were consolidated D and heard together. Judgment in outline form was handed down on 24 July 2009 for both matters, but as indicated then, a detailed written judgment was to follow. This is it:

In HC 4327/078, *Diocesan Trustees for* t*he Diocese of Harare* v *Church of the Province of Central Africa* ("the court application") the applicant seeks E the following order:

"It is ordered that:

1. The following persons be and are hereby declared the Diocesan Trustees of the Diocese of Harare:
   (i) Bishop Dr Nolbert Kunonga
   (ii) Mr Beaven Michael Gundu F
   (iii) Mr Justin M Nyazika
   (iv) Mr P Majokwere
   (v) Mr Onias Gatawa
   (vi) Mr Alfred Tome
   (vii) Mr Winter Regie Shamuyarira G
2. The property of the Diocese of Harare whether movable or immovable owned by the church within the Diocese vests in the Diocesan Trustees mentioned in para 1 above.
3 The respondent be and is hereby ordered to give vacant possession/occupation and control of the assets of the applicant which respondent occupies or possesses and or controls to the Diocesan Board ***within seven days*** of the H date of this order failing which the Deputy Sheriff with the assistance of the

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Zimbabwe Republic Police be and is hereby authorized on the direction of A the Board to take occupational possession of any assets of the Diocese and to hand over any assets or possession to the Board. *(highlighted amendment added)*

4. Cost of suit".

In case HC 2792/09, Diocesan Trustees for the Diocese of Harare v Church of B the Province of Central Africa, the applicants seek the following provisional order:

"Terms of the Interim Order

(a) That the consecration of a new Bishop by the respondent on 26 July 2009, or any date thereafter be and is hereby stopped *pending the discharge or confirmation of this order on the return date*." (*highlighted amendment* C *added*)

Terms of the Final Order Sought

(a) That it be declared that Dr Nolbert Kunonga is still the Bishop of the Diocess of Harare;

(b) That the respondent is barred from recognizing any Bishop of the Diocese of Harare until there has been compliance with the Constitution of the D respondent; and

(c) That it pays costs of suit".

There were preliminary points of law that were raised pertaining to both matters: recusal of the presiding judge, jurisdiction of the court, the defence of *lis alibi pendens* and *locus standi* of the applicants. E

Recusal Application

No formal written application for recusal of myself as the presiding judge was made in this case, despite the requirement for such an application having been drawn to the attention of the applicant or mover of the recusal motion (whom, however, I shall continue to refer to as "the respondent" as in the main matters). The necessity for such a formal application is self evident F given that certain issues raised informally in the preliminary stages of a recusal request could have fallen away and more pertinent points assumed prominence. The formal application, like pleadings, "fixes" or joins issues, so that the proceedings do not become a snowballing roller-coaster of complaints and allegations. As matters stand now, the basis for the application can only G be gleaned from the letter of the respondent dated 29 June 2009 addressed to the High Court Registrar and the verbal submissions made in court on 23 July 2009, which predictably introduced new issues.

The relevant portion of the letter of 29 June 2009 reads as follows:

> "The Honourable Judge has always taken the view that this matter is capable of resolution and has been encouraging parties to settle the same… In his effort to H

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> A effect a settlement in the matter the Honourable Judge has made it clear that he is inclined to take the position that since Dr Kunonga's attempt to withdraw the Diocese of Harare in September 2007 was uncanonical and unconstitutional it was to that extent a nullity and that in the circumstances it should be taken that Dr Kunonga has therefore not left the church B of the Province of Central Africa and remains the incumbent Bishop for the Diocese of Harare under the Church of the Province of Central Africa.
>
> The Judge has expressed the view that it was not useful to refer to events that then occurred after 21 September 2007.
>
> The Honourable Judge among other things enquired about Dr Kunonga's age in an apparent consideration of the fact that if he were to be reinstated in the Church of the Province of Central Africa he could continue to serve as Bishop and retire C in the foreseeable future, the implication being that in the circumstances our client's discomfort with reinstating Dr Kunonga may be short lived.
>
> Indeed in all these discussions the Honourable Judge referred to Dr Kunonga as 'the incumbent Bishop'.
>
> Our understanding of the Judge's position in this regard has been confirmed by the other party in this matter in their urgent application case number HC 2792/09 D which has also been referred to Hlatshwayo J. Reference is made here to para 6 of Dr Kunonga's founding affidavit in that urgent application".

Paragraph 6 of Dr Kunonga's founding affidavit in case No. HC 2782/09 reads:

> "6. The issues in the Anglican Church have been the subject matter of much controversy since September 2007. Litigation is underway in various cases and in particular pertinent to the issue at hand is case number HC 4327/08, E in which the applicant has instituted a suit (by way of court application) seeking a declarator as appears on a copy of the draft order, which I attach as annexure "B". That issues raised therein are still pending, before his Lordship Mr Justice Hlatshwayo, who postponed the matter *sine die*, because it was his Lordship's view that the parties must settle. The parties are to revert to him shortly, at least before the end of the week, to enable dialogue to be pursued in his Lordship's presence, both parties having F accepted that his Lordship's perspective that (made in the light of the averments that were made in the application under reference), the only way in which the dispute in the Anglican Church can be resolved is to revert to the *status quo*, as it pertained on 21 September 2007. It is not necessary that I relate to the reasons for such in this application, suffice to ask and beg this honourable court to refer to my affidavit in that matter, which I G beg leave be incorporated as part of this application".

The respondent (Church of the Province of Central Africa) itself emphatically countered the above averments in its notice of opposition in a manner which should have put the whole matter of recusal to rest, thus:

"36 Ad paragraph 6

H (a) The application HC 4327/08 has not been determined by Hlatshwayo J.

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The respondent's position to the proposed settlement will be set out to the A judge and all interested parties.

(b) Hlatshwayo J has not made a determination in that matter and it is improper that the deponent herein would refer to the remarks that were made by Hlatshwayo J off the record in an attempt to settle the matter. Hlatshwayo J has not ruled that the parties should revert to the *status quo* pertaining on 21 September 2007. If indeed he has ruled so the applicant B is requested to provide proof of this at the hearing of this application. The respondent has never agreed to that proposition. The respondent notes that there is now agreement that Dr Kunonga's actions were uncononical and unconstitutional and that the Diocese of Harare and as such its assets never left the respondent."

When next I met the lawyers in chambers I clarified the position by making C the following points:

(a) That I had not made any determination in the matter but had merely invited the parties, "as a base and point of departure", to focus on the concession made that the attempted withdrawal of the Harare Diocese from the Province of Central Africa was ineffectual. Subsequent D developments could then be taken on board but not as starting points, as there was great divergence of opinion pertaining to them.

(b) That the respondent's reply to the applicant's para 6 sets out the correct position in fact and at law and that, generally, recusal would be expected where the judge has made statements *outside* court expressing prejudice against one of the litigants and rarely where the comments are made in E court, unless the utterances are completely outrageous.

(c) That any references that could have been made in "without prejudice" consultations in chambers to an "incumbent Bishop" were not made in a manner determinative of the matter but just to avoid continuously referring to "Dr Nolbert Kunonga" in the same manner that reference was F constantly made in those discussions to "incoming Bishop", "substitute" or "caretaker Bishop".

(d) That regarding the age of Dr. Kunonga, I had inquired whether the appointment as bishop was for life and was advised it was subject to a mandatory retirement age of 65 years, whereupon, and quite naturally, G I asked how old the "incumbent bishop" was and was told 62 or 63 – quite relevant information which the parties in their negotiations could utilize whichever way they pleased.

(e) That, at any rate, intimations or indications made by a judge in assisting parties to find common ground are not binding on the parties. I also added that not being a member of either of the so-called factions of the H

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A Anglican Church, nor a Christian for that matter, but regarding myself as a rationalist or atheist, I viewed their dispute quite dispassionately.

It appeared that both parties were satisfied with the above explanation and that the issue of recusal had been laid to rest. Indeed, the parties proceeded to make arrangements for the continuation of the settlement efforts with the B assistance of the same presiding judge. It was therefore surprising that the respondent proceeded to file heads of argument regarding the "application" for recusal stating:

"It is regrettable that this application must be persisted in but application HC 2792/07 makes it inevitable".

The settlement efforts had continued for over a month; between 29 June 2009, C when the letter requesting recusal was authored, until 20 July 2009 when the parties declared that negotiations had failed and insisted that the formal process, including the recusal application, be resumed. Accordingly, I set down the matter of my recusal for argument in open court on 23 July 2009. Mr *Zhou* for the applicant in the recusal matter based the "application" on the letter of 29 June 2009 already quoted extensively above and the heads of argument filed D on the subject. He, however, added a new point: that since it is a tradition of this court that a judge who presides over a pre-trial conference does not preside over the trial itself, I should recuse myself from hearing the applications, having been involved in the parties' abortive settlement efforts. However, I was not

drawn to any particularly sensitive information or documentation or E processes which I could have been exposed to during the settlement efforts which could possibly affect my objectivity in dealing with the applications.

Before he could respond, I explained to Mr *Chikumbirike,* the applicant's lawyer in the main matters, that he need not make any submissions at all as the matter of recusal strictly speaking was one between the Bench and F the side making the application, unless he intended to make an exceptional contribution akin to a point of order in parliamentary parlance (see *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* v *Diamond Insurance Company (Pvt) Ltd* 2001 (1) ZLR 226 (H) at 233E-F) – a position he fully appreciated but wished only to submit that in his view the continuation with the recusal application was not *bona fide* as the issue had been settled in chambers. G See *Standard Chartered Finance Zimbabwe Ltd* v *Georgias & Anor* 1998 (2) ZLR 547 (H) where Smith J, in dismissing an application for his own recusal from that case, said:

> "I am satisfied that the application is not *bona fide*. Trinity (the applicant) has not satisfied me that the grounds for this application are not *frivolae causae*. I am also satisfied that I will be able to deal with the matter in an impartial and H unbiased manner."

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Although, of course, and with respect, the issue of the judge's own subjective A belief that he would not be biased is increasingly regarded as irrelevant (*Leopard Rock Hotel Co (Pvt) Ltd & Anor* v *Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 275A-B), I do associate myself with the notion, however, that the application itself should be *bona fide*. After the explanations and clarifications in chambers which were apparently accepted and after the B applicant in its notice of opposition had pointed out the correct position at law pertaining to the misconstrued privileged utterances, there remained very little ground upon which a reasonable apprehension of bias could be based, a mere suspicion of bias not being enough. See *Leopard Rock Hotel Co (Pvt) Ltd & Anor* v *Walenn Construction (Pvt) Ltd supra* and the cases quoted with approval therein, especially *R (Donoghue)* v *County Cork JJ* C [1910] 2 IR 271 at 275 where Lord O'Brien CJ said:

> "By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicions of whimsical, capricious, and unreasonable people should be made a standard to regulate our action here. It might be a different matter D if suspicion rested on reasonable grounds – was reasonably generated – but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision."

Even in its supplementary heads of argument, the applicant in the recusal matter (respondent in the main matters) betrays the lack of any subjective apprehension of bias on its part, let alone the required objective standard, E but reveals, probably, the existence of a justifiable objection to the manner of pleadings which could have been cured by an application to strike out the offending paragraph:

> "It must also be stated that the whole of the application in case HC 2792/09 has been predicated on an opportunistic seizure of words that fell from a learned judge's lips on an occasion which should have been *sub rosa*. The regrettable F result of basing an application on the pronouncements of a judge who was doing no more than to suggest an avenue down which a settlement could be explored is that an indelible impression of bias has been perceived on the part of the Respondent which must lead to an application for recusal of the Judge in question" (para 8).

Regarding my participation in the abortive settlement, and as already pointed G out, my attention was not drawn to any particularly sensitive documentation, discussions or processes that could jeopardize my impartiality. The settlement attempt never got beyond the initial stages where parties essentially restated their positions – submissions which were no different from those they would make in presenting their heads of argument or making closing remarks. The exchanges of letters were copied to the court for information only and

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A contained either notification to the judge that negotiations were continuing or had finally failed or that applications would be made to file certain additional documents, which was subsequently done.

The actual negotiations were not conducted by or before the judge, but by the parties themselves, outside the court. Once the principle and need for B settlement was understood and accepted by all concerned, the judge remained simply available to the parties should they need the court's assistance or directions. In the same vein, the meeting with the lawyers and their principals in the judge's chambers was arranged, with the consent of all concerned, with a view to enable the principals to hear directly from the judge concerning what had been identified in chambers as the need and apparent basis for a C possible settlement and to react thereto. Accordingly, the parties contributed on the need for good faith in the settlement effort, identities and capacities of the negotiating principals and the option to stay all pending court cases and processes while negotiations continued.

A sample of the correspondence exchanged by the parties' lawyers and copied to the judge's clerk may be of assistance in showing the role envisaged for, D and actually played by, the judge:

The respondent's lawyer wrote to his counterpart referring to the lawyers' appearance in chambers on 3 June 2009, thus:

> "The Honourable Judge expressed his view that this matter should perhaps be resolved by the parties and that the respective legal practitioners should take a E leading role in this regard."

On 4 June 2009, Mr *Chikumbirike* for the applicants in the main matters wrote to the judge's clerk, copying the other party, thus:

> "Please could you bring to his Lordship's attention that the parties are still discussing the above matter, with a view to settling. We intend to revert to his Lordship before close of business tomorrow. The parties will be holding a F conference at 11.30 am tomorrow. Could you ask his Lordship to bear with us whilst we are engaged in this fairly delicate process."

Mr *Chikumbirike* addressed another letter to the respondent on 5 June 2009:

> "Your letter of the 5th June 2009 … refers. Since we are relating to ecclesiastic matters, let me borrow an analogy from the Biblical texts. I feel betrayed, as much as Jesus Christ was betrayed by the actions of Judas Iscariot. The contents G of your letter seem to have scarpered [*sic*], in one stroke, the *bona fide* efforts, which we, as legal practitioners, had started, after the initiation by his Lordship, Mr Justice Hlatshwayo, to take torch, and lead our respective clients from the impasse, that has bedeviled the diocese of Harare since the actions, by both parties, which we agreed had not been done in accordance with constitutional provisions, which both accept are applicable to them … The position I hold, H after reading your letter, is that you still want to insist on the position held by

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> your client, in his affidavit in opposition to the application and in your heads of A argument."

On 8 June 2009, the respondent replied:

> "It is unfortunate that your Mr Chikumbirike feels betrayed. As is apparent from our letter of 5 June 2009 we took time to consider the matter and more importantly to consult with our client and put forward what we believe is a clear B and understandable position taken by our client."

On 7 July 2009, the applicant wrote to the respondent:

> "Our meeting of today's date, in his Lordship's chambers (Hlatshwayo J), refers. From what has transpired so far, it is quite evident that his Lordship wants a permanent resolution of the matter. For that to be achieved, it would appear to be his view, that a judgment of the court which will result in either of the divergent C positions held by the parties being upheld (or dismissed) will not be the ideal solution. The ideal being a judgment by consent. Consequently, he would like this matter settled without the court having to impose its decision on the parties. From this, it follows, in our view that all parties must relate to the negotiations towards a settlement, with a sense of responsibility and maturity. To do so, it is necessary that once a party has a thought, which it has formulated, (which it thinks might solve the problem at hand), that it communicates that thought to D the other (so as to enable the thought to be interrogated). We only have seven days within which to do this before the parties revert to his Lordship."

On 8 July, the respondent replied:

> "Our client is equally indebted to the Honourable Judge's attempt to resolve this matter finally without the need for litigation. It is in that spirit that following our last meeting on the 3rd of July 2009 we have met our client and sought further E instruction."

And on 15 July 2009, the respondent further wrote:

"We refer to our recent attempts to settle this matter and the various correspondence that we have exchanged in that regard.

You will recall that on Friday the 10th July 2009 we had agreed that we would meet F our respective clients on Monday 13 July 2009. That we ourselves would then meet on Tuesday 14 July 2009 and then brief Honourable Justice Hlatshwayo on the position of the discussions and the way forward on Wednesday 15 July 2009. In other words, today. Yesterday we made several attempts to speak to you in vain. We were advised at each turn that you were involved in some consultation. Our attempts to reach you this morning have also not borne any fruit. In light of the time element it is inevitable that we discuss this much urgently and as much G as possible report to Honourable Justice Hlatshwayo today."

And finally, on 20 July 2009, the respondent indicated that the negotiations had failed:

"We refer to the above matter and to the meeting which had been scheduled at your offices for 2.30pm on Monday 20 July 2009. We waited and eventually left just before 3.00pm. As we waited the writer engaged his counterpart, Mr H

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A Chikumbirike over this matter. We seem to be agreed that despite the parties' best wishes we cannot pursue the settlement issue any further. The parties' efforts are underlined by the fact that a lot of time and resources have been dedicated to this process. In the circumstances we look forward to hear from the Honourable Judge about the resolution of the various matters before him."

From the above examples, it is quite clear that, as judge, I did not participate B directly in the abortive settlement efforts, nor was I expected to. That alone should dispose of this particular ground for recusal, and lay the whole issue to rest. However, there still remains the submission made that my role in the settlement effort pertaining to an application may be equated with participation in a pre-trial conference, which, as already noted, constitutes a bar to presiding over the actual trial in terms of a time-honoured tradition C of this court.

My view is that this comparison ignores important differences between application and trial procedures. In application procedures, the judge makes decisions based on affidavits and legal arguments filed of record and presented in court by counsel. Rarely do application proceedings entail D the calling and examining of witnesses with the consequent need for the judge to assess the credibility of such witnesses. Therein lies the nub of the distinction, in my view.

This court's tradition of prohibiting a pre-trial judge from conducting the trial itself, seeks to prevent the mischief of a judge's assessment of evidence E in the actual trial being coloured by proceedings at the pre-trial conference stage. That risk does not exist in application proceedings, more so where, as in this case, the judge was not directly involved in the settlement efforts and the negotiations collapsed at the very early initial stages.

Finally, this might be as good an opportunity as any to reflect on whether our rules and practices regarding recusal enhance or detract from impartiality as F a fundamental value inherent in judicial function. Firstly, regarding our rules, the adoption of the objective test and increasing rejection of the subjective self-assessment goes a long way in fostering public confidence in the administration of justice and, in my view, appears to be well ahead of the *The Bangalore Principles of Judicial Conduct* (which was adopted by the Judicial Group G on Strengthening Judicial Integrity and noted by the UN Commission on Human Rights, as revised at the Round Table Meeting of Chief Justices at The Hague, 2002) which appears to embrace both the subjective and the objective approaches. Principle 2.5 thereof provides guidelines as to circumstances in which judges should disqualify themselves from a case, thus:

"2.5 A judge should disqualify himself or herself from participating in any H proceedings in which the judge is unable to decide the matter impartially or in

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which it may appear to a reasonable observer that the judge is unable to decide A the matter impartially. Such proceedings include, but are not limited to, instances where:

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the B matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act would lead to serious miscarriage of justice." C

The European Court of Human Rights has established the principle that "any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw" (see *Indra* v *Slovakia* ECtHR judgment of 1 February 2005, Application 46845/99, para.49) – an approach which is similar to ours.

Secondly, regarding practice, the impression gained from reported cases that D the judges appear reluctant to recuse themselves where so requested may be misleading as the reported cases are the contested ones, whereas, in practice, judges routinely recuse themselves *mero motu*, sometimes without even the parties knowing, and oftentimes at the slightest prompting from any of the parties. Thus, the reported cases constitute a tiny fraction of the recusal cases. E However, there still does exist a tension which should not be ignored between acceding too readily to requests for recusal, on the one hand, and the duty to sit where one is not disqualified on the other. As was noted in *Associated Newspaper of Zimbabwe (Pvt) Ltd & Anor* v *Diamond Insurance Company (Pvt) Ltd supra,* the judge's duty to sit where he or she is not disqualified is as compelling as the duty not to sit where disqualified. In this regard, the F opinion of Mason J in the High Court of Australia judgment Re *JRL:* Ex p *CJL* (1986) 161 CLR 342 (HCA) at 352 bears repeating here:

"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by G someone thought to be more likely to decide the case in their favour."

Accordingly, I dismissed with costs the application for my recusal.

Jurisdiction of the court

Mr *Morris* raised the issue of lack of jurisdiction on the part of this court to hear the matters before it as a late submission not even mentioned in his heads H

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A of argument. He submitted that the majority of the bishops of the Church of the Province of Central Africa, who constitute the Episcopal Synod thereof, are not within this court's jurisdiction and therefore this court would not be able to give an effective judgment. This issue need not detain us at all. It is common cause that the respondent is composed of dioceses some of which are located here in Zimbabwe, although others are in countries within the region B (Zambia, Botswana, Malawi) and that, through such dioceses or directly, it owns properties in Zimbabwe and other countries and that the issues the subject matter of this litigation relate to ownership of such properties and appointment to and retention of offices in Zimbabwe. I have no doubt at all that this court will be in a position to give full effect to its judgment in both C matters. See *Steytler* v *Fitzgerald* 1911 AD 346; *Forbes* v *Uys* 1933 TPD 369.

Further than that, the respondent has clearly submitted to the jurisdiction of this court as evidenced by numerous court cases it has participated in relating to these matters and the pleadings it has filed relating to the matters before this court. It has been said that once a defendant demands security of costs or asks for a postponement or pleads to the merits, he will be held to have D submitted to the jurisdiction of the court. See *Irving & Company* v *Dreyer* 1921 CPD 185 and *New York Shipping Co (Pty) Ltd* v *EMMI Equipment (Pty) Ltd & Ors* 1968 (1) SA 353 (SWA).

A related contention advanced by Mr *Morris* is that formal law courts have no business dealing with ecclesiastical matters; that there is no body of law E in Zimbabwe, unlike in the United Kingdom, dealing with such matters, and that therefore any aggrieved member of a religious body should look to the internal rules of such a body, and not to the formal courts for redress. However, in my view, this contention is only true to a limited extent. It is correct to hold that, as a general rule, voluntary associations, such as churches, should conduct their affairs according to their constitutions and F rules of association. The formal courts would not want to interfere at all in such arrangements. However, where, for example, the criminal laws of the country are violated or members are

unfairly discriminated against or the very rules of the association are violated, it is inevitable that the formal courts would get involved.

G As to the laws that our courts would apply in connection with church disputes, I am indebted to Mr *Chikumbirike*'s survey of the approach taken by our courts in his heads of argument in HC 4327/08. Our courts have consistently stated that there is no separate body of law dealing with church disputes.

> "In resolving church disputes our courts have consistently applied the law of voluntary associations. The majority of disputes involving private associations H that culminate in litigation involve churches. As there is no homogenous law

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> of voluntary association it seems to me that church property disputes demand A special focus. In resolving disputes involving voluntary associations which are churches, the law applicable thereto ought to be fashioned to meet the needs of Zimbabwe churches. Religious associations have features which distinguish them from other associations": *per* Devittie J in *Independent African Church* v *Maheya* 1998 (1) ZLR 552 (H) at p 556 D-E.

Again in *Independent Church* v *Maheya* 2000 (1) ZLR 39 (H) it was held that B where the resolution of a church dispute involves matters of church doctrine and practices, the courts should not become immersed in consideration of the merits of doctrinal matters; they ought instead to apply "neutral principles of law", and further that all questions involving a voluntary association may be resolved in terms of its constitution, using a common sense interpretation. C

Lis alibi pendens

The respondent has raised the plea of *lis alibi pendens* in opposition to the hearing of the matters HC 4327/08 (the application) and HC 2792/09 (the urgent chamber application), maintaining that both matters were instituted in order to frustrate the prior action in HC 6544/07. Initially, of course, the plea was directed at the court application, but when the urgent chamber D application was filed, the exception was accordingly extended. See, for example, the respondent's notice of opposition in case HC 2792/09 para 38(c) where it is stated: "This urgent application (HC2792/09) together with the matter HC 4327/08 are ill conceived and are a clear attempt to avoid the proper determination of the matter at the trial set for 6 July 2009" E and the respondent's heads of argument in HC 2792/09 which double as supplementary heads in HC4327/08, para 4: "Alternatively, these matters are *lis alibi pendens* in a trial cause where all genuine disputes of fact can be aired and tested in a proper way."

I have already set out the claims and orders sought in the two applications F at the beginning of this judgment. In the trial matter, HC6544/07, the respondent in the applications and plaintiff in the trial, viz., the Church of the Province of Central Africa, seeks against the applicants, the Diocesan Trustees for the Diocese of Harare, who are listed in their individual capacities as the first to the seventh defendants ("the trustees'') and various financial institutions (eighth to eleventh defendants) an order interdicting G the "trustees" from in any way holding themselves out as office bearers of the plaintiff and in particular the first defendant from holding himself out as the plaintiff's bishop of the diocese of Harare; the "trustees" from accessing or transacting from plaintiff's bank accounts held by the financial institutions and that the financial institutions are interdicted from taking instructions from the "trustees"; an interdict against the "trustees" from H

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A working or doing business from any of its immovable properties including cathedrals, churches and chapels and for delivery of all plaintiff's movable assets including specified motor vehicles and for the "trustees", jointly and severally, to pay the costs of the action.

Summons commencing action were issued on 20 November 2007 but the B parties only joined issue when plaintiff's replication was filed on 9 May 2008. The court application was filed on 28 August 2008 and the urgent chamber application on 25 June 2009. The court application was set down for hearing on 3 June 2009, but because it appeared that there were prospects of settling the whole matter out of court, the parties started negotiations, which eventually collapsed on 20 July 2009. In the meantime, the trial, which C had been pencilled for 5 July 2009, could not commence because

the trial judge was taken ill and also because the applications and negotiations had not been disposed of.

The plea in abatement that there are pending proceedings between the same parties (*lis alibi pendens*) is raised by a party that is able to establish D the following prerequisites: (a) that the litigation is pending; (b) the other proceedings are between the same parties or their privies; (c) the pending proceedings are based on the same cause of action, and (d) the pending proceedings are in respect of the same subject matter. However, even if a party satisfies all the requisites, the court still has discretion to order or refuse a stay of proceedings on the grounds of *lis alibi pendens*, and in E the exercise of that discretion it will have regard to the equities and to the balance of convenience in the matter. See *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (S); *Baldwin* v *Baldwin* 1967 RLR 289 (G); *Chizura* v *Chiweshe* 2003 (2) ZLR 64 (H)

This case, unlike the usual *lis pendens* cases where both matters are instituted F by the same party, involves the rare, but not unprecedented, situation where the prior matter, the action, was instituted by one party and the latter matter by another party; and in this case the latter matter consists of two applications. In *Michaelson* v *Lowenstein* 1905 TS 324, "[t]he court found it unnecessary to decide whether the exception *lis pendens* is or is not confined to actions in which the same person is plaintiff or claimant in both actions, but held that G the exception is not an absolute bar and that it is a matter in the discretion of the cto decide whether an action brought before it should be stayed pending the decision of another previously brought between the same parties for the same cause and in respect of the same subject matter or whether it is more just and equitable or convenient that it should be allowed to proceed": *Estate* H *Breytenbach* v *Breytenbach* 1945 TPD 264 at 268-9.

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In our jurisdiction, it appears settled that the exception *lis alibi pendens* is A available even where the matters in issue are not brought by the same party, and indeed even where the prior or latter matters consist of more than one suit. See *Mhungu* v *Mtindi supra* where, in response to an application for summary judgment, the respondent said there were other prior proceedings involving virtually the same issues. The court exercised its discretion to B determine the dispute before it in the summary judgment application and made reference to its own records in the other proceedings, taking note of their contents, in disposing of the matter. In *Baldwin* v *Baldwin supra* a wife sued for divorce in a foreign jurisdiction and the husband brought his divorce action before the local courts and the wife's plea in abatement of *lis alibi pendens* was rejected on the basis that the balance of convenience C and equities was not in her favour.

Mr *Chikumbirike* submitted that not all the requirements of *lis alibi pendens* were met in this case and in particular that the parties are not the same, maintaining that Bishop Kunonga is not the applicant:

> "He is only its Chairman. You do not find the status of a party in the deponent that D subscribes to that party's affidavit. Moreover, 1st -11th respondents, apart from being parties in Case No. HC6544/07, are not parties in this application. For one to be a party, one needs to be cited, not merely mentioned, in the body of an affidavit. These persons only appear in the body of the affidavit as trustees and not in their individual capacities, as is their citation in Case No. HC 6544/07."

However, in my view, this is only a purely technical change in the designation E of the parties while the parties remain substantially the same in all the matters: *Thorsen* v *Coopsamy* 1936 NPD 636. The eighth to eleventh defendants in Case HC6544/07 are financial institutions who are not active in the litigation and have opted to abide the court's decision. The fact that the financial institutions are not cited in the two applications does not change the fact that the parties in the applications and the action are virtually the same. F

Therefore, I am satisfied that all the basic requirements for the plea are present. The critical issue in this matter, however, is how the court should exercise its discretion relative to the plea of *lis pendens*. Where does the balance of convenience and equity lie? Does it lie in stopping the applications and allowing the trial to proceed or can the issues raised in all the matters be G fairly, conveniently, equitably and expeditiously disposed of on the basis of the averments and affidavits filed of record in the applications?

In order to answer the above question, it might be useful to use a hypothetical situation which might be regarded as fairly comparable to the factual situation in this case. Suppose a husband has issued

summons against his wife to whom he is married in a monogamous relationship seeking an order against H

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A her continued use of their marital name, that she should stop holding herself out as his wife, that she should surrender all assets under her control and possession by virtue of the marriage and interdicting banks from accepting her instructions in relation to their joint accounts, arguing that she has left the matrimonial home and eloped with a lover. Suppose again, that after pleading to the merits, the wife files a court application for a declarator that B she is still formally married to the husband and is entitled to hold certain assets and transact in the joint accounts by virtue of her extant marriage. And suppose finally, the wife files an urgent application to stop the husband from immediately contracting another marriage and the husband raises the plea of *lis alibi pendens.* Would it be more equitable and convenient to stay C the applications and wait for the issues to be resolved at a trial to be held at a future date way after the proposed marriage or would the court be justified in disposing of the issues by hearing the applications?

In my view, if the matters are capable of resolution on the papers, it would appear that it would be beneficial for both parties to have a declaration of their rights made upfront. Then, if the finding is that the marriage to the wife D no longer exists, the new marriage can be celebrated without the cloud of disputation. If, on the other hand, the court finds that the marriage to the wife is still extant, then the husband would be saved from entering into a bigamous relationship and a long but inconclusive trial would have been avoided. The husband, of course, would still retain the right to proceed against the wife E regarding her indiscretions, either by formally suing for divorce or in one way or another reconciling with her.

I have already commented on the unique feature of this case, that the plea has been raised as against both the court application and the urgent chamber application, and that both applications and, indeed, all the three matters, are intrinsically linked so that one cannot decide one matter without that decision F affecting the other matters. Thus, the urgent chamber application seeks as interim relief an order interdicting the consecration of a new bishop for the diocese of Harare while in the final relief and the application the applicant seeks a declaration that he is still the bishop of Harare and in the action the plaintiff seeks, among other things, an interdict preventing the first defendant G from holding himself out as the bishop of Harare. The consecration has been scheduled for 26 July 2009. If the plea is upheld then the rights of the parties relating to the urgent application would not be determined before the consecration – with irreparable harm to the applicants. If, on the other hand, the matters are heard, then the respondent, if successful, would proceed with the consecration without the cloud of disputation, but even if unsuccessful would H not lose the right to institute disciplinary proceedings against the applicants

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for whatever wrongs they are deemed to have committed. The balance of A convenience and equity on this ground of urgency and interrelatedness of the issues, in my view, is with the applicants, all other things being equal.

The five days trial which was scheduled for 6 July 2009 has been postponed indefinitely for reasons noted above. The matters in issue are important issues of faith for a large number of people who regard themselves as Anglicans in B Zimbabwe, the central African region and indeed the world over. In *Diocese of Harare* v *Church of the Province of Central Africa & Anor* 2008 (1) ZLR 139 (S), the Chief Justice underlined the urgent need to resolve the various disputes between the protagonists in all the matters that have been litigated upon. If the matters can be resolved on the papers, in my view, it would be more expeditious to proceed on the basis of the applications than to wait for C a new trial date to be set. I am fortified in this conclusion by the fact that not only is the rescheduling of the trial beset by the unfortunate circumstances noted above, but there is the additional complication that allowance has to be made for some witnesses to come from outside the country, and that there is a point *in limine* to be argued before the commencement of the trial on D the challenged *locus standi* of the plaintiff.

The manner in which the *locus standi* of the plaintiff is challenged and responded to in the replication is the mirror vision of the same challenge and response in the two applications. In fact,

the issue of *locus standi* of one or the other of the parties lies at the centre of the whole dispute in all the three matters. In the action the standing of the plaintiff is challenged in E the following manner:

> "The plaintiff lacks the requisite *locus standi in judicio* to sue in respect of property belonging to, or vested in, the Diocese of Harare. In terms of the Acts of the Diocese of Harare, such property is held in trust on the Diocese of Harare's behalf by the Trustees of the Diocese of Harare and it is these Trustees that are authorized or permitted to institute legal proceedings in respect of the property F of the Diocese."

To the above plea, the plaintiff replied that the first to seventh defendants "having resigned, withdrawn or seceded from plaintiff and its diocese of Harare, are not eligible for appointment or election to the positions of Trustees of the Diocese of Harare and have no right to hold, possess, control or use any G of the assets in issue in this matter." In other words, the whole subject matter of the application would be rehashed in the trial, even if the plea is upheld.

I am also further fortified in my conclusion about the inconvenience of upholding the plea by the fact that the evidence which is sought to be led at the trial consists of information which is already filed of record by way of affidavits and documents in the applications. For example, in the plaintiff's H

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A synopsis of evidence the plaintiff indicates that in the trial it will lead evidence from five witnesses, namely; Bishop Trevor Mwamba, the Bishop of the Diocese of Botswana, Mr R Stumbles, the Chancellor of the Diocese of Harare, Bishop Hatendi, Mr O Kuwana, Mrs M Ndebele and from Phides Mazhawidza. It goes on to say that Bishop Mwamba will take the court through the church's constitution and will say that a diocese of the Church B of the Province of Central Africa is an integral part of the church and none of the dioceses can exist independently from the Province and can only be excluded or removed from the Province through a special procedure and that the defendants did not follow such procedure and should be taken as having left the church and are no longer members of the plaintiff.

C Mr Stumbles will corroborate Bishop Mwamba and chronicle events leading to the first defendant's secession from the plaintiff and tell the court how the first defendant and his followers subsequently formed their own church known as the Anglican Church for the Province of Zimbabwe, for which the first defendant is the Archbishop, and that therefore the defendants cannot lay claim to the assets of the plaintiff held through the diocese of Harare. D The synopsis concludes by pointing out that the rest of the witnesses "will lead evidence in corroboration of the evidence set above".

Now, the evidence to be adduced from Bishop Mwamba is already part of the record in the two applications by way of the filing of the Constitution and Canons of the Church of the Province of Central Africa which have further been E interpreted in the affidavits and commented upon in heads of argument. The plaintiff's apparent star witness, Mr Robert Stumbles, has already submitted a detailed affidavit on the issues supported by an attachment of a statement of all the Anglican bishops comprising the plaintiff at an Extraordinary Episcopal Synod especially held on the diocese of Harare issue. The other witnesses will corroborate what the two key witnesses would have said. F Beyond what is already available on record, very little additional evidence, it seems, would be forthcoming at the trial itself. Now, if the issue can be determined on the basis of the affidavits and documents filed of record in the applications, there appears to be very little reason why such a decision should be postponed until a trial is held which would not put the court in G any materially better position to make the decision.

In *Estate Breytenbach* v *Breytenbach supra* at 269 it was said:

> "If the present matter can be decided on affidavit it is certainly just and equitable and convenient that it should be so decided, otherwise respondent, by reason merely of the fact that he has issued summons, will remain for a considerable period in possession of the property to which he may not be entitled and petitioners H will be compelled to delay the liquidation of the estate unnecessarily. As in my

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> opinion the matter can be decided on affidavit I am of the opinion that petitioners A should be allowed to proceed with their application and the exception of *lis pendens* fails..."

In *Richtersveld Community* v *Aleskor Ltd & Anor* 2000 (1) SA 337 (LCC), it was concluded:

> "At the end of the day, considerations of convenience and equity must underpin B the exercise of any discretion whether or not to allow the defence of *lis pendens*. The case which is allowed to proceed must not necessarily be the one that was instituted first. The question is whether 'justice will not be done without the double remedy'. In the present case I am satisfied that the plaintiffs had good reason for bringing the second case."

In *Geldenhuys* v *Kotzé* 1964 (2) SA 167 (O) the applicant applied on a notice of motion for the cancellation of a written deed of sale in terms of which he had C sold a certain farm to respondent, for an order that the respondent forthwith vacate the farm and costs of the application. Earlier an action had also been instituted in the same court against the respondent for the cancellation of the same agreement with costs and also damages. The respondent, who had already entered appearance to defend the action, raised the defence of *lis* D *pendens*, as the dispute in both cases arose out of the same cause of action. It was held that the applicant's procedure in bringing the application was not inadmissible, either in relation to the facts or the nature of the application, that the respondent had disclosed no good defence on the papers and that, as the court had a discretion, the application should be allowed for the sake of equity and convenience. E

Accordingly, the plea of *lis pendens* must fail, and the factors discussed above and case authorities support this conclusion.

Locus Standi

The applicants' *locus standi* is challenged on the basis that they left the church of the Province of Central Africa, formed a province of their own F called the Province of Zimbabwe and were subsequently excommunicated, which allegations they deny. They maintain that they, in their representative, and not individual, capacities attempted to remove (withdraw) the diocese from the Province over a doctrinal dispute, that in response to their request to withdraw the province, the Dean of the Province responded by stating G that their attempted withdrawal of the diocese was "uncanonical and unconstitutional," but, however, that their dissociation from the province as individuals was accepted.

The Dean's conclusion, in my view, was a *non sequitur*. The applicants might have expressed their desire to sever ties between the diocese and the province is very strong terms as noted by the respondent, but nowhere in H

A their letter do they evince a desire to withdraw as individuals. Nothing done subsequently by the province to correct or ratify this action seems to have been executed properly.

In a letter dated 21 September 2007 addressed to the Archbishop and Primate of the Church of the Province of Central Africa, the Most Reverend Dr B B A Malango, Dr Nolbert Kunonga in his capacity as Bishop of the diocese of Harare had written concerning the formal withdrawal of the diocese of Harare from the Church of the Province of Central Africa as follows:

> "The above refers, from the Bishop of the Diocese of Harare, Diocesan Synod, Standing Committee, Diocesan Trustees and the whole body of the Church in the Diocese…
>
> C Consistent, therefore, with our 61st Session Diocesan Synod on the 4th of August 2007, in accordance with the Scriptures and the will of God, we were mandated by our Synod to dissociate and sever ties with any individual, group of people, organization, institution, diocese, province which sympathizes or compromises with homosexuality. We, the Diocese of Harare, would like it to be put on record that with effect from 4 August 2007 and as confirmed by the Provincial Synod, we are withdrawing from the Church of the Province D of Central Africa.."

On 16 October 2007 the Dean of the Province of Central Africa and Bishop of Northern Zambia, the Right Reverend Albert Chama responded in a letter headed "Acceptance of the Withdrawal of the Bishop of Harare from the Church of the Province of Central Africa":

> E "I am in receipt of your letter dated 21 September 2007, addressed to the former Archbishop of the Province, the Most Reverend Dr B A Malango advising him of the formal withdrawal of the Diocese of Harare from the Church of the Province of Central Africa.
>
> I would first like to advise you that it is constitutionally and canonically impossible to withdraw the Diocese of Harare from the Church of the Province of Central F Africa because a diocese in accordance with the Constitution of the Church of the Province of Central Africa forms an integral part of the Province. Any act that purports to withdraw a diocese is unconstitutional and uncanonical as this action is tantamount to

altering the very structure and essence of the Province. The Constitution and Canons of the Church of the Province of Central Africa specifically stipulate that any alteration of the Province would require the approval of the Provincial Synod after the Synod of each Diocese in the Province has G also approved and confirmed by the Provincial Synod by a two-thirds majority of those present and has subsequently been endorsed by the Archbishop of Canterbury as not affecting the terms of Communion between the Church of the this Province, the Church of England and the rest of the Anglican Communion.

Consequently, the heading of your letter stating the 'Formal Withdrawal of the Diocese of Harare from the Province of Central Africa' is unacceptable and H misleading. We, however, as the Dean of the Province of Central Africa accept

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and acknowledge that you and some of your supporters have by notice of your A letter severed relationship with the Province of Central Africa.

Therefore I declare that the See of Harare is with immediate effect vacant and in accordance with Canon 14(1) I shall be appointing a Vicar General to hold office whilst the necessary steps are taken for the holding of an elective assembly to elect the next Bishop of the Diocese of Harare.

Given your leaving the Church of the Province of Central Africa we direct that all B properties and assets belonging to the Province should be surrendered immediately to the Vicar General whose name we shall give you in a few days time."

Certain developments and measures then followed, including the excommunication of the bishop of Harare some of the clergy and laity, the purported formation of a new province and the ratification of the actions of C the dean of the province.

Now, if what the applicants did constituted an offence in terms of the canons of the church, then they should have been charged, tried and punished accordingly. Excommunication is a form of punishment following a trial. It has not been shown that any such trial took place.

The formation of a new province may be an act in violation of the canons D of the church and the church would be within its rights to punish such act in terms of its own procedures. The courts will not interfere, for example, as regards whether or not certain acts are punishable by excommunication or not as these are issues within the ecclesiastical competency of the respondent. However, no such trials in terms of canons of the church have taken place. E All that the province has done is to make declarations in direct conflict with specific provisions of the canons.

Canon 24(1) provides that any bishop, priest or deacon of the province "may be accused of and tried in Church Court" for a variety of offences which include schism and willful disobedience of church laws and authorities. There are strict procedures relating to the prosecution of a bishop or a priest F in terms of Canon 24(2):

"No original proceedings shall be instituted in any Church Court:

a) …

b) against a Bishop of the Province unless it be preferred by at least three priests licenced in the Province or by two Bishops of the Province, or, if it relates to matters other than faith and doctrine, by at least three Priests G and three Churchwardens or Councillors all of the dioceses of the accused Bishop;

c) against a priest or deacon, unless leave shall have been given in writing by the Bishop:

d) ..."

The canons also provide for the need for the issuance of notices to accused H

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A persons, the right of appeal in respect of any conviction, the suspension of decisions of the court pending appeal, etc (Canon 26). There is nothing in the pleadings showing that any of the above things were done and actual trials held on the basis of which the sentence of excommunication was eventually pronounced. Nothing.

B I have been referred to the opinion of my brother Hungwe in *Diocese of Harare* v *Church of the Province of Central Africa & Anor* 2008 (1) ZLR 112 (H) regarding the *locus standi* of the applicants but, with respect, it seems to me that the averments considered in that judgment are different from

what has been submitted before me. At any rate, since this judgment is subject to a pending appeal, it would be remiss on my part to comment any further on it.

C By the same token, I need not dwell on the contention of issue estoppel, which the responds contends prohibits applicant from disputing that it has no *locus standi* as decided by Hungwe J, since this decision is currently the subject of an appeal.

I therefore find that the applicants do have *locus standi in judicio* to bring D these applications.

Re: Court application case HC 4327/08

The issue whether there are disputes of fact which cannot be resolved on the papers was not persisted in by the respondent in its heads of argument, and must be regarded as having been abandoned. At any rate, the court may E take a robust approach and resolve the apparent disputes. See *Sofiantini* v *Mould* 1956 (4) SA 150 (E) at 154E, where it was stated:

> "If by a mere denial in general terms, a respondent defeats or delays an applicant who comes to court on motion, the motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common sense approach to a dispute in motion F proceedings as otherwise the effective functioning of the court can be humstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so."

The analysis pertaining to the issue of *locus standi* has already led to the conclusion that the applicants do have *locus standi* to bring this application, G that they have not been lawfully removed from their positions as trustees and that until they are so removed they continue to hold those positions and the property of the church in trust.

Accordingly, the order in terms of the draft as amended is granted.

Re: Urgent chamber application HC 2792/09

H Once more the issue of *locus standi* has been addressed, and decided. As far

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Hlatshwayo J

as the merits of the interim order sought are concerned, the applicants need A only establish a *prima facie* case. That the applicant will suffer irretrievable harm if the proposed consecration of a new bishop for the dioceses of Harare proceeds before he is legally removed from the same position admits of no dispute. That the matter is urgent and the remedy sought is the only effective remedy available also admits of no dispute. The only real point of contention B is what is pointed out in the respondent's answering affidavit, to the effect that the consecration of the new bishop has nothing to do with the position of the bishop of the diocese of Harare. This new and startling contention is stated in respondent's Harare diocese registrar, Michael T Chingore's affidavit dated 23 July 2009 as follows:

> "The third point which should be made is that the Bishop being consecrated on C 27 July is a Bishop of the Anglican Communion worldwide, and not of Harare or the Church of the Province of Central Africa. His appointment transcends provincial boundaries. The fact that the consecration is taking place in Zimbabwe does not change the above position. The consecration could have taken place in any part of the world. The position of Bishop of the Diocese of Harare is an administrative position which may be given to him after his consecration." D

However, this contention is contradicted by all the previous pleadings and the affidavit of a senior member of the church Mr Robert Atherstone Stumbles, the Chancellor of the Anglican Diocese of Harare and Deputy Chancellor of the Church of the Province of Central Africa, wherein he states that:

> "The appointment of Dr Chad Gandiya has been canonically confirmed and the E respondent recognizes him as the incoming bishop of the diocese".

It is quite clear therefore that the appointment of the new bishop is to replace the existing one. Now, if Bishop Kunonga is to be replaced, he must first be charged, tried, convicted and sentenced or forced to resign in terms of the canons and constitution of the respondent. He cannot simply be replaced, wished away or deemed to have resigned without due process in terms of F the statutes declaring or ratifying such removal.

To use a homely example, a spouse in a monogamous relationship does not get rid of a partner by marrying another spouse; that is bigamy, a crime. Such an estranged spouse must first sue the errant spouse for divorce before entering into another relationship. It does not matter what the seriousness G of the indiscretions of the errant spouse may be. I suppose even in the traditional polygamous relationships certain procedures like giving *gupuro* in the Shona culture or the threefold incantation of "I divorce you" in the Islamic religion must be followed.

Accordingly, the interim relief as amended is granted. H

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A *Chikumbirike & Associates*, applicant's legal practitioners

Gill Godlonton & Gerrans, respondents' legal practitioners

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Citation	2009 (2) ZLR 82 (H)
Case No	Judgment No. HH-87-09
Court	High Court
Judge	Uchena J
Heard	29 July 2009
Judgment	29 July 2009
Counsel	Details not supplied
Case Type	Criminal review
Annotations	Link to case annotations

Flynote

Criminal law – *offences under Criminal Law Code – unlawful entry into premises followed by theft of property therefrom – how should be charged – not competent to convict of theft if person charged only with unlawfully entering premises – theft may nonetheless be taken into account in assessing sentence – Criminal Law (Codification and Reform)* D *Act [Chapter 9:23] – s 131*

Headnote

Four persons were tried and convicted by three different magistrates sitting at three different magisterial stations. Their cases all came up for review by the same judge. He found that a

common mistake occurred in each case. In each case the accused was charged with unlawful entry and theft, E as defined in s 131 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Each accused pleaded guilty and was duly convicted and sentenced.

Held, that s 131(1) of the Criminal Law (Codification and Reform) Act ("the Code") enacts the crime of unlawful entry into premises. The essential elements of the crime are an intentional entry into premises without the F authority of the lawful occupier or other lawful authority. The crime is aggravated by the fact that the accused person stole property from the premises or caused damage or destruction to property thereon. The section does not create an offence of unlawful entry and theft, so the accused cannot be convicted of unlawful entry *and* theft, even if the G facts establish that he stole from the premises he unlawfully entered. The elements of theft need not be canvassed as they would for purposes of securing a conviction for theft. The stealing of property can merely be mentioned in the agreed facts or the State outline, or in the prosecutor's address in aggravation.

Held, further, that an accused person who steals from the premises he H

Uchena J

A unlawfully enters must be charged with contravening s 131(1)(a) of the Code for unlawful entry. He can also be charged with contravening s 113(1) of the Code for stealing from those premises if the State hopes that the court may impose a stiffer sentence if the accused is charged with both offences. However, once the details of the theft have been used as an aggravating factor for the unlawful entry charge, they cannot again B be used to punish the convicted person on a theft charge, as that would amount to punishing the convicted person twice for the theft, which would have been taken into account in sentencing him for unlawful entry. The sentence for an unlawful entry which is accompanied by theft of property from the premises will, in most cases, be the same as C that which would be imposed if the convicted person is convicted of unlawful entry as defined in s 131(1) of the Code and theft as defined in s 113(1) of the Code.

Held, further, that a simple unlawful entry not accompanied by theft, destruction or damage and not aggravated by the circumstances mentioned in subs (2) of s 131 of the Code should be charged under subs (1)(b), of D that section, which provides for a lesser sentence than a charge under subs (1)(a) thereof.

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 131(1)(a)

Judgment

E **UCHENA J**: The convicted persons were tried and convicted by three different magistrates sitting at three different magisterial stations. Their cases landed on my desk for review, in the same bundle of review records. A common mistake occurred in each case. Each magistrate construed s 131(1)(a) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] ("the Code") F as if it creates an offence of unlawful entry and theft. It therefore became convenient to deal with the issues arising in each case in one review judgment.

The convicted persons in cases (1) and (2) were tried and convicted separately by the same provincial magistrate sitting at Chivhu Magistrate's Court. They were both charged with contravening s 131(1)(a) of the Code.

G The convicted person in case (1) was charged as follows:

> "Charged with the crime of unlawful entry and theft as defined in s 131 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

In that on 23 May 2009 at Gwena village, Standreck Chirinda unlawfully entered into the house of Noget Chirinda without authority from Noget Chirinda and took 2 x 2 litres cooking oil, five green bars washing soap, H seven counter books, eleven Eversharp ball points, five kilograms salt, five

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kilograms baulgar, two cartons matches, two kilograms flour, 2 kilograms A sugar and five hundred grams vaseline with the intention of permanently depriving Noget Chirinda of her property".

He was convicted on his own plea of guilty. The facts on which the charge is premised are that the accused entered the house of Noget Chirinda by forcing the key to open. He then stole property mentioned in the charge. The B accused confirmed that he agreed with the facts. The elements of unlawful entry and theft of property were put to him and he admitted that he entered the house without the owner's authority and stole the complainant's property intending to deprive the complainant permanently. The stolen property is valued at US$140, and property valued at US$15 was recovered. He was sentenced to four years' imprisonment of which one year was suspended for C five years on condition of good behaviour. The issue is whether s 131(1)(a) of the Code creates the crime of unlawful entry and theft.

The convicted person in case (2) is a seventeen-year-old who was charged with two counts of unlawful entry and theft. He was charged as follows:

> Count One D
>
> "Charged with the crime of unlawful entry and theft as defined in s 131 of the Criminal Law (Codification and Reform) Act [*Chapter 9*:*23*].
>
> In that on 3 June 2009 at house number F4 Chivhu location, Chivhu, Muketiwa Munemo unlawfully entered the house of Joseph Tangwanda without authority from Joseph Tangwanda and took two jackets, fifteen plates, one pair white tekkies and cash US$8 with the intention of permanently depriving Joseph E Tangwanda of his property".
>
> Count Two
>
> "Charged with the crime of unlawful entry and theft as defined in s 131 of the Criminal Law (Codification and Reform Act) [*Chapter 9*:*23*].
>
> In that on 3 June 2009 at house number F4 Chivhu location, Chivhu, Muketiwa F Munemo unlawfully entered the house of Farisai Mvumba without authority from Farisai Mvumba and took three trousers, three shirts, one pair brown shoes, and one aluminum pot with the intention of permanently depriving Farisai Mvumba of her property."

The facts are that in count one he displaced a plank in order to gain entry. While inside he stole the property mentioned in the charge valued at G US$50, of which property valued at US$15 was recovered. He tendered a limited plea admitting that he stole fewer items than had been alleged by the State. The State accepted his limited plea without ascertaining the value of the stolen property. In count two he opened a closed window to gain entry into the complainant's house. He stole the property mentioned in the charge valued at US$40 of which property valued at US$15 was H

Uchena J

A recovered. The issue is whether s 131(1)(a) of the Code enacts the crime of unlawful entry and theft.

The convicted person in case (3) was tried and convicted by a magistrate sitting at Murambinda Magistrate's Court. He pleaded guilty to a charge of contravening s 131(1) of the Code. The charge sheet was framed as follows:

> " B Charged with the offence of contravening s 131 of the Criminal Law Codification and Reform Act [*Chapter 9: 23*]; unlawful entry and theft.
>
> In that on 5 February 2009 and at Jefnos Vengesai's homestead Chipwanyira village, Langton Murozvi unlawfully and intentionally entered the house of Jefnos Vengesai without lawful authority and stole one by eight pane window frame, one green blanket, one plough wheel, three dinner plates, six by five m deformed iron bars the property of Jefnos Vengesai in his lawful custody".

C The convicted person removed a portion of the complainant's thatched roof in order to gain entry. He admitted entering the premises without lawful authority and stealing the items mentioned in the charge.

The convicted person in case (4) appeared before a provincial magistrate D sitting at Nyanga and pleaded guilty to a charge of contravening s 131(1) of the Code. He was charged with contravention of s 131(1) and, in the alternative, contravention of s 113 of the Code. In the main charge, which is the relevant charge in this judgment, he was charged as follows:

> "Charged with unlawful entry into premises as defined in s 131 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

E In that on the date to the prosecutor (*sic*) but during the month of September 2008 and at Mapani Store, Mapani Bussiness Centre, Nyanga Peter Gunura intentionally and without permission of the lawful occupier Naume Kupeta entered into the shop."

The alternative charge, which I need not reproduce in this judgment, alleged that the convicted person stole from the complainant's store and gave F particulars of the stolen property. The magistrate correctly canvassed the elements of unlawful entry. After dealing with the aspects of intention and unlawful entry he canvassed the theft aspect as follows:

"Q: Do you admit that after gaining entry you took complainant's property listed in the charge sheet? G

A: Yes"

The magistrate then asked the Accused if he had any defence to offer, to which he answered "No". The accused was then convicted as pleaded. The prosecutor withdrew the alternative charge after plea. The magistrate then acquitted him on the alternative charge.

H The issues which arise are:

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1) Could the theft have been treated as an alternative charge? A
2) Should the magistrate have canvassed the elements of the contravention of s 113 (1) of the Code, under the charge for the contravention of s 131(1) of the Code?
3) Was the prosecutor correct in withdrawing the alternative charge?
4) Was the magistrate correct in acquitting the accused on the alternative B charge?

The first issue can be answered in the affirmative and the second in the negative. In terms of s 131(1)(a) of the Code, the fact that a convicted person stole from the premises he has entered unlawfully will be used as an aggravating factor in assessing the appropriate punishment. Once the sentence for unlawful entry C takes into consideration the value of the stolen property, there will be little or no hope of the convicted person being sentenced to a stiffer sentence for the unlawful entry and theft charges. It is therefore competent to charge the accused with theft as an alternative to the charge of unlawful entry but not because the crime of unlawful entry includes theft. It is because that crime is aggravated by theft. The value of the stolen property is essential in assessing D the appropriate sentence. The accused did not therefore suffer any prejudice because of the canvassing of the theft elements at the time the magistrate was canvassing the elements of unlawful entry. It must however be stressed that the fact that the accused stole from the premises must be properly dealt with in aggravation to avoid the misconception that the crime committed is E that of unlawful entry and theft. As the contravention of s 131(1)(a) of the Code takes into account the stealing of property from the premises and uses the value of the stolen property to determine the appropriate sentence, the prosecutor was entitled to withdraw the alternative charge of theft as the accused was not likely to receive a different sentence on being convicted on both the unlawful entry and the theft charges. Once the prosecutor is F entitled to withdraw the charge, the magistrate is equally entitled to acquit the accused when the charge is withdrawn after plea.

The magistrate seems, from the way he canvassed the elements of unlawful entry, to have construed s 131(1) of the Code as creating a combined offence of unlawful entry and theft. This, however, did not cause a miscarriage of G justice as the accused was, from his admission of the facts for both counts, aware of what was being alleged he stole from the complainant's store.

The questions arising in case (4) distinguish it slightly from cases (1) to (3), but the real issue is the correct interpretation of s 131(1)(a) of the Code by the three magistrates. They all construed it as if it combines the offences of unlawful entry and theft. The common issue is, therefore, whether or H

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A not s 131(1)(a) of the Code creates an offence of unlawful entry and theft.

The facts of each case are akin to those of the offence which, prior to the codification of our criminal law, was known as housebreaking with intent to steal and theft. The charges in cases (1) to (3) allege that the accused were being charged with the crime of unlawful entry and theft. The framing of the B unlawful entry charge in case (4), though close to how a charge for unlawful entry should be framed, leaves out other important averments. The magistrate, however, canvassed the

elements for the contravention of s 131(1)(a) of the Code as if he was dealing with the crime of unlawful entry and theft.

I sought the Attorney-General's comments on the interpretation of s 131(1)(a) of the Code, and the framing of charges for the contravention of that C section. He commented as follows:

> "Section 131(1)(a) of the Code creates the offence of unlawful entry into premises. The crime is completed once the unlawful entry into premises is effected regardless of the fact that no other crime has been committed in the premises. It follows therefore that the charge should be framed within that context.
>
> To be specific the charge should read as follows:
>
> D Charged with unlawful entry into premises as defined in s 131 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].
>
> In that on the … and at … A unlawfully, intentionally and without permission or authority from B, the lawful occupier of the premises concerned, or without other lawful authority, entered B's premises by climbing into those premises through an open window.
>
> E If however the crime is committed clearly in contravention of s 131(2) of the code then the charge should be cited as follows:
>
> Charged with unlawful entry into premises as defined in s 131(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9*:*23*] as read with s 131(2)(a-e), (whichever is applicable) of the said Act.
>
> F I agree indeed that unlawful entry into premises is aggravated in circumstances provided under s 131(2) of the Code.
>
> With reference to the four review records above, it is apparent that:
>
> (i) The charge sheets were wrongly framed as they combined the crime of unlawful entry and that of theft yet they should only reflect unlawful entry.
>
> (ii) The theft perpetrated by the four accused persons after the unlawful entry G should have been reflected in the State outlines only. The relevant trial magistrates should then have factored in those aspects of theft as aggravating in considering relevant sentences.
>
> Also note that under s 131 of the Code one cannot be charged for any other separate crime apart from unlawful entry, as that would amount to double jeopardy. Suffice to say that the crime committed after the unlawful entry should only be H reflected in the State outline and not in the charge sheet".

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Uchena J

I agree with the Attorney-General's interpretation of s 131(1)(a) of the A Code and his comments on the framing of charges for the contravention of that section. I would, however, add that the crime of unlawful entry is also aggravated if it is committed in circumstances described in s 131(1)(a) of the Code.

The charge sheets in cases (1) to (3) apart from the personal details of the B accused and the complainants and the presence or absence of the details of the stolen property, though not correctly framed followed the wording of s 131(1) and 113(1) of the Code. Section 131(1) of the Code provides as follows:

> "(1) Any person who, intentionally and without permission or authority from the lawful occupier of the premises concerned, or without other lawful authority, enters the premises shall be guilty of unlawful entry into premises and liable – C
>
> (a) to a fine not exceeding level thirteen or not exceeding twice the value of any property stolen, destroyed or damaged by the person as a result of the crime, whichever is the greater, or imprisonment for a period not exceeding fifteen years, or both, if the crime was committed in any one or more of the aggravating circumstances set out in subsection (2); or
>
> (b) in any other case, to a fine not exceeding level ten or not exceeding twice D the value of any property destroyed or damaged by the person as a result of the crime, whichever is the greater, or imprisonment for a period not exceeding ten years, or both.
>
> (2) For the purposes of paragraph (a) of subsection (1), the crime of unlawful entry into premises is committed in aggravating circumstances if, on the occasion on which the crime was committed, the convicted person – E
>
> (a) entered a dwelling house; or
>
> (b) knew there were people present in the premises; or
>
> (c) carried a weapon; or
>
> (d) used violence against any person, or damaged or destroyed any property, in effecting the entry; or F

(e) committed or intended to commit some other crime."

Section 131(1)(a) of the Code spells out the crime of unlawful entry which is aggravated by the fact that the accused person stole property from the premises or caused damage or destruction to property. It does not create the offence of unlawful entry and theft as the magistrates seem to have construed G it. The elements of the crime created by s 13 (1) of the Code are:

(a) an intentional entry into premises; and

(b) without the authority of the lawful occupier or other lawful authority.

The crime is simply that of unlawful entry without authority, and is punishable at two levels, depending on whether or not it is aggravated by theft, damage or destruction of property, or the circumstances mentioned in subs (2) of H

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A s 131. The State, in framing the charge, must distinguish between unlawful entry during which the accused person steals the complainant's property or destroys or damages property, or the entry is aggravated by circumstances mentioned in subs (2), and a simple unlawful entry. The former is charged under s 131(1)(a) of the Code while the latter is charged under s 131(1)(b). The distinction is relevant when the court considers the appropriate sentence. B If it is aggravated, the punishment is a fine not exceeding level thirteen or not exceeding twice the value of any property stolen, destroyed or damaged, which ever is the greater, or imprisonment for a period not exceeding fifteen years, or both. If the unlawful entry is a simple entry not accompanied by theft, destruction or damage, and is not aggravated by the circumstances C mentioned in subs (2), the fine should not exceed level ten or twice the value of any property destroyed or damaged by the person as a result of the crime, whichever is the greater, or imprisonment not exceeding ten years or both. The punishment at the lower level is determined by the extent of damage or destruction which resulted from the unlawful entry. This means that an unlawful entry which is not aggravated and causes no damage or destruction D receives the least punishment. The punishment increases depending on whether or not the convicted person's crime is aggravated by theft of or destruction or damage to property or the aggravating circumstances mentioned in subs (2) of s 131 of the Code.

The crime of theft is spelled out in s 113(1) of the Code, which provides E as follows:

"(1) Any person who takes property capable of being stolen –

(a) knowing that another person is entitled to own, possess or control the property or realizing that there is a real risk or possibility that another person may be so entitled; and

(b) intending to deprive the other person permanently of his or her ownership, F possession or other person of his or her ownership, possession or control, or realizing that there is a real risk or possibility that he or she may so deprive the other person of his or her ownership, possession or control;

shall be guilty of theft and liable to either or both of the following".

A person charged with the contravention of s 131(1)(a) of the Code can G only be convicted of unlawful entry. He can not be convicted of unlawful entry and theft, even if the facts establish that he stole from the premises he unlawfully entered. An accused person who steals from the premises he unlawfully enters must be charged with the contravention of s 131(1)(a) of the Code for unlawful entry. He can also be charged with contravening s 113(1) of the Code for stealing from those premises if the State considers H that the court should impose a stiffer sentence because the accused is charged

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with both offences. I am, however, of the view that once the details of the A theft have been used as an aggravating factor for the unlawful entry charge, they can not again be used to punish the convicted person on a theft charge, as that would amount to punishing the convicted person twice for the theft which will have been taken into account in sentencing him for unlawful entry.

It is incompetent to charge an accused person with unlawful entry and B theft, as defined by s 131(1)(a) of the Code as that section does not create a combined offence of unlawful entry and theft. It merely provides for a stiffer punishment if the unlawful entry is accompanied by the stealing of property from the premises. The elements of theft need not be canvassed as they would have to be for purposes of securing a conviction for theft. The stealing of property can merely be

mentioned in the agreed facts or the C State outline, or in the prosecutor's address in aggravation. If the convicted person admits them at any of these stages, then he can be sentenced in terms of s 131(1)(a) of the Code. The canvassing of theft elements will, however, not vitiate the conviction as it is a relevant fact in passing sentence as long as it remains clear that s 131(1)(a) does not create an offence of unlawful D entry and theft, but provides that it should be used as an aggravating factor.

The value of the stolen property becomes a standard for the sentence to be imposed, and justifies a stiffer sentence of imprisonment if a fine is not an appropriate sentence. A reading of s 131(2)(a) of the Code confirms that the various forms of unlawful entry are aggravated by the various factors E mentioned therein, while the offence created and for which punishment is provided is unlawful entry and nothing else.

I am therefore satisfied that the convicted persons in cases (1) to (3) were improperly convicted of theft on charges which did not charge them with the contravention of s 113 of the Code. Even if reference to theft is made in the charge and agreed facts, the accused persons cannot be charged with F a combined crime of unlawful entry and theft as that crime does not exist. They should, for each entry and theft, have been charged with unlawful entry as defined by s 131(1)(a) of the Code. Their convictions for contravening s 131(1) can not be vitiated by the inclusion of the particulars and elements of theft, as the elements of unlawful entry were properly canvassed and G admitted by the convicted persons. The charges should however be amended so that they comply with the provisions of s 131(1) of the Code. The charges are amended as follows.

"Case (1)

Charged with the crime of unlawful entry into premises as defined in s 131(1)(a) of the Criminal Law Codification and Reform Act [*Chapter 9*:*23*]. H

Uchena J

A In that on 23 May 2009 at Gwena Village, Masasa Standreck Chirinda unlawfully, intentionally and without permission or authority from Noget Chirinda, the lawful occupier of the premises concerned, or without other lawful authority, entered Noget Chirinda's house by forcing the key to open.

Case (2)

Count One

B Charged with unlawful entry into premises as defined in s 131(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9*:23].

In that on 3 June 2009 at house number F4, Chivhu location, Chivhu, Muketiwa Munemo unlawfully, intentionally and without permission or authority from Joseph Tangwanda, the lawful occupier of the premises concerned, or without other lawful authority, entered Joseph Tangwanda's premises by removing a C plank to gain entry.

Count Two

Charged with unlawful entry into premises as defined in s 131(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9*:*23*].

In that on 3 June 2009 at house number F4, Chivhu location, Chivhu, Muketiwa Munemo unlawfully, intentionally and without permission or authority from D Farisai Mvumba, the lawful occupier of the premises concerned, or without other lawful authority, entered Farisai Mvumba's premises by opening a closed window to gain entry.

Case (3)

In that on 5 February 2009 and at Jefinos Vengesai's homestead at Chipwanyira village, Langton Murozvi unlawfully, intentionally and without permission or E authority from Jefnos Vengesai, the lawful occupier of the premises concerned, or without other lawful authority, entered Jefnos Vengesai's premises by removing a portion of the thatched roof to gain entry."

The charge sheet in case (4) must also be amended to make it comply with the correct framing of charges for the contravention of s 131(1)(a) of the Code.

F "Case (4)

Charged with unlawful entry into premises as defined in s 131(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9*:*23*].

In that on date to the prosecutor unknown but during the month of September 2008 and at Mapani Store, Mapani Business Centre, Nyanga, Peter Gunura, intentionally and without permission or authority from

Naume Kupeta, the lawful G occupier of the premises concerned, or without other lawful authority, entered Naume Kupeta's shop by breaking a window to gain entry."

I must now proceed to assess the appropriateness of the sentences imposed in cases (1) to (3) because those sentences were imposed under the mistaken belief that the convicted persons had been convicted of unlawful entry and theft. This means that in assessing the sentence the magistrate took into H consideration convictions for theft for which the convicted person had not

been charged. In case (4) the canvassing of theft elements under unlawful A entry means that the magistrate took into consideration the conviction for unlawful entry and theft, even though the theft charge had been withdrawn. The sentence for an unlawful entry which is accompanied by theft of property from the premises can, in most cases, be the same as that which can be imposed if the convicted person is convicted of unlawful entry as defined B in s 131(1) and theft as defined in s 113 (1) of the Code.

The fact that s 131(1)(a) of the Code provides that the value of the stolen property determines the fine, if double the value of the stolen property is greater than the fine imposable under level thirteen, means that if the convicted person is convicted of both unlawful entry and theft his punishment would be the same or almost the same as that for unlawful entry as defined in s C 131(1)(a). It is, in my view, clear that the legislature, in enacting s 131(1)(a), did not intend to create the former offence of housebreaking with intent to steal and theft, but that of an aggravated unlawful entry. It is, therefore, important to note that a convicted person can be sentenced using the value of the stolen property, without first being convicted of theft as defined in D s 113(1) of the Code. All that is required in terms of s 131(1)(a) is for the accused to admit it as an aggravating factor, the most important factor being his admission of the value of the property stolen. It is therefore, in my view, possible to consider the appropriate sentences in these cases even though the convictions under s 131(1)(a) of the Code purported to be convictions for unlawful entry and theft. The amendment of the charges to confine them E to the crime of unlawful entry does not affect the sentences imposed by the magistrates unless the sentences were not appropriate for other reasons. This conclusion means that the magistrate and prosecutor in case (4) were legally correct when they treated the theft charge as an alternative and withdrew it after securing a conviction for unlawful entry. This is so because the punishment for theft is taken into consideration under s 131(1)(a). F

The sentence imposed in each case must therefore be reviewed to assess its appropriateness. If it is appropriate it will be confirmed; if not, it will be set aside and substituted by an appropriate sentence.

The convicted person in case (1) is a first offender who pleaded guilty to contravening s 131(1). He is 27 years old. The magistrate took into G consideration the fact that he is a first offender who pleaded guilty. The value stolen during the unlawful entry is US$140 of which property valued at US$15 was recovered. The accused therefore benefitted to the amount of US$125. He was sentenced to four years' imprisonment of which one year was suspended on condition of good behaviour. The magistrate said a fine or community service would trivialize this otherwise serious H

A offence. The legislation provides for a fine not exceeding level thirteen or not exceeding double the value of the property stolen during the unlawful entry or imprisonment for a period not exceeding fifteen years. In this case, the convicted person merely forced a lock open. His manner of breaking into the premises was not out of the ordinary so as to deserve four years' imprisonment. In my view, the sentence imposed on this first offender, who B should ordinarily be kept out of prison, is so severe as to cause a sense of shock and warrants the interference of this court. The legislation provides for a fine not exceeding level thirteen as the starting point and fifteen years' imprisonment for the worst offence. The legislature was therefore aware of the seriousness of the crime of unlawful entry but gave the courts a very C wide discretion in considering the appropriate sentence. This must be because unlawful entry can be for various purposes and could cause very serious damage to or destruction of property. The facts of each case must therefore be carefully considered in arriving at an appropriate sentence. The courts must sentence accused persons in accordance

with the statutes which create the offence. In this case the only damage the accused person may have caused D could be to the lock he forced open. The offence is further aggravated by his entering a dwelling-house during the night. See subs (2)(a) of s 131. In my view, while a fine may have the effect of trivializing the offence, there are other sentencing options which would suit this offence and the offender without having to send him to prison for a long time. The ill-gotten gains can be disgorged against a suspended term of imprisonment. His future conduct E can be guided by a suspended term of imprisonment. The sentence of four years' imprisonment is too severe and cannot be allowed to stand. A sentence in the region of two years would be appropriate. The sentence imposed by the magistrate is set aside and the following is substituted:

> "`Two years' imprisonment, of which one year is suspended for five years F on condition the convicted person does not, during that period, commit any offence involving unlawful entry for which he will be imprisoned without the option of a fine. A further eight months' imprisonment is suspended on condition the convicted person restitutes the complainant in the sum of US$125 by 30 October 2009 through the clerk of court, Chivhu Magistrate's court."

G The convicted person in case (2) was sentenced to 36 months' imprisonment, of which twelve months were suspended on condition of good behaviour. Both counts were treated as one for sentence. He is a seventeen-year-old first offender who pleaded guilty. On 3 June 2009 he unlawfully entered two premises without the owner's consent. The fact that he unlawfully entered H two premises on the same day portrays him as a persistent offender who

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has to be dealt with firmly, even though he is a juvenile first offender. He A has clearly started from the deep end. He has to be dissuaded from a life of crime by an effective sentence. Iin count one he stole property whose value was not established but the State accepted his limited plea that he had only stolen the property he stated. In the absence of proof of the value stolen and the fact that property worth US$15 was recovered, out of the original total B value of US$50, the value not recovered can be deemed to be negligible. He therefore did not benefit from the crime he committed in count one. In count two he stole property worth US$40, of which property worth US$15 was recovered. He gained US$25. Crime should not benefit the offender, so the ill-gotten gains should be disgorged. The convicted person is, however, a juvenile whose parents are deceased. He stays with a friend. He should have C been sentenced to corporal punishment in terms of s 353 of the Criminal Procedure and Evidence Act [*Chapter 9*:07] plus a suspended sentence, instead of the long term of imprisonment imposed by the magistrate. The magistrate therefore misdirected himself by failing to consider corporal punishment. In view of his having started at the deep end, a prison term is called for, but it should be suspended on conditions of good behaviour and restitution. D

The convicted person is in the business of buying and selling, raising an income of 400 rands per month. He has assets valued at 1500 rands. He is therefore able to pay restitution to the complainant in count two. Courts should, wherever possible, order restitution to the complainant. Restitution disgorges the offender of the ill-gotten gains and sends a message that crime E does not pay. It affords the complainant a cheaper way of recovering the value of the stolen property. The convicted person will serve a shorter sentence and society will sustain him in prison for a shorter period. The convicted person was sentenced on 12 June 2009. He has therefore spent more than six weeks in prison. It is, in my view, no longer necessary to subject him to corporal punishment when he has already felt the sting of imprisonment. F The period he has served should be equated to the corporal punishment which should have been imposed. He is therefore entitled to his immediate release from prison. The sentence imposed by the magistrate is set aside and is substituted by the following:

> "Both counts treated as one for sentence G
>
> Fourteen months' imprisonment of which ten months are suspended for five years on condition the accused does not, during that period, commit any offence involving unlawful entry for which he will be imprisoned without the option of a fine. A further two months is suspended on condition the convicted person pays restitution to the second complainant in the sum of US$25 by 30 October 2009 through the clerk of court, H

A Chivhu Magistrates' Court.

As the convicted person has already served for more than one and half months, he is entitled to his immediate release from prison."

The convicted person in case (3) was sentenced to fifteen months' imprisonment, of which eight months were suspended on conditions of good B behaviour. The sentence is within the magistrate's discretion. The proceedings in that case will, after the amendment of the charge, be confirmed.

The convicted person in case (4) stole property valued at US$225, of which property valued at US$37 was recovered. He stole a considerable amount of property, most of which was not recovered. The magistrate took all the factors into consideration and sentenced him to 30 months' imprisonment, C of which eight months were suspended on condition of good behaviour and a further ten months on condition the convicted person paid restitution to the complainant. The magistrate took into consideration the accused's future conduct, restitution and his moral blameworthiness. The sentence is therefore within the magistrate's discretion and is confirmed.

D BHUNU J agrees.

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TEMBANI v REPUBLIC OF ZIMBABWE 2009 (2) ZLR 96 (SADC)

Citation	2009 (2) ZLR 96 (SADC)
Case No	Judgment No. SADC-07-08
Court	SADC Tribunal, Windhoek, Namibia
Judge	Pillay P, Mtambo J, Mondlane J, Kamboyo J and Tshosa J
Heard	14 August 2009
Judgment	14 August 2009
Counsel	*J J Gauntlett SC*, with him *F Pelser*, for the applicant *P Machaya*, with him *M Mutsonziwa*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe – s 16(7)(d) – provision in conflict with articles 4(c) and 6(1) of SADC Treaty – Zimbabwe in breach of its obligations thereunder – s 16(7)(d) – preventing access to the courts a breach of international law.*

Costs – *appeal – appeal to SADC Tribunal – costs normally borne by parties* D *thereto – exceptional circumstances justifying departure to normal rule – reprehensible conduct by respondent – order by Tribunal that respondent to pay applicant's costs*

Human rights – *breach of natural justice – denial of right of hearing before independent and impartial court – Constitution of Zimbabwe – s 16(7)* E *(d) – effect of – denial of access to courts*

International law – *treaties – SADC Treaty – art 4(1) – interpretation – principles – requirement to act in accordance with human rights, democracy and the rule of law – Agricultural Finance Act [Chapter 18:02] – s 38 – section authorizing Agricultural Finance Corporation* F *to attach and sell, without recourse to the courts, property which was the subject of a loan – such provision contrary to rule of law and rules of natural justice*

Practice and procedure – *Protocol on SADC Tribunal – art 15(2) - appeals to SADC Tribunal – party bound to exhaust domestic remedies first* G *– application of rule – rule does not apply where it would be wholly pointless for a party to do so*

Statutes – *Agriculture Finance Corporation Act [Chapter 18:02] – s 38(2) – section authorizing Agricultural Finance Corporation to attach and sell, without recourse to the courts, property which was the subject of a loan – section in conflict with arts 4(c) and 6(1) of SADC Treaty – such* H

A *provision contrary to rule of law and rules of natural justice – sale of farm illegal and void*

Headnote

By preventing access to the courts of Zimbabwe, s 38(2) of the Agricultural Finance Corporation Act [*Chapter 18:02*] and s 16(7)(d) of the Constitution of Zimbabwe are in breach of international Law.

B The applicant was a farmer. In order to finance his farming activities, he borrowed monies from the Agricultural Bank of Zimbabwe (ABZ). In terms of clause 6 of the various written agreements he entered into with ABZ, in the event that he was unable to repay any of the monies borrowed, ABZ was entitled, after due demand for repayment, to C enter upon his farm and "without recourse to a court of law", take possession of it. Clause 6 of the agreements was based upon s 38(2) of the Agriculture Finance Corporation Act [*Chapter 18:02*] which, in turn, was anchored to s 16(7)(d) of the Constitution of Zimbabwe. This constitutional provision provided an exception of the general prohibition against compulsory acquisition of property except under authority of D law in certain specified circumstances.

The applicant was unable to pay off his debts to ABZ, which then, in terms of s 38 of the Act, attached his farm and sold it. Contending that it had been sold for an unreasonably low sum, the applicant then applied to the High Court seeking to set aside the sale. In so doing, he also E challenged the constitutionality of s 38 of the Act. In the course of the proceedings in the High Court, the applicant applied for the matter to be referred to the Supreme Court on the point. The High Court granted his application but observed at the same time that it saw no benefit in the referral, as the Supreme Court had, on previous occasions, decided the point in favour of ABZ. It was against this background that the F applicant, rather than appeal to the Supreme Court, sought assistance from the Southern African Development Community Tribunal. It was submitted on his behalf that the effect of s 38 of the Act and s 16(7)(d) of the Constitution was to deny him access to the courts in Zimbabwe and that the respondent (the Republic of Zimbabwe) was in breach of its obligation under arts 4(1) and 6(1) of the Treaty of the Southern African G Development Community ("the Treaty") which, in effect, required member states, of which Zimbabwe was one, to act in accordance with human rights, democracy and the rule of law and refrain from doing anything to jeopardize the sustenance thereof.

Before the Tribunal, the respondent offered no argument to rebut this H submission. Instead, it raised the procedural argument that, by failing

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to argue his case before the Supreme Court, the applicant had failed to A exhaust his domestic remedies. As required by art 15(2) of the Protocol on the Tribunal, the question of costs also arose for consideration before the Tribunal. In terms of its r 78, parties to proceedings before it are normally required to bear their own costs. However, in exceptional circumstances, the Tribunal may order a party to bear the costs of its B opponent. The Tribunal took note of the fact that the applicant was an elderly man of limited means and that the respondent had systematically used all sorts of delaying tactics and procedural obligations. It had also avoided any argument as to the merits of the applicant's case.

Held, that art 15(2) of the Protocol had no application as the Supreme Court had on previous occasion decided the point which was the subject of the C applicant's application for referral. It had ruled that the effect of s 38of the Act and s 16(7)(d) of the Constitution was that the jurisdiction of the courts of law in Zimbabwe was ousted whenever agricultural land is acquired,

as it had been *in casu.* In the circumstances it would be meaningless to insist upon the applicant first exhausting his domestic D remedies.

Held, further, that the denial of the applicant's right of a hearing before an independent and impartial court, where he could contest the amount of his debt which he allegedly owed and the value of the farm sold by ABZ, was a breach of the principles of natural justice.

Held, further, that the applicant had been denied access to the courts and E deprived of a fair hearing. The sale of his farm was illegal and void since both s 38(2) of the Agricultural Finance Corporation Act [*Chapter 18:02*] and s 16(7)(d) of the Constitution of Zimbabwe contravened arts 4(c) and 6(1) of the SADC Treaty.

Held, further, on the question of costs, that the manner in which the respondent's F case had been conducted amounted to an exceptional circumstances justifying an award order. The irresistible conclusion was that no counter arguments on the merits were offered by the respondent because it knew or ought to have known that it stood no prospect of success.

Cases cited G

Agricultural Bank of Zimbabwe v Tembani & Ors S-39-07

A-G, Commonwealth of the Bahamas v Ryan [1980] AC 718 (PC)

Barkhuizen v Napier 2007 (5) SA 323 (CC)

Chief Lesapo v North West Agricultural Bank & Anor 2001 (1) SA 409 (CC)

Chirinda & Ors v Mike Campbell (Pvt) Ltd & Ors SADC(T)-9-08 H

Pillay P

A *Chizikikani v Agricultural Finance Corporation* S-123-95

Mike Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor 2008 (1) ZLR 17 (S)

Mike Campbell (Pvt) Ltd & Ors v Republic of Zimbabwe 2008 (2) ZLR ZLR 343 (SADC T)

Nyamukusa v Agricultural Finance Corporation S-174-94

Tembani v Republic of Zimbabwe SADC(T)-7-08

Legislation considered B

Zimbabwean legislation

Agricultural Finance Corporation Act [*Chapter 18:02*], ss 38, 40(2) and 40(2a)

C Constitution of Zimbabwe 1980, s 16(7)(d)

International instruments

African Charter on Human and Peoples Rights, art 50

European Convention on Human Rights Right and Fundamental Freedoms, art 26

Protocol on Tribunal of the Southern African Development Community, D arts 15(2) and 21(6)

Rules of Procedure of the SADC Tribunal, rr 41(2) and 78

Treaty of the Southern African Development Community, arts 4(c), 6(1), 6(4) and 6(5)

Case information

E *J J Gauntlett SC*, with him *F Pelser*, for the applicant

P Machaya, with him *M Mutsonziwa*, for the respondent

Judgment

PILLAY P:

1. Background

This application involves the consideration of the issue as to whether s 38 F of the Agricultural Finance Corporation Act [*Chapter 18:02*] (the Act) of the Laws of Zimbabwe conforms with arts 4(c) and 6(1) of the Treaty of the Southern African Development Community (the Treaty), which provide as follows:

Article 4:

" G SADC and its Member States shall act in accordance with the following principles:

(c) human rights, democracy and the rule of law."

Article 6:

"(1) Member States undertake to adopt adequate measures to promote the H achievement of the objectives of SADC, and shall refrain from taking any

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measure likely to jeopardize the sustenance of its principles, objectives and the A implementation of the provisions of this Treaty."

We will also bear in mind sub-articles (4) and (5) of art 6, which read as follows:

"(4) Member States shall take all steps necessary to ensure the uniform application of this Treaty. B

"(5) Member States shall take all necessary steps to accord this Treaty the force of national law".

The applicant is a registered owner of a farm of 1265 hectares known as the Remainder of Minverwag of Clare Estate Ranch in Nyazura District in the Republic of Zimbabwe. He and his family have resided on the farm C since 1983.

To finance his farming activities, the applicant borrowed various sums of money from a parastatal bank called the Agricultural Bank of Zimbabwe (ABZ) on the security of the farm. Each of the loan agreements included a standard clause 6 authorizing ABZ, if at any time any sum of money due in respect of an advance is unpaid, to enter upon and take possession of the D whole or any part of the security. The clause read as follows:

"Should the borrower commit or be in breach of any of the terms or conditions of this agreement the Corporation specifically stipulates as provided in section 40 of the Act, that it shall have the right in terms of that section of the Act, after demand by registered letter addressed to the borrower at his last known address or to the address given by him in his application for this loan, and *without* E *recourse to a court of law,* to enter upon the property hypothecated and to take possession thereof and sell and dispose of the same in whole or in part as the Corporation may determine, always in terms of and subject to the provisions of the Act" (the emphasis is ours).

Clause 6 is based on the former s 40 of the Act (which is now s 38) and which, in the relevant part, provides as follows: F

"38(2) The Corporation may, in the case of an advance in respect of which security is given, including any security by way of a notarial bond or note of hand, stipulate that it shall be a condition of the advance that if any advance in respect of which security has been given becomes repayable … the Corporation, in addition to the powers conferred … shall be entitled, … after a period of ten days have elapsed since the posting of a registered letter of demand addressed G to the borrower at his last known address or at the address given by him in his application for the advance, to enter upon and take possession of the whole or any part of the security concerned and to dispose of such security …".

The section is itself anchored to s 16(7)(d) of the Constitution of the respondent which reads as follows:

"(7) Nothing contained or done under the authority of any law shall be held to H

A be in contravention of subsection (1) to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein in any of the following cases … :

(d) As an incident of a contract, including a lease or mortgage, which has been agreed upon between the parties to the contract, or of a title deed to land fixed at the time of the grant or transfer thereof or at any other time with B the consent of the owner of the land."

Subsection (1) of s 16 of the Constitution of the respondent prohibits compulsory acquisition of property, except under the authority of the law in certain specified circumstances.

The applicant was unable to liquidate his indebtedness to ABZ, whose exact C amount from the record is unclear, and, therefore, his farm was attached in terms of s 38 of the Act. The farm was then sold. The applicant sought to set aside the sale and so he applied to the High Court (*Thembani* v *Eagle Estate Agents (Pvt) Ltd and Others*), contending that the farm was sold at an unreasonably low price and that this was due to inadequate advertisement of the sale. He also questioned the constitutionality of the Act. It was submitted D on his behalf, in para 14 of the heads of argument that the point about the constitutionality of the Act was "decisive of this case and there is no need or discretion for the court to look any further", and then it was argued further in para 15 as follows:

> "However, if this court is not persuaded on that, it is respectfully submitted that E the applicant has *bona fide* and legitimate grounds to dispute that:
>
> (a) the Act; and
>
> (b) the way in which it was administered in regard to himself and his property,
>
> are consistent with all the requirements of the Constitution, and to request that if necessary this should be referred to the Supreme Court".

It was further contended on behalf of the applicant in paras 16 and 17 as F follows:

> "16. The Supreme Court is not the sole court that must have regard to the Constitution, but if any party requests that a question concerning the Bill of Rights be referred there by a lower court, the lower court must refer it unless the request is frivolous and vexatious.
>
> 17. Section 3 of the Constitution is totally explicit. It states that any law G inconsistent with any provision of the Constitution is void, and not merely voidable, and that prevents any court from enforcing it".

After considering the issues before it, the learned judge of the High Court granted the application, but concerning the constitutionality of s 38, had this to say:

> H "What one has to consider as I said earlier on is the issue of whether or not the

> property was adequately advertised. If the property was adequately advertised, A then in my view no issue would arise, as the Supreme Court of this country has already decided on the issues touching the AFC sales".

What the High Court was saying here is that there would be no point in referring the question of the constitutionality of s 38 of the Act to the Supreme Court because that court has already resolved the issue in its earlier decisions. B One such case in which the Supreme Court made the position very clear is that of *Chizikani* v *Agricultural Finance Corporation* S-123-95, in which it stated, *per* Gubbay CJ, as follows:

> "The appellant has overlooked the recent judgment of this court in the case of *Nyamukusa* v *Agricultural Finance Corporation* S-174-94 which conclusively affirms the correctness of the decision of the court *a quo*. In that case the court, C after citing s 4(1), s 40(2) and s 40(2a) of the Act, went on to hold as follows:
>
> > 'It is noted that he (the appellant) was signatory to the agreement which gave powers to the respondent to act in the manner it did. My reading of section 40(2) and (2a) is that provided there is a stipulation in the loan agreement, to the effect that the respondent can take possession of the property hypothecated without recourse to law, the respondent is perfectly D entitled to proceed either under s 40(1) or (2) and (2a) of the Act. For obvious advantageous reasons it chose to proceed in terms of the latter subsection in which it is supported by clause 6 of the loan agreement.'"

This position has been maintained in all subsequent cases, which include *Agricultural Bank of Zimbabw*e v *Thembani and Others* S-39-07 [*].

Such is the background of the present case. E

2. Exhaustion of local remedies

On 23 April 2009, when the hearing of the application was called on, the respondent sought leave to file its defence to the claim. The Tribunal allowed it to do so, albeit reluctantly, within seven days from that date and directed the parties to ensure that the pleadings were settled well before 4 June 2009, F the date to which the hearing of the case was postponed. The respondent did not file the defence within the period allowed. But on 29 May 2009, the respondent brought an application to file

a supplementary affidavit by which it sought to adduce further evidence and to contend that the Tribunal had no jurisdiction to hear the application which was before it.

Rule 41 of the Rules of Procedure of the SADC Tribunal (the Rules) is about G closure of pleadings. It stipulates that pleadings shall close after the completion

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Pillay P

A of written proceedings. By fixing a period within which the respondent was to have filed the defence, the Tribunal, by necessary inference, also fixed the date by which pleadings were to close, namely, April 30, 2009, the date by which the defence was to be filed.

In terms of subrule (2) of r 41, no further documents may be submitted to B the Tribunal by either party after the closure of pleadings except with the consent of the other party. The applicant refused to consent, arguing, among other things, that the respondent was in the habit of not following the Rules, pointing out that the Tribunal was only being indulgent when it allowed the respondent a further period to file the defence because that should have been done earlier than 23 April 2009. We agree with this observation and would C only add that it is high time that parties respect the orders of the Tribunal. The application to file a supplementary affidavit is, therefore, rejected.

This, however, does not settle the issue of jurisdiction because it is a question which we have to consider anyway in order to satisfy ourselves that the matter is properly before us and that we have jurisdiction to hear it. We now proceed to do so.

D Under art 15(2) of the Protocol on the Tribunal (the Protocol), no person may bring an action against a member state unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction. We have also referred to other international conventions, such as the European Convention on Human Rights and Fundamental Freedoms of 1950 (the E European Convention) and the African Charter on Human and People's Rights (the African Charter), to mention but two. In art 26 of the European Convention, it is provided as follows:

> "The Commission … may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law …"

F The African Charter, in art 50, stipulates as follows:

> "The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving the remedies would have been unduly prolonged."

G We also recall the case of *Mike Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor* 2008 (1) ZLR 17 (S). The Supreme Court in Zimbabwe had dismissed Campbell's claim saying, among other things, that the question of what protection an individual should be afforded in the Constitution in the use and enjoyment of a private property, is a question of a political and legislative character, H and that as to what property should be acquired and in what manner is not

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Pillay P

a judicial question. The court went further and observed that, by the clear A and unambiguous language of the Constitution, the legislature, in the proper exercise of its powers, had lawfully ousted the jurisdiction of the courts of law from any of the cases in which a challenge to the acquisition of agricultural land may be sought.

We have also reproduced s 16(7)(d) of the Constitution of the respondent B above which provides, among other things, that nothing contained or done under the authority of any law shall be held to be in contravention of the Constitution to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein, even as an incident of a contract, including a lease or mortgage, which has been agreed between C the parties to the contract. We have also replicated s 38(2) of the Act above. That section authorizes the inclusion of a clause in a loan agreement entitling the lending institution to enter upon, and take possession of the whole or any part of, the security concerned and to dispose of it.

The Supreme Court in Zimbabwe had held that in the circumstances where such clause is incorporated in a loan agreement, as is the case in the matter D before us, the lending institution

was entitled to proceed in terms of s 38(2) of the Act, without recourse to a court of law.

Such indeed are the circumstances in which we must decide whether or not the applicant in the present case has exhausted all available remedies or is unable to proceed, under the domestic jurisdiction. Under art 21(b) of the Protocol, E in addition to authorizing the Tribunal to develop its own jurisprudence, the Tribunal is instructed to do so, having regard to applicable treaties, general principles and rules of public international law.

In *Mike Campbell (Pvt) Ltd and Others* v *Republic of Zimbabwe* 2008 (2) ZLR 343 (SADC T), when considering the question of exhaustion of local remedies, the Tribunal observed as follows at 353: F

> "The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law … However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. Further, where, as the African Charter on Human and People's Rights states, "… it is obvious … that the procedure G of achieving the remedies would have been unduly prolonged," the individual is not expected to exhaust local remedies. These are circumstances that make the requirement of exhaustion of local remedies meaningless, in which case the individual can lodge a case with the international tribunal".

We would add that one of the aims concerning exhaustion of local remedies is to prevent individuals from abuse of remedies through concurrent proceedings H

Pillay P

A and thus the requirement aims at avoiding parallelism of proceedings.

The effect of s 38 of the Act and indeed s 16(7)(d) of the Constitution of the Respondent is that the jurisdiction of the courts of law in Zimbabwe is ousted whenever agricultural land is acquired in the circumstances obtaining in the present application. This has been confirmed in the decisions of the B Supreme Court, the highest court in that country, which we have already referred to above.

Thus, it would be meaningless, in our view, to insist that the applicant should have first exhausted his domestic remedies. In the circumstances, we are of the view that the applicant is properly before us and that we have jurisdiction to consider the application, and we now proceed to do so.

C 3. Denial of access to the courts

The next issue to be decided is whether or not the applicant has been denied access to the courts and deprived of a fair hearing, in breach of articles 4(c) and 6(1) of the Treaty when in November 2000 his immovable property, a farm, which he had mortgaged to ABZ as security for his loans, pursuant D to various loan agreements, had been seized and sold by ABZ after he had defaulted on his debts.

It is to be noted that the loan agreements entered into by the applicant with ABZ derived their authority from, and are governed by, the then provisions of s 40(2) and (2a) of the Act which have now been replaced by similar E provisions in s 38(2), as stated already.

Section 40(2) and (2a) of the Act stated as follows:

> "(2) The Corporation may in the case of an advance in respect of which security is given, including any security by way of notarial bond or note of hand, stipulate that it shall be a condition of the advance that if any advance in respect of which security has been given becomes repayable in terms of subsection (1) F the Corporation, in addition to the powers conferred by subsection (1), shall be entitled, subject to the provisions of subsection 2(a), after a period of ten days have elapsed since the posting of a registered letter of demand addressed to the borrower at his last known address or at the address given to him in his application for the advance to enter upon and take possession of the whole or any part of the security concerned and to dispose of such security in accordance G with the provisions of the Second Schedule.
>
> (2a) The Corporation shall be entitled to exercise the powers conferred upon it in accordance with any condition referred to in subsection (2) as soon as it has posted a registered letter of demand to the borrower in terms of that subsection where in any event referred to in paragraph (c), (d) or (e) of subsection (1) occurs:
>
> H Provided that the Corporation shall not dispose of any security so seized

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Pillay P

until the period of ten days has elapsed since the posting of the registered letter A of demand."

The Supreme Court of the respondent had the opportunity, in *Nyamukusa* v *Agricultural Finance Corporation* S-174-94 and *Chizikikani* v *Agricultural Finance Corporation* S-123-95, of construing s 40(2) and (2a) of the Act, together with clause 6 of the loan agreements, and came to the inevitable B conclusion that ABZ could seize and take possession of the mortgaged property of the defaulting debtor without any recourse to a court of law. Moreover, the court in *Nyamukusa supra* held that the seizure of the mortgaged property of the defaulting debtor, as in the present case, was specifically sanctioned by s 16 (7)(d) of the Constitution of the Respondent, already referred to above.

The decision in these two cases was reaffirmed in *Agricultural Bank of* C *Zimbabwe* v *Tembani and Others supra*. In the light of those three judgments of the Supreme Court of the respondent, we cannot but agree with the agent for the applicant that the seizure and the sale of the property of the applicant in the circumstances by the ABZ under the authority of the Act and the Constitution of the Respondent was in contravention of arts 4(c) and 6(1) D of the Treaty.

As the Tribunal had held in *Mike Campbell (Pvt) Ltd* v *Republic of Zimbabwe supra* at 355, after citing numerous authorities:

> "It is settled law that the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate E expectation … Article 4 (c) of the Treaty obliges Member States of SADC to respect principle of 'human rights, democracy and the rule of law' and to undertake under article 6 (1) of the Treaty 'to refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty'. Consequently, Member States of SADC, including the respondent, are under a legal obligation F to respect, protect and promote those twin fundamental rights".

In *Chief Lesapo* v *North West Agricultural Bank and Another* 2001 (1) SA 409 (CC), the Constitutional Court of South Africa considered s 38(2) of the North West Agricultural Bank Act No. 14 of 1981 which is identical to the then s 40(2) of the Act (which is now s 38(2), as indicated already). The court held that s 38(2) of the North West Agricultural Bank Act was in G contravention of s 34 of the Constitution of the Republic of South Africa which provides as follows:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

The court made the following pertinent observations which are applicable H

Pillay P

A to the present case:

> (1) "When the constitutional status of a law is impugned, the approach to determine its constitutionality is objective, not subjective. The subjective position in which the parties find themselves cannot affect the relevant enquiry as to whether the legislation in question complies or not with human rights standards and the rule of law."

B The Tribunal wishes to underline at this stage that in the present case the fact that the applicant voluntarily signed the loan agreements which contained the standard clause 6, already mentioned above, could have no bearing on the issue as to whether or not s 40(2) of the Act and s 16(7)(d) of the Constitution of the respondent comply with articles 4(c) and 6(1) of the Treaty, especially in view of the fact that the loan agreements derived their authority from, and C are governed by, s 40(2) of the Act itself, which in turn is sanctioned by s 16(7)(d) of the Constitution of the respondent, as indicated already.

> (2) "A trial or hearing before a court or tribunal is not an end in itself. It is a means of determining whether a legal obligation exists and whether the coercive power of the State can be invoked to enforce an obligation, or prevent an D unlawful act being committed. It serves other purposes as well, including that of institutionalizing the resolution of disputes, and preventing remedies being sought through self help. No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails": *vide* para 11.
>
> (3) "An important purpose of s 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law. Execution is a E means of enforcing a judgment or order of court and is incidental to the judicial process. It is regulated by statute and the Rules of Court and is subject to the supervision of the court which has inherent jurisdiction to stay the execution if the interests of justice

so require. *If the debt itself is disputed, the seizure of property in execution of the debt must equally be disputed. To permit a creditor to seize property of a debtor without an order of court and to cause it to be* F *sold by the creditor's agent on the condition stipulated by the creditor to secure payment of a debt denies to the debtor the protection of the judicial process and the supervision exercised by the court through its Rules over the process of execution.* Yet this is what s 38 (2) purports to do. It entitles the Bank to seize and sell property in execution whether the debt alleged to be due is disputed or not" (the emphasis is ours): *vide* paras 13 and 14.

G (4) "Section 38(2) the North West Agricultural Bank authorizes the Bank, an adversary of the debtor, to decide the outcome of the dispute. *The Bank thus becomes a judge in its own cause.* The authority to adjudicate over justiciable disputes and to order appropriate relief and the enforcement of the order by attachment and sale of the debtor's goods in a civil matter vests in the courts of the land. Section 38(2), however, limits the debtor's rights in s 34 by vesting that authority in the Bank. *The Bank itself decides whether it has an enforceable* H *claim against the debtor; the Bank itself decides the outcome of the dispute and*

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the subsequent relief; and the Bank itself enforces its own discretion, thereby A *usurping the powers and functions of the courts*" (the emphasis is ours): *vide* para 20.

Moreover, in *Barkhuizen* v *Napier* 2007 (5) SA 323 (CC), the Constitutional Court of South Africa stated at paras 34 and 52 respectively as follows:

"Courts have long held that a term in a contract that deprives a party of the right B to seek judicial redress is contrary to public policy."

"… the requirement of an adequate and fair opportunity to seek judicial redress is consistent with the notions of fairness and justice which inform public policy."

It is our considered opinion that s 38(2) of the Act and s 16(7)(d) of the Constitution of the respondent, by preventing access to the courts, also breaches principles of international law, in the light of the various authorities C quoted by us in *Mike Campbell (Pvt) Ltd* v *Republic of Zimbabwesupra*.

4. Breach of the rules of natural justice

As held in *Mike Campbell (Pvt) Ltd* v *Republic of Zimbabwesupra*, "the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation is another principle well recognized and embodied D in law".

We can only restate what Lord Diplock for the Board of the Judicial Committee of the Privy Council stated in *Attorney-General of the Commonwealth of the Bahamas* v *Ryan* [1980] AC 718 (PC):

"It has long been settled law that a decision affecting the legal rights of an E individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority."

It is noteworthy that, in the present case, ABZ had acted against the principles of natural justice in that the Applicant was not only denied the right of a hearing before an independent and impartial court or tribunal where he could contest the amount of the debt allegedly owed by him and the value of his F farm which he claimed had been sold by ABZ at little more than half of its actual price, but that ABZ also became a judge in its own cause.

It is significant that no argument whatsoever was advanced by the agent for the respondent in respect of the issue as to whether the applicant has been denied access to the courts and deprived of a fair hearing before his G property was seized and sold at auction by ABZ under the Act, in breach of articles 4(c) and 6(1) of the Treaty. Counsel simply contented himself with observing that he would not at this stage, as he put it, "respond to the legal issues" presented on behalf of the applicant since he considered that those issues should first be raised in the Supreme Court of the respondent before they were dealt with by the Tribunal. H

A The only argument made on behalf of ABZ was in the affidavit of its representative which was to the effect that the seizure and sale of the applicant's immovable property was analogous to the common law rights of a pledge. The short answer to this argument is, as rightly pointed out by the

agent for the applicant, that a pledge applies to a movable thing and not to immovable property which is subject to a mortgage, as is the case with B the immoveable property of the applicant.

We consequently hold that the applicant has been denied access to the courts and deprived of a fair hearing, in contravention of articles 4(c) and 6(1) of the Treaty, when his mortgaged property was seized and sold by ABZ under s 38(2) of the Act, and that the sale was illegal and void since both s 38(2) of C the Act and s 16(7)(d) of the Constitution of the Respondent, which sanctions that provision of the Act , contravene articles 4(c) and 6(1) of the Treaty.

5. Conclusions

For the reasons given, the Tribunal holds and declares that:

a. the applicant has exhausted all local remedies; D

b. the applicant has been denied access to the courts in Zimbabwe;

c. the respondent is in breach of its obligations under arts 4(c) and 6(1) of the Treaty;

d. the sale in execution and subsequent transfer of the property held under Deed of Transfer 3673/85, known as the "Remainder of Minverwag of E Clare Estate Ranch", situate in the Nyazura District, Zimbabwe (the property) is illegal and void;

e. the applicant's title to the property, subject to such mortgage as has been held over it at the time of the sale in execution, remains valid;

f. the respondent is directed to take all necessary measures, through its F agents, from:

i evicting the applicant or his family from the property;

ii interfering with the applicant's use and occupation of the property;

iii subjecting the property to any further sale, disposal, transfer, encumbrance or similar limitation of proprietary rights or permitting G any other person or body to do so, pending the proper determination of the applicant's debt by an independent and impartial court or tribunal.

6. Costs

With regard to the issue of costs, we shall first refer to r 78 of the Rules.

H Rule 78 provides as follows:

Pillay P

"1. Each party to the proceedings shall pay its own legal costs. A

2. The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party."

In terms of r 78, each party bears its own costs except where there are exceptional circumstances warranting the grant of costs, in the interests of justice, against a party. B

The Tribunal has already construed r 78 in a broad and purposive manner in *Chirinda and Others* v *Mike Campbell (Pvt) Ltd and Others* SADC(T)-09-2008 and held that there were exceptional circumstances justifying the grant of costs in the interests of justice against a party that brought before the Tribunal a patently frivolous and vexatious application.

The Tribunal also made a costs order in *Tembani* v *Republic of Zimbabwe* C SADC(T)-07-2008 against the respondent when the latter abandoned a preliminary objection on the day of hearing. The Tribunal did not appreciate the fact that the withdrawal of the objection came at the last minute and that no prior notice of the withdrawal was given to the Tribunal or to the applicant. The Tribunal came to the conclusion that the objection taken by D the respondent was in the circumstances a frivolous and vexatious one.

We consider that there are also exceptional circumstances, on the particular facts of the present case, justifying the award of costs in favour of the applicant in the interests of justice. In this regard, we have taken into account the fact that the applicant is an old man of 71 years who has had to bear an intolerable E burden, financial, moral and otherwise, for some nine years in fighting against the power and resources of the respondent, which had successively and systematically used all kinds of delaying tactics, procedural objections of all kinds and even tried at the eleventh hour, against all evidence to the contrary, to contend before us that the applicant had not exhausted domestic remedies through the failure of his legal advisers to raise certain fundamental F issues

relating to the case before the High Court and the Supreme Court of the respondent, as indicated already, when in fact they had done so.

Moreover, the respondent's agent chose not to address those issues before us on the ground that, in his view, it would be better to raise them first before the Supreme Court of the respondent. We consider that the stand taken by counsel G both pre-empted and pre-judged our decision on the issue of the exhaustion of local remedies which, it must be stressed again, he had raised not in the defence of the respondent but in a supplementary affidavit which he sought belatedly to produce and which we refused to admit, as indicated already.

We take the view that, if an objective observer were present at the proceedings of the Tribunal, he or she would have come to the irresistible conclusion in H

Pillay P

A the circumstances that no counter-arguments were offered on behalf of the respondent since the respondent knew or ought to have known that it stood no prospect of success; that the respondent persisted all the same to pursue the matter regardless, instead of coming to terms with the applicant who has always been willing to compromise and come to an amicable settlement with the respondent, especially in the light of the formidable authorities B produced before the Tribunal on behalf of the applicant, including *Mike Campbell (Pvt) Ltd* v *Republic of Zimbabwe supra*, which had significantly decided the very same legal issues against the respondent and in which the agent for the respondent had appeared.

For all the reasons given, we consequently make a costs order against the C respondent under r 78(2) of the Rules. The costs are to be determined by the Registrar in case of disagreement between the parties.

D MTAMBO J, MONDLANE J, KAMBOVO J and TSHOSA J concurred.

* The Supreme Court judgments referred to were not reported, nor were they marked "Reportable" by the judges who delivered them. They were not constitutional cases, as such, and the court was composed of the normal complement of three judges. The constitutionality of the legislation was not in issue. – *Editor*.

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CHAWASARIRA TRANSPORT (PVT) LTD v RESERVE BANK OF ZIMBABWE 2009 (2) ZLR 112 (H)

Citation	2009 (2) ZLR 112 (H)
Case No	Judgment No. HH-86-09
Court	High Court, Harare
Judge	Bhunu J
Heard	18 March 2009
Judgment	19 August 2009

Counsel *T Mambara,* for the applicant
E Manikai, for the respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

Practice and procedure – *res judicata – requirements for – need for parties to be the same – criminal trial – effect on subsequent civil claim – not a bar to action by person suffering injury from commission of offence* D *– Criminal Procedure and Evidence Act [Chapter 9:07] – s 4*

Headnote

The applicant was an exporter of commodities. In terms of s 7 of the Exchange Control (Currency Exchange) Order, 2004 (SI 9 of 2004), it was obliged to offer a proportion of the foreign currency it received to the respondent, the Reserve Bank. To do so, it had to submit its export documentation and E the relevant forms and, based on the amounts disclosed, "acquit" those forms by paying the prescribed amounts to the Bank. It fell behind in its acquittals and was prosecuted in the magistrates court. The magistrate found special reasons for not ordering the applicant to "repatriate" the foreign currency concerned. The Bank nonetheless demanded the acquittal F of the outstanding forms. The applicant refused to do so, claiming that it had been absolved by the magistrate from having to do so, whereupon the Bank, acting in terms of s 7 of the Order, "froze" the applicant's foreign currency account. The applicant sought an order setting aside the Bank's action. The applicant argued that the matter was *res judicata* in the sense that the rights of the parties had already been determined G by the magistrate's judgment. The Bank argued that the magistrate's decision not to order acquittal of the forms did not amount to absolving the applicant from regularizing or acquitting its forms according to law.

Held, that the acquittal of the forms was a statutory obligation imposed by law. That being the case, it was not the function of the courts to excuse or absolve anyone from complying with the law. The mere fact that in H

Bhunu J

A punishing the applicant during criminal proceedings the trial magistrate declined to order repatriation did not absolve or excuse the applicant from complying with the law.

Held, further, that when *res judicata* is pleaded by way of estoppel it amounts to an allegation that the whole of the legal rights and obligations of the parties are concluded by the earlier judgment and that the plaintiff is B estopped by the findings of fact involved in that earlier judgment. Here, the Bank was not a party to the criminal proceedings in the magistrates court; the parties to that case were the State and the applicant. The magistrate did not prohibit the Bank from compelling the applicant to discharge its statutory obligations of repatriating or acquitting its forms. C That being the case, the Bank could not be bound by a judgment to which it was not a party and which made no specific order binding on it. In any event, in terms of s 4 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], neither a conviction nor an acquittal following on any prosecution is a bar to a civil action for damages at the instance of any person who may have suffered any injury from the commission of D any alleged offence. The Bank suffered huge losses arising from the commission of the crime and could not be barred from seeking redress in the civil courts, notwithstanding the applicant's conviction in the criminal court arising from the same facts.

Cases cited E

Flood v Taylor 1978 RLR 230 (G)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 4

Exchange Control (Currency Exchange) Order 2004 (SI 9 of 2004), s 7(1)

Case information

F *T Mambara,* for the applicant

E Manikai, for the respondent

Judgment

BHUNU J: The respondent, the Reserve Bank of Zimbabwe, is a body corporate established in terms of the Reserve Bank Act [*Chapter 22:15*]. Its G functions, among others, include acting as the Exchange control Authority in terms of the Exchange Control Act [*Chapter 22:05*] as read with the Exchange Control Regulations.

On the other hand, the applicant is a duly registered company which is in the business of exporting commodities In terms of s 7 of the Exchange Control H Regulations (Currency Exchange) Order (SI 9 of 2004), the applicant is

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Bhunu J

required to acquit its export documentation, that is to say, repay or settle its A debts or obligations to the respondent arising from export receipts commonly known as CD3 forms. The section reads:

> "7(1) With effect from the 1st January, 2004, every business organisation engaging in the export of goods and services shall be required to acquit the export documentation in respect of those exports" B

Failure to acquit CD3 forms in terms of the Regulations amounts to a criminal offence punishable by the courts. Sometime in 2000 the applicant fell into arrears with the acquittal of some of its CD3 forms. As a result it was prosecuted, convicted and fined in the magistrates court. In sentencing the applicant the trial magistrate found special circumstances for not ordering repatriation. As a result he sentenced the applicant to a fine of $2 000 000 C but declined to order repatriation as requested by the state. Repatriation in terms of the Regulations means to pay back.

Following the conviction and sentencing of the applicant the respondent demanded the acquittal of the outstanding CD3 forms in terms of the Regulations. D

The applicant refused to repay or settle its debts to the respondent arising from the outstanding CD3 forms arguing that it had been absolved by the magistrate from paying its debts to the respondent, whereupon the respondent allegedly invoked the sanction provided by s 7 of the Exchange Control (Currency Echange) Order 2004 (SI 9 of 2004). The effect of this was to freeze the applicant's foreign currency account number 9440031502000. E

The applicant then filed this application seeking a declarator to the effect that it has been absolved from regularizing or acquitting its CD3 forms by the magistrates court. It also sought an order overriding the sanction imposed by the respondent.

The respondent has objected to the applicant's application on the basis that it F has not exhausted its domestic remedies and that the magistrate's refusal to order acquittal of the CD3 forms did not amount to absolving the applicant from regularizing or acquitting its CD3 forms according to law.

The issues which arise from the undisputed facts is whether or not the magistrate, in sentencing the applicant, absolved it from regularizing or G acquitting its CD3 forms according to law, and whether or not the applicant is properly before this court.

While it is desirable that parties should be encouraged to exhaust their domestic remedies before approaching the courts, the mere existence of domestic remedies does not oust the unlimited jurisdiction of this court. The court has therefore discretion whether or not to entertain the application. H

Bhunu J

A Having regard to the fact that the regularization or acquittal of CD3 forms has a direct bearing on the fiscus, the country's economy and the applicant's business operations, it is in the national

interest that the matter be determined as soon as possible. That being the case, I have decided to determine the matter on the merits so as to avoid unnecessary delays which may have the effect of prejudicing both parties and the nation at large.

B I now proceed to determine the application on the merits. In sentencing the applicant, the trial magistrate declined to make a repatriation order on the basis that he had found special circumstances. In his reasons for sentence, the magistrate remarked:

> "For all the forgoing reasons it is this court's finding that special reasons or C circumstances exist in relation to both the offence(s) and the offender. See *S v Chisiwa* 1981 ZLR 666 (H), *S* v *Mbano* 1990 (1) ZLR 270 (S).
>
> It will be considered favourable that the accused company is a first offender.
>
> *Of course the message must be distinctly conveyed to the accused company and would-be offenders, that CD3 Forms must be acquitted within stipulated times as directed.*
>
> D It will be noted also that quite substantial amounts of monies were not accounted for to the Reserve Bank and that this is to be discouraged by the meting out of a fairly stiff penalty for the conviction today, but not necessarily repatriation of the monies as urged by State counsel.
>
> The following is the accused company's sentence:-
>
> Fined $2 000 000 (new currency) or, in default of payment, warrant of execution E against property."

I have carefully gone through the trial magistrate's reasons for sentence and I have found nowhere that he stated or suggested that the applicant was excused or absolved from acquitting its CD3 forms. It is clear, from a proper reading of the trial magistrate's reasons for sentence, that he was alive to the F applicant's statutory obligation to acquit its CD3 forms, hence his remarks to the effect that the message must be driven home to the applicant and others that CD3 forms *must* be acquitted within the prescribed time limits. Note the use of the compulsive word "*must*" and not "*should*"

The acquittal of CD3 forms is a statutory obligation imposed by law. That being the case, it is not the function of the courts to excuse or absolve anyone G from complying with the law. The mere fact that in punishing the applicant during criminal proceedings the trial magistrate declined to order repatriation did not absolve or excuse the applicant from complying with the law.

By the same token, the refusal to order repatriation was no bar to the respondent from compelling the applicant to discharge its statutory obligations, failure H of which it was entitled to invoke any statutory penalties according to law.

Bhunu J

Counsel for the applicant, placing reliance on *Flood* v *Taylor* 1978 RLR 230, A further argued that the matter is now *res judicata* in the sense that the rights of the parties have already been determined by the magistrate's judgment. It was his argument that:

> "All rights and obligations of the applicant and respondent were concluded by the judgment delivered by the learned magistrate and does not require the applicant B to exhaust domestic remedies.
>
> Since the matter is now *res judicata* it's apparent that the respondent failed to comply with the judgment granted by the magistrate. Contrary to the judgment they are forcing the applicant to repatriate the monies or acquit CD3 forms and they prohibit the applicant from carrying out transactions on his foreign account number 9440031502000. Strictly speaking this is a clear violation of a court C order, hence it amounts to contempt of court."

It is needless to say that counsel's reliance on *Flood supra* is grossly misplaced. That case held at p 232C that:

> "When *res judicata* is pleaded by way of estoppel it amounts to an allegation that the whole of the legal rights and obligations *of the parties* are concluded by the earlier judgment and that the plaintiff is estopped by the findings of fact D involved in that earlier judgment (see Halsbury's *Laws of England,* 4 Edition, volume 16, paragraph 1527). The central issue then is what the judgment prayed in aid should be treated as concluding, and for what conclusion it is to stand."

The applicant's plea of *res judicata* falters at the very first hurdle in that the respondent in this case was not a party to the criminal proceedings in the magistrates court. It is common cause that the parties to that case were the E State and the applicant.

In any case, the magistrate's judgment did not order or prohibit the respondent from compelling the applicant to discharge its statutory obligations of repatriating or acquitting its CD3 forms. That being

the case, the respondent cannot be bound by a judgment to which it was not a party and which made F no specific order binding on it.

It is instructive to always bear in mind that, in our law, criminal proceedings are separate and distinct from civil proceedings, such that criminal proceedings are not a bar to civil proceedings. Section 4 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that: G

> **"4 Neither acquittal nor conviction a bar to civil action for damages**
>
> Neither a conviction nor an acquittal following on any prosecution shall be a bar to a civil action for damages at the instance of any person who may have suffered any injury from the commission of any alleged offence."

It is common cause that, despite not being a party to the proceedings in the magistrates court, the respondent suffered financial loss, damage or injury H

Bhunu J

A arising from the commission of the crime. In fact, the trial magistrate made a specific finding of fact that the respondent suffered huge losses arising from the commission of the crime.

It must be borne in mind that the object of criminal proceedings is to punish the offender, whereas the object of civil proceedings is to compensate or provide B redress to the injured party. The standard of proof in criminal proceedings is ordinarily proof beyond reasonable doubt whereas that for civil wrongs is proof on a balance of probabilities. It is therefore not surprising that, based on the same facts or evidence, a criminal court may arrive at a different decision from that of the civil court.

For instance, it is unthinkable that a person negligently injured in a road C accident could be denied redress in the civil courts purely on the basis of findings made in the criminal courts. It therefore stands to reason that criminal proceedings should not be a bar to civil proceedings.

For that reason the respondent falls within the class of persons who are not barred from seeking redress in the civil courts, notwithstanding the D applicant's conviction in the criminal court arising from the same facts. It makes good sense that what is not prohibited is allowed by law. The respondent is therefore entitled to resort to all civil remedies at its disposal including statutory remedies provided by law.

That being the case, the application cannot succeed. It is accordingly ordered E that the application be and is hereby dismissed with costs.

J Mambara & Partners, applicant's legal practitioners

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

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ALLIANCE FRANçAISE v ORFORD & ANOR 2009 (2) ZLR 118 (H)

Citation	2009 (2) ZLR 118 (H)
Case No	Judgment No. HH-88-09
Court	High Court, Harare
Judge	Patel J

Heard 21 May 2009

Judgment 1 September 2009

Counsel *G C C Chikumbirike*, for the applicant
L Uriri, for the respondents

Case Type Opposed application

Annotations No case annotations to date

Flynote

Landlord and tenant – *lease – agreement – amount of rental – must be fixed or some definite mode of fixing it must be agreed*

Landlord and tenant – *lease – termination – fixed term lease – no notice of termination required* D

Landlord and tenant – *tenant – statutory tenant – notice to vacate – must be given before order of ejectment may be applied for – period of notice required – grounds for ejectment – good and sufficient grounds required – allegation that landlord requires premises for own use – failure to state specific use – effect of* E

Headnote

The respondents entered into a fixed term lease of premises from the applicant. The lease was for a three year period, ending at the end of 2008. At the beginning of 2008, the applicant prepared a fresh draft agreement requiring, *inter alia*, usage of the premises in a manner that would be complementary to the applicant's cultural activities. This draft F was rejected by the respondents on the ground that it was an entirely different lease arrangement with more onerous obligations. In March 2008 the applicant's lawyers gave notice to the respondents to vacate at the end of 2008. In July 2008, the applicant filed the present application seeking an order requiring the respondents to vacate the premises by the end of December 2008. The respondents resisted the application on G the ground that the applicant did not want the premises for its own use but for some other ulterior purpose. At the end of the lease period, the respondents did not exercise their right under the contract to renew the lease, but stayed in occupation, thereby becoming statutory tenants. The question that arose was whether or not it was necessary to give the respondents any notice to vacate the premises before seeking their H

A ejectment by the court. The second question was is whether or not the applicant had good and sufficient grounds for requiring the eviction of the respondents as envisaged in s 22(2) of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983).

Held, that an essential ingredient of a contractual lease is that the amount of the rent payable by the lessee must be fixed or that some definite mode B of fixing the rent must be agreed upon. In other words, the rental must be in an ascertained or ascertainable amount. An objective indicator determined by a public body, such as the inflation index compiled and published by the Central Statistical Office, would afford a definite mode of fixing an ascertainable rent.

C *Held*, further, that a fixed term lease terminates *ipso facto* upon the expiry of the fixed term, without the need for any notice of termination from either party. The giving of notice to terminate so as to coincide with the date of expiry of the lease is legally pointless and practically futile.

Held, further, that the overall effect of ss 22 to 24 of the Regulations was that, subject to compliance with the terms of the expired lease agreement, the D respondents were entitled to remain in occupation of the premises and use them without obstruction, unless and until they voluntarily vacated the premises or were lawfully removed therefrom in accordance with the Regulations. In the case of the good statutory tenant, the lessor is obliged to give him notice to vacate before approaching the court for an E eviction order. The period of such notice would be

such notice as would have been required under the lease agreement or, if no notice would have been so required, a period of three months' notice.

Held, further, that an order for the ejectment of a statutory lessee may be made once the lessor satisfies the court that it is has good and sufficient grounds to require an order for ejectment. The needs of the lessee are F irrelevant in this regard. While ejectment may not be ordered if the lessor's grounds for requiring it are that the lessee has declined to accept an increase in rent or because the lessor wishes to lease the premises to another person, the fact that other grounds for requiring ejectment may be motivated by one of those factors is immaterial as long as the other grounds are genuine. While the applicant asserted that it required G the premises for its own use, it did not disclose the specific purpose for which it intended to utilise the premises. While this reticence would not necessarily preclude the relief that the applicant sought, it did render very questionable the *bona fides* of its declared reason for evicting the H respondents.

Patel J

Cases referred to A

Brown v Hicks (1902) 19 SC 314

Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd 1986 (2) ZLR 246 (S)

Film & Video Trust v Mahovo Entprs (Pvt) Ltd 1993 (2) ZLR 191 (H)

Mobil Oil Zimbabwe (Pvt) Ltd v Chisipite Svc Station (Pvt) Ltd 1991 (2) ZLR 82 (S) B

Totoyi v Ncuka 1909 EDC 115

Legislation considered

Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), ss 22, 23 & 24 C

Case information

G C C Chikumbirike, for the applicant

L Uriri, for the respondents

Judgment

PATEL J: The background to this matter is as follows. On 6 February 2006, D the parties herein entered into a lease agreement to run for a period of 36 months, from 1 January 2006 to 31 December 2008, in respect of certain premises situated in Harare. On 30 January 2007, the parties concluded an addendum to the main agreement, providing for an option to renew and other incidental matters.

At the beginning of 2008, the applicant prepared a fresh draft agreement E requiring, *inter alia*, usage of the premises in a manner that would be complementary to the applicant's cultural activities. This draft was rejected by the respondents on the ground that it was an entirely different lease arrangement with more onerous obligations.

On 27 March 2008, the applicant's lawyers gave the respondents notice F to vacate the premises on 31 December 2008, indicating that the applicant intended to utilise the premises for its own use.

In June 2008, the applicant proposed an increase in monthly rental from $4 trillion to $60 trillion. The respondents in turn consulted various estate agents and tendered $25 trillion as being a fair and reasonable rental. G

In July 2008, the applicant filed the present application seeking an order requiring the respondents to vacate the premises by 31 December 2008. The respondents resisted the application on the ground that the applicant did not want the premises for its own use but for some other ulterior purpose, *viz*. in order to lease the premises to another party and/or accrue higher rentals.

For reasons which are not clear from the record, the applicant's lawyers only H

Patel J

A applied in February 2009 for the matter to be set down for hearing. Moreover, they have not applied to amend the relief that was originally sought, *viz*. eviction of the respondents by 31 December 2008.

Duration of Lease

The original lease agreement of 2006 was filed of record as Annexure A to B the applicant's founding affidavit. In terms of the second clause, the lease "shall continue to run for the term or period of 36 months on and up to 31st December 2008". The third clause stipulated the monthly rent for the first 12 months. Thereafter, the rent was to be reviewed "in line with current market trends" (as per the original typed wording) or "monthly in line with inflation" (as per the manually amended version).

C At the hearing of this matter, Mr *Chikumbirike* attempted to disown the latter version with the specious explanation that the manual amendment was in anticipation of what was to be incorporated in the revised draft agreement. However, given that the amended version was in fact filed by the applicant itself, and cited without any qualification in the founding affidavit as the D governing lease agreement, it must be the version that must be adopted for the purposes of this application.

Under the common law, an essential ingredient of a contractual lease is that the amount of the rent payable by the lessee must be fixed or that some definite mode of fixing the rent must be agreed upon. In other words, the rental must be in an ascertained or ascertainable amount. See *Totoyi* v *Ncuka* 1909 EDC E 115. See also *Film and Video Trust* v *Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191 (H) at 195, citing *Brown* v *Hicks* (1902) 19 SC 314 at 315 & 316:

> "Until the rent, or some definite mode of fixing the rent, is agreed upon, there is no contract of letting and hiring of the house. The letting of services stands upon the same footing."

F In this context, an objective indicator determined by a public body would afford a definite mode of fixing an ascertainable rent. In the instant case, I am of the view that the stipulated review of the rental "monthly in line with inflation", in accordance with the inflation index compiled and published by the Central Statistical Office, provides an objective indicator and definite mode for fixing the monthly rent. It follows that the duration of the contractual G lease between the parties was a term of 36 months, expiring on 31 December 2008. Thereafter, inasmuch as the respondents did not exercise their option to renew the lease, the contractual lease lapsed and was converted into a statutory tenancy under Part IV of the Commercial Premises (Rent) Regulations 1983.

Termination of Lease

H The next question is whether the contractual lease was terminable by notice

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Patel J

given before the date of its expiry – as was done by the applicant in March A 2008. The lease agreement itself, as read with the addendum of 2007, does not entitle the applicant to terminate the lease by notice or otherwise, except on the ground of material breach, at any time before the expiration of the fixed term of 36 months.

In this regard, Mr *Chikumbirike* contends that at common law the lessor is B entitled to give notice of termination to coincide with the date of expiration so long as he respects the fixed term of the lease. No authority was cited for this spurious proposition and I am unable to find any merit in it for the simple reason that a fixed term lease terminates *ipso facto* upon the expiry of the fixed term, without the need for any notice of termination from either party. The giving of notice to terminate so as to coincide with the date of C expiry of the lease is legally pointless and practically futile.

In the instant case, Mr *Chikumbirike's* assertion is rendered even more untenable by dint of the option to renew granted to the respondents. In terms of the fourth and sixth clauses of the lease agreement, as substituted by the addendum, the respondents had the option to renew the lease for a further D period of 36 months by giving written notice of their intention to do so no later than 3 months prior to 31 December 2008. This option, subject only to the satisfactory performance by the respondents of their obligations in terms of the lease, further precluded the applicant from terminating the lease before the expiry of its fixed term.

It follows from the foregoing that, except for material breach of the lease E agreement by the respondents, the contractual lease between the parties was not terminable by the applicant by

notice given at any stage prior to the expiration of the fixed period of 36 months. It also follows that the purported notice of termination given by the applicant in March 2008 is a nullity with no legal force or effect insofar as concerns the duration of the lease *in casu*. F

Statutory tenancy

As I have already stated, the respondents did not duly exercise their option to renew the lease before the expiry of the contractual lease on 31 December 2008. Therefore, as from 1 January 2009, they became statutory tenants of the demised premises under Part IV of the Commercial Premises (Rent) G Regulations 1983 (SI 676 of 1983), as amended.

Section 22 of the Regulations restricts the ejectment of statutory tenants and provides as follows:

> "(1) For the purposes of subsection (2), "rent due", in relation to commercial premises, means—
>
> (*a*) where the determination of a fair rent in terms of Part II is in force in respect H

> A of premises, the rent fixed thereby, as varied from time to time in terms of that Part; or
>
> (*b*) in any other case, the rent due in terms of the lease.
>
> (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 B by the lessor, shall be made by a court, so long as the lessee—
>
> (*a*) continues to pay the rent due, within seven days of due date; and
>
> (*b*) performs the other conditions of the lease;
>
> unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that — C
>
> (i) the lessee has declined to agree to an increase in rent; or
>
> (ii) the lessor wishes to lease the premises to some other person."

Section 23 sets out the rights and obligations of statutory tenants and governs the giving of notice by lessors and lessees as follows:

> "A lessee who, by virtue of section 22, retains possession of any commercial premises shall, so long as he retains possession, observe and be entitled to the D benefit of all the terms and conditions of the original contract of lease, so far as the same are consistent with the provisions of these regulations, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the contract of lease or, if no notice would have been so required, on giving three months notice:
>
> Provided that, notwithstanding anything contained in the contract of lease, E a lessor who obtains an order for recovery of possession of the premises or for the ejectment of a lessee retaining possession as aforesaid shall not be required to give any notice to vacate to the lessee."

Section 24 prohibits the unlawful removal of property or any obstruction in the use of leased premises and stipulates that:

> F "No lessor of commercial premises shall —
>
> (*a*) without a lessee's consent and without reasonable excuse, cause the removal from the premises of any property belonging to the lessee; or
>
> (*b*) prevent a lessee from using or occupying the premises;
>
> unless he has obtained an order of court for the removal of such property, if appropriate, or for the recovery of possession of the premises or the ejectment G of the lessee therefrom."

Notice to vacate

For present purposes, the overall effect of these provisions is that, subject to compliance with the terms of the expired lease agreement, the respondents are entitled to remain in occupation of the premises and use them without H obstruction, unless and until they voluntarily vacate the premises or are

lawfully removed therefrom in accordance with the Regulations. The applicant A has now approached the court seeking the eviction of the respondents from the leased premises. The question that arises is whether or not it is required to give the respondents, who are now statutory tenants, any notice to vacate the premises before seeking their ejectment by the court.

Section 23 of the Regulations is ambiguously unclear in this respect. While B it might be correct to infer that no notice to vacate would be required where the lessee fails to observe the terms and condition of the contractual lease, the position where the lessee religiously complies with his lease obligations is not at all clear. The proviso to s 23, in its express terms, only absolves the lessor from having to give notice to vacate where he has already obtained an order for recovery of the premises or for the ejectment of the lessee. The C necessary implication, in the case of the good statutory tenant, is that the lessor is obliged to give him notice to vacate before approaching the court for an eviction order. The period of such notice, again by implication, would be such notice as would have been required under the lease agreement or, if no notice would have been so required, a period of three months notice. D

In the present case, as I have already stated, the purported notice of termination given by the applicant in March 2008 is a nullity insofar as concerns the duration of the lease. It follows that the applicant has not given the respondents any valid notice to vacate. Therefore, if the position postulated above is correct, it also follows that the applicant is precluded from seeking the eviction of the respondents and that the present application is premature and should be E dismissed on that ground alone. In any event, for the reasons that follow, I do not deem it necessary to definitively decide this point and am inclined to leave it open for present purposes.

Ejectment from Premises

The final issue for determination is whether or not the applicant has good and F sufficient grounds for requiring the eviction of the respondents as envisaged in s 22(2) of the Regulations.

In *Checkers Motors (Pvt) Ltd* v *Karoi Farmtech (Pvt) Ltd* 1986 (2) ZLR 246 (S), it was held that it is proper to attach substantial weight to the fact that the owner reasonably requires the use of the premises for his business G operations. However, it was left open as to whether the hardship the tenant will suffer as a result of eviction ought to be taken into account in determining the issue of good and sufficient grounds for eviction.

In *Mobil Oil Zimbabwe (Pvt) Ltd* v *Chisipite Service Station (Pvt) Ltd* 1991 (2) ZLR 82 (S), it was held that where a landowner wishes to use the premises for his own purposes, the court enquires only as to his *bona fides* and not as H

Patel J

A to the reasons why he decided to use the premises for his own purposes. On the facts of that case, the decision by the appellant to use the premises for its own purposes was a legitimate and *bona fide* commercial decision which constituted good and sufficient cause for the purposes of the Regulations.

In *Film and Video Trust* v *Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191 (H), B the court adopted a robust approach in favour of the lessor's position. It was held that an order for the ejectment of a statutory lessee may be made once the lessor satisfies the court that it is has good and sufficient grounds to require an order for ejectment. The needs of the lessee are irrelevant in this regard. While ejectment may not be ordered if the lessor's grounds for requiring it are that the lessee has declined to accept an increase in rent or C because the lessor wishes to lease the premises to another person, the fact that other grounds for requiring ejectment may be motivated by one of those factors is immaterial as long as the other grounds are genuine. It was further held that all that the lessor is required to do is assert his good faith and bring some small measure of evidence to demonstrate the genuineness of his assertion.

D Turning to the instant case, the reasons proffered by the applicant for recovering possession of the premises are set out in the letter of 27 March 2008 from the applicant's lawyers to the respondents' lawyers. The letter refers to the revised draft agreement proposed by the applicant but rejected by the respondents. At p 2 of the letter, it is stated as follows:

> E "That being the position, my clients are of the view that since there does not appear to be any co-operation on the part of your client in relation to certain fundamental aspects, especially aspects that are

covered in the preamble to the proposed lease agreement, in relation to the complimentary [*sic*] nature which they feel your client's restaurant must give in relation to the enhancement of the cultural perspectives which it exists for, my clients do hereby give your F clients notice that at the expiry of the period that relates to the so called lease agreement, that is the 31st of December 2008, they intend to utilise the premises that your clients presently lease for own use …

… *Please note that* the reason for wanting to terminate the statutory tenancy is not because my clients require an increase in rent, which however in respect of any business, is inevitable and in any event, is provided in terms of the invalid lease agreement but because of the failure to come to an agreement in respect G of certain terms that relate to complimentary [*sic*] use of the premises by them in relation to their activities.

It is not intended that they be leased to any other party, but they will be exclusively used by them as provided for in terms of the Rent Regulations."

It is also necessary to consider the applicant's averments in its founding H and answering affidavits. At p 4 of the founding affidavit, it is stated that:

Patel J

"8. Consequently for applicant to utilise the premises by the 31st of December A 2008, and to carry out extensive renovations necessary for it to utilise the premises, applicants [*sic*] seek a declarator, in terms of section 14 of the High Court Act, that the lease agreement between the parties be declared invalid for the reasons that appear in Annexure 'C'.

9. … I must emphasise and reiterate that the decision to terminate the agreement (statutory tenancy) is based on the sincere and *bona fide* desire by applicant to B use the premises for own use."

In the answering affidavit, the above averments are repeated as follows:

"3. The Applicant have [*sic*] contended that it requires the premises for its own use. It intends to renovate the place as well. ……..

4. The Applicant therefore persists with its claim, reiterating that it requires the C premises for its own use, and the desire to do so is not motivated by any of the grounds prohibited by the Rent regulations."

As averred in its affidavits, the applicant's unwavering assertion is that it requires the premises for its own use. However, neither in the affidavits nor in the letter of March 2008 does the applicant disclose the specific purpose for which it intends to utilise the premises. While this reticence does not D necessarily preclude the relief that the applicant seeks, it does render very questionable the *bona fides* of its declared reason for evicting the respondents. More significantly, what the applicant asseverates in its affidavits is patently belied by the contents of the letter of March 2008. In particular, the principal and avowed reason for terminating the lease is "because of the failure to E come to an agreement in respect of certain terms that relate to complimentary (*sic*) use of the premises".

This, it would appear, is the real reason for seeking the ejectment of the respondents. In the present context, this reason in itself cannot constitute a good and sufficient ground for evicting the respondents, inasmuch as the original lease agreement does not oblige the respondents either to provide F the complementary cultural activities in question or to agree to provide such activities in terms of some future lease agreement. As statutory tenants, the respondents are merely bound to observe and adhere to the terms of the expired lease agreement. They cannot be compelled to assume or comply with obligations that they have not agreed to perform. G

To conclude, therefore, the applicant has failed to demonstrate the genuineness of its assertion that it seeks to recover the premises for its own use. The *bona fides* of that assertion is negated by the contents of its own lawyer's letter. It follows that the applicant has failed to show that it has good and sufficient grounds for requiring the ejectment of the respondents from the leased premises. In the result, the application is dismissed with costs. H

Patel J

A *Chikumbirike & Associates*, applicant's legal practitioners

Atherstone & Cook, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/FORRESTER ESTATE (PVT) LTD v VENGESAYI 2009 (2) ZLR 128 (H)

FORRESTER ESTATE (PVT) LTD v VENGESAYI 2009 (2) ZLR 128 (H)

Citation	2009 (2) ZLR 128 (H)
Case No	Judgment No. HH-95-09
Court	High Court, Harare
Judge	Chatukuta J
Heard	8 September 2009
Judgment	8 September 2009
Counsel	*T Shekede,* for the applicant *G N Mlotshwa*, for the respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Property and real rights – *spoliation order – when may be issued – not necessary that possessor be dispossessed of whole thing before being entitled to claim a spoliation order – dispossession of only part of thing enough to entitle possessor to relief*

Headnote

The applicant was the owner of a farm on which it carried out farming D operations. The farm was not acquired by the State. The respondent came to the farm and demanded the keys to the gate and to the house on the farm. He showed one of the directors a copy of a letter purporting to be an instruction to the applicant to cease farming. A director of the applicant refused to give the respondent the keys and also refused to let E him move onto the farm. The respondent left the farm, but left behind seven employees sitting under a tree on the farm. The applicant sought a *mandament van spolie.* At the time the application was made the seven employees were still on the farm, although they were not interfering with the applicant's farming activities. The respondent argued that a F *mandament* could not be issued, as what the respondent did amounted to a mere disturbance of possession, not to unlawful deprivation of property.

Held, that a possessor need not have been dispossessed of the whole thing before he is entitled to claim a spoliation order. Even where he has been deprived of possession of only a part thereof, he is entitled to relief. The act of leaving behind seven employees, coupled with the indications by G the respondent that he intended to take occupation of the homestead and the entire piece of land, amounted to dispossession. The applicant could no longer claim to be in control of that piece of land currently occupied by the respondent's employees. Had the respondent left the farm with all his employees, then one would have classified his visit to the farm as a mere disturbance. H

Chatukuta J

Cases cited A

Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977 (1) SA 230 (E)

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

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

Karori (Pvt) Ltd & Anor v Mujaji 2007 (1) ZLR 105 (H)

B *van t'Hoff v van t'Hoff & Ors (1)* 1988 (1) ZLR 294 (H)

Case information

T Shekede, for the applicant

G N Mlotshwa, for the respondent

Judgment

CHATUKUTA J: The applicant sought and was granted a *mandament van* C *spolie*. The judgment was handed down on 8 September 2009 with reasons. However, the respondent has approached me for written reasons for my judgment. The following are my reasons.

The applicant, through its director, one Heinrich von Pezold, made the following averments in the founding affidavit. The applicant is the owner D of, and carries farming operations on Frogmore, situate in the district of Mazowe. The farm was not acquired by the State and a number of orders have been issued by the High Court confirming this. On 29 August 2009, the respondent came to the farm and demanded keys to the gate and to the house on the farm. He showed Pezold a copy of a letter purporting to be an instruction to the applicant to cease farming. Pezold refused to give the E respondent the keys and also refused to let him move onto the farm. The respondent left the farm. He, however, left behind seven employees sitting under a tree on the farm. At the time when the application was made the seven employees were still on the farm although they were not interfering with the applicant's farming activities.

F The applicant contended that it had been in peaceful possession of the farm until the respondent left seven employees. Mr *Shekede*, for the applicant, submitted that the respondent left his employees without an order of court or the applicant's consent. It is on this basis that it sought a *mandament van spolie*. The respondent opposed the application. Mr *Mlotshwa*, for the respondent, raised a point *in limine* that the application was not urgent G because the respondent's conduct did not amount to spoliation. He submitted that the determination of the preliminary issue would entail determination of the merits of the application. On that basis, I considered it expedient to deal with the merits.

In an application of this nature, the applicant must establish on a balance H of probability that:

Chatukuta J

(a) it was in peaceful possession of the property; and A

(b) the possession was unlawfully interrupted by the second respondent.

See *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S), *van t'Hoff* v *van t'Hoff & Ors* (1) 1988 (1) ZLR 294 (H), *Chisveto* v *Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H) *and Karori (Pvt) Ltd & Anor* v *Mujaji* 2007 (1) ZLR 105 (H). B

Mr *Mlotshwa* conceded that the applicant was in peaceful possession of the property and that the respondent had left seven employees on the farm. He however, contended that this did not amount to unlawful deprivation of property. He referred me to Silberberg and Schoeman *The Law of Property* 3 ed ("Silberberg") where it is observed at p 146 that C

> "8.2 A *mandament van spolie* is aimed only at the recovery of lost possession and does not lie where there is mere disturbance of possession or a threat that possession will be disturbed. In these latter circumstances the possessor may apply for a prohibitory interdict instead…"

The only issue for determination, therefore, is whether or not the respondent's conduct amounted to deprivation of property. D

It appears to me that occupation of the farm by the respondent goes beyond "a mere disturbance". Mr *Mlotshwa* did not substantiate why the respondent considered his conduct in issue as being "a mere disturbance". The act of leaving behind seven employees, coupled with the indications by the respondent that he intended to take occupation of the homestead and the entire piece of land allocated to him, amounts, in my view, to dispossession. The E applicant can no longer claim to be in control of that piece of land currently occupied by the respondent's employees. Had the respondent left the farm with all his employees, then one would have classified his visit to the farm as a "mere disturbance" as envisaged in Silberberg.

It also appears that Mr *Mlotshwa* was selective in his reference to Silberberg. F At p 139-140 of Silberberg it is observed that:

> "A possessor need not have been dispossessed of the whole thing before he is entitled to claim a spoliation order. Even where he has been deprived of possession of only a part thereof, is he entitled to this relief."

The same observations were made in *Bennett Pringle (Pty) Ltd* v *Adelaide Municipality* 1977 (1) SA 230 (E) where it was held that a disturbance of G possession amounts to spoliation. Addleson J observed at 233, as follows:

> "The possession on which he relies need not be of the whole of the property and he need not have lost the whole of that property at the hands of the invader before he is entitled to claim a spoliation order. A disturbance of possession, without deprivation of the whole of it, is sufficient. See *van Rooyen en.'n Ander* v *Burger* 1960 (4) SA 356 (O) at pp. 362-3; confirmed on appeal in 1961 (1) H

Chatukuta J

> A SA 159 (A)." (See also Jonesand Buckle *The Civil Practice of the Magistrates Court in South Africa* 8 ed at 98-99.)

The respondent did occupy part of the farm. It is apparent from the above authorities that it is irrelevant that only a small part of the farm is occupied. Any such occupation amounts to dispossession. It is my view that the applicant has therefore established its entitlement to the relief sought.

B In the result, it is ordered that:

1. A *mandament van spolie* be is hereby granted restoring the status *quo ante* which prevailed prior to 29 August 2009 and to the respondent's occupation of a certain piece of land, known as Frogmore and situate in the District of Mazowe and that such restoration be achieved by the C eviction of the respondent and all persons holding occupation through him from the property in question.
2. The respondent be and is hereby ordered to pay the costs of suit.

Wintertons, applicant's legal practitioners

D *Antonio, Mlotshwa & Co,* respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/SUPA PLANT INVESTMENTS (PVT) LTD v CHIDAVAENZI 2009 (2) ZLR 132 (H)

SUPA PLANT INVESTMENTS (PVT) LTD v CHIDAVAENZI 2009 (2) ZLR 132 (H)

Citation 2009 (2) ZLR 132 (H)

Case No Judgment No. HH-92-09

Court	High Court, Harare
Judge	Makarau JP
Heard	7 May 2009
Judgment	9 September 2009
Counsel	*G C Chikumbirike,* for the applicant *A A Debwe,* for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Contract – *res litigiosa – alienation of – after litis contestatio is reached res may not be alienated – right of successful plaintiff to recover res by execution from possessor without fresh proceedings*

Practice and procedure – *application proceedings – material dispute of* D *fact – what is – court unable to resolve dispute between the parties in the absence of further evidence*

Practice and procedure – *res litigiosa – after litis contestatio is reached res may not be alienated – right of successful plaintiff to recover res by execution from possessor without fresh proceedings* E

Property and real rights – *res litigiosa – alienation of – purchaser bound by judgment – successful plaintiff entitled to recover res from new possessor*

Headnote

The applicant bought a centre pivot for its farm from the respondent, who was represented in the negotiations by his agent. The price initially agreed on with the agent was paid, as was a supplementary payment, but the F respondent did not deliver the centre pivot. He claimed that a further payment had been agreed upon. After an application was brought to order delivery, the respondent sold the pivot to a third party.

Held, that in application proceedings a material dispute of fact arises when the material facts alleged by the applicant are disputed and traversed by the G respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.

Held, further, that although the applicant was suing *ex contractu* to enforce a personal right against the respondent, at the time the centre pivot was sold, the parties had filed both the application and the opposing affidavits and thus the matter had reached *litis contestatio* and the application H

Makarau JP

A could have at that stage been set down for hearing. The centre pivot thus became *res litigiosa.*

Held, further, that in a dispute between litigants, after *litis contestatio* has been reached, a *res litigiosa* cannot be alienated and where it has been alienated, the plaintiff, if successful, can recover the *res* from the B possessor, by execution if necessary, and without fresh proceedings.

Cases cited

Coronel v Gordon Estate & GM Co 1902 TS 95

Hall v Howe 1929 TPD 591

Masukusa v National Food Ltd & Anor 1983 (1) ZLR 232 (H)

C *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town City Council* 1986 (2) SA 656 (C)

PS Booksellers (Pty) Ltd & Anor v Harrison & Ors 2008 (3) SA 633 (C)

Legislation considered

Civil Evidence Act [*Chapter 8:01*], s 26

Case information

D *G C Chikumbirike,* for the applicant

A A Debwe, for the respondent

Judgment

MAKARAU JP: The facts giving rise to this application are largely common cause. They are as follows.

E The applicant is in the farming business, operating a farm in Chakari. In October 2006, it set out to acquire a centre pivot irrigation system for its farm. Its managing director, duly authorized to act on behalf of the applicant, approached one Douglas Chihuri, ("Chihuri"), who was selling a centre pivot system on behalf of the respondent. An agreement of sale was concluded F between the plaintiff and Chihuri, acting for his principal, regarding a 140 HA centre pivot system belonging to the respondent. A purchase price in the sum of $12 000 000 and installation charges of $3 000 000 were agreed upon. Pursuant to the agreement, an invoice was made out to the applicant giving the total amount payable as $15 million. It was made clear to Chihuri that payment would be made through the African Banking Corporation and G would take a few weeks to be processed.

A month later payment was effected in the agreed sum. This was made in favour of Chartered Enterprises, Chihuri's trading mantle. A week after payment had been made, the applicant met with the respondent to discuss the details of the delivery of the centre pivot. Chihuri was in attendance. At the meeting, H the respondent unilaterally increased the purchase price of the centre pivot.

Makarau JP

Instead of holding the respondent to the agreed price, the applicant agreed A to pay an additional $5million and executed an acknowledgement of debt to this effect. The seller also appended his signature to the acknowledgement. So did Chihuri. Payment of the $15 million was then made to the respondent according to his instructions. Still acting as the seller's agent, Chihuri agreed to have the centre pivot delivered to the applicant. B

The respondent did not deliver the centre pivot, prompting the applicant to bring this application seeking an order compelling the respondent to deliver a 140 HA centre pivot to it.

In opposing the application, the respondent denies knowledge of what transpired between the applicant and Chihuri, but admits that he was at that C time selling two centre pivots, the details of which he gave to Chihuri. He further confirmed that in time, Chihuri advised him that he had secured a buyer for one of the centre pivots. He also confirmed that he received the sum of $15 million dollars for the centre pivot that Chihuri had sold to the applicant on his behalf and that a balance in the sum of $5 million would be paid in due course. It was also suggested to him that a further $15 million D would be paid for the same pivot after the applicant had sold his beasts or that he could collect the beasts himself as further payment for the sold pivot. He however opted for a cash payment. He did not agree to the delivery of the pivot in the absence of full payment and did not deliver the centre pivot because he did not receive the full purchase price of $35 million.

At the hearing of the application, it emerged that the respondent had sold the E centre pivot, the subject of this dispute, after being served with this application but before the matter was determined. This emerged from supplementary affidavits filed by both parties days before the hearing and which were filed with my leave. I granted leave to the parties to file the supplementary affidavits as, in my view, they air the full dispute between the parties and F bring out the real issue for determination in this matter.

In his supplementary affidavit, the respondent deposed that after the filing of the above application, a director of the applicant caused his arrest on allegations of fraud. It was alleged in the criminal proceedings that the respondent had fraudulently misrepresented to the said director that the G

centre pivot was available for sale when he knew that it was not as it was to be sold to a third party. The respondent was duly prosecuted but was acquitted at the close of the trial.

In it own supplementary affidavit, the applicant admitted the facts given in the respondent's additional affidavit but urged me to find the contents of the affidavit inadmissible on the basis of irrelevance. H

2009 (2) ZLR p135

Makarau JP

A Before proceeding further, I will dispose of the admissibility of the contents of the affidavit.

In my view, once a court grants leave to a party to file an additional affidavit, that grant of leave necessarily implies that the contents of the affidavit are admissible. Supplementary affidavits should only be filed if their contents B are relevant to the dispute before the court.

It is a general rule of evidence that irrelevant evidence is inadmissible. Section 26 of the Civil Evidence Act [*Chapter 8.01*] provides that evidence that is irrelevant or immaterial and cannot lead to the proving or disproving of any point in issue shall not be admissible. This section is simply a codification of the position at common law, which holds that all facts relevant to the issue in C legal proceedings may be proved and where a legally recognized exception to this rule is not invoked, relevancy remains the fundamental rule governing the admissibility of evidence. As indicated above, this is the rule that a court summarily employs before granting leave to file additional affidavits in motion proceedings.?In my view, the rule against admissibility of irrelevant evidence is rooted more in common sense than in a legal principle. It is a D common sense approach by the court to govern that which it will accept or reject lest it be inundated by evidence of all facts surrounding a dispute and trials will take longer than is necessary to resolve if the parties were left at liberty to drag in all they wish or think is necessary.

It, however, remains clear that the rule against irrelevant evidence is against E evidence of facts that have little to do with the issue in dispute. *In casu,* I was of the view that the disposal of the centre pivot pending litigation is the issue in dispute and thus facts tending to prove the disposal cannot be irrelevant. Further and in any event, the facts sought to be rendered inadmissible by the applicant are common cause and thus no party will be prejudiced by its F admission into evidence.

It is on the basis of the above that I ruled admissible the contents of the two supplementary affidavits.

I now turn to consider the merits of the application.

The issues that fall for determination in this application are mainly two, in G my view. Firstly, I have to determine whether or not there was an agreement between the applicant and the respondent for the sale of the centre pivot for $20 million. The respondent has sought to argue that the agreed purchase price was $35 million. He deposed in his opposing affidavit that after the applicant had paid the first $15 million and had promised a further $5 million by way of the acknowledgement of debt, the parties agreed to a further payment of H $15 million after the applicant had sold its beasts.

2009 (2) ZLR p136

Makarau JP

Relying on these averments by the respondent, *Mr Debwe* argued that the A correct purchase price of the centre pivot cannot in the circumstances be ascertained without the leading of oral evidence and thus the application should fail on this basis.

It is common cause that Chihuri, acting as the agent of the respondent, agreed to sell the centre pivot to the applicant for $15 million. The parties B agreed later to vary the purchase price to $20 million when after making payment of the initial purchase price, the applicant promised by way of an acknowledgement of debt to pay an additional $5 million. The agency of Chihuri to represent the respondent, whilst challenged in the opposing affidavit, was not advanced in argument. In my view, Mr Debwe was well advised not to advance the argument in view of the affidavit by Chihuri C and the fact that respondent accepted the sum of $15 million paid by the applicant through Chihuri. By his own conduct of accepting the payment, the respondent put paid to whatever argument he may have had against the agency of Chihuri. By this conduct, he gave out and confirmed that Chihuri was indeed selling the centre pivot on his behalf and is thus bound D not only by what Chihuri did, but by what he also personally did. If there was any doubt about the agency of Chihuri, the respondent

personally removed that doubt by accepting the part payment of the purchase price and agreeing with the applicant that the balance now stood at $5 million, thereby putting beyond doubt that the purchase price was $20 million. In my view, he is thus condemned by his own actions as revealed by the E papers filed of record.

I am aware that the respondent has repeatedly and vehemently denied in his affidavit that the purchase price of the centre pivot was $20 million. It is my view that it is not the number of times a denial is made or the vehemence with which a denial is made that will create a conflict of fact such as was referred to by McNally J (as he then was) in *Masukusa* v *National Foods Ltd &* F *Anor* 1983 (1) ZLR 232 (H) and in all the other cases that have followed. A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence. G

In casu, I believe the papers filed of record present ready answers to the questions posed by the respondent. He argues that he wanted more than the $20 million that the applicant contends was the agreed purchase price. Firstly, the papers filed of record clearly show that the respondent's agent negotiated and agreed to the sum of $20 million. At law, the actions of the agent bind the principal even if the agent is breaching his own contract of H

Makarau JP

A agency with the principal. There is thus no need to lead evidence to show what the terms of the agency contract were regarding the purchase price he had to seek. The respondent, through the agency of Chihuri, agreed to $20 million that the applicant has paid in full.

Secondly, it is common cause that the respondent received the sum of $15 million dollars through his agent and thereafter acknowledged in writing B that the balance due was $5 million. He did not at that stage query the fact that the balance was only $5 million instead of $20 million according to his assertions. By appending his signature to the acknowledgement of debt which clearly indicates the balance as $5million, he gave out to the applicant that he agreed with the applicant in this regard. Thus in my view, on the basis of C the papers, it is clear that the total purchase price agreed to between parties was in the sum of $20 million which was paid in full.

I find nothing on the papers to indicate that the parties may have agreed to a price other than $20 million. The only suggestion that this may be so is the averment by the respondent in his opposing affidavit to this effect. It is not backed up by any other evidence. It is contradicted by the facts that D are common cause and is thus clearly simply meant to introduce an illusory conflict where none exists.

Aligned to the alleged conflict of fact on the agreed purchase price is whether the respondent agreed to deliver the centre pivot before payment of the purchase price in full. Again, *Mr Debwe* urged me to find that I could not E resolve this dispute in the absence of oral evidence. I am afraid I cannot agree. Having found that the agreed purchase price was $20 million which was paid in full, it matters not, in my view, if the respondent agreed to deliver the centre pivot, as delivery is a legal consequence following the conclusion of a sale agreement. It cannot be the subject of a separate agreement between the parties.

F It is therefore my finding that there is no material conflict of fact in this application. The parties concluded an agreement of sale of the centre pivot for the sum of $20 million which has since been paid in full. The respondent is bound by the law of sale to deliver the centre pivot to the applicant.

Having disposed of the first issue, I now turn to the second issue. It concerns G the relief that the applicant is entitled to in the circumstances of this matter.

It is common cause that the centre pivot that that the respondent sold to the applicant has since been sold to a third party. It is also common cause that the respondent sold the centre pivot whilst fully aware that this application had not yet been determined and thereby sought to render the outcome H of the litigation ineffective by disposing of the subject matter of the suit

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Makarau JP

beforehand. I find the conduct of the respondent in this regard a mockery A of this court and its proceedings.

It was not put in issue by the respondent that the centre pivot was not *res litigiosa* at the time that he sold it to a third party. I will therefore proceed to deal with the matter on the basis that it was. In doing so, I am aware that there is a possible distinction as to when the subject matter of litigation becomes B *res litigiosa* depending on whether the suit before the court concerning the object is an action in *rem* or a personal action. The authorities seem to suggest that in an action in *rem,* the subject matter becomes *res litigiosa* upon service of summons whereas in all other actions, the subject matter becomes *res litigiosa* upon *litis contestatio* or the closure of pleadings. See *Opera House (Grand Parade) Restaurant (Pty) Ltd* v *Cape Town City Council* 1986 (2) SA 656 (C) at 659G-J. C

In any event, and for the avoidance of doubt, although the applicant is suing *ex contractu*, to enforce a personal right against the respondent, at the time the centre pivot was sold, the parties had filed both the application and the opposing affidavits and thus the matter had in my opinion reached D *litis contestatio* and the application could have at that stage been set down for hearing.

The sale of *res litigiosa* has been dealt with by the courts for decades. The position at law appears settled. I believe I can do no better than refer to the words of Innes CJ in *Coronel* v *Gordon Estate & GM Co* 1902 TS 95 at 101 E when he had the following to say:

> "Now, it is undoubtedly the case that under Roman law any right which was *res litigiosa* could not be alienated. But a thing only became *res litigiosa* when there was an action *in rem* concerning it; the doctrine of litigiosity had no place in regard to merely personal action. Coming to Roman-Dutch law, there is some authority for the proposition that the same rule prevailed. … I think then that the weight of Roman-Dutch law authority does not forbid the alienation of F *res litigiosae*. But even if the doctrine of litigiosa is to be applied, it would be necessary to fix some point or stage in process of an action at which it shall begin to operate. This is desirable and necessary in the interests of the public who may have dealings with a litigant. Now the only point or stage in the process at which to fix the vesting of this right to prohibit alienation would be *litis contestatio*." G

My reading of the above remarks by Innes CJ is that, prior to the right of litigiosity vesting, the *res* can be alienated; but after *litis contestio* had been reached, litigiosity operates to prohibit the alienation of the *res*. I am fortified in coming to this conclusion by the further but separate remarks made by Barry J in *Hall* v *Howe* 1929 TPD 591 where, after referring to old Roman- Dutch authorities, the learned judge held that *res litigiosa* could be alienated H

Makarau JP

A provided that if the litigant succeeded in his claim against the seller, he, the litigant could recover the property in dispute from the new possessor.

The doctrine was raised recently in *PS Booksellers (Pty) Ltd & Anor* v *Harrison & Ors* 2008 (3) SA 633 (C) where Meer J also referred to the old Roman-Dutch authorities and to *Opera House (Grand Parade) Restaurant* B *(Pty) Ltd* v *Cape Town City Council supra* and emphasized the right of the first buyer to recover the *res* from the third party by summary process. In para 107 of his judgment, he had this to say:

> "It seems to me that, notwithstanding the different phraseology employed by different sources relating to the safe-guarding of the third party's interest(s) in the *res*, extensive concern for such interest(s) is in each case the same and that there is what may be accepted as unanimity of this point. The position is that it C is now generally accepted that despite the fact that a thing is *res litigiosa* this does not preclude or prevent it from being alienated or similarly dealt with, so long as the rights of the non-alienating litigant in the *res* are protected . . . This means – when applied to the instant case – that respondent, albeit that the Rotunda Hotel site is *res litigiosa*, can only be restrained from dealing with it as it (respondent) proposes doing ... if applicant's rights in and to the site, *viz* D as owner in the event that it is restored to it on the conclusion of the pending action, are not, and will not be, prejudiced by such dealing."

While I have not been able to come across a case in point, from the above authorities I am coming to the conclusion that after *litis contestaio* has been reached, a *res litigiosa* cannot be alienated and, where it has been alienated, the plaintiff, if successful, can recover it from the possessor. The E old authorities suggest that the non alienating party can summarily recover the *res* from the third party. In *Hall* v *Howe supra* the point is made that the non-alienating plaintiff, if successful, can recover the *res* by execution from the new possessor. Silberberg & Shoeman *The Law of Property* 3 ed at p 304 put the position lucidly, in my view, as follows:

F "This means that the sale of a *res litigiosa* is valid *inter partes*, but the purchaser is bound by the judgment in the action and the successful plaintiff can recover it from the new possessor by execution and without fresh proccedings".

In the result, and on the basis of the foregoing, I make the following order:

1. The applicant is by execution, to take delivery of the 140 HA centre pivot sold to it by the respondent. G
2. The respondent shall bear the applicant's costs of suit on a legal practitioner and client scale.

Chikumbirike & Associates, applicant's legal practitioners.

H *Debwe & Partners*, *respondent's* legal practitioners.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/CHIKUMBU v BRYDEN TECHNICAL SERVICES (PVT) LTD & ORS 2009 (2) ZLR 140 (H)

CHIKUMBU v BRYDEN TECHNICAL SERVICES (PVT) LTD & ORS 2009 (2) ZLR 140 (H)

Citation	2009 (2) ZLR 140 (H)
Case No	Judgment No. HH-93-09
Court	High Court, Harare
Judge	Chitakunye J
Heard	9 September 2009
Judgment	9 September 2009
Counsel	*T S Manjengwa,* for the applicant *T Chitere,* for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Company – *director – managing director – authority – ostensible authority to enter into contract – when can be presumed by person contracting with company*

Headnote

The first respondent, by resolution of its board of directors, resolved to sell D a property it owned, with a view to using the proceeds to buy another one instead, and resolved to appoint a particular firm of estate agents to sell the property. The first respondent's managing director gave further instructions to the estate agents in furtherance of the resolution. The applicant made an offer to the estate agents. The offer letter was faxed to E the managing director, who signed it and returned it to the estate agents. A few days later, he signed a special power of attorney,

authorising a firm of legal practitioners to sign all the necessary papers to conclude the sale and effect transfer. The agreement of sale was duly signed by the applicant and a partner in the firm of legal practitioners and two days F later the purchase price was transferred to the first respondent. The day after that, the managing director wrote to the estate agents, purporting to cancel the sale on the grounds that, due to hyper-inflation, the price of the replacement property had gone up substantially. A few days later, the company, through its legal practitioners, wrote to the firm that had facilitated the sale, stating that the managing director had not been G authorised to act as he did.

The applicant sought an order to enforce the sale. His position was that the agreement of sale he entered into was valid and should be enforced. The first respondent contended that it did not see the applicant's irrevocable offer letter and acceptance and it therefore did not accept his offer. In any case, the managing director, who was alleged to have seen the H

A irrevocable offer letter and to have proceeded to sign it, had no authority to negotiate the purchase price.

Held, that the first respondent, being a legal *persona*, had to act through its agents, in this case the board of directors. The company's intention to sell the property was known through the resolution made by the board of directors. The company authorised the managing director to instruct B the estate agents. That director was clothed with the general powers of a managing director of a company. Anyone dealing with him would be entitled to assume he had all the powers and mandate of a managing director. He was a high ranking agent of the company endowed with enormous powers befitting a managing director. Any person dealing with C him was entitled to assume that he had the apparent authority to contract on behalf of the company which is generally available to all managing directors of similar companies. When a person is appointed to a certain position or post, the principal represents by such that that person has such powers as other persons holding similar positions in companies dealing in similar business. These powers include the power to enter D into contracts on behalf of the company. The issue of him not having been specifically authorized to deal with the details of the agreement of sale could not vitiate a contract which he lawfully entered into on behalf of the company. Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers E have been properly and duly performed and that one is not bound to inquire whether acts of internal management have been regular. This rule renders proof by the company that the internal formalities have not been complied with insufficient to enable it to escape liability under the contract. In this country, s 12 of the Companies Act [*Chapter 24:03*] makes it clear that the company was estopped from denying that the F managing director had the necessary authority to sign the irrevocable offer letter and to negotiate the price when, from its own admission, he had been authorized to instruct the estate agents to dispose of the property. Accordingly, the contract would be enforced.

Cases cited G

Monzali v Smith 1929 AD 382

Moresby-White v Rangeland Ltd 1952 SR 200; 1952 (4) SA 285 (SR)

Reed NO v Sager's Motors (Pvt) Ltd 1969 (2) RLR 519 (A); 1970 (1) SA 521 (RA)

Southern Life Association Ltd v Beyleveld NO 1989 (1) SA 496 (A)

H *Stewart v Zagreb Properties (Pvt)* 1971 (1) RLR 180 (A); 1971 (2) SA 346 (RA)

Chitakunye J

Walenn Holdings (Pvt) Ltd v Integrated Contracting Engineers (Pvt) Ltd & Anor 1998 (1) ZLR 333 (H) A

Legislation considered

Companies Act [*Chapter 24:03*], s 12 B

Case information

T S Manjengwa, for the applicant

T Chitere, for the first respondent

Judgment

CHITAKUNYE J: The first respondent owns an immovable property known as stand number 237 Redcliff Township of Redcliff Estate situated in the C District of Kwekwe, measuring 3 185 square metres, held under deed of transfer number 2190/2000, also known as number 5 McNab Road Redcliff.

On 30 April 2007, the board of directors of the first respondent passed a resolution to dispose of that property with a view to buying another immovable property. D

In their resolution the board of directors nominated Nandi Properties (Pvt) Ltd to act as the disposing agent. On 2 May 2007 all the three directors signed the resolution.

It is not disputed that Mr Michael Hanyani as the managing director thereafter gave instruction to Nandi Properties (Pvt) Ltd in furtherance of that resolution. E Nandi Properties (Pvt) Ltd proceeded to source for buyers for the property.

On 21 June 2007 the applicant made an offer to purchase the property at a price of Z$1.9 billion. The amount was to be paid by RTGS (see annexure "A" of the founding affidavit).

That irrevocable offer letter and acceptance was apparently faxed to Kwekwe F fax number (055) 23192, attention Hanyani. Mr M Hanyani, to whose attention it was said the offer letter was drawn, is alleged to have appended his signature on the same date and had the document faxed back to Harare.

On 26 June 2007 Mr M Hanyani signed a special power of attorney, annexure "C" to the founding affidavit, in favour of Messrs Magwaliba & Kwirira, authorizing them to sign all documents relating to the sale and transfer of G rights and interests in the property in question. That document was sent to Magwaliba & Kwirira by fax on that same date.

On that same date, 26 June 2007, the agreement of sale was signed by the parties. Mr T Magwaliba signed on behalf of the first respondent in terms of the special power of attorney, and the applicant signed as purchaser. H

Chitakunye J

A On 28 June 2007 the applicant paid the total purchase price of Z$1.9 billion through RTGS in terms of the agreement of sale.

On 29 June 2007, the first respondent, through Mr M Hanyani, wrote a letter addressed to Mr Madamombe of Nandi Properties (Pvt) Ltd purportedly cancelling the agreement of sale for the property in question. The letter B reads in part:

> "We write to inform you that we are cancelling the sale agreement for the property on 5 McNab Street Redcliff. The directors of Bryden Technical Services (Pvt) Ltd felt that they cannot find a replacement property with an equivalent value as agreed on earlier on (minutes of 30 April 2007).
>
> The replacement property was pegged at Z$1.9 billion but after two weeks C due to hyper inflation and your delay in facilitating payment, the property now costs Z$3.5 billion. This, however, has left us with no option except to cancel the agreement. Please may you reverse payment made as soon as possible."

It is apparent from the above, that the first respondent was by that date aware that an agreement of sale had been concluded and payment made hence the cancellation of the agreement and instructions to its agent to reverse the D payment made as soon as possible. It is also apparent that the reason for the cancellation is the change in the price of the property the first respondent intended to buy after disposing of 5 McNab Street Redcliff.

On 4 July 2007, the first respondent, through Messrs Mkushi, Foroma & Maupa legal practitioners, addressed a letter to Messrs Magwaliba, Matutu E & Kwirira. That letter reads in part:

> "We write you at the instance of Mrs E Khetani and Ms Lukungwe, who are both directors of Bryden Technical Services. Our clients advise that on 30 April 2007, they made a resolution to dispose of the above referenced property, but they were yet to appoint a company representative to sign the requisite documents on behalf of the company. We are advised that Mr Michael Hanyani, one of F the directors had proceeded to negotiate the price as well as granting power of attorney to yourselves to do the needful.

> Our instructions are that the other two directors never authorized Mr Hanyani to act in the manner he did and he acted on his own volition without any company resolution to that effect, implying that whatever was negotiated and concluded by him without the authority of the other directors is null and void. G This includes any agreement, if one had been concluded as well as the power of attorney to yourselves".
>
> The reasons for seeking to annul the agreement of sale are clearly different from those advanced by Mr Hanyani, the managing director in his letter of 29 June 2007 cited above.

Faced with the apparent effort to resile from the contract by the first respondent, H the applicant applied for and obtained a provisional order from this court on

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2009 (2) ZLR p144

Chitakunye J

11 July 2007. The interim relief granted was to restrain and interdict the first A respondent from disposing of the property in dispute and that the order be registered as a caveat against deed of transfer number 2190/2000.

The applicant now seeks the confirmation of the provisional order granted then, which is basically an enforcement of the agreement of sale.

The first respondent opposed the confirmation of the provisional order. The B first respondent's basic grounds for opposing the order sought were that:

(1) The first respondent did not accept the offer made by the applicant; and

(2) The managing director Mr M Hanyani had no authority to accept the offer and to negotiate the selling price.

The main issue is whether the first respondent, being a corporate entity and C legal *persona*, authorized the agreement of sale, or alternatively whether the said agreement of sale is a nullity.

The applicant's position was to the effect that the agreement of sale he entered into was valid and should thus be enforced. The first respondent, on the other hand, contended that it did not see the applicant's irrevocable offer letter and D acceptance and it therefore did not accept his offer. In any case, its managing director, who is alleged to have seen the irrevocable offer letter and to have proceeded to sign it, had no authority to negotiate the purchase price.

The first respondent does not deny that, in terms of its board of directors' resolution of 30 April 2007, it was resolved to dispose of number 5 McNab E Street Redcliff through Nandi Properties (Pvt) Ltd.

There is no denial that Mr M Hanyani, the managing director, instructed Nandi properties (Pvt) Ltd on behalf of the first respondent.

It is trite law that the first respondent, being a legal *persona*, acts through its agents, in this case the board of directors.

In *Walenn Holdings (Pvt) Ltd* v *Integrated Contracting Englineeers (Pvt) Ltd* F & *Anor* 1998 (1) ZLR 333 (H) at p 346, Sibanda J cited with approval the role of the board of directors as summed up in Hahlo *South African Company Law through the Cases* 4 ed at p 445 where the author states:

> "The fountainhead of a managerial power in the company is the board of directors, which acts on its behalf. A transaction entered into or approved by G the board, acting within its constitutional powers, is binding on the company. So is a transaction entered into, within the scope of his actual authority, by the managing director, if there is one, by a single director, or by a manager or other officer of the company."

In casu, the intention of the first respondent to sell the property was known through its resolution made by the board of directors. H

2009 (2) ZLR p145

Chitakunye J

A On whether the first respondent accepted the offer by the applicant, it is common cause that the first respondent nominated and appointed Nandi Properties (Pvt) Ltd as its agent in disposing of the property in question. It is not disputed that Mr M Hanyani was given the mandate to convey the nomination and appointment of Nandi Properties (Pvt) Ltd. He duly did so.

B Nandi Properties (Pvt) Ltd advertised the property and upon receipt of the applicant's offer, sent the same to Kwekwe, fax number (055) 23192, attention Mr Hanyani.

It is apparent that the offer and acceptance was signed and re-faxed to Harare as confirmation that the first respondent had accepted the offer. Soon after that the first respondent's Mr M Hanyani signed a special power of attorney C in favour of Messrs Magwaliba & Kwirira, legal practitioners, authorizing them to sign all documents for the sale and transfer of the property.

The first respondent's effort at pointing to the difference in signatures of Mr M Hanyani on the irrevocable offer letter and acceptance and other documents was without merit. As pointed out by the applicant Mr M Hanyani's manner D of signing where his signature was required is not the same even on those documents that he admitted to having signed. The same applies to how he chose to sign when he was required to sign in acceptance of the offer. I did not hear the first respondent's counsel seriously deny that Mr M Hanyani did sign differently even on admitted documents..

E Clearly Mr M Hanyani is not given to signing in the same manner wherever his signature is required.

I am of the view that the preponderance of probability is clearly against the first respondent in this regard and in favour of the contention that Mr M Hanyani is the one who signed the irrevocable offer letter on behalf of the first respondent.

F Having found thus, can the first respondent be heard to say that it did not know about the acceptance or that its managing director had no authority to negotiate or agree on the purchase price?

It is common cause that the first respondent held out Mr Michael Hanyani as its managing director. In that post, he was clothed with the general powers of G a managing director of a company. Anyone dealing with him would thus be entitled to assume he had all the powers and mandate of a managing director. He was a high ranking agent of the company endowed with enormous powers befitting a managing director.

The general law on agency, as enunciated by A J Kerr *Law of Agency* 3 ed H 1991 at p 259, is that:

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Chitakunye J

> "In the standard case the services of empowered agents acting within the terms A of their authority result in, and the services of unempowered agents contribute to, the formation of a contract between the principal, disclosed and named, and the third person. The resulting legal position, as far as the principal and the third person are concerned, is the same as if the principal had entered into the contract himself; or, in the case of unempowered agents, as if the principal had conducted the negotiations himself."

In this case, the first respondent held out Mr M Hanyani as its managing director and authorized him to deal with Nandi Properties (Pvt) Ltd on its behalf. Any person dealing with him was entitled to assume that he had the apparent authority to contract on behalf of the company which is generally available to all managing directors of similar companies.

This rule relating to apparent authority was derived from *Bowstead on Agency* C and quoted with approval by Stratford J (as he then was) in *Monzali* v *Smith* 1929 AD 382 at 385 where it is stated:

> "Where any person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the D faith of any such representation, to the same extent as if such other person had authority which he so represented to have."

At p 293 of *Bowstead on Agency* 15 ed (1985), the author states:

> "Where a person is held out by the company as having an authority that he might consistently with the provisions of the memorandum and articles possess, a third party is in some cases entitled to assume that he has such authority, and that the E relevant procedures of 'indoor management' (the documents concerning which are not available to him) for giving him this authority have been completed …
>
> The first type of holding out occurs where the agent is appointed to a position carrying with it a usual authority, e.g. that of managing director. Here, provided that the act performed by the agent is within the usual authority of persons holding a position such as that held by the agent, an estoppel operates against F the company and it is bound by his acts even though these were unauthorized, or even though the procedures necessary for authorizing him had not been applied."

Clearly, therefore, when one is appointed to a certain position or post, the principal represents by such, that that person/agent has such powers as other persons holding similar positions in companies dealing in similar business. See *Reed NO* v *Sager's Motors (Pvt) Ltd* 1970 (1) SA 521 (RA) at 524 H- 525A; G *Stewart* v *Zagreb Properties*(*Pvt*) 1971 (2) SA 346 (RA); and *Southern Life Association Ltd* v *Beyleveld NO* 1989 (1) SA 496 (A) at 505B-D.

Mr Hanyani as managing director had certain powers expected of a managing director of a company.

In *Moresby-White* v *Rangeland Ltd* 1952 (4) SA 285 (SR) at 286A–287B H

Chitakunye J

A Tredgold CJ had this to say about the position of a managing director:

> "The term 'managing director' has become virtually a term of art in company law and is applied to a director who is vested by the board of directors with all or a substantial part of its general powers of the control of the affairs of the company. He is the direct and immediate representative of the board, fully recognized as such for certain legal purposes … and acts within his ostensible authority to bind B the company in its dealings with other parties… A fully accredited managing director, acting in that capacity, acts as the company itself, just as the board so acts".

The first respondent's contention that Mr M Hanyani had not been specifically authorized to sign the irrevocable offer letter and to negotiate and agree on the purchase price was bereft of the reality.

C As the managing director, anyone dealing with him would expect him to be reposed with the powers of a managing director of a company. These include to enter into contracts on behalf of the company. The issue of him not having been specifically authorized to deal with the nitty-gritty of the agreement of sale could not vitiate a contract he lawfully entered into on behalf of the D company. It was as managing director that he:

(a) gave instructions to Nandi Properties (Pvt) Ltd to dispose of the property;

(b) signed the irrevocable offer letter;

(c) gave a special power of attorney to Messrs Magwaliba and Kwirira to sign all documents relating to the sale and transfer of the property in E question; and

(d) wrote the letter dated 29 June 2007 purporting to cancel the agreement of sale for the reasons stated therein.

That letter does not show in any way that Mr M Hanyani had no authority from the first respondent to do as he did. If anything, the letter shows a F clear acknowledgement that an agreement of sale had been concluded and the purchase price of Z$1.9 billion had been paid. The directors were now seeking to cancel the agreement because the price of the property they wanted to buy had risen from Z$1.9 billion to Z$3.5 billion.

The irregularities that the first respondent raised pertaining to Mr M Hanyani's lack of authority is of no consequence in the light of the above.

G In *Walenn Holdings (Pvt) Ltd* v *Integrated Contracting Engineers (Pvt) Ltd & Anor* *supra* Sibanda J quoted with approval the words of Lord Simon in *Morris* v *Kanssen* [1946] 1 All ER 586 (HL) at 592 when he said that:

> "The rule in *Royal British Bank* v *Turquand* (The Turquand on Indoor Management Rule) provides that persons contracting with a company and dealing in good H faith may assume that acts within its constitution and powers have been properly

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Chitakunye J

> and duly performed and one is not bound to inquire whether acts of internal A management have been regular. The rule renders proof by the company that the internal formalities have not been complied with insufficient to enable it to escape liability under the contract, hence the rule is not merely an application of the rebuttable presumption *omnia praesumuntur rite esse acta.*"

In Hahlo's *South African Company Law through the Cases* 5 ed at p 460 the B rule is repeated where in it is stated that:

> "Under the rule also known as the indoor management rule persons dealing with the director or manager of a company who openly exercises authority which he could have under the constitution of a company

provided that some act of internal management was performed, are entitled to assume that that act was performed".

In Zimbabwe, the point is made clear by s 12 of the Companies Act [*Chapter* C *24:03*], which provides that:

"Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving title from it shall be estopped from denying their truth: D

(a) that the company's internal regulations have been duly complied with;

(b) that every person described in the company's register of directors and secretaries, or in any return delivered to the Registrar by the company in terms of section *one hundred and eighty-seven*, as a director, manager or secretary of the company, has been duly appointed and has authority to exercise the functions customarily exercised by a director, manager and E secretary, as the case may be, of a company carrying on business of the kind carried on by the company; or

(c) that every person whom the company, acting through its members in a general meeting or through its board of directors or its manager or secretary, represents to be an officer or agent of the company, has been duly appointed and has authority to exercise the functions customarily exercised by an F officer or agent of the kind concerned."

In this case the first respondent is estopped from denying that its managing director had the necessary authority to sign the irrevocable offer letter and to negotiate the price when from its own admission that managing director had been authorized to instruct Nandi Properties (Pvt) Ltd to dispose of the G property.

The first respondent is splitting hairs by seeking to say that, though Mr Hanyani had the authority to instruct Nandi Properties, he had no authority to do other acts that generally or naturally go with such a mandate, that is the issue of purchase price.

I am of the view that the first respondent is estopped from contending that H

Chitakunye J

A Mr M Hanyani as the managing director, did not have the usual ostensible authority expected of any company managing director to enter into contracts on behalf of a company.

It is further estopped from denying that it was aware that its managing director had signed the irrevocable offer letter and had by virtue of the special power of attorney in favour of Messrs Magwaliba, Kwirira legal practitioners entered B into a valid agreement of sale with the applicant.

It is my further view that the first respondent had no good reason to seek to resile from the agreement of sale or to seek to have such agreement of sale nullified.

C Accordingly it is hereby ordered that:

The provisional order granted by this court on 11 July 2007 be and is hereby confirmed with costs.

Wintertons, applicant's legal practitioners

D *Chitere Chidawanyika & Partners*, respondent's legal practitioners

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ATTORNEY-GENERAL v MAPANGA-NHACHI 2009 (2) ZLR 150 (S)

Citation 2009 (2) ZLR 150 (S)

Case No	Judgment No. S-40-09
Court	Supreme Court, Harare
Judge	Sandura JA (in chambers)
Heard	21 August 2009
Judgment	15 September 2009
Counsel	*C Mutangadura*, for the appellant *C Chinyama*, for the respondent
Case Type	Appeal against grant of bail
Annotations	No case annotations to date

Flynote

Criminal procedure – *bail – evidence which court may take into account – documents from police docket relied on by prosecutor – need not be produced unless court requires their production – accused not entitled to have access to such documents* D

Headnote

Bail proceedings are different from proceedings in a criminal trial. In bail proceedings the court has a wide range of information, including hearsay evidence, as the basis on which to determine whether or not to grant bail to the accused. In terms of s 117A(4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the court may consider evidence on E oath, including hearsay evidence; affidavits and written reports which may be tendered by the prosecution or the defence; written statements made by the prosecutor, the accused or his legal representative; and statements not on oath made by the accused. The court may require the prosecutor or the accused to adduce evidence. If the court does not do F so, the prosecutor is not obliged to produce any report he is relying on. In any event, under s 117A(10), assuming the report is part of the police docket, unless the Attorney-General directed otherwise, the defence is not entitled to have access to the report in the bail proceedings although they would be entitled to it for the purposes of his trial. G

Cases referred to

Aitken & Anor v Attorney-General 1992 (1) ZLR 249 (S)

S v Chikumbirike 1986 (2) ZLR 145 (S)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 117A(4) & (10) H

Sandura JA

Case information

A *C Mutangadura*, for the appellant

C Chinyama, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court in terms of which the respondent was granted bail.

B The respondent was arrested on 5 June 2009 and was charged with having committed a number of offences. The offences and the relevant allegations against the respondent are set out in an annexure to the Request for Remand (Form 242) as follows:

> "COUNT ONE
>
> Armed Robbery and Attempted Murder as defined in sections 126 and 189 as read C with section 47 of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*].
>
> On 1 June 2009 at about 2230 hours the accused who was in the company of four accomplices who are still at large, whilst all armed with pistols drove in their getaway motor vehicle along Remembrance Drive towards Simon Mazorodze (Beatrice) Road. They parked their getaway motor vehicle a distance away from ZRP Mbare main gate. They got out of their motor vehicle and walked to the D main gate. The accused approached the two Police Officers who were manning the gate, namely Constable MUDZAMBA and Constable MACHARAGA. Constable MUDZAMBA was armed with an FN rifle loaded with a magazine of 2 rounds. The accused pretended as if they were genuine visitors seeking assistance from the two Police Officers.
>
> When the Police Officers were about to attend to them, suddenly the accused E produced pistols and ordered them to surrender the FN rifle or risk being shot. The Police Officers resisted resulting in the accused firing shots at them. One of the shots grazed Constable MUDZAMBA's forehead. He fell down unconscious resulting in the accused grabbing the FN rifle, and rushed (*sic*) to their parked getaway car. The accused drove off at high speed heading towards the city centre. (The) scene was attended and two spent cartridges were picked (up). Constable MUDZAMBA was sent for medication, had five stitches on the two- F and-a-half centimetre bullet wound and was hospitalised for a day.
>
> Upon the arrest of the accused, he was found in possession of an unlicensed Banadelli 7.65 mm pistol with its serial numbers erased. The recovered firearm was sent for Forensic Ballistic examination and was test fired. The recovered spent cartridge matched to have (*sic*) been fired from the accused's Banadelli pistol.
>
> COUNT TWO
>
> G Contravening section 186(1)(b) of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*] (Threats)
>
> On 3 June 2009 at about 1348 hours the accused, having known that he was being sought by CID Homicide for various cases of armed robberies in the Greater Harare (*sic*). He used his mobile number 0912 863 970 which he had put on hide to avoid identity to 'phone Officer Commanding C.I.D. Homicide H Harare Chief Superintendent MAKEDENGE on his mobile number 0912 329 791

> and threatened to shoot him and his crack team. He further highlighted that he A was highly connected to high ranked mafia gangs in the region and could escape into neighbouring countries without being detected. He also stated that he was connected to court officials who will facilitate his release as evidenced by his Chinhoyi case whereby he was granted bail and he went to stay in South Africa. Evidence from Network providers of his communication to the said Officer has been retained, and his mobile phone has been recovered. B
>
> COUNT THREE
>
> Contravening section 186(1)(b) of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*] (Threats)
>
> On 3 June 2009 at about 1620 hours the accused later used his mobile 'phone 0912 863 970 which he had put on hide to avoid identity to 'phone Chief Superintendent MUKAZHI of C.I.D. Headquarters Harare on his mobile number C 0912 430 972 and repeated his threat as what he had done to Chief Superintendent MAKEDENGE. Evidence from Network providers of his communication to the said Officer has been retained, and his mobile phone has been recovered.
>
> COUNT FOUR
>
> Contravening section 4(1)(a)(b) of the Firearms Act [*Cap 10:09*] 'Unlawful Possession of a firearm without a valid licence' D
>
> On 5 June 2009 Detectives from C.I.D. Homicide Harare received information to the effect that the accused who was wanted for masterminding a series of armed robberies that had recently occurred in and around Harare was booked in (*sic*) room 223 at Cresta Lodge, Samora Machel Avenue/Robert Mugabe Road, Rhodesville, Harare. Acting on the information received, the Detectives raided the room and arrested the accused. A search was carried out in the room and E (of) his belongings leading to the recovery of a Banadelli pistol, 7.65 calibre serial numbers erased with a magazine of five live rounds stashed in a satchel which contained his personal documents. The accused failed to produce the certificate for the firearm and as to why he was in possession of the firearm (*sic*). It was also established from entries in his passport that

he had returned to Zimbabwe from South Africa where he was hibernating on 14 May 2009. It F was further established that he had booked himself (in) at the Lodge under a false name, 'J. Tsitsi'."

On 10 June 2009 the respondent appeared in the magistrates court and was remanded in custody. Thereafter, he filed a bail application in the High Court which was opposed by the Attorney-General on the following grounds:

"(a) That the accused person is likely to abscond in view of the overwhelming G evidence against him in all the charges preferred against him.

(b) That the accused person is likely to interfere with evidence and State witnesses in view of his previous conduct of threatening the police over the phone.

(c) That the accused person is likely to commit similar offences as evidenced by these current charges committed whilst he was on bail." H

Sandura JA

A After hearing the application in chambers, the learned judge admitted the respondent to bail. Aggrieved by that decision, the Attorney-General appealed to this court.

The two main grounds of appeal, in relevant part, read as follows:

"1. The Honourable Court *a quo* misdirected itself in taking the absence of B fingerprints uplifted from the recovered firearm as a factor in assessing the relative strength of the State's case, thereby giving a benefit of the doubt to the respondent's assertion that no firearm was ever recovered from him …

2. The Honourable Court also made an error of law in requiring the ballistic report confirming that the fired cartridge from the firearm allegedly C recovered from the respondent matched the spent cartridges recovered from the scene of the crime of robbery in question, thereby disregarding the fact that such ballistic report was only necessary for trial as provided for in section 117A(10) of the Criminal Procedure and Evidence Act."

The first point I wish to make is that this court would only interfere with the decision of the learned judge in the court *a quo* if he committed an D irregularity or misdirection, or exercised his discretion so unreasonably or improperly as to vitiate his decision. See *S* v *Chikumbirike* 1986 (2) ZLR 145 (S) at 146E-F.

I must now examine what the learned judge said in his judgment in order to determine whether he committed any irregularity or misdirection, or exercised his discretion in a manner vitiating his decision.

E In his judgment the learned judge said:

"I fully agree with the State that the applicant faces serious charges. I am, however, not convinced that the State has overwhelming evidence upon which to urge the court to deny the applicant bail. In the main the State is relying on the alleged possession of the unlicensed firearm. The applicant has strongly denied that fact. F Furthermore, whilst the State is placing emphasis on the firearm, it is surprising that in his affidavit Detective Inspector Nyaradzi Majachani makes no mention at all of the firearm. He also does not make any reference to the ballistic report, yet that is the alleged nexus to the commission of the offence …".

In the circumstances, the learned judge proceeded on the basis that in his affidavit opposing the granting of bail Detective Inspector G Nyaradzai Majachani ("Majachani"), the investigating officer in the case, made no mention of the firearm and the report of the forensic ballistic examination ("the report"). In doing so he erred and misdirected himself.

I say so because in para 3 of his affidavit Majachani said:

"Circumstances surrounding the case are as outlined on the forms (*sic*) 242."

H Form 242 referred to by Majachani is the Request for Remand, which sets

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Sandura JA

out the particulars of the respondent, the offences allegedly committed by A him, the factual allegations against him, and the evidence or facts linking him to the commission of the offences.

In addition, there is an annexure to Form 242 which sets out in detail the particulars of the four counts and the facts or evidence linking the respondent to the commission of the offences. This

annexure has already been set out B in full at the beginning of this judgment.

Because Majachani stated in his affidavit that the circumstances surrounding the case were as outlined on Form 242, it was not necessary for him to specifically mention the firearm, the report and the evidence linking the respondent to the making of the threatening calls allegedly made by him on C his cellphone, all of which were outlined on Form 242 and set out in detail in the annexure to Form 242.

In my view, because of the misdirection referred to above, the learned judge concluded that it could not "be safely argued that there is overwhelming evidence linking the applicant to the offences". It is unlikely that if he had not misdirected himself the learned judge would have reached that conclusion. D

In assessing the strength of the State case the learned judge should have considered all the information placed before him. As Gubbay CJ said in *Aitken & Anor* v *Attorney-General* 1992 (1) ZLR 249 (S) at 255C-D:

> "… the court must assess as best it can on the information placed before it, the relative strength of the State case and, therefore, the probability of a conviction. E See *S* v *Hartman* 1968 (1) SA 278 (T) at 281E; *S* v *Lulane and Ors* 1976 (2) SA 204 (N) at 213D."

The information placed before the learned judge by the Attorney-General was outlined on Form 242 and set out in detail in the annexure to Form 242, which has already been set out at the beginning of this judgment.

That information indicates, *inter alia*, the following. Acting upon certain F information, the police raided room no. 223 at Cresta Lodge, which had been booked in the name of J Tsitsi. They found the respondent in the room and arrested him. They searched the room and the respondent's belongings and found a 7.65 mm calibre Banadelli pistol, whose serial number had been erased, and a magazine with five live rounds, stashed in a satchel containing G the respondent's personal documents. The respondent failed to produce a firearm certificate and could not explain why he was in possession of the pistol. The pistol was later test fired, and a forensic ballistic examination established that the spent cartridges recovered from the scene of the armed robbery and attempted murder had been fired from the pistol found in the respondent's possession. H

Sandura JA

A With regard to the telephone calls allegedly made by the respondent threatening the police before his arrest, Form 242 and the annexure state that the police have evidence from the relevant cellular network providers indicating that on 3 June 2009, two days before his arrest, the respondent, using his mobile telephone number 0912 863 970, communicated with two senior officers B of the Criminal Investigation Department ("CID") on their mobile phones.

All the above information, which was incorporated by Majachani in his affidavit, forms the evidence on the basis of which it was alleged that the State had overwhelming evidence against the respondent. Although the respondent denied all the charges, it could hardly be said that the State case was weak. On the contrary, it would appear to me that the State case is C relatively strong, notwithstanding the fact that the report was not produced and that the respondent's fingerprints were not found on the pistol.

It is pertinent to note that bail proceedings are different from proceedings in a criminal trial. In this regard, the provisions of subss (4) and (10) of s 117A of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the D Act") are significant.

In relevant part, subs (4) of s 117A reads as follows:

> "(4) In bail proceedings the court may –
>
> (a) …
>
> (b) subject to subsection (5) [which is not relevant at present], receive – E
>
> (i) evidence on oath, including hearsay evidence;
>
> (ii) affidavits and written reports which may be tendered by the prosecutor, the accused or his or her legal representative;
>
> (iii) written statements made by the prosecutor, the accused or his or her legal representative; F
>
> (iv) statements not on oath made by the accused;

(c) require the prosecutor or the accused to adduce evidence;

(d) …".

And subs (10) of s 117A reads as follows:

"(10) Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, G record or document relating the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police officer charged with the investigation in question, unless the Attorney-General otherwise directs:

Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for H the purposes of his or her trial."

2009 (2) ZLR p156

Sandura JA

Thus, in bail proceedings the court has a wide range of information, including A hearsay evidence, on the basis of which to determine whether or not to grant bail to the accused.

In the circumstances, it was not necessary for the prosecutor in this case to produce the report, unless the learned judge had required him to adduce that evidence in terms of s 117A(4)(c) of the Act, which the learned judge B did not do. In addition, and assuming that the report was part of the police docket, in terms of s 117A(10) of the Act, unless the Attorney-General directed otherwise, the respondent was not entitled to have access to the report in the bail proceedings although he would be entitled to it for the purposes of his trial.

Before dealing with the main ground on which the granting of bail was C opposed, I wish to state that in bail proceedings the onus rests on the accused to satisfy the court, on a balance of probabilities, that his admission to bail would not prejudice the administration of justice. This was stated by this court in *Aitken's* case *supra* at 253D-E, where Gubbay CJ said:

"The onus is upon the accused to show on a balance of probabilities why it is D in the interests of justice that he should be freed on bail. See *de Jager* v *A-G, Natal and Anor* 1967 (4) SA 143 (D) at 149 G-H; *S* v *Chiadzwa* 1988 (2) ZLR 19 (S) at 21F."

I now wish to deal with the main ground on which the granting of bail was opposed, which was the likelihood that the respondent would abscond. The E factors which the court should take into account in considering the likelihood that if released on bail the accused would abscond were set out by this court in the *Aitken* case *supra* at 254D-F, where Gubbay CJ said:

"In judging this risk (i.e. the risk of abscondment) the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would F be imposed if convicted; the strength of the State case; the ability to flee to a foreign country and the absence of extradition facilities; the past response to being released on bail; and the assurance given that it is intended to stand trial.

It is apparent that the more serious the charge and the heavier the sentence is expected to be, the greater will be the temptation to flee. See *S* v *Price* 1973 (2) PH H92 (C); *S* v *Nichas and Anor* 1977 (1) SA 257 (C) at 263H; *S* v *Hudson* G 1980 (4) SA 145 (D) at 146H."

Applying the above principles to the facts of this case, there is no doubt in my mind that if released on bail the respondent would be tempted to flee. As already indicated, he faces very serious charges and the State case appears strong. One of the bullets fired during the armed robbery grazed Constable Mudzamba's forehead. H

2009 (2) ZLR p157

Sandura JA

A In my view, if the respondent is convicted of armed robbery or attempted murder or both armed robbery and attempted murder he will, in all probability, be jailed for a long time.

Although in the bail application the respondent's legal practitioner states that the respondent resides at 2A Tarlington Close, Avonlea, Harare, it seems B to me that the respondent lives in South Africa, but stays at 2A Tarlington Close whenever he visits Zimbabwe. I say so because of the averment in an affidavit deposed to by Frank, the respondent's nephew. In order to show that the police were wrong in alleging that the respondent was a person of no fixed abode, the respondent's legal practitioner filed an affidavit deposed to by the respondent's nephew Frank, which, in relevant part, reads as follows: C

"(i) Moses Warning Chademana Mapanga Nhachi is a brother to my mother and *he resides with me at number 2A Tarlington Close, Avonlea, Harare, whenever he visits Zimbabwe from South Africa*. He is not a person of no fixed aboard (*sic*) since *he stays at the above address with me during his visits.*

(ii) I confirm that in the event that he is admitted to bail and is required to stay D in Zimbabwe he will be staying with me at the above address until the matter is finalised" (emphasis added).

In addition, it is quite clear, from what the respondent's legal practitioner says in the bail application, that the respondent does not have any meaningful property in this country. He states as follows in paras 4 and 5 of the bail application:

"4. E At the time of his arrest he had no meaningful savings on his person and, should the court be inclined to admit him to bail, he is in a position to raise the sum of USD$50 *(sic*) as bail deposit with the Clerk of Court.

5. Applicant does not hold any title deeds to an immovable property which he can surrender as surety but he is definitely prepared to stand trial since he protests his innocence."

F Finally, the ease with which people in this country can cross the border and enter neighbouring countries without any passport or other travel document is common knowledge. Should the respondent flee, he would have nothing to lose.

Taking all the above factors into account, I am satisfied that the respondent G failed to establish, on a balance of probabilities, the likelihood that if released on bail he would not abscond but would stand trial. On this ground alone I would allow the appeal.

In the circumstances, the following order is made:

1. The appeal is allowed.

H 2. The order granted by the learned judge is set aside, and the following

Sandura JA

is substituted — A

"The application is dismissed".

Chinyama & Partners, respondent's legal practitioners B

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GWARADA v JOHNSON & ORS 2009 (2) ZLR 159 (H)

Citation	2009 (2) ZLR 159 (H)
Case No	Judgment No. HH-91-09
Court	High Court, Harare
Judge	Gowora J
Heard	18 June 2009
Judgment	16 September 2009
Counsel	*G N Mlotshwa*, with him *F Mutamangira*, for the applicant *I E G Musimbe*, with him *F Piki*, for the respondents

Case Type Urgent opposed application

Annotations No case annotations to date

Flynote

Land – *acquisition – land acquired by State – holder of offer letter in respect of land – not a lessee*

Landlord and tenant – *lessee – rights of – when can claim for ejectment of trespasser*

D **Practice and procedure** – *application – urgent – when urgent application may be made – situation existing for significant time before application made – not urgent*

Practice and procedure – *parties – locus standi – lessee of land – when can* E *claim for ejectment of trespasser*

Headnote

The first two respondents were the owners of a farm which had been compulsorily acquired by the State. They had nonetheless remained in occupation of the farm. The third respondent had been allocated the neighbouring farm and was the majority shareholder in a company which F carried out farming operations on two divisions of the farm. The first and second respondents were the remaining shareholders. The applicant had been given a letter of offer for the other division of the farm and moved onto that division. He sought an urgent interdict to prevent the first and second respondents from using and occupying that division. The question was whether the applicant had *locus standi* to claim the G relief sought. The applicant contended that even though he was not the holder of a lease agreement in respect of the piece of land in question, nevertheless the offer letter that he had received gave him the right to sue the respondents for possessory rights over the land.

*Held ,*that a lessee of land acquires a personal right to possession of the land, H but until and unless granted vacant possession by the lessor, has no *locus*

standi to claim the ejectment from the land of a trespasser. A

Held, further, that a letter of offer does not constitute a lease. Although the duration of a lease need not be specified for a lease to be constituted, the same cannot be said of the quantum of the rent and when it should be paid. In the absence of any provision setting out the rent, an offer letter cannot be said to constitute a lease. That being the case, all an B offer letter does is offer a right to occupy at the pleasure of the owner of the land, that is the State. It could not be said that the applicant could claim the same rights as a lessee occupying under an agreement of lease.

Held, further, that when an applicant files an urgent application, the High Court Rules require, where such an applicant is legally represented, that a certificate of urgency be filed setting out why, in the opinion of C the legal practitioner, the matter should be treated as urgent and not await set down in the normal course. The certificate of urgency filed on behalf of the applicant suggested an infringement on the part of the respondents and an interference with his occupation of the piece of land that he was in occupation of. Given that the situation that the applicant D was asking the court to reverse had been in existence for the better part of a year, it was mischievous in the extreme for a legal practitioner to issue a certificate that the matter was urgent. A matter does not assume urgency because a litigant has plans, the fulfilment of which requires an immediate solution. Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme E prejudice to the applicant. The existence of circumstances which may, in their very nature, be prejudicial to the applicant is not the only factor that a court has to take into account, time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threat, whatever it may be. In this matter F no urgency was established.

Cases cited

Airport Game Park (Pvt) Ltd v Karidza & Anor 2004 (1) ZLR 391 (S)

Buchholtz v Buchholtz 1980 (3) SA 424 (W)

Dodhill (Pvt) Ltd & Anor v Min of Lands & Anor 2009 (1) ZLR 182 (H) G

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

Jadwat & Moola v Seedat 1956 (4) SA 273 (N)

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H)

Mgwaco Farm (Pvt) Ltd v Pasi & Ors 2003 (2) ZLR 478 (H)

Nkadia v Mahlazi & Ors 1982 (2) SA 441 (T) H

Gowora J

A *Pedzisa v Chikonyora* 1992 (2) ZLR 445 (S)

Steenkamp v Mienies & Ors 1987 (4) SA 186 (N)

Legislation considered

Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], s 3(1)

Case information

B *G N Mlotshwa,* with him *F Mutamangira,* for the applicant

I E G Musimbe, with him *F Piki,* for the respondents

Judgment

GOWORA J: This matter came before me by way of an urgent chamber application. At the initial set-down date, the legal practitioners indicated C that they wished to file written submissions and the matter was accordingly postponed for that purpose. In view of the legal issues that were apparent from the affidavits which had not been canvassed, I required the legal practitioners to file supplementary heads of argument, which counsel did and I am indebted to counsel for the same. I had also requested a copy of a translation of a South African judgment referred to by applicant's counsel D but unhappily that was not been given to me expeditiously with the result that this judgment was then delayed.

The facts relevant to this dispute are as follows. The dispute centers around Dana Farm. This farm is now owned by the State, after it was gazetted for resettlement under the Land Reform Programme. The first and second E respondents are referred to on the papers as former owners of the farm, although the exact nature of that ownership has not been stated nor is it relevant for present purposes. What is relevant is that they were in occupation at the time the farm was acquired. The third respondent is a beneficiary of the Land Reform Programme but he occupies a neighbouring farm. He is, however, a majority shareholder in a company in which the first and second F respondents also own shares and which is undertaking certain farming operations on Dana Farm. According to the papers, the first and second respondents occupy subdivisions 2 and 3 of the farm. The applicant was issued with an offer letter for subdivision 1 which he occupies.

The applicant seeks an interdict, both in interim and in final terms, against the respondents from use and occupation of subdivision 1 of Dana Farm. G In addition, he seeks their eviction from the same. After he and counsel for the respondents had made submissions on the application, Mr *Mlosthwa* moved for an amendment to the draft order. Mr *Musimbe* did not object to its amendment. The new draft order merely sought an interim interdict against the three respondents, with the eviction being reserved for the final relief. H I find it difficult to comprehend the logic of seeking an amendment of that

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Gowora J

nature at that stage, as counsel for both sides had argued the matter fully on A the merits as related to the interdict and the eviction. In my view, no prejudice will occur to any of the litigants if I dispose of the matter on the merits as if it were an opposed application rather than for relief in

interim terms. Although the applicant sought to file an amendment to the draft order, the application to amend the same was only introduced after both parties had addressed the B court in argument on the basis of the original draft order. It seems to me, therefore, that the dispute between the parties has been ventilated in full and it does not assist either of the parties for this court to ignore that fact. I also agree with the submission in the respondents' heads of argument that the nature of relief sought is in final terms. Even if I considered the matter on the basis of the amended draft order, it would not change much as the relief C being sought is not materially different in the two draft orders.

I proceed now to consider the other point *in limine* raised by the respondents. The respondents had contended that the failure to join the Provincial Lands Inspectorate was fatal to the applicant's case. I disagree. The farm was acquired and now vests in the State, which is the owner of the land. I have D to consider whether there is any effect to the application consequent to the non-citation of the responsible Minister. It becomes necessary, therefore, that I consider the nature of the relief being sought by the applicant. The sum total of the relief sought by the applicant is an interdict against the respondents from utilizing the permanent structures and improvements on the subdivision that he has been offered by the State. E

It is common cause that, although the entire farm was gazetted and has since been acquired, the former owners, in the guise of the second and third respondents, are still in occupation. It also seems that the third respondent is the majority shareholder in a company that is running farming operations on the farm. Although the third respondent made this averment there was a challenge from him that the wrong person had been brought to court. He has F deposed to an affidavit opposing the application on the merits and did not persist with the challenge when the matter was called. All the respondents have been in occupation since the farm was acquired and my view, from an assessment of the facts, is that the respondents have been in possession of the homestead, the barns and the borehole for the entire period that the G applicant has been in occupation of the subdivision. The simple fact is that when he moved in they were in occupation and they have not been evicted from the same.

In terms of s 3(1) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], no person may hold, use or occupy gazetted land without lawful authority. In the Act, lawful authority is defined as an offer letter, a H

A permit or a land settlement lease. The applicant is in possession of an offer letter and therefore he has lawful authority to occupy the part of the farm allocated to him. The respondents have contended that the offer letter is irregular. The lawfulness of the offer letter is not before me and I cannot comment on its validity. That is for the authorities to resolve. What is at issue however is whether or not the applicant has the *locus standi* or right B to claim the relief that he is claiming against the respondents.

In seeking redress from this court, the applicant asserts a right predicated on the offer letter in terms of which he occupies the piece of land in question. The applicant concedes that he has not been granted cession of rights by the owner of the land, the State. The applicant contends that even though C he is not the holder of a lease agreement in respect of the piece of land in question, nevertheless, the offer letter that he is in possession of accords him the entitlement to sue the respondents for possessory rights over the land. There is a plethora of cases in South Africa where the courts have considered the rights of a lessee to a lease agreement in relation to a trespasser or any person occupying the premises to which the lessee is entitled to occupy by D virtue of the lease agreement. In *Jadwat & Moola* v *Seedat* 1956 (4) SA 273 at 276C-D, Caney J dealt with the issue as follows:

> "An action for ejectment on the grounds of a defendant being in wrongful and unlawful occupation is in essence based upon his being a trespasser and trespass is an infringement of possession, which is one of the rights of ownership. If the owner has parted with possession, he cannot maintain an action for trespass E against a third party and sue him for ejectment on that ground, since possession is not in him but in the one to whom he has parted with it; the owner has a cause of action only if his reversionary right to possession is injured by the trespass. *Thomas* v *Guirguis, supra*. If, however, the owner has not parted with possession, he retains the right to sue for trespass and to claim ejectment. He has the right to eject the trespasser in order that he may perform his contractual F obligation to the person to whom he has parted with the right to possession, as in *Jeena* v *Minister of Lands, supra*. This, in my opinion, is clearly so

whether he has parted with the right to possession by selling the property or in some other manner conferring on another the right to possession. Clearly, the buyer of a property who has not obtained transfer (nor cession of the owner's right of action) is not entitled to sue for ejectment: *Nicholas* v *Wigglesworth* 1937 NPD 376. Nor, in my opinion, can a lessee who has obtained the right to possession G but not obtained possession itself, sue a trespasser for ejectment."

This case was followed in a long line of cases by the courts in South Africa. As the applicant is not relying on a lease for the enforcement of his alleged right, it is not necessary that I embark on a discussion of those cases. The clear principle from those cases is to the effect that a lessee acquires a personal H right to possession of the leased premises and until and unless granted vacant

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possession of the said premises by the lessor, such lessee has no *locus standi* A *in judicio* to claim the ejectment from the same of a trespasser. As stated by van Dijkhorst J in *Nkadia* v *Mahlazi & Ors*1982 (2) SA 441 (T) at 447G-H:

"In respect of the claim for ejectment, the applicant's objection to the first respondent's *locus standi* is, in my view, sound. The rights acquired by the first respondent in terms of the certificate of occupation were, in the absence of B possession on her part, merely personal rights. Her rights to *vacua possessio* are to be enforced against the person or body from whom they were acquired. I need not here decide which of the respondents this is to be done: cf *Chiloane* v *Maduenyane* 1980 (4) SA 19 (T); *Tshandu* v *City Council* 1947 (1) SA 494 (W); *Bodasingh's Estate* v *Suleman* 1960 (1) SA 288 (N); *Padayache* v *Veerapan and Another* 1979 (1) SA 992 (W)."

The applicant has referred me to two South African authorities on which he C relies for his right to claim the relief that he seeks, *viz. Buchholtz* v *Buchholtz*1980 (3) S A 424 (W) and *Steenkamp* v *Mienies & Ors*1987 (4) SA 186 (N). In *Buchholtz supra* the applicant therein, who had purchased an immovable property but had not yet obtained transfer, sought to evict her husband from the premises. The respondent had raised a point *in limine* to the effect that D as the applicant was not the registered owner of the premises she could not evict him therefrom. In dismissing the point *in limine,* the court opined (*per* Botha J at 425A-D) that the principle that a purchaser who had not obtained transfer or cession of rights from the seller had never been intended in the literal and wide sense to relate to all conceivable situations.:

"…Taking *Nicholas*' case *supra* as the origin of all what was said in the Natal E cases, it is clear beyond doubt, in my opinion, that the courts were dealing with the situation where a purchaser of property had not yet received either transfer or – and this is important – possession of the property purchased. In such circumstances it is indeed clear that the purchaser would have no right to sue for the ejectment of the person in possession of the property because the purchaser had not acquired a *jus in rem* in relation to the property. By virtue of his purchase of the property he acquires no more than a *jus in personam* against F the seller, and, if someone is in possession of the property, then the purchaser must look to the seller, the owner, to obtain *vacua possessio* of the property. The distinction between a situation where the purchaser has not acquired a right *in rem* and the situation where he has acquired such a right by virtue of actually obtaining possession, appears to me to be implicit in all the cases. See e.g. the discussion regarding the position of a lessee in *Jadwat and Moola* v *Seedat* G *(supra* at 276C-F)."

When the matter was argued before me, reference was made to the decision in *Steenkamp supra*. However, as the actual judgment is in Afrikaans, a full discussion on the judgment was not possible as the legal practitioners did not at that stage have a copy of the translation. That was subsequently availed to me and a perusal of the same does not lead me to conclude that H

A the principle on the rights of a lessee to evict a trespasser has been altered. The applicant contends, based on the *Steenkamp* case *supra*, that by virtue of his occupation of Lot 7 of Dana Farm he has the *locus standi* to obtain the nature of relief he seeks from the respondents. It is the contention of the applicant that, by virtue of being in partial occupation of Lot 7, he has *locus standi* to obtain this relief and that there is no need to obtain vacant B possession in order to acquire *locus standi*. The applicant has, in his heads of argument, quoted from the head note of the judgment and not a passage representing *dicta* from the court. A passage that could accord with what the applicant is submitting is to the following effect:

"Apparently they are using the farm together. However, the applicant has at least C partial occupation of the said farm and as far as I could ascertain, by law there is nothing to prevent him under these

circumstances from enforcing his rights derived from the contract of lease, including against first respondent. Even if his occupation is in some respects incomplete, it cannot be said for one moment that he received no occupation of farm 10 and therefore has no real rights. For purposes of *locus standi* I view this occupation as sufficient to enforce his rights derived from the lease contract against the first respondent. The fact that the D lessor would also have *locus standi* to obtain an eviction order against the first respondent, does not take away the right of the applicant to claim the same relief against the first respondent."

I turn then to consider the legal position within this jurisdiction. In Zimbabwe the leading authority on this principle of law is *Pedzisa v Chikonyora*1992 (2) ZLR 445 (S) at 451, E where Gubbay CJ made the following remarks:

"Where a lessee's rights are personal, as *in casu*, he is entitled to claim delivery of the property from the lessor. His rights are effective against the lessor's gratuitous successors and against purchasers who knew of the existence of the lease when they purchased or took transfer; they are not effective against creditors of the lessor or against the lessor's singular successor in good faith. In the case of a short lease, the lessee has a real right only when he is given occupation of the F property; in the case of a long lease, he has it after registration, or if he is in occupation for the first ten years. Consequently, upon being given occupation, or the lease being registered, the lessee would be entitled to evict anyone who wrongfully assumes occupation of the property, for example a trespasser. See *Morkel's Transport (Pty) Ltd* v *Melrose Foods (Pty) Ltd & Anor* 1972 (2) SA 464 (W) at 482E-F. But not before that occurrence. This principle is clearly set G out by Fannin J in *Bodasingh's Estate* v *Suleman* 1960 (1) SA 288 (N) at 289A, as follows;

'In the case of an ordinary lease, the lessee to whom possession has not yet been given cannot sue a trespasser for ejectment from the leased property, save under a cession of action form the lessor'."

I turn now to discuss the authorities that the applicant seeks reliance on H in his claim against the respondents. The applicant does not state that he

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obtained vacant possession from the respondents. Indeed, it is accepted on A the papers that he had moved onto the farm as a requirement to comply with the terms of the offer letter. He goes further and suggests that by virtue of his occupation, he has acquired a right which is indistinguishable from a lessee who obtained vacant possession and that he now has a real right to evict the former owners whom he says are in illegal occupation. In *Buchholtz supra* B the purchaser had obtained *vacua possessio* from the seller before transfer and was thus invested with a right to occupy by the title holder. The facts in *Steenkamp supra* are somewhat more complex. The applicant had a written agreement of lease with the second respondent which had been entered into on 16 June 1986 in respect of portion 10 of Mier No. 585. It was formerly known as portion 115. The applicant had also alleged that he had rented C the same property from the second respondent in terms of a written lease agreement from 1 January 1981 to 31 December 1985 and that, as a result of the lease contract, he was in partial occupation of the property. The first respondent, on the other hand, had contended that he was in rightful occupation of portion 10 in terms of a written agreement between himself D and the Department of Internal Affairs (Coloured Affairs). A copy of the agreement was attached to his papers and confirmed the agreement which was to expire on 31 December 1985. The farm was referred to in the agreement as 139, Kooi Hoop. The new number was portion 7 of Mier, No. 585. A plan attached to the applicant's papers shows that the farms are indeed different. At the hearing the first respondent's counsel accepted the accuracy of the E plans and maps. The court then was required to determine the point *in limine* raised on behalf of the first respondent as to the *locus standi* of the applicant to bring proceedings for the eviction of the first respondent from portion 10 on the basis that the applicant had never had *vacua possessio*.

The finding of the court was that the applicant therein had leased the portion F in contention prior to 1981 by virtue of an oral agreement and that the applicant had at least partial occupation of the same. It also found that the first respondent had never leased portion 10 and thus had never acquired any rights in respect thereof. The court found that the applicant had at least partially occupied the farm from 1 January 1981 and further that the first respondent had made use of the grazing on the said farm from the same date or even G earlier. The court also stated that the applicant could claim *vacua possessio* from the lessor since the first respondent had been trespassing on the farm for a considerable period, but that this did not detract from the fact that the applicant had acquired a real right through the partial occupation. There is no indication that in obtaining partial occupation the applicant therein had been given vacant occupation by the lessor. The court, however, went on to H

Gowora J

A state that, even if the occupation of the farm by the applicant was somewhat incomplete, it could not be said that he had received no occupation of farm 10 and therefore had no real rights. I assume therefore from the passage that the court found that in obtaining the partial occupation the applicant had received *vacua possessio*.

B I note with interest that the applicant did not find it necessary to discuss the *Pedzisa* case *supra*, even though the respondents had placed heavy reliance on the same. It is a judgment of the Supreme Court of this country and is therefore binding. The judgments from South Africa, where they are not distinguishable from our own, can only be persuasive. I venture to suggest that where the judgment in the*Steenkamp* case s*upra* differs from that in C *Pedzisa* case s*upra*, the *dicta* in the*Steenkamp* case are not binding.

The *applicant* does not have an agreement to lease the property. He has an offer letter which courts in this jurisdiction have found do not constitute a lease. See *Airport Game Park (Pvt) Ltd & Anor* v *Karidza & Anor*2004 (1) ZLR 391 (S) at 390C, where Ziyambi JA stated;

> D "Not only is this basic requirement of a lease lacking in the offer letter, but the contents of the letter do not admit of the interpretation sought to be placed thereon by the appellants, namely, that the first respondent was constituted a lessee by the letter."

And later in the same judgment at 396C-E, in discussing the judgment in *Mgwaco Farm (Pvt) Ltd* v *Pasi & Ors*2003 (2) ZLR 478, the learned Judge E of Appeal stated:

> "I respectfully disagree with the conclusion of the learned judge. The letter clearly indicates that it is only if the Minister was satisfied that the conditions stated therein had been met that he would enter into a lease agreement with the first respondent. The duration of the lease and the rent payable were not set out in the letter. Although the duration of the lease need not be specified for a lease to F be constituted, the same cannot be said of the quantum of the rental and when it should be paid. In the absence of any provision setting out the rental the offer letter cannot be said to constitute a lease."

Clearly, therefore, an offer letter is not a lease agreement. The applicant has premised his right to claim relief on the basis of such rights as would ensue on the conclusion of an agreement for lease. If an offer letter does not G constitute a lease, it seems to me that it offers a right to occupy at the pleasure of the owner of the land, that is, the State. The parameters attendant on such occupation are not before me for discussion, but on the other hand it cannot be said that the applicant can claim the same rights as a lessee occupying under an agreement of lease.

H In a somewhat tongue-in-cheek fashion, the applicant contended that even

Gowora J

if he had no *locus standi* to sue for the ejectment of the respondents from A the *portion* of farm that is in contention, he had *locus standi* to sue for an interdict. In my view, *locus standi* is predicated on the existence of a right, whether clear or *prima facie*. Generally, a right either exists or it does not. There are situations where one can have a right in respect of certain relief, for instance in spoliation proceedings, but no right for obtaining other relief. B This is not so in this case. Since the right is being sought by virtue of an entitlement to occupy the piece of land, I do not believe that such right is capable of qualification. If the applicant has the right to evict the respondent, then he would have a right to an interdict against any perceived infringement of his rights to occupy the land. He has failed to establish the right to evict or for an interdict. *In casu,* the applicant never obtained vacant possession, C having moved onto the farm under his own steam, so to speak. He has thus not acquired the necessary *locus standi* to sue the respondents for the enforcement of rights that may accrue from his possession of the portion of land he occupies. I find that he has no *locus standi* even to obtain an interdict against the respondents. His application must therefore fail on that ground.

I turn next to the issue of urgency, which I left until a discussion of the D facts of the matter. It was contended on behalf of the respondents that the applicant's papers did not exhibit urgency. The leading case within this jurisdiction in relation to urgency is *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (H), a judgment by Chatikobo J. The learned judge had the following to say at 193F-G. E

> "What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated in the Rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any F delay".

When an applicant files an urgent application, the High Court Rules require, where such an applicant is legally represented, that a certificate of urgency be filed setting out why, in the opinion of the legal practitioner, the matter should be treated as urgent and not await set down in the normal course. The certificate of urgency filed on behalf of the applicant suggested an G infringement on the part of the respondents and an interference with his occupation of the piece of land that he was in occupation of. There was also a statement that the applicant was being denied access to a borehole. On the face of it, therefore, the matter appeared to be urgent and an impression was created that the applicant should be allowed, through this court, unhindered access to the borehole and the homestead. It is not stated in the certificate H

Gowora J

A when precisely the alleged interference commenced. It is only when the respondents' papers are examined that it becomes clear that there is no urgency in the application. The applicant has been on the farm since 2008. He has not given a precise date but, going by the averment that he moved onto the farm in order to comply with the requirements on the offer letter that obliged him to take occupation within 30 days of the acceptance of the B offer, it is safe to assume that he had moved onto the farm soon after the month of April 2008 when the farm was offered to him. He alleges that soon after he moved onto the farm the respondents started interfering with his activities, in that they began to construct permanent structures on the farm, guarded the borehole (*sic*), refused to surrender the farmhouse and occupied C the pigsty that is located on his portion of the farm.

Since this application was launched in June 2009, the applicant had waited a full year before approaching this court on an urgent basis for relief over happenings that had taken place on the subdivision. Given that the situation that the applicant seeks this court to reverse has been in existence for the better part of a year, it is mischievous in the extreme for a legal practitioner D to issue a certificate that a matter is urgent in circumstances such as the above. A matter does not assume urgency because a litigant has plans, the fulfillment of which require an immediate solution. Urgency, in my view, arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The E existence of circumstances which may in their very nature be prejudicial to the applicant is not the only factor that a court has to take into account, time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threat whatever it may be. In the matter before me there is no urgency established.

F I wish to respectfully associate myself with the comments by Gillespie J in the case of *General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 at 303A-B wherein the learned judge stated:

> "It is therefore an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, the good faith can be tested by the reasonableness or otherwise of the purported view. Thus, where a G lawyer could not reasonably entertain the belief that he professes in the urgency of a matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency".

There is a duty incumbent upon a legal practitioner before he files a certificate that a matter is urgent to examine carefully the case that his client puts to H him and to satisfy himself that indeed the matter is urgent. As was stated by

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Gowora J

Bere J in *Dodhill (Pvt) Ltd & Anor* v *Minister of Lands & Anor* 2009 (1) ZLR 182 (H), A there is no formula which determines what constitutes urgency, nevertheless a legal practitioner should be diligent in certifying the urgency of a matter. Sufficient thought ought to be given to the instructions from the client as regards the issue of urgency and an opinion expressed clearly to the applicant as regards the lack of cogent grounds to justify urgency. An B applicant who has his matter dealt with

on an urgent basis steals a march on other litigants and it is a facility which should be accorded only to those deserving cases. On the facts presented, this case did not merit such an accommodation.

In the premises, I find that the application was not well founded and the application is therefore dismissed with costs. C

Mutamangira & Associates and *Antonio, Mlotshwa & Co*, legal practitioners for the applicant

I E G Musimbe, legal practitioners for the respondents D

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SIBANDA v NYATHI & ORS 2009 (2) ZLR 171 (H)

Citation	2009 (2) ZLR 171 (H)
Case No	Judgment No. HB-94-09
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	25 March 2008
Judgment	17 September 2009
Counsel	*P Ncube*, for the applicant *S Mazibisa*, for the first and second respondents No appearance for the third and fourth respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Contract – *illegality – contract agreement understating purchase price so as to avoid capital gains tax and stamp duty – contract illegal and void – contract not yet performed – court will refuse to enforce it – court's powers when contract otherwise genuine and mostly carried out – court* D *entitled to declare true purchase price so as to reflect true agreement*

Costs – *legal practitioner and client scale – abuse of process – litigant having no defence to a claim but nevertheless pursuing it in bad faith — unsubstantiated allegations against an attorney involved in the case — award on the scale of attorney and client justified*

Headnote

E An agreement concluded for the sole purpose of avoiding capital gains tax and stamp duty is illegal and *ipso facto* null and void *ab initio*. An illegal agreement which had not yet been performed in whole or in part will never be enforced by the courts.

Where a litigant has no conceivable defence to his opponent's case but F nevertheless, in bad faith, persists in such defence and where he is guilty of making unsubstantiated allegations against a legal practitioner involved in the case, an award of costs against him on the higher scale is justified.

In terms of a written agreement of sale entered into between the applicant and the first and second respondents, the applicant purchased a piece of land from the two respondents. Although the agreement of sale reflected G that the full purchase consideration for the property was Z$70 000 000, it was the applicant's case that the total purchase price was, in fact, Z$130 000 000, when transfer costs and other costs were included. Subsequent memoranda by the parties supported the applicant's case. The first reflected that Z$77 274 000 had been paid by the applicant to H the respondents, with Z$28 million to remain for transfer and a balance

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of Z$24 720 000 to be paid later. The second and later memorandum A reflected the purchase price as Z$130 million with only a balance of Z$14 316 000 still to be paid. The third memorandum, in the form of a receipt from the respondent, recorded the payment of that balance by the applicant to them. The respondents had thereupon delivered vacant possession to the applicant, who had been in occupation ever since. In spite B of all this, nearly eight months later, the respondents purported to cancel the agreement of sale, alleging what they claimed was a breach thereof. They claimed that the applicant had failed to pay, by installments, a sum of money which was not reflected in any of the foregoing memoranda.

In the ensuing application which the applicant bought to enforce transfer of the stand into her name, she argued that the total purchase price was C Z$130 million, including transfer and other costs. The respondents disputed this, arguing that the applicant had only paid Z$102 million of the purchase price of $130 million. They contended that the balance of Z$28 million was for transfer charges and capital gains tax and did not form part of the purchase price at all. Belatedly, they raised a final D defence that the written agreement of sale was *in fraudem legis* and thus a nullity as it had been concluded for the sole purpose of avoiding capital gains tax and stamp duty.

Held, that having regard to the memoranda, particularly the receipt it was, in fact, common cause that the applicant had paid the purchase price in full and for that reason the respondents had given her vacant possession E of the stand. The sale was a genuine one and could not have been made for the sole purpose of evading payment of tax because all that was due to the fiscus had been paid.

Held, further, that what was illegal in the written agreement of sale was that portion which reflected the full purchase consideration for the property as Z$70 million, whereas the correct amount was Z$130 million. The F agreement to reflect the purchase price in that manner was null and void.

Held, further, however, that the applicant was not seeking to enforce an illegal agreement. The true purchase price of Z$130 million, which included transfer fees, had been paid in full. The court was, therefore, at liberty properly to declare the same, so as to reflect what had been G agreed between the parties.

Held, further, that the applicant must be granted the order she sought to enforce transfer of the stand, with costs on the higher scale.

Case cited

Brits v van Heerden 2001 (3) SA 257 (C) H

Kamocha J

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

Legislation considered

Contractual Penalties Act [*Chapter 8:04*], s 8

Stamp Duties Act [*Chapter 23:09*], s 44

Case information

B *P Ncube*, for the applicant

S Mazibisa, for the first and second respondents

No appearance for the third and fourth respondents

Judgment

KAMOCHA J: The applicant sought and was granted a provisional order C on 11 July 2005 which she now seeks to have confirmed. The amended final order reads as follows:

"It is ordered that:

1. The purported cancellation of the agreement of sale dated 24 September 2004 between applicant and first and second respondents by the first respondent is hereby declared null and void; D
2. The said agreement of sale between applicant and first and second respondents dated 24 September 2004 in respect of stand 157 Burnside Township 8 of subdivision 10 of Matsheumhlophe situate in the District of Bulawayo measuring 4070 square metres otherwise known as number 157 Red Robin Close Burnside, Bulawayo is hereby declared valid and of full force and effect. E

   2(a) The total purchase price of the said property described in clause 2 above, be and is hereby declared to be a sum of $130 000 000,00 (one hundred and thirty million dollars), which sum has been paid in full by the applicant to the first and second respondents.
3. First and second respondents be and are hereby ordered to sign all the documents and/or transfer papers necessary to effect the transfer of the said F house number 157 Red Robin Close, Burnside, Bulawayo from Warren Vincent Pearce to first and second respondents and from first and second respondents to the applicant.
4. Alternatively, should first and second respondents fail to sign any of the above documents on demand, that the Deputy Sheriff be and is hereby authorized to sign all the necessary papers to enable the transfer to go G through.
5. That first and second respondents be and are hereby ordered to surrender the Title Deeds of number 157 Red Robin Close Burnside, Bulawayo to Messrs Ben Baron and Partners within 14 days of the date of this order.
6. That Messrs Ben Baron and Partners be and are hereby authorised to proceed with the transfer of number 157 Red Robin Close Burnside, Bulawayo from H Warren Vincent Pearce to first and second respondents and from first and

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second respondents to the applicant. A

7. That first and second respondents pay the costs of suit on an attorney and client scale."

The background of this matter may be summarised thus. On 24 September 2004 the first and second respondents entered into an agreement of sale whereby they sold to the applicant a certain piece of land in extent 4070 B square metres, being No. 157 Burnside Township 8 of subdivision 10 of Matsheumhlophe situate in the district of Bulawayo, otherwise known as No. 157 Red Robin Close, Burnside, Bulawayo.

According to clause 2 of the memorandum of agreement of sale, which was signed by the parties "… the full purchase consideration for the said property C is in the sum of $70 000 000 (seventy million dollars) payable by the purchaser direct to the seller which shall be paid in full upon signing this agreement of sale …" . However, according to the applicant the total purchase price was $130 million when transfer costs and other costs are included.

After the applicant had paid a sum of $77 274 000 the parties agreed that the applicant would pay $28 000 000 for transfer fees and the balance of D $24 720 000 would be paid on or before 18 October 2004. The parties then recorded the information as follows in annexure "B":

"Nomalanga Sibanda being the buyer of stand number 157 Red Robin Close to Burnside *(sic)*. The side *(sic)* of the stand is 130 000 000

77 274 000 has been paid E

28 000 000 to remain for the transfer

24 720 00 being the balance to be in *(sic)* on the 18-10-2004".

The document was signed by Mrs Nyathi whose identity number was given as 08-534841 A 73. The parties further recorded in annexure "C" certain information relating to their agreement in the

following terms:-

"Buying Price $130 000 000

Nomalanga Sibanda buyer for No. 157 Red Robin Close to Burnside from Mr and Mrs G Nyathi

Less $28 000 000

Bal $102 000 000

Less $87 684 000

Bal $14 316 000 to be paid on 18 October 2004".

Annexure "D" reflects that the buyer paid the last instalment on 18 October 2004 as agreed by the parties. The receipt reads as follows:

"I have received the last and final payment for No. 157 Red Robin Close to Burnside.

Kamocha J

$14 316 000 paid on 18 October 2004

Paid to Mr and Mrs Nyathi

08-534841 A 73".

A signature was appended before the identification number. Pursuant to the provisions of clause 6 of the memorandum of agreement of sale which stipulates that "the seller shall give vacant possession of the property to the purchaser by 24 September 2004" the first and second respondents handed the keys to the house to the buyer on that day. They delivered vacant possession to the applicant who has been in occupation ever since.

The applicant averred that the first and second respondents had in fact also handed to her the title deeds of the property but because the transfer was going to be handled by Messrs Ben Baron and Partners, the parties agreed that the title deeds be left with that firm to facilitate the transfer.

The applicant paid in full the $28 million transfer fees to Messrs Ben Baron and partners and was ready to take transfer of the property but to her shock and dismay she received the following letter dated 19 May 2005.

"Dear Madam

Re: Cancellation of sale of agreement of stand No. 157 Burnside Township 8 of subdivision 10 of Matsheumhlophe situated in the district of Bulawayo

I refer to the sale of agreement *(sic)* between myself and yourself sometime in 2004.

You will note that the from *(sic)* the onset, you had promised to pay the sum of $90 000 000 in cash towards purchasing the said immovable property. You however failed to pay in installments which was a breach of contract. This made me fail to use the money on what I had intended to do. At the same time ZIMRA was asking for about $9 000 000 from me. As you had already breached the contract the amount – needed by ZIMRA is still accruing which should not be done by me.

You are therefore advised that from the date of this letter, the said agreement has been cancelled and that I am in a position to re-emburse you what you paid according to the Contractual Penalties Act.

Be guided accordingly

Yours faithfully

G Nyathi".

It is difficult to understand what the first and second respondents were trying to achieve in the light of annexure "B" *supra* which they signed. In it the parties stipulate the terms of the sale by instalments. The cash payment of $90 000 000 does not appear in that document. That the sale was a sale of immovable property by instalments admits of no doubt.

Kamocha J

It is accordingly not true that the first and second respondents were cancelling the agreement in terms of the Contractual Penalties Act. What is true is that the purported cancellation was contrary to the provisions of section 8 of that Act. Not only does the purported cancellation fall foul of these provisions but it was also contrary to clause 8 of the memorandum of agreement which provides that:

> "Should any party fail to remedy any serious breach of this agreement within fourteen days of demand to that effect the aggrieved may elect to cancel this agreement without prejudice to this right to recover any damage suffered, nonpayment of the purchase price to constitute a serious breach."

If the respondents believed the applicant was in serious breach of the contract, they should have demanded that she remedied such breach within 14 days. C Instead, it is common cause that they did not do that. In the result this court makes a specific finding that the purported cancellation was of no force or effect. The parties' agreement is still extant and enforceable.

This court has now got to determine whether or not the agreement is *contra legem*. The first and second respondents submitted that the agreement of D sale that applicant sought to rely on was *contra legem* and was *ipso facto* unenforceable. They contended that it was entered into and signed solely for the purpose of tax evasion. The respondents argued that what the parties had concluded was an illegal contract which was void or at least voidable at law.

They submitted that the agreement of sale was for the purchase price of $130 000 000. The applicant only paid $102 000 000 towards the purchase of E the property. The $28 000 000 paid to Ben Baron and Partners did not form part of the purchase price as it was for transfer fees and ZIMRA charges. They then concluded on that point that the full purchase price had not been paid in full. The applicant was accordingly not entitled to any transfer.

The applicant on the other hand had averred that inclusive of transfer costs F and other costs, the total purchase price was the sum of $130 000 000. The applicant's averments are supported by what is contained in annexure "B" at p 174 *supra.* The respondents' argument that the full purchase price had not been paid is devoid of any merit in the light of the acknowledgement of receipt of the last and final payment for the property made by both respondents G in annexure "D" on pp 174-5 *supra.*

The respondents asserted that the agreement was concluded for the sole purpose of avoiding payment of the capital gains tax and the stamp duty.

Indeed there can be no doubt an agreement concluded for the sole purpose of avoiding payment of the capital gains tax and the stamp duty is illegal and *ipso facto* null and void *ab initio*. Section 44 of the Stamp Duties Act H

Kamocha J

A [*Chapter 23:09*] provides thus:

> "44 Agreements to evade duty shall be void
>
> Every contract, agreement or undertaking made for the purpose of evading, defeating or frustrating the requirements of this Act as to the stamping of instruments, or with a view to preclude objection or inquiry relative to the due stamping of any instrument shall be void."

B It is now settled law that "an illegal agreement which has not yet been performed either in whole or in part, will never be enforced" in terms of the maxim *ex turpi causa non aritur actio* – a rule which is absolute and admits of no exception by the courts: *per* Gubbay JA (as he then was) in *Dube* v *Khumalo* 1986 (2) ZLR 103 (S) at 109D-F.

C *In casu* the agreement of sale is almost complete. It has been performed in part, as it is common cause that the applicant has paid the purchase price in full as acknowledged by the respondents in documents quoted *supra*. The applicant was given vacant possession of the house by the respondents on 24 September 2004 and has been in possession ever since. The agreement of sale is almost complete. It has been performed in part.

D It admits of no doubt that the sale was a genuine one. It could not have been made for the sole purpose of evading payment of tax, as suggested by the respondents, since the applicant paid the purchase price in full and has been in vacant possession of the house since 24 September 2004. The agreement of sale was therefore not a sham but a reality. All that is left is for the property E to be transferred to her. Transfer fees have already been paid to Messrs Ben Baron and Partners.

What is illegal in the agreement of sale is the portion of clause 2 wherein the parties state that "… the full purchase consideration for the said property is the sum of $70 000 000 payable by the purchaser direct to the seller …", F when in fact the correct amount should have been reflected as $130 000 000. The rest of the agreement of sale document reflects the true and correct intention of the parties.

The South African courts had occasion to deal with an analogous case in *Brits* v *van Heerden* 2001 (3) SA 257 (C). The parties in that case reflected the purchase price as being R160 000 only and made declarations to that G effect when in fact the purchase price was R160 000 plus a cession of an insurance policy of R33 000. The equivalent of s 44 of the Stamp Duties Act in South Africa is s 14 of their Act. Knoll J had this to say at 272A.

> "It is the agreement to omit the particular portion of the agreement referring to the balance of the purchase consideration which is in fact the illegal agreement."

H Undoubtedly what is null and void in this case is the agreement to reflect

Kamocha J

the purchase price as $70 million instead of $130 million. In my view, this A court is at liberty to properly declare the true purchase price as being $130 million so as to reflect the true agreement between the parties.

The applicant has, right from the onset, sought to enforce the true purchase price of $130 million which she has paid in full not the $70 million. She, therefore, sought the very opposite of enforcing an illegal agreement. The B court must come to her assistance.

Costs

It was argued on behalf of the applicant that the first and second respondents had no conceivable defence to the applicant's case. It was pointed out to them that their purported letter of cancellation was a nullity. They were also C advised of the correct legal position in the matter but still persisted with their *mala fide* defence. They did not stop there, but they went on to make serious unsubstantiated allegations against the legal practitioner representing their opponent. Finally, they raised as an afterthought the defence of *contra legem* which they had not pleaded.

There is merit in the applicant's submission that they should be ordered to D pay punitive costs. This court shall show its displeasure at their conduct by an award of punitive costs.

In the result I would grant the order sought in terms of the amended draft.

Coghlan and Welsh, applicant's legal practitioners E

Cheda and Partners, first and second respondents' legal practitioners

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Source:
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S v NEMUKUYU 2009 (2) ZLR 179 (H)

Citation	2009 (2) ZLR 179 (H)
Case No	Judgment No. HH-102-09
Court	High Court, Harare
Judge	Karwi J & Uchena J
Heard	17 September 2009
Judgment	21 September 2009

Counsel *N Machingauta,* for the appellant
A Masamba, for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Criminal procedure (sentence) – *general principles – factors affecting – need for judicial officer to avoid emotion and bias against class of persons – need to consider factors set out in statute creating offence – deterrence – relevance of – should not result in inappropriate sentence*

Headnote

D A judicial officer must, in considering sentence, be dispassionate and avoid being propelled by emotion into passing ever-increasing sentences. He must look at all factors which can be considered in passing the appropriate sentence for the offence under consideration. He must avoid E over-emphasizing some factors, while playing down or ignoring others. He must avoid language which displays gender insensitivity or bias against a class of people, as that gives an impression that the offender is, over and above being punished for his offence, being punished for belonging to a class which the judicial officer has displayed bias against. Where the factors to be considered are provided by statute, he must F consider all such factors. If he does not consider the factors which the statute requires him to consider, the sentence may be set aside, if it is shown that a consideration of the omitted factors would have resulted in the court arriving at a different sentence. While deterrence is a valid consideration, a judicial officer must avoid giving the impression that the sentence is a tag which society must read for it to be deterred. The G sentence must suit the offence and the offender. If others have to be deterred, they should be deterred by a deserved sentence, and not by one which over-emphasises deterrence, and punishes the offender beyond H the level his offence deserves.

2009 (2) ZLR p180

Uchena J

Cases cited A

S v Banana 2000 (1) ZLR 607 (S)

S v Nyathi 2003 (1) ZLR 587 (H)

Legislation considered

Criminal Law (Codification and Reform) Act [C*hapter 9:23*], s 65(2) B

Case information

N Machingauta, for the appellant

A Masamba, for the respondent

Judgment

UCHENA J: The appellant was convicted by a regional magistrate sitting at Marondera magistrates court, on a charge of contravening s 65 of the Criminal C Law (Codification and Reform) Act [*Chapter 9*:*23*] (rape). He appealed to this court against conviction and sentence.

In his grounds of appeal it is alleged that:

Against conviction

1. The trial magistrate did not give due consideration to the fact that D whereas the offence is alleged to have occurred in September 2007 it was reported at a far much later date in

October. Furthermore, no reasonable explanation was given to indicate what really prompted the complainant to make a report to her aunt and mother.

2. The trial magistrate did not give adequate consideration to the fact E that despite the fact that the complainant made a report to her aunt and mother in October 2007 the matter was reported to the police on 2 July 2008, that is some eight months later…
3. The trial magistrate failed to give due consideration to the fact that initially the complainant alleged that the appellant had attempted to rape her but later changed her story and alleged that the appellant had F actually raped her.
4. The matter was unusually fast tracked and the appellant who is an unsophisticated old man was not given an opportunity to prepare his defence to the serious allegations that he was facing.

Against Sentence G

The sentence imposed by the honourable magistrate is manifestly excessive and is out of touch with current sentences that are being imposed in similar cases.

Appeal against conviction

The evidence led at the trial of the appellant on the basis of which the H

Uchena J

A magistrate convicted the appellant, established that the complainant came from school and found the appellant at home sitting in the kitchen smoking a cigarette. She greeted him and proceeded to the bedroom to change her clothes. While she was changing her clothes the appellant opened the door. She was half naked, as the top part of her body was exposed and her skirt was not zipped. This far the appellant's and the complaint's evidence agrees. B They differ only on the complainant's evidence that he forced his way in, and when she tried to run out of the house he embraced her, dragged her to the bed and raped her once. After he had completed his purpose he warned her not to tell anyone or he would kill her. According to the appellant when the complainant told him that she was changing her clothes, and he had seen that C she was not fully dressed he backed off and went away. It is common cause that the incident took place on 15 September 2007. The State's evidence from the complainant, Fungayi, to whom the complainant first made her report, and the complainant's grandmother, establishes that the complainant made a report to Fungayi the next day. The magistrate believed the complainant and the State's witness. The appellant confirmed that, by admitting that he D was questioned by his wife about the rape the following day.

Mr *Machingauta,* for the appellant, relying on the grounds of appeal referred to above, submitted that the magistrate erred in convicting the appellant. Mr *Masamha* for the respondent supported the conviction, but at the end of his submissions conceded that the sentence imposed by the magistrate E induced a sense of shock and that this court was at large as to what would be the appropriate sentence.

Mr *Machingauta* submitted that the complainant reported the rape to her aunt and mother in October 2007, when the incident on which the rape charge arose had occurred in September 2007. Mr *Masamha* for the respondent argued that the report was made the following day as per the evidence of the F complainant. It is true that the complainant said she was raped on a Friday afternoon and she made her first report to Fungayi on Saturday, which was the following day. This is confirmed by the appellant's own evidence on p 12 of the record, where the following exchange took place between him and the prosecutor: G

"Q When did you learn that the complainant was alleging rape against you?

A The following day I got it from my wife

Q What did your wife say to you?

A She said my husband the child is saying you raped her."

There is therefore no merit in the appellant's first ground of appeal. It is H based on the appellant's counsel's failure to correctly read the evidence led

Uchena J

at the appellant's trial. The appellant's counsel also missed the point when A he said that the report was made to the complainant's aunt and mother, as the record clearly states that the report to the complainant's aunt and to her mother was made in 2008, after which the complainant's mother and father confronted the appellant at Masomera. The complainant's mother then made the report to the police while she was on her way from her father's home. B The issue of what prompted the report does not arise when it is common cause that the incident took place the previous day. Once the appellant is believed when she says the appellant raped her, then that prompted the report. The fact that she was seen by Fungayi walking on the tarmac with a young boy becomes peripheral, and of no significance. The bottom line is that the complainant's story is based on events which had taken place between her C and the appellant the previous day. The evidence is that Fungayi saw her walking with the boy on the tarmac and joked with her. She does not say she saw anything suspicious between the complainant and the young boy.

The second ground of appeal is also a result of the appellant's counsel's failure to appreciate the evidence led. The evidence led is to the effect that the complainant reported to Fungayi the next day who on the same day reported D the case to the complainant's grandmother. The complainant's grandmother and Fungayi did not take the matter any further. The complainant then went to stay with her mother where she exhibited signs of distress. She moved on to her father's house. Her father noticed that she had something troubling her and encouraged her to open up. She asked to be allowed to go and stay E with her father's young brother. She eventually made her second report to her uncle's wife. Her father was then informed, and he in turn informed his former wife the complainant's mother. They together went to the appellant's home and confronted the appellant, who had previously been confronted by his wife about the same issue. The complainant's mother then reported the case to the police on 2 July 2008. F

It is unfortunate that the appellant's counsel either misread the record or sought to mislead the court. The first duty of a legal practitioner presenting a case on appeal is to assist the court to decide the case on the basis of the evidence led at the trial by correctly analyzing the evidence and applying it to the law. He as an officer of the court must formulate his grounds of G appeal from the evidence led, and the decision arrived at by the court *a quo*, and not from what is clearly an incorrect restatement of the evidence led.

In his third ground of appeal counsel for the appellant submitted that at first the complaint alleged that the appellant had attempted to rape her, but later changed and said, he had raped her. He submitted that, that shows inconsistency on her part. Mr *Masamha* for the respondent submitted that H

A the correct sequence of the evidence led was that the complainant reported to Fungayi that the appellant had raped her. Fungayi called her mother-in-law, who is the complainant's grandmother and the appellant's wife. It is to her grandmother that the complainant changed her story and said the appellant had attempted to rape her. He argued that the complainant said she was afraid of her grandmother. That fact is corroborated by the complainant's B grandmother when she said at pp 6 to 7of the record:

> "I then enquired from the complainant as to why I had been called and she said grandmother, grandfather came into the room when I was changing clothes, he intended to rape me, but he did not rape me, in other words he had attempted. Fungayi told complainant that was not a report she had presented. I demanded the truth from her but she did not tell. I left her there for two days thinking that C she may tell the aunt the truth since she was more comfortable with her than me.
>
> Q What did you do yourself?
>
> A I went to the accused person and confronted him, he called Bridget (complainant) and asked if he had touched her or done anything on her, but complainant did not say anything so I just took it as a case which has D no merit.
>
> Q When was this?
>
> A Last year in October"

The correct sequence of the evidence on record is that the complainant reported to Fungayi the next day that the appellant had raped her. Alarmed by E the nature of the complainant's report, Fungayi went and called her mother-in-law, the complainant's grandmother, to come and hear the

complainant's report. When Fungayi asked the complainant to repeat her report to her grandmother the complainant then said the appellant had attempted to rape her. The complainant's grandmother demanded the truth from her. The complainant did not tell her anything further. She left her with Fungayi for F two days hoping she would open up to Fungayi with whom she was more comfortable than with herself. It must be noted that in her evidence the complainant confirms that sequence of events and the details of the evidence given by her grandmother and Fungayi, but adds that she told her grandmother that the appellant attempted to rape her as she was afraid of her. Her fear G of her grandmother is confirmed by her grandmother's confession that she was more comfortable with Fungayi than herself. It is also apparent from the complainant's grandmother's evidence that she was not gentle with the complainant. She said she demanded the truth from the complainant. The use of the word "demand" by the complainant's grandmother suggests firm and harsh questioning which must have further intimidated the complainant who H had according to her evidence been threatened with death if she revealed what

had happened between her and the appellant. She was immediately taken to A the appellant where the appellant was given an opportunity to question her about what she had revealed to Fungayi. This in my view must have further intimidated the complainant into silence even over the two days she was left to stay with Fungayi.

Our courts have, since *S* v *Banana* 2000 (1) ZLR 607 (S), moved away B from the cautionary rule which required the courts to start assessing the complainant's evidence in sexual cases from a suspicious angle. In that case Gubbay CJ at 614D-G said:

> "Recently, in *S* v *K* 2000 (4) BCLR 405 (NMS), the Supreme Court of Namibia followed the decision in *S* v *Jackson supra*. It held that the cautionary rule had outlived its usefulness. There were no convincing reasons for its continued C application. It exemplified a rule of practice that placed an additional burden on victims in sexual cases which could lead to grave injustice to the victims involved (see at 418H-419D).
>
> It is my opinion that the time has now come for our courts to move away from the application of the two-pronged test in sexual cases and proceed in conformity with the approach advocated in South Africa. In so holding, I have not overlooked D the well-researched judgment of Gillespie J in *S* v *Magaya* 1997 (2) ZLR 138 (H). But having regard to the abrogation of the *obligatory* nature of the rule in such countries as Canada, the United Kingdom, New Zealand and Australia, as well as by the State of California (see Chaskalson *et al Constitutional Law of South Africa* at 14-62; Hatchard (1993) *Journal of African Law* 97 at 98; (1983) 4 *Canadian Journal of Family Law* 173), I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. Yet I E would emphasise that this does not mean that the nature and circumstances of the alleged sexual offence, need not be considered carefully".

This means the courts must now treat a complainant in a case of a sexual nature like any other witness. It must, in doing so, as is expected in any other case, carefully consider the nature and circumstances of the alleged sexual F offence. This means like in any other case the court must, without placing an additional burden on the complainant because she is a complainant in a case of a sexual nature, carefully consider the evidence placed before it to confirm the commission of the offence and by whom, if it finds that the offence was committed.

In this appeal it is important to note that the evidence of the complainant G and the appellant converges on the following:

1. that the complainant come from school on the afternoon of Friday,15 September 2007, (see pages 1, 2, and 11 of the record);
2. she found the appellant seated in the kitchen smoking a cigarette;
3. she greeted him and proceeded to the bedroom to change her clothes; H

4. the appellant followed her to the bedroom where he opened the door and found her half naked;
5. that the complainant said to him "Grandfather, I am still changing";
6. that he entered the bedroom when complainant was changing and was half naked (see p 12 of the record); B
7. that the appellant was confronted about the rape by his wife the following day; and

8. that in July 2008, when she was taken to the appellant's home to confront him the complainant persisted with the allegation that the appellant had raped her.

C This makes the complainant's evidence convincing. She is obviously not talking about imaginary things. Her story was corroborated on minute details by the appellant's own evidence. Only the sexual act was disputed by the appellant, yet the appellant clearly attempted to mislead the court when he in his defence outline said he arrived from where he was coming from, and entered the bedroom where the complainant was changing her clothes. He D later agreed with the complaint's sequence of events that she arrived from school and found him smoking in the kitchen. She greeted him and then went to change her clothes. The appellant must have agonized over how he could reasonably have followed the complainant to the bedroom when he knew she had gone there to change her clothes. To avoid that difficulty, he E in his defence outline proffered an innocent explanation by saying that he was arriving from where he had gone when he entered the bedroom where he saw the complainant half naked. He must have realized that if he said he followed her to the bedroom conscious of the fact that she had gone there to change her clothes, that would raise the question, why follow her into the bedroom at that time? That question now arises and tilts the scales of F justice against him. His defence crumbled under cross-examination when he conceded that the complainant found him in the kitchen and that he followed her to the bedroom. It is therefore clear that the complainant is a more credible witness than the appellant who attempted to mislead the court on an essential portion of the events which took place on the day in question. The trial magistrate cannot therefore be faulted for believing the G complainant and disbelieving the appellant.

Mr *Machingauta* for the appellant also submitted that the appellant was not given an opportunity to prepare his defence. The case was reported on 2 July 2008. His trial started on 8 July 2008. According to the record of proceedings the appellant did not seek a postponement of the trial. He did not say he H wanted time to prepare. The provisions of ss 188 and 189 of the Criminal

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Procedure and Evidence Act [*Chapter 9:07*]were explained to him before he A gave his defence outline. He thereafter gave what appears to be a reasoned defence outline, though he could not sustain it under cross-examination. It seems to me that the efficiency of the court *a quo* is being used to criticise it, when there is nothing on the record to show that the appellant told the court that he was not ready for trial. Trial courts are not expected to refuse to hear B cases just because the trial is too close to the date of the commission of the offence or the date on which it was reported to the police. On the contrary, courts should be commended for working hard to clear the backlog of cases awaiting trial. That can be achieved by hearing cases without unnecessary delays. I find no merit in this ground of appeal.

The appellant's counsel's criticism of the delay it took before the complainant C was examined by the doctor who found that penetration was effected is accepted as a valid observation which diminishes the probative value of the doctor's findings. It must however be noted that that was not because the complainant had not reported timeously. She had reported the case the next day. Her own grandmother, whom both Fungayi and herself looked up to, to D take up the case decided to suppress it. While the delay dilutes the force of the doctor's report it does not affect the fact that the complainant raised the issue the next day, and the issue she raised is corroborated by the doctor's finding that her vagina was penetrated. The delayed examination does not therefore diminish the complainant's credibility as a witness.

I would in the result find that there is no merit in the appellant's appeal E against conviction.

Appeal against sentence

The appellant was sentenced to 18 years' imprisonment of which four years'imprisonment was suspended for five years on conditions of good behaviour. It was argued on the appellant's behalf that the sentence is too F harsh and induces a sense of shock. Mr *Masamha* supported the sentence in his written submissions but conceded in his oral submissions that it was too severe when it was pointed out that in the case of *S* v *Nyathi* 2003 (1) ZLR 587 (H) an accused who raped his 16-year-old daughter on ten occasions and was sentenced by the trial court to 30 years, had his sentence reduced G to an effective sentence of 18 years. The concession was properly made, as the fact that Nyathi was facing ten counts of rape should distinguish his crime from the accused's.

Section 65(2) of the Criminal Law (Codification and Reform) Act [*Chapter 9*:*23*] provides for the factors to be taken into consideration in assessing the appropriate sentence. It provides as follows: H

2009 (2) ZLR p187

Uchena J

A "(2) For the purpose of determining the sentence to be imposed upon a person convicted of rape, a court shall have regard to the following factors, in addition to any other relevant factors and circumstances -

(*a*) the age of the person raped;

(*b*) the degree of force or violence used in the rape; B

(*c*) the extent of physical and psychological injury inflicted upon the person raped;

(*d*) the number of persons who took part in the rape;

(*e*) the age of the person who committed the rape;

(*f*) whether or not any weapon was used in the commission of the rape;

(*g*) whether the person committing the rape was related to the person raped in C any of the degrees mentioned in subsection (2) of section *seventy-five*;

(*h*) whether the person committing the rape was the parent or guardian of, or in a position of authority over, the person raped;

(*i*) whether the person committing the rape was infected with a sexually transmitted disease at the time of the rape.

The trial magistrate's reasons for sentence are short, but full of fury against D male members of society, and do not cover all aspects to be considered in passing sentence for the contravention of s 65(1) of the Code. She reasoned:

"Accused pleaded not guilty to the charge of rape. He is a paternal grandfather, to the child and was actually staying with the child in a loco parentis relationship. C/S 65 (1) is a very serious and heinous offence if perpetrated on a minor by a E relation. It calls for stiffer sentences that send a message to society that crime does not pay. It is the duty of the courts to curb this monster of child sexual abuse and teach men that they should learn to control themselves. It is difficult these days to trust any man with a female child even if the man is her father. Who is there to protect children if parents turn into rapists and grandparents have lost their role in society of protecting and teaching and guiding children through life? What accused did was unspeakable and should be punished severely. He has F tarnished the image of the family and made him loose respect of his children and grandchildren. His submissions in mitigation are outweighed by the seriousness of the offence and must be given a custodial sentence."

A judicial officer must, in considering sentence, be dispassionate and avoid being propelled by emotions into passing ever lengthier sentences. He or she G must look at all factors which can be considered in passing the appropriate sentence for the offence under consideration. He or she must avoid over-emphasizing some factors, while playing down or ignoring others. He or she must avoid language which displays gender insensitivity or bias against a class of people, as that gives an impression that the offender is over and above being punished for his offence, being punished for belonging to a class H which the judicial officer has displayed bias against. Where the factors to

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2009 (2) ZLR p188

Uchena J

be considered are provided by statute he must consider all such factors. If A he or she does not consider factors which the statute requires him or her to consider, the sentence may be set aside, if its shown that a consideration of the omitted factors would have resulted in the court arriving at a different sentence.

In this case, the magistrate said the offence calls "for stiffer sentences that B send a message to society". While deterrence is a valid consideration, a judicial officer must avoid giving the impression that the sentence is a tag which society must read for it to be deterred. The sentence must suit the offence and the offender. If others have to be deterred, they should be deterred by a deserved sentence, and not one which overemphasises deterrence, and punishes the offender beyond the level his offence deserves. C

The magistrate said she was out to "teach men that they should learn to control themselves". The question is: which men? The magistrate fell into the danger of purporting to be dealing with a class of persons she wants to teach through the convicted person. The magistrate goes further to say:

"It is difficult these days to trust any man with a female child, even if the man is D her father".

Again the magistrate seems to have been more concerned about society in general than the convicted person before the court. Due to that approach, the magistrate forgot to specifically deal with the convicted person's mitigation, and age. These are factors which should in terms of s 65 (2) of the Code be taken into consideration before arriving at the appropriate sentence. This E court is therefore at large as regards sentence.

The convicted person was aged 59 at the time of his conviction and sentence. Courts generally consider advanced age as a mitigating factor, for which the ordinarily deserved sentence is reduced. The age difference between the appellant and the complainant is aggravating. She is a young child while F he is an old man who should have protected her. He took advantage of his being *in loco parentis* over her.

The complainant was aged 12. She is the convicted person's daughter's daughter. The relationship between them is aggravating, as it is within the range prohibited by s 75 (2) of the Code. The convicted person is therefore G guilty of an incestuous rape.

The convicted person did not use a lot of force. He simply overpowered the complainant, causing no further physical harm beside that he inflicted on her private parts. He however caused the complainant mental anguish as demonstrated by her leading a restless life thereafter. She could not continue staying with the appellant's family. She resorted to shedding tears which H

Uchena J

A remained unrewarded until July 2008. She stayed with her mother for a while but she was not afforded an opportunity to speak about her anguish. She moved on to her father's house. He noticed the complainant's distress and encouraged her to speak out whatever was bothering her. She asked to be allowed to go and stay with her uncle, her father's young brother. Her father allowed her and she eventually reported the rape for the second time B after nine and half months. Her close relative, whom she looked up to, raped her. Her grandmother, who got to know of the offence the next day, took no interest. She bottled herself up when she went to stay with her mother. She must have lost confidence with relatives on her mother's side because of the manner some of them had handled her initial report. The complainant C suffered a lot of psychological trauma because of what the accused did to her. He threatened her with death if she reported. When she reported the report was suppressed, sending home a message that her aggressor was being afforded protection at her expense.

After considering the offence of which the appellant was convicted, and the fact that he is self employed and of little means, it becomes apparent D that a fine is out of consideration. The offence is a serious one and calls for imprisonment. However, when the offence is compared to that of *S* v *Nyathi* already referred to above, the sentence imposed by the trial magistrate becomes too severe. A sentence for one count of rape cannot be equal to one for ten counts of rape. The reduction of the sentence must, however, not trivialize the offence. I am convinced that a sentence of 12 years'imprisonment, with four E years suspended on condition of good behaviour, will do justice in this case.

The appellant's appeal against conviction is dismissed, but his appeal against sentence is upheld. The sentence imposed by the magistrate is set aside and is substituted by the following:

> Twelve years'imprisonment, of which four years are suspended for five F years on condition the accused does not during that period commit any offence of a sexual nature for which he will be sentenced to imprisonment without the option of a fine.

KARWI J concurred.

G *Sakala & Co*, appellant's legal practitioners

Attorney General's *Office*, respondent's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/S v TAPINDWA 2009 (2) ZLR 190 (H)

S v TAPINDWA 2009 (2) ZLR 190 (H)

Citation	2009 (2) ZLR 190 (H)
Case No	Judgment No. HB-97-09
Court	High Court, Bulawayo
Judge	Kamocha J & Ndou J
Heard	21 September 2009
Judgment	21 September 2009
Counsel	*S Nkiwane*, for the appellant *T Hove*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – indecent assault – aggravated indecent assault – act involving penetration of the body of another male – placing of penis into buttocks of complainant – an act involving penetration – Criminal Law Code [Chapter 9:23] – s 66(1)(a)*

Headnote

The appellant, a male aged 21 years, pleaded guilty to two counts of D aggravated indecent assault, in contravention of s 66(1)(a) of the Criminal Law Code [*Chapter 9:23*]. The section penalises a male person who commits upon a male person anal sexual intercourse or any other act involving the penetration of any part of the other male person's body. The complainants were boys aged nine and ten years, respectively. The E agreed facts were that the appellant took each of the complainants and made him lie facing downwards, with his trousers at knee level, and that the appellant inserted his penis between the complainant's buttocks. In respect of one complainant, the appellant forced the boy to suck the appellant's penis. It was argued on the appellant's behalf that penetration F had not been proved.

Held, that in each case the appellant inserted his penis into the complainant's buttocks, thereby penetrating each complainant's body. In the first count he also penetrated the complainant's mouth. The very fact that he inserted his penis into the complainant's buttocks sufficed to constitute the offence of aggravated indecent assault. It was immaterial whether or not he went G through sexual motions and completed his purpose. It was also irrelevant whether or not penetration was vertical or horizontal. Similarly, it was also immaterial whether or not he went through sexual motions and completed his purpose when he penetrated the complainant's mouth. H

Kamocha J

Case referred to A

R v S 1956 (1) SA 649 (T)

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 66(1)(a)

Case information

B *S Nkiwane*, for the appellant

T Hove, for the respondent

Judgment

KAMOCHA J: The appellant, who was aged 21 years, was charged with two counts of aggravated indecent assault as defined in s 66(1)(a)(ii) of C the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which he allegedly committed on 5 February 2009.

The allegations on count one were that on 5 February 2009 the appellant with indecent intent inserted his penis into the mouth and between the buttocks of the complainant – a boy aged 10 years – without his consent or realizing D that there was a risk or possibility that he might not have consented to it.

Secondly, on the same day at the same place he, with indecent intent, inserted his penis between the buttocks of another boy aged nine years, knowing that he had not consented to it or realizing that there was a real risk or possibility that he might not have consented to it.

E The outline of the State case was as follows:

> "The complainants and the accused person are not related but they live in the same neighbourhood.
>
> On 5 February 2009 at around 1000 hours the two complainants were playing in the yard of Lotshe School hitting birds using catapults.
>
> The accused person Brian arrived, he was carrying canned drinks and offered F to give them if they accompanied him to Amakhosi. They accompanied him and on their way back he led them to a bushy area where he told them that he was going to have sexual intercourse with them and threatened them with death if they told anybody.
>
> He took the first complainant 'M' and made him lie facing downwards with his trousers at knee level and he inserted his penis between his buttocks, after that G he forced him to suck his penis. When he refused he hit him until the young boy sucked it.
>
> He went to 'X, and told him to lie facing downwards with his trousers at knee level. He then inserted his penis in between his buttocks. He hit the two boys if they looked at each other. The accused had no right to act in the manner he did." (Only the initials of the boys are quoted as they are juveniles.)

H The appellant tendered pleas of guilty to both counts. He agreed with the

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above State outline *in toto.* He also admitted the essential elements of the A offence of aggravated indecent assault in respect of both counts and the trial court proceeded to find him guilty as pleaded in respect of both counts.

He was sentenced to 12 years' imprisonment in respect of the first count and 10 years' imprisonment on the second. Of the total, five years were suspended for a period of five years on the customary conditions of future B good behavior.

The accused then first filed this appeal against sentence only on the following grounds:

> "The learned trial magistrate misdirected himself (*sic*) by imposing custodial sentence. C
>
> The sentence imposed by the learned trial magistrate in the court *a quo* is wholly inappropriate in that:
>
> The learned trial magistrate just imposed a custodial sentence without giving due weight to the mitigating factors;
>
> The learned trial magistrate erred in not considering the mitigating factors namely that the accused pleaded guilty to the offence and that he is a first offender; and D
>
> The court *a quo* erred in not considering the personal circumstances of the accused, in that he has a mental disability."

A look at the trial magistrate's reasons for sentence leaves one with the inescapable conclusion that the legal practitioner who drafted the grounds of appeal merely did so without applying his mind to

what he was doing. E It was, therefore, not surprising that the grounds of appeal were abandoned by the advocate who was instructed to argue the appeal.

Mr Nkiwane sought the court's indulgence to exercise its review powers and grant an application for the late filing of an application for review wherein the relief sought was against both conviction and sentence on the grounds that:- F

"Ad Conviction

1. The court *a quo* erred in law in convicting the appellant of contravening s 66 of the Criminal Law (Codification and Reform) Act (hereinafter referred to as 'the Act'), in that the essential elements of the offences were neither alleged by the State nor admitted by him, more particularly, that penetration of the complainants body was neither alleged nor proved in either counts, G more so that the appellant was not legally represented at the summary trial.
2. The facts established by the State in the outline of the State case and admitted by the appellant only support verdicts of contravening s 67 of the Act, that is to say, indecent assault *simpliciter*, the penalty for which is set out in that appropriate section which is a permissible verdict under s 275(a) of the Act as read with the Fourth Schedule thereto. H

A Ad Sentence

1. The overall sentence imposed is so manifestly excessive so as to induce a sense of shock.
2. A balance up of the aggravating and mitigating circumstances of his offences and of the accused militate against the lengthy term of imprisonment imposed. B
3. Additionally, or in the further alternative, a globular and shorter term of imprisonment is called for in a case of the nature in issue and a failure to consider it constitutes a gross misdirection on the part of the trial court below."

The State had been served in advance with the purported application to C amend the grounds of appeal and had no objection to the application being granted for the sake of finalization of the matter. In the result, counsel for the State prepared his heads of argument on the basis of the amended grounds of appeal. This court eventually granted the application on the basis that it was an application for the review and that court would exercise its review powers to deal with the matter.

D It was argued on behalf of the appellant that his conviction under s 66 of the Act was irregular, in that penetration of each complainant's body *per anum* was neither alleged nor admitted. It was further submitted that the State did not even alleged, let alone establish, that the appellant went through sexual motions. The State had also allegedly failed to prove that the appellant had E completed his purpose by emitting semen into either of the complainants' anuses or into the mouth of the first complainant. Finally, the appellant complained that it had not been established whether or not the insertion into the buttocks was vertical as it could well have been horizontal.

It was therefore contended that the facts in the State outline quoted *supra,* which the appellant agreed with without demur, did not support a conviction F under s 66 of the Act but do support a conviction under s 67 of the Act, which is a competent verdict.

Aggravated indecent assault relating to male persons is defined in s 66(1)(a)(ii) as follows:

"Any person who being a male person … commits upon a male person anal sexual G intercourse or *any other act involving the penetration of any part of the other male person's body* or of his own body … with indecent intent and knowing that the other person has not consented to it or realising that there is a real risk or possibility that the other person may not have consented to it, shall be guilty of aggravated indecent assault and *liable to the same penalty as is provided for rape*" (emphasis added).

H The record of proceedings shows that the appellant accepted the State outline

in which he is said to have led the two complainants to a bushy area where A he announced to them that he intended to have sexual intercourse with them. That seems to have been the whole reason why he had taken them to a bushy area. It must have been apparent to him that the two boys were unwilling to indulge in what he proposed, hence his threats of death to them if they reported the matter to anybody. The need to utter threats of death would B not have arisen had they been willing

participants. It therefore admits of no doubt that the appellant's intention to have sexual intercourse with the two complainants was clearly established beyond any doubt.

With that intention, the appellant proceeded to insert his penis between the buttocks of each complainant. He did not end there but went on to force the C first complainant to suck his penis.

As is apparent from the provisions of s 66(1)(a)(ii) of the Act, the offence of aggravated indecent assault is not confined to non-consensual anal sexual intercourse with a male victim as suggested by the appellant. The provisions also cater for "any other act involving penetration of any part of the other male person's body ..." D

In each case, the appellant inserted his penis into the complainant's buttocks – thereby penetrating each complainant's body. In the first count, he also penetrated the complainant's mouth. The very fact that he inserted his penis into the complainant's buttocks suffices to constitute the offence of aggravated indecent assault. It is immaterial whether or not he went through sexual motions and completed his purpose. It is also irrelevant whether or E not penetration was vertical or horizontal. Similarly, it is also immaterial whether or not he went through sexual motions and completed his purpose when he penetrated the complainant's mouth.

There was no reason whatsoever why the appellant sought to limit the offence of aggravated indecent assault to non-consensual anal sexual intercourse F when s 66(1)(a)(ii) of the Act caters for any other act involving penetration of any part of body of the male victim. Quite clearly, the appeal against conviction is devoid of any merit and must accordingly fail.

Turning to the appeal against sentence, counsel for the appellant had no meaningful submissions to make, rightly so, in my view. What the appellant G did was despicable and depraved. The law provides that persons convicted of such conduct are liable to imprisonment for life or any shorter period. See s 66(1)(a)(ii), as read with s 65(1).

Depraved and despicable practices must be condemned in the strongest possible terms. Miscreants of such practices should expect nothing other H than periods of incarceration which may well be lengthy.

2009 (2) ZLR p195

Kamocha J

A That kind of conduct has been condemned since time immemorial. For instance, an appellate court in *R* v *S* 1956 (1) 649 (T), when refusing to interfere with the sentence imposed by the magistrate, held that: "persons who have been guilty of depraved practices should not escape gaol sentences. The court should not encourage the belief that depraved conduct can be embarked upon with no consequences other than that of psychiatric treatment."

B The court *a quo*'s approach to sentence is unassailable. It exercised its discretion properly. A total effective sentence of 17 years' imprisonment in the circumstances of this case cannot be described as shocking.

It must be mentioned that the appellant, through his legal representative, appears to be insensitive to the boys' ordeal, when he stated that he was a C young man of 21 years "while the complainants are small boys of 9 and 10 years, not babies. The trauma on the victims is a matter of conjecture." The trauma cannot be a matter of conjecture when the appellant threatened the complainants with death and then proceeded to perform hideous acts on them. Children of such a tender age are unlikely to be familiar with such depraved practices.

D The foregoing were the reasons why after hearing the appellant counsel's submissions we felt that there was no need to hear the respondent's counsel and dismissed the appeal in its entirety and indicated that our reason would follow in due course. These are they.

E NDOU J concurred.

Dube-Banda, Nzarayapenga & Partners, appellant's legal practitioners

Criminal Division of the Attorney-General's Office, respondent's legal F practitioners

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Source:
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KATSANDE v RUMANI REAL ESTATE (PVT) LTD & ANOR 2009 (2) ZLR 196 (H)

Citation	2009 (2) ZLR 196 (H)
Case No	Judgment No. HH-96-09
Court	High Court, Harare
Judge	Makarau JP
Heard	3 September 2009
Judgment	23 September 2009
Counsel	*B Philemon*, for the applicant *C Gumiro*, for the first respondent *T L Machinga,* for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Agency – *agent – estate agent – status of – not an agent strictu sensu – no authority generally given to bind the principal in a sale agreement*

Headnote

The second respondent, which was an estate agent, advertised certain stands D for sale on behalf of the first respondent, the seller. The applicant responded to the advertisement and identified a stand which he wanted to purchase. He was advised of the seller's requirements and stipulations. He met them all, including depositing the asking purchase price into the seller's bank account, the details of which had been given to him by the second respondent. He then paid the second respondent's commission E and duly signed an agreement of sale which had been prepared by the second respondent. The agreement of sale was sent to the seller, the first respondent, who refused to sign it because the stand had already been sold. Aggrieved at the stance taken by the first respondent, the applicant filed an application seeking an order compelling the first respondent to F transfer the stand in question to him or, in the alternative, the transfer to him of property of equal value.

Held, that while it is legally correct that an estate agent and the seller of the property are in an agent-principal relationship, the Roman-Dutch law of agency has since adopted the position that obtained in English law, which places the estate agent in a position *sui generis*. An estate G agent is not an agent *strictu sensu,* clothed with authority to transact fully on behalf of his principal. An estate agent is merely mandated to find a prospective purchaser of the seller's property. After accepting the mandate, he is under no obligation to find the purchaser and no action will lie against him for failing to find a purchaser or for finding a purchaser who will not eventually go through with the sale. After H

Makarau JP

A finding a prospective purchaser, he is not clothed with authority to bind his principal in the sale agreement. The appointment of an estate agent to find a purchaser for immovable property in return for a commission, without more, places the agent under no contractual obligations. The contract is merely a promise, binding upon the principal, to pay a sum of money upon the happening of a specified event. While the estate B agent assumes no obligations under his contract with the seller of the property, equally, in this relationship *sui generis*, the seller is not obliged to accept any of the buyers that the estate agent may find. The seller is simply bound to pay the agent's commission where the agent does find a prospective buyer.

C *Held,* further, that an estate agent may be authorised to conclude an agreement of sale on behalf of the seller, but such an authorization is not to be lightly inferred from vague and ambiguous language. The fact that an estate agent is authorised to accept payments for his commission before forwarding a draft agreement of sale to the seller cannot be construed as a grant of authority by the seller to the estate agent to conclude the D sale agreement.

Held, further, that the clearest language that a seller can use to show that the estate agent has authority to conclude the agreement of sale is specifically to authorize the agent, in the seller's mandate, to sign the agreement of sale on behalf of the seller. Where the seller retains or reserves the right to sign the agreement of sale, that is the clearest language that the final E word rests with the seller and the agent is but an estate agent.

Cases cited

Bird v Summerville 1961 (3) SA 194 (A)

Frazer v Ruwisi 1990 (2) ZLR 99 (S)

F *Ronstan Invstms (Pty) Ltd & Anor v Littlewood* 2001 (3) SA 555 (SCA)

Wragg v Lovett [1948] 2 All ER 968 (CA)

Case information

B Philemon, for the applicant

C Gumiro, for the first respondent

G *T L Machinga,* for the second respondent

Judgment

MAKARAU JP: The facts of this application are largely common cause. Where there is a dispute, I do regard such as lacking sufficient materiality to deter me from determining this matter on the legal issue that I perceive to be arising. I summarize the facts as follows.

H In or about October 2008 the second respondent, as estate agent, advertised

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certain stands for sale on behalf of the first respondent, the seller. The applicant A , as purchaser, responded to the advertisement and identified one stand for purchase. He was advised as to the seller's requirements and stipulations. He met all these, including depositing the asked purchase price into the seller's bank account, the details of which he was given by the second respondent. He paid the second respondent's commission when he was asked to do B so. He duly signed an agreement of sale that was prepared by the second respondent. The agreement of sale was sent to the seller which declined to sign, it alleging that at the time it received the agreement of sale and proof of payment of the asking price, the property in question had already been sold to another purchaser. Aggrieved by the stance adopted by the first respondent, the applicant filed this application, seeking an order compelling C the first respondent to transfer the property sold to him or, in the alternative, to transfer to him an alternative property of equal value.

In my view, the issue that falls for determination in this application is simple. It is whether, in the circumstances outlined above, the transaction between the applicant as purchaser and the second respondent as estate agent brought D into being a valid and enforceable agreement of sale that

would bind the seller, notwithstanding that the seller did not append its signature to the document embodying the terms of the agreement. The applicant contends that the seller is so bound and that there is a basis upon which I can compel the first respondent, as seller, to transfer the land sold to him or, alternatively, I can compel the seller to transfer to him land of equal value. E

Before I proceed further, I wish to comment on the alternative relief that the applicant is seeking in this application. He contends that if this court cannot compel specific performance on account of the property in issue having been transferred to a third party, the first respondent should be compelled to transfer to him a property of equal value. The applicant's case is based F on contract. He alleges that he has a contract with the first respondent. He would want that contract enforced, hence the order for specific performance, which in my view is properly sought in the circumstances of the claim. I am not convinced that the alternative order sought in the matter is competent. It is not a remedy that is ordinarily available as an alternative to specific performance. From the wording of the alternative relief, it would appear G to me that the applicant is essentially seeking damages that would have placed him in the same position he would have been had the contract been performed. However, in view of the conclusion that I reach in this matter and the fact that the alternative relief was not debated to any great length during the hearing of the application, I make the observations out of idle curiosity and only in passing. H

A From the manner in which the applicant framed his application and heads of argument, and indeed from submissions made in similar matters that have been placed before me at trial and at pre-trial conferences, it would appear that the relationship of an estate agent and the purchasers that he or she identifies on behalf of the seller, bears repeating. In this regard, without seeking in any way to down play the personal anguish that the applicant may B have felt when the first respondent refused to sign the agreement of sale, I would suggest that the facts of this matter are common place and represent a number of transactions that are unfolding on the market scene on a daily basis. Prospective purchasers of land throng the offices of estate agents in search of properties and deal exclusively with estate agents who advise C them of the terms upon which the seller will sell his or her property. Upon satisfying these, the prospective purchasers genuinely believe they have agreements of sale even before the seller has agreed to the sale.

I believe that the relationship between the estate agent and the seller, whilst not arising in this application, is a good starting point. While it is legally correct that an estate agent and the seller of the property are in an agent- D principal relationship, the Roman-Dutch law of agency has since adopted the position that obtained in English law that places the estate agent in a position *sui generis*.

Prof Ellison Khan, in an article in (1980) 97 *SALJ* 342, describes the estate agent as a "legal oddity". This is easy to understand as, generally speaking, E an estate agent is not an agent *strictu sensu,* clothed with authority to transact fully on behalf of his principal. An estate agent is merely mandated to find a prospective purchaser of the seller's property. After accepting the mandate, he or she is under no obligation to find the purchaser and no action will lie against him or her for failing to find a purchaser or for finding a purchaser who will not eventually go through with the sale. After finding a prospective F purchaser, he or she is not clothed with authority to bind his or her principal in the sale agreement. Hence his or her oddity as an agent *strictu sensu* would not be thus restricted.

In *Bird* v *Summerville* 1961 (3) SA 194 (A) at 202C-E, a case referred to in the above cited article, Hoexter ACJ explains the unique position that the G estate agent enjoys *vis-à-vis* the seller of the property in the following terms, which I find quite instructive:

> "The estate agents on their part did not undertake anything at all, if they wanted to earn a commission, they would have to find a purchaser; but they could not be compelled to earn their commission, nor, if they found a purchaser or purchasers, were they bound to introduce him or them to the appellant. They clearly had no H authority to enter into a contract of sale on behalf of the appellant, nor could they

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> foist on him a buyer without his consent. They could only produce a prospective A buyer but they could not force the appellant to sell to him or sell at all; indeed the right to refuse to sell to any prospective buyer or to choose one out of several was always that of the appellant and the appellant only."

In my view, the relationship between the estate agent and the seller of the property is aptly and concisely stated by Nugent AJA in the opening paragraph B of his judgment in *Ronstan Investments (Pty) Ltd & Anor* v *Littlewood* 2001 (3) SA 555 (SCA) as follows:

> "[1] The appointment of an estate agent to find a purchaser for immovable property in return for a commission, without more, places the agent under no contractual obligations. The contract is merely a promise, binding upon the principal, to pay a sum of money upon the happening of a specified event."

While the estate agent assumes no obligations under his contract with the C seller of the property, equally, in this relationship *sui generis*, the seller is not obliged to accept any of the buyers that the estate agent my find. The seller is simply bound to pay the agent's commission where the agent does find a prospective buyer. (See *Bird* v *Summerville supra*).

It was argued by Mr *Philemon* that the second respondent had a mandate D from the first respondent to conclude a sale with the applicant and that it did fulfill that mandate, thereby birthing a valid and enforceable agreement between the applicant and the first respondent. In support of this submission, reliance was placed on the general principle of agency, found in Wille's *Principles of South African Law* 7 ed p 466, to the effect that a principal is E bound by the acts of his duly authorised agent.

As discussed above, this is not the position at law. It is, however, accepted that an estate agent may be authorised to conclude an agreement of sale on behalf of the seller. As stated by Lord Greene MR in *Wragg* v *Lovett* [1948] 2 All ER 968 (CA), although on the facts of the individual case the seller may authorize the estate agent to conclude the contract, such an authorization is F not to be lightly inferred from vague and ambiguous language.

It is in this vein that the second respondent, in an attempt to save the applicant's case, sought to argue that *in casu,* the first respondent authorised the second respondent to conclude the agreement of sale. In support of this submission, Mr *Machinga* relied on the fact that the estate agent was authorized to accept G payments for his commission before forwarding a draft agreement of sale to the first respondent, "for administrative purposes."

In *Frazer* v *Ruwisi* 1990 (2) ZLR 99 (S), a similar point was made and discussed, relating to the payment and acceptance of a deposit for the property being sold. It was held in that case that the mere acceptance of the deposit of the purchase price does not take the estate agent out of the ordinary H

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A relationship of estate agent and principal. *In casu,* however, the second respondent did not receive the purchase price. It directed that the purchase price be deposited directly into the seller's account. That was done, but the fact that the purchase price had been paid for this particular property and by the applicant was unbeknown to the seller. The payment of the purchase price into the seller's account was therefore neither here nor there, as it had B no legal impact. It could not show that the second respondent had authority to conclude the sale as the second respondent had no authority even to receive the purchase price or to sign the agreement.

It is common cause that the second respondent asked for, and received, its commission from the applicant. It is not clear from the papers why it was C the applicant who had to pay the agent's commission. I am assuming, for the purposes of this judgment, that the second respondent merely asked the applicant to deduct the amount of the commission from the purchase price that was deposited into the seller's account. It has exercised my mind what to make of this transaction between the applicant and the second respondent. What it is clearly not, in my view, is a grant of authority by the first respondent D as seller to the second respondent as agent to conclude the sale agreement. I cannot see how the payment of the commission can be taken as clear and unambiguous language coming from the seller that the second respondent as agent can conclude the agreement of sale that Lord Greene MR had in mind in the *Wragg* case *supra*.

E In my view, the clearest language that a seller can use to show that the estate agent has authority to conclude the agreement of sale is specifically to authorize the agent, with the seller's mandate, to sign the agreement of sale on behalf of the seller. Where the seller retains or reserves the right to sign the agreement of sale, in my view, that is the clearest language that the final word rests with the seller and the agent is but a mere estate agent. It F appears to me that Mr *Gumiro* had an admirably easy task in this matter. As correctly submitted by him, there was no contract between

the applicant and the first respondent as the first respondent was under no obligations to conclude a contract with the applicant, even if the applicant was prepared to meet, and had actually met, all the conditions that the estate agent had told him the seller was looking for.

G *In casu,* I find that the applicant and the second respondent were in an ordinary estate agent and seller relationship. The estate agent found a prospective buyer for the property who was not only happy to meet the conditions advised him by the agent but went further to perform all such conditions, with the urging of the estate agent. In reality, the seller may well have accepted the applicant H as a purchaser of the property had it been advised of the applicant's wish

Makarau JP

to purchase the property in good time. The seller was, however, under no A legal obligation to conclude the agreement of sale with the applicant even if it had been advised of his wish in good time.

I have searched and failed to find a basis upon which I can vary the law of estate agents and principals in this case. Not enough evidence has been placed before me to justify such a decision. I cannot find that the seller had B put, in clear and unambiguous language to the estate agent and to the world at large, that the estate agent had authority to conclude an agreement of sale in respect of the property in question.

On the basis of the foregoing, I come to the conclusion that the second respondent in this matter was acting as an ordinary estate agent and that the applicant has failed to show clear language on the part of the first respondent C granting the second respondent authority to conclude a binding agreement between it and the first respondent.

In the result, I make the following order:

The application is dismissed.

The applicant is to bear the costs of the application. D

V S Nyangulu & Associates, applicant's legal practitioners.

Mhiribidi, Ngarava & Moyo, first respondent's legal practitioners.

Machinga & Partners, second respondent's legal practitioners, E

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Source:
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NKALA v SEBATA & ANOR 2009 (2) ZLR 203 (H)

Citation	2009 (2) ZLR 203 (H)
Case No	Judgment No. HB-96-09
Court	High Court, Bulawayo
Judge	Ndou J
Heard	17 September 2009
Judgment	24 September 2009

Counsel *R Ndlovu,* for the plaintiff
No appearance for the defendants

Case Type Unopposed civil application

Annotations Link to case annotations

Flynote

Damages – *assessment of – delictual – actio injuriarum – defamation – need to assuage injured feelings of plaintiff and to compensate him reasonably for the injury – villagers at general meeting falsely accusing plaintiff of stock theft – motive to influence chief to evict plaintiff from his home* D *– appropriate award*

Headnote

In cases of defamation, the quantum ultimately determined by the court represents what is designed to be a fair and appropriate sum which, in contemporary thinking, will help to assuage the plaintiff's injured feeling E and will compensate him reasonably for the injury (*dicta per* Reynolds J in *Zvobgo* v *Kingstons Ltd* 1986 (2) ZLR 310 (H) followed).

The defendants had defamed the plaintiff at a rural public meeting before the local chief and attended by most of the villagers. The defendants had falsely and maliciously accused him of stock theft and other crimes of a similar nature, their principal motive being to evict him from his F home. As a result, the plaintiff brought an action against them for defamation and claimed US $7 000 in damages. The defendants did not oppose the action and the only question which concerned the court was an appropriate award of damages.

Held, that here, in a rural setting, the defendants participated in an extremely G grave attack upon the applicant. They wanted to cause the applicant to lose his homestead. They wanted to maliciously influence the chief to remove the applicant from the village. Bearing in mind these factors, and having regard to the true value of awards in recent cases of defamation, H an award of US $2 000 would meet the justice of the case.

2009 (2) ZLR p204

Ndou J

Cases cited A

Guriranai v Kwenda & Anor HH-194-91

Tekere v Zimbabwe Newspapers (1980) Ltd & Anor 1986 (1) ZLR 275 (H)

Zvobgo v Kingstons Ltd 1986 (2) ZLR 310 (H)

Case information

R Ndlovu, for the plaintiff B

No appearance for the defendants

Judgment

NDOU J: This is an application for default judgment. The plaintiff issued out summons against the defendants jointly and severally claiming *inter alia* a total of US$7 000 damages for defamation. This *quantum* of damages is the subject of this judgment. The other prayers are in order. The defendants were C properly served with the summons on 22 July 2009 and chose not to defend the action. They are, therefore, in willful default. The background facts are the following. Sometime in July 2009, Chief Mathe presided over a meeting of his subjects at Mashaba. This was a public meeting open to all villagers and indeed most of them were in attendance. The first defendant, who is a D senior kraalhead in Mashaba, was present. So was the second defendant, a senior villager. The first defendant addressed the meeting and made utterances to the effect that the applicant is a

stock thief who has stolen cattle from fellow villagers. He further uttered words to the effect that the applicant recruited other villagers to participate in this nefarious practice. He stated that his (applicant's) herdboy and young brother had stolen cattle and sold E them to the applicant. The second defendant also addressed the meeting and made utterances that were corroborative of the above-mentioned defamatory words attributed to the first defendant. He further said the other villagers in attendance were afraid to unmask the applicant as a stock thief because they thought he would steal their cattle (in revenge). It is the applicant's F case that these utterances were false and actuated by malice. He feels that the utterances were defamatory in that they portrayed him a criminal and stock thief in the eyes of the villagers gathered at the meeting. The utterances were actuated by malice in that the defendants' principal intention was to persuade Chief Mathe to order his eviction from his homestead in Mashaba. I am in agreement that, as a result of such utterances and at such a meeting, G the applicant's dignity, self-esteem and reputation was maligned and lowered in the eyes of the villagers present. He is entitled to defamation damages. The issue is whether he has justified or is entitled to US$7 000 for this kind of defamation. This is the issue before me. In *Guriramai* v *Kwenda & Anor* HH-194-91, Smith J correctly stated the approach is determining awards in the following terms: H

Ndou J

> A "Reference to comparable cases though never decisive is instructive but requires a study of the full judgment … The theoretical desirability of achieving some measure of uniformity of awards in similar cases, must not fetter the trial court's discretion. Some awards will have to be increased significantly over awards in earlier comparable cases because of the recent marked diminution of the purchasing power of the Zimbabwe dollar."

B It was pointed out by Sandura JP (as he then was) in *Tekere* v *Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H) at 289D-F:

> "The assessment of damages in a case such as this is not an easy exercise because it is difficult to recompense the plaintiff for the insult perpetrated against him and the pain which he suffered as a result of the false allegations levelled against him."

C In *Zvobgo* v *Kingstons Ltd* 1986 (2) ZLR 310 (H) at 329A-E, Reynolds J observed:

> "But, it must also be remembered that, as Greenberg J commented in *Innes* v *Visser* 1936 WLD 44:
>
> > 'The figure of justice carries a pair of scales, not a cornucopia'.
>
> The quantum ultimately determined by the court represents what is designed D to be a fair and appropriate sum which, in contemporary thinking, will help to assuage the plaintiff's injured feelings, and will compensate him reasonably for the injury ... It is not always a simple matter to decide what is proportionate or adequate. The difficulty of assessing an appropriate figure in cases of this sort was adverted to by Greenberg J in *Innes* v *Visser, supra* at 45 … Again, and in the words of Lord Hailsham in *Cassel & Co Ltd* v *Broome* [1972] AC E 1027 at 1027G:
>
> > 'the whole process of assessing damages were they are "at large" is essentially a matter of impression and not addition.'
>
> (See too, the pertinent remarks of Williams AJ in *Buthelezi* v *Poorter & Ors* 1975 (4) SA 608 at 618.)"

F In a rural setting the defendants participated in an extremely grave attack upon the applicant. They wanted to cause the applicant to lose his homestead. They wanted to maliciously influence the chief to remove the applicant from the village. Bearing in mind the various factors that I have adverted to above and the true value of the awards in the cases referred to above, I am of the view that an award of US$2 000 will meet the justice of the present case.

G Accordingly, it is ordered that default judgment be and is hereby granted to the plaintiff in the following terms:

1. The defendants, jointly and severally, the one paying the other to be absolved, shall pay the plaintiff the sum of US$2 000 (two thousand United States dollars) being damages for defamation. H
2. The defendants, jointly and severally, shall deliver to the plaintiff eight

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Ndou J

head of cattle, being replacement of the plaintiff's cattle unlawfully A seized by the defendants.

3. The defendants, jointly and severally, the one paying the other to be absolved, shall pay to the plaintiff the sum of ZAR11 000 (eleven thousand South African rands), one goat and 20 kg mealie-meal, property stolen from the plaintiff's homestead. B
4. The defendants, jointly and severally the one paying the other to be absolved, shall pay costs of this suit on the ordinary scale.

R Ndlovu & Co plaintiff's legal practitioners C

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/NCUBE v GUNI 2009 (2) ZLR 207 (H)

NCUBE v GUNI 2009 (2) ZLR 207 (H)

Citation	2009 (2) ZLR 207 (H)
Case No	Judgment No. HH-121-09
Court	High Court, Harare
Judge	Mavangira J
Heard	21 September 2009
Judgment	25 September 2009
Counsel	Ms *P Chakasikwa,* for the applicant *R T Maganga,* for the respondent
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Family law – *child – custody – award of – to third party – limited grounds on which custody may be awarded to a third party where a natural parent is available*

Headnote

D The applicant and respondent had been divorced from one another. Custody of the children of the marriage was awarded to the applicant. She relocated to Australia and left the children with her mother in Bulawayo. At the beginning of the school holidays, the respondent collected the children from the applicant's mother's residence. This was in pursuance of the E terms of the divorce order in terms of which he was entitled to such access. Just before the end of the school holiday he telephoned the applicant and advised her that he would not be taking the children back to her mother's residence at the start of the new term. The applicant, pending the determination of an application to be made for the grant of guardianship to her, sought an order that the respondent should return F the two minor children to their grandmother's residence in Bulawayo. It was submitted that as the custodian parent she had the right to choose and establish the

residence of the minor children, including the right to ask a third party to exercise her rights on her behalf.

Held, that a court will only deprive a natural parent of custody and award it to a third party upon special grounds. These grounds include detrimental or G undesirable effects or influences upon the physical, moral, psychological or educational welfare of a child. The test is not whether a third party can provide better materially or possesses more desirable attributes, but whether the parent or parents should be deprived of custody for any reason, including harm or danger to the child's welfare. The interim H relief sought by the applicant would, if granted, be tantamount to placing

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Mavangira J

the custody of the children with their grandmother in preference to their A father who was willing and able to take care of the children and in fact was taking care of them. Both parties had instituted proceedings and the determination of those matters would resolve the real issue of contention between the parties and also put an end to the continual disruption of the minor children's lives that had been happening. B

Cases cited

Makumbe v Chikwenhere 2003 (1) ZLR 372 (H)

Simleit v Cunliffe 1940 TPD 67

Case information

Ms *P Chakasikwa,* for the applicant C

R T Maganga, for the respondent

Judgment

MAVANGIRA J: The parties in this matter were on 22 November 2007 divorced by this court. The respondent in the instant matter was the plaintiff in the divorce action. In terms of the order of divorce, custody of the two D minor children of the marriage was awarded to the respondent who is the applicant in the instant matter.

The application before this court is for interim relief that the respondent returns the two minor children to their grandmother's residence in Bulawayo forthwith. The events leading to the filing of this application will emerge E from the following account.

The applicant stated in her founding affidavit that due to circumstances beyond her control she has since December 2008 relocated to Australia where she is currently based, to enable her to cater for the children. She contended that the respondent had abandoned the minor children and that she therefore left the minor children in the *de facto* custody of her mother who F has been taking very good care of them since December 2008. She stated that the respondent did not object to this arrangement when she consulted him about it. Because of the respondent's choice to play no role in the lives of the children, she has filed before this court an application in which she seeks an order awarding her guardianship of the children. The application, G HC 2665/09, is still pending.

The applicant's intention is to eventually take the children to Australia where she can properly look after them and provide for them. She stated that at the commencement of the August school holidays, the respondent collected the children from the applicant's mother's residence in Bulawayo. This was in pursuance of the terms of the divorce order in terms of which he is entitled H

Mavangira J

A to such access. Just before the end of the school holiday the respondent then telephoned the applicant and advised her that he would not be taking the children back to her mother's residence at the commencement of the new term. He did not give reasons and refused to discuss the matter further.

The applicant further stated that her legal practitioners then wrote to the B respondent's legal practitioners demanding that the respondent deliver the children back to their grandmother's residence. No response was received to the letter. The applicant stated that she does not know the children's current whereabouts or whether they are attending school. She has not been able to get through to the mobile number which she gave to the elder child. She suspects that the respondent has barred the children from talking to her. She C stated that this is not the first time that the respondent has conducted himself in this manner as sometime in 2006 he, without notifying her, removed the children from the schools that they were attending and enrolled them at another school where they did not do well. She had to come to their rescue and moved them to a better school in Bulawayo.

D The applicant contended that the respondent's conduct is contemptuous of this court's divorce order which awarded her custody of the minor children. Furthermore, she contended that he has also defied the said order by not paying any maintenance for her or the children as ordered by this court. She contended that if he genuinely believes that it is in the children's best interests that he be awarded their custody, his remedy is to approach the E court for an order of variation of custody.

It was submitted on behalf of the applicant that, as the custodian parent, she has the right to choose and establish the residence of the minor children including the right to ask a third party to exercise her rights on her behalf, as she did to the minor children's grandmother. The applicant's legal F practitioner cited the following as authorities for her submission: *Simleit* v *Cunliffe* 1940 TPD 67, *Family Law in Zimbabwe* by Professor W Ncube and *Makumbe* v *Chikwenhere* 2003 (1) ZLR 372 (H) at 367C-E. She contended that it is imperative that the children return to their schools quickly so that no valuable time is lost.

G The applicant thus sought a provisional order in the following terms (as amended):

"TERMS OF THE INTERIM RELIEF GRANTED

Pending final determination of this application on the return day,

1. Respondent be and is hereby ordered or directed to return the minor children Nigel and Hazel Rounell Guni to their grandmother's residence in Bulawayo H forthwith.

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2. In the event that respondent fails to comply with paragraph (1) above, A any attested member of the Zimbabwe Republic Police be and is hereby authorised to ensure compliance with this order.

TERMS OF THE FINAL RELIEF SOUGHT

1. Pending final determination of the application for guardianship filed by applicant in HC2665/09 or any other application that either party may file respondent be and is hereby restrained and interdicted from interfering with B the applicant' s custodial rights in respect of the children and not to disrupt or interfere in any way with the children's schooling or living arrangements.
2. The respondent shall pay the costs of this application."

In his opposing affidavit the respondent denied that he was consulted when the children were left at their grandmother's residence. He stated that the C applicant had unilaterally removed the children from boarding school without consultation, when she moved to Bulawayo. He only became aware of the arrangement after the applicant had gone to Australia. When he took the minor children for the holidays, they refused to go back to their grandmother and he then enrolled them in schools in Harare where he met the financial requirements by himself. D

The respondent stated that he has since filed an application for variation of custody. He is living with the children at a house in Alexandra Park in Harare. He also stated that the children do talk to the applicant and that the allegation that she does not know their current whereabouts is untrue. He contended that, as the applicant is in Australia, he cannot be said to be in E contempt of court. That would only be the case if he had refused to hand the children over to her while in Zimbabwe. The children refused to go back to Bulawayo to their grandmother. Returning the children to Bulawayo would be to give them into the custody of their grandmother, yet the order of the court awarded custody to the applicant and not to the applicant's mother. He, as the children's father, has secured places in school for them and thus F they are not likely to suffer any harm or be prejudiced. He thus prayed for the dismissal of the application with costs.

The respondent stated that he has opposed the applicant's application for guardianship and has in turn filed an application for variation of the custody order in his favour. He denied the applicant's

allegation that he has not been G paying maintenance and said that his half share of the rentals received from the parties' jointly owned immovable property have been and are still being deposited into the applicant's account.

In reply to the respondent's legal practitioner's submissions the applicant's legal practitioner submitted that she had cited *Simleit* v *Cunliffe* merely for the purpose of showing what the principle of custody entails. She submitted H

Mavangira J

A that the *dicta* in *Makumbe* v *Chikwenhere* were however relevant and applicable in this matter. She particularly referred the court to the passages at 376C-E which read:

> "The custodian mother of the children is working outside the country. She has handed over the children to the grandparents i.e. the respondent. This conduct of the mother has drawn brash criticism from the applicant. Should the mother be B deprived of her custody of the children simply because she went to the United Kingdom leaving the children in the care of third party? I do not think that this is, *per se,* a sufficient justification to deprive the custodian parent of her or his custodial rights. I am justified by what Goldin AJA stated in *W* v *W* case *supra* at 248B:
>
> > 'I do not agree that her conduct in handing over the child to his grandmother C under the strained economic and emotional situation in which she found herself has rendered her an unsuitable person so as to justify depriving her of the custody of the child. It only shows that she was concerned for the child and in the circumstances considered that it would be to his advantage to be with his grandmother until she surmounted her problems.'"

In my view, the full and proper import of the cited case cannot be appreciated D without reading the passages following that referred to by the applicant's legal practitioner at 376C-E. At 376H-377G the following was said:

> "There is not much said about the paternal grandparents. *The tragedy of this case is that the applicant, who is the children's father, and the only parent living in Zimbabwe, is not able to assume the responsibility of having their custody because of his current family set up.* He cannot stay with the children at his home. He E wants them to shuttle between boarding school and his own parents' home. As the upper guardian of all minors, this court always has the power in a proper case to deprive parents of custody and award this right to a third party, usually a relative: see *W* v *W supra* at 247B-E, Goldin AJA admirably emphasized the point in the following terms:
>
> > 'The power to award custody to a third party does not involve or justify F the adoption of a test or approach that anybody concerned becomes a candidate or claimant. Compared with parents, grandparents and others may often be able to provide superior material advantages and unlimited time and attention, they may also be endowed with greater wisdom and patience. These attributes and assets would not, however, entitle them to custody in competition with natural parents who may not possess the same G advantages. In deciding what is in the best interests of a child, the court generally has regard to the relative merits only of the parents. Grandparents are considered useful baby-sitters and a source of help in times of need or mere convenience. They are also "first reserves" when natural parents or a surviving parent are held not to be proper persons to whom to award custody. The natural affinity and emotional bond and attachment between parent and child are generally irreplaceable and an accepted fact of life. H Such an association benefits and promotes a child's emotional security and

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Mavangira J

> > feeling of normality, whilst the award of a child's custody to a third party A places him in a distinctly unusual or abnormal category.
> >
> > A court will only deprive a natural parent of custody and award it to a third party upon special grounds. Such special grounds include detrimental or undesirable effects or influences upon the physical, moral psychological or educational welfare of a child. The test is still not whether a third party can provide better materially or possesses more desirable attributes, but B whether the parent or parents should be deprived of custody for any reason including harm or danger to the child's welfare as mentioned above: see *Calitz* v *Calitz*, 1939 AD 56 at 63; *Short* v *Naisby supra* at p 575; *Horsford* v *de Jager & Anor* 1959 (2) SA 152 (N) at 154; *Petersen & Anor* v *Kruger & Anor* 1975 (4) SA 171 (C) at 174.'
>
> See also Ex p *Walton* 1969 (2) RLR 133.

As indicated above, the mother is the custodian parent. The applicant is the non C -custodian parent. He seeks to reverse this application. As the upper guardian of the two children, this court has to rely on the welfare principle in the resolution of this custody dispute. These children are not only enrolled at Baines School in Bulawayo, they have already started attending lessons, and this court should be careful not to further disrupt their already disrupted lives" (emphasis added).

I am aware that I am not faced with and am not dealing with an application D for variation of a custody order in this matter. However, on a consideration of the case cited above it would appear to me that the interim relief sought by the applicant would, if granted, firstly, be tantamount to placing the custody of the children with their grandmother in preference to their father who is willing and able and is in fact taking care of the children. Secondly, E it would entail further disruption of the children's already disrupted lives. Both parties have instituted proceedings in matters that are now pending before this court. The determination of those matters will resolve the real issue of contention between the parties and also put an end to the continual disruption of the minor children's lives that has been happening.

It was for the reasons that I dismissed the application with costs on 25 F September 2009.

Kantor & Immerman, applicant's legal practitioners

Maganga & Associates, respondent's legal practitioners. G

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ZIMBABWE REVENUE AUTHORITY & ANOR v MUROWA DIAMONDS (PVT) LTD 2009 (2) ZLR 213 (S)

Citation	2009 (2) ZLR 213 (S)
Case No	Judgment No. S-41-09
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Garwe JA
Heard	14 July 2008
Judgment	28 September 2009
Counsel	*A Moyo*, for the appellants *A P de Bourbon SC*, for the respondents
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Bank – *funds – funds in customer's account – ownership of – such funds not belonging to account holder*

D **Interpretation of statutes** – *meaning of words – use of grammatical or ordinary meaning of words unless absurdity or inconsistency result*

Revenue and public finance – *duty and value-added tax – payment of duty in foreign currency when luxury goods imported – resident of Zimbabwe exempt from paying duty in foreign currency when goods paid for with* E *funds "obtained" from authorised dealer – money in resident's foreign currency account with authorised dealer – money "obtained" from authorised dealer*

Headnote

The respondent company, a resident of Zimbabwe, imported motor cars, which were luxury items as defined in the Customs & Excise (Designation F of Luxury Items) Notice 2007 (SI 80A of 2007). The funds used to purchase the motor vehicles were sitting to the credit of the respondent's foreign currency account held with a commercial bank. In terms of the Notice, every resident of Zimbabwe who imports luxury items that were purchased using funds obtained otherwise than through an authorized dealer was liable to pay duty in foreign currency.

G The appellants argued that the funds deposited into a foreign currency account belong to the holder of such account, so the respondent did not "obtain" the funds in the sense of acquiring ownership thereof or being in possession thereof through an authorized dealer. The funds could not therefore be said to have been "obtained" within the context of the H notice nor could it be said that being given authority to utilize the funds

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in terms of the Exchange Control Regulations amounted to "obtaining" A the funds from an authorized dealer.

The respondent argued that the real dispute was whether the holder of a foreign currency account physically holds or in law owns the money in that account and whether, when he accesses that money, he "obtains" it from an authorized dealer. By operation of law, the use of funds in a B foreign currency account had to be dealt with through an authorized dealer. The intention of the legislature was to ensure a measure of control over the source of funds used for the importation of goods which would then qualify for payment in local currency, even though they are classified as luxury items. In requiring an application through an authorized dealer for the necessary authority from the Reserve Bank to use the funds, the C legislature had ensured that there is a measure of control over foreign currency accounts.

Held, that in general, if the plain and ordinary meaning of the words in an enactment is clear and unambiguous, then there is no need to resort to a secondary meaning. The grammatical and ordinary sense of the words D is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.

Held, further, that the words "purchased using funds obtained otherwise than through an authorized dealer" were clear and unambiguous. By operation E of law, funds in a foreign currency account can only be accessed through an authorized dealer. The legislature must have been aware that there were persons who were holding foreign currency in foreign currency accounts and that to access these they had to apply for authority from the Reserve Bank. In exempting persons who purchased luxury items using funds obtained from an authorized dealer, the legislature did not exclude F such persons with foreign currency held to their credit by authorized dealers. No distinction was made between persons who would have accessed the foreign currency from the Reserve Bank of Zimbabwe or other authorized dealers and those, for example, who would have earned the funds from exports. It could not be said the intention of the legislature G was to exclude persons who would have access to funds from foreign currency accounts. The intention of the legislature was to create two categories of people, who would be treated in different ways. The first group consisted of those who purchased luxury items using funds held by an authorized dealer. That group would be exempt, irrespective of the source of the funds. The second group would consist of those who H

Garwe JA

A purchase luxury items using funds not held by an authorized dealer or accessed from sources outside the country. That group would not be exempt.

Held, further, that the word "obtain", in its ordinary and popular sense, means "to get", "to acquire", "to come into possession of". It could B not be said the legislature intended that only persons who had *bought* foreign currency from an authorized dealer were exempt.

Held, further, that funds in a foreign currency account do not belong to the account holder, so the respondent in this case could not be said to have obtained what it already owned.

Judgment of Makarau JP in *Murowa Diamonds (Pvt) Ltd* v *ZRA & Anor* C 2007 (2) ZLR 375 (H) upheld.

Cases referred to

Chegutu Municipality v Manoora 1996 (1) ZLR 262 (S)

Madora v Tanganda Tea Co Ltd 1999 (1) ZLR 374 (S)

Meman & Anor v Controller of Customs & Excise 1987 (1) ZLR 170 (S)

D *Registrar-General of Elections & Ors v Tsvangirai* 2002 (1) ZLR 204 (S)

S v Scher 1968 (1) SA 239 (C)

Legislation considered

Customs & Excise (Designation of Luxury Items) Notice 2007 (SI 80A E of 2007), s 3

Case information

A Moyo, for the appellants

A P de Bourbon SC, for the respondents

Judgment

GARWE JA: In this appeal the issue that falls for determination is the F construction to be given to the words "funds obtained otherwise than through an authorized" dealer.

The first appellant in this matter is a statutory body established in terms of the Revenue Authority Act [*Chapter 23:11*] whose primary function it is to collect revenue for and on behalf of the Government of Zimbabwe. The G respondent is a company incorporated according to the laws of Zimbabwe which, as its name suggests, is engaged in mining diamonds at Murowa Ward in Zvishavane. The respondent is the holder of a local foreign currency account with Barclays Bank of Zimbabwe. In April 2007, after consultation with its freight company, the respondent applied for permission to utilize the funds in the foreign currency account to import two vehicles, a Toyota Hilux H 2.5 Double Cab 4x4 and a VW Jetta 1.9TD1. Permission was granted by the

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Garwe JA

Reserve Bank of Zimbabwe and consequently the respondent purchased the A two vehicles in question. The two vehicles were imported into the country and the duty payable in respect of the vehicles was duly paid to the first appellant's offices at Beitbridge in local currency. The payment was accepted but subsequently the appellant advised the respondent that payment of duty and value added tax should be made in foreign currency in terms of the B Customs & Excise (Designation of Luxury Items) Notice, 2007 (SI 80A of 2007) (hereinafter referred to as "the notice"). The appellants thereafter issued a notice of seizure in respect of the two vehicles pending payment of the duty in foreign currency.

Aggrieved by this decision, the respondent filed an application with the High Court seeking an order directing the release of the motor vehicles to it. The C High Court, after due consideration of the matter, granted the order sought. It is against that order that the appellant has now appealed to this court.

The issue that arises before this court is a narrow one and that is whether, regard being had to the provisions of the notice, the respondent is liable to pay duty in foreign currency. D

The relevant portion of the notice, which came into force on 5 April 2007, reads as follows:

> "3. The following persons shall be liable to pay duty and value added tax on luxury items in terms of section 2 –

(a) every resident of Zimbabwe who imports luxury items that were purchased E using funds obtained otherwise than through an authorized dealer;

(b) …".

It is not in dispute in this case that the respondent company is a resident of Zimbabwe, that it imported luxury items as defined in the notice and that the funds used to purchase the motor vehicles were sitting to the credit of the respondent's foreign currency account held with Barclays Bank of Zimbabwe. F The issue that falls for determination is whether the vehicles were purchased using funds obtained through an authorized dealer.

The appellants accept, as a matter of law, that if a Zimbabwean resident obtains the funds from an authorized dealer then he or she becomes exempt from paying duty in foreign currency. The appellants, however, argue that G the funds deposited into a foreign currency account belong to the holder of such account. The respondent therefore did not obtain the funds in the sense of acquiring ownership thereof or being in possession thereof through an authorized dealer. The appellants further argue that, at the time the respondent applied for exchange control approval to purchase the motor vehicles, the funds in the foreign currency account were already acquired H

Garwe JA

A by it and belonged to it. The funds cannot therefore be said to have been obtained within the context of the notice nor can it be said that being given authority to utilize the funds in terms of the Exchange Control Regulations amounts to obtaining the funds from an authorized dealer. The appellants further submit that the intention of the legislature was not to exempt persons in the position of the respondent who lawfully obtained foreign currency B elsewhere other than from an authorized dealer from paying duty in foreign currency. In short, so the appellants have submitted, the respondent must have *bought* the foreign currency from an authorized dealer in order to be exempt from payment of duty in foreign currency.

The respondent does not accept the interpretation contended for by the C appellants. The respondent submits that the real dispute seems to be whether the holder of a foreign currency account physically holds or in law owns the money in that account and that when he accesses that money he does not obtain it from an authorized dealer. The respondent submits that it obtained the necessary funds to import the two motor vehicles from an authorized dealer and, in the circumstancesc duty was not payable in foreign currency D as contended. In any event, by operation of law, the use of funds in a foreign currency account has to be dealt with through an authorized dealer. Lastly, the respondent contends that the intention of the legislature was to ensure a measure of control over the source of funds used for the importation of goods which would then qualify for payment in local currency even though they are E classified as luxury items. In requiring an application through an authorized dealer for the necessary authority to use the funds from the Reserve Bank of Zimbabwe, the legislature has ensured that there is a measure of control over foreign currency accounts.

The issue before this court is the interpretation to be given to the words F in question. Interpretation of a statute is an exercise that is fraught with difficulty. It is a fact that various systems and theories of interpreting statutes have resulted, to some extent, in throwing the principles of statutory interpretation into confusing disarray, often compounded by the conflicting *dicta* of judges: *Principles of Legal Interpretation, Statutes, Contracts & Wills* by E A Kellaway at p 4.

G A basic principle of construction generally accepted, up to a point, in South Africa is that the language used by the legislature should be read in its ordinary sense and where it is clear a court should not depart from the natural and ordinary meaning of the words: Kellaway *op cit* at p 16.

The rider to the above is that the words must be read within their context H and the grammatical and ordinary sense of the words may be departed from

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Garwe JA

where this would result in some absurdity or repugnance or inconsistency A with the rest of the statute.

In South Africa the clear principle has been established that the literal sense of the words used in a provision of a statute must not be allowed to defeat the intention of the legislature. In other words, if a court comes to the conclusion that the language is clear and unambiguous, it is entitled to reject

the purely B literal meaning if it is apparent, from the anomalies which flow therefrom, that the literal meaning could not have been intended by the legislature. It is the duty of the court to interpret a statute so as to give effect to what the legislature had in mind in order to realize the purpose of the enactment. A rule of construction is to be followed only when the provisions of a statute or the author or authors of a statute have obscured the intention that has motivated C the statute and the statute gives no guide to a court which has to interpret it.

In Zimbabwe the approach is similar to that in South Africa. Decisions of this court have stressed the need to bear in mind the purpose of the legislation: *Meman & Anor v Controller of Customs & Excise* 1987 (1) ZLR 170 (S) at 172F-G. In general, if the plain and ordinary meaning of the words in D the enactment is clear and unambiguous, then there is no need to resort to a secondary meaning: *Registrar General of Elections & Ors* v *Tsvangirai* 2002 (1) ZLR 204 (S) at 213E-H.

The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with E the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further: see *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262 (S) at 264D-E; *Madoda* v *Tanganda Tea Co Ltd* 1999 (1) ZLR 374 (S) at 377A-D.

In the present case, the words "purchased using funds obtained otherwise than through an authorized dealer" are clear and unambiguous. I agree with F the respondent that by operation of law funds in a foreign currency account can only be accessed through an authorized dealer. In enacting the relevant statutory provision, the legislature must have been aware that there were persons who were holding foreign currency in foreign currency accounts and that to access these they had to apply for authority from the Reserve G Bank of Zimbabwe. In exempting persons who purchased luxury items using funds obtained from an authorized dealer, the legislature did not exclude such persons with foreign currency held to their credit by authorized dealers. No distinction was made between persons who would have accessed the foreign currency from the Reserve Bank of Zimbabwe or other authorized dealers and those, for example, who would have earned the funds from H

Garwe JA

A exports. Moreover, it cannot be said the intention of Parliament was to exclude persons who would have access to funds from foreign currency accounts. It seems to me that the intention of the legislature was to create two categories of people who would be treated in different ways. The first group consists of those who purchase luxury items using funds held by an authorized dealer. That group would be exempt, irrespective of the source B of the funds. The second group would consist of those who purchase luxury items using funds not held by an authorized dealer or accessed from sources outside the country. That group would not be exempt. That appears to me to have been the intention of Parliament.

The appellants have urged this court to find that the funds in the foreign currency C account already belonged to the respondent and that in the circumstances the respondent cannot be said to have obtained funds as these already belonged to it. The word "obtain" in its ordinary and popular sense means "to get", "to acquire", "to come into possession of": *S* v *Scher* 1968 (1) SA 239 (C) at 242A. I would agree with the remarks of the court *a quo* that:

> "The natural meaning of the word appears to me to be clear. It means 'get' in D common language. Thus a rendition of the section replacing the word 'obtain' with 'get' will be to the effect that residents of Zimbabwe who get funds to import a luxury item other than through an authorized dealer are liable to pay duty and value-added-tax in foreign currency. Those who 'get' funds through an authorized dealer are exempt. Thus, those who have such funds processed through an authorized dealer in whatever form is appropriate for the importation E (*sic*) are, in my view, exempt from paying duty and tax in foreign currency. The exact nature of the process through which the funds are 'got' is in my further view immaterial. Such funds may be gotten from funds already held to the credit of an account, they may be purchased from the bank or where appropriate and acceptable, a line of credit may be extended to the importer through arrangements made by the authorized dealer. The material issue in my view is not so much how the funds are accessed but from whom such funds are gotten."

F The appellants have further urged this court to find that the word "obtain" has a wider meaning than that suggested by the court *a quo*. I do not agree with this suggestion. Within the context of this provision, it cannot be said the legislature intended that only persons who had bought foreign currency from an authorized dealer were exempt. As already indicated, such an G intention cannot

be inferred from the context. Again I am inclined to agree with the remarks of the court *a quo* that one cannot read into the language of the subsidiary legislation:

> "…anything that would expand the meaning of the word 'obtain' to exclude obtaining funds from a foreign currency account lawfully held with an authorized dealer. It is trite that the law maker speaks through the language used in an H enactment and the court can only read the law maker's intention from that

Garwe JA

> language. I see nothing in the language used by the law maker in the statutory A instrument or the context of the legislation to justify an expansion of the word as urged upon me by the respondents. In my view, if the intention of the law maker was to exclude funds from foreign currency accounts lawfully held, the language used in the subsidiary legislation would have expressly said so. Alternatively, if it was the intention of the law maker to use the word obtain, to mean purchase, then the law maker would have so defined the word for the B purposes of the subsidiary legislation to make it clear that it only exempted those funds purchased from an authorized dealer."

I also do not accept the suggestion that funds in a foreign currency account belong to the account holder and that therefore the respondent in this case cannot be said to have obtained what it already owned. As stated by McNally JA in *Meman & Anor* v *Controller of Customs & Excise supra* at p 173F: C

> "Strictly speaking a person does not own the money in his bank account …"

The learned Judge of Appeal further remarked at 174A:

> "Money in your bank account is not strictly your money, but it is money at your disposal; and that is so whether you have earned it or been given it, or borrowed it."

There is clearly no basis to ascribe a secondary meaning to the word "obtain". D To suggest that it means "purchase" would be stretching the language of the notice.

I am satisfied in all the circumstances that the conclusion of the court *a quo* was correct and that the present appeal is without merit. E

The appeal is accordingly dismissed with costs.

SANDURA JA and ZIYAMBI JA concurred.

Kantor & Immerman, appellants' legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners F

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Source:
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DJORDJEVIC v CHAIRMAN, PRACTICE CONTROL COMMITTEE, MEDICAL & DENTAL PRACTITIONERS COUNCIL OF ZIMBABWE 2009 (2) ZLR 221 (H)

Citation	2009 (2) ZLR 221 (H)
Case No	Judgment No. HH-110-09
Court	High Court, Harare
Judge	Makoni J
Heard	25 March 2009

Judgment 28 September 2009

Counsel *H Zhou*, for the applicant
G Mamvura, for the respondent

Case Type Opposed application for review

Annotations Link to case annotations

Flynote

Administrative law – *review – application for – domestic remedies available* D *– need to advance reasons why domestic remedies not pursued – grant of declaratory order when domestic remedies available – not appropriate if court being asked to substitute its decision for that of administrative body*

Medicine – *medical practitioner – negligence on part of medical practitioner* E *– standard by which to assess such negligence – average reasonable professional*

Headnote

The applicant, after some years of provisional registration as a medical practitioner, applied for an unrestricted practising certificate permitting her to practise as a specialist obstetrician and gynaecologist. The Medical and Dental Practitioners Council refused her application. The applicant F sought a declaratory order to the effect that she was entitled to the issue of an unrestricted practising certificate. She also sought consequential relief, that the respondents issue her with such a certificate. The first respondent raised the point *in limine* that the applicant had not exhausted the domestic remedies available to her before approaching the court. G In terms of s 22 of the Health Professions Act [*Chapter 27*:*19*], any person who is aggrieved by any decision taken in regard to him or her by a council may appeal against the decision to the Health Professions Authority within thirty days after being informed of the decision. Section 123 provides for an appeal from that Authority to the High Court.

Held, that where domestic remedies are capable of providing effective redress H in respect of the complaint, a litigant should first exhaust those remedies

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Makoni J

unless there are good reasons for not doing so. No good reasons were A advanced for not pursuing the domestic remedies available to her. Whilst a declaratory order may be granted even if some other form of relief is available, the merits of each case constitute one of the circumstances of the matter to which regard must be paid before a declaratory order is issued. The nature of the relief being sought by the applicant was such B that she was asking the court to substitute its own decision for that of the first respondent. A court will not interfere in the sphere of practical administration. There were disputes of fact which the court could not resolve, as they would require the expertise provided for in the Act.

Cases cited C

Director of Civil Aviation v Hall 1990 (2) ZLR 354 (S)

Girjac Services (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243 (S)

Jansen v AFC 1995 (1) ZLR 65 (H)

Masunda v Chairperson, Cresta Lodge Disciplinary & Grievance Cttee HH-115-94

McGown v Health Professions Council 1994 (1) ZLR 86 (H) D

Moyo v Forestry Commission 1996 (1) ZLR 173 (H)

Legislation considered

Health Professions Act [*Chapter 27:19*], ss 22 and 135 E

Case information

H Zhou, for the applicant

G Mamvura, for the respondent

Judgment

MAKONI J: The applicant seeks a declaratory order to the effect that the applicant is entitled to the issue of an unrestricted practising certificate permitting her to practise as a specialist obstetrician and gynecologist. F She also seeks consequential relief that the respondents issue her with an unrestricted practising certificate permitting her to practise as a specialist obstetrician and gynecologist and costs of suit.

The background facts are that the applicant is a Yugoslavian citizen. She has a residence permit which permits her to remain in Zimbabwe indefinitely. G On 8 February 2000 she applied for provisional registration as a medical practitioner and specialist registration as an obstetrician and gynaecologist. She was duly registered on 7 August 2001 with the practising certificate restricting her practice to a Government central hospital. She commenced work at Parirenyatwa Hospital. She then took unpaid leave from 29 July 2002 to 28 February 2003. In April 2005she applied for re-registration on H

A the provisional register. This was approved in May 2005 subject to her obtaining a post of senior registrar obstetrician and gynaecologist working in a Government hospital under the supervision of a specialist gynaecologist.. In February 2006 the applicant wrote to the first respondent requesting re-registration as approved in May 2005. She attached confirmation of an offer of employment by Parirenyatwa group of hospitals. She was duly registered B on the provisional register with effect from 23 February 2006 for a period of three years.

In January 2008 the applicant applied for the issue of an unrestricted practising certificate. The application was not approved. The applicant then filed the present application. In its opposing papers, the first respondent raised a C point *in limine* that the applicant had not exhausted the domestic remedies available to her before approaching the court. I will deal with this point first.

Mr *Mamvura,* for the respondents, submitted that in terms of s 22 of the Health Professions Act [*Chapter 27*:*19*] (hereinafter referred to as "the Act"), any person who is aggrieved by any decision taken in regard to him by the Council may appeal against the decision to the Health Professions Authority D within thirty days after being informed of the decision. Section 123 of the Act provides for an appeal from the decision of that Authority to this court.

It was further submitted that the appeal procedure is capable of affording the applicant effective redress. No special circumstances or reasons were advanced by the applicant for approaching this court. The applicant ought to E have exhausted the domestic remedies available to her under the domestic legislation.

Mr *Zhou* submitted that the point raised *in limine* is without merit and ought to be dismissed. He said that this court has already stated in *McGown* v *Health Professions Council* 1994 (1) 86 (H) that, in such disputes as the present F one, the procedure for an appeal does not apply. He further submitted that in an application for a declaratory order, such an order will be granted even if some other form of relief is available.

In my view, the *McGown* case s*upra* can be distinguished from the present matter. In that matter Smith J, when he made the remark that "the applicant G does not have a right of appeal against the condition imposed by the Practice Control Committee", was dealing with the provisions of the now repealed Medical, Dental and Allied Professions Act [*Chapter 27:08*]. That Act did not provide a procedure for an appeal where a person had a condition imposed by the Practice Control Committee. The repealed Act did not have a provision similar to s 22(1) of the Act which provides for an appeal to lie H to the Health Professions Authority of Zimbabwe (hereinafter referred to

Makoni J

as "the Authority") by any person who is aggrieved by any decision taken A in regard to him by a Council. It also did not provide for an appeal to the High Court whereas the Act further provides for an appeal to lie to this court were any person is aggrieved by a decision of the Authority. See s 128(1).

In my view, the appeal procedure is available to the applicant as such a procedure is available in terms of the Act to *any* person aggrieved by *any* B decision taken in regard to him or her (the emphasis is my own). The applicant has decided to approach the court rather than proceed by way of domestic remedies provided for in the Act. It has been laid down in a number of cases that where domestic remedies are capable of providing effective redress in respect of the complaint, a litigant should exhaust the domestic remedies unless there are good reasons for not doing so. See C *Girjac Services (Pvt) Ltd* v *Mudzingwa* 1999 (1) ZLR 243 (S) at 247. The same approach was adopted in *Masunda* v *Chairperson, Cresta Lodge Disciplinary & Grievance Committee* HH-115-94 (not reported) and *Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H) at 191D-192 B.

The applicant did not advance, in her founding papers, good reasons for not D pursuing the domestic remedies available to her. However, it was submitted on her behalf that a declaratory order should be granted even if some other form of relief is available. See *Jansen* v *AFC* 1995 (1) ZLR 65 (H) at 74H-75A. In that case the point was also made that the merits of each case constitute one of the circumstances of the matter to which regard must be paid before a declaratory order is issued. *In casu,* the applicant seeks a declaratory order E to the effect that she is entitled to an unrestricted practising certificate. The nature of the relief being sought by the applicant is such that she is asking me to substitute my own decision for that of the first respondent. It has been held in these courts that a court will not interfere in the sphere of practical administration. See *Director of Civil Aviation* v *Hall* 1990 (2) ZLR 354 (S) at 361E. There are issues which, in my view, can best be revolved by the F administrative structure provided for in the Act.

In my view, there are disputes of fact which this court cannot resolve. They would require the expertise provided for in the Act. In para 13 of her founding affidavit the applicant disputes that she remains registered on the provisional register of medical practitioners. She refers to annexure C to disprove the G respondents' averments. This court cannot say whether registration on the specialist register is the same as registration on the permanent register. The court does not know how to deal with the fact, that during the period of the applicant's initial registration on the provisional register, she was absent without leave for a certain period. Such issues can best be dealt with by the domestic remedies provided for in the Act. H

Makoni J

A In view of the above, I am not able to grant the applicant the relief that she seeks. The Health Professions Authority is capable of providing effective redress in respect of her complaint. She ought to have exhausted the domestic remedies available to her under the domestic legislation.

In the result, the point *in limine* is upheld.

B Accordingly, the application is dismissed with costs.

Gill Godlonton & Gerrans, applicant's legal practitioners

C *Scanlen & Holderness*, respondents' legal practitioners

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ALSPITE INVESTMENTS (PVT) LTD v WESTERHOFF 2009 (2) ZLR 226 (H)

Citation	2009 (2) ZLR 226 (H)
Case No	Judgment No. HH-99-09
Court	High Court, Harare
Judge	Makarau JP
Heard	9 June2009; 6 July 2009; 7 July 2009
Judgment	7 October 2009
Counsel	*T B Ndoro*, for the plaintiff *N Zvidzai*, for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Family law – *husband and wife – divorce – distribution of property following divorce – rights of former spouses thereto – nature of rights – not rights in rem – court order creates personal rights inter partes only*

Property *and real rights – ownership – vindication – actio rei vindicatio – founded in property law actio in rem – enforceable against the world at* D *rge – irrelevance of equitable considerations – acquisition of property by third party – in absence of fraud rights of third party to property cannot be resisted*

Headnote

The *actio rei vindicatio* is found in property law. It is aimed at protecting E ownership. It is based on the principle that an owner shall not be deprived of his property without his consent. So exclusive is the right of an owner to protect his property that, at law, he is entitled to recover it wherever it is found and from whomsoever is holding it, without alleging anything further than that he is the owner and that the defendant is in possession of F the property. Thus, it is an *actio in rem*, enforceable against the world at large. There are no equities in the application of the *actio rei vindicatio*. Thus, in applying the principle, a court may not accept and grant pleas of mercy or for extension of possession of the property by a defendant against an owner for the convenience or comfort of the possessor, once it is accepted that the plaintiff is the owner of the property and does G not consent to the defendant holding it. It is a rule or principle of law that admits of no discretion on the part of a court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership.

The rights to property in the matrimonial estate that a divorcing party is afforded by the divorce order are founded on principles of equity as H

A provided for in s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. Such rights, even if granted by a court order, are not rights *in rem*. Where a spouse has been awarded a share in the matrimonial estate by a court order, until that share is transferred, no rights of ownerships are created in favour of the spouse by the mere issuance of the court order.

B Prior to their divorce, the defendant and her husband lived together in the matrimonial home on a suburban stand in Harare. At the time of the divorce, she had entered into a consent paper with her husband which was incorporated into the court order. Part of that court order enabled the defendant to buy out her husband's rights of ownership to the property upon certain terms and conditions. She was, however, unable to raise C sufficient money to do so within the time allotted to her in the consent paper. The husband thereupon became entitled to sell the property,

provided that some of the money from the sale thereof was paid to her and the minor child of the marriage. In due course, he exercised his right and sold the property to the plaintiff. The defendant however remained in occupation of the former matrimonial home and ignored D all requests by the plaintiff, the new owner, to vacate it. The plaintiff eventually brought a vindicatory action in the High Court, seeking her eviction and that of the minor child from the property. In resisting the action, the defendant raised a number of equitable reasons, which the court found compelling, for her continued occupation of the property. Prominent among these reasons were complaints at the manner in which E her former husband had sold the property, including alleged violations of the consent paper, her inability to purchase house for herself and her minor child, and her HIV status. While accepted that the plaintiff had not fraudulently associated with her former husband to defeat her just claims to the erstwhile matrimonial home, the court came to the F conclusion that the equities favoured the defendant. Notwithstanding this however, it was:

Held, that it is only when the wife in the position of the defendant proves that the plaintiff has associated with her former husband to defraud her of her former rights in the matrimonial home, that she can resist an action of eviction at the instance of the plaintiff.

G *Held*, further, that the divorce order was only a judgment *in rem* as far as it regulated the status of the former spouses. When it deals with the distribution of the matrimonial estates, it becomes a judgment *inter partes* and is only binding as between the parties. It creates personal rights in favour of the divorcing parties and where it is violated, the H injured former spouse can seek recourse against the other former spouse.

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Held, further, granting the plaintiff's claim for eviction, that it was not material A to determine whether or not the property was sold strictly in term of the divorce order. Even if the defendant was correct and the property was not sold strictly in accordance with the provisions of the court order, such a finding would not assist the defendant's case. She could not raise a defence from the principles of the law of husband and wife to defeat a *actio rei vindicatio* at the instance of a third party.

Cases cited

Chapeyama v Chapeyama HH-96-05

Chetty v Naidoo 1974 (3) SA 13 (A)

Ferris v Weaven [1952] 2 All ER 23 (QBD) C

Jolly v Shannon & Anor 1998 (1) ZLR 78 (H)

Mashave v Standard Bank of SA Ltd 1998 (1) ZLR 436 (S)

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

Muswere v Makanza 2004 (2) 262 (H)

Musanhi v Mount Darwin Rushinga Co-operative Union 1997 (1) ZLR 120 (S) D

Ndlovu v Ndlovu HH-15-04

Nyatwa v Nene S-119-91

Semwayo & Anor v Chitara & Anor HH-48-07

Sibanda v Church of Christ 1994 (1) ZLR 74 (S)

Standard Finance Zimbabwe Ltd v Chivungwa 1999 (1) ZLR 262 (H) E

Legislation considered

Matrimonial Causes Act [*Chapter 5:13*], s 7

Case information

T B Ndoro, for the plaintiff

N Zvidzai, for the defendant F

Judgment

MAKARAU JP: The defendant was married to one Clemens Westerhoff in terms of the Marriages Act [*Chapter 5:11*]. The marriage was dissolved by this court on a date that is not readily ascertainable and is any event immaterial for the purposes of this trial. G

During the subsistence of the marriage, the parties had acquired an immovable property called Stand 491 Mount Pleasant Township 13 of Lot 33 of Mount Pleasant. This they set up as the matrimonial home. Title in the property was held freehold by a company called Westerhoff Investments (Pvt) Ltd. It is common cause that the parties regarded the company as their joint *alter ego*, set up primarily for the purposes of holding title in the property. H

A Prior to divorce, and with the assistance of the judge who presided over a pre-trial conference in their matter, the parties settled as between themselves a consent paper, which disposed of the issues of paternity and maintenance for the minor child of the marriage and the distribution of the joint estate. The consent paper was, at the time of the divorce, incorporated into and became part of the divorce order.

B Regarding the fate of the matrimonial home, the court ordered as follows, following the wording of clause 5 of the consent paper:

> "5. After the results of the paternity tests, the following scenario will obtain:
>
> (a) The property known as No 29 Morningside Drive, Mount Pleasant, Harare, shall be valued for commercial purposes and the value shall be divided in C such a manner that:
>
> (i) if the plaintiff is the natural father of the minor child, plaintiff gets a 40% share, the defendant a 40 % and the minor child 20 % share, and the defendant shall pay to the plaintiff such amount as may be the difference between the plaintiff's 40 % share and the sum of $110 million which is the lump sum payment for the maintenance of the minor child in D full and final settlement as provided for in clause 2 hereof; and
>
> (ii) If the plaintiff is found by results of the tests not to be (the) natural father, then the ratio shall be 60 % for the plaintiff and 40 % for defendant.
>
> (b) The valuation provided for in clause 5 (a) hereof shall be conducted by an independent valuer appointed by the Master of the High court from his list and such valuation shall be conducted and concluded within 7 days of E receipt by plaintiff (who shall serve the results on the defendant's legal practitioner within 7 days of receipt of them) of the results of the valuation.
>
> (c) The costs of the valuation shall be borne by plaintiff and defendant in the ratio of 50% plaintiff and 50% defendant. The valuation costs shall be paid for in full by plaintiff to facilitate the process and he shall be refunded his share by defendant at the time that defendant pays what is due to plaintiff F either in terms of clause 5 (a) (i) or clause 6.
>
> (d) Should the defendant fail to pay the amount payable to plaintiff within 12 months of the date of valuation, then and in that event, and without notice to defendant, the plaintiff shall be entitled to sell the immovable property, and from the proceeds pay $110 million as provided for in clause 2, to defendant for the minor child and 40% of the proceeds to the defendant as G her share. In a sale in terms of this clause, the defendant herein irrevocably appoints her legal practitioner, failing him the Sheriff or his lawful deputy to sign all documents necessary to effect the sale and resultant transfer, and the rates duties and other taxes payable by reason of the transfer including transfer fees shall be paid from the proceeds of sale."

It is common cause that in January 2006 the property was evaluated for the H purposes of clause 5(a) of the divorce order. This was to set the value of the

property at which the defendant could "buy off" her former husband's share A in the property to enable her to acquire joint title with the minor child in the property, to the exclusion of her former husband. The defendant had a year in which to do this and the clock started ticking against her in January 2006.

It is further common cause that the defendant failed to raise the requisite funding necessary to bring into effect the provisions of clause 5(a)(i) of the B order. She could not buy out her former husband and her failure to raise the necessary funding triggered the provisions of clause 5(d) of the divorce order. In terms of this clause, the property had to be sold and the proceeds parceled out in a pre-determined ratio.

Again, it is not in dispute that, in the course of time, the property was sold C to the plaintiff. Transfer of title was conveyed to the plaintiff and in due course, the plaintiff sought the eviction of the defendant from the property. The defendant resisted the plaintiff's claim for eviction and this is the suit that came before me.

In defending the eviction summons at the instance of the plaintiff, the defendant pleaded that the agreement of sale to the plaintiff was defective, D transfer to the plaintiff was fraudulently procured and was to the prejudice of the defendant and the minor child of the marriage. In the plea, the defendant prays for the sale and subsequent transfer of the property to be set aside.

At the pre-trial conference of the matter, where in terms of our procedures, all legal issues ought to have been crystallized, the matter was referred to E trial on the following issues:

1. Whether or not the agreement of sale entered into by and between the plaintiff and Westerhoff Investments (Pvt) Ltd in respect of the property known as No. 29 Morningside Drive Mount Pleasant, Harare and its subsequent transfer by the latter to the former is valid at law. F
2. Whether or not the plaintiff is entitled to an order for the eviction of defendant from the premises.
3. Who between the parties should bear the costs of suit.

In my view, the matter could have been handled differently at the pre-trial conference. Firstly, it does not appear clear to me what defect the defendant G alleged was attendant upon the sale of the property and how this defect would at law have the effect of vitiating the contract. No further particulars were sought or given regarding this alleged defect. Secondly, the details of the alleged fraudulent transfer were not fully disclosed in the pleadings and in the summary of evidence filed on behalf of the defendant. Again, no further particulars were sought or given on this issue. H

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A It would appear that in terms of the defendant's summary of evidence, and indeed according to the evidence led at the trial, the defendant took issue with the fact that she was not consulted on the ultimate price at which the house was sold to the plaintiff. She is of the view that the property was sold at an unreasonably low price to her prejudice, as she then could not buy B another property from her share of the proceeds.

I raise these issues at this stage as the issues that were pleaded and the issue upon which evidence was led differed. Had the judge presiding over the pre-trial conference been more robust and probed the defendant's defence, he or she may have assisted the parties to realize the correct issue that falls for determination in this trial. The parties may then have been more focused C in the presentation of their cases. As it turned out, no fraud was proved or relied upon and the alleged defect in the agreement of sale as pleaded was not advanced further than the plea. The trial of the matter was thus on an issue that had not been pleaded. However, in view of the fact that such issue was fully ventilated during the trial, I will proceed to treat it as the D sole issue in the trial.

To substantiate its claim, the plaintiff first called Joseph Mandizha. He was approached by a third party to act on behalf of the defendant's former husband. He was instructed to carry out the terms of the divorce order as between the parties and as it related to the distribution and disposal of the former matrimonial home.

E In January 2007, the witness advised the defendant that he had been instructed to cause the sale of the property. His instructions had been for him to proceed without informing the defendant as her time to act had come and gone by. He met with the defendant and her legal practitioner and they discussed the matter. He informed the defendant and her legal practitioners on how he F intended to dispose of the property. He indicated to the defendant that, while clause 5(d) did not place any obligation on him to consult her in disposing of the property, he would nevertheless keep her informed of developments out of courtesy.

Before putting up the property for sale, the witness caused a market appraisal G of the property to be done. The estate agents that were approached to carry out this appraisal included Heaven on Earth, an agency in which he is the majority shareholder. After the appraisal, instructions were given to Heaven on Earth to sell the property. It is at this stage that reports were received that to the effect that the defendant was objecting to the mandate given to Heaven on Earth Real Estate to sell the property. She sought to introduce H a new agent to handle the sale. Undeterred by the efforts taken by the

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defendant to stall the selling of the property, the witness had the property A sold to the plaintiff in June 2007. The defendant was advised of the sale of the property through correspondence to her legal practitioners. Requests were made for the attendance of the defendant upon the witness for the signing of the agreement of sale. It is at this stage that the defendant intimated that the property could be sold for a higher price. It was indicated to the witness B by the defendant's legal practitioners that in view of the prices she was expecting, she was unlikely to sign the agreement of sale which reflected a purchase price of $13 billion. He received the purchase price for the property and then proceeded to facilitate the registration of transfer of the property to the plaintiff.

In disposing of the property, he never had sight of the articles of association C of the company that held title in the property. He merely followed the dictates of the court order as to how the property was to be disposed and the proceeds distributed between the divorced parties and their minor child. While the parties held a meeting before the property was sold, it was never his intention to renegotiate the dispute between the parties or to be taken D outside the provisions of the divorce order. His instructions were not to revisit the distribution of the property. When he was genuinely convinced that the defendant would not sign the agreement of sale, he requested the Deputy Sheriff to sign on her behalf in accordance with the court order.

The witness gave his evidence well and was very candid with the court. His explanations were full and, while one may not agree that it was prudent of E him to instruct his own agency to sell the property, one cannot on that basis find that he was an unreliable witness.

Next to testify on behalf of the plaintiff was one Tongoringa Mubaiwa. He is an estate agent, working for Heaven on Earth Real Estate. He handled the sale of the property in dispute. Prior to putting up the property for sale, he did F a market appraisal of the property. He compiled a report of his findings. He was then given instructions to market the property which he did. Eventually he sold the property to the plaintiff. He drafted the agreement of sale which was signed in due course.

The witness gave his evidence well. He fared well under cross-examination. G His answers and explanations were easy to follow. I find him a credible witness.

The plaintiff called Muriel Chengetai Dowa as its third witness. She represented the directors of the plaintiff in the purchase of the property. She was under instructions form the plaintiff to look for a property. She at one stage responded to an advertisement by Heaven on Earth for a property in Mt Pleasant. The deal fell through. She then advised the estate agency to H

A contact her should they have another property in the same area for sale. After some time, she was informed of the property in dispute. She was advised that the property was being sold as a result of a divorce. She could not view the property but was shown pictures of it. The directors of the plaintiff advised her to seek legal advice before proceeding. She did so and proceeded to buy the property. Eventually the property was transferred to the plaintiff and, B when she tried to gain access to the property after transfer, she was denied access by the defendant.

I find no fault with the evidence and manner of testifying of this witness. I shall rely on her evidence. After the evidence of this witness, the plaintiff closed its case.

C The defendant called one Bruce Beaven Mujeyi to give evidence first. He was acting as the legal practitioner of the defendant during the hearing of the divorce matter and was especially instructed to deal with the matter of the disposal of the matrimonial home. At the time he received instructions to act in the matter, the matter had received a lot of publicity and tensions were D high on either side. The legal practitioner, who had acted for the defendant's husband during the divorce

proceedings, had renounced agency and he had to deal with Mr Mandizha, who like him, had been instructed to act in the matter after the divorce had been granted. Mr Mandizha wrote to the defendant advising her that he was now handling the matter. He responded to the letter by telephoning Mr Mandizha. They agreed to meet. In view of the fact that E neither he nor Mr Mandizha had handled the much publicized divorce, he suggested that the best way forward was for the parties to negotiate their way through the disposal of the former matrimonial home. He was aware of the divorce order and the consent paper on which the order was based.

In the meeting, Mandizha agreed to keep him abreast of developments as F he had the company documents and the deed of transfer in respect of the property. He also understood that the draft agreement would be forwarded to him for his input.

Regarding the agency of Heaven on Earth in the matter, the defendant was clearly uncomfortable that an agency in which Mandizha had an interest should be used to sell the property. On the instructions of the defendant, he G addressed a letter to Mandizha expressing these concerns. When Mandizha responded showing little concern for this since his client had no problem with the arrangement, he filed an urgent application on behalf of the defendant, seeking to interdict Heaven on Earth from proceeding. Regrettably, the matter was not determined as the judge before whom the urgent application H was placed ruled that the matter was not urgent as there were other remedies

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available to the defendant. His further understanding was that if the property A was to be evaluated, this had to be done by an estate agent on the Master's roll.

The defendant also informed him that she had problems with people coming to view the house. Since the parties had agreed to negotiate, they had not agreed on who was to carry out the evaluation of the property. His client was aggrieved by this as it went against the spirit of the meeting while Mandizha B was equally aggrieved by what he perceived as lack of cooperation from the defendant. He was somewhat caught in the middle.

On 25 June 2007, he received notification that the property had been sold and requesting his client to sign the draft agreement of sale. He had not been shown a copy of the draft. He was constrained to write to Mandizha C informing him that he could not sign the agreement on behalf of his client, that his client was out of the country and that she would take issue with the price at which the property had been sold. From the response he received, he gained the impression that he should wait for Mandizha's further advice. The letter read:

> "Your letter of 26th instant received in fax form refers. (*Sic*) D
>
> We advise that it has been referred to our client. We will revert to you once his instructions are to hand."

When his client returned, he contacted Mandizha to advise him that the parties could now move forward. He was advised that the property had been sold. For his client's signature, Mandizha had approached the Deputy Sheriff. He then advised his clients of the developments and the two parted company E after he felt that it was best that another law firm took over the matter as the defendant felt that she had been let down.

The witness gave his evidence well. He was quite clear in his responses to questions and while his reading of the divorce order may have been different to mine in some respects, that is not a basis for impugning his credibility. F

The defendant also gave evidence. During the subsistence of her marriage to her former husband, the two bought a property that was registered in the name of a company. At the time of the divorce, the parties entered into a consent paper.

She tried to raise money to "buy the defendant out" but failed. She is living G openly with HIV/AIDS and was not in gainful employment at the time. When she realized that she could not raise the necessary funds to buy him out, she tried to sell the property within the one year stipulated in clause 5 of the divorce order. She failed.

In January 2007, she received a letter from Mandizha advising her that he wanted to sell the property. She attended a meeting with Mr Mandizha in H

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A the company of her legal practitioner. It was agreed at the meeting that the fighting between the parties should come to an end, that the parties would henceforth resolve all issues amicably and that the parties would be in constant communication over the disposal of the former matrimonial home. At the meeting no mention was made of the estate agency that would dispose of the property.

B A day after the meeting, an agent from Heaven on Earth came to the property to carry out an evaluation of the property. She allowed him in. Later on, she did not open her gate to him and to people who wanted to view the property. She had issues with the whole process as she had not received the valuation report to compare it with her own idea of how much the property should C fetch. When she finally received the evaluation report, she then realized that Mandizha was one of the directors of Heaven on Earth. She raised the issue with her legal practitioner. She felt that there was an obvious conflict of interest in that Mandizha represented her former husband, was selling the property through his agency, would do the conveyancing and then distribute the proceeds from the sale to the parties as between the parties D and the minor child. The matter came to court but unfortunately the urgent application was not granted.

While waiting for developments in the matter, she instructed her lawyers to place a caveat against title to the property as she felt that she had real rights in the property that needed protection. She was also protecting the interests E of the minor child.

Some time later she sent an e-mail to her lawyer, suggesting that an independent estate agent be appointed to handle the sale. She suggested one. She copied the e-mail to Mandizha. In the e-mail she also gave her own suggestion of the fetching price for the property.

F She left Harare for some time and when she returned, she was advised that the property had been sold. She was not happy. She went to her legal practitioner and asked him to stop the transfer and he filed an urgent application. She went to the anti-corruption unit and lodged a complaint. Before the urgent application to stop the transfer could be heard, Mandizha appeared and showed them the deed of transfer. She then withdrew the case.

G At one point she expected her former husband to call for a company resolution on the disposal of the property.

In her view, her former husband did not comply with the court order from the beginning. Her legal practitioners ought to have been shown a copy of the draft agreement. They were not.

H At the same time she was also looking for another house to buy. The price

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fetched for the former matrimonial property was not sufficient to meet her A obligations in procuring another property.

In conclusion, she prayed for an order setting aside the sale and transfer to the plaintiff and for the property to be resold under the supervision of the Master of this court.

The defendant was understandably highly emotional when she gave her B evidence. This did not, however, deter her from giving her opinion on how the former matrimonial home should have been disposed of. Her testimony was to a large extent corroborated by that of her former legal practitioner. I have no cause to disbelieve her on fact. Due to the emotion which the defendant testified and presumably which she attaches to this matter, I C have reproduced her testimony in greater detail than for any other witness deliberately as I shall try and examine each issue that she has raised in her evidence and upon which she rests her defence.

It is not in dispute that the plaintiff has brought the *rei vindicatio* against the defendant. As aptly summarized by Mr *Ndoro* in his closing submissions, the plaintiff has approached this court as an owner of the property to seek D the ejectment of the defendant simply on the basis that it is owner and is thus entitled as such to enjoyment of its property.

The *rei vindicatio* is an action that is founded in property law. It is aimed at protecting ownership. It is based on the principle that an owner shall not be deprived of his property without his consent. So exclusive is the right E of an owner to possess his or her property that, at law, he or she is entitled to recover it from wherever found and from whomsoever is holding it, without alleging anything

further than that he or she is the owner and that the defendant is in possession of the property. Thus it is an action *in rem*, enforceable against the world at large.

This is settled law in this jurisdiction which hardly requires authority. See F *Sibanda* v *The Church of Christ* 1994 (1) ZLR 74 (S); *Musanhi* v *Mt Darwin Rushinga Cooperative Union* 1997 (1) ZLR 120 (S); *Mashave* v *Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S); *Jolly* v *Shannon & Anor* 1998 (1) ZLR 78 (H) and *Stanbic Finance Zimbabwe Ltd* v *Chivhungwa* 1999 (1) ZLR 262 (H). G

The bedrock of all the above decisions is *Chetty* v *Naidoo* 1974 (3) SA 13 (A) where, at 20B-D, Jansen JA had this to say:

> "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 right enforceable against the owner (eg. a right of retention or a contractual right). The owner, in instituting H

> A a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and the defendant is holding the *res* – the onus being on the defendant to allege and establish any right to continue to hold against the owner."

There are primarily two defences to the *rei vindicatio*, each aimed at destroying each of the two essential elements of the action. The first one seeks to destroy the claim of ownership completely by denying that the plaintiff is the owner B of the property in question or seeks to diminish his rights in the property by admitting his or her ownership but by alleging that the plaintiff has parted, under some recognized law, with the right to exclusive possession of the property. The second defence of course is to deny possession of the property at the time the action is brought or the claim is instituted.

C There are no equities in the application of the *rei vindicatio*. Thus, in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion D on the part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership. The application of the principle conjures up in my mind the most uncomfortable image of a stern mother standing over two children fighting over a lollipop. If the child holding and licking the lollipop is not the rightful owner of the prized possession and the rightful owner cries to the E mother for intervention, the mother must pluck the lollipop from the holder and restore it forthwith to the other child, notwithstanding the age and size of the owner-child or the number of lollipops that the owner-child may be clutching at the time. It matters not that the possessor child may not have had a lollipop in a long time or is unlikely to have one in the foreseeable F future. If the lollipop is not his or hers, he or she cannot have it.

In casu, the defendent has not denied that the plaintiff is the owner of the property. She has not denied that she is in possession of the property in issue. She has, however, sought to attack the right of the plaintiff to exclusive use of the property on the basis that she was unfairly treated by her former husband and his agents when the property was disposed of.

G In my view, the defendant's case is hampered by the application of three legal principles.

Firstly, she is relying on the consideration of equities in the matter to deny the plaintiff exclusive enjoyment of its property. I repeat her evidence in this regard. She could not raise enough funds to purchase her former husband's H share in the property as she was not in gainful employment at the time. She

could not raise any loans as she is publicly known to be living with the HIV/ A AIDS virus. She intended to purchase another property for herself and for the minor child of the marriage. She could not do so from the proceeds of the sale of the property as her share was too low. The success of this suit against her will literally make her and the minor child of the marriage homeless.

On the other hand, the plaintiff has bought the property for investment B purposes. It does not require the property for its own accommodation but as an income generating investment. Thus, on

equities alone, the defendant has a strong case.

Having heard and seen the defendant testifying and having listened to the impassioned plea that she was making to the court for a break for herself and C the minor child of the marriage and having heard the anguish in her voice, I would have used my discretion, if I had any, in her favour and granted her prayer. I have none. The law gives me none. I have no power to abrogate any to myself to change the principles of the *rei vindicatio* to bring in the consideration of equities into the matter. My hands are tied. I must apply the law that denies her a remedy, even if I am keenly aware of her circumstances. D

Secondly, the defendant has not raised any personal relationship with the plaintiff in terms of which the plaintiff may be estopped from taking possession of the property from her. The legal authorities are all clear that in a *rei vindicatio*, where the defendant shows that he or she has some right of possession enforceable against the owner, then the action cannot succeed. To E succeed in defeating the action, a defendant must therefore set up facts that establish a legal relationship in terms of which possession of the property by the defendant is justifiable.

It is a settled position at law that it is only when the wife in the position of the defendant proves that the plaintiff has associated with her former husband to defraud her of her rights in the former matrimonial home can she resist F an action of eviction at the instance of the plaintiff. See *Ferris* v *Weaven* 1952 (2) All ER 233: *Muganga v Sakupwanya* 1996 (1) ZLR 217 and *Nene* v *Nyatwa* S-119-91.

In casu, no suggestion was ever made in evidence that the plaintiff fraudulently associated with the defendant's former husband to defeat her G just claims in the former matrimonial home. If anything, all the blame was heaped on the legal practitioner acting for the defendant's former husband for violating the consent order in more than one respect.

I have been referred to two decisions of this court that seem to go against the finding that I make in this matter. See *Ndlovu* v *Ndlovu* HH-15-04 and *Chapeyama* v *Chapeyama* HH-96-05. H

Makarau JP

A In *Ndlovu* v *Ndlovu (supra*) I made the finding that the personal rights that the wife had in that matter were equal to the personal rights that the third party had from his agreement of sale with the respondent/husband. It is worth noting that in that case, no transfer of the property had been effected in favour of the third party when the wife/applicant approached the court for relief. The facts of that matter are therefore distinguishable from the facts in B this matter. The competition in that case was between two equal rights. The applicant wife and the respondent purchaser had personal rights against the respondent/husband and on a balance of equities, the applicant succeded.

In *Chapeyama* v *Chapeyama* (supra) the suit was between the former spouses and, Gowora J correctly, in my view, held that as between the two of them C the wife had breached the terms of the divorce order in having transfer registered in her favour before first affording her former husband the right to purchase her out. She therefore ordered the two parties to proceed in terms of the divorce order.

In any event, the above two cases were each instituted by the wives to protect D their rights in the properties in question. The causes of action in both cases were different and called for different considerations. As indicated above, the applicant in this matter is bringing a *rei vindicatio.* The considerations that I have to take into account when dealing with this specific cause of action are different from the considerations that arose in the above cases. Such is the law.

E Finally, the defendant has raised issues with the manner in which the property was disposed of in terms of the divorce order. She alleges that the terms of the consent paper, incorporated into the divorce were violated to her prejudice.

Two issues arise here. Firstly, the divorce order is only a judgment *in rem* as far as it regulates the status of the former spouses. When it deals with the F distribution of the matrimonial estate, it becomes a judgment *inter partes* and is only binding as between the parties. It creates personal rights in favour of the divorcing parties and where it is violated, the injured former spouse can seek recourse against the other former spouse. The injured party cannot seek recourse against the world at large for an injury occasioned by a judgment that is personal.

G Secondly, the rights to property in the matrimonial estate that a divorcing party is afforded by the divorce order are founded on principles of equity as provided for in s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. Such rights, even if granted by a court order, are not rights *in rem*. Where a spouse has been awarded a share in the matrimonial estate by a court order, until H that share is transferred to them, no rights of ownership are created in favour

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2009 (2) ZLR p240

Makarau JP

of that spouse by the mere issuance of the divorce order. At best, the court A order serves as a *declarator* of the respective rights that the former spouses have in the property.

It has been the position in this jurisdiction that the rights that a wife has against her husband in terms of family law are personal against her husband and do not enter the realm of property law to clog the rights of an owner. B

The chasm between family law considerations and property law considerations has been the subject of many debates in this jurisdiction. This court is getting hoarse from bemoaning the injustice that this chasm has wrought on wives and from imploring the legislature to redress the injustice by enacting appropriate legislation. The situation has not yet been addressed and many C wives in the position of the defendant will have to wait a while longer for redress and justice. See *Muswere v Makanza* HH-16-05 and *Semwayo & Anor* v *Chitara & Anor* HH-48-07.

In casu and for my purposes, it is not therefore material for me to determine whether or not the property was sold strictly in terms of the divorce order. D Even if the defendant is correct and I find that the property was not sold strictly in accordance with the provisions of the court order, that finding will not assist the defendant's case. She cannot raise a defence from the principles of the law of husband and wife to defeat a *rei vindicatio* at the instance of a third party.

On the basis of the foregoing, the plaintiff's claim must succeed. E

Regarding costs, I will not make an order of costs against the defendant for the reason that she was assisted by the Legal Aid Directorate in terms of the Legal Aid Act [*Chapter 7:16*].

In the result, I make the following order: F

1. The defendant and all those occupying through her are to give vacant possession of the property called stand number 491 Mount Pleasant Township 13 of Lot 33 Mount Pleasant to the plaintiff within 30 days of this order failing which the Deputy Sheriff is hereby authroised to evict the defendant and all those occupying through her from the G property and give vacant possession to the plaintiff.
2. Each party shall bear its own costs.

Ziumbe & Mtambanengwe, plainitff's legal practitioners.

Legal Aid Directorate, defendant's legal practitioners. H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/B-SKY ENERGY (PVT) LTD v MINISTER OF ENERGY AND POWER DEVELOPMENT & ANOR 2009 (2) ZLR 241 (H)

B-SKY ENERGY (PVT) LTD v MINISTER OF ENERGY AND POWER DEVELOPMENT & ANOR 2009 (2) ZLR 241 (H)

2009 (2) ZLR p241

Citation 2009 (2) ZLR 241 (H)

Case No Judgment No. HH-104-09

Court	High Court, Harare
Judge	Bhunu J
Heard	8 October 2009
Judgment	8 October 2009
Counsel	*J Samukange,* with him Mrs *J B Wood,* for the applicant Mr *Chaunoita,* for the respondents
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Constitutional law – *Minister – authority of – duty to exercise general direction and control over Ministry – does not empower Minister to assume powers not specifically granted by statute – Cabinet authority and directives – not having force of law – Minister not entitled to act in* D *terms of Act not assigned to him*

Headnote

The second respondent, an official in the Ministry of Energy, prevented the applicant from importing a load of diesel fuel into the country. The reasons given were that the sulphur content was above the standards E determined for Zimbabwe. His actions were subsequently supported by the first respondent, the responsible Minister. The applicant was one out of 15 importers of fuel of the same quality, which came from the same source in South Africa, but the other importers were not prevented from importing their consignments. In justifying his actions, the Minister claimed that he was exercising his constitutional mandate F to give general direction and control over his Ministry and departments in terms of s 31D of the Constitution. He also claimed cabinet authority and directives as justification of his conduct. Finally, he sought to argue that as a government Minister he placed the embargo on the diesel in the public interest because it constituted a harmful substance in terms of the Environmental Management Act [*Chapter 20:27*].

G *Held,* that while it was correct for the Minister to say that, as the minister, he had a constitutional duty to exercise general direction and control over his Ministry or departments, that constitutional mandate must be exercised within the strictest confines of the law. It cannot and must not be used as a vehicle to act outside those confines. All administrative powers H (other than those exercised by domestic tribunals) derive from statute

and the nature and extent of those powers are to be found in the statutory A provisions whereby these powers have been granted. Such powers are not unlimited. The legislature gives power for specific purposes only, or subject to special procedures or with some other kinds of limits. The exercise of a power by an administrative official or body will be invalid unless the official or body is authorized to exercise that power. If an B administrator purports to exercise a power he does not have or acts in excess of a power he possesses, his action will be invalid on the basis that it is *ultra vires.*

Held, further, that the Minister's resort to cabinet authority and directives as justification of his unlawful conduct was equally misplaced and without merit because the cabinet has no legislative authority. Laws are made C in Parliament and not in cabinet.

Held, further, that the Environmental Management Act defines "Minister" as the Minister of Environment and Tourism or any other minister to whom the President may, from time to time, assign the administration of the Act. As the first respondent was not the Minister of Environment D and Tourism, nor had the administration of the Act been assigned to him, his conduct in assuming responsibility over the Act without presidential authority was unconstitutional and

unlawful. In any event, neither the Act nor regulations made under it authorized any minister to place an embargo on any fuel on the basis that its specifications constituted a hazardous substance or was harmful to motor vehicles. E

Held, further, that although the second respondent was acting in the course of duty as a civil servant, he was not entitled to act unlawfully. A civil servant who acts unlawfully in the course of duty attracts personal liability for the simple reason that he is not employed to discharge his duties contrary to law. He could therefore not object to being sued in F his personal capacity.

Cases cited

Min of Justice & Anor v Musarurwa & Ors 1964 RLR 298 (A); 1964 (4) SA 209 (RA)

Legislation considered G

Environmental Management Act [*Chapter 20:27*], ss 2 and 72

Case information

J Samukange, with him Mrs *J B Wood,* for the applicant

Mr *Chaunoita,* for the respondents H

Bhunu J

Judgment

A **BHUNU J**: The applicant is a duly registered company in terms of the laws of this country. It is in the business of importing and marketing fuel in terms of licence number 000228 issued by the respondent Ministry on 2 January 2009.

It is common cause that on 4 September 2009 a consignment of 476 427 litres of diesel was imported into the country from Sasol South Africa through B the Beitbridge border post

The diesel was delivered to Zimbabwe in train wagons to be offloaded at NOCZIM, Beitbridge but destined for Chiredzi. The transporter was unable to offload the product, on the instructions of the second respondent, a director in the first respondent's ministry.

C The second respondent's functions include:

1 Managing, monitoring and reviewing all government-initiated or sponsored liquid fuel supplies contracts and all fuel safety and quality standards and

2 Providing leadership and facilitating the strategic management process to guide the operation of the Petroleum Department and the oil industry.

D The applicant's complaint is basically that the second applicant is abusing his authority and has taken the law into his own hands by placing an embargo on the product when there is no law which authorizes him to do so.

The responsible Minister in the respondent's ministry has since filed an affidavit dated 8 October 2009 ratifying the second respondent's conduct. E In that affidavit he acknowledges responsibility for his conduct in the following terms:

> "4. On 14 September 2009 I ordered the return of substandard diesel imported by a company called B-SKY because it did not meet the quality specifications that we have determined. The level of 4400 ppm imported by B-SKY was too high and thus unacceptable. F
>
> 5. More so is the fact that the high sulphur content of 50 ppm to 500 ppm is a regional standard that has been agreed upon by South Africa, Zimbabwe, Tanzania, Mozambique, and Malawi. This position has been approved by Cabinet.
>
> 6. This Cabinet position is known and was communicated to the oil industry leading to the setting up of the National Procurement Committee to enforce G quality and prices monitoring and sometimes control.
>
> 7. Soon after we liberated the importation of fuel, the rule of practice in the industry to set the quality has now been breached by B-SKY
>
> 8. There is no understating the damage that can be caused by high sulphur diesel being imported knowing the serious corrosive effect.

9. The imported diesel is hazardous to property and I believe as Minister of H the State of Zimbabwe I have a duty flowing from the constitution to protect

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2009 (2) ZLR p244

Bhunu J

our citizens and property from harm posed by such dangers knowingly A caused by a licensed company because it believes there may be a gap in the law in terms of quality level stipulation by statutory instrument.

10. I am reliably informed that the diesel is a hazardous substance therefore is limited in its use as it damages the environment.
11. I am informed in terms of the Environmental (Hazardous Substances Pesticides and Other Toxic Substances) Regulations, 2007, such substance(s) B can only be imported under notification and license from the Environmental Management Agency.
12. I am also informed that counsel for the applicant has failed to produce the same under law.
13. The licence issued by my ministry is not for the importation of the substandard fuel." C

Upon placing an embargo on the fuel in dispute the ministry constituted an investigating team comprising Ministry and NOCZIM staff. The team's terms of reference were to inspect the product by way of reading documents or breaking seals and taking samples for testing. Thereafter the team would gather information and report on the quality of fuel being imported by various D companies through the Beitbridge border post.

In discharging its mandate the team was supposed to work in conjunction with ZIMRA staff. ZIMRA however objected to the intended investigations, particularly the breaking of seals and taking of samples, pointing out that it was unlawful. With much reluctance ZIMRA management finally granted the team access to the relevant documents. The team then proceeded to discharge E its mandate by restricting itself to perusing the documents without breaking the seals and analyzing samples. In its written report the investigating team made the following findings:

"Findings

- We found that all fuel from SASOL was of the high sulphur type F **(0.5/500ppm).** This is far above Zimbabwe spec.
- All companies importing SASOL products were dumping its product on poor countries (Zambia, Zimbabwe, DRC and other countries).
- *ZIMRA had no legal mandate to check fuel quality as there was no instrument to that effect.*
- *We have always been using high sulphur diesel in our engines, so there is* G *no new harm that can be done now.*
- *Ministry in collaboration with EMA and ZIMRA to draft an instrument on fuel specifications that is legally binding.*
- *ZIMRA to act on the basis of the instrument on fuel specifications so that they deny product on entry.*
- *SASOL to* be *advised of Zimbabwe's required fuel specifications.* H

2009 (2) ZLR p245

Bhunu J A

- BSKY *fuel is released as demurrage charges may be charged to the Ministry upon losing its case.*
- *Fuel* samples *should be collected at destinations as companies may possibly change their paper work without changing their product quality.*

Options

B **Option one**

Stopping high product entry

Implication **of option one**

It has some legal implications as there is no instrument to that effect.

This may also result in critical fuel shortage ...

C **Option two**

To continue business while putting the required legislation in place

Implications of option two

> This will ensure a smooth change over to agreed specs without interrupting product inflow into the country" (my emphasis).

The above report is expertly written and presented such that one cannot D imagine a better report or recommendations. What emerges quite clearly from the report is that Zimbabwe has no legal instrument which entitles the respondents or anyone to regulate the quality of fuel being imported into the country. This stark reality has left both the Minister and the second respondent groping in the dark for legal authority to justify what is clearly E unlawful conduct.

Both the first and second respondents have conveniently made no reference to the above report in their detailed opposing affidavits. As things stand, one cannot but surmise that they have deliberately sought to steer away from the report because it is not to their liking and yet they are unable to challenge F its findings. That kind of conduct smacks of a deliberate attempt to mislead the court by silence particularly on the part of the second respondent whose function includes advising the Minister on policy issues such as these.

On the facts before me, it is doubtful that the report was drawn to the Minister's attention before he endorsed the order to place an embargo on the fuel in dispute or at the time he executed his opposing affidavit.

G The attempt to conceal the investigating team's report tends to confirm the applicant's allegation that the second respondent was motivated by some improper motive, malice or ill-will in placing an embargo on its fuel when its competitors were importing the same fuel without let or hindrance from the same respondents. The applicant's managing director makes the telling H point in para 10 of the applicant's founding affidavit when he says:

2009 (2) ZLR p246

Bhunu J

> "It will also be seen from the letter from Sasol dated 1 October 2009 that apart A from the applicant, fifteen other companies are importing the same diesel as the one imported by the applicant in this case. These other companies have been allowed to have their diesel imported into the country without any obstruction. I must point out that Redan, the largest private importer and retailer of fuel in Zimbabwe, are importing the same Sasol diesel. This can be seen from the letter from Sasol mentioned above and which I attach as Annexure E" B

The letter from Sasol reads in part:

> "As from 29 September 2009 Sasol Oil sold approximately 1500m3 of diesel 5000 ppm into Zimbabwe. This is to let you know that diesel 5000 ppm is also sold in Zambia and the DRC in considerable quantities. The following companies all moved diesel 500ppm into Zimbabwe for the month of September 2009: UTEC, Nettrade Marketing, Redan, FX International, Petrotrade, Tradimex, Imvuselelo, C Cargo Carriers, Lydon, Lemino, Zelda, Stoner Trading, Khumbulani and Bojas."

That much is common cause as the respondents have not been able to challenge those factual dispositions.

In his opposing affidavit, the first respondent nevertheless deposed that in imposing the embargo he was exercising his constitutional mandate to give general direction and control over his Ministry and departments in terms of D section 31D of the Constitution which provides that:

> "(3) Subject to the provisions of this Constitution and any Act of Parliament, where any Minister has been charged with responsibility for any Ministry or department he shall exercise general direction and control over that Ministry or department and, subject to such direction and control, any such Ministry shall E be under the supervision of a Secretary."

It must be noted that the constitutional mandate restricts the minister's authority to his ministry in so far as the section states that, "… he shall exercise general control and direction over *that Ministry"* and not any other ministry.

While it is correct for the first respondent to say as minister he has a constitutional duty to exercise general direction and control over *his Ministry* F or *departments*, that constitutional mandate must be exercised within the strictest confines of the law. It cannot and must not be used as a vehicle to act outside the strict confines of the law. The words of Prof G Feltoe in his booklet, *A Guide To Administrative Law* at p 22 are instructive when he says:

> "*All administrative powers (other than those exercised by domestic tribunals)* G *derive from statute and the nature and extent of those powers are to be found in the statutory provisions whereunder these powers have been granted. Such powers are not unlimited*. The legislature will not give unlimited power but

instead it will give power for specific purpose only, or subject to special procedures or with some other kinds of limits. In other words, the limits upon the power are to be discovered by examining the statutory provisions in order to determine what powers the legislature has expressly or impliedly granted. *The exercise of* H

2009 (2) ZLR p247

Bhunu J

A *a power by an administrative official or body will be invalid unless the official or body is authorized to exercise that power. If an administrator purports to exercise a power he does not have or acts in excess of a power he possesses, his action will be invalid on the basis that it is* ultra vires" (my emphasis).

Thus the first respondent cannot use the general powers granted to him by the Constitution to arrogate to himself specific administrative powers which B have not been granted to him by the legislature.

His resort to cabinet authority and directives as justification of his unlawful conduct is equally misplaced and without merit because the Cabinet has no legislative authority. It is trite that laws are made in Parliament and not in Cabinet.

C The first respondent also sought to argue that as a government Minister he placed the embargo on the diesel in the public interest because it constituted a harmful substance in terms of the Environment Management Act [*Chapter 20:27*] as read with the Environmental Management (Hazardous Substances, Pesticides and Other Toxic Substances) Regulations 2007, SI12 of 2007.

D In other words the first respondent is claiming that he has authority to administer the Environmental Management Act simply because he is a Government Minister. Section 2 of that Act however, defines "Minister" in the following terms:

> "'Minister' means the Minister of Environment and Tourism or any other Minister to whom the President, may from time to time, assign the administration of this E Act."

What that means is that, for the purposes of administering that Act, the law does not recognize any Minister other than the Minister of Environment and Tourism or any other Minister specifically assigned the task of administering that Act by the President.

F In this case, it is common cause that the first respondent, as Minister of Energy and Power Development, neither is the Minister of Environment and Tourism, nor has he been assigned by the President the right to administer the Act. For that reason, he cannot assign to himself the power to administer the Act without usurping both the President and the Minister of Environment and Tourism's functions.

G That being the case, the first respondent's conduct in assuming responsibility over the Act without presidential authority was unconstitutional and to that extent unlawful. In legal parlance, his conduct was *ultra vires* the Constitution as read with the Act and Regulations.

Looked at from a different angle, a perusal of the Constitution, the Act and H Regulations shows that nowhere do they authorize any minister to place an

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2009 (2) ZLR p248

Bhunu J

embargo on any fuel on the basis that its specifications constitute a hazardous A substance or is harmful to motor vehicles. This explains why the responsible Minister, that is to say, the Minister of Environment and Tourism, has wisely chosen not to interfere with the importation of the diesel in question.

Resorting to the Constitution, the Environmental Management Act and Regulations could not assist the respondents to achieve their purpose B considering that in the case of *Minister of Justice & Anor v Musarurwa & Ots* 1964 RLR 298 the Appellate Division held *per* Beadle CJ that:

> "(3) When several Acts are used together for the single purpose of producing a desired result, all the Acts must be looked at together as comprising one scheme. If in its pith and substance such scheme is unlawful, what was done under each Act must be regarded as having been unlawfully done" C

In the same case Quénet JP weighed in with the observation that:

> "In exercising his powers of restriction the Minister was not influenced by a desire to give effect to the purpose of s. 50(1) (b) of the Law and Order (Maintenance) Act [*Chapter 39*], but by a desire to achieve a

result not contemplated by the section, *viz*., to regulate the visits of other persons to the area of restriction. The existence of such ulterior motive invalidated the orders." D

In this case the Minister's resort to s 72 of the Environmental Management Act was not motivated by a desire to advance the purpose of that section but to bar the applicant from importing the diesel in circumstances where others were importing such diesel without let or hindrance. I come to that conclusion because the section does not authorize anyone to bar the importation of such E diesel. It reads:

"**72 Hazardous waste**

(1) The Standards and Enforcement Committee shall, in consultation with the Agency, recommend to the Board standard criteria for the classification of hazardous wastes with regard to determining — F

(*a*) hazardous waste;

(*b*) corrosive waste;

(*c*) flammable waste;

(*d*) toxic waste;

(*f*) radioactive waste;

(*g*) any other category of waste the Board may consider necessary. G

(2) The Board shall, on the recommendation of the Standards and Enforcement Committee, issue guidelines and recommend to the Minister the making of regulations for the management of each category of hazardous waste determined under subsection (1).

(3) Regulations referred to in subsection (2) may prescribe the procedure and criteria for: H

2009 (2) ZLR p249

Bhunu J A

(*a*) The control of imports and exports of toxic and hazardous chemicals and materials permitted to be so imported or exported;

(b) The distribution, storage, transportation and handling of chemicals and materials."

As can be seen the section simply authorizes the responsible minister to make regulations controlling the importation of hazardous waste. Diesel with a B high sulphur content is however not waste. The section does not prohibit the importation of substandard fuel. The general rule of law is that what is not prohibited is allowed. As the importation of substandard fuel is not prohibited by law it means its importation is legally permissible.

It follows therefore, that the Investigating Committee and ZIMRA were C absolutely correct in advising the second respondent that his conduct was unlawful. He disregarded that sound advice at his own peril. His conduct becomes especially malicious and objectionable if one takes into account that he singled out the applicant for victimization in circumstances where 15 others were not penalized at all and continue not to be penalized for the same alleged misdemeanour. This discriminatory conduct offends both against the D Constitution and all notions of justice and fairness.

Being an adviser to the first respondent, the second respondent appears to have misled his principal by concealing and deliberately not disclosing to him the Investigating Committee's report.

That kind of conduct cannot be tolerated by these courts. By consciously E ignoring sound advice, thereby deliberately straying into the wilderness of costly illegality, the second respondent cannot cry foul when he is personally visited with adverse costs.

Granted the second respondent was acting in the course of duty as a civil servant, but while going about his duties he was not entitled to act unlawfully F thereby trampling on other people's rights. A civil servant, or any other employee for that matter, who acts unlawfully in the course of duty attracts personal liability for the simple reason that he is not employed to discharge his duties contrary to law. People must not cause harm to others under the guise of executing official duties. There is therefore no merit in the second respondent's objection to being sued in his personal capacity.

G While the importation of substandard fuel is undesirable and harmful to public interest, there is absolutely nothing the respondents can do about it in the absence of the necessary legal instruments as recommended by the investigating committee. This is what the cherished rule of law is all about.

It is accordingly ordered that a provisional order be and is hereby granted H in the following terms:

2009 (2) ZLR p250

Bhunu J

TERMS OF THE FINAL ORDER SOUGHT A

Pending the final determination of this matter, the applicant is granted the following relief:

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

a) That the respondents pay demurrage costs to the amount of South African B R308 660.

b) That the respondents pay costs of suit on an attorney and client scale

INTERIM RELIEF GRANTED

Pending determination of this matter the applicant is granted the following C relief:

a) That the respondents release to the applicant diesel or its agent fuel held at Beitbridge being a total of 476 427 litres, without any conditions.

b) That the respondents are interdicted from unlawfully frustrating or preventing the applicant from carrying out its business of trading in fuel including importing and distributing fuel in the country D

Venturas & Samukange, applicant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/STANDARD CHARTERED BANK (ZIMBABWE) LTD v ZIMBABWE REVENUE AUTHORITY 2009 (2) ZLR 251 (H)

STANDARD CHARTERED BANK (ZIMBABWE) LTD v ZIMBABWE REVENUE AUTHORITY 2009 (2) ZLR 251 (H)

2009 (2) ZLR p251

Citation	2009 (2) ZLR 251 (H)
Case No	Judgment No. S-42-09
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Garwe JA
Heard	6 May 2008
Judgment	19 October 2009
Counsel	*J C Andersen SC*, for the appellant *L Mazonde*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Revenue and public finance – *income tax – gross income – interest accruing on treasury bills – interest not actually received during year of assessment* D – *whether taxable*

Headnote

The main issue in this appeal was whether the discount on a treasury bill (i.e. the difference between the price at which the appellant bank bought the treasury bill and the bill's face value payable on the date of maturity) accrued to the bank before the date of maturity. The dispute between the E parties concerned the time when the income earned from purchasing a treasury bill accrued to the purchaser, for the purposes of s 8(1) of the Income Tax Act [*Chapter 23:06*]. In terms of the section, "gross income" means the total amount received by or accrued to or in favour of a person or deemed to have been received by or to have accrued to or in favour of a person in any year of assessment. According to the appellant bank, F the income in question ("the discount") accrued to the bank only on the date when the treasury bill matured. On the other hand, the respondent contended that the discount, like interest on a loan, accrued on a daily basis from the date when the treasury bill was purchased by the bank up to the date when the treasury bill matured.

G *Held*, that what accrued to the bank before the date of maturity of the treasury bill was a right to claim payment of the discount in future (i.e. on the date of maturity) and that the value of that right was to be included in the bank's gross income for taxation purposes. The words in the Act, "has accrued to or in favour of a person", merely mean "to which he has become entitled". It has been authoritatively held that, in respect of H a debt which is payable in the future and not in the year of assessment,

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Sandura JA

> while it might be difficult to hold that the cash amount of the debt has A accrued to the taxpayer in the year of assessment, as he has not become entitled to a right to claim payment of the debt in the year of assessment, he has acquired a right to claim payment of the debt in future. This right has vested in him, has accrued to him in the year of assessment, and it is a valuable right which he could turn into money if he wished to do B so. There is no real difference between the discount on a treasury bill and a debt payable in the future. After all, the discount is payable in the future, i.e. when the bill matures. Accordingly, the discount on the treasury bill ought to have been included in the bank's gross income for taxation purposes, with something being deducted from the face value of the discount to allow for the fact that the discount was not payable C at the end of the year of assessment.

Judgment of Kudya J in *Standard Chartered Bank Zimbabwe Ltd* v *ZRA* 2007 (1) ZLR 228 (H) upheld.

Cases referred to

CIR v People's Stores (Walvis Bay) (Pty) Ltd 1990 (2) SA 353 (A) D

Lategan v CIR 1926 CPD 203

Willingale (Inspector of Taxes) v Intl Commercial Bank Ltd [1978] 1 All ER 754 (HL)

Legislation considered

Income Tax Act [*Chapter 23:06*], s 8(1) E

Case information

J C Andersen SC, for the appellant

L Mazonde, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court F which dismissed with costs the appellant's court application for an order in the following terms:

> "IT IS ORDERED:

1. That by way of a declaration of an existing and future right, that the income earned by a purchaser of a Treasury Bill only accrues for tax purposes on G the maturity date of the Treasury Bill.
2. That the respondent shall pay the applicant's costs on the higher scale."

The background facts are as follows. In 2006 the respondent ("Zimra") carried out what it called a tax audit in respect of the income earned by the appellant ("the bank") from the purchase of treasury bills and other financial instruments during the period extending from 2000 to 2005. As a result of H

Sandura JA

A that audit Zimra discovered that the bank's computerized accounting system automatically accrued interest in respect of treasury bills and other financial instruments as the year progressed, and that at the end of each tax year the bank reversed the interest accrued but not yet received. The reversed amounts were, however, included in the bank's taxable income for the following year.

In addition, Zimra discovered that in the case of the profits realised by the B bank in each financial year the bank distributed dividends on the basis of total profits, taking into account the income accrued, but not yet received, in respect of the non-matured treasury bills. Zimra, therefore, concluded that the reversal of the income accrued was only done in order to postpone the payment of income tax.

C In the circumstances, Zimra prepared a schedule of income tax adjustments in respect of the income earned by the bank from treasury bills and other financial instruments during the period in question. The schedule indicated that additional taxes, penalties and interest amounting to Z$803 095 918 160.82 were payable by the bank. When called upon to pay that sum the bank disputed the liability to pay any additional taxes, penalties and interest.

D The dispute between the parties concerned the time when the income earned from purchasing a treasury bill accrued to the purchaser, for the purposes of s 8(1) of the Income Tax Act [*Chapter 23:06*] ("the Act"). Section 8(1) of the Act, in relevant part, reads as follows:

> "For the purposes of this Part –
>
> > ' E gross income' means the total amount received by or accrued to or in favour of a person or deemed to have been received by or to have accrued to or in favour of a person in any year of assessment …"

According to the bank, the income in question ("the discount") accrued to the bank on the date when the treasury bill matured. On the contrary, Zimra contended that the discount, like interest on a loan, accrued on a daily basis F from the date when the treasury bill was purchased by the bank up to the date when the treasury bill matured.

When the dispute could not be resolved, the bank filed a court application in the High Court seeking the order set out at the beginning of this judgment. The application was subsequently dismissed with costs. Aggrieved by that G result, the bank appealed to this court.

The main issue in this appeal is whether the discount on a treasury bill (i.e. the difference between the price at which the bank bought the treasury bill and the bill's face value payable on the date of maturity) accrued to the bank before the date of maturity.

H After considering the issues before him very carefully, the learned judge in

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Sandura JA

the court *a quo* concluded, correctly in my view, that what accrued to the A bank before the date of maturity of the treasury bill was the bank's right to claim payment of the discount in future (i.e. on the date of maturity) and that the value of that right was to be included in the bank's gross income for taxation purposes.

Although in his judgment the learned judge in the court *a quo* dealt at B length with the issue of whether the discount on a bill was the same as the interest payable on a loan, and concluded that the two were the same, it is unnecessary for me to deal with that issue because I did not understand the learned judge to base his decision on that finding. I should mention in passing, however, that in *Willingale (Inspector of Taxes)* v *International Commercial Bank Limited* [1978] 1

All ER 754 (HL), the House of Lords, C by a majority of three to two, ruled that the discount on a bill was not the same as interest on a loan.

In my view, the learned judge in the court *a quo* based his decision on the judgment in *Lategan* v *Commissioner for Inland Revenue* 1926 CPD 203, a judgment of the Full Bench of the Cape Provincial Division of the Supreme D Court of South Africa. At 207 Watermeyer J (as he then was) summarised the facts as follows:

> "This is a case stated by the Income Tax Special Court for the decision of this Court. The appellant is a wine farmer, and in May 1920, he sold the wine which he made during the year of assessment ending 30 June 1920, for a sum of £5 924. Of this sum £3 500 was payable in the year of assessment, and the balance was E payable in instalments in July, August and September 1920.
>
> The Commissioner claimed that the whole purchase price should be included in the appellant's gross income for the year ending 30 June 1920. The appellant contended that the instalments payable after June 1920, should be excluded, and the first question submitted for our decision is whether the instalments payable after June 1920 should be included in or excluded from the appellant's gross F income for the year ending 30 June 1920 …"

The court held that all the instalments were to be included in the gross income for the year of assessment ending 30 June 1920, but that something had to be deducted from the face value of the instalments to allow for the fact that the instalments were not payable at the end of the year of assessment, the G value to be fixed in respect of the instalments being the present worth of the instalments at the end of the year of assessment.

In addition, the court dealt with the meaning of the word "amount" in the definition of "gross income" in s 6 of the Income Tax (Consolidation) Act 41 of 1917. In s 6 "gross income" was defined as "the total amount received by or accrued to or in favour of any person", a definition which is identical H

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A to the definition of "gross income" set out in s 8(1) of the Zimbabwean Act.

Commenting on the meaning of the word "amount" and other related issues, Watermeyer J said the following at 208-211:

> "In my opinion, the word 'amount' must be given a wider meaning, and must include not only money, but the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value …
>
> B If this view be correct, then the taxpayer's income for taxation purposes includes not only the cash which he has received or which has accrued to him, but the value of every other form of property which he has received or which has accrued to him, including debts and rights of action.
>
> It was argued … that a debt payable in the future was not an amount of money 'accrued to' the taxpayer, and consequently it was not part of his 'gross income', C and a number of cases were cited on the meaning of the word 'accrue'.
>
> In my opinion, the words in the Act, 'has accrued to or in favour of any person', merely mean 'to which he has become entitled'.
>
> So far as a debt is concerned which is payable in the future and not in the year of assessment, it might be difficult to hold that the cash amount of the debt has accrued to the taxpayer in the year of assessment. He has not become entitled D to a right to claim payment of the debt in the year of assessment, but he has acquired a right to claim payment of the debt in future. This right has vested in him, has accrued to him in the year of assessment, and it is a valuable right which he could turn into money if he wished to do so.
>
> According to what has been stated above, the value of this right must, in my opinion, be included in the taxpayer's gross income for taxation purposes …
>
> E In my opinion, therefore, the answer to the first question in the special case is that the instalments must be regarded as gross income, but something must be deducted from their face value to allow for the fact that they were not payable at the close of the year of assessment. Assuming that the right to receive the instalments was not converted into money by sale or otherwise during the year of assessment, the value to be fixed (apart from any question whether the debt F was good or bad) would be the present worth of the instalments at the end of the year, i.e. 30 June 1920."

The decision in *Lategan's* case *supra* was subsequently approved of and applied by the Appellate Division of the Supreme Court of South Africa (Corbett CJ, Joubert JA, Hefer JA, Nestadt JA and

Nicholas AJA) in *Commissioner for Inland Revenue* v *People's Stores (Walvis Bay) (Pty) Ltd* G 1990 (2) SA 353 (A).

Hefer JA, who prepared the judgment in that case, set out the facts as follows at 360G-361F:

> "From the agreed statement of case presented to the Special Court it appears that the respondent ('the taxpayer') carries on business as a subsidiary in the Edgars H group of companies as a retailer of clothing, footwear, household textiles and

> related goods, and that it sells its wares to its customers for cash and on credit … A
>
> During the 1983 tax year the taxpayer sold goods under the scheme for a total amount of some R1.3 m. At year-end an amount of R341 281 representing instalments not yet payable was still outstanding. The appellant ("the Commissioner") included the latter amount in the taxable income on which the taxpayer was assessed for normal tax for the year in question … Having B unsuccessfully objected to the assessment, the taxpayer appealed to the Special Court on the grounds that:
>
> '13.1 The instalments not yet payable nor paid of R341 281 did not constitute an "amount, in cash or otherwise, received by or accrued to or in favour of" the taxpayer within the meaning of "gross income" as defined …, and ought therefore not to have been treated as such. C
>
> 13.2 Alternatively to 13:1:
>
> 13.2.2 The instalments not yet payable nor paid … ought not to have been included in the taxpayer's gross income at their face value. They should have been included at no more than the present value of the right to receive those instalments in future.'"

In the circumstances, the Special Court had to answer the following two D questions:

> "19.1 Ought the value of the instalments not yet payable nor paid to have been included in the taxpayer's gross income?
>
> 19.2 If so, at what value ought those instalments to have been included in the gross income? Ought it to have been done at the face value or at the E value to the taxpayer or at the market value or at some other value?".

The Special Court ruled that the value of the instalments not yet payable nor paid ought to have been included in the taxpayer's gross income, and that the outstanding instalments had to be valued at their market value.

The Commissioner appealed to the Appellate Division against the Special Court's ruling on the second question, contending that the outstanding F instalments ought to have been included in the gross income at their full or face value. On the other hand, the taxpayer cross-appealed against the Special Court's ruling on the first question, arguing that the value of the outstanding instalments should not have been included in its gross income.

After approving the decision in *Lategan's* case *supra* and applying the G principles set out therein, the Appellate Division dismissed the appeal and cross-appeal. In dismissing the appeal and the cross-appeal Hefer JA said the following at 367 C-F:

> "In my view, the decision in the *Lategan* case reflects the law correctly. It being common cause that the debts which accrued to the taxpayer in the present case could be turned into money, I am also of the view that the Special Court's ruling H

> A on the first question was correct. This conclusion disposes of the cross-appeal.
>
> Very little need be said about the Commissioner's appeal. His contention is that the debts have to be reflected as part of the 'gross income', not at their present value as the Special Court found, but at their full or face value. This is plainly not so … It is the right to receive payment in the future that accrued to the taxpayer; it is that right that has to be valued and, as stated before, its value B is obviously affected by its lack of immediate enforceability."

I entirely agree with the learned Judge of Appeal.

In my view, the principles set out in the *Lategan* case *supra* and confirmed and applied in the *People's Stores* case *supra* are the principles to be applied in determining the issues in this appeal. There is no doubt that the right to C claim payment of the discount in future could be turned into money.

In this regard, it seems to me that there is no real difference between the discount on a treasury bill and a debt payable in the future. After all, the discount is payable in the future, i.e. when the bill matures. I cannot, therefore, see any good reason why the principles set out in the *Lategan* case *supra*, which apply to a debt payable in the future, should not apply to D the discount on a bill.

Accordingly, applying the principles set out in the *Lategan* case *supra* to the facts of the present case, the conclusion must be that the discount on the treasury bill ought to have been included in the bank's gross income for taxation purposes, with something being deducted from the face value of E the discount to allow for the fact that the discount was not payable at the end of the year of assessment.

However, assuming that the right to receive the discount was not converted into money, for example by sale during the year of assessment, the discount ought to have been included in the bank's gross income on the basis of the market value of the discount at the end of the year of assessment.

F In the circumstances, the main issue in this appeal, which is whether the discount on the treasury bill accrued to the bank before the date of maturity, must be answered in the affirmative, subject to the qualification that it is the right to claim payment of the discount in future which accrued to the bank before the date of maturity. It is that right which had to be valued and the G value thereof included in the bank's gross income for taxation purposes.

Finally, I would like to comment very briefly on the House of Lords' decision in *Willingale (Inspector of Taxes)* v *International Commercial Bank Limited supra*.

In that case, the House of Lords held, by a majority of three to two, as H indicated in the headnote at 754, that:

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> "When the bank discounted or purchased a bill of exchange it acquired an asset A and could not realise any profit in respect of it until it was sold or matured. It followed that no part of the profits anticipated on sale or maturity could be included in the computation of the bank's taxable profits for the accounting periods in question."

However, it is clear from the speeches delivered by the five Law Lords that counsel appearing for the Inspector of Taxes did not advance any argument B based on the principles set out in the *Lategan* case *supra*. He was probably unaware of the case.

Nevertheless, in his speech, Lord Salmon, who concurred with two other Law Lords in dismissing the appeal, said the following at 756d:

> "Take the case of a bank which buys for the equivalent of £10 000 a foreign bill C of exchange with a face value equivalent to £15 000, maturing five years after the date of its purchase. The bank in calculating the price which it was prepared to pay for the bill, on which it expected to make a profit, may well have taken into consideration the interest it would be losing on the purchase price. This, however, would be only one factor in arriving at the price which the bank was prepared to pay." D

And at 757a the learned Law Lord continued:

> "I agree, however, that it is arguable, although the Crown does not rely on the argument, that the bank on entering into the transaction which I have postulated acquires the right to be paid the £5 000 in five years' time and that accordingly the bank earns that sum in the fiscal year in which the transaction is made. It follows, so the argument runs, that the bank can be taxed on the £5 000 in that E fiscal year subject to a suitable adjustment for the deferment of the payment."

In my view, the above argument is consistent with the principles set out in the *Lategan* case *supra*. It is likely that if the Crown had relied on such an argument on behalf of the Inspector of Taxes it would have succeeded.

In the circumstances, the appeal is dismissed with costs. F

ZIYAMBI JA and GARWE JA concurred.

Atherstone & Cook, appellant's legal practitioners

Kantor & *Immerman*, respondent's legal practitioners G

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U-TOW TRAILERS (PVT) LTD v CITY OF HARARE & ANOR 2009 (2) ZLR 259 (H)

Citation	2009 (2) ZLR 259 (H)
Case No	Judgment No. HH-103-09
Court	High Court, Harare
Judge	Makarau JP
Heard	30 June 2009; 13 July 2009
Judgment	21 October 2009
Counsel	*L Mazonde*, for the applicant *S Chirowe*, for the first respondent *C Daitai,* for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Administrative law – *administrative decision – decision arising out of contract between administrative authority and another party – applicability of Administrative Justice Act [Chapter 10:28] to such decision – duty of administrative authority to act fairly and in accordance with Act*

D **Landlord and tenant** – *lease – breach of by lessee – breach entitling lessor to cancel lease and seek eviction of lessee – only court may order ejectment of lessee*

Local government – *town council – administrative decision by – decision arising out of contract between administrative authority and another* E *party – applicability of Administrative Justice Act [Chapter 10:28] to such decision*

Practice *and procedure – application – what must be pleaded – no need to plead the law under which application made – application may be heard as long as necessary averments to sustain cause of action are pleaded*

F **Statutes** – *Administrative Justice Act [Chapter 10:28] – applicability – decisions by administrative authority arising out of contract – such decision subject to Administrative Justice Act*

Headnote

The applicant was the lessee of premises and the first respondent, the Harare City Council, was the lessor. The lease agreement provided that G the premises could not be sub-let without the written consent of the lessor. In spite of this provision, the applicant sub-leased the premises to the second respondent. The first respondent wrote to the applicant summarily terminating the lease agreement and seeking the ejectment of the applicant from the premises. When the applicant tendered rent H for that month, it was rejected on the basis that the lease agreement had

been cancelled. The applicant sought firstly, an order holding the first A respondent bound by the lease agreement on the basis that it was not subletting to the second respondent as alleged, and, secondly, an order ejecting the second respondent from the premises. The main issue for determination was whether the first respondent was justified in summarily cancelling the lease agreement without first affording the applicant a B chance to respond to the allegations that it was subletting the premises to the second respondent. The first respondent argued that the terms of the lease agreement allowed it to sub-let. The second issue is whether the Administrative Justice Act [*Chapter 10:28*] introduced the application of rules of natural justice into the field of contract law where one of the parties is a local authority. C

Held, that even where a lease agreement grants the lessor the right to cancel the lease on account of breach and to re-take possession of the leased premises, such cancellation is always subject to the control of, and confirmation by, the court. The lessor has to approach the court for the confirmation of its cancellation of the agreement and for the eviction of D the tenant. The right to summary termination of the lease agreement, no matter how clearly worded, does not oust the jurisdiction of the court to grant the eviction order. The existence of the grounds for, and the validity of, the cancellation of the lease agreement are always subject to validation and confirmation by the court, which alone can order the eviction of the defaulting tenant. The lessor cannot exercise self- help E and retake possession of the property without a court order, even where the agreement specifically so provides. Here, the first respondent did not approach the court for the eviction of the applicant, neither it did it counter- apply for the confirmation of its cancellation of the lease agreement and the eviction of the applicant.

Held, further, that the first respondent acted strictly in terms of the lease F agreement between the parties and did not afford the applicant a chance to be heard before it summarily cancelled the lease agreement. The rule at common law is that tenets of natural justice have no application in the law of contract unless the aggrieved party can prove that the contract impliedly imported and incorporated such into the contract. G However, even before the enactment of the Administrative Justice Act, courts in this jurisdiction were generally alive to the need to import fairness into administrative decisions, even those that were founded primarily on contract, especially the employment contract. Section 2 of the Administrative Justice Act defines an administrative authority as including any person, committee or council of a local authority and an H

A administrative action as including any action or decision taken by an administrative authority. The definition is immensely wide. Accordingly, any decision made by an administrative authority under the empowering provisions of any enactment, in pursuance of any rule of common law, or in terms of an agreement between itself and another party or in terms of any legal instrument, must be made fairly and in accordance with the B provisions of the Act. The decision by the first respondent to summarily terminate the lease agreement between itself and the applicant was an administrative act carried out by an administrative authority, empowered to do so by the lease agreement between the parties. The Administrative Justice Act applies fully to this decision. The first respondent was bound C to act fairly in terminating the lease agreement between itself and the applicant. It failed to do so and so breached the obligations imposed upon it by the law. Its consequent decision, arrived at in circumstances where it had failed to act fairly, could not therefore stand.

Held, further, that s 4 of the Administrative Justice Act provides that any person who is aggrieved by the failure of an administrative authority D to comply with s 3 may apply to the High Court for relief. Generally, it is not necessary for an applicant specifically to plead the law that it seeks to rely on as long as the necessary averments are made therein to sustain a cause of action under the applicable is law, unless the law under which the applicant is proceeding requires that certain averments E be specifically pleaded.

Cases cited

Bater & Anor v Muchengeti 1995 (1) ZLR 80 (S)

Chirwa v Transnet Ltd & Ors 2008 (4) SA 367 (C)

de Villiers v Min of Education, Western Cape & Anor 2009 (2) SA 619 (C)

F *Gründling v Beyers & Ors* 1967 (2) SA 131 (W)

Joubert v Bester 1977 (2) SA 641 (T)

Livingstone v Solomon 1924 SR 117

Machaya v BP Shell Marketing (Pvt) Ltd 1997 (2) ZLR 473 (H)

Nedbank Ltd v Master of High Court, WLD & Ors 2009 (3) SA 403 (W)

G *Sikutshwa v MEC for Social Development, Eastern Cape & Ors* 2009 (3) SA 47 (TkH)

Towers v Chitapa 1996 (2) ZLR 261 (H)

Legislation considered

Administrative Justice Act [*Chapter 10:28*], ss 2 & 4

H High Court Rules, 1971 (RGN 1047 of 1971), s 4C

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Promotion of Administrative Justice Act 3 of 2000 (South Africa), s 1 A

Case information

L Mazonde, for the applicant

S Chirowe, for the first respondent

C Daitai, for the second respondent

Judgment

MAKARAU JP: The brief background facts in this matter are largely common B cause. I set them out as follows.

In 1994 the applicant entered into a lease agreement with the first respondent in respect of certain premises situate at No. 9 Market Street, Eastlea, Harare, (hereinafter referred to as "the Premises"). The lease agreement was constantly C renewed over the years, with the last renewal being agreed upon on 20 June 2007 for a further three years. Thus the lease agreement between the parties is due to expire by effluxion of time on 31 March 2010. It was a specific term of the agreement between the applicant and the first respondent that the applicant would not sublet the Premises without the written consent of the lessor. D

In 2008 the applicant and the second respondent reached an understanding in terms of which the second respondent moved onto, and took occupation of, part of the Premises. I shall revert to the details of this understanding in due course.

In January 2009 the first respondent wrote to the applicant summarily E terminating the lease agreement and seeking the ejectment of the applicant from the Premises. This was on the allegation that the applicant was subletting the Premises to the second respondent without the prior written consent of the lessor and in breach of the specific term of the lease agreement against subletting. When the applicant tendered rent for the month of February 2009, it was rejected on the basis that the lease agreement had been cancelled. This F in turn prompted the applicant to approach this court seeking firstly, an order holding the first respondent bound by the lease agreement on the basis that it was not subletting to the second respondent as alleged, and secondly, an order ejecting the second respondent from the Premises.

The application was opposed by both respondents. In opposing the application, G the first respondent contended that it had proceeded in terms of the lease agreement to cancel the lease agreement summarily as the applicant was in breach. It justified its action by relying on clause 21 of the lease agreement which provides that:

> "If the lessees shall fail to pay the rent on the due date or at the latest within ten days thereafter or if the lessees shall commit any other breach of the terms or H

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A conditions of this lease then the Municipality shall have the right in its discretion summarily to terminate this lease and retake possession of the stand without payment of any compensation whatsoever and without prejudice to any claim which it may have against the lessees for rent already due or for any damages which it may suffer by reason of such breach or termination."

The second respondent's opposition to the application is, in my view, B somewhat curious. The second respondent is the alleged sub-lessee and it objects to the continuation of the lease agreement between the applicant and the first respondent. While admitting, as contended by the applicant, that it took occupation of the Premises in anticipation of a joint venture between itself and the applicant, it does not proffer any defence as to why it should not be evicted from the Premises at the instance of the applicant. Instead, and C curiously so as I have observed above, it adopts and pleads the case of the first respondent that the applicant was in breach of the lease agreement, indeed epitomizing the proverbial stranger who mourns louder than the bereaved. It further avers that in February 2009, when the applicant's rent was turned down, this was because it had paid rent in respect of the Premises. It, however, falls short of alleging that it is now the tenant in respect of the Premises.

D In its opposing affidavit, the first respondent does not admit any formal relationship with the second respondent. It simply maintains that the applicant's rent for February 2009 was not accepted as its lease had been cancelled.

I believe it is pertinent at this stage that I dispose of the issue between the applicant and the second respondent. As observed above, the applicant is E seeking the eviction of the second respondent from the Premises on the basis that the proposed joint venture between the parties has failed. This is not disputed by the second respondent, which then proceeds to aver that after the joint venture had failed to materialize, the applicant demanded rent from it, thereby creating the sublease. The totality of the averments made F by the second respondent, even if proved, do not constitute a defence to an order for eviction at the instance of the applicant. Thus, in the event that I find for the applicant and hold the first respondent to the agreement, I must perforce order the eviction of the second respondent from the Premises on the basis that the second respondent has failed to proffer a defence to the applicant's claim.

G The issue that remains for determination is between the applicant and the first respondent. It is whether the first respondent was justified in summarily cancelling the lease agreement without first affording the applicant a chance to respond to the allegation that it was subletting the Premises to the second respondent.

H It is trite that even where a lease agreement grants the lessor the right to

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cancel the lease on account of breach and to re-take possession of the leased A premises, as was the position between the applicant and the first respondent, such cancellation is always subject to the control of, and confirmation by, the court. The lessor has to approach the court for the confirmation of its cancellation of the agreement and for the eviction of the tenant. The right to summary termination of the lease agreement, no matter how clearly worded, B does not oust the jurisdiction of the court to grant the eviction order. The existence of the grounds for, and the validity of, the cancellation of the lease agreement are always subject to validation and confirmation by the court ,which alone can order the eviction of the defaulting tenant. The lessor cannot exercise self-help and retake possession of the property without a court order, even where the agreement specifically provides so. See *Livingstone* C v *Solomon* 1924 SR 117; *Joubert* v *Bester* 1977 (2) SA 641 (T); *Towers* v *Chitapa* 1996 (2) ZLR 261 (H) and *Bater & Anor* v *Muchengeti* 1995 (1) ZLR 80 (S) at 85.

In casu, the first respondent did not independently approach the court for the eviction of the applicant after it became aware of the alleged breach in D the form of subletting. After being served with this application, it did not seek to counter-apply for the confirmation of its cancellation of the lease agreement and the eviction of the applicant. The validity of its actions in cancelling the lease agreement and its threat to re-take possession of the Premises have been brought before the court by the applicant, not for its confirmation but for it to be set aside on the basis that the first respondent E did not give the applicant an opportunity to respond to the allegations before it acted summarily.

Thus it appears to me that, even if I were to find that the purported cancellation of the lease agreement by the first respondent was justified in the circumstances, that finding would not automatically translate into an order evicting the F applicant from the Premises as there is no prayer before me for the eviction of the applicant from the Premises. In my view, such a finding, if I were to make it, would simply lay the foundation for the issuance of an eviction order against the applicant at the instance of the first respondent whenever it is moved to seek such an order.

It is on the basis of the above that, in my view, it is not necessary that I make G a finding as to whether or not the applicant was subletting to the second respondent and was therefore in breach of the lease agreement. In my view, to do so would be to tie down the court that may be approached by the first respondent for an order evicting the applicant from the Premises.

In my view, the legal issue that must be resolved in this matter is whether, in H

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A light of the promulgation of the Administrative Justice Act [*Chapter 10.28*], (hereinafter referred to as "the Act"), the powers of the first respondent as a local authority to act summarily as it did has been modified. Hence, at the hearing of the matter I directed the parties to make reference to the provisions of the Act, which came into operation on 3 September 2004. My anxiety not to overlook the provisions of the Act was prompted by the admitted fact that B the first respondent acted strictly in terms of the lease agreement between the parties, and did not afford the applicant a chance to be heard before it summarily cancelled the lease agreement on the allegation that the applicant was subletting the Premises to the second respondent.

I have now received extensive heads of argument from both counsel in this C matter and I appreciate the assistance rendered me in this regard.

Mr *Chirowe,* for the first respondent, ingeniously in my view, put the issues that arise from a consideration of the provisions of the Act as follows:

1. "Whether or not the applicant by entering into a lease agreement which entitles first respondent to summarily terminate the lease agreement can be held to have waived its right to be heard as provided (for) in the Administrative D Justice Act.
2. Whether or not first respondent cannot validly enter into a contract with the applicant which varies or excludes some provisions of the Administrative Justice Act."

I view the settling of the issues by Mr *Chirowe* as ingenious because the Act E came into operation on 3 September 2004 when the parties were already in the landlord and tenant relationship. The applicant could thus not have waived rights under the Act when it contracted with the first respondent because such rights were not in existence and had not accrued to it. By the same token, the parties could not have expressly excluded the provisions of the Act in their agreement as the lease agreement preceded the coming F into operation of the Act. All in all, I gain the impression that Mr *Chirowe,* in settling the issues in the manner that he did, was at pains to show that the provisions of the Act are not binding on the parties. Whether the first respondent is bound by the provisions of the Act is the issue that I address in this judgment.

Mr *Mazonde,* on the other hand, perceived the issue arising from the provisions G of the Act as simply whether they have introduced the application of rules of natural justice into the field of contract law where one of the parties is a local authority, as is the first respondent in the case before me. I tend to agree with his definition of the issue that falls for my determination in this suit. The rule at common law is that tenets of natural justice have no application in the law H of contract unless the aggrieved party can prove that the contract impliedly

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imported and incorporated such into the contract. See *Machaya* v *BP Shell* A *Marketing (Pvt) Ltd* 1997 (2) ZLR 473 (H). With the promulgation of the Act, it appears to me that this common law was varied in some instances as it relates to administrative authorities to which the Act applies.

I first have to determine whether the Act applies to the first respondent.

In s 2 the Act defines administrative authority to include any person, committee B or council of a local authority. *In casu,* it is common cause that the decision to terminate the lease agreement

between the applicant and the first respondent summarily was taken on behalf of the first respondent by a duly authorised employee or committee of the first respondent, who or which, by virtue of the provisions of the Act, becomes the administrative authority for the purposes of the Act. That is not in dispute. In the same section, an administrative action is C defined to include any action or decision taken by an administrative authority. The definition given in the section appears to me to be immensely wide. I would venture to suggest that the definition of "administrative action" in the Act is wider than that given in s 1 of the South African Promotion of Justice Act as reported in decisions such as *Sikutshwa* v *MEC for Social* D *Development, Eastern Cape & Ors* 2009 (3) SA 47 (TkH) and *Nedbank Ltd* v *Master of High Court, Witwatersrand Local Division & Ors* 2009 (3) SA 403 (W) where it is stated that "administrative action" in terms of s 1 of the Act means any decision taken, or any failure to take a decision, by an organ of State when such organ of State is exercising a public power or performing a public function in terms of legislation, which adversely affects the rights E of any person and which has a direct, external legal effect .

In my view, the definition of "administrative action" as given in s 1 of the South African Promotion of Justice Act, as compared to the definition given in the Act, marks the point of departure in the laws of our two countries. Thus, in South Africa, if action is taken on the basis of a contract between F the parties, it has been held not to constitute an "administrative action" that is subject to the provisions of the SA Act. See *Chirwa* v *Transnet Ltd & Ors* 2008 (4) SA 367 (CC) (2008 (3) BCLR 251 and *de Villiers v Minister of Education, Western Cape & Anor* 2009 (2) SA 619 (C). In excluding contractual relations from the application of Promotion of Justice Act, the South African courts have been guided by the definition of "administrative G action" that I have referred to above which is captured in the following remarks by Nqcobo J (as he then was), in para 142 of the judgment in *Chirwa's* case (*supra*):

> "The subject-matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power H

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> A involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public B power does not transform its conduct in terminating the applicant's employment contract into administrative action."

With much commendable foresight (or hindsight), the Legislature in enacting the Act specifically included acts by all public authorities, even where the power to carry out the action in question is derived from a contract, thereby C obviating the need for our courts to debate the issue that fell for determination in the South African courts in matters involving the termination of employment contracts. Section 2 of the Act defines "administrative action" as follows:

> ""administrative action" means any action taken or decision made by an administrative authority and the words "act", "acting" and "actions" shall be construed and applied accordingly;"

D In the same section, "empowering provision" is defined as follows:

> ""empowering provision" means a written law or rule of common law, or an agreement, instrument or other document in terms of which any administrative action is taken".

My reading of the two definitions put together makes me arrive at the conclusion that, for the purposes of the Act, any decision made by an E administrative authority under the empowering provisions of any enactment, in pursuance of any rule of common law relating to the terms of an agreement between itself and another party or in terms of any legal instrument, shall be made fairly and in accordance with the provisions of the Act.

It is clear that the statutory provisions protecting the public's rights to fair F administrative decisions as given under the Act are considerably wider than those conferred under the South African equivalent, and to construe them restrictively would be to take away from the public by judicial interpretation that which the Legislature has given. That the promulgation of the Act brings in a new era in administrative law in this jurisdiction cannot be disputed. It can no longer be business as usual for all administrative authorities, as G there has been a seismic shift in this branch of the law.

The shift that has occurred is, in my view, profound as it brings under the judicial microscope all decisions of administrative authorities save where the provisions of s 3 (3) of the Act apply.

On the basis of the foregoing, I find that the decision by the first respondent H summarily to terminate the lease agreement between itself and the applicant

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Makarau JP

was an administrative action carried out by an administrative authority, A empowered to do so by the lease agreement between the parties. The Act applies to such a decision. The Act provides that an administrative authority which has the responsibility or power to take any administrative action which may adversely affect a right, interest or legitimate expectation of any person shall, *inter alia,* act reasonably and in a fair manner. The Act proceeds B to define what a fair manner, for the purposes of the Act, entails and this includes adequate notice of the nature and purpose of the proposed action and a reasonable opportunity to make adequate representations, in my view, an embodiment of the *audi alteram partem* rule.

Additionally, in my view, the Act is simply a codification of the position C that was gaining general acceptance at common law to the effect that rules of natural justice have to be observed before any administrative decision is taken where such may adversely affect the rights or property of an individual. See *Gründling v Beyers & Ors* 1967 (2) SA 131 (W). Thus, even prior to the promulgation of the Act, courts in this jurisdiction were generally alive to the need to import fairness into all administrative decisions even those that D were founded primarily on contract, especially the employment contract. See the *Machaya* case (*supra*).

On the basis of the above, it is therefore my finding that the first respondent was bound to act fairly in terminating the lease agreement between itself and the applicant. It failed to do so. By failing to act fairly in the circumstances, E it breached the obligations placed upon it by the Act. Its consequent decision, arrived at in circumstances where it had failed to act fairly, cannot therefore stand. I make this decision in the full knowledge of the fact that the first respondent genuinely believed it had a case against the applicant and that the lease agreement between itself and the applicant allowed it to act as it did. Notwithstanding all that, because the law imposes a duty on the first F respondent to act fairly in the matter, its decision has to be set aside as it was arrived at unfairly. The decision is set aside even without an examination of whether or not the applicant was subletting the Premises, in promotion of the need to advance fairness in public administration as embodied in the Act.

Before I dispose of this matter, I need to deal with a point *in limine* taken G by the first respondent and arising out of adjectival law. The first respondent contends that the applicant did not approach this court for relief under the Act and thus I cannot apply the provisions of the Act to its advantage.

Section 4 of the Act provides that any person who is aggrieved by the failure of an administrative authority to comply with s 3 therein may apply to the High Court for relief. It is common cause that the applicant filed this application H

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A challenging the decision of the first respondent summarily to cancel the lease agreement. It filed a court application in terms of the High Court Rules. While the application does not make any reference to the provisions of the Act, in my view it makes allegations that fall squarely within the provisions of the Act. I was satisfied before I referred the question to the parties for B further argument that the allegations and contentions made by the applicant in its court application fell within the purview of the Act even if the Act was not specifically invoked. In my view, generally, it is not necessary for an applicant specifically to plead the law that it seeks to rely on as long as the necessary averments are made therein to sustain a cause of action under the applicable law unless the law under which he or she is proceeding requires C that certain averments be specifically pleaded. The court is not a slave to the form of the law. It is always a slave to justice whom it must always serve.

For the avoidance of doubt, if I have erred in allowing the applicant to bring a deformed application before the court and the correct position is that it was necessary for the applicant specifically to

invoke the provisions of the Act, I D will condone that oversight in terms of r 4C of the High Court Rules, 1971.

As correctly pointed out by the first respondent, this is not an application for review. It is an application for the setting aside of an administrative decision on the basis that it was not arrived at fairly and thus, at law, contravenes the Act. In view of the fact that the applicant succeeds on a matter that it E did not specifically raise in its initial heads of argument, I will not punish the first respondent with an award of costs. The same does not apply to the second respondent.

In the result, I make the following order:

1. The decision by the first respondent to summarily cancel the F applicant's lease agreement is hereby set aside.
2. The second respondent and all those occupying through it are to vacate the Premises at number 9 Market Street within 7 days of this order failing which the deputy sheriff is hereby authorised to evict the second respondent and all those occupying through it from the G Premises.
3. The second respondent shall bear the applicant's costs of suit.

Muzangaza, Mandaza &Tomana, applicant's legal practitioners

Gambe & Partners, first respondent's legal practitioners

H *Magwaliba & Kwirira*, second respondent's legal practitioners

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Source:
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NEXBAK INVESTMENTS (PVT) LTD & ANOR v GLOBAL ELECTRICAL MANUFACTURERS (PVT) LTD & ANOR 2009 (2) ZLR 270 (S)

Citation	2009 (2) ZLR 270 (S)
Case No	Judgment No. S-43-09
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA and Ziyambi JA
Heard	24 June 2008
Judgment	22 October 2009
Counsel	*A A Debwe,* for the appellants *F M Katmandu*, for the respondents
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Costs – *legal practitioner and client scale – award of costs on the higher scale – general behaviour of litigants throughout the litigation completely unjustified* D

Lien – *creditor's lien – scope of – debt arising ex contractu – personal right only – when right of retention arises – creditor not having performed work on or incurred expenditure on such property – creditor having no lien over property*

Lien – *salvage lien and improvement lien – rights given by such liens – both* E *liens confer real rights valid against the world*

Practice *and procedure – pleadings – prescription – allegation of prescription in special plea – opposing party relying on interruption of prescription – need to file replication alleging interruption*

Headnote

A salvage lien gives the possessor of property belonging to another, a real F right against the entire world. He has a right of retention until paid the amount of his expenditure. Similarly, an improvement lien confers a real right valid against the entire world for the amount of enhancement of the property. A debtor and creditor lien, however, arising *ex contractu* only, confers a personal right, available only against the other party to the G contract (or third party with knowledge of the lien) to retain the property until paid the contract price. A debtor and creditor lien gives no right of retention over the property of the debtor that is in possession of the creditor (whether in pursuance of the contract or not) but on which he has not actually performed the work in respect of which he claims payment.

The respondents, in the second of two interrelated case, which were heard by H

Sandura JA

A the Supreme Court together, had claimed damages from the appellants in the sum of six trillion dollars, which claim was based on unjust enrichment. In answer thereto, the appellant filed a special plea alleging that the respondents' claim, in terms of s 15(1) of the Prescription Act [*Chapter 8:11*], had prescribed because more than three years had elapsed since the claim arose. The respondents made no answer thereto. However, when B the special plea was argued in the court *a quo*, the respondents alleged that the three year period of prescription, in terms of s 18(1) of the Act, had been interrupted. Notwithstanding the failure of the respondents to file any replication to the special plea, the court *a quo* dismissed the appellants' special plea. On appeal to the Supreme Court:

C *Held,* that the importance of carefully pleading one's case cannot be over emphasized. If the respondents wished to rely upon the alleged interruption of the running of prescription, they should have filed a replication to the special plea. In the absence of a replication, the issue between the parties was to be found in the pleadings as they stood and those issues did not include the issue of whether the running of prescription had been interrupted.

D *Held,* further, that the appeals must be dismissed. Bearing in mind that the general behaviour of the respondents in the two interrelated matters was completely unjustified, an award of costs against them was appropriate.

Cases cited

E *Fletcher and Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636

Impefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A)

Legislation considered

Prescription Act [*Chapter 8: 11*], ss 15(2) and 18(1)

Case information

F *A A Debwe,* for the appellants

F M Katmandu, for the respondents

Judgment

SANDURA JA: These two appeals were heard together. In the first appeal, the appellants appealed against the dismissal by the High Court of their G court application in case no. HC 1819/07, and in

the second appeal the appellants appealed against the dismissal by the High Court of their special plea in case HC 275/07.

The background facts may be tabulated conveniently as follows –

1. On 15 June 2004 Global Electrical Manufacturers (Pvt) Ltd ("Global") H issued a summons out of the High Court in case HC 7515/04 against

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Nexbak Investments (Pvt) Ltd ("Nexbak"), Andrew Ngoni Chirikure ("Chirikure") A and the Registrar of Deeds, seeking an order compelling them to transfer Stand 62, Mbuya Nehanda Street, Harare ("Stand 62"), to Global.

2. On 28 September 2005 the High Court dismissed Global's claim with costs. Dissatisfied with that result, Global appealed to this court. B
3. On 18 January 2007, before Global's appeal had been determined by this court, Global and Benjamin Mahlatini ("Mahlatini") issued a summons out of the High Court in case HC 275/07 against Nexbak and Chirikure, claiming damages for unjust enrichment in the sum of Z$6 000 000 000.
4. On 3 April 2007 this court dismissed Global's appeal with costs (see C judgment S-76-06).
5. On 4 April 2007 the legal practitioners acting for Nexbak wrote to the legal practitioners acting for Global as follows:

> "We refer to the Supreme Court judgment in the above matter in terms of which your client's appeal was dismissed with costs, and advise that our client has instructed us to demand that yours vacate its property *forthwith* D to avoid unnecessary embarrassment."

6. On 5 April 2007 the legal practitioners acting for Global replied as follows:

> "2. Global Electrical Manufacturers (Pvt) Ltd, through its directors (*sic*) Mr Benjamin Mahlatini, contends that Nexbak Investments (Pvt) Ltd has E been unjustly enriched by the efforts it took in the acquisition of stand 63, Mbuya Nehanda Street.
>
> 3. In the result as a precondition for its vacation of stand 62, Global Electrical Manufacturers (Pvt) Ltd demand (*sic*) reparation in the amount of $6 000 000 000 (six billion dollars). It instituted action at the High Court in case HC 275/07 wherein part of the relief is the retention of its occupation F of stand 62 as security for the due payment of the amount of reparation.
>
> 4. Our instructions are that Nexbak Investments (Pvt) Ltd attends to the payment of reparation as a precondition for Global Electrical Manufacturers (Pvt) Ltd (*sic*) vacation of stand 62 Mbuya Nehanda Street.
>
> 5. Should Nexbak Investments (Pvt) Ltd seek eviction without making reparation as claimed then such a measure would be resisted."

7. On 17 April 2007 Nexbak and Chirikure filed a court application in the G High Court (case HC 1819/07) against Global and Mahlatini, seeking an order evicting them from Stand 62. On the same day, Nexbak and Chirikure filed two special pleas in case HC 275/07. The first was the plea of prescription, the allegation being that the claim by Global and Mahlatini for payment of $6 000 000 000 was prescribed, and the second H

Sandura JA

A was the plea of *res judicata*, which was later abandoned. No replication to the special pleas was filed by Global and Mahlatini.

8. On 12 July 2007 the court application for the eviction of Global and Mahlatini from Stand 62 (case HC 1819/07) and the special plea of prescription in case HC 275/07 were argued together before the learned B judge in the court *a quo*.
9. On 5 March 2008 the court application and the special plea of prescription were dismissed with costs.

Aggrieved by that decision, Nexbak and Chirikure appealed to this court.

For the sake of convenience I will deal with the court application and the C special plea separately.

The court application: Case HC 1819/07

As already stated in this judgment, in case HC 7515/04 Global's claim to ownership of Stand 62 was dismissed with costs by the High Court and a subsequent appeal to this court was also dismissed with costs. Both courts D were satisfied that Stand 62 belonged to Nexbak, the company in which Chirikure was a director.

However, when Global was called upon to vacate Stand 62 it refused to do so on the ground that it required to retain occupation of the Stand as security for the payment of the sum of $6 000 000 000 which it had claimed from Nexbak and Chirikure as damages for unjust enrichment in case HC 275/07.

E The learned judge in the court *a quo* accepted Global's argument and dismissed the court application with costs.

The issue which arises in this appeal is whether Global had any right of retention in respect of Stand 62. I do not think it had. I say so because there is no evidence that Global incurred any expenditure on Stand 62 entitling F it to retain possession of the stand until it was paid compensation for its expenditure.

The circumstances in which a person has the right of retention are clearly set out by Professor R H Christie in *Business Law in Zimbabwe* at pp 454-455, where the learned author states as follows:

> G "A right of retention, or lien, arises by operation of law from the principle that no-one should be unjustly enriched at the expense of another. A person who has incurred expenditure on the property of another, movable or immovable, and who is in possession of that property, is entitled to retain possession until paid sufficient compensation to prevent the owner being unjustly enriched at his expense.
>
> H The amount of this compensation will depend on the circumstances. A possessor

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> who has incurred necessary expenses, i.e. expenses which must be incurred to A prevent the destruction or deterioration of the property, has a right of retention until paid the amount of his expenditure. This is known as a salvage lien, and it gives the possessor a real right against all the world. Useful expenses, i.e. expenses which have enhanced the market value of the property, give rise to an improvement lien, also valid against all the world, for the amount of the enhancement: *Fletcher and Fletcher* v *Bulawayo Waterworks Co Ltd* 1915 AD B 636. The third type of lien, a debtor and creditor lien, is available to anyone who has, by contract, performed work or incurred expenditure on the property of another. It confers a personal right, available only against the other party to the contract (or third parties with knowledge of the lien), to retain the property until paid the contract price. …
>
> *A debtor and creditor lien gives no right of retention over other property of the debtor that is in the possession of the creditor (whether in pursuance of the* C *contract or not) but on which he has not actually performed the work in respect of which he claims payment*: *Raymer* & *Co* v *Goldberg* & *Goldberg* 1912 SR 167; *Hotel Victoria (Rhodesia) Ltd* v *Alexander* 1952 SR 35, 1952 (2) SA 637" (emphasis added).

Applying these principles to the facts of the present case, it is clear that D Global has no right of retention in respect of Stand 62. It did not incur any expenditure on Stand 62 which would have entitled it to retain possession of the stand until it was paid compensation for its expenditure.

On the contrary, Global alleged that, in terms of an oral agreement concluded between 1997 and 2002 Global, represented by Mahlatini, it "rendered services and expended time and operating expenses negotiating the purchase and sale E to" Nexbak, represented by Chirikure, of Stand 63, Mbuya Nehanda Street, Harare ("Stand 63"). In my view, even if this allegation were accepted, it would not have created a right of retention in respect of Stand 62.

In the circumstances, the learned judge in the court *a quo* should have granted the court application and ordered Global's eviction from Stand 62. F

The special plea of prescription: Case HC 275/07

As already indicated, in case HC 275/07 Global and Mahlatini claimed from Nexbak and Chirikure payment of damages for unjust enrichment in the sum of $6 000 000 000.

On 17 April 2007 Nexbak and Chirikure filed two special pleas. The first was G the plea of prescription and the second was the plea of *res judicata*. Since the plea of *res judicata* was subsequently abandoned, I will not deal with it.

The special plea of prescription was in these terms:

"1.1 (The) Plaintiffs' claim is based on a repudiation of an alleged oral agreement between the parties which is alleged to have taken place in 2003. In that year the plaintiffs' claim was due. H

Sandura JA A

1.2 The plaintiffs' summons was issued in early 2007 and served on the defendants on 7 February 2007, that is, more than three (3) years after the date upon which the claim arose.

1.3 In terms of section 15(2) (*sic*) of the Prescription Act [*Chapter 8:11*] the period of prescription of an ordinary debt is three years.

1.4 *In casu*, summons was only issued in 2007 and it follows *a fortiori* that the B plaintiffs' claim is prescribed. Accordingly, the same must be dismissed with costs on a legal practitioner and client scale."

There was no replication to the special plea. Nevertheless, the learned judge in the court *a quo* said the following at p 3 of his judgment:

"The applicants argue that the cause of action arose in 2003 and that in 2007 the claim had prescribed. The respondents countered this proposition by stating that C even assuming the cause of action arose in 2003, the running of prescription was interrupted by an express or tacit acknowledgement of liability by the applicants in 2005. (Section 18(1) of the Prescription Act [*Chapter 8:11*]). It is my view that prescription was interrupted as submitted by the respondents. Accordingly, the special plea fails."

In concluding that the running of prescription had been interrupted in D 2005, the learned judge relied upon a submission made to him by the legal practitioner who appeared for Global, which submission was not supported by any averment in the pleadings, as no replication had been filed. I have no doubt in my mind that in this regard the learned judge erred.

If Global wished to rely upon the alleged interruption of the running of E prescription, it should have filed a replication to the special plea. In the absence of a replication, the issues between the parties were to be found in the pleadings as they stood. Those issues did not include the issue of whether the running of prescription had been interrupted.

The importance of carefully pleading one's case cannot be over-emphasised. As Kumleben JA *et* Nienaber JA stated in *Imprefed (Pty) Ltd* v *National* F *Transport Commission* 1993 (3) SA 94 (A) at 107C-E:

"At the outset it need hardly be stressed that:

'The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.'

(Durbach v *Fairway Hotel Ltd* 1949 SR 115; 1949 (3) SA 1081 (SR) at 1082).

G This fundamental principle is similarly stressed in Odger's *Principles of Pleading and Practice in Civil Actions in the High Court of Justice* 22 ed at 113:

'The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.'"

In the present case, as it was common cause that Global had not filed a H replication to the special plea, the learned judge should have ignored the

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submission by Global's legal practitioner that the running of prescription A had been interrupted, and should have upheld the special plea and dismissed the claim by Global and Mahlatini.

Finally, I would like to deal with the question of costs. Mr *Debwe*, who appeared for the appellants, submitted that the appellants' costs in the court *a quo* should be paid by the respondents on the legal practitioner and client B scale. I agree with that submission. In my view, the respondents' conduct deserves to be censured by this court.

I say so because on 18 January 2007, before the respondents' appeal to this court in case HC 7515/04 had been determined, and apparently in anticipation of the dismissal of that appeal, the respondents instituted case HC 275/07 in the High Court against the appellants, claiming damages in the sum of C $6 000 000 000 for unjust enrichment. In my view, when they instituted that action they were most probably motivated by the desire to extend their unlawful occupation of Stand 62, with no rent to pay, until the action was finally determined some time in the future.

In any event, if the claim for damages for unjust enrichment was a genuine D claim, and not a mere afterthought, there appears to be no good reason why the claim was not pleaded in the alternative in case HC 7515/04, the case in which Global unsuccessfully claimed the ownership of Stand 62. Had the claim been pleaded in the alternative, all the issues between the appellants and the respondents would have been finally determined by this court on E 3 April 2007, when judgment SC 76/06 was handed down.

Furthermore, when the respondents' appeal to this court in case HC 7515/04 was dismissed on 3 April 2007, and the respondents were asked to vacate Stand 62, they refused to do so. The refusal to vacate the stand was completely unjustified, because the question of the ownership of Stand 62 had been F finally determined by this court.

Consequently, an order of costs on the legal practitioner and client scale is justified.

In the circumstances, the following orders are made—

A. In case HC 1819/07 —

1. The appeal is allowed. G
2. The order granted by the court *a quo* is set aside and the following substituted –
   (a) The respondents and all persons claiming the right of occupation through them shall forthwith vacate Stand 142, Salisbury Township, otherwise known as 62 Mbuya Nehanda Street, H

2009 (2) ZLR p277

Sandura JA

A Harare.

   (b) The respondents shall pay the applicants' costs of suit on the legal practitioner and client scale, jointly and severally, the one paying the other to be absolved.
3. The respondents shall pay the appellants' costs, jointly and severally, the one paying the other to be absolved. B

B. In case no HC 275/07 —

1. The appeal is allowed.
2. The order granted by the court *a quo* is set aside and the following substituted — C
   (a) The special plea of prescription is upheld.
   (b) The plaintiffs' claim is dismissed.
   (c) The defendants' costs shall be paid by the plaintiffs on the legal practitioner and client scale, jointly and severally, the one paying the other to be absolved. D
3. The respondents shall pay the appellants' costs, jointly and severally, the one paying the other to be absolved.

CHEDA JA and ZIYAMBI JA concurred.

E *Debwe & Partners*, appellants' legal practitioners

F M Katsande & Partners, respondents' legal practitioners

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MUTASA v NDUNA NO & ORS 2009 (2) ZLR 278 (H)

2009 (2) ZLR p278

Citation 2009 (2) ZLR 278 (H)

Case No Judgment No. HH-113-09

Court	High Court, Harare
Judge	Patel J
Heard	15 October 2009
Judgment	27 October 2009
Counsel	*F Mutamangira,* for the applicant *H Zhou,* for the first respondent *M Chimombe,* for the second and third respondents *T Mpofu,* with him *L Uriri,* for the fourth respondent
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Criminal procedure – *witness – compellability – when witness may decline to give evidence – privilege – effect of – witness claiming that being called in order to degrade his character – relevance*

Headnote

The applicant was formerly the Minister responsible for land reform and D resettlement. He sought an interim order barring the first respondent, who was the presiding magistrate in a criminal matter, from compelling him to testify in that matter. He also sought a final order setting aside the subpoena issued for him to attend and testify in the criminal matter, which involved the prosecution of the fourth respondent under s 3 of the E Gazetted Lands (Consequential Provisions) Act [*Chapter 20:*28]. The fourth respondent claimed that the applicant's evidence was necessary for his defence, which was that he was given an "offer letter" by the applicant which constituted the requisite "lawful authority" entitling him to remain in occupation of the farm. His evidence was that this offer letter was returned to the applicant in order to correct a spelling F error in his name and that the letter was then never handed back to him. He wanted the applicant to testify on his behalf by confirming that the offer letter was in fact originally issued to him. The applicant's reasons for not testifying in the trial were, firstly, that the evidence sought did not constitute a valid defence to the charge and was therefore irrelevant G and inadmissible; secondly, that he could not be compelled to divulge matters involving land allocation, as these were privileged by dint of public policy and public interest; and, thirdly, that he was only being called as a witness in order to degrade his character and could not be compelled to do so. He relied on ss 252, 295 and 297 of the Criminal H Procedure and Evidence Act [*Chapter 9:07*].

A *Held*, that ordinarily, the applicant's claims of privilege and the validity or otherwise of the subpoena should in the first instance be ventilated before the magistrates court. Nevertheless, as the subpoena was originally issued by an officer of the court and subsequently reissued by order of the court, it may properly be regarded as an order of the court itself. Moreover, whether the subpoena is regarded as an administrative order issued by B the clerk or as an order of the court, the High Court is endowed with the requisite jurisdiction in either case, by virtue of its inherent jurisdiction at common law as well as its statutory jurisdiction under s 26 of the High Court Act, "to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe". It C was thus perfectly appropriate to deal with the merits of the application in order to avoid further delays in the administration of justice.

Held, further, that generally speaking, the mere production of an offer letter would, unless the origin or authenticity of the letter is questioned, avail as a complete defence to a charge of contravening s 3. However, where the offer letter in question is lost or destroyed, the evidence

of the issuing D authority or other public official may be necessary in order to establish that the letter was in fact issued to the occupier concerned at the relevant time. Such evidence would undoubtedly constitute the requisite lawful authority and a valid defence to the charge and as such was highly relevant and admissible.

E *Held,* further, that given that such evidence was to be elicited from the applicant in relation to what he himself did or did not do *vis-à-vis* the fourth respondent as the authority responsible for issuing offer letters, there could be no question of him having to divulge any official secret or other confidential information inimical to public policy or the public interest.

Held, further, that as for the possible degradation of the applicant's character, F any such apprehension of an attack on his character must be weighed against the constitutional right of every accused person to be afforded a fair criminal trial as enjoined and guaranteed by s 18(3) of the Constitution and, in particular, the right "to obtain the attendance and carry out the examination of witnesses to testify on his behalf".

Cases cited G

A-G v Makamba 2004 (2) ZLR 63 (S)

Chimuka & Ors v Min of Lands & Ors HC 4837/07

Chirikure & Ors v Kenmast Farming (Pvt) Ltd & Ors 2005 (2) ZLR 372 (H)

G *S v Strowitzki* 1995 (2) SA 525 (Nm)

2009 (2) ZLR p280

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Legislation considered A

Constitution of Zimbabwe 1980, s 18(3)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 229, 252, 295 and 297

Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], ss 2(1), 3(1) B

High Court Act [*Chapter 7:06*] ss 26, 29(2)(b)(ii)&(vi) & (5)(b)

High Court Rules 1971 (RGN 1047 of 1971), r 256

Case information

F Mutamangira, for the applicant

H Zhou, for the first respondent

M Chimombe, for the second and third respondents C

T Mpofu, with him *L Uriri,* for the fourth respondent

Judgment

PATEL J: The applicant herein is the Minister of State responsible for Presidential Affairs. He was formerly the Minister responsible for Land Reform and Resettlement. D

The applicant originally sought an order, *inter alia*, staying and eventually setting aside the execution of a warrant of arrest issued against him on 6 October 2009. The warrant of arrest was then cancelled on 9 October, on the very day that this application was filed, and is no longer of any concern.

Nevertheless, the applicant still seeks an interim order barring the first respondent, who was the presiding magistrate in a criminal matter before E the Chinhoyi magistrates court, from compelling him to testify in that matter. He also seeks a final order setting aside the subpoena issued on 2 October 2009 for him to attend and testify in the criminal matter. The latter involves the prosecution of the fourth respondent under the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:*28] and has been set down to F resume on 4 November 2009.

Objections *in limine*

Counsel for the fourth respondent has raised several objections *in limine* : firstly, that the applicant's plea on the merits is one of State privilege and, as such, it must be raised by way of a sworn affidavit from the head of the G Ministry concerned, *viz*. the Ministry responsible for land resettlement, and not by the applicant himself; secondly, that the applicant's founding affidavit and his lawyer's supporting affidavit must both be disregarded, as the former contains no substantive averments and the latter cannot be used in support of an affidavit that avers nothing of substance.

As regards the first objection, counsel relies on Feltoe *A Guide to Administrative* H

Patel J

A *and Local Government Law in Zimbabwe* 4 ed (2006) at p 94. While I have no doubt that the learned author is correct in his general statement of the procedure to be applied, I am not persuaded that his proposition necessarily and invariably applies to every claim of privilege by a witness in terms of s 295 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], *viz*. on the grounds of public policy and/or public interest. In my view, the form in B which the privilege is claimed would depend upon the nature of the evidence in question and the context in which the evidence is called for. In the instant case, it seems to me that the privilege has been appropriately raised through the supporting affidavit of the applicant's lawyer. Accordingly, the fourth respondent's objection in this regard cannot be sustained.

C Turning to the second objection, it appears that the deponent to the supporting affidavit, Itayi Ndudzo, personally attended the magistrates court on 6 October 2009 and had personal knowledge of the relevant proceedings and the record thereof. As is correctly conceded by fourth respondent's counsel, a legal practitioner can depose to issues of procedure and issues of fact that only he and not the client can depose to. The applicant himself had D no knowledge of what transpired at the magistrates court, except by way of hearsay, and properly associates himself with the averments contained in Ndudzo's affidavit on the basis that the latter was fully seized with the matter and in attendance at the court at the relevant time. It follows that the preliminary objection on this point must also fail.

E **Basis of application**

The present application is by way of criminal review in terms of s 29 of the High Court Act [*Chapter 7:06*]. It was raised in the course of argument by counsel that the application is formally defective in that it has not been brought as a court application pursuant to r 256 of the High Court Rules, F 1971 and that the review jurisdiction of this Court must be exercised with the concurrence of another judge.

As regards the first point, I take the view that r 256 is confined to civil matters and proceedings and does not apply to criminal reviews. In any event, it seems unnecessary for me to decide the point for present purposes, as I am inclined to entertain this matter on the robust approach adopted in G *S* v *Strowitzki* 1995 (2) SA 525 (Nm) at 532E, to wit:

> "It is not the form of the procedure used which matters so much as the nature and substance of the application itself."

As for the second point, the final order sought by the applicant requires the setting aside of the subpoena issued by the magistrates court. This clearly H falls within the purview of subpara (ii) of s 29(2)(b) of the Act and would

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Patel J

require the concurrence of another judge by virtue of the peremptory proviso A to s 29(5)(b). See *Attorney-General* v *Makamba* 2004 (2) ZLR 63 (S) at 66.

On the other hand, the interim relief sought herein is to bar the first respondent from compelling the applicant to testify pending the granting of the final order. This relief, in my view, lies within the ambit of the general powers conferred by subpara (vi) of s 29(2)(b) and can be granted by a single judge B in terms of s 29(5)(b).

Propriety of application

Section 229 of the Criminal Procedure and Evidence Act regulates the process for securing the attendance of witnesses, as follows:

> (1) In this section — C
>
> "prescribed officer" means the registrar, assistant registrar or clerk of the court or any officer prescribed by rules of court.
>
> (2) Either party desiring to compel the attendance of any person to give evidence or to produce any books, papers or documents in any criminal case may take out of the office prescribed by rules of court the process of the court for that purpose. D
>
> (3) When the accused desires to have any witnesses subpoenaed and satisfies the prescribed officer of the court that —
>
> (a) he is unable to pay the necessary costs and fees; and
>
> (b) such witnesses are necessary and material for his defence;
>
> the prescribed officer of the court shall subpoena such witnesses.
>
> (4) In any case where the prescribed officer of the court is not so satisfied, E he shall, upon the request of the accused, refer the application to the judge or magistrate who may grant or refuse such application or may defer giving his decision until he has heard the other evidence in the case or any part thereof."

It is averred on behalf of the applicant that the subpoena that is impugned *in casu* was issued as an order of court and not merely through the office F of the clerk of court. Accordingly, the first respondent was *functus officio vis-à-vis* the subpoena and his decision in that regard is properly reviewable by this court.

In his affidavit filed at the direction of the court, the first respondent affirms that the subpoena was originally issued by the clerk of court at the request of G the fourth respondent. Subsequently, following the reluctance of the police to serve the subpoena, the first respondent directed that the subpoena be "reissued to the police to serve the witnesses for the defence today". The first respondent's position is that, in essence, he merely ordered the police to serve the subpoena originally issued by the clerk of court.

Assuming that this evidence accurately reflects what transpired in the issuance H

A and re-issuance of the subpoena, the subpoena was issued not by the first respondent but by the clerk of court acting in terms of subss (2) and (3) of s 229. It follows that the validity of the subpoena on its merits was never canvassed before the first respondent and, therefore, he cannot be said to be *functus officio* in that regard.

Ordinarily, the applicant's claims of privilege and the validity or otherwise of B the subpoena should in the first instance be ventilated before the magistrates court. Nevertheless, on the basis that the subpoena was originally issued by an officer of the court and subsequently reissued by order of the court, it may properly be regarded as an order of the court itself. Moreover, whether the subpoena is regarded as an administrative order issued by the clerk or C as an order of the court, this court is endowed with the requisite jurisdiction in either case, by virtue of its inherent jurisdiction at common law as well as its statutory jurisdiction under s 26 of the High Court Act, "to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe". I therefore deem it perfectly appropriate to deal with the merits of this application in order to avoid further D delays in the administration of justice.

Merits of application

According to the fourth respondent, the evidence of the applicant is necessary for the purposes of his defence in his prosecution before the magistrates court under s 3 of the Gazetted Lands Act. His defence, in essence, is that he E was given an "offer letter" by the applicant which constitutes the requisite "lawful authority" entitling him to remain in occupation of the farm without contravening s 3 of the Act. His evidence is that this offer letter was returned to the applicant in order to correct a spelling error in his name and that the letter was then never handed back to him. He now wants the applicant to testify on his behalf by confirming that the offer letter was in fact originally F issued to him.

The applicant challenges the propriety of his testimony on several grounds. In particular, he relies on the grounds of inadmissibility of evidence and non-compellability of witnesses as set out in ss 252, 295 and 297 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. These sections G provide as follows:

> "252. No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact at issue in the case which is being tried."
>
> "295. No witness shall, except as in this Act is provided, be compellable or permitted to give evidence in any criminal proceedings as to any fact, matter or H thing, or as to any communication made to or by such witness, as to which, if

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Patel J

> the case were depending in the Supreme Court of Judicature in England, such A witness would not be compellable or permitted to give evidence by reason that such fact, matter or thing or communication, on grounds of public policy and from regard to public interest, ought not to be disclosed and is privileged from disclosure:
>
> Provided that …"
>
> "297. No witness in any criminal proceedings shall, except as provided by this B Act or any other enactment, be compelled to answer any question which, if he were under examination in any similar case depending in the Supreme Court of Judicature in England, he would not be compelled to answer by reason that his answer might have a tendency to expose him to any pains, penalty, punishment or forfeiture or to a criminal charge or to degrade his character:
>
> Provided that …"

The applicant's reasons for not testifying in the fourth respondent's criminal C trial are threefold: firstly, that the evidence sought does not constitute a valid defence to the charge and is therefore irrelevant and inadmissible; secondly, that he cannot be compelled to divulge matters involving land allocation as these are privileged by dint of public policy and public interest; and, thirdly, that he is only being called as a witness in order to degrade his character and D he cannot be compelled to do so.

By virtue of s 3(1) of the Gazetted Lands (Consequential Provisions)Act [*Chapter 20:28*], "no person may hold, use or occupy Gazetted land without lawful authority". The term "lawful authority" is defined in section 2(1) to mean "(a) an offer letter; or (b) a permit; or (c) a land settlement lease" E and "offer letter" means "a letter issued by the acquiring authority to any person that offers to allocate to that person any Gazetted land, or a portion of Gazetted land, described in that letter".

As recent case authority demonstrates, mere verbal authority to occupy Gazetted Land or a general policy statement to that effect does not satisfy the requirement of lawful authority for the purposes of s 3 of the Act. See F *Chirikure & Others* v *Kenmast Farming (Pvt) Ltd & Others* 2005 (2) ZLR 372 (H); *Chimuka & Others* v *Minister of Lands & Others* HC 4837/07. The accused occupier must provide proof of a valid offer letter, permit or land settlement lease.

Generally speaking, the mere production of an offer letter would, unless the G origin or authenticity of the letter is questioned, avail as a complete defence to a charge of contravening s 3. However, where the offer letter in question is lost or destroyed, the evidence of the issuing authority or other public official may be necessary in order to establish that the letter was in fact issued to the occupier concerned at the relevant time. Such evidence would undoubtedly constitute the requisite lawful authority and a valid defence H

Patel J

A against a charge of contravening s 3.

Having regard to the foregoing, I am satisfied that the testimony required from the applicant as to whether he did or did not issue an offer letter to the fourth respondent in relation to the land in question, is highly relevant and clearly admissible for the purposes of the fourth respondent's acquittal or B conviction under s 3. Moreover, given that such evidence is to be elicited from the applicant in relation to what he himself did or did not do *vis-à-vis* the fourth respondent as the authority responsible for issuing offer letters, there can be no question of him having to divulge any official secret or other confidential information inimical to public policy or the public interest. I am therefore quite unable to perceive any logical basis for the privilege claimed C by the applicant on

the facts of this case. As for the possible degradation of his character, there is nothing meaningful in the founding papers to substantiate the apprehended attack on his character. Ultimately, any such apprehension must be weighed against the constitutional right of every accused person to be afforded a fair criminal trial as enjoined and guaranteed by s 18(3) of the Constitution and, in particular, the right "to obtain the attendance and carry D out the examination of witnesses to testify on his behalf".

It follows that the applicant has failed to establish any basis for justifying the interim relief that he seeks. Accordingly, this court cannot interfere with the subpoena issued by the Chinhoyi magistrates court by barring the first respondent or any other magistrate from compelling the applicant to testify E at the fourth respondent's criminal trial.

As regards costs, the applicant's counsel conceded at the hearing of this matter that the first respondent should not have been cited in his personal capacity and that he was entitled to his wasted costs, including the costs of appearance by counsel. It is accordingly ordered that the applicant shall pay F the first respondent's costs on a legal practitioner and client scale.

As for the other respondents, although the applicant has failed on the merits of his application, I am not persuaded that his approach to this court was so unjustified or unnecessary as to warrant a punitive award of costs. The second, third and fourth respondents are therefore only entitled to their costs on the ordinary scale.

G In the result, this application is dismissed with costs as aforesaid.

Mutamangira & Associates, applicant's legal practitioners

Civil Division of the Attorney-General's Office, first, second and thirdrespondents' legal practitioners

H *Mushonga, Mutsvairo & Associates*, fourth respondent's legal practitioners

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Source:
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RUNATSA v RUMANI ESTATES (PVT) LTD & ORS 2009 (2) ZLR 286 (S)

Citation	2009 (2) ZLR 286 (S)
Case No	Judgment No. S-54-09
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Ziyambi JA
Heard	3 November 2009
Judgment	3 November 2009
Counsel	*T S Manjengwa*, for the appellant *C W Gumiro*, for the first and third respondents No appearance for the second respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Agency – *agent – estate agent – authority of – no authority to amend agreement of sale unless instructed to do so by parties*

Contract – *condition precedent – fulfilment – whether must be fulfilled in forma specifica – intention of parties as expressed in agreement*

Contract – *interpretation – intention of parties – plain language of agreement* D *– plain language indicating manner of fulfilment of condition precedent*

Estate *agent – authority of – no authority to amend agreement of sale unless instructed to do so by parties*

Headnote

The first respondent and the appellant signed an agreement for the sale by E the first respondent to the appellant of a piece of land. The agreement provided that the effective date of the agreement would be the date of payment of the deposit by the purchaser and that the purchase price was payable on the signing of the agreement. The appellant did not pay the purchase price immediately as stipulated; instead, she approached the F estate agent who had negotiated the agreement and requested to pay in two instalments. The estate agent agreed to this and the appellant paid the two instalments. She was then informed that the first respondent had cancelled the agreement and sold the property to the third respondent. The appellant sought an order compelling the first respondent to transfer the property to her. The application was dismissed and the appellant G appealed.

Held, that the clause which deferred the commencement of the operation of the agreement until the date of the payment of the "deposit" (by which the parties must have meant the purchase price) by the appellant introduced a condition precedent (which is also known as a suspensive condition) into the agreement. The condition precedent to the coming H

2009 (2) ZLR p287

Sandura JA

A into operation of the agreement was that the appellant paid the full purchase price to the seller's estate agents on the date of the signing of the agreement.

Held, further, that the essential question was whether the condition precedent was to be fulfilled in *forma specifica*, i.e. in the exact manner stated by the parties in the agreement, or *per aequipollens*, that is to say, in B some equivalent manner. The answer depended upon the intention of the parties as expressed in the agreement. There could be no doubt that the language used was plain and that, therefore, the condition precedent had to be fulfilled *in forma specifica* before the agreement came into effect.

Held, further, that the conclusion of a sale agreement on behalf of a prospective C seller is not part of an estate agent's business, unless the estate agent is instructed by the prospective seller to conclude the sale agreement on his behalf. An estate agent does not have the power or authority, in the usual course of his business as an estate agent, to amend an agreement concluded by a prospective seller and a prospective purchaser unless instructed to do so by the parties to the agreement.

D *Held*, consequently, that the condition precedent was not fulfilled, and the agreement did not come into operation.

Case referred to

Frumer v Maitland 1954 (3) SA 840 (A)

Case information

E *T S Manjengwa*, for the appellant

C W Gumiro, for the first and third respondents

No appearance for the second respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court F which dismissed with costs the appellant's court application for the specific performance of an agreement of sale concluded by the appellant and the first respondent on 30 October 2007. After hearing both counsel, we dismissed the appeal with costs and indicated that the reasons for that decision would be given in due course. I now set them out.

The background facts are as follows. On 30 October 2007 the first respondent G and the appellant signed an agreement of sale ("the agreement"), in terms of which the first respondent agreed to sell a certain piece of land ("the property") to the appellant for Z$2 800 000 000 (two billion and eight hundred million Zimbabwe dollars).

Clauses 2, 3 and 4.1 of the agreement read as follows: H

> "2. The effective date of this agreement shall be the date of payment of the

> deposit by the purchaser in terms of paragraph 3 hereof. A
>
> 3. (1) The purchase price for the property is the sum of $2 800 000 000.00 (two billion eight hundred million dollars) payable upon (the) signing of (the) Agreement of Sale.
>
> 4. 4.1 The seller shall tender transfer of the property to the purchaser within (14) fourteen working days of payment of the purchase price by the purchaser B to Africa Real Estate, the seller's agents."

And clause 14 of the agreement reads as follows:

> "This agreement represents the entire contract between the parties. No purported amendment or waiver of or addition to any provision hereof or amendment or waiver of any notice given in terms hereof or collateral or replacement agreement in relation to the subject matter hereof shall be of any force unless and until C reduced to writing in a document or series of documents, duly signed by the parties, each before 2 (two) witnesses."

After signing the agreement on 30 October 2007 the appellant could not pay the purchase price on that day, as she was required to do in terms of clause 3(1) of the agreement. She then approached Allen Manyunga ("Allen"), an estate agent employed by Floburg Real Estate ("Floburg"), who had negotiated D the sale of the property to her, and proposed payment of the purchase price in two instalments. Allen accepted the proposal, and gave the appellant Floburg's bank account details.

Thereafter, on 9 November 2007 the appellant transferred the first instalment of Z$1 200 000 000 to Floburg's bank account, and on 20 November 2007 she E transferred the second instalment of Z$1 600 000 000 to the same account.

Subsequently, the appellant was advised telephonically by Floburg that the agreement had been cancelled because she had failed to pay the purchase price in terms of the agreement. The appellant then contacted a representative of the first respondent who confirmed the cancellation of the agreement, and advised her that the property had in fact been sold to F the third respondent.

Aggrieved by what had happened, the appellant filed a court application in the High Court seeking an order compelling the first respondent to transfer the property to her. The application was subsequently dismissed with costs. Dissatisfied with that result, the appellant appealed to this court. G

In dismissing the application, the learned judge in the court *a quo* said the following in his reconstructed *ex tempore* judgment:

> "… it is common cause that payments were made to Floburg Real Estate, long after the agreement had been signed, when in terms of clauses 3 and 4.1 of the agreement payment had to be made on signing the agreement to Africa Real Estate. In terms of para 14 of the agreement, the agreement represents the entire H

> A agreement and cannot be altered without a written document signed by the parties.
>
> In this case, the applicant made alternative arrangements for payments through Floburg and in two instalments without agreeing in writing with the first respondent. Therefore, the payments were not made to Africa Real Estate as required by clause 4.1 of the agreement. It was (*sic*) also not made on the date B

> the agreement was signed as stipulated in clause 3. The applicant's payments were therefore not in terms of the agreement, and were not made at the time stipulated in the agreement and to the agent stipulated in the agreement. It cannot therefore be said that the applicant complied with the terms of the agreement. The agreement cannot be said to have come into effect as no payment has (*had?*) been made to the first respondent."

C We entirely agree with the learned judge.

In our view, clause 2 of the agreement, which deferred the commencement of the operation of the agreement until the date of the payment of the deposit by the appellant in terms of clause 3 of the agreement, introduced a condition precedent (which is also known as a suspensive condition) into the agreement. Although clause 2 refers to "payment of the deposit", it must be accepted that D the parties meant "payment of the purchase price", because clause 3 does not mention the payment of the deposit, but simply states that the purchase price is payable upon the signing of the agreement.

In this case, the condition precedent to the coming into operation of the agreement was that the appellant paid the full purchase price to Africa Real E Estate on the date of the signing of the agreement.

The essential question which arises in this appeal is whether the condition precedent was to be fulfilled *in forma specifica*, i.e. in the exact manner stated by the parties in the agreement, or *per aequipollens*, that is to say, in some equivalent manner. In our view, the answer to that question depends F upon the intention of the parties as expressed in the agreement.

As van den Heever JA stated in *Frumer* v *Maitland* 1954 (3) SA 840 (A) at 850A-B:

> "Where the language is plain, I think, the golden canon of interpretation has been crisply stated by Greenberg JA in *Worman* v *Hughes and Ors* 1948 (3) SA 495 (A) at 505:
>
> G ' It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract.'
>
> From the nature of the function of a suspensive condition it seems to me that this rule should in that case, if anything, be more strictly adhered to than in regard H to other terms of a contract."

Sandura JA

Applying the above principles to the agreement in question, there can be A no doubt that the language used is plain, and that, therefore, the condition precedent had to be fulfilled *in forma specifica* before the agreement came into effect.

In this regard, it is pertinent to note that clause 14 of the agreement provides that the agreement represents the entire contract between the parties, and that B no amendment, *etcetera*, shall be valid until reduced to writing and signed by the parties in the presence of two witnesses. It is significant that no such amendment of the agreement was made by the parties. That, in our view, must be interpreted as an acknowledgement by the parties that the agreement was to be carried out in its original form. C

Even if it were true that Allen authorised the appellant to pay the purchase price to Floburg in two instalments long after the agreement had been signed, Allen's actions would not bind the first respondent. We say so because the relationship between an estate agent and the prospective seller of immovable property is not the same as the relationship between an ordinary agent and D his principal.

As Professor R H Christie puts it in *Business Law in Zimbabwe* 1 ed at p 336:

> "An estate agent is sometimes said not to be an agent at all, as he does not conclude a contract on behalf of his principal and does not undertake a mandate. This is true as far as it goes but … he is treated as an agent for some purposes. …
>
> His normal method of operation is to receive instructions from a prospective seller E of immovable property and to endeavour to find a prospective buyer, whom he introduces to the seller. … Of course, there is nothing to prevent a seller instructing an estate agent to conclude the sale on his behalf, but the presumption that the ordinary relationship is intended is so strong that instructions to 'sell' or to 'go ahead and prepare the agreements to clinch the sale' will not be interpreted as authorising an estate agent to conclude the sale: *Guest and Tanner (Pvt) Ltd* v F *Lynch* 1964 RLR 252 at 256-7."

Thus, the conclusion of a sale agreement on behalf of a prospective seller is not part of the estate agent's business, unless the estate agent is instructed by the prospective seller to conclude the sale agreement on his behalf.

That being so, an estate agent does not have the power or authority, in the usual G course of his business as an estate agent, to amend an agreement concluded by a prospective seller and a prospective purchaser unless instructed to do so by the parties to the agreement.

Accordingly, Allen, who was not authorised by the first respondent to amend the agreement, did not have the power to authorise the performance of the agreement in a manner not provided for in the agreement. Consequently, the H

2009 (2) ZLR p291

Sandura JA

A condition precedent set out earlier in this judgment was not fulfilled, and the agreement did not come into operation.

In the circumstances, the appeal was devoid of merit, and we dismissed it with costs.

B CHIDYAUSIKU CJ and ZIYAMBI JA concurred.

Wintertons, appellant's legal practitioners

C *Mhiribidi, Ngarava & Moyo*, first and third respondent's legal practitioners

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KWIK-PAK (PVT) LTD v MASHIRINGWANI & ANOR 2009 (2) ZLR 292 (H)

2009 (2) ZLR p292

Citation	2009 (2) ZLR 292 (H)
Case No	Judgment No. HH-230-10
Court	High Court, Harare
Judge	Kudya J
Heard	4 November 2009
Judgment	4 November 2009
Counsel	*T Mpofu*, for the applicant *G N Mlotshwa*, for the first respondent No appearance for the second respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Property and real rights – *spoliation order – requirements for – peaceful and undisturbed possession – unlawfulness of possession – irrelevance of*

Headnote

The applicant was the owner of a farm which had been compulsorily acquired by the state and allocated to the respondent. The applicant continued to occupy and make use of a portion of the farm for over two years, until D the first respondent forcibly prevented it from doing so. The applicant sought a spoliation order. The respondent argued that the applicant, not being the owner, had no *locus standi* and, in any event, because its possession was unlawful, was therefore not peaceful and undisturbed.

Held, that the purpose of a spoliation order is not to restore ownership but to E prevent self help. It seeks to encourage the despoiler to have recourse to the due process. The restoration of the despoiled party is not permanent but temporary. The order does not stop the despoiler from seeking the proper eviction of the despoiled party.

Held, further, that the requirements for a spoliation order are that the applicant was in peaceful and undisturbed possession of the property; and that F the respondent deprived him of the possession forcibly or wrongfully against his consent. Possession, in order to be protected by a spoliatory remedy, must consist of the *animus* – the intention of securing some benefit to the possessor – and of *detentio*, namely the holding itself. A spoliation order is available to any person who (a) is making physical G use of property to the extent that he derives a benefit from such use; (b) intends by such use to secure the benefit to himself; and (c) is deprived of such use and benefit by a third person. The mental element is met once the possessor intends to derive some benefit from his possession. That intention is not affected by the criminalization of his conduct. H

2009 (2) ZLR p293

Kudya J

Cases referred to A

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

Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977 (1) SA 230 (E)

Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor 2009 (1) ZLR 368 (S)

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

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

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

Gifford v Muzire & Ors 2007 (2) ZLR 131 (H)

Magadzire v Magadzire & Ors S-196-98

Case information

T Mpofu, for the applicant

C *G N Mlotshwa*, for the first respondent

No appearance for the second respondent

Judgment

KUDYA J: On 30 October 2009 the applicant company filed an urgent chamber application seeking spoliatory relief. The draft order was couched in these terms:

> D "TERMS OF THE FINAL ORDER SOUGHT
>
> That you show cause why an order in the following terms should not be granted:
>
> 1. That respondents or any person acting on their behalf shall be and are hereby barred from in any way interfering with applicant's possession and control of the portion of Friedwell Farm (that it controlled immediately before 29 October 2009), including in any way interfering with the possession by E the applicant's workers of the farm compound and shall so refrain from any such

future interference save as may be authorised by a binding and operational order of a court of competent jurisdiction.

2. That the first respondent shall pay costs of suit (if he opposes this application)and that such costs shall be at an attorney-client scale.

INTERIM RELIEF

F Pending the return day, it is hereby ordered:

1. That the respondents or any person acting on their behalf or for the purpose of furthering their interests shall be and are hereby ordered to restore to the applicant's possession such amenities as were immediately before 29 October 2009 under the applicant's use and control including proper access to the main entrance to the farm, the piggery, the crocodile pens, the paddocks, G the farm compound, the office house, until the finalization of this matter on the return date.
2. That the respondents shall not in any way stop the applicant's representatives and workers from accessing the piggery, the crocodile pens, the main entrance to the farm, the homestead, the compound and such amenities the applicant had access to immediately before 29 October 2009, until the H finalization of this matter on the return date.

Kudya J

SERVICE OF THE PROVISIONAL ORDER A

The applicant's legal practitioner shall be and are hereby granted leave to serve this provisional order upon the respondents."

On 4 November 2009, after hearing counsel, I delivered judgment and granted an order in terms of the first paragraph of the interim relief sought. In September 2010, the file of proceedings was brought to my attention with B a request that I reduce my reasons to writing as the first respondents had noted an appeal against the provisional order on 5 November 2009.

The facts

It was common cause that Friedwell of Reinfield farm in Makonde District of Mashonaland West Province was compulsorily acquired by the State C and the first defendant was on 27 July 2007 issued with an offer letter for the entire farm. In July 2007 the first respondent occupied a portion of the farm. The applicant remained on the portion that the first respondent could not occupy because it was being used by the applicant for pig, crocodile and cattle farming. On 29 October 2009, the second respondent, who happened to be the farm manager of the first respondent, denied access to the piggery, D paddocks and crocodile pens to the applicant's workers. The cattle were driven from the paddocks to the abattoir where there is no grazing and a truck which brought feed was refused entry at the main gate. On 30 October 2009, the respondents attempted to forcibly take over the farm compound from the applicant, resulting in the gun shot injury to five of the applicant's employees and the destruction of the property of its employees. While the E first respondent filed an opposing affidavit denying the averments made by the applicant, it was apparent from the supporting affidavit attributed to the second respondent that the applicant had full control and custody of a portion of the farm that was referred to its founding affidavit from July 2007 until the events of 29 and 30 October 2009. F

The preliminary issues

The first respondent raised three preliminary issues. The first was that the application was defective for the non-joinder of the acquiring authority. The second was that the applicant did not have the *locus standi* to bring the present application and the third was that the court did not have jurisdiction G to deal with the application. I dismissed all the preliminary points that were raised and proceeded to hear the matter on the merits.

In my view, the non-joinder of the acquiring authority was not fatal to the application for the reason that the applicant sought relief against the parties it alleged had forcibly removed it from the farm. The acquiring authority did not use physical force to remove the applicant from the farm. It was H

Kudya J

A apparent from the averments of the applicant that the acquiring authority was utilizing the criminal justice system to remove the applicant from the farm through the medium of the provisions of s 3(5) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*].

The contention by Mr *Mlotshwa* that the applicant lacked the necessary B *locus standi* to launch these proceedings was rooted in ownership rights. In *Chisveto* v *Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H) at 250B-D Reynolds J stated that:

> "Lawfulness of possession does not enter into it … Thus it is my view that the lawfulness or otherwise of the applicant's possession of the property in question does not fall for consideration at all. In fact, the classic generalisation is sometimes made in respect of spoliation actions that even a robber or a thief C is entitled to be restored to possession of the stolen property."

These views were affirmed by Korsah JA in *Magadzire* v *Magadzire & Ors* S-196-98 at p 2 of the judgment when he stated:

> "A spoliation order has nothing to do with the rights of ownership in the property as the trial court suggested."

D The last preliminary issue was that this court did not have authority to restore the *status quo ante* because in so doing it would grant the applicant the right to stay on the property. It seems to me that this court has the jurisdiction to entertain spoliatory proceedings. A plethora of cases has set out the basis for granting such an extraordinary remedy. It is to prevent self help. It seeks to E encourage the despoiler to have recourse to the due process. The restoration of the despoiled party is not permanent but temporary. It does not stop the despoiler from seeking the proper eviction of the despoiled party.

It was for these reasons that I dismissed all the three preliminary issues raised by the first respondent.

F **The merits**

Mr *Mpofu* submitted that the applicant was merely required to establish evidence of a *prima facie* right of spoliation against the respondents. That submission is contrary to authority. In *Blue Ranges Estates (Pvt) Ltd* v *Muduviri & Anor* 2009 (1) ZLR 368 (S) at 377 Malaba DCJ stated that "a spoliation order cannot be granted on the evidence of a *prima facie* right". G The onus lies on the applicant to establish on a balance of probabilities that it has been despoiled.

Counsel were agreed on the two essential elements for spoliation. They were set out by Gubbay CJ in *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S) at 79D-F thus:

> H "It is clear law that in order to obtain a spoliation order two allegations must be

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> made and proved. These are: A
>
> (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 his consent.
>
> See *Nino Bonino* v *de Lange supra* at 122; *Kramer* v *Trustees Christian Coloured Vigilance Council*, *Grassy Park* 1948 (1) SA 748 (C) at 753; *Davis* v *Davis* 1990 (2) ZLR 136 (H) at 141C". B

Mr *Mpofu* submitted that the applicant made and proved both these essential elements. I am satisfied that the applicant demonstrated that it was in possession of the portion of the farm which the respondents have forcibly taken away from it. Mr *Mlotshwa,* however, argued that while the applicant was in possession C of the portion in issue, that possession was neither peaceful nor undisturbed. He contented that the possession was shaken by the compulsory acquisition and the criminalization of the applicant's continued stay in defiance of the Gazetted Land (Consequential Provisions) Act, *supra*.

In *Gifford* v *Muzire & Ors* 2007 (2) ZLR 131 (H) at 136E-H I expressed myself on the point in this manner: D

> "In my view, it was common cause that the applicant had physical control of the farm in question before the new farmers occupied it on 22 August 2007. I however hold that, by operation of law, by 4 February 2007, his possession was no longer peaceful and undisturbed. The Gazetted Land (Consequential Provisions) Act was the source of the disturbance. Transient relief came for him in the form of the notice of eviction of 12 March 2007, which was served on him on 3 April E 2007. The acquiring authority authorized

> him, as it is wont to do by virtue of s 3(2)(a) of the Gazetted Land (Consequential Provisions) Act, to stay until 30 June 2007. From 30 June to 22 August 2007 he remained in physical control of the farm even though his continued stay was illegal. In my view, possession that is tainted with illegality cannot be peaceful and undisturbed. The notice of eviction and his response to it of 16 April 2007 underscored the point that he was no longer in a peaceful and tranquil state of mind. I, therefore find that F he neither had the right of nor the right to possess the farm. The absence of the mental right undermined the physical act. In my view, by operation of law, he did not have peaceful and undisturbed possession of the farm after 30 June 2007. But even if I am wrong on the application of the mental aspect of possession, and such possession denotes physical control only, it seems to me that the applicant's case would still fail on the basis of the second essential element of spoliation." G

The submission of Mr *Mlotshwa* and the sentiments I expressed in the *Gifford* case overlooked the definition of undisturbed and peaceful possession that was approved by Adam J in *Davis* v *Davis* 1990 (2) ZLR 136 (H) and affirmed by Gubbay CJ in *Botha & Anor* v *Barrett supra*. At 41E-F Adam J quoted with approval the observations of Addelson J in *Bennett Pringle (Pty) Ltd* v *Adelaide Municipality* 1977 (1) SA 230 (E) that: H

Kudya J

> A "In terms of all the authorities cited, the 'possession', in order to be protected by a spoliatory remedy, must still consist of the *animus* – the 'intention of securing some benefit to' the possessor; and of *detentio*, namely the 'holding' itself … If one has regard to the purpose of this possessory remedy, namely to prevent persons taking the law into their own hands, it is my view that a spoliation order is available at least to any person who is (a) making physical use of property B to the extent that he derives a benefit from such use; (b) intends by such use to secure the benefit to himself; and (c) is deprived of such use and benefit by a third person."

It is apparent from the definition of possession that the mental element is met once the possessor intends to derive some benefit from his possession. That intention does not appear to be affected by the criminalization of his conduct.

C The facts adduced on behalf of the applicant in the founding affidavit demonstrated that it had both the intention of securing some benefit and the physical control of the portion of the farm in question. These were not affected by the compulsory acquisition of the farm or by provisions of the Gazetted Land (Consequential Provisions) Act. Unlike in the *Gifford* case, D *supra,* the applicant demonstrated, and the respondent did not challenge its averment, that it did not consent to the dispossession of its possessory right. The applicant established on a balance of probabilities that it had been despoiled and is thus entitled to the remedy it sought.

In *Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR 511 (S) 518C Malaba JA, as he then was, held that an interim interdict as a E remedy for unlawful conduct could not be granted for the protection of the illegal activities of the appellant. Paragraph 2 of the interim relief sought is in the nature of an interim interdict. It is a remedy that is not available to the applicant. I will accordingly delete this paragraph from the draft order.

I accordingly grant the following interim relief:

F Pending the return day, it is hereby ordered that:

> The respondents or any person acting on their behalf or for the purpose of furthering their interests shall be and are hereby ordered to restore to the applicant's possession such amenities as were immediately before 29 October 2009 under the applicant's use and control including proper G access to the main entrance to the farm, the piggery, the crocodile pens, the paddocks, the farm compound, the office house, until the finalization of this matter on the return date.

Coghlan, Welsh & Guest, applicant's legal practitioners

A *Antonio, Mlotshwa & Co,* respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/NEMUSESO v MASHITA & ORS 2009 (2) ZLR 298 (H)

NEMUSESO v MASHITA & ORS 2009 (2) ZLR 298 (H)

Citation	2009 (2) ZLR 298 (H)
Case No	Judgment No. HH-122-09
Court	High Court, Harare
Judge	Guvava J
Heard	4 November 2008; 5 November 2008; 11 November 2008
Judgment	5 November 2009
Counsel	*R Matsikidze,* for the plaintiff *N Madya,* for the fifth defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Administration of estates – *estate property – sale of – when Master' consent required – property devolving upon minors – Master's or court's consent required – sale without such consent void ab initio*

Headnote

The plaintiff bought a house which was part of a deceased estate. The D arrangement was made between the plaintiff and the first defendant, the executor of the estate. The heirs to the estate were minors at the time of the sale. The fifth defendant had, after the estate was wound up, bought the property from the heirs. The plaintiff issued summons seeking a declarator that the transfer of the property to the fifth defendant by the E third and fourth defendants was wrongful, unlawful and fraudulent as he had already purchased the property from the estate. He sought an order for the cancellation of the transfer and an order for specific performance in terms of his contract. The fifth defendant counter-claimed for the ejectment of the plaintiff.

Held, that, in terms of s 122 of the Administration of Estates Act [*Chapter* F *6:01*], it was incumbent upon the parties to approach the Master for his consent to the sale or so that he could apply to a judge for authority to sell the property. The provision indicates that the Master is called upon to exercise his discretion as to the referral of the case to a judge in chambers. It is clear that the property of a minor is protected and may G not be disposed of without the consent of either the Master or the court. Clearly, the intention of the legislature was to protect the inheritance of minors from unscrupulous executors. The Master will usually require a sworn appraisement of the property to be sold. He will want to know why the property is being sold and why the sale will be to the benefit of the minor(s). The same information will be required by a court and H

Guvava J

A the court will not grant such leave unless it is fully satisfied beyond all reasonable doubt that it will be to the advantage of the minor(s). Here, the Master' consent was never sought in accordance with s 122 of the Act. Where a provision prescribed by statute is not followed, then it renders the contract void. The agreement which the plaintiff entered into with the executor was

null and void as it related to property in B which minors had an interest and no authority to sell was sought either from the Master or from the court for such sale. It was as if there was never a sale to the plaintiff by the first and second defendants. The fifth defendant' counter-claim would be upheld.

Cases cited C

Chetty v Naidoo 1974 (3) SA 13 (A)

Mugwebie v Seed Co Ltd & Anor 2000 (1) ZLR 93 (S)

Schierhout v Min of Justice 1926 AD 99

Legislation considered

D Administration of Estates Act [*Chapter 6:01*], s 122

Case information

R Matsikidze, for the plaintiff

N Madya, for the fifth defendant

Judgment

GUVAVA J: The dispute in this matter revolves around an estate belonging E to the late Panganayi Elias Mashita who died, testate, in South Africa on 10 December 1983. He was survived by his wife, the first defendant, and two minor children, being the third and fourth defendants. In terms of his will dated 27 June 1978, the first defendant was appointed executor of his estate. He left in his estate an immovable property known as the remainder F of subsection B of subsection C of Lot 9 of Hatfield Estate, measuring 6359 square metres otherwise known as No. 11 Chedgelow Road, Logan Park, Hatfield, Harare ("the property"), which was to devolve upon his two minor children.

The second defendant was the brother of the first defendant. He was G mandated by the first defendant to administer the estate on her behalf through a general power of attorney. Following the registration of the estate and the issuance of the letters of administration by the Master of the High Court ("the Master") the first and second defendants entered into an agreement of sale with the plaintiff and sold the property to him. Transfer was not effected to the plaintiff. In 2005 the third and fourth defendants sold and transferred H the property to the fifth defendant.

2009 (2) ZLR p300

Guvava J

The plaintiff issued summons out of this court seeking a declarator that transfer A of the property to the fifth defendant by the third and fourth defendants is wrongful, unlawful and fraudulent, as he had already purchased the property from the estate. He seeks an order for the cancellation of the transfer and an order for specific performance in terms of his contract. In the alternative he seeks an order for damages against the first and second defendants in B the sum of Z$4, 5 billion. The claim was opposed by the fifth defendant. He states in his plea that he purchased the property in good faith from the fourth defendant. The property has been transferred into his name. He filed a counterclaim for the eviction of the plaintiff from the property and holding over damages. The first, third and fourth defendants entered appearance to defend and filed a plea. The second defendant did not enter an appearance C to defend. The sixth defendant, the Master, filed a report in terms of r 248 of the High Court Rules, 1971. He stated that the estate of the late Panganyi Elias Mashita was wound up in 1995 after he had confirmed the distribution account which transferred the deceased's immovable property to his two children in equal shares. D

At a pre-trial conference held on 3 July 2007 before a judge in chambers, the first, third and fourth defendants did not appear. They were held to be in default. The matter was thus referred to trial against the fifth defendant only on the following issues:

1. Whether or not the plaintiff validly and lawfully purchased the property E from the estate of the late Panganayi Elias Mashita;
2. Whether the plaintiff's claim for transfer of the property to him has prescribed;
3. Whether at the time that the fifth defendant purchased the property he was aware of any claim by the plaintiff; F

4. Whether the transfer to the fifth defendant should be reversed;
5. Whether the plaintiff and all those who claim through him should be evicted from the property; and
6. Whether the plaintiff is entitled to damages based on the current value of the property. G

The plaintiff testified that he knew the first and second defendants and they were related by marriage. The second defendant was married to the plaintiff's sister. He first moved into the property as a tenant. This was during the period 1990 to 1994. The property consisted of a main house and a cottage. He moved into the cottage. The first defendant approached him with a proposal that he buys part of the property which consists of the cottage. The H

Guvava J

A first defendant produced a will which showed that she had been appointed executor of the estate of the late Panganayi Mashita ("the deceased") who owned the property. The will was produced in court and confirmed that the first defendant was indeed the executor of the estate. She also showed him letters of administration issued by the Master which authorized her to administer the estate of her husband. The plaintiff and the first defendant B then entered into an agreement of sale on 14 November 1994 wherein he purchased the property for the sum of Z$20 000. The plaintiff paid a deposit of Z$5 000 and the balance was to be paid through a CABS account availed by the first defendant. At a later date the second defendant approached the plaintiff and asked him to pay the instalments for the property through C Gabriel Real Estate, an estate agent company. Following this instruction he then received a letter from Gabriel Real Estate, dated 14 October 1999, wherein the author indicated that they were acting on behalf of the first and second defendants, the owners of the property. In the letter he was asked to pay the sum of Z$20 157.63, being arrears on the capital and interest. He then paid off the outstanding amount. The plaintiff produced copies of D receipts from Gabriel Real Estate and also produced a letter addressed to him from Gabriel Real Estate dated 16 March 2000 asking him to attend at their offices in connection with the transfer of the property.

Various correspondences were produced showing that the issue was handed over to a firm of legal practitioners so that they could effect the transfer to E him. At some stage there was an indication that the title deeds had been lost and that they were in the process of obtaining replacements. The plaintiff thereafter received correspondence from the legal practitioners seeking payment of Z$45 333.33, which he duly paid as detailed in the receipt that he produced to the court dated 6 May 2001. The plaintiff subsequently received notice that the third defendant had died and the transfer was stopped. In F July 2004 he left for Australia before the transfer had been effected into his name. On 4 January 2005 the fourth defendant wrote to him and advised that the deceased's estate had not been properly administered and asked him to pay an additional amount to the purchase price he had already paid. He did not pay this amount as he was of the view that he had complied fully with the terms of the agreement with the first defendant. In May 2005 the G fourth defendant advised him that he was selling the property, following which he caused the plaintiff's children to be evicted. The plaintiff stated that, unbeknown to him, the property was then sold to the fifth defendant.

The plaintiff further testified that he is 56 years old and that the property was now his home. He had one year left in Australia in terms of his contract. H He stated that at the time he moved into the house it was not electrified and

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Guvava J

he had electricity installed. He has put up a wall around the property and A installed burglar bars. He had the property valued by a valuator and the present value was put at Z$210 quadrillion. An application to amend his claim to this amount was admitted by consent.

In cross-examination the plaintiff confirmed that he was related to the first and second defendants. He admitted that, in terms of clause 2 of the will, B the property was bequeathed to the deceased's minor children and therefore he was aware that the property belonged to the deceased's minor children. He, however, stated that as far as he was aware, the Master's consent to sell the property had been sought and obtained. He also confirmed that he later learnt that the property had been transferred into the names of the heirs to the estate. He also admitted that he had no agreement with the heirs as he C had entered into an agreement of sale with the first defendant. When it was put to him that his agreement was illegal, he stated that he did not know the law. He admitted that

the fifth defendant was not related to any of the parties but had bought the property through an estate agent. The plaintiff also conceded that he had received notice in May 2005 from the fourth defendant that he was selling the property and he had not done anything to D stop the sale. He, however, explained that he was out of the country at the time. When questioned by the court, the plaintiff stated that in terms of their agreement he was not purchasing the whole property but only the cottage where he was residing. He confirmed that there was a subdivision of the property and this is the same property which was sold to the fifth defendant. E

The plaintiff's evidence, in my view, was not convincing. He contradicted himself when he stated that he did not know that the property was sold to the fifth defendant and yet confirmed that the fourth defendant had advised him that he was selling the property. When he was told that the property was being sold, he did nothing to protect his interests. It was apparent from the evidence that he was aware that the property he wished to purchase was estate F property and yet he did not give a clear explanation regarding his failure to investigate whether or not the Master's consent to the sale was obtained. He merely stated that it was the duty of the sellers to obtain such consent.

Edgar Nemuseso was the second witness for the plaintiff. He stated that in 2004 he was asked by the plaintiff to stay at his place of residence which G was No. 11 Chaghill Road, Hatfield. He said that at some stage a messenger of court from the magistrates court came and sought to evict them. They however managed to have the order set aside and they were restored to the property. At the end of 2004 some agents from a firm of estate agents came to inspect the property. He stated that he showed them documents which showed that the matter relating to the property was before the courts. At a H

A later date people from another firm of estate agents came to the property and he also showed them the papers. In September 2005 the fifth defendant then approached him and stated that he had bought the property and gave him notice to vacate the premises. The witness told the court that he agreed to meet with him in town the following day, whereupon he told the fifth defendant that he would not talk to him but would refer the matter to his B legal practitioners. In cross-examination the witness admitted that he met the fifth defendant on two occasions after that and he promised to give him the keys to the property. He also told the court that many people came to view the property but would not talk to him. The witness was, however, adamant that he had showed the people from the estate agents the agreement of sale C between the plaintiff and the first defendant.

The witness's evidence, in my view, served to confirm that the sale to the fifth defendant was not done clandestinely. Whilst he told various estate agents that the property had been sold to the plaintiff, he did not tell the agent who sold the property to the fifth defendant, neither did he tell the fifth defendant. He also confirmed that that the plaintiff was aware that the D property was on the market. Thus, although he was a credible witness, in my view, he did not take the plaintiff's case any further. With this evidence the plaintiff closed his case.

The fifth defendant testified that he is employed by the Standard Chartered Bank and is presently based in Qatar. In June 2005 he saw an advertisement E in the newspaper for the sale of a house. He then called the agent who gave him the address of the property. He went to view the property in Hatfield. On the first occasion he found no-one present. On the second occasion he was met by a lady at the gate who then showed him round the cottage. He subsequently entered into an agreement of sale on 23 June 2005. An evaluation of the property was conducted by a firm of valuers and a report F was submitted to his employers who subsequently availed a loan to him to purchase the property. On 26 August 2005 the property was transferred into his name after obtaining replacement deeds. When he sought vacant possession of the property he was then advised by the plaintiff's agent that the plaintiff had also bought the same property. He served the plaintiff with an eviction G notice dated 31 August 2005. He confirmed Edgar Nemuseso's testimony that they had met at Construction House on two separate occasions as he tried to get keys for the premises. When he failed to get access to the property. he then instituted proceedings at the magistrates' court for the eviction of the plaintiff. He stated that he later abandoned those proceedings when the plaintiff instituted these proceedings against him. The fifth defendant told H the court that he was abandoning his claim for holding over damages and

merely pursing the claim for eviction of the plaintiff. In cross-examination A the fifth defendant was adamant that he was unaware of the dispute over the property. He denied that he had viewed the property in the company of the employees from the estate agent which had the mandate to sell the property. He also told the court that he did not know the name of the seller until he signed the agreement of sale. B

The fifth defendant gave his evidence well. He was an honest witness who was not shaken in cross-examination. His evidence was credible and supported in all material respects by documentary proof. It was apparent that he was unaware of any prior sale that had taken place between the plaintiff and the first defendant. It was apparent from the agreement of sale which he produced that the sellers of the property were the third and fourth defendants. There C was no evidence that the firm which had conducted the valuation had been advised of the prior sale. One would have thought that, since they were conducting the valuation on behalf of the bank, they would have raised the alarm on any impropriety. I found him a credible and reliable witness.

It seems to me that this matter may be resolved by the determination of the D first issue that was referred to trial, namely whether or not the agreement entered into by the plaintiff and the first and second defendants is legal. From the evidence led during the trial, it was quite apparent that the plaintiff was aware that he was purchasing property that related to a deceased's estate. He was also aware, having been shown the will, that the property devolved upon two minor children. It was also not in dispute that the consent from E the Master was never sought at any stage of the sale. It is trite that estate property is regulated by the Administration of Estates Act [*Chapter 6:01*] ("the Act"). An executor appointed to administer an estate must act in accordance with the Act. In order for any agreement to be valid it must comply with the provisions of the Act. Sections 120 and 122 of the Act deal with the disposal F of estate property. Section 120 of the Act provides as follows:

> "Sale of Property otherwise than by public auction
>
> If, after due inquiry, the Master is of the opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such an estate otherwise than by public auction he may, if the will of the deceased contains no provision to the contrary, grant the necessary authority to the executor so to act." G

It is apparent from this provision that an estate property may not be sold through private treaty without the Master's consent. In this case, the consent of the Master was never sought at any stage in order to effect the sale of the property to the plaintiff. The plaintiff submitted that it was the first and second defendant's obligation to secure the Master's consent and, in any event, authority may be secured even after the sale. I understood the plaintiff to be H

Guvava J

A saying that the failure to obtain the Master's consent before the sale did not make the sale void *ab initio* but merely voidable if the Master subsequently did not give his consent. The fifth defendant, on the other hand, submitted that the failure to obtain the Master's consent prior to the sale made the sale void *ab initio*.

B It seems to me that it is not necessary to determine whether the effect of s 120 is to make a sale void *ab initio* or voidable. I say this because the Master's consent was never sought at all by the parties. The estate was wound up in 1995 and is no longer in the hands of the Master. The property was transferred into the names of the beneficiaries of the estate in accordance with the will of the deceased.

C Section 122 of the Act, which deals with disposal of estate property where minors have an interest in such property, provides as follows:

> "In cases where minor heirs are interested in property inherited from the estate of any deceased person, the Master may apply through the chamber book to a judge in chambers for authority for the lease, mortgage, sale or other disposition of such property, and the judge make such order as in the circumstances he D considers advisable."

In casu, it is not in dispute that at the time of the sale to the plaintiff, the heirs to this estate were minors. In terms of the provision set out above, it was incumbent upon the parties to approach the Master for his consent or so that he could apply to a judge for authority to sell the property. An interpretation of the provision, in my view, seems to indicate that the Master is called upon E to exercise his discretion as to the referral of the case to a judge in chambers. Thus the word "may" is used instead of the mandatory "shall".

It seems to me that the rationale of this provision may stem from the South African provision. Section 87 of the South African Administration of Estates Act, No 24 of 1913, which is similar to s 122 of the Act, prohibits the sale of F property belonging to a minor by a tutor or curator (unless duly authorized to do so by a will or deed appointing him) without a court order, or if the property is below a certain prescribed value, the consent of the Master. The provision in the Zimbabwean legislation does not prescribe a value above which the Master is required to refer the case to a judge for his authority. The provision is couched in very wide terms, thus giving the Master a wide G discretion once a request has been made to him either to grant the consent himself or to refer the matter to a judge in chambers.

What is clear in both the South African legislation and the Zimbabwean legislation is that property of a minor is protected and may not be disposed of without the consent of either the Master or a judge of the High Court. H Clearly the intention of the legislature was to protect the inheritance of

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Guvava J

minors from unscrupulous executors. In my view, it might be necessary for A Parliament to consider amending s 122 of the Act in order direct the Master to refer the request to a judge where the value of the property to be sold exceeds a prescribed amount. This would ensure certainty with respect to the manner in which properties relating to minors are dealt with. It should also be noted that, due to the high turnover of officers in the public service, B such an amendment would provide guidance in the Master's office when dealing with such matters.

D Meyerowitz *The Law and Practice of Administration of Estates* 2 ed at p 227 explains the need for authorization as follows:

> "Before considering giving his authority to sell, the Master will usually require a sworn appraisement of the property to be sold. … He will want to know the C reason why the property is being sold and why the sale will be to the benefit of the minor"

The learned author goes on to state that the same information will be required by a court and further comments as follows:

> "… the court will not grant such leave unless it is fully satisfied beyond all D reasonable doubt that it will be to the advantage of the minor."

In this case the Master's consent was never sought in accordance with s 122. Where a provision prescribed by statute is not followed then it renders the contract void. In *Schierhout* v *Minister of Justice* 1926 AD 99 at 109 Innes CJ held as follows:

> "It is a fundamental principle of our law that a thing done contrary to the E prohibition of the law is void and of no effect. So that what is done contrary to the prohibition of the law is not only of no effect but must be regarded as never having been done – and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act."

The same sentiments were expressed by Sandura JA in *Mugwebie* v *Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S) where the respondents had not complied F with the provisions of the code of conduct in suspending an employee. He stated as follows.

> "There is no doubt in my mind whatsoever that it was null and void. It was a complete nullity. In this respect I can do no better than quote what Lord Denning said in *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1721:
>
> > 'If an act is void then it is at law a nullity. It is not only bad, but incurably bad. G There is no need for an order of the court to set it aside. It is automatically null and void without further 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.'"

Turning to the facts at hand, it is my view that the plaintiff's case falls on this H

Guvava J

A basis. The agreement which he entered into with the executor of the estate was null and void as it related to property in which minors had an interest and no authority to sell was sought either from the Master or from the court for such sale. It is as if there was never a sale to the plaintiff by the

first and second defendants. The heirs to the estate subsequently sold the property to the fifth defendant after they had inherited it from their father's estate.

B The fifth defendant acquired rights of ownership over the property. It is trite that he can thus vindicate it from whoever is in possession. See *Chetty* v *Naidoo* 1974 (3) SA 13 (A) The fifth defendant had not given the plaintiff an opportunity to vacate the premises before he is evicted. In the order that I will make I will give the plaintiff an opportunity to vacate the premises on C his own. The fifth defendant abandoned his claim for holding over damages at the trial and the claim therefore falls away.

The fifth defendant had claimed costs on a legal practitioner and client scale but, in his closing submissions, he merely prayed for costs on the ordinary scale. I take the view that he has abandoned the claim for costs on a legal practitioner and client scale, which is punitive in nature. He has successfully D defended his rights of ownership and entitlement to evict the plaintiff. He is thus entitled to his costs.

Accordingly I make the following order:

1. The plaintiff's claim is hereby dismissed with costs.
2. The fifth defendant's counterclaim is upheld and it is ordered that E the plaintiff, and all those claiming occupation through him, be and are hereby evicted from the remainder of sub-division B of sub-division C of Lot 9 of Hatfield Estates, otherwise known as No. 11 Chedgelow Road, Logan Park, Hatfield, Harare within seven days of service of this order.
3. F The plaintiff shall pay the fifth defendants' costs of suit.

Matsikidze & Mucheche, plaintiff's legal practitioners

G *Wintertons*, fifth defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/BORDER TIMBERS INTERNATIONAL (PVT) LTD v EXPORT PROCESSING ZONES LABOUR BOARD & ORS 2009 (2) ZLR 308 (S)

BORDER TIMBERS INTERNATIONAL (PVT) LTD v EXPORT PROCESSING ZONES LABOUR BOARD & ORS 2009 (2) ZLR 308 (S)

2009 (2) ZLR p308

Citation	2009 (2) ZLR 308 (S)
Case No	Judgment No. S-46-09
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA and Garwe JA
Heard	17 November 2008
Judgment	5 November 2009
Counsel	*J Mugandiwa*, for the appellant *J Bamu*, for the second to seventh respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment – *Labour Act [Chapter 28:01] – s 89(6) – amendment thereto by Labour Amendment Act 2005 – effect of procedural effect only – retrospective operation of amending Act* D

Employment – *Labour Court – jurisdiction – exclusive jurisdiction in labour matters – includes exclusive jurisdiction in review proceedings in labour matters*

Interpretation *of statutes – retrospectivity – effect on vested rights – change to procedural law – no vested rights in procedural matters* E

Statutes – *retrospectivity – when statutes operate retrospectively – matters of procedure operate retrospective in absence of good reasons to the contrary – no vested right in matters of procedure*

Headnote

"Questions relating to what courts and within what times proceedings are to be instituted are questions of procedural law" (*dicta per* Kotzé JA F in *Bezuidenhout* v *AA Mutual Insurance Association Ltd* 1978 (1) SA 703(A) at 711 followed).

"It does not follow that once an amending statute is characterized as regulating procedure, it will always be interpreted as having retrospective effect. It will depend on its impact upon existing substantive rights and obligations. G If those substantive rights and obligations remain unimpaired and capable of enforcement by invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply" (*dicta per* Marais JA in *Minister of Public Works* v *Haffejee NO* 1996 (3) SA 745 (A) approved).

In an application to the respondent Labour Board, the appellant had sought, H

A unsuccessfully, authority to terminate the respondent employees' contracts of employment. Aggrieved by the Labour Board's decision, which was handed down on 25 November 2005, the appellant, on 18 January 2006, brought an application to the High Court seeking a review of the decision. However, on 30 December 2005, and thus before the filing of the application to the High Court, the Labour Act [*Chapter 28:01*] had been amended by B the Labour Amendment Act, 2005 (Act No.7 of 2005), one of the effects of which was to remove the power of the High Court to review proceedings in labour matters, and to give the Labour Court, in terms of s 89(6) of the Labour Act, exclusive jurisdiction to review such matters. It was on this basis that the High Court dismissed the appellant's application for a review C of the decision of the Board, holding that it had no jurisdiction to hear the matter. On appeal to the Supreme Court, the appellant argued that Act 7 of 2005 did not have retrospective effect and that it had a vested right to institute proceedings in the High Court within the eight week period allowed for the institution of review proceedings.

Held, that it is an established principle that a person cannot have a vested D right in matters of procedure. Alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be. In other words, if a statute deals merely with the procedure in an action and does not affect the rights of the parties, it will be held to apply *prima facie* to all pending as well as future applications.

E *Held,* further, that the High Court had been correct in holding that it did not have jurisdiction to hear the application to review the decision of the Labour Board. The amendment to the Labour Act by Act No. 7 0f 2005 had the effect of widening the scope of s 89(6) by conferring on the Labour Court exclusive jurisdiction to review labour matters. That amendment was wholly procedural and thus had retrospective operation.

Cases cited F

Bezuidenhout v AA Mutual Insurance Association Ltd 1978 (1) SA 703 (A)

Minister of Public Works v Haffejee NO 1994 (3) SA 49 (N)

Minister of Public Works v Haffejee NO 1996 (3) SA 745 (A)

Legislation considered G

High Court Act [*Chapter 7:06*], s 26

Labour Act [*Chapter 28:01*], s 89(6)

Case information

J Mugandiwa, for the appellant

H *J Bamu*, for the second to seventh respondents

Sandura JA

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court in A terms of which the appellant's application for the review of a decision made by the first respondent in a labour dispute was dismissed with costs, on the ground that the High Court did not have the jurisdiction to hear the application.

The background facts are as follows. At the relevant time, the appellant company ("the company") was an export-oriented door manufacturing B company, licensed by the Zimbabwe Export Processing Zones Authority. The first respondent ("the Labour Board") was a body established in terms of s 24(1) of the Export Processing Zones (Employment) Rules, 1998, published in Statutory Instrument 372 of 1998 ("the Rules"). Its main function was to resolve labour disputes within the area of its jurisdiction. The second to the seventh respondents ("the employees") worked for the company. C

After a prolonged wage dispute between the company and its employees, the employees wrote to the company on 20 July 2005 threatening to resort to collective job action on 3 August 2005.

On 1 August 2005 the company's factory manager responded as follows:

> "… the proposed work stoppage/sit-in threatened to be carried out on 3 August D 2005 is illegal. Accordingly, you are required to write a withdrawal letter before 12 pm tomorrow, 2 August 2005. Should you fail or refuse to comply with this instruction, and proceed with the sit-in, management will be left with no option but (to) take disciplinary action. A sit-in amounts to collective job action, and in terms of the Export Processing Zones Employment Rules, collective job action is a dismissible offence … ". E

Thereafter, when the threat to resort to collective job action was not withdrawn, the company, which did not have a registered code of conduct, suspended the employees and charged them with the act of misconduct specified in s 28(c)(iii) of the Rules, i.e. any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of the contract of employment. F The particulars of the charge were stated as follows:

> "1. Organising or instigating an illegal/unlawful collective job action.
> 2. Threatening to engage in an illegal/unlawful collective job action.
> 3. Refusal to follow a lawful instruction."

Internal disciplinary proceedings were subsequently conducted and all G the employees were found guilty as charged, and their dismissal was recommended. The internal appeals which followed were dismissed.

The company then applied to the Labour Board, in terms of s 28(a) of the Rules, for the authority to terminate the employees' contracts of employment. In due course, the Labour Board heard the applications and dismissed them, having concluded that no act of misconduct had been established. Accordingly, H

Sandura JA

A it ordered that all the employees be reinstated in their posts without loss of pay and other benefits. That decision was communicated to the parties on 25 November 2005.

Aggrieved by the Labour Board's decision, the company filed a court application in the High Court on 18 January 2006, seeking a review of the B Labour Board's decision and an order setting it aside.

In due course, the court application came before the learned judge in the court *a quo*, who dismissed it with costs, on the ground that in terms of s 89(6) of the Labour Act [*Chapter 28:01*]

("the Labour Act"), the High Court did not have the jurisdiction to hear and determine the application. Dissatisfied with that result, the company appealed to this court.

C Only one ground of appeal is set out in the notice of appeal, and that is that the court *a quo* erred in finding that it had no jurisdiction to deal with the matter. The main issue in this appeal is, therefore, whether in January 2006, when the company filed the court application in the High Court, the High Court had the jurisdiction to hear the application.

D However, before dealing with that issue, I would like to set out the relevant provisions of s 89 of the Labour Act.

Before the Labour Amendment Act No. 7 of 2005 ("the Amendment Act") came into force on 30 December 2005, s 89 of the Labour Act, in relevant part, read as follows:

> E "89 Functions, powers and jurisdiction of Labour Court
>
> (1) The Labour Court shall exercise the following functions –
>
> (a) hearing and determining applications and appeals in terms of this Act or any other enactment; and
>
> (b) hearing and determining matters referred to it by the Minister (of Justice) F in terms of this Act; and
>
> (c) referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so; and
>
> (d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section *ninety-eight* to hear and determine an application; G and
>
> (e) doing such other things as may be assigned to it in terms of this Act or any other enactment.
>
> (2) – (5) …
>
> (6) No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in H subsection (1)."

Sandura JA

In my view, subs (6) is very clear. It gives the Labour Court exclusive A jurisdiction in the first instance to deal with all the matters set out in subs (1). Had the legislature intended leaving the High Court with the jurisdiction to deal with the matters set out in subs (1), subs (6) of s 89 would have been worded as follows:

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

It must be emphasised, however, that the exclusive jurisdiction in the first instance given to the Labour Court in terms of subs (6) is to deal with "any application, appeal or matter referred to in subsection (1)", and not to deal with all labour matters in the first instance as the learned judge in the court C *a quo* stated.

In passing, I wish to state that the Rules did not provide a procedure in terms of which a party dissatisfied with the Labour Board's decision could challenge that decision.

In addition, it is pertinent to note that before the Amendment Act came D into force on 30 December 2005, the Labour Act did not apply to licensed investors operating in export processing zones, and to persons employed in such zones. That was so because s 56(1) of the Export Processing Zones Act [*Chapter 14:07*] provided as follows:

> "56Chapter 28:01 not to apply E
>
> (1) The Labour Act [*Chapter 28:01*] shall not apply in relation to licensed investors operating and employees employed in an export processing zone."

In this matter, it was common cause that the company was a licensed investor operating in an export processing zone, and that its employees were employed in that zone. Consequently, the Labour Act did not apply to the company F and its employees before 30 December 2005.

That being so, the Labour Court, which was established in terms of the Labour Act, had no jurisdiction over labour disputes between the company and its employees before 30 December 2005. As a result, the company could not have challenged the Labour Board's decision in the Labour Court before that date.

However, the company was not without a remedy. In order to challenge the G Labour Board's decision before 30 December 2005, the company could have instituted review proceedings in the

High Court before that date, relying upon s 26 of the High Court Act [*Chapter 7:06*], which reads as follows:

> "26 Power to review proceedings and decisions
>
> Subject to this Act and any other law, the High Court shall have power, jurisdiction H

2009 (2) ZLR p313

Sandura JA

> A and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe."

It was common cause that the company filed the review application in the High Court on 18 January 2006, after the Amendment Act had come into force. A different situation then prevailed. The Amendment Act had repealed s 56 of the Export Processing Zones Act [*Chapter 14:07*], with the result B that the Labour Act became applicable to the company and its employees.

In addition, s 29 of the Amendment Act had amended subs (1) of s 89 of the Labour Act by the insertion of the following paragraph after para (d):

> "(d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters."

C In my view, the addition of this paragraph to the paragraphs in subs (1) of s 89 means that the areas in which the Labour Court enjoyed exclusive jurisdiction in the first instance were increased by the inclusion of review proceedings in labour matters.

However, there can be no doubt that both before and after the coming into D effect of the Amendment Act, the Labour Court enjoyed exclusive jurisdiction in the first instance to hear and determine all the matters set out in subs (1) of s 89.

I now come to the main issue in this appeal, which is whether in January 2006, when the company instituted the review application in the High Court, the High Court had the jurisdiction to hear and determine the application. E The learned judge in the court *a quo* answered that question in the negative. In my view, that answer was correct.

However, Mr *Mugandiwa*, who appeared for the company, submitted as follows in his heads of argument:

> "19. As at 25 November 2005 and prior to the coming into operation of (the F Amendment Act) on 30 December 2005, (the company) … had the right to bring on review to the High Court the proceedings of (the Labour Board) within eight weeks of 25 November 2005.
>
> 20. – 21….
>
> 22. It is common cause that (the company's) application for review was filed on 18 January 2006, within eight weeks of 25 November 2005. G
>
> 23. The effect of the High Court judgment is that the repeal of section 56 of the Exports (*sic*) Processing Zones Act extinguished the right to bring on review to the High Court the proceedings of (the Labour Board) within eight weeks of the termination of the proceedings, which right (the company) had as at 25 November 2005.
>
> 24. There is a presumption at common law against interpreting a statute in such H a way as to make it apply retrospectively. …

2009 (2) ZLR p314

Sandura JA

> 25. The presumption against legislative interference with vested rights has A also found expression in statute. The provisions of section 17(1) of the Interpretation Act [*Chapter 1:01*] are in line with the common law position. …
>
> 26. It is accordingly submitted that any rights that accrued to (the company) as at 25 November 2005 were not extinguished by the repeal of section 56 of the Export Processing Zones Act, which was repealed with effect from B 30tDecember 2005. The accrued rights could be exercised after 30 December 2005.
>
> 27. It is submitted that (the company's) application for review was properly before the High Court and that the High Court had the jurisdiction to hear and determine same. The law that should have been applied in the matter was the law as at 30 November 2005 …". C

The real issue here is whether on 25 November 2005 the company acquired a vested right to institute review proceedings in the High Court within eight weeks from that date, challenging the Labour Board's decision. I do not think it did.

I say so because it is an established principle that a person cannot have a D vested right in matters of procedure. Thus, *Craies on Statute Law* 7 ed states the following at 401:

> "But there is no vested right in procedure or costs. Enactments dealing with these subjects apply to pending actions, unless a contrary intention is expressed or clearly implied. … For it is perfectly settled that if the legislature forms a new procedure, that, instead of proceeding in this form or that, you should proceed E in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. In other words, if a statute deals merely with the procedure in an action, and does not affect the rights of the parties, it will be held to apply *prima facie* to all actions, pending as well as future." F

With regard to the content of matters of procedure, Kotzé JA said the following in *Bezuidenhout* v *AA Mutual Insurance Association Ltd* 1978 (1) SA 703 (AD) at 711B-C:

> "Questions relating to what courts and within what time proceedings are to be instituted are questions of procedural law (*Salmond on Jurisprudence* 11 G ed, p 504)."

I respectfully agree with that statement.

In casu, there can be no doubt that the issue as to which court the company could institute review proceedings in on 25 November 2005 was an issue concerning procedure, and in respect of which the company could not have acquired a vested right. H

Sandura JA

A Consequently, whilst it is correct, as already stated in this judgment, that the company could have instituted review proceedings in the High Court before the Amendment Act came into operation on 30 December 2005, it could not do so after that date. A different situation then prevailed because in terms of s 89(6) of the Labour Act the Labour Court had exclusive jurisdiction to deal with the matters set out in subsection (1) of s 89, which then included B exercising "the same powers of review as would be exercisable by the High Court in respect of labour matters".

Quite clearly, by repealing s 56 of the Export Processing Zones Act, and thereby transferring from the High Court to the Labour Court the hearing of review proceedings in labour matters from export processing zones, the C Amendment Act merely dealt with procedure and did not affect the substantive rights of the parties. The Amendment Act, therefore, applied to all actions, pending as well as future.

In the circumstances, the High Court did not have the jurisdiction to hear and determine the company's application for the review of the Labour Board's decision.

D In his submissions Mr *Mugandiwa* relied heavily upon the case of *Minister of Public Works* v *Haffejee NO* 1994 (3) SA 49 (N). The facts in that case were as follows:

1. On 29 April 1986 the Minister of Public Works ("the Minister") expropriated an immovable property belonging to the respondent E ("Haffejee"), in terms of the Expropriation Act 63 of 1975 ("Act 63 of 1975"), and offered him compensation which he rejected.
2. On 1 May 1992 the Expropriation Amendment Act 45 of 1992 ("the Amending Act") came into operation. It repealed all relevant provisions in Act 63 of 1975 relating to the compensation court and provided that F compensation would be determined by the Provincial or Local Division of the Supreme Court of South Africa.
3. On 6 August 1992 Haffejee filed an application in the compensation court against the Minister claiming compensation in the sum of R80 410.
4. On 30 April 1993 the Minister filed an application against Haffejee in G the Natal Provincial Division, seeking the following declaratory orders –
   (a) that the Amending Act had abolished the compensation court;
   (b) that Haffejee's application for compensation filed in the compensation court was, therefore, a nullity; and
   (c) that in terms of s 10(5) of Act 63 of 1975 Haffejee was deemed to H have accepted the Minister's final offer of compensation.

Sandura JA

5. Haffejee filed a notice of opposition, in which he submitted that the A Amending Act did not have retrospective effect, and that it did not, therefore, affect compensation claims which had arisen before 1 May 1992, whether or not such claims were actually pending in the compensation court on that date.

The matter came before Combrink J, who found for Haffejee, and dismissed B the Minister's application with costs. He found that the Amending Act did not retrospectively affect vested rights, and that as Haffejee had rejected the Minister's final offer before 1 May 1992, he had acquired a vested right to lodge an application for compensation in the compensation court.

Dissatisfied with that result, the Minister appealed to the Appellate Division of C the Supreme Court of South Africa, which upheld the appeal with costs. See *Minister of Public Works* v *Haffejee NO* 1996 (3) SA 745 (A). Mr *Mugandiwa* did not mention the Appellate Division decision in his heads of argument, and was probably unaware of it. Had he been aware of it, he would not have relied in his heads of argument upon the decision of the Natal Provisional Division, which had been reversed. D

In the Appellate Division decision *supra* Marais JA said the following at 753B-E:

> "In other words, it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of E enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. *Aliter* if they are not.
>
> *In casu* the relevant amendments were undoubtedly procedural provisions. Their only effect was that an application for compensation in an amount of less than R100 000 was thenceforth to be initiated in a forum different from the one in F which such an application had to be brought in terms of the unamended Act. And, as was said in *Bezuidenhout* v *AA Mutual Insurance Association Ltd* 1978 (1) SA 703 (A) at 711 B-C, questions relating to in what courts proceedings are to be instituted are questions of procedural law.
>
> Furthermore, should the amendments be given retrospective effect it will entail nothing more than the application of a new procedure to the respondent's pre G -existing right to compensation; the only difference being that, as from 1 May 1992, the respondent had to enforce that right to compensation in the Natal Provincial Division instead of a compensation court. There would be no adverse impairment of any pre-existing substantive right to compensation."

And at 754G the learned Judge of Appeal continued as follows:

> "I find no indication, clear or otherwise, in any of this that a claim such as the H

Sandura JA

> A respondent's was to continue to be maintainable in a compensation court."

I respectfully agree with the learned Judge of Appeal. His reasoning is unassailable and supports the conclusion I have reached in this appeal.

In the circumstances, the appeal is dismissed with costs.

B ZIYAMBI JA and GARWE JA concurred.

Wintertons, appellant's legal practitioners

Mbidzo, Muchadehama & Makoni, second, third, fourth, fifth, sixth and C seventh respondents' legal practitioners

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Source:

MANGENA & ANOR v FILANNINO & ORS 2009 (2) ZLR 318 (H)

Citation	2009 (2) ZLR 318 (H)
Case No	Judgment No. HB-116-09
Court	High Court, Bulawayo
Judge	Ndou J
Heard	6 July 2009
Judgment	5 November 2009
Counsel	*S S Mazibisa*, for the applicants *J Tshuma,* for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – *application – withdrawal of by applicant after set down – court's discretion to allow withdrawal unless it amounts to abuse of court process*

Headnote

The court retains a discretion whether or not to allow the withdrawal of D a case after set-down. A party is normally permitted to withdraw a claim subject to an appropriate order as to costs, unless the withdrawal amounts to an abuse of the court process. The same principles apply to application proceedings.

Cases cited E

Abramacos v Abramacos 1953 SR 118; 1953 (4) SA 474 (SR)

Levy v Levy 1991 (3) SA 614 (A)

Pearson & Hutton NNO v Hitzeroth & Ors 1967 (3) SA 591 (E)

Case information

S S Mazibisa, for the applicants F

J Tshuma, for the first respondent

Judgment

NDOU J: The applicants instituted a court application seeking a remedy in the following terms:

"It is ordered that:-

1. The eviction of the applicants by the respondents jointly and severally from G their land namely plot number lot 32 and 33 Essexvale be and is hereby declared to be unlawful.
2. The first respondent's occupation of the applicants' pieces of land without a lawful court order evicting the applicants be and is hereby declared to be unlawful.
3 The first respondent and all those claiming through him or for him be and are H

Ndou J

A hereby directed to vacate the applicants' piece of land namely plot number 32 and 33 Essexvale within 48 hours of granting of this order, failing which the Deputy Sheriff with the assistance of the Officer-In-Charge, Esigodini be and are hereby directed to evict the first respondent and all those acting through him or for him.

4. The respondents jointly and severally be and are hereby interdicted from B interfering with the applicants' occupation, use and possession of the piece of land namely plot 32 and 33 Essexvale, without a lawful court order authorizing the confiscation of their land.
5. The first and second respondents be and are hereby ordered to pay costs of suit."

At some stage a default judgment was granted against the first respondent. C Under case number HC 667/08, the first respondent applied for rescission of the default judgment. The parties, after filing heads of argument and the matter having been set down for hearing, reached a settlement. The settlement culminated in a consent order dated 14 January 2009 phrased as follows:

"It is ordered that: D

1. Judgment granted in default in case number HC 197/07 and X-Ref HC 2794/07, 341/07 on 21 February 2008 be and is hereby rescinded.
2. Applicants' application case No. 1623/07 for the dismissal of the main action, case No. HC 197/07 be and is hereby withdrawn.
3. The applicants' supplementary affidavit filed under HC 667/08 be and is hereby incorporated as pleadings under case No. HC 197/07. E
4. The respondents are granted leave to file any answer if they so wish to the supplementary affidavit, within 15 days of this order.
5. The parties be and are hereby directed to file heads of argument within 10 days after the filing and service of the answer to the supplementary affidavit or expiry within which the answer is to be filed.
6. *Pending the finalization of the main action case No. HC 197/07 the parties* F *shall continue to peacefully co-exist at the farm in dispute.*
7. The costs of this application be costs in the cause" (emphasis added).

Thereafter, the parties' legal practitioners of record approached Cheda J on 19 June 2009. It was apparently agreed that the matter be heard on 6 July 2009, so the matter was set down for hearing. On 1 July 2009 the applicants' G legal practitioner filed a letter saying they intended withdrawing the main application under HC 197/07. Initially the applicant did not tender costs. On 2 July 2009 the first respondent's legal practitioner wrote back saying they were not consenting to the withdrawal. On 3 July 2009, the applicants' legal practitioner filed another withdrawal letter this time around tendering costs. Still the first respondent did not consent. It is important to quote from H the letter of withdrawal itself to understand the motive:

Ndou J

"Re: Edward Mangena & anor vs Nino Flannino and Ors: HC 197/07 (Set A Down for 6 July 2009)

We refer to the above matter. We would like to advise you that our clients would like to withdraw this matter with a tender of costs on an ordinary scale due to the following reasons:

1. The relief our clients wanted on the draft order was for them to be re-instated B on Lot 32 and 33, Essexvale, which they have been re-instated and they are peacefully co-existing with first respondent in this matter. From the look of things we would like to believe that the relief being sought has been cured since the parties now co-exist together and continue their farming activities without disturbance from each other.
2. Since that farm was not de-listed and there is no authority from the Ministry of Lands that de-listed the farm it means the applicants are in lawful C occupation of that land.

   The applicants have allocation letters and everything entitling them to the land. Thus there is no reason to continue pursuing this matter under HC 197/07 fully knowing that the applicants were given that land by the designating authority and now are in peaceful existence on Lot 32 and 33 Essexvale and they are satisfied to be carrying their farming activities. Their D allocations have not been LAWFULLY set aside.
3. The applicants are not interfering with business of first respondent. Then as facts stand on the ground everyone is happy and continuing with their business. The papers show their designated plots which they occupy.

It is on these grounds that the applicants would withdraw their matter and tender wasted costs on an ordinary scale since it was because of the respondent's conduct E that the applicants approached the court. Thus accompanying this letter is a notice of withdrawal. By copy of this letter we advise the Honourable Justice Ndou, through his clerk, that we have withdrawn the matter."

It is trite that in the absence of agreement between the parties, the court retains a discretion whether or not to allow the withdrawal of a case after set-down: *Abramacos* v *Abramacos* 1953 SR 118; 1953 (4) SA 474 (SR); F *Pearson & Hutton NNO* v *Hitzeroth & Ors* 1967 (3) SA 591 (E) at 594G. A party is normally permitted to withdraw a claim subject to an appropriate order as to costs, unless the withdrawal amounts to an abuse of the court process: *Levy* v *Levy* 1991 (3) SA 614 (A) at 619F-620C and Herbstein and van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed at 568- G 569. Although these authorities were specifically dealing with trial actions, the same principles, in my humble view, apply to application proceedings. The above-mentioned letter of withdrawal contains inaccuracies. It is misleading to give the impression that the applicants sought a relief of co-existence with the first respondent. They actually sought full rights to the land in dispute and, more importantly, the eviction of the first respondent. The peaceful H

Ndou J

A co-existence is a creature of Cheda J's above-mentioned order in para 6 which I highlighted above. This co-existence is interlocutory "pending the finalization of the main action case No. 197/07." It was never meant to be a final determination of the parties' rights of occupation even before the matter was argued. Thus withdrawal, for the reasons given by the applicants above, amounts to an abuse of the court process: *Levy* v *Levy, supra*. The withdrawal B is not made in good faith and should not be permitted.

Accordingly I refuse the withdrawal and the matter will be argued on the merits.

Cheda & Partners applicants' legal practitioners

C *Webb, Low & Barry,* first respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/EDGARS STORES LTD v RAMSON (PVT) LTD & ORS 2009 (2) ZLR 322 (H)

EDGARS STORES LTD v RAMSON (PVT) LTD & ORS 2009 (2) ZLR 322 (H)

Citation	2009 (2) ZLR 322 (H)
Case No	Judgment No. HB-110-09
Court	High Court, Bulawayo
Judge	Ndou J
Heard	19 October 2009; 23 October 2009
Judgment	5 November 2009
Counsel	*N Mazibuko*, for the applicant *W T Manase*, with him *J Tsvangirai*, for the first and second respondents
Case Type	Urgent chamber application

Annotations No case annotations to date

Flynote

Appeal – *leave to execute pending appeal – order granting leave – not appealable*

Court – *High Court – jurisdiction – civil matter arising in Harare – High Court, Bulawayo, having jurisdiction over the matter* D

Headnote

The applicant sought a stay of execution pending an appeal noted at the High Court, Harare, against a decision of the magistrates court in Harare. The application was made to the High Court in Bulawayo. The first and second respondents had obtained a default judgment from the magistrates court for the eviction of the applicant from premises it occupied in Harare. E The applicant sought rescission of the default judgment and a stay of execution ending appeal. The magistrate rejected the application, and the applicant appealed to the High Court, Harare. Two days later, the first and second respondents filed an application for execution pending appeal, which was granted. The applicant filed a notice of appeal against this judgment. Two issues were raised in the present application. The first F was whether the High Court, Bulawayo, had jurisdiction, as the cause of action arose in Harare, and the affected premises were in Harare. The second was whether the filing of the notice of appeal suspended the magistrate's judgment granting leave to execute pending appeal. The applicant's argument was that, whilst an application for leave is, G technically an interlocutory matter, once it is granted, its effect is final and as such the notice of appeal would serve to suspend that order as envisaged by the provisions of s 40(2)(b) of the Magistrates Court Act [*Chapter 7:10*].

Held, that there was no legal bar to the matter being heard by the High Court in Bulawayo. Under s 13 of the High Court Act [*Chapter 7:06*], the High H

Ndou J

A Court has full original civil jurisdiction over all persons and over all matters within Zimbabwe. There is only one High Court, although some of its judges operate from Harare and others from Bulawayo.

Held, further, that when leave to carry a judgment into execution under s 40(3) of the Magistrates Court Act has been granted by a magistrate, the appellant cannot take interdict proceedings against the execution of B the judgment pending his appeal. The effect of the order sought by the applicant would be to reverse the order by the Harare magistrate even before the appeal was heard, which would render the hearing of the appeal academic. More importantly, an order granting leave to execute under s 40(3) is interlocutory and accordingly not appealable.

Cases referred to C

Jasat v Moosa 1949 (1) SA 883 (N)

Kuruman Cape Blue Asbestos (Edms) Bpk v Boshoff 1973 (2) SA 663 (NC)

Sabena World Airlines v Ver Elst 1980 (2) SA 238 (W)

S A Druggists Ltd v Beecham Group plc 1987 (4) SA 876 (T)

D *South Cape Corp (Pty) Ltd v Eng Mgmt Svcs (Pty) Ltd* 1977 (3) SA 534 (A)

van Leggelo v Transvaal Cellocrete (Pty) Ltd & Anor 1953 (2) SA 287 (T)

Legislation considered

High Court Act [*Chapter 7:06*], s 13

E Magistrates Court Act [*Chapter 7:10*], s 40(2)(b) & (3)

Case information

N Mazibuko, for the applicant

W T Manase, with him *J Tsvangirai*, for the first and second respondents

Judgment

NDOU J: The applicant seeks a provisional order in the following terms.

" F TERMS OF FINAL ORDER SOUGHT

That you show course why a final order should not be granted in the following terms:

1) That execution of the judgment granted by the Harare magistrates court on 28 August 2009, be and is hereby stayed pending the finalization of the G applicant's appeal under HCA Civil 'A' 411 /2009.

2) That the first, second and third respondents pay for the costs of application and a legal practitioner and client scale

INTERIM RELIEF GRANTED

Pending the return date and finalization of this application the applicant be and is hereby granted the following interim relief:

H 3) The Third respondent be and is hereby interdicted from evicting the applicant

Ndou J

from premises known as stand 2099A, Cameron/Bank Street, Harare, and A is further interdicted from attaching and/or removing applicant's goods and/or assets at the aforesaid premises or any other place.

4) In the event that by the time this order is granted, the third respondent would have evicted the applicant from the above mentioned premises and attached and removed applicant's goods, then the third respondent be and is hereby ordered to restore the applicant to the premises aforesaid and to B restore whatever goods and property it would have attached and removed, into the possession of the applicant at no cost to the applicant."

By agreement of the parties and on account of the urgency of the matter I heard submissions on both the points *in limine* raised by the first and second respondents and the merits of the case. The understanding is that, if I rule in C favour of the points raised by the first and second respondents, the matter will be disposed off without consideration of the merits. If, on the other hand, I reject the points *in limine* I will be in a position to go straight to deal with the matter on the merits.

Points *in limine*

1. Whether the High Court of Zimbabwe sitting in Bulawayo has D jurisdiction:

The background of this point is that this matter was first dealt with by the Harare magistrates court. Subsequent to that the applicant appealed to the High Court, Harare, which appeal is pending and yet to be heard. The cause of action also arose in Harare as the premises which are the subject matter E of the dispute are in Harare. The issue is whether there is a legal bar to the applicant instituting these proceedings before the High Court sitting in Bulawayo. The short answer is that there is no such and legal bar. Section 13 of the High Court Act [*Chapter 7: 06*], provides:

"13. Original Civil Jurisdiction F

Subject to this and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe."

It seems to me that there is only one High Court of Zimbabwe with some of its judges operating from Harare and others Bulawayo. There is no law that provides otherwise. Accordingly I have the requisite jurisdiction to entertain this application. G

2. Whether this matter was properly before this court:

The salient facts in this regard are the following. The first and second respondents filed a court application at Harare magistrates court seeking vacation of premises that the applicant leased from them on or before 31 July 2009. The applicant did not instruct its legal practitioners timeously, H

Ndou J

A resulting in a default judgment granted against it on 28 August 2009. Subsequently to the granting of the default judgment, the applicant filed an application for rescission. The first and second respondents filed opposing papers to the application for rescission. The applicant filed an application for a stay of execution and a rule *nisi* in it was duly granted. The application for rescission and the application for a stay of execution were subsequently B set down for hearing and were both dismissed with costs. Aggrieved by the turn of events, the applicant appealed against both judgments of the Harare magistrate to the High Court, Harare on 23 September 2009. On 25 September 2009 the first and second respondents filed an application for execution pending appeal. The applicant filed opposing papers and the matter was set C down for hearing on 15 October 2009 and the Harare magistrate granted the application for leave to execute pending appeal. The applicant filed a notice of appeal against the latter judgment. The issue is whether the filing of this notice of appeal suspends the magistrate's judgment granting leave to execute pending appeal. The applicants' case is that, whilst an application for leave is, technically an interlocutory matter, once it is granted, its effect D is final and as such the notice of appeal would serve to suspend that order as envisaged by the provisions of s 40(2)(b) of the Magistrates Court Act [*Chapter 7:10*]. In my view, when leave to carry a judgment into execution under s 40(3) *supra* has been granted by a magistrate, the appellant cannot take interdict proceedings against the execution of the judgment pending E his appeal: *Jasat* v *Moosa* 1949 (1) SA 883 (N) and *Sabena Belgian World Airlines* v *Ver Elst* 1980 (2) SA 238 (W). Such a procedure, as adopted by the applicant *in casu,* is not competent. The applicant was now wanting from this court what it could not get from the magistrates court. But that power rests squarely in the magistrates court. It has failed there and this court cannot assist it. The effect of the order sought by the applicant is to F reverse the order by the Harare magistrate even before the appeal is heard, thus rendering the hearing of the appeal academic. More importantly, an order granting leave to execute under s 40 is interlocutory and accordingly not appealable: *van Leggelo* v *Transvaal Cellocrete (Pty) Ltd & Anor* 1953 (2) SA 287 (T); *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pvt) Ltd* 1977 (3) SA 534 (A) at 552 and *South African Druggists* G *Ltd* v *Beecham Group plc* 1987 (4) SA 876 (T). See also *Jones and Buckle The Civil Practice of the Magistrates Court in South Africa* 8 ed by Erasmus at 316. *In casu,* the applicant seeks stay of execution "pending appeal." In light of the non–appealability of the order of Harare magistrate, such application is not competent and has to be refused. When one goes through H the applicant's founding papers, it is clear that what is being alleged as the

basis of the appeal is gross irregularities. Review, instead of appeal, would A have been the appropriate vehicle for redress. It is trite that in appropriate circumstances, a magistrate's decision under s 40 can be taken on review: *Kuruman Cape Blue Asbestos (Edms) Bpk* v *Boshoff* 1973 (2) SA 663 (NC). In its wisdom, the applicant chose the appeal route. I am not dealing with the appeal but the merits of the appeal are relevant in the determination of B this application, as rightly pointed out by counsel.

In light of the foregoing I accordingly dismiss the application with costs.

Calderwood, Bryce Hendrie and Partners, applicant's legal practitioners

Manase and Manase, c/o Danziger and Partners, first and second respondent's C legal practitioners

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Source:
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MUTASA & ANOR v CAGAR (PVT) LTD 2009 (2) ZLR 327 (S)

Citation	2009 (2) ZLR 327 (S)
Case No	Judgment No. S-47-09
Court	Supreme Court, Harare
Judge	Malaba DCJ, Cheda JA, & Sandura JA
Heard	18 May 2009
Judgment	9 November 2009
Counsel	*A Mugandiwa,* for the appellant *S M Bhebe,* for the respondent
Case Type	Details not supplied
Annotations	No case annotations to date

Flynote

C **Appeal** – *Labour Court – appeal from – appeal on a "question of law" – what amounts to a "question of law" – when misdirection on facts may amount to a question of law*

Headnote

The appellants were employed by the respondent as managers in a shopping centre. The shop was guarded by security guards employed by another D company. The keys for the shop and the safe housed therein were kept by the appellants. The external doors of the shop could only be unlocked when both appellants were present, because for each door each appellant had a key that was different from the key kept by the other. The same applied to the safe. Spare keys for the shop and the safe were kept at the respondent's head office and senior employees had access to them.

E At the end of the working day on 27 May 2001 the appellants locked up the shop. A security guard checked the external doors and satisfied himself that everything was in order before the appellants left the premises. When the appellants arrived at the premises the following morning, they were informed that the back door of the shop had been found open. They entered the shop and found the door of the safe open and Z$247 000 F was missing. They reported the matter to their superiors. The matter was reported to the police but they declined to prosecute the appellants. The respondent charged the appellants with theft of the missing money and suspended them. It applied to a labour relations officer for an order authorising their dismissal. The labour relations officer found them guilty of theft and authorised their dismissal. The appellants appealed to the G Labour Court. Their appeal was dismissed. They appealed to the High Court. Two of the grounds of appeal were as follows. Firstly, that the court *a quo* misdirected itself, on a question of law, by making certain findings of fact which were so outrageous in their defiance of logic that no reasonable person, properly applying his mind to the issues, could H have arrived at the conclusions reached. Secondly, that the court *a quo*

Sandura JA

misdirected itself, on a question of law, by reading the conclusion that A theft by the appellants was the more natural and plausible conclusion among several conclusions that could be arrived at from the circumstantial evidence that was available.

Held, that in terms of s 92F (1) of the Labour Act [*Chapter 28:01*], an appeal on a question of law only shall lie to the Supreme Court from B any decision of the Labour Court. 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 is 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 C 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, it means any question which is within the province of the judge instead of the jury is called a question of law. This division of judicial function arises in this country in a criminal trial presided over by a judge and assessors. A serious misdirection on the facts amounts to a misdirection in law. If D an appeal is to be related to the facts, there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who applied his or her mind to the facts would have arrived at such a decision. And a misdirection of fact is either a failure to appreciate a fact at all, or a finding of fact that is contrary to E the evidence actually presented.

Cases cited

Muzuva v United Bottlers (Pvt) Ltd 1994 (1) ZLR 217 (S)

National Foods Ltd v Magadza S-105-95

Reserve Bank of Zimbabwe v Granger & Anor S-34-01 F

Legislation considered

Labour Act [*Chapter 28:01*], s 92F

Case information

A Mugandiwa, for the appellant G

S M Bhebe, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the Labour Court which upheld the appellants' dismissal by the respondent. The background facts are as follows. The appellants were employed by the respondent ("the Company") as managers in a shop at High Glen Shopping Centre, in Harare. H

Sandura JA

A There was a police post at the shopping centre and the shop was guarded by security guards employed by another company. The keys for the shop and for the safe, which was housed in one of the rooms in the shop, were kept by the appellants. The external doors of the shop could only be unlocked when both appellants were present because for each door each appellant had a key different from the key in the custody of the other appellant. For B instance, there were two locks at the main entrance to the shop and each appellant could unlock only one of them. The same applied to the safe. In order to unlock the safe both appellants had to be present. However, spare keys for the shop and for the safe were kept at the Company's head office and senior employees had access to them.

C At the end of the working day on 27 May 2001, the appellants locked up the shop. A security guard checked the external doors and satisfied himself that everything was in order before the appellants left the premises. When the appellants arrived at the premises the following morning they were informed that the back door of the shop had been found open. They entered the shop and found the door of the safe open and the sum of Z$247 000, which had D been in the safe on the previous day, missing. They reported the matter to their superiors. Subsequently, the matter was reported to the police but the police declined to prosecute the appellants.

Thereafter, the Company charged the appellants with theft of Z$247 000, and suspended them from their posts without pay and other benefits on 12 June E 2001. In addition, the Company forthwith applied to a labour relations officer for an order authorising the appellants' dismissal. The application was made in terms of s 3(1)(d) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371 of 1985). Subsequently, the

application was heard by a labour relations officer on 24 September 2002 and on 13 November 2002 he found the appellants F guilty of theft and authorised the Company to dismiss them.

In due course the appellants appealed to the Labour Court which, on 4 February 2008, dismissed the appeal with no order as to costs. Aggrieved by that result, the appellants appealed to this court. Two of the grounds of appeal set out in the notice of appeal read as follows: G

"1. That the court *a quo* misdirected itself, on a question of law, by making the following findings of fact which are so outrageous in their defiance of logic that no reasonable person properly applying his mind to the issues, could have arrived at the conclusions reached:

1.1 That the appellants were the sole custodians of the keys to the premises;

1.2 That the premises had not been forcibly broken into; and H

1.3 That records from security guards who were guarding the premises

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were placed before the Labour Officer and were part of the record of A proceedings.

2. – 3. …

4. That the court *a quo* misdirected itself, on a question of law, by reaching the conclusion that theft by the appellants was the more natural implausible (*sic)* conclusion among several conclusions that could be arrived at from the circumstantial evidence that was available. That conclusion did not B take into account the fact that the respondent had not placed the following evidence before the Labour Officer:

4.1 evidence of the security guards;

4.2 the evidence of the senior management at head office who kept another set of keys for the shop (they could have been called to state whether or not any of them had visited the shop at the relevant time, or whether C or not their set of keys disappeared at any stage during the relevant period);

4.3 the evidence of an expert locksmith; and

4.4 fingerprint evidence (which they could have requested from (*sic*) the police who investigated the theft to lift from the scene of the offence)." D

The first issue which I shall consider is whether the appeal is on a question of law. The issue is important because, in terms of s 92F(1) of the Labour Act [*Chapter 28:01*] ("the Act"), the only appeal which lies to this court from a decision of the Labour Court is an appeal on a question of law. The section reads as follows:

"Appeals against decisions of Labour Court E

(1) An appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court."

What is a question of law has been discussed in a number of cases, the leading one in this jurisdiction being *Muzuva* v *United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S). At 220D-F Gubbay CJ said the following: F

"The twin concepts, questions of law and questions of fact, were considered in depth by E M Grosskpof JA in *Media Workers' Assoc of SA & Ors* v *Press Corporation of SA 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 G has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is 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 functions arises in this H

A country in a criminal trial presided over by a judge and assessors.

I respectfully adopt this classification, although the third sense is of no relevance to a matter such as this."

Another relevant case is *National Foods Ltd* v *Stewart Magadza* S-105-95, a case in which Ebrahim JA said the following at p 4 of the judgment:

" B It seems to me that it was open to the legal representative of the appellant in its appeal to this court to challenge the findings of the Tribunal on the basis that it misdirected itself in its findings on the facts.

It is true that this court only has jurisdiction to hear an appeal from the Tribunal on a point of law. … But clearly if there is a serious misdirection on the facts that amounts to a misdirection in law. The giving of reasons that are bad in law C constitutes a failure to hear and determine according to law."

Finally, in *Reserve Bank of Zimbabwe* v *Granger & Anor* S-34-01, Muchechetere JA, with whom McNally JA and I concurred, said the following at pp 5-6 of the judgment:

"An appeal to this court is based on the record. If it is to be related to the facts, there must be an allegation that there has been a misdirection on the facts D which is so unreasonable that no sensible person who applied his mind to the facts would have arrived at such a decision. And a misdirection of fact is either a failure to appreciate a fact at all, or a finding of fact that is contrary to the evidence actually presented. See *Hama* v *NRZ* 1996 (1) ZLR 664 (S) at 670; and *S* v *Pillay* 1977 (4) SA 531 (AD) at 535C-E."

Applying the principles set out in the three cases cited above, I have no doubt E in my mind that the appeal raises questions of law. There are allegations in the grounds of appeal that the Labour Court committed misdirections on the facts which are so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such a decision. The appeal is, therefore, properly before this court.

F The main issue in this appeal is whether the appellants were properly found guilty of theft of the sum of Z$247 000. I do not think they were. I say so because, in arriving at the conclusion that the appellants were guilty, the President of the Labour Court misdirected herself in a number of respects. Firstly, at p 1 of the judgment the President of the Labour Court said:

" G The employees (i.e. the appellants) were the sole custodians of the keys to the premises."

In making that finding, she completely ignored the uncontested facts that another set of keys for the shop and for the safe was kept at the Company's head office and that the Company's senior employees had access to the keys. This was a failure to appreciate the facts of the case. It was also a H finding of fact which was contrary to the evidence actually presented. In the

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circumstances, the President of the Labour Court committed a misdirection A on the facts which is so unreasonable that no sensible person who had applied his or her mind to the facts would have made the finding that she made.

Secondly, at p 2 of the judgment the President of the Labour Court said:

"If outsiders or other persons from the head office had visited the premises during the night in question, security officers who guard the premises could have alleged B as such, (much?) but in this case the security guard's records did not show that there had been any intruders. The back door had simply been left open. There was no evidence of any forced entry."

The finding that the records of the security guards did not show that there had been any intruders suggests that such records were placed before the labour relations officer or the Labour Court. However, nothing could be further C from the truth. No evidence whatsoever was obtained from the security guards, and there is no such evidence in the record before this court. When the appellants appeared before the labour relations officer, Mr *Mugandiwa*, who represented them, submitted that the Company should have obtained a report from the security company whose officers were guarding the premises D at the relevant time, dealing with the following matters –

"(i) The identity of all the persons that were seen entering or leaving the complainant's premises after the shop's closing time.

(ii) The exact time the back door was found open, and whether or not any instruments were found at the scene."

That submission would not have been made if the records of the security E guards had been placed before the labour relations officer. It is pertinent to note that although the appellants could have called the security guards to testify before the labour relations officer on what happened during the night in question, they did not do so because they had been released on bail on condition that they did not interfere with potential State witnesses, who F included the security guards.

In the circumstances, the finding that the records of the security guards did not show that there had been any intruders was unfounded, and was contrary to the evidence before the labour relations

officer and the Labour Court, which did not indicate that such records had been produced. The finding G was, therefore, a misdirection on the facts, which is so unreasonable that no sensible person who had applied his or her mind to the facts would have arrived at such a conclusion.

Finally, at p 3 of the judgment the President of the Labour Court said:

> "… the most probable persons to have committed the theft were the two joint H custodians of the keys to the back door and to the safe."

Sandura JA

A This conclusion was based on a misdirection on the facts referred to earlier in this judgment, i.e. that the appellants were the sole custodians of the keys to the shop and to the safe. In my view, bearing in mind that another set of keys for the shop and for the safe was kept at the Company's head office, and that the Company's senior employees had access to the keys, the finding that the appellants were the most probable persons to have committed the B theft is so outrageous in its defiance of logic that no sensible person who had applied his or her mind to the question to be decided would have made such a finding. On the evidence before this court, one cannot say who committed the theft, or who most probably committed the theft.

I now wish to deal with the question of the costs reserved in the chamber C application filed by the appellants for leave to appeal and for an extension of time within which to appeal. I cannot see any reason why these costs should be borne by the Company.

In the circumstances, the following order is made –

1. The appeal is allowed with costs. D
2. The order granted by the Labour Court is set aside and the following substituted:
   "(a) The appeal is allowed with costs.
   (b) The order or determination made by the labour relations officer is set aside.
   (c) The respondent shall reinstate the appellants without loss of salary and benefits, with effect from the date of suspension, provided that if the E employment relationship is no longer tenable, the parties may agree on the quantum of damages payable in lieu of reinstatement, failing which either party may approach the Labour Court for the quantification of such damages."
3. No order as to costs is made in respect of the appellants' application for F leave to appeal and for an extension of the time within which to appeal.

MALABA DCJ and CHEDA JA concurred.

Wintertons, appellants' legal practitioners

G *Kantor & Immerman*, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/PINELONG INVESTMENTS v VALLANCE & ANOR 2009 (2) ZLR 334 (H)

PINELONG INVESTMENTS v VALLANCE & ANOR 2009 (2) ZLR 334 (H)

Citation 2009 (2) ZLR 334 (H)

Case No Judgment No. HH-132-09

Court High Court, Harare

Judge	Makoni J
Heard	11 June 2009
Judgment	11 November 2009
Counsel	*J M Mafusire*, for the applicant First respondent in person
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – *appearance to defend – requirement to serve copy of notice on plaintiff or his legal practitioner – defendant timeously entering appearance to defend but failing to serve notice on plaintiff* D *within 24 hours of entry of appearance to defend – plaintiff not entitled to have matter struck off or to move for summary judgment*

Practice *and procedure – parties – defendant a corporate body – representation by a person other than a legal practitioner – leave of court required*

Headnote

The applicant issued summons against the respondents. On the same date, E the summons was served on the second respondent, a company, which also accepted service on behalf of the first respondent. On the day of expiry of the *dies induciae*, the first respondent entered an appearance to defend for himself and on behalf of the second respondent. The notice was not served on the applicant's legal practitioners. A week F later, the applicant filed an application for default judgment. Later on the same day, the first respondent served the notice on the applicant's legal practitioners. The applicant's legal practitioners pointed out to the first respondent the irregularities of the notice of appearance to defend. The first point was that the respondents had not complied with r 49 of High Court Rules 1971, which provides for service of a notice G of appearance to defend within 24 hours of the entry of appearance to defend. The second point was that the notice did not comply with Form No. 8, in that it did not state the date on which the summons was served. The last point was that the respondents did not comply with s 51 of the High Court Act [*Chapter 7:06*], as the first respondent had entered an appearance to defend for both himself as well as the second respondent, H

A a duly registered company. There was no reply to this letter by the respondents. The applicant then filed an application for an order that the notice of appearance to defend be struck off and that the registrar be directed to expunge it from the court record.

Held, that a notice of intention to defend, consequent upon the service of a summons will be irregular if the defendant, having filed the original B notice with the registrar, fails to serves a copy on the plaintiff or his legal practitioner. In the event of failure to serve the notice in this manner, the plaintiff will be entitled to assume that notice of intention to defend has not been given. If however, the plaintiff does so and moves for judgment, the court will not grant judgment, but will order the defend C to pay the wasted costs occasioned by his omission. Rule 50 provides the sanction (barring) for failure to enter appearance in terms of r 48, but the Rules provide no sanction for failure to serve the notice in terms of r 49. The irregularity in this case did not warrant the punishment of having the notice of appearance struck off and that it be expunged from the record. Such a relief would be too drastic in view of the fact that the D notice was entered timeously.

Held, further, that a person, other than a duly authorized legal practitioner, who wishes to appear on behalf of a corporate body, must first seek the leave of the court to do so. Accordingly, the

second respondent, being a juristic person, has no right to be heard in court except through legal representation and the first respondent had no right to enter appearance on its behalf.

Cases cited

Diana Farm (Pvt) Ltd v Madondo NO & Anor 1998 (2) ZLR 410 (H)

Founders Bldg Soc v Dalib (Pvt) Ltd & Ors 1998 (1) ZLR 526 (H)

HPP Studios (Pvt) Ltd v Associated Newspapers of Zimbabwe (Pvt) Ltd 2000 (1) ZLR 318 (H)

Lees Import and Export (Pvt) Ltd v Zimbank 1999 (2) ZLR 36 (S)

Pumpkin Construction (Pvt) Ltd v Chikaka 1997 (2) ZLR 430 (H)

Legislation considered

High Court Act [*Chapter 7: 06*], s 51

High Court Rules 1971 (RGN 1047 of 1971), rr 48, 49 and 50

Legal Practitioners Act [*Chapter 27:07*], s 9

Case information

J M Mafusire, for the applicant

First respondent in person

2009 (2) ZLR p336

Makoni J

Judgment

MAKONI J: On 26 July 2008, the applicant issued summons, out of this court, claiming eviction and other ancillary relief against the respondents. On the same date, the summons was served by the Deputy Sheriff on the second respondent, who also accepted service on behalf of the first respondent. The *dies induciae* expired on 6 August 2008.

The fist respondent entered an appearance to defend for himself and on behalf of the second respondent on 6 August 2008. He did not serve the notice on the applicant's legal practitioners. On the morning of 14 August 2008, the applicant filed an application for default judgment. On 2 September 2008, the application was returned with a comment from a Judge that an appearance to defend was entered timeously on 6 August 2008. In the afternoon of 14 August 2008, the first respondent served the notice on the applicant's legal practitioners.

On 20 August 2008 the applicant's legal practitioners wrote a letter to the first respondent pointing out the irregularities of the notice of appearance to defend. The first point was that the respondents had not complied with or r 49 of High Court of Zimbabwe Rules, 1971 ("the Rules") which provides for service of a notice of appearance to defend within 24 hours of the entry of appearance to defend. The second point was that the notice did not comply with Form No. 8 in that it did not state the date on which the summons was served. The last point was that the respondents did not comply with s 51 of the High Court Act [*Chapter 7:06*] ("the Act"), as the second respondent had entered an appearance to defend for both himself as well as the second respondent, a duly registered company. There was no response to this letter by the respondents.

On 24 September 2008, the applicant filed the present application whereby he seeks an order that the notice of appearance to defend filed by in these proceedings on 6 August 2008 be struck off and that the registrar be directed to expunge it from the court record. He also seeks costs from both respondents jointly and severally.

The applicant contends that he is proceeding in terms of a direction given by Gillespie J in *Founders Building Society* v *Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526 at 534. The directive was to a following effect

> "In any action, where the plaintiff's legal practitioner contemplates an application for default judgment, but is aware of some proceedings being taken by the defendant which is an attempt at opposition but does not constitute due and regular entry of appearance to defend, he ought to address to the defendant or his

legal practitioner due warning of the irregularity of the procedural step. Having done so, he may then choose between –

(a) an application for default judgment; or H

2009 (2) ZLR p337

Makoni J A

(b) an application, on notice to defendant to struck out the irregular proceeding p 534C".

It was submitted on behalf of the applicant that the first respondent's notice was irregular in that it was not properly delivered. It was not served on the applicant's attorney within 24 hours of entry as is provided for in r 49. It was not in Form No. 8 in that it did not state the date on which the summons was B served. No proof of service was filed in accordance with r 42B.

It was further submitted that an irregular entry of appearance triggers the choices available to the plaintiff as directed by Gillespie J in *Founders Building Society, supra*.

The applicant also referred to C *HPP Studios (Pvt) Ltd v Associated Newspapers of Zimbabwe (Pvt) Ltd* 2000 (1) ZLR 318 (H) at 334 in support of its contention. It was submitted that Adam J. was far less generous than Gillespie J. According to Adam J, a plaintiff who has given notice of the irregular appearance and is ignored should not be burdened with a further court application to strike out, before he can obtain default judgment.

D The second respondent concedes that the notice was not served timeously as is provided for in terms of the rules but argues that that does not invalidate the notice. He submitted that the applicant fails to appreciate that the criteria for determining whether the notice is valid is the issuing and entry of the notice in the appearance book kept by the Registrar, and not service on the plaintiff.

The first issue for determination is whether the notice is irregular for want E of service on the plaintiff's legal practitioners.

Rule 49 provides that within twenty four hours of the entry of appearance to defend, written notice thereof should be served on the plaintiff or his legal practitioner at the plaintiff's address for service and such notice shall be in Form No. 8. The rule is couched in peremptory terms. It does not F give the defendant a choice. It is couched in such a manner to assist in the expeditious resolution of disputes and to avoid incurring unnecessary costs. If such notice is not served, the plaintiff, after the expiry of the *dies induciae,* might apply for default judgment as has happened *in casu*. In my view, such notice would be irregular.

The point is made in Herbstein and van Winsen *The Civil Procedure of the* G *Supreme Court of South Africa* 4 ed at p 431 where it is stated:

> "A notice of intention to defend will be irregular if the defendant, having filed the original notice with the registrar, fails to serve a copy on the plaintiff on his attorney".

It is therefore my finding that the notice is irregular.

H Having determined that the notice is irregular, the next issue is whether such

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2009 (2) ZLR p338

Makoni J

notice should be struck off the record. A

Rule 48 provides that a defendant wishing to defend an action must enter an appearance to defend in the manner prescribed in the Rules. Rule 49 provides for service of the notice on the plaintiff or his legal practitioner. Rule 50 provides the sanction for failure to enter appearance in terms of r 48.

The rules are silent as to the sanction for failure to serve the notice in terms B of r 49. Mr *Mufusire* conceded the point but argued that the sanction has been interpreted in case law. He referred to the *Founders Building Society* and *HPP Studios* cases *supra*.

In my view, the two cases can be distinguished from the present matter. In *Founders Building Society supra* the defendant, after having been served with C the summons, did not enter appearance in the form prescribed by the rules but filed a notice of assumption of agency. On the same day the defendant, through his attorneys, filed a request for further particulars. The plaintiff's

attorney then simply ignored these two proceedings and applied for default judgment. No appearance to defend was entered.

In *HPP Studios (Pvt) Ltd supra* the facts are that on 18 June 1999, after the D respondent had been automatically barred, a notice of appearance to defend was served on applicant's legal practitioners. It stated incorrectly that appearance to defend had been entered on 17 June 1999, the last day on which they could have done so. The appearance book revealed that appearance to defend was entered on 18 June 1999. The appearance to defend was entered out of time. E

In casu, the appearance to defend was not only entered but was entered timeously. The applicant did not refer the court to a case whereby an appearance to defend was entered timeously but was not served in terms of the rules. The two authorities cited by the applicant do not assist the court as they are clearly distinguishable from the present matter. The rules are silent on the issue of what the court can do with a defendant who enters appearance to F defend timeoulsy but does not serve the notice as provided for in the rules.

Herbstein and van Winsen *supra* p 431 state:

> "in the event of failure to serve the notice on the plaintiff's attorney's the plaintiff will be entitled to assume that notice of intention to defend has not been given. If however, he does so and moves for judgment, the court will not grant judgment, G but will order the defendant to pay the wasted costs occasioned by his omission".

I associate myself fully with the above remarks.

The applicant's only remedy lies in a claim for costs for the application for default judgment. The irregularity does not warrant the punishment of having the notice of appearance struck off and that it be expunged from the record. Such a relief would be too drastic in view of the fact that the notice H

Makoni J

A was entered timeously. In view of the above the applicant's argument on this point cannot succeed.

The second issue is whether the notice of appearance to defend entered by the first defendant in respect of the second respondent is properly before the court. It was submitted on behalf of the applicant that the second respondent, B a juristic person, has no right to be heard in court except through legal representation.

The first respondent, in his notice of opposition, dealt with the above issue in para 4. He did not plead any facts which would establish a basis why he entered appearance to defend on behalf of the second respondent. He gave what he considers to be the law relating to the issue at hand.

C In terms of s 51 of the High Court Act [*Chapter 7:06*] and s 9 of Legal Practitioners Act [*Chapter 27:07*], the second respondent has no right of audience before this court except through legal representation. This position has been laid down in a number of cases in this jurisdiction. See *Diana Farm (Pvt) Ltd* v *Madondo NO & Anor* 1998 (2) ZLR 410 (H), *Pumpkin Construction (Pvt) Ltd* v *Chikaka* 1997 (2) ZLR 430 (H) and also *Lees Import* D *& Export (Pvt) Ltd* v *Zimbank* 1999 (2) ZLR 36 (S).

In *Lees Import supra* the court recognised exceptions to the rule that a corporate body can appear through its *alter ego*. One has to seek leave of the court to appear on behalf of a corporate body. The same technicality that bedevils the first respondent in the main matter also affects it in the E present proceedings. It has no right of audience and is not properly before me. I cannot therefore deal with the issue relating to the second respondent.

In view of the above the applicant cannot succeed.

Accordingly it is ordered :

1. that the application is dismissed. F
2. The applicant is to pay the second respondent's costs.

Scanlen & Holderness, applicant's legal practitioners

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MATANDA (PVT) LTD v MINISTER OF LANDS & ORS 2009 (2) ZLR 340 (H)

Citation	2009 (2) ZLR 340 (H)
Case No	Judgment No. HH-178-10
Court	High Court, Harare
Judge	Makoni J
Heard	22 October 2009
Judgment	11 November 2009
Counsel	*N Chikomo,* for the applicant *M Chimombe,* for the first, second, third and fourth respondents *E Jena,* for the fifth, sixth, seventh, eighth and ninth respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Land – *acquisition – preliminary notice of acquisition – withdrawal of such notice – effect – ownership of land remaining with original owner*

Headnote

A preliminary notice of acquisition was issued in terms of s 5(1) of the Land D Acquisition Act [*Chapter 20:10*] in respect of the applicant's farm. Just over a year later, a notice withdrawing the preliminary notice was published in terms of s 5(7) of the Act. Nonetheless, offer letters were issued to the fifth to ninth respondents by the first respondent. The applicant sought an order declaring that it was the owner of the farm. The first respondent's position was that, despite the "de-listing" of the farm, E it was subsequently acquired by operation of s 16B of the Constitution (introduced by the Constitutional Amendment Act (No. 17) 2005), as it was listed in the schedules.

Held, that the word "withdraw" in this context means "discontinue, cancel, retract". If one were to use that meaning, it would mean that the Government cancelled or retracted the preliminary notice in respect of F the farm. It no longer had an interest in the farm. If it were to develop an interest in future it would have to start the whole process of acquisition afresh. The farm was not issued with a fresh notice of acquisition. It was a mistake or an oversight on the part of the acquiring authority to include the property in the schedules, since the initial identification of G the land had been withdrawn.

Legislation considered

Constitution of Zimbabwe 1980, s 16B

Land Acquisition Act [*Chapter 20:10*], s 5(1), (7) & (9) H

Makoni J

Case information

A *N Chikomo,* for the applicant

M Chimombe, for the first, second, third and fourth respondents

E Jena, for the fifth, sixth, seventh, eighth and ninth respondents

Judgment

MAKONI J: The applicant approached this court seeking an order in the B following terms:

1. That the applicant be and is hereby declared the legal owner of certain piece of land called Lot 1 of Orange Grove situated in the District of Hartley measuring 2 039 6170 acres held under Deed of Transfer Number 609/66. C
2. That the offer letters issued in favour of the fifth to ninth respondents be and are hereby declared void and therefore of no force and effect on the ground that the farm was delisted by Government on 21 January, 2005.
3. That the fifth to ninth respondents be and are hereby ordered to vacate the said farm forthwith, and not to interfere with the applicant's workers D and operations at the said farm.
4. That the fifth to ninth respondents pay costs of suit jointly and severally, the one paying the other to be absolved.

The basis of the application is that the applicant is the current owner of a E certain piece of land called Lot 1 of Orange Grove Hartley ("the farm"). On 12 December 2003 the Minister of Lands, Land Reform and Resettlement (the Minister) published a notice of acquisition of the farm in the *Government Gazette*.

Representations were made to the Minister that the farm was now owned by indigenous Zimbabweans. On 21 January 2005 the farm was delisted by a F publication in the *Government Gazette*. In February 2005 the Government also issued a "Certificate of No Present Interest" in the farm.

After the delisting of the farm, some persons, including the fifth to the ninth respondents, were issued with offer letters in respect of subdivisions on the farm. The respondents are now claiming the right to occupy and carry out G farming activities on certain portions of the farm on the basis of the offer letters.

The first respondent's position is that despite the delisting of the farm, it was subsequently acquired by operation of the Constitutional Amendment Act (No. 17) ("the Act") as it was listed in the schedules. The applicant has no *locus* H *standi* to seek the eviction of the respondents as it does not own the farm.

Makoni J

The fifth to the ninth respondents' position is basically the same of that as A the first respondent.

From the first respondent's stance, it was my view that the parties address me on the following:

(i) the effect of delisting gazetted land and B

(ii) the effect of the provisions of the Act on delisted properties.

The parties filed supplementary heads addressing the issues. The first to fourth respondents had been barred for failing to file heads of argument in terms of the rules. I, however, invited the Attorney-General's Office to address the court on the above issues as *amicus curiae*.

Mr *Chikomo* submitted that de-listing the farm, meant that the land had been taken out of the list of properties intended for acquisition. It no longer existed in the *Gazette* or *Gazette Extraordinary*.

Section 16B of the Act was intended for land that was gazetted. If it was intended for land whose notices to acquire had been withdrawn, the legislature would have specifically and expressly stated so.

Mr *Jena* submitted that the farm was acquired by operation of s 16B(2) of the Act. Section 16B(2) lays down the procedure for acquiring land and specifically mentions "All agricultural land …" regardless of whether it had been listed or delisted before. The land in issue is listed in Schedule 7 of s 16 B of the Act.

The heads of argument filed by the Attorney-General did not assist the court as they did not address the issues raised by the court. However, towards the end of their submissions, they make the point that if the legislature intended that land previously delisted would not be acquired pursuant to s 16B(2) of the Act, it would have enacted such a provision.

The first respondent uses the word "de-list" to refer to situations where the preliminary notice to acquire land is withdrawn in terms of s 5(1) of the Land Acquisition Act [*Chapter 20:10*].

Section 16B(2) reads:

> "Not withstanding anything contained in this Chapter –
>
> (a) all agricultural land –
>
> (b) (i) that was identified on or before the 8th July, 2005, in the *Gazette* or *Gazettee Extraordinary* under s 5(1) of the Land Acquisition Act [*Chapter 20*:*10*], and which is itemized in Schedule 7, being agricultural land required for resettlement purposes; or
>
> (ii) …
>
> (iii) …

Makoni J

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

Three issues arise from a reading of s 16B(2):

(i) the land must have been identified on or before 8th July 2005;

(ii) it must be itemized in Schedule 7; and

(iii) it must be agricultural land required for resettlement purposes".

Items (ii) and (iii) are not in issue. I will only deal with item (i).

In my view it is important, at the outset, to define what "identifying" means in the context of the Land Acquisition Act [*Chapter 20:10*] and s 16 B of C the Act.

Section 5(1) of the Land Acquisition Act provides:

> "Where an acquiring authority intends to acquire any land otherwise than by agreement, he shall –
>
> (a) publish once in the *Gazette* and once a week for two consecutive weeks, D commending with the day on which the notice in the *Gazette* is published, in a newspaper circulating in the area in which the land to be acquired is situated …, a preliminary notice –
>
> (i) describing the nature and extent of the land which he intends to acquire …
>
> (ii) setting out the purpose for which the land is acquired; E
>
> (iii) …".

In my view, the process as laid out in s 5(1) of the Land Acquisition Act is the process of identifying the land. It includes publication in one *Gazette*.

It is common cause that a preliminary notice in terms of s 5(1) of the Land Acquisition Act was published on 21 January 2003 in respect of the farm. F It was therefore identified by that publication. It is also common cause that the preliminary notice was withdrawn by a publication in the *Gazette* of 21 January 2003. The withdrawal was done in terms of s 5(7) of the Land Acquisition Act.

This would then bring the question of what is the effect of the withdrawal of the preliminary notice to acquire land. In the *Reader's Digest – Oxford* G *Complete Wordfinder* the word "withdrawn" is defined as:

> "(1) pull or take aside or back (2) discontinuing, cancel, retract (3) remove, take away (4) take money out of an account (5) retire or go away, move away or back."

In the context of the Land Acquisition Act the meaning attributable to the H word "withdraw" would be "discontinue, cancel, retract". If one were to

Makoni J

use the above meaning, it would mean that the Government cancelled or A retracted the preliminary notice in respect of the farm. It no longer had an interest in the farm.

If it were to develop an interest in future it would have to start the whole process of acquisition afresh.

My view is fortified by the procedure, laid down in s 5(9), regarding lapsed B notices. It provides that where a preliminary notice lapses for the reasons provided, nothing shall prevent the acquiring authority from issuing fresh notice in terms of subs (1) or (3) as the case may be. Section 5(a) provides for the process of identifying the land afresh in respective of lapsed notices. My view is that the same should apply in respect of withdrawn notices.

It is not in issue that the land in question was not issued with a fresh notice C of acquisition. It is clear that it was a mistake or an oversight on the part of the acquiring authority to include the property in Schedule 7 of s 16B, since the initial identification of the land had been withdrawn.

It is therefore my finding that the land was not acquired by the operation of the provisions of s 16B of the Act as advanced by the respondents. D

Having arrived at that conclusion, it follows that the issue whether the applicant has *locus standi* or not falls away. The land in question is owned by the applicant. The fifth to ninth respondents are claiming occupation on the basis of offer letters. The first respondent is not the owner of the property and cannot, therefore, issue offer letters in respect of that land. The applicant E has established a basis for the order that it seeks.

In the result, I will make the following order:

1. The applicant be and is hereby the legal owner of certain piece of land called Lot 1 of Orange Grove situated in the District of Hartley measuring 2 039 6170 acres held under Deed of Transfer No. 609/06.
2. The offer letters issued in favour of the fifth to ninth respondents be and F are hereby declared void and of no force and effect.
3. The fifth to ninth respondents are hereby ordered to vacate the said farm forthwith and are ordered not to interfere with the applicant's workers and operations at the farm.
4. The fifth to ninth respondents pay costs of suit jointly and severally the G one paying the one to be absolved.

Mhiribidi, *Ngarava & Moyo*, applicant's legal practitioners

Mpame Associates, fifth, sixth, secenth, eighth and ninth respondents' legal practitioners H

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S v BENNETT 2009 (2) ZLR 345 (H)

Citation 2009 (2) ZLR 345 (H)

Case No Judgment No. HH-138-09

Court High Court, Harare

Judge Bhunu J and Assessors

Heard	9 November 2009
Judgment	11 November 2009
Counsel	*J Tomana*, for the State Mrs *B Mtetwa*, for the defence
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal procedure – *defence outline – defence outline inadequate – Attorney-General not entitled to apply for outline to be struck out – late filing of defence outline – Attorney-General's remedies*

Headnote

D Where an accused person is committed for trial in terms of s 66(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a notice is served on him in terms of s 66(6), requesting him to give an outline of his defence to the charge and a list of the witnesses he proposes to call, together with a summary of the evidence which each witness will give. Where E the accused is represented by a legal practitioner, s 66(8) requires the legal practitioner to supply this information to the Attorney-General at least three working days before the trial date. Failure by the accused to supply an adequate outline does not entitle the Attorney-General to apply for the striking out of the defence outline. It simply places the accused at the risk that the court may, in terms of s 67(2), draw such F inferences from the failure as appear proper and that the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused. Similarly, failing to supply the information by the stipulated time would not give rise to the striking out of the defence outline. It would simply entitle the Attorney General G to an extension of time to consider the defence outline.

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 66

Case information

J Tomana, for the State

H Mrs *B Mtetwa*, for the defence

Bhunu J

Judgment

BHUNU J: The accused is charged with possessing weaponry for insurgency, A banditry, sabotage, or terrorism, in contravention of s 10(1) of the Public Order and Security Act [*Chapter 11:17*]. Arising from that charge are alternative charges of:

1. Possession of dangerous weapons, in contravention of s 11(1) of the Public Order and Security Act [*Chapter 11:17*]; or B
2. Unlawful possession of prohibited firearms, in contravention of s 24(1)(d) of the firearms Act [*Chapter 10:09*]; or
3. Unlawful possession of firearms, in contravention of s 4 of the Firearms Act [*Chapter 10:09*].

On the second count, he is charged with incitement to commit insurgency, in C contravention of s 6 of the Public Order and Security Act [*Chapter 11:17*].

Admittedly these are very serious offences punishable by death or life imprisonment. Not surprisingly the proceedings are mired in controversy and emotions are highly charged There is therefore need to proceed with extreme caution and due diligence. D

I would at the outset mention in passing that, at the beginning of these proceedings, we were advised that there were foreign observers who wanted to be introduced to members of the court. While our courts are open to members of the public, we accord no special treatment to any class of persons regardless of their station or purpose in life. E

We operate in an adversarial criminal justice system where a criminal trial is akin to a contest between the State and the accused and the function of the court is to a large extent that of a referee or umpire. The court is therefore keenly aware, that like in any other contest the audience or spectators attend court for various reasons, some are in support of one side or the other, some are neutral curious observers and yet others pretend to be neutral when in F actual fact they are not disinterested curious observers.

Members of the public are nevertheless free to attend our proceedings without let or hindrance notwithstanding their purpose for attending court. In the ordinary run of things, the court does not want to know why any member of the public may be attending court for fear that their purpose for attending G court might rub onto its shoulders, thereby undermining the independence and impartiality of the judiciary.

Impartiality, equality and fairness are the bedrock upon which our criminal justice system firmly rests. Justice and fairness demands that if foreign observers are to be accorded the privilege of being introduced and rubbing shoulders with members of the judiciary. The same privilege must be accorded H

A to local observers and audience and *vice versa*. This is, however, unusual if not ridiculous. For instance, it is scandalous that members of the accused's family may strive to introduce themselves to the bench. The same applies to State functionaries and foreign observers who are not directly involved in these proceedings. This explains why the court turned down the request for the introduction to the bench of any observers, foreign or otherwise.

B Unfortunately, the presence of a high profile unusual audience appears to have had an unsettling effect on both counsel. The court has noted a marked tendency to play to the gallery. Both counsel appear to have lost their usual composure. They have uncharacteristically resorted to being quarrelsome and argumentative as they try to outwit each other in the glare of an unusual C audience. They have tended to launch vicious personal attacks on each other.

There is no gainsaying that this is unacceptably deplorable conduct. Both counsel are very senior respectable members of the profession. They both know what is required of them. I can only remind them of the need to conduct these proceedings in a composed, ethical and civilized manner. I am sure counsel will take heed for the good of the due administration of justice.

D I now turn to consider the preliminary issues before me on the merits.

While preparing judgment on the preliminary issues I discovered that ss 5 to 13 of the Public Order and Security Act [*Chapter 11:17*], which form the bulk of the charges against the accused, were repealed by s 282 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Act 23 of E 2004). Upon perusing the papers I realized that the alleged offences had been committed between 2002 and 2006 and the proceedings were saved by s 17 of the Interpretation Act [*Chapter 1:01*], which provides:

> "17 Effect of repeal of enactment
>
> (1) Where an enactment repeals another enactment, the repeal shall not— F
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) affect *the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or*
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed; or G
>
> (d) *affect any offence committed against the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect thereof; or*

(e) affect *any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy shall be exercisable, continued or enforced and any such penalty, forfeiture or* H *punishment may be imposed as if the enactment had not been so repealed.*

Bhunu J

(2) Nothing in subsection (1) shall be taken to authorize the continuance in A force, after the repeal of an enactment, of any statutory instrument made under that enactment.

(3) Where an enactment repeals and re-enacts, with or without modification, any provision of any other enactment, all proceedings commenced under any provision so repealed shall be continued under and in conformity with the provision so repealed." (My emphasis) B

Upon discovery of this occurrence I consulted both counsel in chambers and they both confirmed that the charges were in order.

The State has now applied for the striking out of the accused's defense outline on the basis that it does not comply with s 66 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] C

On the other hand, the defence has countered by applying for the striking out of portions of the summary of State case, arguing that they are not in compliance with s 188 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Despite spirited submissions from both counsel, my perusal of the sections D relied upon by both parties shows that none of the parties is entitled to the relief sought in their respective applications.

Section 66(6) provides for the parties' respective duties and obligations in respect of the provision of the State outline or defence outline. It reads:

"(6) Where an accused has been committed for trial in terms of subsection (2) E there shall be served upon him or her in addition to the indictment and notice of trial —

(a) a document containing a list of witnesses it is proposed to call at the trial and a summary of the evidence which each witness will give, sufficient to inform the accused of all the material facts upon which the State relies; and

(b) a notice requesting the accused — F

(i) to give an outline of his or her defence, if any, to the charge; and

(ii) to supply the names of any witnesses he or she proposes to call in his or her defence together with a summary of the evidence which each witness will give, sufficient to inform the Attorney-General of all the material facts on which he or she relies in his or her defence;

and informing the accused of the provisions of section 67(2). G

(7) The Attorney-General shall lodge with the registrar of the High Court a copy of the document and notice referred to in subsection (6).

(8) Where the accused is to be *represented at his or her trial by a legal practitioner, the legal practitioner shall, at least three days, Saturdays, Sundays and public holidays excluded, before the date for trial determined by the Attorney-General in terms of s 160(1)* — H

Bhunu J A

(a) *send to the Attorney-General; and*

(b) lodge with the registrar of the High Court;

a document containing the information referred to subsection (6)(b)" (my emphasis).

It is self evident that the section makes no provision for the striking out of B an accused person's defence outline on the basis that it is inadequate or does not address the merits. It simply authorizes the Attorney General to request for a defence outline, if any, in terms of para (a) of that section.

As can be seen, the subsection provides that, if the accused fails to provide a defence outline in conformity with the provisions of s 66 the answer does not lie in striking out the defence outline but the accused deliberately takes C a calculated risk in terms of s 67(2), which reads:

"(2) If an accused has failed to mention any fact relevant to his or her defence as requested in the notice in terms of section sixty-six (6)(b), being a fact which, in the circumstances existing at the time, he or she could reasonably have been expected to have mentioned, the court, in determining whether there is any D

evidence that the accused committed or whether the accused is guilty of the offence charged or any other offence of which he or she may be convicted on that charge, may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused.

(3) In deciding, in terms of subsection (2), whether in the circumstances existing E at the time the accused could reasonably have been expected to mention any fact, the court may have regard to the document referred to in section sixty-six (6)(*a*)."

The mere fact that the defence outline was filed a day or so out of time does not, in my view, give rise to the striking out of the defence outline but it entitles the Attorney-General to an extension of time to consider the defence outline.

F I therefore find that there is no merit in the State's application to strike out the defence outline. If the defence outline for any reason is defective the remedy lies in s 67(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

I now turn to consider the accused's counter application for the quashing of portions of the State outline on the basis that they are prejudicial to the G accused, in so far as they seek to rely on the evidence of a witness who has no relevant evidence to give against him.

As I have already stated, the application is grounded on the allegation that it does not comply with the requirements of s 188 of the Criminal Procedure and Evidence Act. A reading of the section shows that it has no application H in the High Court, as it relates to the magistrates court. It reads:

2009 (2) ZLR p350

Bhunu J

"188 Outline of State and defence cases A

In a trial before a *magistrate*, if the accused pleads not guilty or a plea of not guilty is entered in terms of section one hundred and eighty-two —

(a) the prosecutor shall make a statement outlining the nature of his case and the material facts on which he relies: and

(b) the accused shall be requested by the *magistrate* to make a statement B outlining the nature of and the material facts on which he relies and, if he is not represented by a legal practitioner, the provisions of subsection (2) of section one hundred and eighty-nine shall be explained to him" (my emphasis).

Despite the fact that the defence has sought to rely on a section of the law which is inapplicable in this court, I fail to see how the calling of a witness C who is going to say he has no relevant evidence to give against the accused can be prejudicial to the accused. I also fail to see how such evidence can be said to be irrelevant when it directly relates to the accused's guilt or innocence.

The defense's application is to a large extent based on what the witness might have said at different fora outside these proceedings. That much can only affect the weight of evidence. It is, however, the court's prerogative D to weigh and assess the probity and sufficiency of evidence. No one can do this on its behalf without usurping the function of the court.

It is my firm view that this is a case crying out to be determined on the merits rather than technicalities. How can this court determine the matter on technicalities when the life of a citizen is at stake? On the other hand, E how can this court resort to technicalities in determining the matter when the security of the country is at stake?

It is therefore in everyone's interest that this grave matter be determined on the merits rather than technicalities. It is accordingly ordered that both applications be and are hereby dismissed. F

Attorney General's Office, the State's legal practitioners

Mutetwa and Nyambirai, accused's legal practitioners G

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ROUTE TOUTE BV & ORS v MINISTER OF LANDS & ORS 2009 (2) ZLR 351 (H)

Citation	2009 (2) ZLR 351 (H)
Case No	Judgment No. HH-128-09
Court	High Court, Harare
Judge	Patel J
Heard	7 June 2007
Judgment	17 November 2009
Counsel	*D P Drury,* for the applicants Mrs *E M Mwatse,* for the first respondent *A Mutsonziwa,* for the fourth respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – s 16(9b) – protection given to investors under international treaties – investment in rural land – acquisition of rural land under s 16B – whether s 16B overrides provisions of s 16(9b)*

D **International law** – *treaties – incorporation into domestic law – effect of ratification of treaties – State's duty to comply with terms of treaties*

Land – *acquisition – acquisition from foreign investor – s 16(9b) of Constitution – protection given to foreign investors under international treaties – acquisition of rural land under s 16B – whether s 16B overrides* E *provisions of s 16(9b)*

Land – *acquisition – land acquired by State – holder of offer letter in respect of land – not entitled to evict former owner – need for former owner to be duly evicted in terms of Gazetted Lands (Consequential Provisions) Act*

Land – *acquisition – under s 16B of Constitution – requirements for land* F *to have been validly acquired – not necessary that all requirements of Land Acquisition Act [Chapter 20:10] be complied with*

Practice *and procedure – notice – service – notice of eviction – requirements for valid service*

Headnote

G The first applicant was a business corporation registered in the Netherlands. The other three applicants were commercial farming entities registered in Zimbabwe. The applicants together, directly or indirectly, were the registered owners and leaseholders of a farm. On 21 January 2005 the first respondent published a preliminary notice of his intention to acquire the farm for resettlement purposes. On 10 June 2005 he issued H an acquisition order compulsorily acquiring the farm. On 8 August 2006

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the first respondent caused to be delivered a notice of eviction upon the A applicants. It was served on a director of the third applicant at the farm, not at the company's registered office. Subsequently, an arrangement was negotiated between the parties not to enforce the eviction of the applicants. Nevertheless, on 8 November 2006, the third respondent, a general in the army, arrived to occupy the farm on the strength of the B earlier notice of eviction and a letter of offer dated 11 July 2006, which he had received from the first respondent. The applicants sought to

enforce their ownership and leasehold rights in the farm. They claimed protection against compulsory acquisition by virtue of two separate bilateral treaties concluded by the Government of Zimbabwe with the Governments of the Netherlands and Malaysia. Six issues arose for determination: (1) C whether the farm had been duly acquired by the State in terms of s 16B of the Constitution; (2) the effect of the notice of eviction served upon the applicants and whether the applicants were entitled to continue in occupation until evicted by order of a competent court; (3) the effect of the letter of offer given to the third respondent and whether this letter D conferred any right of occupation before the current occupier vacated the farm or was duly evicted by a court order or otherwise; (4) whether the applicants' rights and interests in the farm constituted "investments" within the meaning of the relevant bilateral treaties; (5) the effect of the relevant bilateral treaties within the domestic legal system and their enforceability at the national level; and (6) the interrelationship between E ss 16(9b) and 16B of the Constitution of Zimbabwe and whether or not, and the extent to which, the former has been overridden by the latter.

Held, that the critical requisites for the application of s 16B(2)(a) of the Constitution were (a) that the land in question was identified as being required for resettlement purposes on or before 8 July 2005 in the *Gazette* under s 5(1) of the Land Acquisition Act [*Chapter 20:10*] and (b) that it F was itemised as such in Schedule 7 to the Constitution. The question of compliance with all the requirements of s 5(1) of the Land Acquisition Act did not arise for purposes of the acquisition of the agricultural land and the vesting of title thereto in the State in terms of s 16B of the Constitution. Both requisites had been met and accordingly, *prima facie*, G the farm had been duly acquired by, and vested in, the State in terms of s 16B(2)(a) of the Constitution.

Held, further, that the eviction notice was invalid. By virtue of subs (3), as read with subs (6), of s 16B of the Constitution, Parliament specifically contemplated the enactment of legislation dealing with the criminal prosecution and eviction of unlawful possessors or occupiers of State H

A land. As a matter of principle, where the Constitution enjoins that anything should be done by or under statute, then that is the manner in which that thing should be done. In the absence of such legislation, the State cannot resort to any other non-statutory basis for evicting a recalcitrant occupier.

B *Held,* further, that s 3 of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] was clearly designed to address the issue of eviction. It specifically provides for the prosecution and conviction of any person who continues to hold, use or occupy gazetted land after the stipulated period and for the eviction of such person upon conviction. What this means is that the applicants were at large to remain in occupation of the C farm and could not be evicted therefrom except by due process, *viz*. by order of court after prosecution and conviction in terms of s 3 of that Act.

Held, further, that the letter of offer, as defined by statute, merely constituted an offer by the State to allocate to the third respondent the piece of land described in the letter. It did not *per se* confer any proprietary rights of use or occupation without due process. The third respondent could not D rely on the letter to enter or occupy the farm until the applicants had been duly evicted by court order issued in terms of s 3 of the Gazetted Lands (Consequential Provisions) Act. He could not resort to self-help in order to obtain vacant possession.

Held, further, that there is little doubt that the first applicant was a "national" E within the meaning of the Netherlands Agreement and an "investor" within the meaning of the Malaysia Agreement. It was equally clear that the first applicant's rights and interests in the farm, as well as those of its subsidiary companies, i.e. the other three applicants, constituted "investments" within the meaning of both Agreements. The position in most Commonwealth jurisdictions is that customary international law is F generally regarded as having been internally incorporated insofar as it is not inconsistent with statute law and judicial precedent. In contrast, the internal reception of treaty law is perceived as standing on an entirely different footing. A treaty does not form part of the domestic law except by virtue of enabling legislation. Thus, the mere ratification of a treaty does not serve to incorporate its provisions into domestic law. What is G required for that purpose is Parliamentary intervention in the shape of legislation clearly designed to transform the relevant treaty provisions into rules of national law. The common law position had been specifically codified and embodied in s 111B of the Constitution. Both the Netherlands Agreement and the Malaysia Agreement were approved by Parliament and H ratified by the President in conformity with s 111B (1) of the Constitution.

However, they had not been directly incorporated by or under an Act A of Parliament so as to form part of the law of Zimbabwe. In any event, s 16(9b) of the Constitution was specifically enacted in December 1996 to protect and safeguard proprietary rights and obligations created under multilateral and bilateral treaties. Whether or not investment protection treaties can properly be regarded as having been incorporated into our B domestic law, the courts of Zimbabwe were bound to give effect to the terms of such treaties in accordance with the constitutional guarantee afforded by s 16(9b) of the Constitution.

Held, further, that the amendments to s 16 of the Constitution were inconsistent with the international standards embodied in prevailing investment protection treaties governing the form, nature and justiciability of C compensation in the event of expropriation. Section 16(9b) of the Constitution was introduced in 1996 with the specific policy objective of preserving pre-existing international norms notwithstanding the diminution of those norms in s 16(1). Section 16(9b) conferred a greater degree of protection against expropriation in favour of foreign investors D in contradistinction to local nationals whose rights and interests are governed by the lower standards of protection contained in s 16(1). The provisions of s 16B(2) clearly conflicted with the objectives underlying s 16(9b) in several material respects: the act of expropriation itself was explicitly declared to be unchallengeable before any court, contrary to the due process requirements of investment protection treaties; no E compensation was payable for agricultural land in respect of the land itself; the standards of compensation (for improvements only), *viz*. fair compensation within a reasonable time, were clearly inconsistent with the compensatory norms recognised and applied under prevailing investment protection treaties. Applying the maxim *lex posterior priori derogat* or, as it is otherwise stated, *leges posteriores priores contrarias abrogant*, F the later s 16B must be construed to take precedence and prevail over the earlier s 16(9b) to the extent that the latter was inconsistent with the former. On the other hand, s 16B was couched in very general and all-embracing terms, whereas s 16(9b) was specific in its scope of application to property rights protected by international treaties that were binding G upon Zimbabwe. Having regard to the maxim *generalia specialibus non derogant*, it was perfectly permissible to construe the later general provisions of s 16B as not derogating from the prior special provisions of s 16(9b). There was a general presumption against the extinction or diminution of pre-existing fundamental or substantive rights. The abridgement of s 16(9b) and the diminution of the rights protected by H

A that provision would involve a violation of Zimbabwe's obligations at international law. There would thus be a contradiction between our domestic law and the State's international obligations, although that did not necessarily negate or invalidate the conflicting domestic law. In interpreting and applying the domestic law, the courts could not entirely B disregard international law and the obligations of the State thereunder. In enacting domestic legislation Parliament was presumed to be aware of the State's solemn undertakings at the international level and to have legislated without intending to extinguish or diminish rights vested under international law.

C *Held,* further, that under s 52(1) of the Constitution, any amendment of the Constitution must be made in explicit terms. Section 16B of the Constitution specifically mentioned ss 16(1), 18(1) and 18(9) as not applying in relation to land acquired under s 16B(2), but did not make any express reference to s 16(9b). It would then follow that s 16B of the Constitution did not operate to amend, override or detract from the D provisions of s 16(9b). Nonetheless, in view of the ruling of the Supreme Court to the contrary in *Nyahondo Farm (Pvt) Ltd* v *Tapfumaneyi & Ors* S-176-08, the court was bound to find that agricultural land covered by investment protection agreements under s 16(9b) was susceptible to acquisition in terms of s 15B*.

Cases cited E

Barker McCormac (Pvt) Ltd v Government of Kenya 1983 (2) ZLR 72 (S)

Browne v Inc Law Soc of Natal 1968 (3) SA 535 (N)

In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)

F *Karori (Pvt) Ltd & Anor v Mujaji* 2007 (1) ZLR 105 (H)

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

Nyahondo Farm (Pvt) Ltd v Tapfumaneyi & Ors S-176-08

Vice-Chancellor, University of Zimbabwe & Anor v Mutasah & Anor 1993 (1) ZLR 162 (S)

Legislation considered G

Agricultural Land Settlement Act [*Chapter 20:01*], ss 8 & 9

Constitution of Zimbabwe 1980, ss 16(1), 16(9b), 16B and 111B(1)

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Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], ss 2(1), A 3 and 6

Interpretation Act [*Chapter 1:01*], s 40(2)

Land Acquisition Act [*Chapter 20:10*], s 5(1)

Case information

D P Drury, for the applicants B

Mrs *E M Mwatse,* for the first respondent

A Mutsonziwa, for the fourth respondent

Judgment

PATEL J: The first applicant is a business corporation registered in the Netherlands. The other three applicants are commercial farming entities registered in Zimbabwe. The applicants together, directly or indirectly, are C the registered owners and leaseholders of Fangudu Farm ("the Farm"). They claim the right to continue to own and occupy the Farm for commercial benefit.

The first respondent is the Minister responsible for Lands and Resettlement. The second respondent, who is not opposed to this application, is the Minister of Foreign Affairs. The fourth respondent is the Attorney-General, who is D cited herein in his official capacity. The first respondent filed his notice of opposition out of time and has applied for condonation therefor. His application for condonation is not opposed and is accordingly granted.

The third respondent, Major-General Chimonyo, is involved in this matter by dint of his claim to occupy and utilise the Farm for his own account. His status with respect to the Farm is predicated on the first respondent's E rights thereto. He filed his notice of opposition well out of time and later sought condonation by way of a chamber application. He was served with the notice of set-down of this matter for hearing by the Registrar and by the applicants' legal practitioners on 11 May 2007. He has not filed his heads of argument and has not appeared at the present hearing, having written to F the Registrar two days ago to indicate that he would not be appearing in court. He is clearly barred for the late filing of his notice of opposition and for the non-filing of his heads of argument. Accordingly, the contents of his opposing papers must be disregarded for present purposes.

Background G

The applicants together, as I have stated, seek to enforce their ownership and leasehold rights in the Farm. They claim protection against compulsory acquisition by virtue of two separate bilateral treaties concluded by the Government of Zimbabwe with the Governments of the Netherlands and Malaysia.

On 21 January 2005, the first respondent published a preliminary notice H

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A of his intention to acquire the Farm for resettlement purposes. On 10 June 2005, he issued an acquisition order compulsorily acquiring the Farm. Thereafter, on 22 July 2005, he lodged an application for the confirmation of the acquisition. This application before the Administrative Court has yet to be finalised, having been overtaken by legislative enactment. On 8August 2006 the first respondent caused to be delivered a notice of eviction B upon the applicants. Subsequently, an

arrangement was negotiated between the parties not to enforce the eviction of the applicants. Nevertheless, on 8November 2006 the third respondent arrived to occupy the Farm on the strength of the earlier notice of eviction and his letter of offer dated 11 July 2006 from the first respondent.

C As a result of the third respondent's actions, the applicants filed an urgent application to this court and were granted a provisional order on 22 November 2006. The present proceedings are instituted to confirm the provisional order.

The issues

The issues for determination in this matter, as I perceive them and as D consequently argued by counsel, are as follows:

1. Whether the Farm has been duly acquired by the State in terms of s 16B of the Constitution.
2. The effect of the notice of eviction served by the first respondent upon the applicants; whether the applicants are entitled to continue in occupation E until evicted by order of a competent court.
3. The effect of the letter of offer given to the third respondent by the first respondent; whether this letter confers any right of occupation before the current occupier vacates the Farm or is duly evicted by a court order or otherwise.
4. F Whether the applicants' rights and interests in the Farm constitute "investments" within the meaning of the relevant bilateral treaties.
5. The effect of the relevant bilateral treaties within the domestic legal system and their enforceability at the national level.
6. The interrelationship between ss 16(9b) and 16B of the Constitution; G whether or not, and the extent to which, the former has been overridden by the latter.

Section 16B of the Constitution

Section 16B of the Constitution came into operation on 14 September 2005. Subsections (2) and (3) thereof are directly pertinent *in casu* and they provide H as follows:

Patel J

"(2) Notwithstanding anything contained in this Chapter – A

(*a*) all agricultural land –

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

(ii) that is identified after the 8th July, 2005, but before the appointed day B …; or

(iii) that is identified in terms of this section by the acquiring authority after the appointed day ...;

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

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

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

(*a*) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge; E

(*b*) may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired."

Subsections (5) and (6) of s 16B are also relevant for present purposes. They provide as follows: F

"(5) Any inconsistency between anything contained in –

(*a*) a notice itemised in Schedule 7; or

(*b*) a notice relating to land referred to in subsection (2)(*a*)(ii) or (iii);

and the title deed to which it refers or is intended to refer, and any error whatsoever contained in such notice, shall not affect the operation of subsection (2)(*a*) or G invalidate the vesting of title in the State in terms of that provision.

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

Acquisition of farm

The preliminary notice pertaining to the Farm *in casu* was published on 21 H

Patel J

A January 2005 as part of General Notice 18 of 2005. The latter is listed as Item No. 148 in Schedule 7 to the Constitution. Mr *Drury,* for the applicants, argued that this is not enough for the purposes of acquisition in terms of s 16B(2)(a) of the Constitution, inasmuch as there is no proof of full compliance with s 5(1) of the Land Acquisition Act [*Chapter 20:10*] ("the Acquisition Act"). Mrs *Mwatse,* in opposition, submitted that non-compliance with s 5(1) of the B Acquisition Act is irrelevant in the context of the constitutional provision.

I agree with Mrs *Mwatse*. The critical requisites for the application of s 16B(2)(a) of the Constitution are, firstly, that the land in question was *identified* as being required for resettlement purposes on or before 8 July 2005 in the *Gazette* under s 5(1) of the Acquisition Act and, secondly, that it is *itemised* C as such in Schedule 7 to the Constitution. The question of compliance with all the requirements of s 5(1) of the Acquisition Act does not arise for the purposes of acquisition of agricultural land and the vesting of title thereto in the State in terms of s 16B of the Constitution. I am fortified in this view by having regard to s 16B(5) which declares that any error contained in an itemised notice shall not affect the operation of s 16B(2)(a) or invalidate the D vesting of title in the State in terms of that provision. As I have stated, the Farm was identified in a preliminary notice published under s 5(1) of the Acquisition Act and that notice is itemised in Schedule 7 to the Constitution. Accordingly, *prima facie* and subject to what follows later in this judgement, the Farm has been duly acquired by, and has vested in, the State in terms of E s 16B(2)(a) of the Constitution.

Notice of eviction

Mr *Drury* submitted that the notice of eviction that was served by the first respondent on 8 August 2006 was not properly served. This is because it was handed to the Director of the third applicant at the Farm and not at its F registered office as required by s 40(2)(d) of the Interpretation Act [*Chapter 1:01*]. Section 40(2) provides that:

"Where an enactment authorizes or requires a document to be served on any person without directing it to be served in a particular manner, the service of that document may be effected —

(a) - (c) [not relevant] G

(d) in the case of a corporate body, or an association of persons whether incorporated or not, by delivering it to a director, the secretary or clerk of the body or association at the registered or principal office of the body or association, or serving it by post on such director, secretary or clerk at such office; or

(e) [not relevant]."

H Mr *Drury* further argued that even if the notice of eviction was properly served

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it has no statutory or other basis inasmuch as s 16B(3) of the Constitution A excludes the application of the notice provisions stipulated in the Acquisition Act with respect to land acquired under s 16B(2). Moreover, there was at that time no other law catering for eviction as envisaged by s 16B(6). Mrs *Mwatse* conceded the statutory gap but submitted that the notice of eviction was issued under the common law right of an owner to give any tenant or B occupier reasonable notice to vacate the land or premises in question.

Given the wording employed in s 40(2) of the Interpretation Act, viz. "service … *may* be effected", I am not entirely persuaded that its provisions are peremptory to the extent of requiring strict compliance in every case. However, it seems unnecessary to decide this point for the following reasons. Section 16B of the Constitution did in my view create a statutory gap *vis-* C *àvis* the vacation of land acquired under that provision. By virtue of subs (3) as read with subs (6), Parliament specifically contemplated the enactment of legislation dealing with the criminal prosecution and eviction of unlawful possessors or occupiers of State land. As a matter of principle, where the Constitution enjoins that anything should be done by or under statute then D that is the manner in which that thing should be done. In the absence of such legislation, the State cannot resort to any other non-statutory basis for evicting a recalcitrant occupier. Accordingly, as was eventually conceded by Mrs *Mwatse*, the notice of eviction *in casu* cannot be relied upon to secure the eviction of the applicants from the Farm. E

Gazetted land

The Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] ("the Gazetted Lands Act") was promulgated on 20 December 2006 to make certain provisions consequential to the enactment of s 16B of the Constitution with respect to Gazetted land, *viz*. agricultural land referred to in s 16B(2) of the Constitution. Section 3 of the Gazetted Lands Act, in its relevant portions, F stipulates as follows:

> "(1) Subject to this section, no person may hold, use or occupy Gazetted land without lawful authority.
>
> (2) …
>
> (3) If a former owner or occupier of Gazetted land who is not lawfully authorised G 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 two (*b*), does not cease to occupy his or her living quarters in contravention of proviso (ii) to section two (*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 or to both such fine and such imprisonment. H

Patel J

> A (4) Any person, other than a person referred to in subsection (2), who contravenes subsection (1), shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.
>
> (5) A court which has convicted a person of an offence in terms of subsection (3) or (4) shall issue an order to evict the person convicted from the land to B which the offence relates."

As is apparent, s 3 of the Gazetted Lands Act is clearly designed to address the *lacuna* in the law that I have adverted to earlier. It specifically provides for the prosecution and conviction of any person who continues to hold, use or occupy Gazetted land after the stipulated period and for the eviction of such person upon conviction. What this means in the instant case is that C the applicants are at large to remain in occupation of the Farm and cannot be evicted therefrom except by due process, *viz.* by order of court after prosecution and conviction in terms of s 3 of the Gazetted Lands Act.

Offer letter

The third respondent founds his claim to occupy the Farm on his letter of D offer dated 11 July 2006 from the first respondent. In this respect, Mr *Drury* contended that this offer letter is invalid for want of compliance with the provisions of the Agricultural Land Settlement Act [*Chapter 20:01*]. Sections 8 and 9 of that Act enable the relevant Minister to issue leases to applicants in respect of holdings of State land – but only after any such application has been referred to the Agricultural Land Settlement Board for its consideration E and report. In any event, the Minister is not bound by any recommendation or report of the Board. In the instant case, there is no evidence that the third respondent's application to occupy and use the Farm was granted after consideration by the Board and the issuance of its report. Does this render his offer letter invalid?

F Section 2(1) of the Gazetted Lands Act defines an "offer letter" to mean:

> "a letter issued by the acquiring authority to any person that offers to allocate to that person any Gazetted land, or a portion of Gazetted land, described in that letter".

By virtue of s 6 of the Act:

G "Any offer letter issued on or before the fixed date that is not withdrawn by the acquiring authority is hereby validated."

Taken in its literal and grammatical terms, s 6 of the Gazetted Lands Act must be construed to validate every offer letter that was issued before 20 December 2006, including the third respondent's offer letter, notwithstanding any non-compliance with the requirements of the Agricultural Land Settlement Act. H Such construction would obviously operate to render nugatory the provisions

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of that earlier Act and this cannot have been what was intended by Parliament. A

Be that as it may, I do not deem it necessary to decide the point in the context of the earlier Act. What is relevant for present purposes is the third respondent's right to enter, occupy and use the Farm in counter position to the applicants' pre-existing and continuing entitlement to do so. The latter, as I have stated, are at liberty to remain in occupation until they are duly B evicted by a court of competent jurisdiction. In contrast, the third respondent is presently armed with nothing more than his letter of offer. This letter, as defined by statute, merely constitutes an offer by the State to allocate to the third respondent the piece of land described in the letter. It does not *per se* confer any proprietary rights of use or occupation without due process. In other words, the third respondent cannot rely on the letter to enter or occupy C the Farm until the applicants have been duly evicted by court order issued in terms of s 3 of the Gazetted Lands Act. He cannot resort to self-help in order to obtain vacant possession. See in this respect the very pertinent remarks of Kudya J in *Karori (Pvt) Ltd & Anor v Mujaji* 2007 (1) ZLR 105 (H) at 110D-E. It follows that the applicants are entitled to the relief that they seek as against D the third respondent.

Meaning of "investments"

There are two bilateral treaties to be considered *in casu*. The first is the Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Zimbabwe and the Kingdom of the Netherlands E ("the Netherlands Agreement"). The second is the Agreement between the Government of Malaysia and the Government of the Republic of Zimbabwe for the Promotion and Protection of Investments ("the Malaysia Agreement"). In both Agreements, the term "investments" is extensively defined to comprise every kind of asset, including movable and immovable property and other rights *in rem* as well as rights derived from shares and F other interests in companies.

In the instant case, the first applicant holds all of the shares in the second applicant which in turn holds all the shares in the third applicant. The latter has a lease agreement with the fourth applicant and also holds 6 per cent of its shares. The fourth applicant is the registered title holder of the Farm. The G second, third and fourth applicants are corporations registered in Zimbabwe, while the first applicant is duly incorporated in the Netherlands. The shares of the first applicant are held by two other corporations, one of which (Rainbow Century) is the majority shareholder registered in Malaysia while the other (Rozanante Beleitigungs) is the minority shareholder registered in Austria.

Having regard to the foregoing, there is little doubt that the first applicant H

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A is a "national" within the meaning of the Netherlands Agreement and an "investor" within the meaning of the Malaysia Agreement. It is equally clear, and this was quite properly conceded by Mrs *Mwatse*, that the first applicant's rights and interests in the Farm as well as those of its subsidiary companies, i.e. the other three applicants, constitute "investments" within the meaning of both Agreements.

B **Legal effect of bilateral treaties**

The applicability of international law within the domestic sphere is generally subject to two divergent doctrines. The doctrine of incorporation asserts that the rules of international law are automatically incorporated into, and form part of, the domestic law. The doctrine of transformation,

on the other hand, C restricts the internal applicability of international law to those rules which have been clearly transformed into rules of the domestic legal system. The position in most Commonwealth jurisdictions is that customary international law is generally regarded as having been internally incorporated insofar as it is not inconsistent with statute law and judicial precedent. In contrast, the internal D reception of treaty law is perceived as standing on an entirely different footing.

Under the arrangements prevailing in most Commonwealth countries, the constitutional separation of powers requires that the Executive's treaty-making powers should not override Parliament's law-making functions. Accordingly, it is constitutionally necessary to subject the domestic application of treaties to the doctrine of transformation. It follows, therefore, that a treaty does not E form part of the domestic law except by virtue of enabling legislation. Thus, the mere ratification of a treaty does not serve to incorporate its provisions into domestic law. What is required for that purpose is Parliamentary intervention in the shape of legislation clearly designed to transform the relevant treaty provisions into rules of national law.

F In Zimbabwe, as far as I am aware, the opportunity for any definitive judicial pronouncement on the subject has never properly arisen. In *Barker McCormac (Pvt) Ltd* v *Govt of Kenya* 1983 (2) ZLR 72 (S) at 77, the Supreme Court observed that international law formed part of the law of Zimbabwe except to the extent that it was in conflict with statute or prior judicial precedent. The principal issue before the court concerned the propriety of applying the G restrictive doctrine of sovereign immunity. The reception of international law was not fully argued or analysed and the court's observation in that regard must accordingly be treated as being somewhat *obiter*. Be that as it may, given that the Zimbabwean constitutional system and attendant conventions are derived from the English constitutional model, and in the light of our consistent H legislative practice since the attainment of independence in 1980, I am of the

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firm opinion that Zimbabwean law has inherited the doctrine of transformation A to the same extent as other Westminster jurisdictions. Accordingly, under our common law, a treaty only becomes part of the domestic law if enabling legislation is specifically enacted to give it internal effect.

In any event, insofar as concerns treaties concluded on or after the first of November 1993 (following the entry into force of the Constitution Amendment B No. 12, 1993), the common law position has been specifically codified and embodied in the Constitution. Section 111B(1) now expressly declares that:

> "(1) Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations — C
>
> (a) shall be subject to approval by Parliament; and
>
> (b) shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament."

It is common cause that both the Netherlands Agreement and the Malaysia Agreement were approved by Parliament and ratified by the President in D conformity with s 111B(1) of the Constitution. However, they have not been directly incorporated by or under an Act of Parliament so as to form part of the law of Zimbabwe. In any event, s 16(9b) of the Constitution was specifically enacted to protect and safeguard proprietary rights and obligations created under multilateral and bilateral treaties. Section 16(9b) provides that:

> "Nothing in this s shall affect or derogate from — E
>
> (*a*) any obligation assumed by the State; or
>
> (*b*) any right or interest conferred upon any person;
>
> in relation to the protection of property and the payment and determination of compensation in respect of the acquisition of property, in terms of any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international F organizations."

Arguably, as was submitted by both Mr *Drury* and Mr *Mutsonziwa*, this provision must be taken to incorporate into our law, indirectly and by necessary implication, every investment protection treaty duly concluded by the executive. I am not convinced that this approach is entirely correct and G in

keeping with the intention behind s 111B(1)(b). Nevertheless, whether or not investment protection treaties can properly be regarded as having been incorporated into our domestic law, I have no doubt that the courts of Zimbabwe are bound to give effect to the terms of such treaties in accordance with the constitutional guarantee afforded by s 16 (9b).

For present purposes, the relevant terms of the Netherlands Agreement H

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A and the Malaysia Agreement regulating the expropriation of protected investments are contained in Article 6 of the former and Article 4 of the latter. The conditions governing expropriation are essentially threefold: the measures taken must be for a public purpose or in the public interest and under due process of law; they must not be discriminatory; and they must be accompanied by provision for the payment of just or prompt, adequate B and effective compensation.

Relationship between ss 16(1), 16(9b) and 16B of the Constitution

Section 16(1) of the Constitution stipulates, in essence, that the compulsory acquisition of property must be effected under the authority of a law and be reasonably necessary in the public interest, subject to the giving of reasonable C notice and the payment of fair compensation within a reasonable time, and amenable to contestation before the courts. In its original and unamended form, the Constitution required the payment of prompt and adequate compensation and the justiciability of any question relating to compensation. By Constitution Amendment No. 11 (1990) the standard of compensation was amended to D that of fair compensation within a reasonable time. Subsequently, through Constitution Amendment No. 12 (1993) and Constitution Amendment No. 14 (1996), the contestability of compensation was restricted to compensation for property and land other than land compulsorily acquired for resettlement purposes.

The constitutional amendments that I have mentioned were obviously E inconsistent with the international standards embodied in prevailing investment protection treaties governing the form, nature and justiciability of compensation in the event of expropriation. Section 16(9b) of the Constitution, as I understand it, was introduced by Constitution Amendment No. 14 (1996) with the specific policy objective of preserving pre-existing F international norms notwithstanding the diminution of those norms in s 16(1). In effect, s 16(9b) operates to confer a greater degree of protection against expropriation in favour of foreign investors in contradistinction to local nationals, whose rights and interests are governed by the lower standards of protection contained in s 16(1).

The legal effect of s 16B(2)(a) of the Constitution, as I have already stated, is G to acquire compulsorily all agricultural land that was identified in the notices of acquisition itemised in Schedule 7. Full title in such land vested in the State with effect from 14 September 2005. Moreover, by virtue of s 16B(2)(b), no compensation is payable for this land except for any improvements effected thereon before it was acquired.

H In my view, the provisions of s 16B(2) of the Constitution clearly conflict

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with the objectives underlying s 16(9b) in several material respects. Firstly, A the act of expropriation itself is effectuated summarily by operation of law and is explicitly declared by s 16B(3) to be unchallengeable before any court, contrary to the due process requirements of investment protection treaties. Secondly, no compensation is payable for agricultural land acquired under the Constitution in respect of the land itself. Thirdly, the governing standards of B compensation for improvements, *viz*. fair compensation within a reasonable time, are clearly inconsistent with the compensatory norms recognised and applied under prevailing investment protection treaties.

The question that the court is asked to adjudicate is this: Does s 16B of the Constitution operate to supersede and negative the protection afforded by s 16(9b), either partially or *in toto*? Dealing with the latter question first, C it is evident that the operation of s 16B is confined to agricultural land acquired for resettlement purposes. The provision clearly does not apply to non-agricultural land or to any other form of immovable or movable property. Therefore, if s 16B was designed to override s 16(9b), it would so operate *pro tanto*, *viz*. so as to dilute or amend the latter in respect of the D

acquisition of agricultural land only, and not as regards the protection of any other property or investment covered by s 16(9b). It follows that investment protection treaties falling within the ambit of s 16(9b) would not be rendered entirely nugatory or illusory for the purpose of their domestic application.

The meaning and effect of s 16(9b) are clear and unambiguous: nothing E contained in s 16 shall affect or derogate from the protection of property rights and the compensation payable therefor as guaranteed in terms of any treaty concluded by the Executive. There is no mention of anything contained in any other provision of the Constitution. In contrast, the expropriation of agricultural land without compensation for the land itself is stipulated by s 16B(2) so as to apply notwithstanding anything contained in Chapter III, F *viz*. the Declaration of Rights, which includes s 16(9b).

Applying the maxim *lex posterior priori derogat* or, as it is otherwise stated, *leges posteriores priores contrarias abrogant*, the later s 16B must be construed to take precedence and prevail over the earlier s 16(9b) to the extent that the latter is inconsistent with the former. On the other G hand, s 16B is couched in very general and all-embracing terms, whereas s 16(9b) is specific in its scope of application to property rights protected by international treaties that are binding upon Zimbabwe. Having regard to the maxim *generalia specialibus non derogant*, it is perfectly permissible to construe the later general provisions of s 16B as not derogating from the prior special provisions of s 16(9b). H

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A There are several other general rules of statutory interpretation that come into play in the present context. The first and foremost is the presumption against the retrospective operation of statutes impinging on vested rights. One aspect of this rule is that where one enactment repeals another, the repeal does not "affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed". See s 17(1)(c) of the B Interpretation Act. Taking the presumption further, a later statute will only be construed as affecting or taking away a right accrued under a previous statute if the later enactment expressly intends to take away the prior existing right. See *Browne* v *Incorporated Law Society of Natal* 1968 (3) SA 535 (N). To similar effect, it was held in C *Vice-Chancellor, University of Zimbabwe & Anor v Mutasah & Anor* 1993 (1) ZLR 162 (S) at 173-174, that the removal of an existing right has to be done expressly and not indirectly.

In the constitutional context, there is a general presumption against the extinction or diminution of pre-existing fundamental or substantive rights. In *Nkomo & Anor* v *Attorney-General & Ors* 1993 (2) ZLR 422 (S), the State sought to argue that the effect of the amendments to s 15 of the Constitution D was to deprive the applicants of the remedy they sought. On behalf of the applicants it was argued that the passing of the amendment Bill was contrary to the provisions of the Constitution and that, in any event, the amendment did not affect existing rights vested in the applicants. Gubbay CJ, at 432-433, observed as follows:

> E "… I would stress that where fundamental human rights or freedoms are conferred on individuals under a Constitution, derogations therefrom, as far as their language permits, should be narrowly or strictly construed. See *Minister of Home Affairs & Ors* v *Dabengwa & Anor* 1982 (1) ZLR 236 (S) at 244B-C; 1982 (4) SA 301 (ZS) at 306H; *S* v *Ncube & Ors* 1987 (2) ZLR 246 (S) at 264F; 1988 (2) SA 702 (ZS) at 715C; *African National Congress (Border Branch) & Anor* v *Chairman, Council of State of the Republic of Ciskei & Anor* 1992 (4) SA 434 F (CkG) at 447G-I.
>
> … account is taken of the well-established rule that a statute should be interpreted, where possible, so as not to impair or extinguish substantive rights actually vested at the time of its promulgation. Courts will only find that such an inequitable result was intended when compelled to do so by language so clear as to admit of no other inference. See *Curtis* v *Johannesburg Municipality* 1906 TS 308 at G 311. The supposition is that the Legislature intends to deal with future events and circumstances and not with those pertaining to the past. See *Principal Immigration Officer* v *Purshotam* 1928 AD 435 at 450; *R* v *Margolis & Ors* 1936 OPD 143 at 144; *Bartman* v *Dempers* 1952 (2) SA 577 (A) at 580C; *Katzenellenbogen Ltd* v *Mullin* 1977 (4) SA 855 (A) at 884D."

The case of In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) is also instructive H as to the interpretive approach to be applied in the examination of provisions

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which derogate from fundamental rights. Gubbay CJ, at 59-60, stated as A follows:

> "The second principle relates to the adoption of a broad approach. All provisions bearing upon a particular subject are to be considered together and construed as a whole in order to effect the true objective. Derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide construction. Rights and freedoms are not to be diluted or diminished B unless necessity or intractability of language dictates otherwise. See *Minister of Home Affairs & Ors* v *Dabengwa & Anor* 1982 (1) ZLR 236 (S) at 244B–C, 1982 (4) SA 301 (ZS) at 306H; *S* v *Ncube & Ors* 1987 (2) ZLR 246 (S) at 264F, 1988 (2) SA 702 (ZS) at 715C; *African National Congress (Border Branch)* v *Chairman, Council of State of Ciskei* 1992 (4) SA 434 (CkG) at 447G–I."

It is also necessary in this matter to consider the international ramifications C of the large question posed earlier. There is little doubt that the abridgement of s 16(9b) and the diminution of the rights protected by that provision would involve a violation of Zimbabwe's obligations at international law. There would thus be a contradiction between our domestic law and the State's international obligations. That in itself does not necessarily negate or invalidate D the conflicting domestic law. If the clear intention of the Legislature is to take away property rights recognised at international law, our courts are bound to apply and give effect to that intention as expressed in the domestic law, even if it entails a breach of international law. On the pragmatic approach that has come to be adopted in international practice, neither legal system enjoys primacy over the other. In principle, they both hold sway and supremacy in E their respective domains. See Brownlie: *Principles of Public International Law* 4 ed at pp 34-35. The resultant divergence between the two systems is reconciled on the basis that the State incurs international responsibility for having violated its international obligations and must accordingly effect the requisite reparations in order to satisfy its international responsibility. See F Brownlie, *op. cit.*, at pp. 35-37.

In any event, what is pertinent for present purposes is that in interpreting and applying the domestic law the courts cannot entirely disregard international law and the obligations of the State thereunder. In enacting domestic legislation Parliament is presumed to be aware of the State's solemn undertakings at the international level and to have legislated without intending to extinguish or G diminish rights vested under international law. In other words, insofar as it is possible, domestic laws must be construed and applied in conformity with international custom and treaties binding upon the State. See Brownlie, *op cit*, at pp 48-50. In my view this presumption must apply *a fortiori* where those treaties have been directly or indirectly transformed into rules of domestic law. H

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A Turning to the amendments to the Constitution itself, s 52(1) of the Constitution declares as follows:

> "Parliament may amend, add to or repeal any of the provisions of this Constitution:
>
> Provided that, except as provided in subsection (6), no law shall be deemed to amend, add to or repeal any provision of this Constitution unless it does so in express terms."

B As already stated, s 16B(2) applies generally notwithstanding anything contained in Chapter III, without adverting to any specific provision in that Chapter. On the other hand, s 16B(3) expressly refers to the provisions of sections 16(1), 18(1) and 18(9) as not applying in relation to land acquired under s 16B(2), except for the purpose of determining the payment of C compensation. It is evident that s 16B as a whole does not make any express reference to the provisions of s 16(9b). It is pertinent to note in this regard that s 16(1) of the Constitution was specifically amended by Act 5 of 2000 to be made "subject to s 16A". Again, sections 18(1) and 18(9) were also explicitly amended by Constitution Amendment No. 12 (1993) so as to be "subject to the provisions of this Constitution". Arguably, if Parliament had D intended to subordinate s 16(9b) to the provisions of s 16B, it would have explicitly said so, either in s 16B or in s 16(9b) itself. In the absence of any such express reference, the intention of Parliament to override s 16(9b) must be discerned by way of necessary intendment from the general reference in s 16B(2) to "anything contained in this Chapter". Does this transgress the E injunction contained in s 52(1) against any law being "deemed to amend, add to or repeal any provision of this Constitution unless it does so in express terms".

Having regard to the general rules of interpretation and the presumptions adumbrated earlier, coupled with the absence of any express reference to s 16(9b) in s 16B, the answer to the question posed above must be in the F affirmative. It would then follow that s 16B does not operate to amend, override or detract from the provisions of s 16(9b). On the other hand, any such

construction would render the opening words of s 16B(2) entirely redundant in relation to land protected under investment protection treaties, quite contrary to the relatively clear intention of Parliament that all duly gazetted agricultural land shall be acquired by, and vest in, the State without G any right to compensation except for improvements effected on the land, notwithstanding anything to the contrary contained in Chapter II, including s 16(9b).

On balance, I am more inclined to lean towards the former approach, predicated on the provisions of s 52(1), *viz*. in favour of the preservation of the property H rights and correlative obligations guaranteed by s 16(9b). Be that as it may,

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it appears that I am bound by the contrary position recently adopted by the A Supreme Court in *Nyahondo Farm (Pvt) Ltd* v *Tapfumaneyi & Others* S- 176-08 to the effect that agricultural land covered by investment protection agreements under s 16(9b) is susceptible to acquisition in terms of s 16B. Regrettably, the Supreme Court's reasons for judgement in that case have not as yet been made available and my understanding of the court's decision B is largely dictated by written submissions filed by counsel.

Final order

It follows from all of the foregoing that the applicants have succeeded on many of the issues for determination in this matter, but not on the paramount aspect relating to the status of the property *in casu* in terms of ss 16B C and 16(9b) of the Constitution. Consequently, they are not entitled to the declarations sought in paras 1 and 2 of the draft final order but are entitled to the declarations and relief sought in paras 3 to 6 of that order (with the necessary amendments excluding all references to "the Agreements"). They are also entitled to an order for costs, but only as against the third respondent. D

It is accordingly declared and ordered as follows:

1. It be and is hereby declared that the Notice of Eviction delivered to Fangudu (being Lot 1 of Fangudu in the District of Umtali and two contiguous pieces of land called Lot 1 of Essex and Remainder of Bomponi in the District of Umtali) on 8 August 2006 is invalid and of E no force or effect.
2. It be and is hereby declared that the occupation of Fangudu by the third respondent and all other persons claiming occupation of Fangudu through him and/or the first respondent was and continues to be unlawful.
3. It be and is hereby declared that all plantation crops, crops and movable property on Fangudu belonging to the applicants are not subject to F compulsory acquisition by the first respondent or to appropriation by any person other than a representative, employee or invitee of the applicants, except in accordance with the law.
4. It be and is hereby declared with regard to the applicants' movable property that the mandatory and peremptory provisions of the Acquisition G of Farm Equipment and Materials Act [*Chapter 18:23*] have not been initiated or complied with and that, accordingly, the possession, control and appropriation of the applicants' movable property by the third respondent was and continues to be unlawful.
5. There shall be no order of costs as between the applicants and the first, H

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A second and fourth respondents. The third respondent shall pay the applicants' costs of suit.

Gollop & Blank, applicants' legal practitioners

Civil *Division of the Attorney-General's Office*, first & fourth respondents' B legal practitioners

* *Editor's note*: the judgment in *Nyahondo Farm (Pvt) Ltd* v *Tapfumaneyi & Ors* S-176-08, referred to in the judgment, had not been received by the editors of these Reports before this volume went to print.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/1. ANTONIO v ASHANTI GOLDFIELDS ZIMBABWE LTD & ANOR; 2. Mujati v Ashanti Goldfields Zimbabwe Ltd & Anor; 3. Ashanti Goldfields Zimbabwe Ltd v Bonde 2009 (2) ZLR 372 (H)

1. ANTONIO v ASHANTI GOLDFIELDS ZIMBABWE LTD & ANOR; 2. Mujati v Ashanti Goldfields Zimbabwe Ltd & Anor; 3. Ashanti Goldfields Zimbabwe Ltd v Bonde 2009 (2) ZLR 372 (H)

Citation	2009 (2) ZLR 372 (H)
Case No	Judgment No. HH-135-09
Court	High Court, Harare
Judge	Makarau JP
Heard	16 June 2009; 17 June 2009; 23 June 2009; 20 July 2009
Judgment	18 November 2009
Counsel	*G C Manyurureni*, for Antonio and Bonde *T Nyamasoko*, for Antonio *T Magwaliba*, for Ashanti Goldfields Zimbabwe Ltd
Case Type	Civil trials
Annotations	No case annotations to date

Flynote

Company – *employee – evidence given by employee – need for employee to* C *be suitably placed within structures of company to have knowledge of facts to which he deposes – employee not being so placed nor having such knowledge – effect of his evidence*

Contract – *formation – offer – what constitutes an offer – proposal intended to create binding legal relations and which so appears to the offered* E *– what constitutes – need to consider terms of offer so as to determine how acceptance to be made – offer silent as to how it is to be accepted – how offer can be accepted – any conduct consistent with acceptance sufficient to create vinculum juris*

Contract – *option – offer by company to sell its houses to its employees* F *residing therein on stipulated terms – such offer in effect an option, alternatively an irrevocable offer, by the company to sell its houses to its employees – offer accepted upon the signing of lease agreement or upon affecting rental payments in terms of the scheme.*

Evidence – *evidence given upon behalf of a company – employee giving* G *evidence – need for employee to be suitably placed within government structures of company to have knowledge of the facts to which he deposes – employee not being so placed nor having such knowledge – effect of his evidence*

Headnote

An offer may be described as a proposal by the offeree made with intention H

A that, by its mere acceptance, a contract shall form. In other words, the proposal objectively construed must be intended to create binding legal relations and must have so appeared to the offeree.

As a general rule, a contract is not concluded until the offeree has not only decided in his mind to accept the offer but has communicated his acceptance to the offeror. In each case, it is necessary to consider the B terms of the offer to determine the mode of acceptance required. Where the offer is silent as to how it is to be accepted, any conduct on the part of the offeree, by deed or word, that is consistent with acceptance of the offer and which conduct or word is brought to the attention of the offeror and is also understood by the offeror as an acceptance of the offer is sufficient to create the requisite vinculum juris between the parties.

C In a matter in which three trials, with the consent of the parties, were consolidated into one trial (as the points at issue between them were essentially the same), two of the parties sought the transfer of immoveable property owned by Ashanti Goldfields into their own name, while a third resisted a claim for eviction by Ashanti Goldfields from the house D which he occupied. The evidence disclosed that Ashanti Goldfields ("the defendant"), upon concluding that the ore at its mine would be depleted in about five years, decided to dispose of its housing to its various employees who resided therein. It considered various ways of doing so and entered into protracted negotiations wit its employees who resided therein. These included A, M and B ("the plaintiffs"). Eventually, in E 2003, a committee of the defendant drafted a memorandum of agreement (the first agreement), the operative part of which read:

> "Ashanti Goldfields agrees to dispose of its housing units to its employees who are sitting tenants effective 1 December 2003. Find the agreed prices attached."

F This first agreement was referred to the defendant's board of directors, which understood it to be an agreement of sale to its various employees, and approved it. All relevant employees, including the plaintiffs, were informed accordingly and also understood the memorandum to be an agreement of sale. The question then arose as to how the plaintiffs and the other employees were to pay for the houses. According to the G plaintiffs, it was eventually agreed between the parties that a finance-lease agreement would be drawn up. Two of the three plaintiffs said that they signed such an agreement (the second agreement) and the rentals paid were used to pay off the purchase price of their respective houses. After each monthly payment, the balance due in respect of each house would be reflected on the relevant pay slip. The third plaintiff said that, H while he did not sign this second agreement, he had paid off the entire

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purchase price of the house he occupied by means of regular monthly A installments and, thereafter, by a lump payment of the balance.

The defendant argued that the second agreement was entirely separate from the first and had nothing to do with it. In support of its case, the defendant relied wholly on the evidence of its human resources manager. He said that the first agreement was no more than a memorandum to B the effect that the properties would be disposed of at a later date, which would then necessitate separate agreements of sale. He said that after the first agreement the parties had concluded an entirely unrelated lease agreement. The manager, however, was not part of the management team that negotiated the sale or disposal of the house. He was not a director of the defendant and had no access to the minutes of the board C of directors. In effect, his evidence was no more than a reflection of his personal opinion as to what had happened. During the course of the trial there was argument as to whether there had been any acceptance of the defendant's offer to sell the house to the employees and, if so, what form that acceptance had taken.

Held, that to the limited extend that the defendant bound itself in the first D agreement to offer the houses for sale to its employees on the terms stipulated therein, an agreement came into being. Its true nature was an option granted to the employees to purchase the houses. The first agreement could also be viewed as an irrevocable offer by defendant to sell the houses on the terms and conditions stipulated therein. E

Held, further, that it is not every employee who can give evidence on behalf of a corporate body such as defendant which has a board of directors and an executive management. The employee who gives evidence on behalf of a corporate litigant must be suitably placed within the corporate governance structures to have knowledge of the facts to which they testify. On the facts, the human resources manager was not so placed within the F governance structures of the defendant. On his evidence alone it could not be held that it was defendant's intention to enter into separate lease agreement with the same employees to which it had agreed to dispose of its houses.

Held, further, that the plaintiffs did conclude binding agreements of sale G with the defendant in respect of each of their houses. The offer to purchase was made by the defendant in terms of the first agreement. The acceptance was by each employe when he communicated his intention to participate in the scheme and made arrangements to pay off the purchase price. In the case of A and M, this was done when they signed the lease agreement, being the second agreement. Although he did not sign the H

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A lease agreement, B had also indicated his intention to participate in the scheme and had done so.

Held, accordingly, that the defendant should be ordered to effect transfer of the houses into the names of A and M respectively and that the defendant's claim for eviction against B be dismissed.

Cases cited B

Ashanti Goldfields Zimbabwe Ltd v Kovi S-7-09

Case information

G C Manyurureni, for Antonio and Bonde

T Nyamasoko, for Antonio

C *T Magwaliba*, for Ashanti Goldfields Zimbabwe Ltd

Judgment

MAKARAU JP: With the consent of all the parties, I consolidated the hearings of the above three matters as they involve the same dispute between Ashanti Goldfields Zimbabwe Ltd and three of its former workers. Again with the consent of the parties, I agreed that the three former workers give their combined evidence first even though the third worker is a defendant under HC3793/08. For convenience, I shall refer to the three former employees as the plaintiffs and to Ashanti Goldfields Zimbabwe Ltd as the defendant.

The dispute between the parties revolve around two agreements that were concluded between the defendant and its former workers in respect of certain E properties that the workers were occupying during the subsistence of their employment with the defendant. On 1 December 2003, an agreement headed "memorandum of agreement between Ashanti Goldfields management and Employees" was signed by the defendant's general manager and finance director, on the one hand, and by three employees who were members of the Workers Committee, representing the defendant's employees, on the F other. In the agreement, the defendant agreed to dispose of its housing units situated in Chiwaridzo, Grey Line Flats and Low Density to its employees who were sitting tenants. An agreed price list was attached to the agreement. On various dates thereafter, but commencing around 9 December 2003, the defendant and its employees entered into several lease agreements in respect of the housing units that the employees were occupying. Deductions were G thereafter effected against the salaries of the employees. The employees contend that such were in fulfillment of the agreement of sale concluded on 1 December 2003. The defendant, on the other hand, contends that these were rentals deducted in fulfillment of the lease agreements concluded by each of the employees in respect of the housing unit they were occupying. H Failing to reach agreement on whether the employees had purchased the

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housing units or were renting same from the defendant, a number of suits A were filed in this court, including the above three.

In the first suit, the plaintiff issued summons on 20 August 2007, seeking an order declaring binding the sale agreement between the parties and compelling the defendant to transfer certain immovable property, described in the summons, to the plaintiff. The suit was defended. In a separate suit, the B defendant counter-claimed for an order evicting the plaintiff from the property.

In the second matter, the plaintiff filed a court application seeking an order compelling the defendant to transfer to him certain immovable property described in the papers. In the application, the plaintiff averred that he had purchased the immovable property from the defendant in terms of the C agreement of sale of 1 December 2003 and that he had paid the full purchase price through deduction effected against his salary.

The application was opposed and in the opposing affidavit, the defendant denied the agreement of sale and averred that the second plaintiff was occupying the property in terms of a lease agreement which he had breached.

At the hearing of the application, the matter was referred to trial with the D papers filed of record standing as pleadings.

In the third matter, the defendant sued for the eviction of the plaintiff from certain immovable property described in the summons. In the declaration filed with the summons, the defendant alleged that the third plaintiff was a tenant in respect of the property and that, by terminating his employment E with the defendant, he had breached the lease. In defending the suit, the third plaintiff averred that he was not occupying the property in terms of a lease agreement but had purchased same from the defendant in terms of the agreement of sale of 1 December 2003.

Thus the issues arising from the above three matters are similar and call for F an interpretation of the two agreements that the parties concluded in respect of the properties in dispute.

In support of their cases, the three employees gave evidence. Again, for convenience, I shall refer to them as the first to third plaintiffs.

The first to testify was Simbarashe Antonio. He resides in Bindura and was G employed by the defendant up to June 2007.

During the subsistence of his employment with the defendant, he occupied many roles. He was a trained electrical technician and would act as a consultant electrical technician on a need to need basis. On a daily basis, he was employed in the finance department where he was the financial assistant accountant, responsible for banking, investments, debtors and gold sales. H

A He also represented the lower levels of the employees on the board of the defendant and was thus a board member. Due to his position on the board, he was appointed into a committee that spearheaded and shepherded the alleged disposal of the housing units by the defendant to its employees. His testimony was as follows.

B In or about 1998, the defendant, then under different shareholding and management, expressed a desire to dispose of its housing units to its employees. This was driven by reports that the ore reserves at the mine would be depleted in five years and the disposal of the housing units was viewed as a way of recouping some of its investments and at the same time as a way of keeping essential skills until the mine closed.

C Initially, the defendant wanted to hand over all the housing units to a building society for it to oversee the disposal. The defendant failed to raise the deposit require by building societies for such an exercise and the matter returned to the board for further discussion. Negotiations were opened between the workers and management and the witness was tasked to speed up the process. The board empowered him to ensure that management did not slacken on the D process. As part of the process, a committee was set up called the housing committee. It comprised the general manager, the finance director and a Mr Musarira as representing management and thus the defendant and the witness and two others as representing the workers.

In 2002, the board met in Ghana and the issue came up for discussion. It was E followed up at a subsequent board meeting held in Johannesburg, where it was resolved that the matter should now be concluded. The sticking point that was disclosed to the board was the inability of the workers to pay in cash for the properties. The committee was tasked to come up with a financing method that was acceptable to both sides.

F Consultations between the two sides continued up to late 2003. A legal practitioner was retained to draft a document that would capture and protect the interest of both parties. The board had indicated that it required evidence at its meeting of 1 December to show that the issue had been put

to rest. The housing committee in its wisdom, decided to come up with the memorandum of agreement on 1 December 2003 in which it is recorded that the defendant G had agreed to dispose of its housing units to its employees.

During negotiations, the committee had agreed that each housing unit be valued and three evaluations were carried out in respect of each unit and a value was assigned to each unit. The sitting tenant in respect of each unit was also identified and all this was agreed upon by members of the committee H in a schedule they attached to the agreement.

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The witness understood the document to be the agreement of sale between A the defendant and its workers. The document was taken to the board and was accepted by the board as having put the matter to rest. The board also understood it to be an agreement of sale.

The employees were informed that the board had now agreed to sell the properties. Since the employees had no money with which to finance the B purchases, they decided to sell their shares in the defendant. A sum of $5 million was raised from the exercise and this was distributed to the workers. The witness then paid for his particular unit in full.

Another method of paying for the properties was agreed upon. The defendant had on a previous occasion disposed of motor vehicles through a finance C -lease arrangement. This would entail periodic payments deducted from the employees' salary and the document for so doing was a lease agreement. The witness entered into a lease agreement with the defendant in respect of his unit which is the document he used to effect payment of the purchase price to the defendant.

An accounting system was created for this particular exercise. The employees' D pay slips would reflect a rent to buy deduction. After each deduction, the balance due in respect of the property being purchased would be reflected on the pay slip.

All appeared to be going well until 2006 when the defendant was sold Mwana Africa. The workers went on strike. They were apprehensive as to E their welfare and, in particular, as to whether the new owners of the mine would honour the agreements that had been concluded with the previous owners. They were assured that nothing would change and they returned to work. Later the employees heard that the new board of directors was not going to honour the agreements of sale. Employees pressing the issue were victimized and subsequently dismissed or retrenched. F

The witness was suspended from employment in April 2007. On 27 June, he resigned.

The witness was quite eloquent. His narrative was easy to follow and he gave his evidence well. Under cross-examination, he was effusive, and would give explanations not called for. He however admitted that, in terms of the G lease agreement, he had to remain in the employment of the defendant for five years before he could purchase the property and that he left employment before that period had lapsed.

The witness was cross-examined at great length in connection with a memo that was addressed to all the workers on 2 December 2003 by the chairman of the workers' committee, giving them up to February 2004 to decide whether H

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A or not they wanted to buy the house allocated to them. It was suggested to him that this memo indicated that there had been no agreement of sale on 1 December 2003 as he had testified. The witness remained firm in his belief that on 1 December 2003, the defendant had bound itself to sell the housing units to its employees.

While he was rather verbose and lengthy in his testimony, especially when B answering questions under cross-examination, I gained the impression that he was truthful and honest. There were no improbabilities in his testimony. He remained consistent in his narration of events leading to the execution of the two agreements. His understanding of the two agreements, though not strictly legal at times, was reasonable.

C Next to testify in the matter was Kingstone Fungai Mujati. He also resides in Bindura and was employed by the defendant.

He is one of the signatories to the agreement of 1 December 2003. He represented the workers when he signed the document. His understanding of the document was that the defendant was agreeing to dispose of its properties D to its employees who were sitting tenants in respect of those properties. The prices of the properties were attached to the agreement. His own property was listed on the attachment as number 1287 and the agreed price was the sum of $2 140 000.

In his testimony, the witness testified that he paid in full the purchase price in respect of the property that was allocated to him. The purchase price E was deducted from his salary on a monthly basis. In 2005, he then made a lump sum payment to clear the balance that was due. He identified the pay slips from which the various deductions had been made. After he had made the final payment, the defendant wrote to the local authority and to the Zimbabwe Electricity Supply Authority advising the two that the defendant was no longer responsible for rates and electricity charges respectively, for F the property. All utility bills were now coming in his name.

The testimony of this witness was largely similar to that of the first witness. He however testified that, while others signed a finance-lease agreement in respect of their properties, he did not.

The witness gave his evidence well. He was cross-examined on why he did G not sign a lease agreement and I found his responses forthright and probable. It is my finding that he was truthful.

Kwadzanai Bonde also gave evidence. He also resides in Bindura and was employed by the defendant as an accounts clerk. He joined the defendant in 1995 and left employment in November 2007. His evidence was similar in H material respects to the evidence of the first and second witnesses. Unlike the

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second witness, he signed a lease agreement in respect of the property. The A lease agreement was explained to him by members of the housing committee as a document that would assist him to finance the purchase of the property.

He concluded his evidence by maintaining that he had purchased the house he was occupying and the defendant had no right to evict him therefrom.

The witness gave his evidence well. He was not shaken in cross- examination. B I shall rely on his evidence.

The plaintiffs also called the evidence of one Emmanuel Gambara. He resides in Bindura and was once an employee of the defendant. During the course of his employment with the defendant, he was elected as a representative of the workers. He was one of the signatories to the agreement of 1 December C 2003 and was a member of the housing committee set up by the defendant's board. His understanding of this document and the subsequent lease agreement was similar to that of the other witnesses. He did not personally sign the lease agreement as the defendant's finance director was of the view that the workers' representatives should be the last one to participate in the purchase of the properties. D

After the testimony of this witness, the plaintiffs closed their cases.

The defendant called the evidence of one Agasi Wala. He is its human resources manager. He was employed by the defendant in 1996. He initially was a welfare officer and rose through the ranks to his current position. The matter relating to the alleged disposal of the properties to staff were matters E that fell under the purview of the human resources department where he worked, as his department coordinated all the meetings with staff.

He confirmed that the three plaintiffs were all once employed by the defendant. He also confirmed that there were negotiations at works council level between the management and the employees of the defendant in 2002 regarding the disposal of the properties that the defendant had allocated to its workers. These F were protracted until December 2003 when the memorandum of agreement was signed. It was his understanding that the memorandum of agreement between the parties signified that with effect from 1 December 2003, sitting tenants in company houses were to be offered their units to purchase. To him, this was a statement that these properties would be disposed of to the G workers at a later date. There was going to be a separate agreement of sale at a later date. After this agreement, the parties concluded a lease agreement.

Regarding the contention by the plaintiffs that the agreement of 1 December 2003 was an agreement of sale, the witness was of the view that it was not. He was of the further view that the price list attached to the agreement for each unit was meant to assist in assessing a rental for each. H

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A He confirmed that on 5 December 2003, following the first agreement, a notice was put up on the notice board inviting all employees interested in participating in the scheme to make their choices known. He was of the view that if the first agreement was an agreement of sale, this notice to the workers would have been unnecessary and may not have come out in that form. The employees responded to that notice by filling in lease agreement forms.

B The witness confirmed that deductions were effected against the salaries of the workers who had responded to the notice of 5 December 2003. These were only effected after the workers had signed the lease agreements. A worker who was not participating in the scheme would be in mine accommodation and would pay subsidized rentals. All those against whose salary were deducted C payments were to purchase their properties after five years. The amount they would have paid in advance would be taken into account in assessing the purchase price of the property after the five year period.

In respect of the second plaintiff, he was adamant that Kingstone Mujati signed a lease agreement that he removed from his file before he left employment. All employees participating in the scheme had signed the lease agreements.

D Regarding the letters written to ZESA and to Bindura Municiaplity in connection with Kwadzanayi Bonde's property, he testified that the letters did not state that the employee had bought the property. It simply transferred responsibility for the payment of bills to the employee who had left employment with the defendant.

E Under cross-examination, the witness testified that he did not attend the meeting at works council level where the issue of the disposal of houses was discussed. He kept track of what was being discussed there from feedbacks he got from the housing committee and from some of the records of the transactions that were kept by the defendant. He did not have any access to F the minutes of the board of the defendant.

The witness gave his evidence well. The bulk of his evidence was in corroboration of the plaintiffs' evidence as to how the two agreements came about. The difference between his testimony and that of the plaintiffs was in the interpretation that each side gave to each of the two agreements. While he obtained his information from the housing committee, he was of the view G that the two documents should speak for themselves.

The testimony of this witness was largely a reflection of his personal opinion. It was not based on personal experience, as he was not part of the management team that negotiated the sale or disposal of the housing units. He did not sit on the board where the issue was debated and resolved. He did H not have access to the minutes of the board where the issue was recorded.

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While he has been chosen to be the mouthpiece of the defendant, he cannot A testify as to the intention of the defendant when the two agreements were concluded. He cannot know what the defendant intended as he was not part of the defendant's representatives when such decisions were being made. I shall revert to this point in due course.

The defendant did not call any other witness and closed its case after the B testimony of Agasi Wala.

In my view, the first issue that I have to determine in this matter is whether or not the agreement of 1 December constituted an agreement of sale between the defendant and its employees.

As indicated above, the agreement of 1 December 2003 was a terse document C whose operative part read:

> "Ashanti Goldfields agrees to dispose of its housing units situated in Chiwaridzo, Grey Line Flats and Low Density to its employees who are sitting tenants effective 1 December 2003. Find the agreed prices attached."

I am in agreement with Mr *Magwaliba* for the defendant that the above was an agreement by the defendant to dispose of its properties to its employees D who were sitting tenants and that the agreement would be with effect from 1 December 2003 and that this agreement was not the agreement of sale itself.

In my view, the agreement of 1 December 2003 is no more than an agreement by the defendant to bind itself to sell its housing units, described in the schedule, to the employee named against each unit and at the price given as E the market value of each unit on the date of the agreement. It was thus an agreement giving the employees an option to purchase the housing units on the terms and conditions stipulated in the agreement.

To the limited extent that the defendant bound itself to offer the housing units for sale to its employees on the terms stipulated in the agreement, an agreement came into being. It would be binding on the defendant, but not F on the employees. The true nature of that agreement was an option granted to the employees to purchase the housing units.

In my view, the agreement could also be viewed as an irrevocable offer by the defendant to sell its housing units on the terms and conditions stipulated in the agreement. G

It is not in dispute between the parties that once the terms and conditions of the agreement of 1 December were met, a *vinculum juris* would be formed between the parties and a binding contract would come into being. Thus, the option granted the employees to purchase the housing units was also an offer by the defendant to each and every employee named in the schedule to purchase the unit allocated to him or her at the agreed price. H

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A As offer has been described as a proposal by the offeree made with the intention that by its mere acceptance, a contract shall form. See R H Christie *The Law of Contract in South Africa* 3 ed p 29. In other words, "the proposal, objectively construed, must be intended to create binding legal relations and must have so appeared to the offeree": D T Zeffertt "Payments in Full Settlement" (1972) 89 *SALJ* 35 at 38.

B The next issue that falls for determination is whether the offer, as contained in the agreement, was ever accepted by the above three plaintiffs.

It is trite that, as a general rule, a contract is not concluded until the offeree has not only decided in his mind to accept the offer, but has communicated his acceptance to the offeror.

C In each case, it is necessary to consider the terms of the offer to determine the mode of acceptance required. Where, in my view, the offer is silent as to how the offer is to be accepted, any conduct on the part of the offeree, by deed or by word is, in my view; that is consistent with acceptance of the offer and which conduct or word is brought to the attention of the offeree and is D also understood by the offeree as an acceptance of the offer is sufficient to create the requisite *vinculum juris* between the parties.

In casu, it is not in dispute that the agreement of 1 December 2003 was silent as to what the employees needed to do to accept the offer. In my view, after the agreement of 1 December 2003, if each and every employee named in the agreement had tendered the full purchase price of their respective unit to the E defendant, a binding agreement of sale would have been created. The three plaintiffs contend that they accepted the offer to purchase their respective housing units by completing the lease agreements which they understood to be vehicles to finance the payment of the purchase price in installments.

Two issues arise from the execution of the lease agreements between the F parties. Firstly, I have the testimony of the plaintiffs as to how the lease agreements came into being. This testimony, in my view, cannot be assailed at the instance of the defendant. It is common cause that at the time the lease agreements were executed, there was no dispute between the parties as to which employee was in occupation of which unit and what rental the employee had to pay. The parties had not been negotiating lease agreements G at any level and there was thus no factual or legal dispute that required the parties to enter into lease agreements. In other words, there was no need for the lease agreements either on the part of management or on the part of the employees.

On the other hand, the parties had been negotiating the disposal of the housing H units by management to the employees. The negotiations had spanned a period

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of over five years and days before the lease agreements were executed, the A defendant had finally bound itself to dispose of the houses to the employees in a written document. Thus, the dispute between the parties was in connection with the disposal of the housing units and thus the understanding by the employees that the lease agreements were part of the process was, in the circumstances, more probable than the defendant's contention that this was B a new stand alone agreement.

Thus on a balance of probabilities, I would hold that that lease agreements were not separate from the exercise of the disposal of the houses to the plaintiffs.

What emerges from the testimony of the parties regarding the lease agreements, if I were to accept the defendant's testimony, is that parties were not *ad idem* C concerning the true nature of the agreement. The employees regarded the agreement as a vehicle to offset the purchase price of the housing units when, on the other hand, the defendant viewed the agreement as a stand alone lease agreement, creating fresh obligations for the parties.

In any event, I have above expressed my reservations about accepting the views of Agasi Wala as representing the intention of the defendant when it D concluded the lease agreements with the first and third plaintiffs.

It is trite, in my view, that it is not every employee who can give evidence on behalf of a corporate body such as the defendant which has a board of directors and an executive management. The employee who gives evidence on behalf of a corporate litigant must be suitably placed within the corporate E governance structures of the defendant to have knowledge of the facts that he testify about. This knowledge can be derived from the employee's personal contact with the transactions in issue or from their position in the corporation that allows them access to the memories of the corporate body. Agasi Wala had neither. On his testimony alone, I therefore cannot find that it was the intention of the defendant to enter into separate lease agreements with the F same employees that it had agreed to dispose of its housing units to. He has no personal knowledge of what the defendant's intention was. He is not so placed within the structures of the defendant to have known from accessing records as to what the intention of the defendant was.

The major defect of the defendant's defence is that no one appropriately G placed in the corporate governance structures of the defendant came to testify on behalf of the defendant.

Thus, the lease agreement between the parties was not meant to be in replacement of the first agreement. It was not executed with the necessary *animus contrahendi* by the employees and is therefore not binding on all the parties. H

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A The issue remains as to whether the plaintiffs accepted the option granted them by the defendant. In my view, they did.

It is common cause that the plaintiffs made various monthly payments to the defendant in reduction of the agreed purchase price of their respective units. This was sufficient communication of the acceptance of the offer. B It is further not in dispute that the representatives of the defendant then accepted the deductions as part payment of the purchase price. The opinions of Agasi Wala as to what these payments constituted cannot be ascribed to the defendant, for the reasons I have given above.

It is therefore my finding that the plaintiffs did conclude binding agreements of sale with the defendant in respect of each of their units. The offer to purchase C was made on 1 December 2003. The acceptance was by each employee when he or she communicated their intention to the management of the day that they were going to participate in the scheme and made arrangements to pay off the purchase price. The offer from the defendant did not stipulate how acceptance was to be communicated and any conduct consistent with being bound by the defendant's terms, communicated to the defendant's D representatives, was sufficient.

In concluding as I do, I am aware of the Supreme Court judgment in *Ashanti Goldfields Zimbabwe Ltd* v *Kovi* S-7-09, in which it was held that the agreement of 1 December 2003 between the

defendant before me and a similarly placed employee to the plaintiffs before me was not an agreement E of sale. I agree. In particular, I agree with the finding by the Supreme Court that in the agreement of 1 December 2003, the defendant agreed to offer the housing units to its employees. It thus granted them an option to purchase. The clear evidence led before me shows that each of the three employees took up the offer made to them and exercised the option by commencing to make periodic payments to the defendant. More importantly, in my F view, such periodic payments in the matter before me were accepted by the defendant's management of the day as a reduction in the purchase price of the housing units involved.

I am bound by all decisions of the Supreme Court on points of law. Where however, the facts that were placed before the Supreme Court are different G from the facts before me, I believe I am at liberty to interpret those facts in light of the law handed down by the Supreme Court. The doctrine of *stare decisis* applies to points of law and not to factual disputes.

In the result, I make the following orders:

In HC4428/07 and 5665/07:

H The defendant is hereby ordered to transfer ownership in the property

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commonly known as Stand number 293 Tumazos Avenue, Bindura, A within 10 days of this order failing which the Deputy Sheriff is hereby empowered to sign all necessary documents and transfer the property to the plaintiff.

The defendant's counterclaim is dismissed.

The defendant shall bear the plaintiff's costs of suit. B

In HC 2125/07:

The defendant is hereby ordered to effect transfer of the property commonly known as number 1287 Chiwaridzo Township, Bindura, to the plaintiff within 10 days of this order, failing which the Deputy Sheriff is hereby empowered to sign all such necessary documents and C take all necessary steps to transfer the property to the plaintiff.

The defendant shall bear the plaintiff's costs.

In HC3793/08:

The plaintiff's claim (Ashanti Goldfields Zimbabwe Ltd's claim) is dismissed. D

The plaintiff is to bear the defendant's costs.

Atherstone & Cook, legal practitioners for the first plaintiff

Manyurureni & Co, legal practitioners for Mujati and Bonde

Magwaliba & Kwirira, legal practitioners for Ashanti Goldfields Zimbabwe Ltd E

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CHIBAGE v NDAWANA 2009 (2) ZLR 387 (H)

2009 (2) ZLR p387

Citation	2009 (2) ZLR 387 (H)
Case No	Judgment No. HH-141-09
Court	High Court, Harare

Judge	Makarau JP
Heard	10 June 2009;11 June 2009;14 July 2009; 14 September 2009;15 September 2009
Judgment	18 November 2009
Counsel	*J Shekede,* for the plaintiff *S Mahuni,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Delict – *negligence – professional negligence on part of medical practitioner – standard by which to assess such negligence – average reasonable professional*

Headnote

D The issue of whether to bring claims of professional negligence against medical practitioners in delict or in contract is not new. The line of division where negligence is alleged is not always easy to draw; for negligence underlies the field both of contract and of delict. It is not necessary for a plaintiff to plead a contractual relationship between the E parties to enable him to bring an action in delict against a defendant medical practitioner. Our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and permits the plaintiff in such a case to choose which he wishes to pursue.

Where the conduct of a defendant medical practitioner towards a plaintiff, F who may not be his patient, is unlawful and causes injury to the plaintiff, the medical practitioner is liable if his conduct was negligent. The particulars of negligence alleged against a medical practitioner can only be validated by reference to the standard operating procedures of other medical practitioners in that field. This is so because, to test the negligence of a professional, one has to first establish what an average G reasonable professional in the shoes of the defendant would have done. An average professional is not one who is so careful that he will weigh each and every risk attendant upon the task at hand and advise the client of all such risks before proceeding. He will weigh the obvious risks and advise the client of the same. The reasonable professional is H one who will bring his training to bear on the task at hand to assess the

attendant risks and proceed with alertness. He has a certain degree of A confidence in his capacity and skill that allows him to proceed without undue timidity and is, to a large extent, a practical person who wishes to achieve a specified result.

The stringent test for establishing the negligence of a professional thus requires that the allegedly defaulting professional be judged by the B standards set by his peers. Cases of professional negligence are difficult to successfully prosecute in this jurisdiction where most professions are still small and closely knit and members of the profession know each other on personal levels. Testifying against a fellow professional is still frowned upon as being in itself unprofessional and thus evidence of negligence is difficult to come by. C

Cases cited

Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A)

Bayer SA (Pty) Ltd v Frost 1991 (4) SA 559 (A)

Durr v Absa Bank Ltd & Anor 1997 (3) SA 448 (SCA)

Holtzhausen v ABSA Bank Ltd 2008 (5) SA 630 (SCA) D

S v McGown 1995 (1) ZLR 4 (H)

van Wyk v Lewis 1924 AD 438

Case information

J Shekede, for the plaintiff

S Mahuni, for the defendant E

Judgment

MAKARAU JP: The plaintiff is a commissioner in the Zimbabwe Republic Police. The defendant, a duly qualified dental surgeon, was at the material time also a member of the Zimbabwe Republic Police. She practiced her dentistry at the Police Camp Hospital and also at her surgery in town.

In June 2007, the plaintiff consulted the defendant, complaining of sensitivity F to his teeth. She examined him at the police hospital and later invited him to her surgery where she carried out some work on him. The work entailed extracting a tooth that was embedded in his gum. The extraction was not successful and she referred him to Professor Chidzonga, a specialist in the field who finally extracted the tooth and also found out that in the process, the G plaintiff had suffered a fractured jaw. When the plaintiff's superiors visited him at his house, a decision was made that he be flown to South Africa for further management and treatment. He was duly attended to in South Africa and the fracture was reduced.

On 24 January 2008 the plaintiff issued summons out of this court against the defendant. He alleged that she had been negligent and had caused the H

A fracture in his jaw. He claimed against her the sums of R10 000 for pain and suffering, R10 000 for loss of comfort and R78 000 as special damages.

The suit was defended.

In her plea, the defendant denied that she was negligent as alleged or at all. She further denied knowledge of the injury sustained by the plaintiff and B in particular, that she fractured his jaw, and suggested that this occurred at Professor Chidzonga's surgery where the tooth was extracted.

At the pre-trial conference of this matter, the parties settled the issues for trial as follows:

1. Whether or not the defendant undertook to perform surgery on the plaintiff C with such professional skill as is reasonable for a qualified dentist?
2. Whether or not the defendant carried out the surgery on the plaintiff negligently as alleged by the plaintiff?
3. Whether or not the plaintiff suffered damages as a result of the defendant's negligence and if so the quantum thereof.

D At the trial of the matter, the plaintiff gave evidence. His evidence was as follows.

In early 2007, he visited the Police Camp Hospital. He was complaining of sensitivity in his teeth. He sought professional assistance from the defendant. She advised him that he required a dental cleaning session and that she E needed to examine the exposed roots of his teeth. On the first visit, she applied some medication to his gums. She did not have adequate equipment at the hospital and could offer him treatment at her surgery. He accepted the offer. A week later he visited her surgery and she requested him to have an X-ray. A week later she called him and advised him that she had discovered a buried molar on the right side of his mouth. The tooth had to be extracted. F On 26 June, he attended at her surgery for the tooth to be extracted. After taking him through the process, the defendant attempted to extract the tooth using a variety of tools. After some time he grew tired and was also in pain. She advised him that she had almost exposed the tooth. He then felt a sharp pain and told her to stop. He had been on her chair for two and a half hours. She advised him that he now required theatre and she would refer him to G Professor Chidzonga. She telephoned

Professor Chidzonga's surgery and explained to them what she had already done. She wrote him a letter of referral and he left her surgery. He could feel that his jaw was heavy. It was painful.

At Professor Chidzonga's place he was taken into the consulting room and by that time he could not talk. Professor Chidzonga took a small X-ray of the H area. He then extracted the tooth in about 20 minutes. He suspected that the

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plaintiff had fractured his jaw. He could not develop the X-ray at that time A and allowed the plaintiff to go home on a prescription for a mouth wash, a pain killer and some antibiotics. As he was driving home, he sent a message on his mobile phone advising the defendant that he was in terrible pain and was suspected ofhaving fractured his jaw. His mouth was now quite heavy and he had to keep on holding his lower jaw. He was also bleeding profusely. B

When he reported back to Professor Chidzonga's rooms the following day, the fracture was confirmed. Professor Chidzonga cleaned his mouth and immobilized the jaw. He placed him on a special diet and prescribed more medication.

The Commissioner-General of Police visited him at home. At this time his C entire face was swollen. He was incoherent. Arrangements were made for him to be flown to South Africa where he was accompanied by his wife.

In South Africa, the wires that had been used by Professor Chidzonga to immobilize his lower jaw were removed and replaced by bracelets. He was placed on a liquidized diet. On 29 July, he returned to the clinic in South Africa where a few of the bands holding his jaw together were removed. D He could open his mouth by a fraction and could now use a spoon to eat porridge and yoghurt. In August, all the bands were removed and he was referred for physiotherapy. Around September, he returned to have all the bracelets removed. He was still on physiotherapy. He had to return for reviews in September and December 2007. In January 2008, he attended the final E physiotherapy session here in Zimbabwe.

At the time of testifying, he could not chew hard things with his right hand side. He still felt some numbness in the side which he hoped would go away after some time.

The witness then applied to have affidavits by the three medical practitioners F who attended to him in South Africa adduced into evidence. Also adduced were various documents, including air tickets from Harare to Johannesburg and invoices for the services rendered him in South Africa.

The witness gave his evidence well. He is fairly articulate. His responses to questions put to him under cross- examination were forthright. He did not seek to exaggerate. It is my finding that the witness was honest and truthful. G

The plaintiff called Professor Median Chidzonga. He holds qualifications in dentistry and is a professor in maxillo-facial, oral and dental surgery. He has specialized in facial surgery and has 30 years' experience under his belt. His evidence was as follows.

The plaintiff was referred to him by the defendant who wrote a note to him H

A explaining that he should continue with the removal of a wisdom tooth that she had started working on as the plaintiff was now in severe pain.

After sitting the plaintiff in the chair, he took a radiograph of the site and then proceeded to examine him. He saw a socket where an incision had been made. He attempted to remove the tooth and it was during this process that B he noticed that the jaw was not moving in unison. He requested the plaintiff to go for an X ray of the jaw. The following day the plaintiff brought back the X-ray and it showed that there was a fracture passing through the socket where he had removed the tooth. He reduced the fracture by wiring. He also obtained the results of the first radiograph he had taken when the plaintiff first visited him. It also showed that there was a fracture. Based on that C radiography, he was of the view that the jaw was fractured before he started working on the plaintiff.

He further testified that it is not normal for jaws to be broken during tooth extractions. It is however possible. The possibility of this happening can be assessed through X-rays of the area taken before the extraction.

D He was aware that the plaintiff later sought medical attention in South Africa. He was also aware that what was done in South Africa is similar to what he did on the plaintiff in reducing the fracture. The equipment used in South Africa is not available in this country but the expertise is.

Under cross-examination, the witness testified that the breaking of a jaw during a tooth extraction does not in itself denote negligence. Each case E must depend on its facts. Even where a practitioner exercised all due care, at times, a jaw could still break.

Regarding the plaintiff's subsequent visit to South Africa to seek medical attention, he was of the view that this was not necessary as he could have attended to the plaintiff himself had the deteriorating condition of the plaintiff F been brought to his attention.

The evidence of this witness was of great benefit to the court and great reliance shall be placed upon it in the resolution of the matter. He is an expert in his field and I would have been unable to form some of the conclusions I formed in this matter without his expert opinions.

G After the evidence of this witness, the plaintiff closed his case.

The defendant testified. She narrated most of the facts that are common cause in this trial as to how the plaintiff approached her for assistance and what she did up to the time she referred the plaintiff to Professor Chidzonga.

Regarding the allegation that she was negligent, her evidence was as follows.

H The plaintiff's tooth was a difficult one. She did the best that she could to

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extract it without resorting to surgery. During the process, the plaintiff did A not bleed profusely as he alleges. She however was putting water into his mouth during the process.

She was not aware that she had fractured the plaintiff's jaw during the extraction. Had she known, she would have put it in her referral letter to Professor Chidzonga. She only received a report from Professor Chidzonga B who stated that during the time he was extracting the tooth, he felt an abnormal movement to the jaw. She personally did not feel such movement.

The witness also gave her evidence well. Her evidence was in the main common cause with that of the plaintiff up to the time the plaintiff left her surgery. I have no reason to disbelieve her. C

The defendant also called one Lewis Chidzambwa. He is a dentist, holding a degree from a university in Finland. He has ten years experience. The testimony of this witness was of a very general nature. He gave the court his views on what can cause pain to a patient undergoing tooth extraction, how each case is unique and how fractures can occur in patients. I found the D evidence of this witness to be educative in a very general way.

After this witness was stood down, the defendant closed her case.

In his declaration, the plaintiff alleged that he concluded an agreement with the defendant in terms of which the defendant agreed to render to him services, performed with such professional skill as is reasonable for a qualified dentist. He further alleges that despite this agreement, the defendant performed her E services negligently.

It appears to me that in so doing, the plaintiff was trying to lay the basis of a duty of care owed to him by the defendant which duty of care was breached giving rise to the claim in delict.

The issue of whether to bring claims of professional negligence against F doctors in delict or in contract is not new. It arose in *van Wyk* v *Lewis* 1924 AD 438. In that case, the defendant, a surgeon, performed an urgent and difficult operation on the plaintiff and at the end of the operation, one of the swabs used was overlooked in the plaintiff's abdomen. It passed out after 12 months. The plaintiff sued the defendant for damages, alleging G that thedefendant had been negligent in failing to ensure that the swab was removed after the operation. In absolving the defendant from liability, the court held that negligence could not be inferred simply because the accident had happened.

In deciding whether the plaintiff's claim was delictual or contractual, Innes CJ had this to say on page 443: H

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> A "There was some discussion during the argument as to whether the action had been framed in contract or in tort. One of the appellant's contentions indeed assumed that the basis of her claim was contractual. Now the line of division where negligence is alleged is not always easy to draw; for negligence underlies the field both of contract and of tort. Cases are conceivable where it may be important to decide on which side of that line the cause of action lies. But the B present is not such a case; no mere omission is relied on, nor is the basis upon which damages should be calculated in dispute."

It was held in a subsequent case that, although there was a contract between the parties in the *van Wyk* case, Dr Lewis would have been liable to his patient for professional negligence even in the absence of a contract between the parties, for instance, if he had operated on a person found unconscious in the C streets or if he had contracted with a third person to perform an operation on the patient. The wrongfulness of his conduct would have arisen (at least *prima facie*) from his infringement of the patient's bodily integrity; and if then other elements of the *actio legis Aquilia* had been present (more particularly *culpa* and resultant damage) an action by the patient would have been competent. See *Administrateur, Natal* v *Trust Bank van Afrika* D *Bpk* 1979 (3) SA 824 (A).

Thus, in my view, it was not necessary for the plaintiff to plead a contractual relationship between the parties to enable him to bring an action in delict against the defendant. Our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in E contract, and permits the plaintiff in such a case to choose which he wishes to pursue. See *Bayer South Africa (Pty) Ltd* v *Frost* 1991 (4) SA 559 (A); *Durr* v *Absa Bank & Anor* Ltd 1997 (3) SA 448 (SCA) and *Holtzhausen* v *ABSA Bank Ltd* 2008 (5) SA 630 (SCA).

The position appears to me to be that where the conduct of the defendant F medical practitioner towards a plaintiff, who may not be his or her patient, is unlawful and causes injury to the plaintiff, the medical practitioner is liable if his conduct was negligent.

The plaintiff alleges that the defendant fractured his jaw during a tooth extraction. He further alleges that the fracturing of the jaw was as a result of negligence on the part of the defendant. Finally, the plaintiff alleges that G as a result of the fracture to his jaw, he suffered the various damages whose heads appear in his summons. The factual issues that fall for determination in this matter present themselves to me as firstly, whether it was the defendant who fractured the plaintiff's jaw and, if so, whether such fracturing was as a result of negligence on her part, and again, if so, what damages did the H plaintiff suffer?

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I now turn to the first issue. It is to determine whether the fracture in the A plaintiff's jaw was caused by the defendant.

I do not have any direct evidence in answer to this issue. The X-ray that was taken of the tooth area after the defendant had referred the plaintiff to Professor Chidzonga was not produced to show whether or not the jaw was fractured before Professor Chidzonga started working on the plaintiff. What B was adduced into evidence was a photocopy of the X-ray which did not show anything. The copy of the X–ray was not accompanied by any report explaining the picture and as was correctly stated by Professor Chidzonga in his evidence-in-chief, the photocopy was not useful at all.

The plaintiff was of the firm belief that he suffered the fracture whilst receiving C attention from the defendant. He is of this belief because he felt a sharp pain after an hour of drilling and wedging and he stopped the defendant from further proceeding. When he left the defendant's place, he was now holding his lower jaw. He urges me to infer that the sharp pain marked the point when his jaw fractured. This is a reasonable belief on the part of the plaintiff but it is not the only reasonable inference that one can draw from the facts. It is D common cause that the plaintiff was under a local anesthetic that was now wearing off. The tooth extraction was causing him a lot of pain. The sharp pain could have been pain from the process which would have otherwise been masked by the anesthetic had it been working.

Professor Chidzonga testified that it was during the process of extracting E the tooth that he noticed that the jaw was not moving in unison. He did not notice this during the examination of the plaintiff before he commenced the extraction. He then informed the plaintiff that he suspected a fractured jaw. The fracture was only confirmed the following day from X-rays.

As indicated above, it would have made my task easier had the plaintiff produced the original X-ray that was taken prior to Dr Chidzonga commencing F work on him. The absence of the X-ray and the evidence by Dr Chidzonga that he only noticed the irregular movement of the jaw during the extraction places me in a position where I cannot confidently hold that the jaw was broken at the defendant's surgery. This is compounded by the fact that neither Professor Chidzonga nor the plaintiff asked for leave and opportunity to G replace the useless photocopy with the original x-ray and no explanation was tendered for this omission.

Further, it was Professor Chidzonga's evidence that the X–ray that he took would only show the tooth and nothing much. He was not asked whether it would show the jaw and the fact that he referred the plaintiff to another facility for a bigger picture that would show the jaw seems to suggest to me H

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A that the radiograph that he took did not. In any event, neither the plaintiff nor Professor Chidzonga asked for time and opportunity to have the original radiograph adduced into evidence and no explanation was tendered for this omission.

I am unable to come to a conclusion as to where and when the fracture B occurred from the evidence adduced before me. It could have occurred at the defednant's surgery. It could have occurred at Professor's Chidzonga's.

On the one hand, I have the testimony of the plaintiff feeling the sharp pain and the testimony of Professor Chidzonga that when he looked at the radiograph that he had taken in his surgery, he observed a fracture. This evidence seems to suggest that the fracture may have occurred at the defendant's. C On the other hand, I have the missing radiography and the testimony of the defendant that she did not notice the irregular movement of the plaintiff's jaw when she was working on his tooth or else she would have included that in her written report to Professor Chidzonga. Further, I have the testimony of Professor Chidzonga that he only noticed the irregular movement of the plaintiff's jaw when he was in the process of extracting the tooth. I also have D his evidence that the X-ray he took in his surgery is of a localized nature, showing the tooth area hence his request to the plaintiff for him to attend the Avenues Clinic for a bigger picture showing the jaw area as well. The learned professor was not asked whether the localized X-ray he took would show the jaw area as well and to what extent. In my view, the fact that he E referred the plaintiff for a bigger picture tends to suggest his one would not show the fracture to the jaw.

I have no crystal ball to gaze into for an answer to this issue. In my view, the balance of probabilities tilts in favour of no party and remains even to the detriment of the plaintiff who bears an onus to establish the facts that F he relies on for his claim.

Assuming that I have erred and there is ample evidence upon which a superior court will find that the defendant did indeed fracture the plaintiff's jaw, I will proceed to give my opinion on the next issue which arises. This is to determine whether the defendant was negligent as alleged or at all, assuming she did fracture the plaintiff's jaw.

G In his declaration, the plaintiff alleged that the defendant was negligent in that she failed to remove the tooth with such skill as is reasonable for a qualified dentist, that she tried to remove the tooth in a way that caused the plaintiff to suffer severe bleeding and unbearable pain and that she fracturedthe plaintiff's lower jaw.

H In his testimony, the plaintiff confined himself, and correctly so in my view,

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to narrating the events leading to his visit to Professor Chidzonga's surgery A and thereafter to him seeking treatment in South Africa. When asked how the defendant had been negligent, he simply

gave his opinion that she must have been unprofessional by failing to extract the tooth in 2 hours when Professor Chidzonga managed to do so in about 20 minutes.

The difficulty that the plaintiff had in articulating the particulars of the B defendant's alleged negligence is in my view understandable. He is not a dental surgeon. I understand the plaintiff to have taken the simple approach to this whole matter that because an accident occurred whilst the defendant was in charge, she must have been negligent.

In my view, the particulars of negligence alleged against the defendant can C only be validated by making reference to the standard operating procedures of dentists. This is so because to test the negligence of a professional, one has to first establish what an average reasonable professional in the shoes of the defendant would have done. See *S* v *McGowan* 1995 (1) ZLR 4 (H). The average reasonable professional is not one who is an ace or an expert in his or her field. Thus, the skills exhibited by Professor Chidzonga cannot be D used to measure whether or not the defendant was negligent. She may not have been as adept at extracting teeth as the professor was. This however does not automatically translate into negligence on her part.

An average professional is not one who is so careful that he or she will weigh each and every risk attendant upon the task at hand and advise the client of all such risks before proceeding. He or she will weigh the obvious risks and E advise the client of the same.

In casu, it was Professor Chidzonga's testimony that the likelihood of a fracture during a tooth extraction can sometimes show in an x-ray taken before the extraction. It is not in dispute that the defendant caused an x-ray of the plaintiff's mouth to be taken before she started working on him. It F was not suggested that this x-ray showed that possibility of the plaintiff fracturing his jaw and notwithstanding clear evidence of this likelihood, the defendant proceeded with the extraction without taking any steps to guard against the occurrence.

It further appears to me that the reasonable professional is one who will bring G their training to bear on the task at hand, to assess the attendant risks, and proceed with alertness. He or she has a certain degree of confidence in the capacity and skill that allows them to proceed without undue timidity and is to a large extent a practical person who wishes to achieve a specified result.

As I have indicated above, to establish what a reasonable dentist would have done in the circumstances of this matter, the evidence of the plaintiff H

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A was not material. It would only have been material in showing what the defendant actually did. The evidence of another dentist was imperative to set the standards that are average in the profession and against which the conduct of the defendant would have been measured to show the deviation relied upon to form a cause of action in delict.

B The evidence of Professor Chidzonga, called by the plaintiff, did not sufficiently set out the average professional standards expected of a dentist extracting a tooth. His evidence was also largely narrative of the steps he took to extract the tooth after the defendant referred the plaintiff to him. He did not testify that what the defendant had done prior to her referring the plaintiff to his surgery was negligent. He was not examined on this aspect C of the matter. The only portion of his evidence-in-chief that I regard as relevant on this issue is when the professor testified that it is not normal that a jaw will fracture during a tooth extraction. He qualified that by testifying that the possibility of a fracture can be assessed by taking an X-ray before the extraction. As stated above, the defendant did cause an X-ray to be taken before she discovered the embedded tooth. The X-ray so taken was D not adduced into evidence. The issue that may have exercised my mind is whether the defendant was negligent in not noticing fromthis X–ray that the plaintiff's jaw was likely to fracture during the extraction had the plaintiff so pleaded. He did not.

Of significance, in my view, is the evidence of the professor under cross- E examination that the fracturing of a jaw during a tooth extraction does not necessarily denote negligence on the part of the dentist. He agreed with Mr *Mahuni's* suggestion that sometimes, even where the dentist was careful, a jaw could still break. His explanation was that a lot depended on the circumstances surrounding the case.

F Faced with such colourless evidence as to what a reasonable dentist would have done in the circumstances, I have no basis for holding that what the defendant did deviated from that norm and

was thus negligence.

Again assuming that I have erred in holding that there is insufficient evidence before me to hold the defendant negligent I proceed to determine whether the plaintiff has proved that he would have been entitled to damages in this G matter and, if so , the quantum thereof.

Under the first head of damages, the plaintiff claims against the defendant the sum of R10 000 for pain and suffering. It is common cause that the plaintiff was attended to by two medical practitioners on the same day and was thereafter attended to in South Africa. In his evidence, it is clear that H he wishes to be compensated for the pain that he endured not only whilst

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in the defendant's surgery but thereafter and through his entire ordeal until A the braces were removed from his face. But it is trite that the defendant can only be liable for the pain that she factually and legally caused. The issue that immediately arises, and one that Mr *Shekede* did not address fully, is how I am to apportion the pain and suffering between that caused by the defendant and that caused by the other medical professionals who attended B to the plaintiff. It would appear to me that the plaintiff has again taken the simplistic approach that, since the defendant set the whole train in motion, she must be held liable for all the pain that followed her contact with the defendant.

In my view, the attention given to the plaintiff by the professor was clearly *novus actus interveniens* that broke the chain of events and thus the liability C of the defendant. In this regard, I have asked myself what was the active or direct cause of the pain that the plaintiff suffered in this matter. It appears to me that the tooth extraction, started by the defendant but finished by the professor was the direct cause of the pain. Thus, the defendant did not cause all the pain. She may have contributed to the subsequent pain. Some D of the pain may have been naturally associated with a tooth extraction and may not have been actionable. I have no way of knowing the pain that the plaintiff suffered unlawfully at the hands of the defendant for no medical evidence was adduced as to the pain that the plaintiff experienced prior to the extraction of the tooth.

Due to the manner in which the events of this matter unfolded, it appears E to me that the plaintiff had a mammoth task in proving pain and suffering attributable to the defendant alone.

Legal causation is usually problematic where a whole chain of consecutive or remote consequences results from the wrongdoer's alleged negligence and where it is alleged that he or she should be held legally responsible for all the F consequences. I am of the view that the efforts of the professor to assist the plaintiff neutralizes the causative force of the defendant's original conduct. In any event, it has not been argued that a reasonable dentist would have foreseen the entire chain of events that unfolded in this matter and would have taken steps to guard against the same.

Had I found the defendant liable, I would have assessed damages under this G head modestly and may have awarded a sum of not more than R2 000 in view of the inadequacies that I have highlighted above.

Regarding damages for loss of comfort, which I believe ought to be correctly reflected as "loss of amenities", and the special damages of expenses incurred in South Africa, I would have absolved the defendant from liability on the H

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A basis that the damage is remotely connected to her conduct in that there was an *novus actus interveniens* in the form of the services rendered to the plaintiff by Professor Chidzonga. The attention given to the plaintiff by Professor Chidzonga was the ultimate cause for the discomfort that he suffered and the expenses that he incurred in seeking treatment in South Africa. Had he sought treatment in South Africa immediately after consulting the defendant, B my finding on this issue would have been different.

Regarding costs, it is my view that the plaintiff's approach to the court was reasonable and was prompted by a desire to be compensated for damages flowing from alleged professional negligence. Tested against a reasonable man, the plaintiff's case has merit. No one expects to have their jaw broken C when they request for a tooth extraction from a dentist and where this occurs, there should

be redress. Unfortunately, the law does not allow the judge, using the test of the *paterfamilias,* to substitute his or her own standards for those of a reasonable professional such as a dentist. The stringent test for establishing the negligence of a professional requires that the allegedly defaulting professional be judged by the standards set by his or her peers. D Cases of professional negligence are, in my view, difficult to successfully prosecute in this jurisdiction, where most professions are still small and closely knit and members of the profession know each other on personal levels. Testifying against a fellow professional is still frowned upon as being in itself unprofessional and thus, evidence of negligence is difficult to come by. From the above, I am not suggesting that Professor Chidzonga chose E not to testify against the defendant as he is personally known to her. He was simply not led on the critical issues of negligence and I do not know what his responses would have been. The testimony of Dr Lewis Chidzambwa, on the other hand, was clearly meant to absolve the defendant from all professional liability.

F While he is not succeeding, I see no reason to mulct the plaintiff with an order of costs on the basis of the above observations.

In the result, I make the following order

1. The defendant is absolved from the instance.
2. Each party shall bear its own costs.

G *Wintertons*, plaintiff's legal practitioners.

Mantsebo & Company, defendant's legal practitioners.

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HALWICK INVSTMS v NYAMWANZA 2009 (2) ZLR 400 (S)

Citation	2009 (2) ZLR 400 (S)
Case No	Judgment No. S-48-09
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Garwe JA
Heard	6 October 2008
Judgment	19 November 2009
Counsel	*A Mugandiwa*, for the appellant Respondent in person
Case Type	Labour appeal
Annotations	Link to case annotations

Flynote

Appeal – *court's powers on appeal – appeal court's powers to substitute its discretion for that of the trial court – trial court erroneously failing to exercise discretion – facts not in dispute – appeal court entitled to interfere*

Contract – *waiver – what is – what party alleging waiver must show* D

Headnote

The respondent was employed as a driver by the appellant company. An incident occurred which resulted in disciplinary proceedings being instituted against the respondent and the respondent being dismissed. He filed an appeal with the Labour Court, but shortly afterwards signed a document stating that he accepted a specified sum of money in full and E final settlement of his claim or entitlement arising out of terminal benefits and that he confirmed that his acceptance of that sum determined finally his claim and that he had no future or retrospective claims against the appellant of any nature whatsoever. In spite of signing this document, the respondent persisted with his appeal in the Labour Court, citing F various alleged irregularities in the disciplinary hearing. At the hearing, the appellant raised the issue of the waiver, as well as disputing the irregularities. The Labour Court did not address the issue of the waiver; it only dealt with the alleged procedural irregularity and remitted the case for re-hearing. On appeal to the Supreme Court, the appellant argued, *inter alia*, that the respondent had waived his right to appeal or to take G on review the termination of his employment. It argued that, since the facts were common cause, the court could determine whether waiver had been established.

Held, that it is not permissible for an appellate court to interfere with the discretionary power vested in a lower court unless it is shown that the lower court had committed such an irregularity or misdirection or exercised H

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A its discretion so unreasonably or improperly as to vitiate its decision. If the lower court erred in the exercise of its discretion, and if all the facts relevant thereto are undisputed, the appeal court would be free to exercise its own discretion. Here, the Labour Court failed to determine an issue that had been properly raised by the appellant. It completely ignored the issue of waiver raised and proceeded to determine the matter B on the basis of procedural impropriety. It failed to appreciate that the question of waiver could finally determine the issues between the parties, depending on the interpretation that would be given to the agreement reached between the two sides. The contents of the agreement were not in dispute, so the only issue was whether the facts established waiver.

C *Held*, further, that waiver occurs when one of the parties, by his words, actions or inaction, has evinced an intention not to enforce one or more or all of his rights under the contract. There is a presumption against waiver and that it must be clearly proved that the person who is alleged to have waived his rights knew what those rights were. Here, the respondent accepted payment of a sum of money in full and final settlement of any D claims he may have had against the appellant. In so doing, he waived any right of action he may have had to challenge his dismissal. Having entered into this agreement he no longer had any rights to pursue. His decision to proceed with the appeal thereafter could only be described as dishonest.

Cases referred to E

Johnsen v AFC 1995 (1) ZLR 65 (S)

Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd & Anor 1989 (4) SA 31 (T)

Case information

F *A Mugandiwa*, for the appellant

Respondent in person

Judgment

GARWE JA: This is an appeal against the decision of the Labour Court setting aside the proceedings of a disciplinary committee constituted by the G appellant and remitting the matter for a rehearing before a different panel.

The background leading to the institution of disciplinary proceedings against the respondent is common cause. The respondent was employed by the appellant as a driver. At the time the incident giving rise to the disciplinary proceedings took place, he was driving a truck belonging to the appellant carrying fertilizer destined for Zambia. There were also a number of other H trucks belonging to the appellant carrying fertilizer to Zambia. At Chirundu

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Border post there was a delay in clearing the truck as one bill of entry was A missing. The respondent then telephoned a Chief Superintendent Mandipaka of the Zimbabwe Republic Police and made a report to the effect that the appellant's clearing agents were smuggling fertilizer out of Zimbabwe. As a result of that report some sixteen trucks, some belonging to the appellant, were delayed at the border post whilst the police investigated the report B made by the respondent.

Upon full investigation, however, the missing bill of entry was found and it was established that there was no intention on the part of the respondent or its agent to smuggle the fertilizer out of the country. The appellant's clearing agent thereafter wrote a letter of protest to the appellant highlighting the C inconvenience caused by the report and the expenses which the company had been forced to incur to have the matter resolved.

Against that background the appellant instituted disciplinary proceedings against the respondent on a number of allegations of misconduct. The disciplinary committee found the respondent guilty of misconduct and determined that his employment be terminated with effect from 14 December D 2005. The respondent appealed to the appellant's Managing Director who, by letter dated 23 December 2005, upheld the decision of the disciplinary committee. On 30 December 2005, the respondent filed a notice of appeal with the Labour Court, Harare, seeking a review of the proceedings. On 3 January 2006, however, the respondent and the appellant executed a document E that read as follows:

> "I, NYAMWANZA G S, in my capacity as Driver being duly authorized hereto, hereby confirm that I have on this 03/01/06 day of Jan 2006 accepted from WHELSON TRANSPORT the sum of $15 168 014 179 in full and final settlement of my/our claim/entitlement arising out of Terminal Benefits and I confirm that my/our acceptance of the aforesaid amount determines finally my/our claim and F that I/we have no future/retrospective claims against WHELSON TRANSPORT of any nature whatsoever, including interest costs, collection commission arising out of the subject matter aforesaid, or otherwise.
>
> I therefore do hereby sign as acknowledgement and in agreement with the above without alterations or cancellations."

The document was signed by the respondent. G

Notwithstanding the above document, the respondent proceeded with his appeal before the Labour Court. He sought a review of the proceedings before the disciplinary committee on three grounds. These were, firstly, that his senior, a Mr Ndoro, played the dual role of chairperson of the disciplinary committee and witness during the disciplinary hearing; secondly, H

A that no hearing actually took place; and, thirdly, that he was not given the opportunity to be heard.

In its submission before the Labour Court, the appellant raised two issues. These were, firstly, that having executed the document dated 3 January 2006, the respondent waived any rights he may have had to challenge the B decision to dismiss him whether by way of appeal or review. Secondly, that the respondent had not established good legal ground for setting aside the dismissal.

The court *a quo* did not consider the issue of waiver raised. It only dealt with the question of procedural irregularity.

In determining that there had been a procedural irregularity and that the C matter be remitted for a hearing, the Labour Court remarked:

> "In this case there was a serious procedural irregularity in that the Chairman of the Committee was the witness. He led evidence from the bench. Obviously there was a real risk of bias in the findings by the Committee. However, from the facts of the matter which are follows: the appellant was employed as a driver with the respondent. On the day in question, the appellant was driving one of D the respondent's trucks ferrying fertilizers to Zambia. When the appellant got to Chirundu Border Post and had found that

one bill of entry form was missing he phoned the police and advised that respondent was smuggling fertilizers outside the country. As a result of the report 16 trucks belonging to the respondent were delayed at the border whilst the police were carrying on investigations. The respondent lost time and money. The investigations revealed the report was E false. The appellant was charged and dismissed from employment. Since the facts are common cause to some extent I will not order reinstatement of the appellant as he clearly has a case to answer."

The appellant attacks the decision of the Labour Court on four grounds. These are:

1. That the Labour Court misdirected itself by not dealing with the defence F of waiver raised by the appellant.
2. The Labour Court misdirected itself by coming to the conclusion that the rules of natural justice were violated in that the chairman of the disciplinary committee was both the chairman and the only witness.
3. The Labour Court misdirected itself by disposing of the matter on a G technicality when it was possible for it to dispose of the same on the merits on the available evidence.
4. The Labour Court misdirected itself by finding that there was a real risk of bias in the findings of the disciplinary committee.

I proceed to deal with the issue of waiver, which is the first ground of appeal H raised by the appellant. Reference has already been made to the document

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signed by the respondent in which he accepted payment of a sum of money A in full and final settlement of all his claims and in which he confirmed that his acceptance of the money finally determined any claim he may have had of any nature whatsoever.

In its heads of argument before the court *a quo*, the appellant specifically raised the issue of waiver. It was the appellant's contention that, by entering B into the above agreement, the respondent had waived his right to appeal or to take on review the termination of his employment. The appellant had further contended that the ordinary grammatical meaning of the agreement was that the respondent had made an undertaking that the execution of the agreement determined finally any claims of any nature whatsoever.

Despite the fact that the issue had been raised, the court *a quo* did not C consider it at all and made no reference to the submission in its judgment. This, in my view, was a misdirection. I would agree with the appellant that the failure to deal with a defence raised by one of the parties amounts to a failure to hear and determine the matter according to law.

The question that necessarily arises at this stage is how the misdirection D should be corrected. The appellant has suggested that, since the facts are common cause and all that needs to be done is to determine whether on the facts waiver was established, this court should itself determine the matter since all that is involved is the construction of a contract. Unfortunately this branch of the law is not as clear as the appellant would seem to suggest.

The position is now settled that it is not permissible for an appellate court E to interfere with the discretionary power vested in a lower court unless it is shown that the lower court had committed such an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision: Herbstein and van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed at p 918. In *Johnsen* v *AFC* 1995 (1) ZLR 65 (S) at 73B F -C, Gubbay CJ further clarified the position when he remarked as follows:

> "… clearly a distinction was drawn between the position of an appellate court where, on the one hand, the court of first instance had not exercised a judicial discretion at all, and, on the other, where it had exercised the discretion, but wrongly. In the latter occurrence, the appellate court is not inhibited from setting aside the original discretion. It must examine anew the relevant facts G and circumstances in order to exercise a discretion itself by way of review, which may uphold, reverse or vary, the order made by the court below. In Re *J (an infant)* 1981 (2) SA 330 (Z) at 335D-E, I ventured to state the principle, as I understood it, thus:
>
> > 'If the (primary) court erred in the exercise of its discretion, and as all the facts relevant thereto are undisputed, this court is now free to exercise its own discretion … If the primary court acts upon a wrong principle, if it allows H

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A extraneous or irrelevant matters to guide or affect it, if it makes mistakes of fact, if it does not take into account some material 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 doing so.'"

In *Johnsen* v *AFC supra* the appellant had sought an order declaring *inter* B *alia* that the AFC was not entitled to recover any amount claimed to be due in respect of an escalation of expense, however caused, of the equipment for the purchase of which the loans were granted. The learned judge who heard the application was of the view that this was not a proper case for the grant of a declaratory order because, firstly, what was sought was a legal opinion from the court; secondly, that such relief if granted would not bring litigation C between the parties to finality; and, thirdly, that there was an alternative remedy by way of an interdict.

This court rejected that finding and came to the conclusion that the omission of the court *a quo* to have regard to the terms of the agreement of loan as a factor to be weighed in the exercise of its judicial discretion constituted a D misdirection. This court remarked at 76G-H:

"In my view, the failure by the court *a quo* to construe the agreement of loan caused it to overlook that a declarator, though not necessarily ending all litigation over the issue of liability between these parties, nonetheless would have achieved finality on the applicability of the summary execution procedures. …"

This court then decided to exercise its judicial discretion since the same E materials that were before the court *a quo* were also before it.

The position was also aptly summarized by Stegmann J in *Tjospomie Boerdery (Pty) Ltd* v *Drakensberg Botteliers (Pty) Ltd & Anor* 1989 (4) SA 31 (T) at 40A-J when he stated:

"1. There is no rule of law to the effect that in every appeal against the exercise F of any discretionary power vested in court of first instance the Court of appeal has no jurisdiction to interfere with the decision appealed against unless such decision is shown to have been unjudicial in one of the respects mentioned in Ex p *Neethling and Ors* 1951 (4) SA 331 (A) at 335D-E.

2. In an appeal against the exercise of a discretionary power by a court of first instance, the first task of the court of appeal is to examine the nature of the discretionary power, and to decide whether it belongs to the category G of discretionary powers contemplated by the decision in Ex p *Neethling & Ors*.

3 If the power is found to belong to such category, the court of appeal has no jurisdiction to interfere with the exercise of the power decided on by the court of first instance unless such decision is shown to have been unjudicial in one of the respects mentioned in Ex p *Neethling and Ors*, ie that such H decision was capricious, that it was based on a wrong principle, that it was

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not reached by unbiased judgment, or that it was not based on substantial A reasons.

4. If the discretionary power is not found to belong to such category, the court of appeal must decide to what category it does belong. One possibility is that it may be found to belong to the same category as the discretionary power in *Mahomed* v *Kazi's Agencies (Pty) Ltd & Ors* 1949 (1) SA 1162 (N). B

5. If the power is found to belong to the last-mentioned category, the function of the court of appeal is to hear all such arguments as may be addressed on the basis of the record before it, and to give due consideration to the decision of the court of first instance.

6. In some cases it may be possible to conclude that the exercise of the discretionary power by the court below was 'wrong' in some sense other C than the sense of 'unjudicial' contemplated by Ex p *Neethling and Ors*. However, discretionary powers being what they are, there is usually no objective criterion according to which the exercise of such power can be judged to be 'right' or 'wrong'. The criteria according to which it may be judged to be 'judicial' or 'unjudicial' are dealt with in Ex p *Neethling and Ors*. However, there are always criteria according to which the exercise of D a discretionary power may be judged to be 'appropriate' or 'inappropriate'. Such criteria depend upon the circumstances of the particular case. In the very nature of things, therefore, when the subject-matter of an appeal is the exercise of a discretionary power of the kind referred to in para 5 above, the court of appeal is not bound to uphold the decision of the court below unless satisfied that such decision was 'wrong'.

7. In an appeal against the exercise of such a discretionary power, the function of E the court of appeal is to consider whether, in the light of all relevant factors, the exercise of the power by the court of first instance was appropriate to the circumstances of the particular case. If it was, the appeal must

> fail. If it was not, the court of appeal must exercise the discretion anew, and must substitute its own discretion for the discretion of the court below."

I am satisfied that the authorities referred to above correctly reflect the law F on this aspect.

There was a failure by the court *a quo* to determine an issue that had been properly raised by the appellant. The court completely ignored the issue of waiver raised and proceeded to determine the matter on the basis of procedural impropriety. There was a failure by the court *a quo* to appreciate that the G question of waiver could finally determine the issues between the parties, depending on the interpretation that would be given to the agreement reached between the two sides. The contents of the agreement are not in dispute. In these circumstances, I am satisfied that no purpose would be served by remitting this matter to the court *a quo* for it to place an interpretation on the contents of the agreement entered into between the two parties. Since H

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A the contents of the agreement are common cause, the only issue that arises is whether the facts establish waiver. It has never been suggested that the document was the result of duress, mistake or undue influence. I hold the view therefore that this court can properly determine the issue without the need to remit the matter to the court *a quo*.

B The issue that arises as a result of the conclusion I have reached above is whether the respondent waived any rights he may have had to take this matter either on appeal or review. That question necessarily raises the question: what is waiver?

> "When one of the parties, by his words, actions or inaction, has evinced an intention not to enforce one or more or all of his rights under the contract C we select whichever word seems most appropriate from a list which includes abandonment, acquiescence, release, renunciation, surrender and waiver. Of these words by far the most commonly used is waiver, which is regarded in many of the cases as interchangeable with any of the other words…"

See R H Christie *The Law of Contract in South Africa* 3 ed at p 495-6. The law is also settled that there is a presumption against waiver and that it must D be clearly proved that the person who is alleged to have waived his rights knew what those rights were.

The respondent in this case was fully aware of the dispute between him and the appellant. He had filed a notice of appeal with the Labour Court seeking the review of the disciplinary proceedings. About four days after E doing so, he then signed the document, part of the subject of this appeal. In that document, he acknowledges receipt of a sum of money in full and final settlement of any claims he may have had against the appellant. In the document he further confirms that his acceptance of the amount determines finally his claim and that he has no future or retrospective claims against the appellant of any nature whatsoever.

F Clearly the respondent accepted payment of a sum of money in full and final settlement of any claims he may have had against the appellant. That meant that, as at that date, he had waived any right of action he may have had to challenge his dismissal. Having entered into this agreement he no longer had any rights to pursue. His decision to proceed with the appeal thereafter G can only be described as dishonest.

I am satisfied in all the circumstances that the respondent waived any rights he may have had against the appellant who was his employer. The appellant's submission in this regard must therefore succeed.

In the light of the above conclusion, it becomes unnecessary to consider and H determine the other grounds of appeal raised.

Garwe JA

The appeal must therefore succeed. A

It is accordingly ordered as follows:

1. The appeal is allowed with costs.
2. The judgment of the Labour Court is set aside and in its place the following is substituted:

> "The appeal is dismissed with costs." B

SANDURA JA and ZIYAMBI JA concurred.

Wintertons, appellant's legal practitioners C

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S v K (A JUVENILE) 2009 (2) ZLR 409 (H)

Citation	2009 (2) ZLR 409 (H)
Case No	Judgment No. HH-149-09
Court	High Court, Harare
Judge	Uchena J and Assessors
Heard	6 July 2009;7 July 2009; 8 July 2009; 13 July 2009; 14 July 2009; 15 July 2009; 16 July 2009; 22 July 2009; 24 July 2009; 28 July 2009; 11 August 2009; 13 August 2009; 9 November 2009; 10 November 2009; 12 November 2009
Judgment	20 November 2010
Counsel	*R Chikosha* and *F Matsinde,* for the State *T Mpofu,* for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal procedure – *mental disorder – accused found to be suffering from* D *mental disorder at time of commission of crime – special verdict – courses open to court after returning special verdict*

Interpretation *of statutes – intention of legislature – error – reference to wrong section of another statute – reading of enactment so as to refer to section to which legislature must have intended to refer*

Headnote

E The accused, a 17-year-old juvenile, was charged with two counts of murder. He shot and killed his parents when he was aged 16 years. He pleaded not guilty and raised defences of automatism, mental disorder and intoxication with mental disorder arising from intoxication. In respect of the defence of automatism, it was submitted that his conduct was F not voluntary as he acted without conscious knowledge or control. In respect of the defence of mental disorder, it was submitted that he suffered from mental disorder or defect which made him incapable of appreciating his conduct or its unlawfulness. In respect of the defence of intoxication, it was submitted that he involuntarily got intoxicated G leading to his suffering a mental disorder arising from intoxication. His defence, therefore, was that he did not have the requisite *mens rea* when he shot his parents. The State led evidence from a Government psychiatrist with impressive credentials. He found that the accused was suffering from post traumatic stress disorders and

panic disorders. He sent the accused for an EEG scan which showed that the accused was H suffering from temporal lobe epilepsy. In response to a question from

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one of the assessors, he said that the accused was not responsible for A his actions because of the mental defect he suffered as a result of the temporal lobe epilepsy. The State then closed its case. Counsel for the accused applied for discharge, arguing that the State had not proved that the accused had the requisite *mens rea* when he shot his parents.

Held, that the effect of s 229 of the Criminal Law (Reform and Codification B Act [*Chapter 9:23*] ("the Code") is that if an accused person is proved to have committed the acts constituting the crime charged, but is also proved to have been suffering from a mental disorder or defect at the time of committing the offence, which mental disorder or defect constitutes a complete defence in terms of s 227 of the Code, he must in terms of s 29(2) of the Mental Health Act [*Chapter 15:12*], be found not guilty C because of insanity, and be dealt with in terms of the options provided in paras (a) to (c) of that subsection. Section 229 of the Code applies to Part V of the Code, which comprises ss 226 to 229.

Held, further, that s 29(2) of the Mental Health Act, which provides for a special verdict, refers to s 248 of the Code as being the section which D provides for a mental disorder or defect being a complete defence. Section 248 actually provides for consent to medical treatment for non-therapeutic purposes. It is therefore not the provision intended by the legislature in s 29(2) of the Mental Health Act. The legislature clearly intended to refer to a section of the Code which provides for a mental disorder or defect being a complete defence, that section being s 227. A E wrong section was referred to in s 29(2) of the Mental Health Act. As to whether the court could substitute s 248 of the Code with s 227 of the Code in s 29(2), the court could do so, as the intention of the legislature was clear, and reference to s 248 was an obvious error. In interpreting a statute, the court must be guided by the clear intention of the legislature. When the words used by the legislature create an absurdity they can be F modified to bring out the clear intention of the Legislature.

Held, further, that having returned a special verdict, the court had three options under s 29(2) of the Mental Health Act: (a) if the accused person still needed to be mentally examined or to be treated, he had to be returned to prison where he would be transferred to an institution or special G institution for examination or treatment; (b) if the offence the accused person was facing and for which a special verdict had been returned was one for which the accused could not have been sentenced to imprisonment or a fine exceeding level three, then the accused could be released to be dealt with in terms of s 29(2)(b); (c) if the court is satisfied that the accused is no longer mentally disordered or intellectually handicapped H

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A or is otherwise fit to be discharged, it can order his discharge. If (a) was applicable, the condition of a prison did not justify the court's refusal to send to prison those the law said must be sent there. The court had to proceed in terms of the correct option. From prison the accused must be transferred to a designated institution or special institution, as defined B in s 2 of the Mental Health Act.

Cases cited

Bennett NO v Master of High Court 1986 (1) ZLR 127 (H)

Ex p *Min of Justice,* In re *Jacobson & Levy* 1931 AD 466

Fernandez v SA Rlys 1926 AD 60

C *S v Aitken* 1992 (2) ZLR 84 (S)

S v Karani 1997 (2) ZLR 114 (H)

Skinner v Palmer 1919 WLD 39

Legislation considered

Criminal Law (Reform and Codification) Act [*Chapter 9:23*], ss 227 D and 229

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 198(3)

Mental Health Act [*Chapter 15:12*], 29(2)

Case information

R Chikosha and *F Matsinde,* for the State

T Mpofu, for the accused

Judgment

UCHENA J: The accused is a 17-year-old juvenile. He was indicted for trial on two counts of murder. The State alleges that he murdered his father and mother. According to the State, he shot and killed them on 19 April 2008. He was then aged 16. According to common cause evidence, his parents loved him and showered him with luxuries. During the December 2007 and January 2008 school holidays they took him on holiday to Dubai. They were educating him at expensive private schools. There was ordinarily no reason for him to gun them down.

The accused person pleaded not guilty to the charges of murder and raised defences of automatism, mental disorder and intoxication with mental disorder arising from intoxication. In respect of the defence of automatism, it was submitted that his conduct was not voluntary, as he acted without conscious knowledge or control. In respect of the defence of mental disorder it was submitted that he suffered from a mental disorder or defect which made him incapable of appreciating his conduct or its unlawfulness. In respect of the defence of intoxication, it was submitted that he involuntarily got intoxicated

leading to his suffering a mental disorder arising from intoxication. The accused's defence was therefore that he did not have the requisite *mens rea* when he shot his parents. There is no issue on whether or not he shot them. He admits the *actus reus*.

The State led evidence from Precious Chawa, Admire Musasa, Patrick Makanjera, Spiwe Chakuvinga and Dr Dickson Chibanda. The evidence of the first four witnessess, apart from confirming that they woke up to witness the double murders and suspected the accused, did not cast a strong light on the accused's *mens rea*, which is the only element in issue. Their evidence, however, casts a weak light on the accused's apparent unusual behaviour. They said he questioned why Spiwe Chokuvinga was mourning. He bought himself coca cola which he moved around drinking during the funeral. He hid some of the family's weapons in the ceiling. The hiding of weapons in the ceiling tends to suggest that he knew an issue would arise on their use in the murders of the deceased. He therefore wanted them out of the way. This tends to show that he knew what he had done and wanted to conceal it.

The State's case took a new and definitive twist when it led evidence from Dr Chibanda. He is a Government psychiatrist with impressive credentials. He teaches Mental Health Legislation and Human Rights internationally through the World Health Organisation. He examined the accused at Harare remand prison. He found that the accused was suffering from post traumatic stress disorders and panic disorders. He suspected that the accused could be suffering from temporal lobe epilepsy, and recommended that he be taken for an EEG scan. His suspicion was based on the accused's admitted sudden violent behaviour and his confession to him that he was in the habit of abusing drugs, such as marijuana and cocaine. He said sudden violent behaviour is a characteristic common in patients suffering from temporal lobe epilepsy. He said the alleged murders suggested some underlying neuro-psychopathology in the accused . Under cross-examination by counsel for the accused, he agreed with the results of the EEG scan done by Dr Mangwende, and the conclusions drawn therefrom by Dr Madhombiro. He concluded that the accused was suffering from temporal lobe epilepsy when he shot and killed his parents. In response to a question asked by one of the assessors in clarification, he said the accused was not responsible for his actions because of the mental defect he suffered as a result of the temporal lobe epilepsy. That was in fact the finding of Dr Madhombiro whose affidavit he had been shown and had agreed with under cross-examination. The State then closed its case, leading to the

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A application for discharge in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07]*, which I will in this judgment refer to as "the CP&E Act".

Application for discharge

Mr *Mphofu* for the accused applied for discharge at the end of the State case, arguing that the accused had not been proved to have had the requisite *mens rea* when he shot and killed the deceased persons. He went further and submitted that the State's own expert witness had proved that the accused B did not have the requisite state of mind which would render him liable for his actions. There is no doubt that, according to Dr Chibanda, the accused did not have the requisite intention to murder his parents. The element of intention was therefore not proved by the State. Ordinarily that would have led to his discharge at the end of the State case. Section 198 (3) of the CP&E Act provides as follows:

> C "(3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

The language used by the legislature obliges the court to discharge the accused at the end of the prosecution's case if it considers that there is no D evidence proving that the accused committed the offence charged or any other offence of which he might be convicted arising from that charge. The court has no discretion; it must discharge the accused if there is no evidence. It must therefore be guided by the evidence led by the prosecution.

In this case, there is no evidence to prove that the accused intended the E death of his parents. On the contrary, the State proved the absence of such an intention because the accused person suffers from a mental defect which amounts to a complete defence. In the absence of the provisions of s 229 of the Criminal Law (Reform and Codification) Act [*Chapter 9:23*], and s 29 of the Mental Health Act [*Chapter 15*:*12*], which will in this judgment be called "the Code" and "the Mental Health Act" respectively, the application F for discharge would have been granted. In view of the provisions of s 29 of the Mental Health Act and s 229 of the Code, the parties should have agreed on a special verdict instead of closing the State case as nothing would change after the clear and definitive evidence of Dr Chibanda. It was also, in my view, ill-advised for counsel for the accused to apply for discharge at the end of the State case when it was clear that the accused's defence of G a mental disorder amounting to a complete defence had been accepted by the State's expert witness and the logical conclusion was a special verdict. This is so because s 229 of the Code provides as follows —

> "Nothing in this Part shall affect the operation of the Mental Health Act [*Chapter 15:12*] (Act No. 15 of 1996) in relation to — H
>
> (*a*) the procedure to be followed when persons being tried are found to be

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Uchena J

> mentally disordered or defective or any verdict to be returned at any such A trial; or
>
> (*b*) the detention, examination or treatment of persons found to be mentally disordered or defective."

My understanding of s 229 of the Code is that, if an accused person is proved to have committed the acts constituting the crime charged, but is B also proved to have been suffering from a mental disorder or defect at the time of committing the offence, which mental disorder or defect constitutes a complete defence in terms of s 227 of the Code, he must, in terms of s 29(2) of the Mental Health Act, be found not guilty because of insanity, and be dealt with in terms of the options provided in subss (a) to (c) of that section. The part referred to in s 229 of the Code is Part V of the Code, C which includes ss 226 to 229. Section 29 of the Mental Health Act refers to s 248 of the Code. That section falls out of Part V. This raises questions on the applicability of s 229 of the Code. When the application for discharge was made, both parties did not refer to the provisions of s 229 of the Code and s 29 of the Mental Health Act. Realising the effect of the provisions of these sections on the application for discharge, I called the parties back and D asked them to address the court on the meaning and the effect of s 229 of the Code and the effect of s 29 of the Mental Health Act referring to s 248 of the Code instead of s 227.

Section 229 of the Code

Mr *Mpofu* for the accused submitted that there was no conflict between s E 198 (3) of the CP&E Act and s 229 of the Code. He therefore submitted that his application for discharge could still be granted. He also made two alternative submissions. In the first alternative, he submitted that the effect of s 198 (3) of the CP&E Act, and s 29(2) of the Mental Health Act as read with s 229 of the Code leads to the same result. He therefore submitted that F the court could proceed in terms of s 29(2) of the Mental Health Act. He therefore indirectly admits that s 29(2) of the Mental Health Act cannot be avoided in a case where the accused raises mental disorder as a complete defence. I must, however, state that Mr *Mpofu*'s contention that the effect of s 198(3) of the CP&E Act and s 29(2) of the Mental Health Act is the same is not legally correct. Section 198(3) is intended for a case where the G State fails to present a *prima facie* case against an accused person when it closes its case. Section 29(2) of the Mental Health Act, on the other hand, is intended for a case where an accused person is proved to have committed the act constituting the offence charged but cannot be convicted because of a mental disorder or defect, which constitutes a complete defence. In that case the court must, in terms of s 29(2) of the Mental Health Act, return a special H

A verdict to the effect that the accused is not guilty because of insanity. The former is a complete failure by the State to prove a case against the accused, while the later is a case where the State has proved that the accused person committed the offence while suffering from a mental disorder or defect. The latter is guided by the provisions of s 229 of the Code and leads to a special verdict, to the effect that the accused is not guilty because of insanity, and B is followed by consequences provided by s 29(2)(a) to (c) of the Mental Health Act, while the former leads to a discharge, the effect of which is that the accused is found not guilty and is acquitted with no consideration by the court of any further consequences.

In his address on s 229 of the Code Mr *Matsinde,* for the State, conceded C that the State should have accepted the accused's plea of insanity after Dr Chibanda's evidence, and the case should have proceeded in terms of s 29(2) of the Mental Health Act. He submitted that s 229 of the Code makes it impossible to avoid the provisions of s 29 of the Mental Health Act once the accused is proved to have killed the deceased while suffering from a mental disorder which constitutes a complete defence in terms of s 227 of D the Code. I agree with Mr *Matsinde*'s submission.

The Applicability of s 229 of the Code

Section 229 of the Code confines its operation to Part V of the Code. That part includes ss 226 to 229. However, s 29(2) of the Mental Health Act, which provides for a special verdict, refers to s 248 of the Code as the section E which provides for a mental disorder or defect being a complete defence. It provides as follows:

> "(2) If a judge or magistrate presiding over a criminal trial is satisfied from evidence, including medical evidence, given at the trial that the accused person did the act constituting the offence charged or any other offence of which he may be convicted on the charge, but that when he did the act he was mentally F disordered or intellectually handicapped so as to have a complete defence in terms of section 248 of the Criminal Law Code [*Chapter 9:23*], the judge or magistrate shall return a special verdict to the effect that the accused person is not guilty because of insanity, and may –
>
> (a) order the accused person to be returned to prison for transfer to an institution or special institution for examination as to his mental state or for treatment; G or
>
> (b) if the judge or magistrate considers that, had the accused person been convicted of the offence concerned, he would not have been sentenced to imprisonment without the option of a fine or to a fine exceeding level three, order –
>
> (i) the accused person to submit himself for examination and additionally, H or alternatively, treatment in any institution or other place in terms of

> Part VI; or A
>
> (ii) the accused person's guardian, spouse or close relative to make an application for the person to be received for examination and additionally, or alternatively, treatment in any institution or place in terms of Part VII or Part VIII;

and may give such orders as may be appropriate for the accused person's release from custody for the purpose of such examination or treatment; or

(c) if the judge or magistrate is satisfied that the accused person is no longer mentally disordered or intellectually handicapped or is otherwise fit to be discharged, order his discharge and, where appropriate, his release from custody."

Section 248 of the Code, referred to by s 29(2) of the Mental Heath Act, is not found in Part V of the Code. That raises questions on the applicability of s 229 of the Code to the situations referred to in s 29(2) of the Mental Health Act. An examination of the provisions of s 248 is therefore necessary. It provides as follows:

"248 Consent to medical treatment for non-therapeutic purposes

(1) In this section –

"patient" means a person to whom medical treatment is given or upon whom a medical operation is performed;

"qualified person", in relation to any medical treatment or operation, means a person who, by virtue of his or her qualifications or training, is in all the circumstances qualified to give the medical treatment or perform the medical operation.

(2) Where a qualified person, with the consent of the patient concerned, gives any medical treatment to or performs any medical operation upon a patient

(*a*) otherwise than to cure or alleviate any disease or disability; or

(*b*) in order to sterilise the patient;

such consent or authority shall be a complete defence to a charge of murder or assault arising out of that treatment or operation if –

(i) the consent complies with paragraphs (*b*), (*c*) and (*d*) of subsection (1) of section *two hundred and forty-five*; and

(ii) the treatment or operation is carried out competently in accordance with recognised medical procedures; and

(iii) in a case where the treatment consists of the administration of any new, untried or experimental drug, medicine or allied substance, such treatment is conducted pursuant to and in accordance with the procedures prescribed for the clinical trial of a medicine under the Part III of the Medicines and Allied Substances Control Act [*Chapter 15:03*]."

Section 248 does not provide for a mental disorder or defect being a complete defence. It provides for consent to medical treatment for non-therapeutic

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purposes. It is therefore not the provision intended by the legislature in s 29(2) of the Mental Health Act. The legislature clearly intended to refer to a section of the Code which provides for a mental disorder or defect being a complete defence. There is no doubt in my mind that a wrong section was referred to in s 29(2) of the Mental Health Act. There is therefore an error of reference. The intention of the legislature was obviously to refer to the section which provides that a mental disorder or defect can be a complete defence. A reading of the Code reveals that s 227 of the Code deals with that issue. It provides as follows:

"227 Mental disorder at time of commission of crime

(1) The fact that a person charged with a crime was suffering from a mental disorder or defect when the person did or omitted to do anything which is an essential element of the crime charged shall be a complete defence to the charge if the mental disorder or defect made him or her –

(*a*) incapable of appreciating the nature of his or her conduct, or that his or her conduct was unlawful, or both; or

(*b*) incapable, notwithstanding that he or she appreciated the nature of his or her conduct, or that his or her conduct was unlawful, or both, of acting in accordance with such an appreciation.

(2) For the purposes of subsection (1), the cause and duration of the mental disorder or defect shall be immaterial.

(3) Subsection (1) shall not apply to a mental disorder or defect which is neither permanent nor long-lasting, suffered by a person as a result of voluntary intoxication as defined in section *two hundred and nineteen*."

It is apparent that s 227 of the Code is the section which provides that the fact that an accused person was suffering from a mental defect or disorder at the time he or she does anything which is an essential element of a crime charged, shall be a complete defence to the charge. The contents of Dr Madhombiro's affidavit, which were fully endorsed by Dr Chibanda and F on which counsel for the accused premised his application for discharge, squarely falls within the provisions of s 227 of the Code The issue which remains to be resolved is whether this court can substitute s 248 of the Code with s 227 of the Code in s 29(2) of the Mental Health Act. Counsels for the State and the accused submitted, without citing authorities, that the court can do so as the intention of the legislature is clear, and reference to s 248 was G an obvious error. I agree with them, since in interpreting a statute the court must be guided by the clear intention of the legislature. Case law confirms that when the words used by the legislature create an absurdity they can be modified to bring out the clear intention of the legislature. In *Skinner* v *Palmer* 1919 WLD 39 at 44-45 Ward J said:

H "I take these two examples as showing that if a proper case arose, the court could

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delete one word and read in another. But the court will not reject a word of clear A meaning unless it is forced to do so … In *Laird* v *Briggs* an entirely different word was suggested. It seems to me to be authority for saying that if I am forced to the conclusion that the word 'fifty-eight' should be read for 'fifty-nine' I can so read it. But I cannot do so merely because I think the draughtsman made a mistake. I must be forced to the conclusion that the word 'fifty-nine' makes the clause nonsense, or that they are opposed to the clear meaning of the section." B

In the case of *Fernandez* v *SA Railways*, 1926 AD 60 at 66 Solomon JA said:

"The language of this regulation is certainly far from clear. In the case of *Behr* v *SA Railways and Harbours* 1925 AD 483, it was suggested that the word or is a mistake for on … The substitution of on for or would certainly make the regulation intelligible, which it certainly is not as it stands … In the circumstances I think that we should now definitely decide what was left open in *Behr's* case, and in C order to make the regulation intelligible, hold that the word or is a mistake for on and so give effect to what I am satisfied was the real intention of the framers of the regulation"

See also the South African case of Ex p *Min of Justice* In re *R* v *Jacobson & Levy* 1931 AD 466. The High Court dealt with the court's power to modify the language of a statute in *S* v *Karani* 1997 (2) ZLR 114 (H) at 115C-F D where Gillespie J said:

"As was said by Schreiner JA in *Durban City Council* v *Gray* 1951 (3) SA 568 (A) at 580B:

> '[It] is within the powers of a court to modify the language of a statutory provision where this is necessary to give effect to what was clearly the E legislature's intention.'

Such power is undisputed where slavish literalism:

> 'leads to an absurdity so glaring that it could never have been contemplated by the legislature, or if it leads to a result contrary to the intention of Parliament as shown by the context or by such other circumstances as the court is justified to take into account."

(*Per* de VilliersAJ in *Venter* v *R* 1907 TS 910 at 915). F

If the court were not able to supply the relevant correction of ss 54(4) and 55(5) then there would be no penalty enacted for the offences of contravening ss 54(2) and 55(2) of the Act. The punishments, considered in meticulous detail, and set out in ss 54(4) and 55(5) would be completely otiose since they would refer only to a non-existent offence. Such an absurdity cannot be permitted to stand in the light of the obvious intention. The reference in each subsection to 'an offence in G terms of subsection (1)' must be read as 'an offence in terms of subsection (2).'"

See also *Bennett NO* v *Master of the High Court* 1986 (1) ZLR 127 (H) at 130G-131A where Smith J said:

"According to the golden rule of interpretation of statutes, if there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. It is a H

A corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express."

I am satisfied that the legislature in this case said what it did not intend to say. The rest of its words in s 29(2) of the Mental Health Act clearly point to its having intended to refer to s 227 of the Code. Its reference to s 248 of B the Code is therefore a mistake which this court must correct to give effect to the clear intention of the legislature.

The Supreme Court has confirmed the court's power to modify the language of a statue. In *S* v *Aitken* 1992 (2) ZLR 84 (S) at 88G–89D Gubbay CJ said:

> "Even if I am wrong in ascribing the meaning I do to the term 'interlocutory', I C am nonetheless convinced that the legislature could not possibly have intended what that word signifies. On that ground alone this court would be justified in modifying the meaning. For to stand aside where the object and intention of the enactment are clear would be to allow it, contrary to good sense, to be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law. In this connection I can do no better than to echo, with approval, the observations by Denning LJ (as he then was) in *Seaford Court Estates Ltd* v *Asher* [1949] 2 All D ER 155 (CA) at 164 E-H:
>
> > 'Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. E This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen, have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of F it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.'
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> G To much the same effect are the remarks of Wessels ACJ in Ex p *Min of Justice:* In re *Jacobson & Levy* 1931 AD 466 at 476-477."

I am therefore satisfied that the State and defence counsel correctly submitted that this court must, in this case, substitute the reference in s 29(2) of the Mental Health Act to s 248 with a reference to s 227, as that was the clear H intention of the legislature. The reference to s 248 is clearly an error which

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this court must correct to give effect to the intention of the legislature. A

In view of the modification of s 29(2) of the Mental Health Act, the provisions of s 229 of the Code, become applicable to this case

Effect of section 229 of the Code

Section 229, which has already been quoted above, clearly states that nothing B in Part V of the Code shall affect the operation of the Mental Health Act in relation to the procedure to be followed when persons being tried are found to be mentally disordered or defective, or any verdict to be returned at such trial, or the detention, examination or treatment of persons found to be mentally disordered or defective. This, in my view, means that if at the end of the State case it has been proved that the accused killed his parents C and that he did so while suffering from a mental disorder or defect, then the accused person can not avoid the provisions of s 29(2) of the Mental Health Act. This is exactly what the prosecution did in this case, therefore the accused cannot be discharged in terms of s 198(3) of the CP&E Act. He must present his defence case to enable the court to arrive at a decision D on the verdict. In the result, the accused's application for discharge was dismissed and the trial was ordered to continue to enable the court to arrive at an appropriate verdict after hearing the defence's case.

Mr *Mpofu,* in his second alternative, submitted that the accused should be dealt with as a child in need of care. He however conceded that this could only be done if the court finds the option in s 29(2)(c) of the Mental Health E Act to be the appropriate option. This can, therefore, only be dealt with after a special verdict has been returned, and when consideration is being given as to which of the options under s 29(2) of the Mental Health Act is appropriate.

Further evidence

The accused was called to give evidence, in his own defence. He declined to F give evidence and refused to answer questions put to him by the prosecutor. The defence then led evidence from Dr Madhombiro, whose affidavit had already been accepted by consent when Dr Chibanda who gave evidence for the State was cross-examined on it. Dr Chibanda agreed with Dr Madhombiro's affidavit on the accused's mental state. They agree that he suffers from a G condition called temporal lobe epilepsy which renders him incapable of being responsible for his actions.

The State and the defence later advised the court that they were both satisfied that the court should return a special verdict in terms of s 29(2) of the Mental Health Act. We adjourned the proceedings to consider the parties' submissions on the retention of the special verdict. In view of the common evidence from H

Uchena J

A the expert witnesses of the State and the defence, we were satisfied that the parties' concessions as to the special verdict were properly made.

The remaining issue is on how to deal with the accused after returning the special verdict. The State urged the court to proceed in terms of s 29(2)(a) of the Mental Health Act, while the defence urged the court to proceed B in terms of s 29(2)(c) of the Mental Health Act. The defence relied on the evidence of Drs Chibanda and Madhombiro, as complemented by that of Jealous Gambiza, in urging the court to proceed in terms of s 29(2)(c). Jealous Gambiza is the Superintendent of Northcote Children's Home. He told the court of how the accused has been staying at the Home on remand, and the Home's willingness to continue looking after him after the passing C of the special verdict and his attaining the age of majority. The evidence of Yeukai, a probation officer, was admitted by the State. It was to the effect that if the court allows the accused to remain at Northcote Children's Home, she would on, his attaining the age of majority, apply for an order authorizing his continued stay at Northcote or any other institution.

D Mr *Mpofu* then made spirited submissions on why the court should not proceed in terms of s 29(2)(a) of the Mental Health Act, but urged the court to proceed in terms of s 29(2)(c). He relied on the evidence of Drs Chibanda and Madhombiro that sending the accused to Chikurubi Psychiatric Unit would be like signing his death warrant. They explained that their view was based on the existing conditions at that prison.

E Mr *Chikosha,* on the other hand, submitted that the accused should be returned to prison in terms of s 29(2)(a) of the Mental Health Act, because Northcote Children's Home does not have the capacity to look after him, as demonstrated by the incident in which the accused caused Tinashe to lose consciousness at the Home on 24 July 2009. He submitted that the incident demonstrates that the Home does not have the capacity to look after the accused.

F In my view, the issue does not depend on the willingness of the Home to look after the accused. It depends on what the law says should be done after a special verdict has been returned in respect of an accused person who has not yet recovered from his mental illness. The provisions of s 29(2) are clear G as to what should be done. The section provides as follows;

> "(2) If a judge or magistrate presiding over a criminal trial is satisfied from evidence, including medical evidence, given at the trial that the accused person did the act constituting the offence charged or any other offence of which he may be convicted on the charge, but that when he did the act he was mentally disordered or intellectually handicapped so as to have a complete defence in terms of section *two hundred and twenty-seven* of the Criminal Law Code, the H judge or magistrate shall return a special verdict to the effect that the accused

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Uchena J

> person is not guilty because of insanity, and may – A
>
> (*a*) order the accused person to be returned to prison for transfer to an institution or special institution for examination as to his mental state or for treatment; or
>
> (*b*) if the judge or magistrate considers that, had the accused person been convicted of the offence concerned, he would not have been sentenced to B imprisonment without the option of a fine or to a fine exceeding level three, order –

(i) the accused person to submit himself for examination and additionally, or alternatively, treatment in any institution or other place in terms of Part VI; or

(ii) the accused person's guardian, spouse or close relative to make an application for the person to be received for examination and C additionally, or alternatively, treatment in any institution or place in terms of Part VII or Part VIII;

and may give such orders as may be appropriate for the accused person's release from custody for the purpose of such examination or treatment; or

(c) if the judge or magistrate is satisfied that the accused person is no longer D mentally disordered or intellectually handicapped or is otherwise fit to be discharged, order his discharge and, where appropriate, his release from custody."

My understanding of s 29(2)(a) is that if the accused person still needs to be mentally examined or to be treated, he has to be returned to prison where he will be transferred to an institution or special institution for examination E or treatment. If the offence the accused person was facing and for which a special verdict has been retained was one for which the accused would not have been sentenced to imprisonment or a fine exceeding level three, then the accused can be released to be dealt with in terms of s 29(2)(b). That subsection is not appropriate in this case because, if the accused had been convicted of the two counts of murder, he would not have been sentenced F to a fine of or below level three.

Section 29(2)(c) only applies if the court is satisfied "that the accused person is no longer mentally disordered or intellectually handicapped or is otherwise fit to be discharged". In this case Dr Madhombiro said that the accused has not yet recovered from mental illness. He is still under treatment. He G will only refer him to the Special Review Board when he is satisfied of his recovery after a period of six months from the middle of July 2009. The accused is therefore still mentally ill. He is not fit for discharge. He therefore cannot be dealt with in terms of s 29(2)(c). The only option available to the court is s 29(2)(a). It must be invoked, despite the conditions at Chikurubi Psychiatric Unit described by Dr Chibanda. The condition of a prison does H

A not justify the court's refusal to send to prison those the law says must be sent there. In an ordinary case not under the Mental Health Act, the court would at most reduce the period of imprisonment in recognition of the hardship to be faced by the prisoner. In the case of a special verdict returned because of the accused's mental disorder, the court has to proceed in terms of the correct option. If the accused person has to be returned to prison in terms B of s 29(2)(a) of the Mental Health Act, the court must give that order and leave administrative issues to the institution.

It must be stressed that the institution to which an accused on whom a special verdict has been returned must be transferred to by the Prisons Department, is one which is an "institution" as defined in s 2 of the Mental Health Act. C An institution is defined therein as "any mental hospital which the Minister, by notice in the *Gazette*, has declared to be an institution for the purposes of this Act". It is therefore clear that the accused, who is still mentally ill, cannot be dealt with other than in terms of s 29(2)(a) the Mental Health Act. Mr *Mpofu* did not indicate whether or not Northcote Children's Home is an institution in terms of the Mental Health. Act. In the absence of that D information, it can not be considered to be an institution to which the accused can be transferred to in terms of s 29(2)(a) of the Mental Health Act. On being returned to prison the accused must be transferred to a designated institution or a special institution. The accused must therefore be returned to prison, pending transfer to a designated institution or special institution.

E In the result the accused is found not guilty because of insanity and is returned to prison to be dealt with in terms of s 29(2)(a) of the Mental Health Act.

Attorney General's Office, Criminal Division, State's legal practitioners

F *Mawere & Sibanda*, accussed's legal practitioners

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MUTANGADURA v TS TIMBER BUILDING SUPPLIES 2009 (2) ZLR 424 (H)

Citation	2009 (2) ZLR 424 (H)
Case No	Judgment No. HH-146-09
Court	High Court, Harare
Judge	Patel J
Heard	16 June 2009;19 June 2009
Judgment	24 November 2009
Counsel	*F B Chirimuuta* for the plaintiff *T S Majengwa* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract – *impossibility – supervening impossibility alleged by non-performing party – when party may be relieved of obligations on grounds of impossibility – temporary impossibility – does not relieve party of obligations – plaintiff entitled to specific performance and a monetary award of damages in the alternative* D

Contract – *breach – damages – mitigation – plaintiff entitled to be placed in the position he would have been but for defendants breach of the contract – plaintiff not obliged to accept an offer which would result in a monetary loss due to hyper-inflation* E

Headnote

The plaintiff brought an action of specific performance against the defendant claiming delivery of 1200 bags of cement or, in the alternative, the sum of $11400, being the current market value of the cement. Rejecting the defendant's argument to the contrary, the court came to the conclusion that in July 2007, the parties had indeed entered into a binding agreement F for the sale and delivery of the cement. The parties intended delivery to be made in early August 2009. Thereafter the plaintiff had paid the full purchase price by instalments. By the end of August, however, the defendant was no longer able to obtain delivery of the cement from its own suppliers and could not, therefore, supply the plaintiff therewith in terms of the contract. It notified plaintiff accordingly. G

On 1 October 2007, and in response to a letter of demand from the plaintiff, the defendant offered to refund him the purchase price, expressed in the old Zimbabwean currency, which offer the plaintiff refused, because, in a time of hyper-inflation, the offer, if accepted, would be insufficient to buy 1200 bags of cement. Among the arguments raised by defending counsel in opposing the action was the submission that the inability of H

A own suppliers to provide it with the cement amounted to a supervening impossibility which had the effect of extinguishing its contract with the plaintiff. The evidence, however, revealed that, after this initial unavailability of cement, cement did became available once again later in

October 2007. The defendant also submitted that, in refusing its offer of a refund of the purchase price on 1 October 2007, the plaintiff had B failed to mitigate his damages and must, therefore, bear a reduction in the quantum of his alternative monetary claim.

Held, that where a supervening or legal factor renders the performance of a contract impossible through no fault of the debtor, the obligations of the parties under the contract are thereby extinguished and cannot be C enforced. However, this general principle does not apply where a party is only temporarily disabled from fulfilling his contractual obligations.

Held, further, that in any event there was nothing to have prevented the defendant from delivering the cement in early August 2009, when delivery should have been made. Upon either basis, the defence of supervening impossibility could not be sustained.

D *Held*, further, that there was no basis for holding that the plaintiff had failed to mitigate his damages. He was entitled to be placed in the position he would have been in had defendant not been in breach of the contract. His rejection of the defendant's offer of a refund was completely justifiable at the material time because of the hyper-inflationary situation which E then existed.

Held, further, that as the defendant, upon whom the onus lay, had not advanced any satisfactory reason for not ordering specific performance, the plaintiff was entitled to be granted his main relief. It was also just and equitable that, in the alternative, he be award damages in the sum of $11 400 as claimed.

Cases cited F

Beretta v Rhodesia Railways Ltd 1947 SR 48; 1947 (2) SA 1075 (SR)

Beitbridge-Bulawayo Rly (Pvt) Ltd v Commercial Union Ins Co of Zimbabwe Ltd 2008 (1) ZLR 207 (S)

G *Bekker NO v Duvenhage* 1977 (3) SA 884 (E)

Bischofberger v van Eyk 1981 (2) SA 607 (W)

Field NO & Anor v Compuserve (Pvt) Ltd 1990 (2) ZLR 253 (H)

Intercontinental Trading (Pvt) Ltd v Nestlé Zimbabwe (Pvt) Ltd 1993 (1) ZLR 21 (H)

Case information

H *F B Chirimuuta* for the plaintiff

Patel J

T S Majengwa for the defendant A

Judgment

PATEL J: The plaintiff in this case claims the delivery of 1200 bags of PC 15 cement or, in the alternative, damages for breach of contract equivalent to the current market value of the cement, being US$11 400, and costs of suit.

The defendant resists the claim on several grounds, to wit, that delivery of B the cement was conditional on the defendant receiving the same from its supplier, that it was unable to deliver due to supervening impossibility and that it is no longer able to deliver the cement and has offered a refund to the plaintiff in the sum of ZW$336 million.

Evidence for the plaintiff C

Elliot Mutangadura, the plaintiff, testified as follows. In July 2007 he approached the defendant to purchase various building materials. The defendant then submitted a quotation on 18 July 2007 listing those materials that it was able to supply, including the cement in question. At that time, PC 15 cement was available on the market and also in defendant's warehouse D (though he was not aware of the quantity thereof). This was confirmed by the defendant's branch manager (Mavengere) as well as its sales manager (Jongwe) without any condition as to having to await delivery from the defendant's suppliers. The plaintiff then paid the full purchase price for all the materials in six

instalments amounting to $3.51 billion, as was confirmed in a letter from Jongwe dated 30 August 2007. In that letter, Jongwe also E confirmed that "we had promised delivery early August". The defendant thereafter delivered all the purchased items, save for the cement.

On 19 September 2007 Mavengere wrote a letter stating that the defendant was "unable to supply PC 15 Cement as per agreement" and offered to supply masonry or other building materials equivalent to the amount paid. F The plaintiff rejected the offer as the PC 15 cement was specifically required for the building work in question.

On 21 September 2007 the plaintiff's lawyers wrote a letter of demand to the defendant. In response, on 1 October, the defendant's lawyers offered a refund of the original purchase price of $336 million [Exhibit 4]. The plaintiff G rejected this offer through a letter from his lawyers on 9 October because the money tendered was insufficient to pay for 1200 bags of cement at that time.

Subsequently, from October 2007 to June 2008, the plaintiff sourced 1200 bags of cement on loan from his uncle's hardware business. The return of the cement borrowed is now overdue. The requisite PC 15 cement is currently available on the market at US$9.50 to US$10 per bag. H

Patel J

A **Evidence for the defendant**

Thomas Jongwe was the sales manager of the defendant's Harare branch at the relevant time. His evidence was as follows. Before giving the original quotation to the plaintiff on 18 July 2007, he made enquiries with the defendant's suppliers and told the plaintiff that PC 15 cement was available B for supply to the plaintiff. However, before the first payment was received on 20 July, he verbally informed the plaintiff that the cement was not immediately available and would be sourced from Unichem, a supplier in Bulawayo. He then placed an order for 1200 bags with Unichem on 31 July. Unichem did not have any clinker, a critical raw material in cement, and he verbally informed the plaintiff of that fact.

C The plaintiff made six payments in all, from 20 July to 16 August 2007, as shown on the receipts therefor. There was no indication on the receipts as to the specific items paid for. The payments were made towards the total quotation amount, with appropriation in respect of each item being made at the time of invoicing. No invoice was raised for the cement as it was not in stock to deliver. In accordance with the defendant's internal accounting D system, an invoice is raised after payment is received and is given to the customer at the delivery point as a delivery note.

Under cross-examination, Jongwe accepted that by the date of the last payment on 18 July 2007, the plaintiff had discharged his obligation under the contract. He also conceded that he made enquiries with the defendant's E suppliers and made certain that the cement was available before issuing the quotation to the plaintiff. He further confirmed that PC 15 cement is presently available on the market.

Issues for determination

The agreed issues for determination herein are as follows:

F (a) What terms and conditions were agreed to or can be implied from the contract concluded between the parties?

(b) Whether the defendant is liable for specific performance in terms of the contract.

(c) What amount of compensation, if any, is the defendant liable to pay to G the plaintiff?

Terms and conditions of contract

The evidence before the court shows that after the plaintiff initially approached the defendant, its sales manager, Thomas Jongwe, made enquiries with the defendant's suppliers and received positive confirmation as to the availability H of PC 15 cement. Jongwe then made out the quotation and upon handing

Patel J

it to the plaintiff on 18 July 2007, gave a firm assurance that the cement A would be delivered in early August. At that time, the defendant did not, as it contends, stipulate any condition as to the fulfilment of the contract being subject to delivery from its suppliers. Thereafter, the plaintiff paid the full amount of the quotation in six instalments, beginning on 20 July and finishing on 16 August 2007. The defendant only raised the non-availability B of PC 15 cement from its suppliers over one month after full payment had been made and received.

All the payments made by the plaintiff were towards the total quotation and not towards any specific materials thereon. The defendant's invoicing process involved the appropriation of the amounts paid to particular items as and when delivery was effected and the invoices served as delivery notes. C However, this was quite clearly a process that was internal to the defendant's accounting system and totally irrelevant to the conclusion of the contract between the parties.

It is quite clear from the foregoing that the contract *in casu* was concluded unconditionally on 20 July 2007 when the defendant accepted the plaintiff's D first instalment as part payment towards the entire quotation, including the PC 15 cement. The terms and conditions of the contract were that the defendant would deliver the cement in early August against payment by the plaintiff of the full amount of the quotation in instalments. In effect, the parties concluded an unconditional and binding contract for the supply of 1200 bags of cement to the plaintiff in early August 2007. E

Specific Performance and Supervening Impossibility

The defendant avers that at the end of August 2007 it was unable to source PC 15 cement from its suppliers because a requisite component (clinker) was not available at that time. It therefore contends that this market factor constituted a supervening event rendering impossible the performance of F the contract for the supply of PC 15 cement.

It is trite that a party to a binding agreement has the right to demand from the other party, as far as it is possible, performance of his undertaking in terms of the contract where he is in a position to do so. Such specific performance can only be avoided in compelling circumstances. In this respect, the onus G lies on the party seeking to avoid the contract to establish the facts and circumstances justifying the court's exercise of its discretion to refuse specific performance. See *Intercontinental Trading (Pvt) Ltd v Nestlé Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H) at 28.

The general rule in our law is that, if a supervening physical or legal factor renders the performance of a contract impossible through no fault of the debtor, H

Patel J

A the obligations of the parties under the contract are thereby extinguished and cannot be enforced. See *Beitbridge-Bulawayo Railway (Pvt) Ltd* v *Commercial Union Insurance Company of Zimbabwe Ltd* 2008 (1) ZLR 207 (S). However, this general rule does not override the terms of the implications of the contract. The court must have regard to, *inter alia*, the nature and circumstances of the contract and the nature of the impossibility that is relied upon. If, for instance, B it is ascertained that the parties contemplated the situation that gives rise to the impossibility and accepted the risk of the supervening event, the general rule does not apply and the parties are bound to perform their contract. See *Beitbridge-Bulawayo Railway supra*; *Bekker NO* v *Duvenhage* 1977 (3) SA 884 (E) at 888; *Bischofberger* v *van Eyk* 1981 (2) SA 607 (W) at 610-611; C Christie *The Law of Contract in South Africa* 3 ed at 527.

There is a further situation, more pertinent to the facts *in casu*, where the general rule does not override the obligation of the parties to perform their contract. This arises where a party is only temporarily disabled from fulfilling his contractual obligations, in contradistinction to the position where the contract becomes finally and completely impossible of performance. See D *Field NO & Anor* v *Compuserve (Pvt) Ltd* 1990 (2) ZLR 253 (H) at 260, citing *Beretta* v *Rhodesia Railways Ltd* 1947 SR 48; 1947 (2) SA 1075 (SR) at 1078 as follows:

> "The law is clear that when a contract becomes finally and completely impossible of performance by reason of an act of State it is discharged. *Peters Flamman & Co* v *Kokstad Municipality* 1919 AD 427. But this does not cover the situation E in which one party is temporarily disabled from fulfilling his obligation.
>
> It is nowhere suggested that the immediate effect of such temporary disability is to end the contract, and this is not surprising, for any such suggestion would involve consequences so extreme as to be unthinkable."

On the evidence before the court, there is nothing to indicate that the non- F availability of clinker on the market was permanent and irreversible. According to Jongwe's testimony, this non-availability only occurred towards the end of August 2007 when the defendant's suppliers intimated their inability to supply PC 15 cement. This would mean that the defendant was merely temporarily unable to source the 1200 bags of cement and deliver the same to the plaintiff. Certainly, there was no evidence adduced to contradict the G plaintiff's testimony that PC 15 cement was available on the market from October 2007 onwards. In any event, the shortage of clinker on the market occurred one month after the promised date of delivery and, therefore, it could not and should not have affected the defendant's undertaking to deliver the cement to the plaintiff in early August 2007.

H It follows that the defendant's defence of supervening impossibility cannot be

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sustained, either at the time when delivery of the cement was to be effected A as contemplated by the parties , i.e. in early August 2007, or at any time from October 2007 onwards, when cement was available on the market. It also follows that the defendant has failed to establish any basis for declining specific performance and must, therefore, be held bound to its undertaking to deliver PC 15 cement to the plaintiff. B

Quantum of damages

Assuming that I am wrong in finding that the plaintiff is entitled to claim specific performance on the facts *in casu*, it is necessary to consider the measure of damages properly due to the plaintiff. In this regard, the defendant submits that the plaintiff should have accepted the refund that was tendered C by the defendant in October 2007. By refusing to accept that refund, so it is argued, the plaintiff has failed to mitigate his damages and must therefore bear the penalty of a commensurate reduction in the quantum of damages to be awarded.

In my view, these submissions are devoid of merit for several reasons. It cannot be disputed that the plaintiff's entitlement to damages must entail him D being placed in the position he would have been in but for the defendant's breach of contract. The plaintiff's unchallenged evidence was that, in order to complete his building project, he borrowed the requisite cement and presently remains obligated to replace the borrowed cement. More particularly, he rejected the defendant's offer to refund the purchase price originally paid E specifically because the amount tendered would not have placed him in the position he was in at the time that the contract was concluded due to the hyperinflationary economic environment that prevailed at that time. No evidence was adduced on behalf of the defendant to counter the plaintiff's testimony in the above respects.

I accordingly find that the plaintiff did endeavour to mitigate his loss and that F his rejection of the refund offered by the defendant was perfectly justifiable at the material time. Moreover, it is common cause that the plaintiff duly performed his contractual obligations and that the defendant has remained in possession and beneficial use of the money paid by the plaintiff for the cement. It also not disputed that the current minimum price for cement is G US$9.50 per bag.

In the final analysis, the law requires that the plaintiff be put in a position to purchase the cement that he requires at the current minimum market price in order to meet his obligation to replace the cement that he has borrowed. He is, therefore, entitled to the measure of damages that he claims in the alternative. H

A **Disposition**

Although the plaintiff's claim for damages was originally framed as an alternative in the event of the claim for specific performance being refused, I believe that it would be just and equitable at this juncture, having regard to the facts of this case and the circumstances of both parties, to grant both an order for specific performance and damages as alternative remedies.

B In the result, judgement is hereby entered in favour of the plaintiff as against the defendant for:

(i) the delivery of 1200 bags of PC 15 cement within 7 days of the granting of this order or, alternatively, the payment of damages for breach of contract in the sum of US$11 400, being the current market value of C 1200 bags of PC 15 cement; and

(ii) costs of suit.

Chirimuuta & Associates, plaintiff's legal practitioners

D *Wintertons*, defendant's legal practitioners

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S v HUNI & ORS 2009 (2) ZLR 432 (H)

Citation	2009 (2) ZLR 432 (H)
Case No	Judgment No. HH-147-09
Court	High Court, HararE
Judge	Kudya J
Heard	25 November 2009
Judgment	25 November 2009
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *general principles – multiple counts – treating as one for sentence – mandatory minimum sentence applicable on each count – not competent to treat counts as one for sentence – permissible to order sentence on one count to run concurrently with sentence on other count or counts* D

Headnote

The accused were each convicted of more than one count of stock theft. No special circumstances having been found, a minimum sentence of nine years' imprisonment was mandatory, in terms of s 114(2)(e) of the Criminal Law Code [*Chapter 9:23*]. The magistrate ordered that the counts against each accused be treated as one for sentence. On review: E

Held, that in the absence of special circumstances an accused person must be sentenced to an effective mandatory minimum sentence of nine years for each count that he is convicted of. Where the accused person has been convicted on more than one count, to treat both or all of them as one for the purposes of sentence defeats the clear intention of the legislature, F that there should be an effective mandatory minimum penalty of nine years per count. The options

available to the trial magistrate were either to impose an effective minimum sentence of nine years' imprisonment per count and order the accused person to serve the arithmetical total or to impose the minimum mandatory sentence on each count and order both or one or more to run concurrently with each other or the others. G The result will always be that the total effective sentence would be a multiple of nine years.

Cases cited

S v Hove 1981 ZLR 610 (H)

S v Pearce 1975 (1) RLR 10 (G); 1974 (2) SA 37 (R) H

Kudya J

A *S v Sabawu & Anor* 1999 (2) ZLR 314 (H)

S v Sithole HH-66-94

S v Tarwirei GS-350-1981

Legislation considered

B Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 114 (2)(e) & (4)

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 343 (1) & (2)

Judgment

KUDYA J: These three records of proceedings were presided over by the same magistrate at Murewa magistrates court and raise the same issue. The C issue that arises is whether a magistrate can treat more than one count of theft of bovine or equine as one for sentence.

Each accused person was correctly convicted on his own plea of guilty of the theft of bovine in contravention of s 114(2)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The trial magistrate properly D canvassed the question of special circumstances and correctly found them absent in each case, respectively.

Tobias Huni stole one black cow and one brown heifer on 4 January and 10 March 2009 respectively, from two different complainants. The cow, valued at US$ 200 and the heifer, valued at US$150 were recovered. On 20 March 2009, both counts were treated as one for sentence and he was sentenced E to fourteen years'imprisonment of which four years was suspended for five years on condition he did not commit any offence involving dishonesty for which he was sentenced to imprisonment without the option of a fine.

Brighton Chinyerere was convicted of two counts of theft of bovine on 5 and 16 April 2009 from two different complainants. In each count he stole F a heifer valued at US$150, respectively. Both heifers were recovered. On 19 May 2009, both counts were treated as one for sentence and he was sentenced to nine years'imprisonment.

James Simbi and Mike Griya Katandika jointly stole a heifer and two oxen at different times from three complainants on 6 and 9 June 2009, respectively. They drove each animal to a nearby mountain where they slaughtered it. They G were both arrested in Harare selling the meat. The heifer was valued at US$150 while the oxen were valued at US$250 and US$150 respectively. The heifer was not recovered while meat valued at US60 and US$50 was recovered from the oxen respectively. On 15 June 2009 all three counts were treated as one for sentence. James Simbi was sentenced to 15 years'imprisonment H of which three years was suspended for five years on condition of future

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Kudya J

good conduct, while the 22-year-old Mike Griya Katandika was sentenced A to 13 years, of which three years was suspended on similar conditions as for his 37-year-old uncle. The trial magistrate treated them differently on the basis of the differences in their ages. He took the view that the uncle influenced the nephew to commit the two crimes. In my view, there was no basis for

differentiating the penalties between the two, as their moral B blameworthiness was the same. There was no evidence that the nephew acted under the pervasive influence of his uncle.

The penalty provided for the theft of a bovine animal in the absence of special circumstances is set out in s 114(2)(e) of the Criminal Law Code, *supra.* It reads thus: C

> "(e) If the stock theft involved any bovine or equine animal stolen in the circumstances described in paragraph (a) or (b), and there are no special circumstances in the particular case as provided in subsection (3), to imprisonment for a period of not less than nine years or more than twenty-five years;"

Paragraph (e) above must be read in conjunction with s 114(4), *supra*, which D provides as follows:

> "(4) A court sentencing a person under paragraph (e) of subsection (2) –
>
> (*a*) to the minimum sentence of imprisonment of nine years, shall not order that the operation of the whole or any part of the sentence be suspended;
>
> (*b*) to imprisonment in excess of the minimum sentence of imprisonment of nine years, may order that the operation of the whole or any part of the E sentence exceeding nine years be suspended."

The import of these provisions is that in the absence of special circumstances an accused person will be sentenced to an effective mandatory minimum sentence of nine years for each count that he is convicted of. Where the accused person has been convicted of more than one count, to treat both or F all of them as one for purposes of sentence defeats the clear intention of the legislature for the imposition of an effective mandatory minimum penalty of nine years per count.

In *S* v *Tarwirei* GS-350-81 Pittman J, with the concurrence of Waddington J reviewed a judgment where the trial magistrate convicted the accused person of three separate counts of theft of cattle and treated all counts as G one for sentence before imposing the mandatory minimum sentence of nine years'imprisonment. At p 1 of the judgment he stated that:

> "It is clear that the wording of s 8A requires that the minimum sentence of 9 years'imprisonment shall be imposed for each such theft, and consequently it was not competent for the magistrate to treat the three separate offences as one for sentence." H

Kudya J

A It seems to me therefore that it was incompetent for the trial magistrate to treat the separate counts in each of the three cases in question as one for sentence.

The options available to the trial magistrate were either to impose an effective minimum sentence of nine years'imprisonment per count and order the accused person to serve the arithmetical total or to impose the minimum B mandatory sentence on each count and order both or one or more to run concurrently with each other or the others the result being always that the total effective sentence would be a multiple of nine. That the sentences may run concurrently is supported by the sentiments of Beadle CJ in *S* v *Pearce* 1974 (2) SA 37 (R) at 38A-B where the learned Chief Justice stated that:

> "I draw attention to the fact that sentences on two separate counts each carrying a C minimum sentence of imprisonment can, and often are, made to run concurrently with each other, and a portion of the sentence of imprisonment on a minor offence can, and often is, ordered to run concurrently with a minimum sentence of imprisonment imposed on a more serious offence.'

See also subss (1) and (2) of s 343 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the successor to s 319 of the Criminal Procedure and D Evidence Act [*Chapter 59 of 1974*].

In the light of the misdirections perpetrated by the trial magistrate I am at large on sentence. I have the power on review to set aside the erroneous sentence and impose a new sentence that may result in the increase of the erroneous one that had been imposed by the trial magistrate.

. E In *S* v *Sabawu& Anor* 1999 (2) ZLR 314 (H) at 318D-E Chatikobo J, with reference to *S* v *Hove* 1981 ZLR 610 (H), concluded that "the verdict was altered to the more serious offence and the mandatory sentence was brought into effect." In *Hove*'s case, *supra*, Gubbay J, as he then was, stated at 612D -613C that:

> F "But where a mandatory sentence or some other form of mandatory order is required, the position, in my opinion, is different. This is because the validity of any such sentence or order stems from, and is dependent upon, the nature of the conviction which precedes. Any consequent increase in the punishment takes place, therefore, by operation of law. See *R* v *Froneman & Froneman,* 1941 TPD 74 at 79. Indeed, it

is difficult to suppose that where the conviction has to be altered, an incompetent sentence must be allowed to stand on account G of the original error. Support for this interpretation is to be found in proviso (i) to s 29(2)(b)(ii), which allows for the substitution of a sentence of imprisonment in place of a fine, where the enactment under which the accused was convicted does not permit of the imposition of a fine. As this must apply equally where a minimum period of imprisonment is provided, the result would be extraordinary if the minimum period could be substituted where a fine, but not a lesser term H of imprisonment, was wrongly imposed.

2009 (2) ZLR p436

Kudya J

The same conclusion is reached by having recourse to s 29(2)(b)(iii) of the Act, A which empowers the High Court to –

> 'generally give such judgment or impose such sentence or make such order as the inferior court or tribunal ought in terms of any law to have given, imposed or made....'.

In the instant case, the inferior court *ought* to have convicted the accused of contravening s 3(1) of the Precious Stones Trade Act, instead of an attempt B to do so, and *ought* to have imposed a sentence of not less than the minimum prescribed. By correcting the verdict to guilty of a more serious offence, and thereby averting an injustice to the State, I will merely be doing what the magistrate ought to have done in the first place. If he had done so, he would have imposed the compulsory sentence. I am fortified in this view by the decision in *R* v *Matsebe* 1949 (4) SA 55 (T), in which Ramsbottom, J (as he C then was), on review, changed a conviction under s 1 of the Stock Theft Act, 1923, to one of stock theft (a more serious crime). The sentence of six months' imprisonment was ordered to stand, but a mandatory compensatory fine was added, with an alternative of further imprisonment. See, also, *R* v *Kandu* 1949 (4) SA 329 (SWA) at 331.

For these reasons, the conviction is altered to guilty as charged, and a sentence D of three years' imprisonment with labour substituted. The trial magistrate is directed to explain the effect of this judgment to the accused."

See also *S* v *Sithole* HH-66-94 where Mtambanengwe J, with the concurrence of Chidyausiku J, as he then was, set aside the financial penalty that had been imposed for possession of a firearm and imposed on review the mandatory minimum sentence of five years'imprisonment E.

In exercising the powers that the trial magistrate should by operation of law have exercised, the overall sentence that I will impose will result in the reduction of the effective sentence imposed on Tobias Huni by one year; a standstill position for Brighton Chinyerere and an increase to eighteen years for James Simbi and Mike Griya Katandika F .

The sentence imposed on Tobias Huni is set aside and substituted by the following:

Count 1 - 9 years'imprisonment

Count 2 - 9 years'imprisonment

The 9 years in count 2 shall run concurrently with the period in count 1 G

Total effective sentence: 9 years'imprisonment.

The sentence imposed on Brighton Chinyerere is set aside and substituted by the following:

Count 1 - 9 years'imprisonment

Count 2 - 9 years'imprisonment H

2009 (2) ZLR p437

Kudya J

A The 9 years in count 2 shall run concurrently with the period in count 1

Total effective sentence: 9 years'imprisonment.

The sentence imposed on James Simbi and Mike Griya Katandika is set aside and substituted with the following:

Each accused:

B Count 1 - 9 years'imprisonment

Count 2 - 9 years'imprisonment

Count 3 - 9 years'imprisonment

The 9 years'imprisonment in count 3 shall run concurrently with the period in count 2

C Total effective sentence -18 years'imprisonment.

The trial magistrate is directed to recall each accused person and explain to him the effect of this judgment.

D CHITAKUNYE J agrees.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/SOUTHBAY REAL ESTATE (PVT) LTD v SOUTHBAY PROPERTIES (PVT) LTD & ORS 2009 (2) ZLR 438 (H)

SOUTHBAY REAL ESTATE (PVT) LTD v SOUTHBAY PROPERTIES (PVT) LTD & ORS 2009 (2) ZLR 438 (H)

Citation	2009 (2) ZLR 438 (H)
Case No	Judgment No. HH-150-09
Court	High Court, Harare
Judge	Makarau JP
Heard	3 September 2009; 9 September 2009
Judgment	25 November 2009
Counsel	*O Mushuma*, for the applicant *S A Tawonga*, for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Company – *name – changing of – application to compel company to change its name – grounds for such application – who may make application – no need to show that use of name amounts to passing off* D

Company – *name – registration of company name – Registrar's decision – procedure for impugning such decision*

Practice *and procedure – application – domestic remedies not exhausted – court's discretion – domestic tribunal showing no inclination to deal with matter – party entitled to approach court for redress* E

Headnote

The jurisdiction of the High Court over all matters and people in the country is not ousted save by the clearance language in a statute. The court may, in its discretion, withhold its jurisdiction to allow an inferior tribunal to complete its processes. Generally speaking, where domestic remedies are capable of providing effective redress, a litigant should exhaust F those remedies unless there are good reasons for not doing so. Where an official who could deal with a matter shows a clear disinclination to do so, there would be good reason for approaching the court for relief.

Once the Registrar of Companies makes a decision to register a name in terms of the Companies Act [*Chapter 24:03*], such an exercise, being a G juristic act, cannot be impugned by the High

Court save by way of an appeal in terms of s 24(11) of the Act or by way of review at common law. The registration of names in terms of the Act is a function in the exclusive discretion of the Registrar, such discretion to be exercised not only in terms of the guidelines set out in the Act but also judiciously. It is thus a quasi-judicial exercise that confers not only corporate status H

A on the company so registered, but also creates a new legal *persona*.

The principles of the law of passing off are well settled. They seek to protect business from unfair competition where one business entity seeks to feather its nest from the goodwill and reputation built up by the plaintiff business enterprise through confusing the public. The public must be misled to such an extent that they mistake one business venture for the B other and take away the business of the reputation holder to the imposter.

The statutory remedy of compelling a competitor company to change its name under s 24 of the Act is akin to, but not the same as, the delict of passing off. The right to protect a name under the delict of passing off arises only when the name has acquired a reputation. Under the statute, C however, all that the applicant needs to prove is that the respondent's name is likely to mislead the public or gives so misleading an indication of the nature of its activities as to be likely to cause harm to the public or is likely to cause damage to any other person. Such an applicant need not prove that it has a reputation or goodwill or a clientele that will be confused by the similarities in names. The emphasis of the section is the D protection of the public from being misled, rather than the protection of the applicant company's good name and business against competition. This approach is confirmed by s 24(13), which gives the right to *any* person to approach the court to compel a change of name on the grounds listed in the section. A member of the public thus could approach the E court under the section. It would be absurd to require such an applicant to satisfy the requirements of a passing off action by showing that he has a reputation or goodwill to protect. The section is primarily enacted for the protection of the public. Thus, if it is proved that the public is likely to be misled, the application to compel the respondent should succeed even if the respondent has no intention of engaging the public.

Cases referred to F

F W Woolworth & Co (Zimbabwe) Ltd v The W Store & Anor 1998 (1) ZLR 93 (H); 1999 (2) SA 887 (ZH)

Girjac Services (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243 (S)

Kellogg Co v Cairns Foods Ltd 1997 (2) ZLR 230 (S)

G *Musara v Zinatha* 1992 (1) ZLR 9 (H)

Tutani v Min of Labour & Ors 1987 (2) ZLR 88 (H)

Legislation considered

H Companies Act [*Chapter 24:03*], s 24(2), (11) & (13)

Makarau JP

Case information

O Mushuma, for the applicant A

S A Tawonga, for the respondents

Judgment

MAKARAU JP: On 7 January 2009, the applicant filed this application seeking an order compelling the first respondent to change its name within six weeks of the granting of the order. In its founding affidavit, the applicant B averred that it was duly registered by the third respondent on 26 October 2006. On 12 November 2008, it came to its attention that the third respondent had registered the first respondent, whose name is identical to its own.

The applicant further averred that, on 14 November 2008, it wrote to the third respondent objecting to the registration of the first respondent on the basis that their two names were identical and pointing out that the first C respondent's main line of business was also real estate. No response was elicited by this letter although, in consequence to a follow up on the letter, the third respondent wrote to the first respondent bringing to its attention the objection and the basis of the objection and gave a copy of this letter to the applicant. D

In opposing the application, the second respondent deposed to an affidavit on behalf of the first respondent and also on his own behalf. In the affidavit, the first respondent indicated, by way of giving a historical background to the dispute, that as far back as 2001, the promoters of the first respondent had registered a company by the name Southbay Investments (Pvt) Ltd. The E promoter was therefore the first to use the prefix "Southbay".

In 2006, the applicant changed its name from Vineyard Real Estate to its current name with the full knowledge of the existence of Southbay Investments (Pvt) Ltd. Objections were raised to the proposed change of name, to no avail.

Regarding the merits of the application, the first and second respondents argued that the applicant did not have goodwill in the name "Southbay", F denied that the first respondent had misrepresented to the public or caused any confusion in the public as to the distinction between the two companies as the first respondent was not trading as a real estate agency and had made no moves to be registered as such with the Estate Agents Council. Finally, the respondent argued that there is a big difference between the two companies G , such that the public will not be confused by the two registrations.

In the main, the second respondent argued that, since it was incorporated as a subsidiary to Southbay Investments (Pvt) Ltd, it was not meant to carry out real estate business but to manage the property portfolio of the parent company.

The third respondent did not oppose the application. H

2009 (2) ZLR p441

Makarau JP

A At the hearing of the matter, the first and second respondents took a point in *limine,* objecting to the jurisdiction of this court. Mr *Tawona* for the respondents argued that the matter was before the third respondent to whom a letter of objection had been addressed by the applicants and who to all intents and purposes, was still seized with the matter. He argued that the process started by the parties before the third respondent should be completed before the B court exercises its jurisdiction in the matter.

On the turn, I dismissed the point *in limine* and indicated that my reasons would follow.

The jurisdiction of this court over all matters and people in Zimbabwe is a power inherent in the court as the only superior court in the land with unlimited C jurisdiction at first instance. It is not ousted save by the clearest language in a statute. In instances where this court has concurrent jurisdiction with other bodies and tribunals set up by law, this court may, in its discretion, withhold its jurisdiction to allow the inferior tribunal to complete its processes. The court has at times withheld its jurisdiction to allow domestic and statutory remedies to be exhausted. The test as to when this court will withhold its D jurisdiction is, in my view, well settled. In a judgment that has since been endorsed by the Supreme Court, Mtambanengwe J observed in *Tutani* v *Minister of Labour & Ors* 1987 (2) ZLR 88 (H) at 95D that where domestic remedies are capable of providing effect redress in respect of the complaint and the unlawfulness alleged has not been undermined by the domestic E remedies themselves, a litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for not doing so. See *Girjac Services (Pvt) Ltd* v *Mudzingwa* 1999 (1) ZLR 243 (S).

Mr *Mushuma*, correctly in my view, observed that the third respondent in this matter has shown a clear disinclination to deal with the matter. He has been seized with the complaint since November 2008 and all he has done F is to address a single letter to the first respondent. When served with this application, he did not oppose it or at least indicate to the court that he is actively dealing with the matter and requires time to complete his processes. Thus, the statutory remedies have proved incapable of providing redress in the matter and the machinery set up to effect redress at the domestic level G may have compounded the cross-complaints brought by the parties about the two registrations.

On the basis of the above, I therefore held that the applicant had a good reason for approaching the court without first exhausting the statutory remedy.

I now turn to the merits of the application.

H Section 24 (2) of the Companies Act [*Chapter 24.03*] provides:

2009 (2) ZLR p442

Makarau JP

> "No name shall be reserved and no company shall be registered by a name A which is identical with that for which a reservation is current or with that of a registered company or a registered foreign company or a private business corporation registered under the Private Business Corporations Act [*Chapter 24:11*] or which so nearly resembles any such name as to be likely to deceive unless the registered company or registered foreign company or private business corporation, as the case may be, is in liquidation and signifies its consent to the B registration in such manner as the Registrar may require."

The applicant argues, firstly, that the registration of the first respondent was unlawful as it was done in contravention of this section. In other words, the applicant is arguing that the third respondent erred at law in registering the first respondent in contravention of the specific language used in the section. C

In my view, once the registrar makes a decision to register a name in terms of the Act, such an exercise, being a juristic act, cannot be impugned by this court save by way of an appeal in terms of s 24(11) of the Act or by way of review at common law. It is trite, in my view, that the registration of names in terms of the Act is a function in the exclusive discretion of the third respondent, such discretion to be exercised not only in terms of the D guidelines set out in the Act but also judiciously. It is thus a quasi-judicial exercise that confers not only corporate status on the company so registered bit also creates a new legal *persona*.

Thus, the decision by the third respondent is not one that can be set aside by this court exercising its own discretion in the matter outside the appeal E process set out in the Act and/or outside the inherent powers of this court to review and set aside in appropriate cases, decisions of inferior tribunals and quasi-judicial authorities.

The application before me is neither an appeal in terms of s 24(11) of the Act, nor a review at common law. I therefore cannot set aside the decision F of the registrar on any ground outside the above two processes.

It has not been argued before me that a registration in contravention of the section is void *ab initio* such that any person can approach this court for the registration to be set aside. See *Musara* v *Zinatha* 1992 (1) ZLR 9 (H).

It does not appear to me that it was the intention of the legislature to deem G void a registration in violation of s 24(2) of the Act. Firstly, there is no clear language to this effect in the law. Secondly, the law provides processes and remedies for redressing grievances arising out of registrations done in contravention of the section.

On the basis of the above, I decline to determine this issue in the present application. H

2009 (2) ZLR p443

Makarau JP

A Secondly, the applicant argues that in seeking an order from this court to compel the first respondent to change its name, it has approached this court not under the common law of passing off but under the provisions of s 24(13) of the Act which provides that:

> "(13) The court may at any time, on application by any person, order a company to change its name within such period as may be specified by the court on the B grounds that the name of the company —
>
> (a) is likely to mislead the public or gives so misleading an indication of the nature of its activities as to be likely to cause harm to the public; or
>
> (b) is likely to cause damage to any other person.".

The principles of the law of passing off are well settled, in my view. They C seek to protect business from unfair competition where one business entity seeks to feather its own nest from the good will and reputation built up by the plaintiff business enterprise through confusing the public. The requirements of the delict were well researched and discussed by Gillespie J in *F W Woolworth & Co*

(Zimbabwe) (Pvt) Ltd v *The W Store and Another* 1998 (1) ZLR 93 (H) at102 D where he describes the delict in the following terms:

> "'The wrong known as passing-off consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to a passing-off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of one is, or is concerned with, that of another': *per* Rabie JA *in Capital Estate &* E *General Agencies (Pty) Ltd & Ors* v *Holiday Inns Inc & Anor* 1977 (2) SA 916 (A) at 929.)
>
> The 'representation' referred to may be any act by one trader that is calculated to deceive or cause confusion between his goods or business and those of a rival. The act might include the adoption of a trade mark, a get-up or any distinguishing sign or slogan. Where a trader does use a mark so closely resembling that of F another as is calculated to cause confusion,
>
> 'A trader may be held to have impliedly represented that his goods are those of his rival or that they are connected in some way with his rival. If such conduct causes or is calculated to cause his rival damage, either in the form of diversion of custom or damage to or misappropriation of his goodwill, then the delict of passing-off is committed …': *per* Corbett CJ in *Royal Beech-Nut (Pty) Ltd* v G *United Tobacco Co Ltd* 1992 (4) SA 118 (A) at 122D."

See also *Kellogg Co* v *Cairns Foods Ltd* 1997 (2) ZLR 230 (S).

In my view, the statutory remedy of compelling a competitor company to change its name under s 24 of the Act is akin to, but not the same as, the delict of passing off.

H The right to protect a name under the delict of passing off arises only when

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Makarau JP

the name has acquired a reputation. Thus, it is a requirement under the delict A for the applicant to establish a reputation or goodwill in the name.

It appears to me that under the statute all that the applicant needs to prove is that the respondent's name is likely to mislead the public or gives so misleading an indication of the nature of its activities as to be likely to cause harm to the public or is likely to cause damage to any other person. My B reading of the section is that such an applicant need not prove that it has a reputation or goodwill or a clientele that will be confused by the similarities in names. The emphasis of the section appears to me to be the protection of the public from being misled rather than the protection of the applicant company's good name and business against competition.

I am fortified in my belief by the wording of s 24(13) of the Act which gives C the right to any person to approach the court to compel a change of name on the grounds listed in the section. In my view, in terms of the section, a member of the public could approach the court under the section. Now, it would be absurd to require such an applicant to satisfy the requirements of a passing off action by showing that they have a reputation or goodwill to protect. D

It is on the basis of the above that I do not agree with Mr *Tawona'a* submission that the applicant cannot succeed because it did not show that it had goodwill in the name sought to be protected.

In casu, the plaintiff has argued that the similarities in names between the applicant and the first respondent are such that the public will be misled E into believing that one is the other. I tend to agree. The two names have the same root name, "Southbay." This is not a common name in this country as it does not denote a place, a location or anything familiar with the populace. It is an alien name which can only be recognized in connection with the business connected to it. Both companies are in the real estate business and the public are likely to confuse one for the other. The situation may have F been different had the two companies been in very disparate businesses such that one would stand alone distinctly from the other.

In defence of the registration of the first respondent, Mr *Tawona* has also submitted that the registration is unlikely to mislead as the first respondent is not registered to deal with the public but to manage the property portfolio of G it parent company. In this regard, he relied on the fact that the first respondent has not sought to register with the Estate Agents Council and has not traded with the public.

In a passing off action, it is yet another requirement of the delict that the public be misled to such an extent that they mistake one business venture for the other and take away the business of the reputation holder to the imposter. H

Makarau JP

A I do not read such a requirement in s 24(13) of the Act. I do not even think that such a requirement is necessary. As I have pointed out above, it appears to me that the section is primarily enacted for the protection of the public. Thus, if it is proved that the public is likely to be misled, the application to compel the respondent should succeed even if the respondent has no intention of engaging the public.

B *In casu*, I hold that the public is likely to be misled because the respondent has actually placed a notice with its name in the street, outside its offices in the city centre. This can only be for the information of the public for its holding company requires no such notice of its existence.

On the basis of the foregoing, I am of the view that the registration of the C first respondent is likely to mislead the public and must be changed.

In the result, I make the following order:

1. The first respondent be and is hereby ordered to change its name within 6 weeks of the date of this order. D
2. The first respondent shall bear the applicant's costs.

Mushuma Law Chambers, applicant's legal practitioners

E *Muza & Nyapadi*, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/NEGOWAC SERVICES (PVT) LTD v 3D HOLDINGS (PVT) LTD & ANOR 2009 (2) ZLR 446 (H)

NEGOWAC SERVICES (PVT) LTD v 3D HOLDINGS (PVT) LTD & ANOR 2009 (2) ZLR 446 (H)

Citation	2009 (2) ZLR 446 (H)
Case No	Judgment No. HH-144-09
Court	High Court, Harare
Judge	Mtshiya J
Heard	13 October 2009
Judgment	25 November 2009
Counsel	*T Nleya,* for the plaintiff *B Mugomeza,* for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Landlord and tenant – *tenant – obligations – obligation to pay rent – rent dispute – duties of parties – tenant obliged to continue paying last agreed rent – if last agreed rent not determinable, must pay a reasonable rent* D

Headnote

The defendants were lessees of premises owned by the plaintiff. For some years they had been in occupation of the premises, in terms of leases which were renewable on an annual basis. Rents were payable in Zimbabwe dollars up to the end of 2008. In February 2009 the parties commenced negotiations for payment of rent in United States dollars, following the E adoption of the multi-currency system and the effective abandonment of the Zimbabwe currency. The plaintiff's agent proposed a certain figure, to which the defendants made a counter-proposal of a much lower figure. No conclusion was reached. The defendants did not make any payments at all for a period of four months and the plaintiff cancelled F the lease agreements and brought proceedings to eject the defendants. Neither party saw fit to refer the dispute to the Rent Board in terms of the Commercial Premises (Rent) Regulations 1983 (SI 626 of 1983).

Held, that the obligation on the part of a tenant to pay rent is at the core of a lease agreement. Failure to do so entitles the landlord to cancel the agreement. The fact that negotiations for new rent were in process did G not absolve the defendants from paying the last agreed rent or the amount proposed as a fair rent during the negotiations.

Held, further, that from January 2009 the rent payable by the defendants became a totally unknown entity, so there was no question of the defendants continuing to pay the rent previously agreed. Although they could have at least continued to pay the rents they proposed, that rent could not, in H

Mtshiya J

A the absence of an agreement, constitute a fair rental. Clearly, therefore, it was incumbent upon both parties to approach the Commercial Rent Board or an arbitrator to fix the rent.

Held, further, that the Commercial Premises (Rent) Regulations, apart from offering the tenant protection from unfair and prohibitive rent, do not in any way give a tenant a licence to exploit the landlord by enjoying B occupation of the landlord's premises without paying rent for it. That is why it is incumbent upon a sitting tenant either to pay the last agreed rent or to approach the Commercial Rent Board to determine a fair rent. This the defendants failed to do. As long as they wanted the tenancy to continue, they had an obligation to continue paying rent. They should C have continued to pay what they believed was a reasonable rent, rather than enjoy a benefit from the plaintiff for nothing. Consequently, the plaintiff was entitled to the relief it sought.

Cases cited

Moffat Outfitters (Pvt) Ltd v Hoosein & Ors 1986 (2) ZLR 148 (S)

D *Parkside Holdings (Pvt) Ltd v Londoner Sports Bar* 2005 (2) ZLR 68 (H)

Legislation considered

Commercial Premises (Rent) Regulations 1983 (SI 626 of 1983), s 7

Case information

E *T Nleya,* for the plaintiff

B Mugomeza, for the defendant

Judgment

MTSHIYA J: On 29 June 2009 the parties filed a consent paper agreeing to the consolidation of the following two cases. F

1. Case No. HC 2021/09 Negowac Services (Pvt) Ltd v 3D Holdings (Pvt) Ltd
2. Case No. HC 2022/09 Negowac Services (Pvt Ltd v Giftcare Electrical (Pvt) Ltd t/a Reg Electrical Wholesalers.

The reason behind the consolidation was to save time and costs since the two cases dealt with similar maters and both parties were represented by G the same legal practitioners. Indeed, as confirmed below through the issues referred to trial in each case, the matters for determination were similar.

(a) Issues for determination in HC 2021/09 were listed as follows:

"1.1. Is there a rent dispute between the parties?

1.2 Whether or not the defendant breached the terms and conditions of the lease H agreement in failing to pay its rent for the months of January, February,

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Mtshiya J

March, April and May 2009. A

1.3. If the answer for 1.2. is in the affirmative, whether or not plaintiff was entitled thereafter to cancel the lease agreement and demand vacant possession of the premises and payment of outstanding rentals";

(b) Issues for determination in HC 2022/09 were listed as follows:

"1.1. Is there a rent dispute between the parties? B

1.2. Whether or not the defendant breached the terms and conditions of the lease agreement in failing to pay its March and April 2009 rentals.

1.3. If the answer for 1.2. is in the affirmative, whether or not plaintiff was entitled thereafter to cancel the lease agreement and demand vacant possession of the premises and payment of outstanding rentals".

Following the consolidation, the defendants in the two cases will be referred C to as the first and second defendants, respectively.

The record shows that with effect from 1 February 2004 the plaintiff and the first defendant entered into a lease agreement whereby the plaintiff leased to the first defendant offices 5, 7, 8, 9 and A1 Strathaven Shopping Centre, 17 Browning Drive, Strathaven, Harare ("the premises"). The lease was D , subject to agreed terms, renewable and indeed the lease agreement remained in force until 8 April 2009 when the plaintiff, through its legal practitioners, wrote to the first defendant in the following terms:

"We act for Negowac Services (Pvt) Ltd.

Our instructions are that you lease from our client, offices 5, 6, 7, 8 and 9 at the aforementioned premises E .

We are also instructed that, in breach of the agreement of lease with our client, you have failed to pay rent and operating costs from January 2009 to date.

Further, we are instructed that you have breached the agreement of lease by assigning your rights and obligations to a third party without the prior written consent of the landlord.

As a consequence of your breach of the agreement of lease with our client, we have F been instructed to cancel the said agreement and recover the leased premises. In the circumstances, take notice that lease agreement is hereby cancelled. Further, we demand that you vacate the premises and handover the keys at our offices, no later than end of business on Tuesday 14 April 2009.

In the event that you do not vacate he premises as stated above, we shall issue court process to recover the premises without further notice. The resultant legal G costs will be for your account."

As can be deduced from the above letter, the reason for terminating the lease agreement was failure to pay rent from January 2009 to April 2009 and cancellation was effective from 14 April 2009.

On 14 April 2009 the first defendant, through its legal practitioners, responded to the plaintiff's letter of 8 April 2009 in the following terms: H

Mtshiya J

A "Our client instructs that it has not failed to pay rent as alleged by your client. The real issue and dispute between the parties is the amount of rent payable. Our client proposed payment of rent in the sum of one United States of America dollar (USD1) per square metre,which was not accepted by your client. The rent payable was not agreed between the parties.

On the issue of assigning rights and obligations without the consent of the landlord, it should be noted that the tenant, 3D Holdings did not change. It is the B management of the tenant which changed, and therefore there is no assignment of any rights. It is also surprising that the issue is being raised now, when the change of management took place in 2007 and rent was being paid to CB Richard Ellis by the new management.

In the circumstances, we are of the view that there is no basis at all for the cancellation of the lease agreement."

C As can be seen from the second paragraph of the above letter, the first defendant raised the issue of a dispute of the rent payable. That letter prompted the following response from the plaintiff's legal practitioners.

"It is an express term of the agreement of lease that your client was obliged to pay rent monthly and in advance. Failure by the parties to agree on an amount D with regards to rent did not absolve your client from either paying the last agreed rent or reasonable rent since January 2009. Your client's failure in this regard is a clear breach of the aforementioned term of the agreement of lease.

In the circumstances, please note that the lease agreement remains cancelled on the basis stated above. We therefore demand that your client relinquish vacant possession of the premises forthwith and hands over the keys at our offices no later than end of business on Wednesday 23 April 2009."

E On 8 May 2009, when the first defendant had refused to vacate the premises, the plaintiff issued summons by this court praying for the following relief:-

"(a) Confirmation of cancellation of the lease agreement entered into between the parties for Offices 5, 7, 8, 9 and A1, 3D Centre, Strathaven Shopping Centre. F

(b) An order for the ejectment forthwith of the defendant, together with its Subtenants, assignees, invitees and all other persons claiming through it from Office 5, 7, 8, 9, 3D Centre, Strathaven Shopping Centre.

(c) Costs of suit at attorney and client scale".

It is also common cause that with effect from 1 February 2004 the plaintiff and the second defendant entered into a lease agreement with plaintiff G leasing to second defendant Office 21 at 3D Centre Strathaven Shopping Centre ("the premises"). The lease agreement remained in force until 9 April 2009 when the plaintiff's legal practitioners sent the following letter to the second defendant

"We act for Negowac Services (Pvt) Ltd.

H Our instructions are that you lease from our client the premises described above.

2009 (2) ZLR p450

Mtshiya J

We are also instructed that in breach of the terms and conditions of the agreement A of lease with our client, you have failed to pay rent and operating costs for March and April 2009 accumulating arrears thereby in the sum of US$510.

As a consequence of your breach of the agreement of lease with our client, we have been instructed to cancel the said agreement and recover the leased premises together with the outstanding amount. In the circumstances, take notice that the lease agreement is hereby cancelled. Further, we demand that you vacate the B leased premises and handover the keys at our offices, and settle the outstanding amount, no later than end of business on Tuesday 14 April 2009.

In the event that you do not vacate the premises and make payment as stated above, we shall issue court process to recover the premises without further notice. The resultant legal costs will be for your account. "

The issue, as can be seen from the above letter, was non-payment of rent for C the months of March and April 2009 (i.e. indicated as a total sum of US$510). On 14 April 2009 the second respondent's legal practitioners responded to that letter in the following terms:

"Our client instructs that it has not failed to pay rent. Our client advises that the real dispute is about the amount of rent to be paid per square metre. Your client D wanted five United States of America dollars (USD5) per square metre which our client rejected as unreasonably high. It counter-offered rent payable as one United States of America dollar (USD1) per square metre. No agreement was reached on the rent payable. Our client was surprised to see your letter when the rent payable was not agreed on.

In the circumstances, we feel that there is no basis to cancel the agreement of lease. It is the issue of rent payable which should be resolved. Our client E has instructed us to tender rent calculated on the basis of one United States of America dollar (USD1) per square which is twenty seven United States of America dollars (UDS27) per month."

Again, as was the case in the other lease agreement with the first defendant, the second defendant, in similar fashion, also raised the issue of there being a dispute over the rent payable. On 20 April 2009 the plaintiff's legal F practitioners responded to the second defendant's letter in the following terms:

> "It is an express term of the agreement of lease that your client was obliged to pay rent monthly and in advance. Failure by the parties to agree on an amount with regards to rent, did not absolve your client from its obligations in terms of the agreement of lease. Your client ought to have paid either the last agreed G rent or a reasonable amount towards rent. The failure by your client to pay rent for March and April 2009, is a clear breach of the aforementioned term of the agreement of lease.
>
> In the circumstances, please note that the lease agreement remains cancelled on the basis stated above. We therefore demand that your client relinquish vacant possession of the premises forthwith and hands over the keys at our offices no later than end of business on Wednesday 23 April 2009." H

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A With the second defendant having refused to vacate the premises by 23 April 2009, on 6 May 2009 the plaintiff issued summons through this court praying for:

> "(a) Confirmation of cancellation of the agreement of lease entered into between the parties for Office 21 at 3D Centre, Strathaven Shopping Centre. B
>
> (b) An order for the ejectment forthwith of the defendant, together with its Subtenants, assignees, invitees and all other persons claiming through it from Office 21 at 3D Centre, Strathaven Shopping Centre.
>
> (c) Costs of suit at attorney and client scale".

The foregoing sets out the background to the two cases that were consolidated and, as can be seen, the issues for determination are much the same. The C only slight difference is that default in rental payments covers different periods in each case.

The plaintiff called one witness, Mr Mandaza of CB Richard Ellis (Pvt) Ltd which is the plaintiff's agent managing the premises who testified as follows. He is the property portfolio manager at CB Richard Ellis. He had dealt with both defendants in this matter since January 2009. There was indeed a dispute D over the amount of rent payable but the defendants, instead of not paying any rent at all, should have continued paying what they were offering, namely US$2 per square metre. The dispute had arisen when the plaintiff proposed a new rental of US$5 per square metre, in line with market trends. He was, however, convinced that the defendants did not want to pay any rent at all E and hence the reason for not even approaching the Commercial Rent Board or appointing an arbitrator to determine the matter. He was fully aware that the correct thing to do was to approach the Commercial Rent Board or go to arbitration for the fixing of a fair rent.

Under cross-examination, Mandaza maintained that CB Richards Ellis was F convinced that there was no commitment on the part of the defendants to pay any rent at all. He said that, although not produced in court, statements had been sent to the defendants in March 2009. He did not indicate though what rentals were reflected on those statements. He also said that apart from their proposal of 3 February 2009, which suggested US$5 per square metre, another proposal had been sent to the defendants on 1 January 2009 proposing G that rentals be paid in the form of fuel coupons. It was his evidence that by end of February 2009, it was clear that there would be no agreement on the issue of rent and hence the decision to institute legal proceedings.

The plaintiff closed its case after Mandaza's evidence.

The defendants led evidence from Regis Jamba, the managing director of H both defendants. Jamba said he has been the managing director of both

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companies since 1997. In the main Jamba's evidence was a confirmation A of what the plaintiff's witness told the court. Jamba said after their offer of US$2 per square metre was made on 17 February 2009, he had remained in constant communication with CB Richards Ellis. He had consistently been phoning Mandaza and at one time he spoke to a Mr Matondo who had expressed surprise as to why the rent issue had remained unresolved. B The said Matondo had promised action but had never gone back to them (defendants) with a solution. Jamba said that on 8 April 2009 the

defendants had requested rental statements, which the plaintiff was no longer sending to them. He maintained that the real issue separating the parties was the rent dispute. He, however, said that the issue had been resolved by the owner of the premises, namely Minister Goche. He said Minister Goche had indicated C that he was not interested in the legal proceedings. This was, however, quickly dismissed by the plaintiff's legal practitioner, who said his instructions were to proceed with the action. Jamba went on to say that in March 2009 the defendants' accounts were suspended. The defendants had, however, made the following payments in October 2009: the first defendant paid US$2 560 and the second defendant paid US$350. The payments were based on US$3 D per square metre and were accepted by the plaintiff.

Under cross-examination, Jamba agreed that the payments were accepted under a receipt with the endorsement "without prejudice". He also confirmed that since January 2009 the plaintiff had never interfered with the defendants' occupancy of the premises. He said at a meeting held on 8 October 2009 the E defendants' new proposal of US$3 per square metre had been accepted and the defendants were now waiting for details regarding the outstanding amounts.

The defendants closed their case after Jamba's testimony.

I must point out at this stage that, apart from confirming the rent dispute, Jamba's evidence also touched on evidence that did not form part of the F pleadings. Such evidence, for the purposes of this judgment, will be ignored.

Facts that are common cause *in casu* are well captured and summarised by Mr *Nleya*, for the plaintiff, in his written submissions. I cannot do better than reproduce them hereunder in full:

"1. The defendants currently occupy the plaintiff's premises situated at Strathaven Shopping Centre G .

2. First defendant has been in occupation of plaintiff's premises from March 2004 to date.

3. Second defendant has been in occupation of plaintiff's premises from April 2004 to date.

4 The relationship between the plaintiff and both defendants is governed by separate written lease agreements, which were for an initial period of one H

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A year, but were automatically renewed in terms of the provisions of clause 2 therein.

5. In February 2009 the parties commenced negotiations for payment of rentals in United States dollars, following the adoption of the multi-currency system.

6. These negotiations were not concluded.

7. Plaintiff proposed rent at US5 per sq/m and the defendants made a counter B proposal of US$2 per sq/m.

8. Whilst these negotiations were still pending, the first defendant did not pay rent from January 2009 up to May 2009.

9. Likewise, second defendant failed to pay rent for March and April 2009.

10. Following defendants' failure to pay rent, plaintiff cancelled the lease agreements and caused summons to be issued against both defendants on C 8 May 2009".

In his submissions Mr *Nleya* correctly submitted that the obligation on the part of a tenant to pay rent is the core of the nature of a lease agreement and indeed, failure to do so entitles the landlord to cancel the agreement. He then submitted that the fact that negotiations for new rent were in process did D not absolve the defendants from paying the last agreed rent or the amount proposed as a fair rent during the negotiations. He also submitted that, at the every least, the defendants should have continued paying the amount they were proposing. This submission, as the facts show, is indeed a confirmation of the fact that there was indeed a rent dispute.

Mr *Nleya*, however, did not agree that the rent dispute necessarily required E the intervention of the Commercial (Rent) Board in terms of the Commercial Premises Rent Regulations, 1983 (SI 626 of 1983) ("the Regulations"). He reasoned that the fact that the defendants continued in occupation of the premises without taking the initiative to refer the dispute to the Commercial Rent Board enjoined the defendants to pay some rent. They could, therefore, F not use the rent dispute as an excuse for not paying any rent at all.

In his written submissions, Mr *Mugomeza,* for the defendants, pointed out that the admission by the plaintiff of the fact that there was indeed a rent dispute meant that the matter ought to have been referred either to an arbitrator or the Commercial Rent Board as admitted by Mandaza who testified

on behalf of the plaintiff. It was Mr *Mugomeza's* submission that since the parties agreed G that there was a rent dispute which remained unresolved in terms of the law, then the matter should be dismissed on that basis. He said it was not the court's duty to fix rent for the parties. This was the duty of the Commercial Rent Board as provided in s 7 of the Regulations.

An analysis of the facts in this case leads me to the conclusion that from H January 2009 the rent payable by the defendants became a totally unknown

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entity. It was mentioned that on 1 January 2009 a proposal of rent in fuel A coupons was made. There were, however, no details of that proposal and no information as to how the defendants responded to the proposal. It is clear, however, that as from February 2009 the plaintiff was no longer accepting payment of rent in Zimbabwe dollars. In March 2009, having failed to get the defendants' acceptance of the proposed rent of US$5 per square metre, B the plaintiff suspended the defendants' accounts. The defendants had counter-offered US$2 per square metre. The pleadings refer to US$1 per square metre but evidence in court confirmed the offer of US$2 per square metre. That offer was rejected as being too low, and from that time up to the issuance of summons, there was no agreement on the rent payable. The rent fixed in Zimbabwe dollars ceased to be payable from 31 December 2008. C There was therefore no question of the defendants continuing to pay the rent previously agreed. That point finds confirmation in the suggestion that the defendants could have at least continued to pay the rent they proposed. That rent, though, could not, in the absence of an agreement, constitute a fair rent. Clearly, therefore, it was incumbent on both parties to approach the Commercial Rent Board or an arbitrator for the fixing of rent from January D /February 2009.

Section 7 of the regulations referred to by Mr *Muzomeza* provides as follows:-

> "1. A lessor may apply to the appropriate board for –
>
> (a) the determination of a fair rent: or
>
> (b) the variation of such a determination; in respect of commercial premises E let by him.
>
> 2. A lessee may apply to the appropriate board for –
>
> (a) the determination of a fair rent; or
>
> (b) the variation of such a determination; in respect of commercial premises hired by him.."

I agree with Mr *Mugomeza* that, apart from ensuring a fair commercial rent, F the regulations are aimed at also preventing "unscrupulous landlords from taking advantage of the shortage of commercial premises by increasing their rent unjustifiably". See *Moffat Outfitters (Pvt) Ltd* v *Hoosein & Ors* 1986 (2) ZLR 148 (S).

It is, however, true that on the basis of authorities cited by Mr *Nleya*, G the defendants had a duty to continue paying the last agreed rents. See *Parkside Holdings (Pvt) Ltd* v *Londoner Sports Bar* 2005 (2) ZLR 68 (H). However, this was not possible *in casu* because, payment of rent in Zimbabwe dollars ceased on 31 December 2008 and from March 2009 the defendants' accounts were suspended. Accordingly, it could be argued that, even if the defendants thought US$2 was reasonable, they could still H

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A claim that they were prevented from effecting payment. That fact, however, was disputed. It was submitted that statements were sent for February and March on the basis of the US$2 proposed by the defendants. The statements were, however, not produced in evidence. The defendants only requested for statements in April 2009.

B It is clear to me that up to the date of the hearing of this matter, there was no agreed position on rent. The dispute over rent still persists. Instead of approaching the Commercial Rent Board, the plaintiff has chosen to issue summonses seeking confirmation of the cancellation of the lease agreements and ejectment of the defendants from the premises. Apart from stating that the defendants are in breach for not paying rent, the plaintiff's summonses C do not disclose what rent was payable. This is so because there was indeed never any agreement on the reviewed rents.

I must point out that the plaintiff's agent totally mishandled this matter. It knew what the law says in the event of a rent dispute. Mandaza confirmed this. It sat back and did nothing. I am unable to find any law which allows D a landlord faced with a rent dispute to ignore the Regulations and impose any rent on a sitting tenant. I am also equally unable to find a law which says when there is a rent dispute, a sitting tenant's obligation to pay rent ceases and the tenant could continue in occupation indefinitely without paying any rent at all.

Whilst I agree that there was indeed a rent dispute, I am, however, not E persuaded to agree that the plaintiff's action should be dismissed on that ground. My view is that, as long as the defendants wanted the tenancy to continue, they had an obligation to continue paying rent. They should have continued to pay what they believed was a reasonable rent. I do not believe that the plaintiff would have refused to accept receipt of rent paid in United F States dollars. Evidence was produced that statements were indeed sent to the defendants and, notwithstanding the dispute, the defendants ought to have paid what they believed to be reasonable. The defendants agree that they only asked for statements in April 2009.

Due to the fact that as from 31 December 2008 the plaintiff was no longer G accepting payments in Zimbabwe dollars, the defendants should have continued paying their suggested US$2 per month rather than enjoy a benefit from the plaintiff for nothing. Added to the need to pay rent, the Regulations allow the defendants to approach the Commercial Rent Board independently for a fair rent. The need to approach the Commercial Rent Board applied to both parties. Instead of using the law to protect their tenancy, the defendants H chose to believe that they could remain in the premises without paying

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anything for as long as the rent dispute persisted. That cannot be. The A obligation to pay rent remained present and failure to do so in the manner I have indicated above means that the defendants were in breach of the lease agreement for non-payment of rent.

The Regulations, apart from offering the tenant protection from unfair and prohibitive rents, do not in any way give a tenant the licence to exploit the B landlord by enjoying occupation of the landlord's premises without paying rent for it. That is why it is incumbent upon a sitting tenant either to pay the last agreed rent or to approach the Commercial Rent Board for a fair rent. This the defendants failed to do. They did not pay any rent for the periods indicated on the summonses. That fact they do not dispute. The defendants were therefore in clear breach of their lease agreement for non-payment of C rent. Subsequent payments allegedly made in October 2009 did not in any way save the breaches. The plaintiff remains entitled to its arrear payments and therefore acceptance of those payments without revoking cancellation of the agreement(s) cannot be held against the plaintiff.

As to the issue of costs, I find that failure to approach the Commercial Rent D Board or an arbitrator is an omission attributable to both parties. That failure is what led to this action. I therefore deem it fair for each party to bear its own costs.

In the premises, my finding is that the plaintiff is entitled to the relief it seeks.

I therefore order as follows: E

1. That the cancellation of the lease agreement entered into between the parties for Offices 5,7,8,9 and A1, 3D Centre, Strathaven Shopping Centre be and is hereby confirmed.
2. That the plaintiff be and is hereby authorised to evict forthwith the first defendant, together with its subtenants, assignees, invitees and all other F persons claiming occupation through it from Office 5,7,8 and 9, 3D Centre, Strathaven Shopping Centre.
3. That the cancellation of the lease agreement entered into between the parties for Office 21 at 3D Centre Strathaven Shopping Centre be and is hereby confirmed.
4. That the plaintiff be and is hereby authorised to evict forthwith the G second defendant together with its subtenants, assignees, invitees and all other persons claiming occupation through it from Office 21 at 3D Centre. Strathaven Shopping Centre.
5. That each party shall bear its own costs. H

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A *Gill, Godlonton & Gerrans*, plaintiff's legal practitioners

Mutezo & Company, defendants' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2009/Volume 2/MARUFU v MINISTER OF TRANSPORT, COMMUNICATIONS AND INFRASTRUCTURAL DEVELOPMENT 2009 (2) ZLR 458 (H)

MARUFU v MINISTER OF TRANSPORT, COMMUNICATIONS AND INFRASTRUCTURAL DEVELOPMENT 2009 (2) ZLR 458 (H)

Citation	2009 (2) ZLR 458 (H)
Case No	Judgment No. HB 127-09
Court	High Court, Bulawayo
Judge	Ndou J
Heard	28 October 2009; 20 November 2009
Judgment	3 December 2009
Counsel	*B Ndove*, with him Ms *J Gororo,* for the applicant *T Machiridza*, with him *E Moyo,* for the first respondent
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Administrative law – *administrative decision – administrative authority's duty to act lawfully, reasonably and fairly – Minister making declaration that would operate unequally as between different groups of residents* D *of same city – declaration unlawful – Minister establishing toll gates on trunk roads close to a city – local residents affected thereby – need for Minister to avoid partial and unequal treatment between various classes of city residents – Minister ordered to relocate the toll gate*

Interpretation *of statutes – schedule to an enactment – extent to which can be used to clarify or complement main body of enactment –extent to* E *which such schedules can be considered structural parts of an enactment*

Statutes – *delegated legislation – validity – when can be declared to be ultra vires – delegated legislation grossly unreasonable – regulations should only be made where reasonably necessary to further the objects of the enabling Act – inherent jurisdiction of courts to declare subsidiary* F *legislation ultra vires if it cannot be construed so as to accord with the enabling Act*

Statutes – *Toll Roads Act [Chapter 13:13] – declaration of toll road – road between places other than cities as defined by Urban Councils Act [Chapter 29:15] – such road may be declared to be a toll road – need* G *for Minister to consult with city council before removing a road from its jurisdiction — where such consultation is not required*

Headnote

The extent to which schedules to legislation can and will be regarded as intra-textual structural parts of any enactment has to be determined with reference to their nature and intended functions relative to the context H

A or enactment as a whole. Schedules are treated, at least, as intra-textual sources of clarification and elucidation which are not necessarily only consulted in instances of uncertainty and ambiguity but also as complements to or further explanations of the apparently clear and unambiguous sections contained in the body of the enactment.

B A court has inherent jurisdiction to declare as null and void subsidiary legislation on the ground that it is *ultra vires* if it cannot be construed so as to accord with primary legislation. It is presumed that Parliament, which is the maker of primary legislation, intended that regulations should be enacted only where reasonably necessary to further the objects of primary legislation.

C In terms of s 6 of the Toll Roads (Regional Trunk Road Network) Regulations, 2009 as read with s 3(2) of the Toll Roads Act [*Chapter13:13*], the first respondent had, without consulting the Bulawayo City Council, Tolls Act declared a point at the13 kilometre peg close to Bulawayo along Bulawayo to Victoria Falls road, to be a road tolling point. Passing motorists were required to pay a toll at the toll gate before continuing their journey. D The applicant, who was a ratepayer of the City of Bulawayo, owned and resided on a residential stand in the vicinity of the toll gate but which was within the jurisdiction of the City Council. He and his wife were required to pay over a period of time a considerable amount of money in toll fees in order to drive daily to Bulawayo for the purpose of his E business, to take his children to and from school and to access the shops. Accordingly, he sought a *declarator* that the establishment of a toll gate at a point so close to Bulawayo was unlawful, alternatively, that the first respondent be ordered to relocate the toll gate to any convenient section of that road which was outside the jurisdiction of the Bulawayo City Council. He submitted that the first respondent, being the administrative F authority in terms of s 2(1) of the Administrative Justice Act [*Chapter 10:28*], had failed to act lawfully, reasonably and fairly towards him and other residents of the area and that the regulations were partial and unequal in their operation as between people who were ratepayers and residents of Bulawayo. As such, he argued, first respondent had failed to comply with s 3 of that Act. The first respondent argued that there G was no need for him to consult the City Council, notwithstanding that the toll gate was within its area of jurisdiction, because he had received proper authority from the Minister of Local Government to set up the toll gate at its present location. Thus, first respondent submitted, the relevant section of the road was already within the area of his authority.

H *Held,* that on this point the first respondent's argument was correct. Once

he had received due authority from the Minister of Local Government A the relevant section of the road ceased to be under the jurisdiction of the Bulawayo City Council and the need to consult it in terms of s 3(2) of the Toll Roads Act fell away.

Held, further, however, that this did not preclude the court from concluding that in establishing the toll gate at the 13 kilometre peg on the Bulawayo- B Victoria Falls road, the regulations were partial and unequal in their operation as between the various classes of people who were ratepayers and residents of the City of Bulawayo.

Held, further, that as a result the first respondent had failed to comply with s 3(1) of the Administrative Justice Act [*Chapter 10:28*], in that he had failed to act lawfully, reasonably and fairly and, as a result, his location C of the toll gate was a nullity and he must be ordered to relocate the toll gate to a convenient point outside the area of the Bulawayo City Council.

Cases cited

Combined Harare Residents Association & Anor v Registrar General D & Ors 2002 (1) ZLR 83 (H)

Econet (Pvt) Ltd v Minister of Information Posts and Telecommunications 1997 (1) ZLR 342 (H)

Liquidators, Wapejo Shipping Co Ltd v Lurie Brothers 1924 AD 69

PF-Zapu v Minister of Justice 1985 (1) ZLR 305 (S)

Public Carriers Association & Ors v Tolcon Road Concessionaries (Pty) Ltd & Ors 1989 (4) SA 574 (N)

S v Bechoo 1979 (3) SA 946 (A)

R v Jeremiah 1955 SR 260; 1956 (1) SA 8 (SR)

S v Nyamapfukudza 1983 (2) ZLR 43 (S)

S v Delta Consolidated (Pvt) Ltd & Ors 1991 (2) ZLR 234 (S)

South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A)

Strydom v Strydom 2003 (1) ZLR 379 (H)

Utopia Vakansie-Oorde Bpk v du Plessis 1974 (3) SA 148 (A)

Legislation considered

Administrative Justice Act [*Chapter 10:28*], ss 2(1) and 3

Toll Roads Act [*Chapter 13:13*], ss 3(2) and 6

Toll Roads (Regional Trunk Road Network) Regulations 2009 (SI 39 of 2009), s 3(2)

Urban Councils Act [*Chapter 29:15*], s 14(3)

Ndou J

Case information

B Ndove, with him Ms *J Gororo,* for the applicant

T Machiridza, with him *E Moyo,* for the first respondent

Judgment

NDOU J: When the matter was heard on 28 October 2009 the parties informed me that they had discussed the matter and reached common ground on the approach in this matter. The essence of their agreement is that the relief sought as interim relief is essentially the same as the relief sought on the return date. They agreed that the best approach is for the matter to be fully argued on an urgent basis on the validity of the statutory provisions raised in the papers. I went along with the suggested route, as it was adopted by the Supreme Court in *Combined Harare Residents Assn & Anor* v *Registrar-General & Ors* 2002 (1) ZLR 83 (H) at 108D and also by the High Court in *Econet* v *Minister of Information* 1997 (1) ZLR 342 (H). The parties filed all their papers and argued the matter fully on 20 November 2009. I will therefore grant final relief in this matter if the applicant succeeds on the merits. The applicant seeks a declarator to effect that the declaration by the first respondent ("the Minister") of the 13 kilometre peg along the Bulawayo-Victoria Falls road as a road tolling point is *ultra vires* s 3(2) of the Tolls Roads Act [*Chapter 13:13*] ("the Act"), and is thus unlawful. The applicant seeks consequential relief arising from such declaration. The alternative relief sought is that, within 48 hours of the granting of the order, the Minister be ordered to relocate the tolling point from the 13 kilometre peg along the Bulawayo-Victoria Falls Road to any convenient section of that road which is outside the third respondent's area of jurisdiction.

The background facts of this application are the following.

The applicant is the owner of stand number 12 Norwood Township of Subdivision R of the Helenvale Block, Bulawayo, commonly known as Plot 12, Shenfield Road, Norwood, Bulawayo. The property is within the jurisdiction of the third respondent and the applicant is a ratepayer within third respondent.

On 9 April 2009, the Minister, purporting to act in terms of s 6 of the Act, declared, through the Roads Toll (Regional Trunk Road Network [Amendment] Regulations, 2009 (SI 39 of 2009) ("the Regulations"), the Bulawayo-Victoria Falls road as a toll road. Further, the Minister declared an area along that road, referred to in the Regulations as "before Nyamandlovu turn off between the 12.5 kilometre peg and the 13.5 kilometre peg, 13 kilometres from Bulawayo" as a road tolling point, also commonly known as a toll gate. The effect of the Minster's above declaration is that every motorist driving past the toll gate shall pay a prescribed toll fee, depending

Ndou J

on the type of the motor vehicle. Criminal sanctions are prescribed for a A failure to pay such toll fees.

By virtue of the location of the applicant's residential property and indeed that of other several residents of the area, the applicant finds himself in a position whereby he has to pay in order to access the City of Bulawayo. The applica B nt has school going children in Masiyepambili Primary School and every school day he pays toll fees. His wife has a car which she uses to drive into the city for household chores and she pays toll fees. The applicant has two further vehicles that he uses in the course of his business. His visitors from other parts of the city have to pay toll fees to access his family residence. In his rough estimate, his family will pay toll fees in the region of US$3 650 just to access the city wherein he is a ratepayer. In his observation, C he is adversely affected by the discriminatory way in which the toll gate is located. He states, and this is substantially beyond dispute, that for example, the Bulawayo-Plumtree road toll gate is in Figtree, some 37.2 kilometres from Bulawayo. The Bulawayo-Beitbridge road toll gate is in Esigodini, some 37 kilomtres from Bulawayo. The Harare-Gweru road toll gate is in D Norton, some 44.5 kilometres from Harare. The Harare-Chirundu road toll gate is at Inkomo, some 40 kilometres from Harare. The Gweru-Bulawayo road toll gate is 17 kilometres from Gweru. The Masvingo-Bulawayo road toll gate is 53 kilometres from Masvingo. The Masvingo-Beitbridge road toll gate is 45 kilometres from Masvingo.

Further, in his own affidavit, the Minister adds that Harare-Masvingo road E toll gate is 18 kilometres from Harare. The Harare-Mutare road toll gate is 14 kilometres from Rusape (between 155 to 157 kilometres from Harare). What seems clear is that the toll gate subject matter of this application is closest to any city, that is 12-13 kilometres.

In the circumstances, it impacts more on the lives of the residents on the F periphery of Bulawayo. The Minister's explanation for this position is:

> "it must be borne in mind that tolling points are strategically positioned at traffic catchment points, otherwise it would be a futile exercise and sheer waste of resources to situate these tolling points at areas where traffic is highly dispersed."

I propose to deal with the issues raised by applicant in turn. G

Is Bulawayo-Victoria Falls road a "city to city trunk road network?

The Regulations define a "city to city trunk road network" as

> "'… roads of the regional network that links cities in Zimbabwe'. On the one hand, taken in isolation, this definition would exclude the Bulawayo-Victoria Falls road, simply on account of the fact Victoria Falls is not a city as defined under s 14(3) of the Urban Councils Act [*Chapter 29:15*]. H

Ndou J

A On the other hand, s 3(2), as read with the Second Schedule of the Regulations, the Bulawayo-Victoria Falls road is a city to city truck road network. *In casu*, I hold that the latter construction applies. Section 3(2) of the Regulations specifically provides:

> "Every route along the City to City Trunk Road Network specified in the first column of the Second Schedule shall be a toll road for the purposes of the Act" B (emphasis added).

In this context, "city" cannot be interpreted as a reference to "city" as defined in s of 14(3) of the Urban Councils Act *supra*. The extent to which schedules can and will be regarded as intra-textual, structural parts of any enactment will have to be determined with reference to their nature and intended function, C relative to the context of the legislation or enactment as a whole, Schedules are treated, at least, as intra-textual sources of clarification and elucidation which are not necessarily only consulted in instances of uncertainity and ambiguity, but also as complements to or further explanations of the apparently clear and unambiguous sections contained in the body of the enactment. The Second Schedule further explains the trunk roads to which s 3 of the D Regulations is applicable. See *Strydom* v *Strydom* 2003 (1) ZLR 379 (H) at 383-4; *Liquidator Wapejo Shipping Co* v *Lurie Brothers* 1924 AD 69 at 72-73; *S* v *Bechoo* 1979 (3) SA 946 (A) and *Utopia Vakansie-oorde Bpk* v *duPlessis* 1974 (3) SA 148 (A) at 177. In the circumstances, the Bulawayo-Victoria Falls road is a regional road network that links cities for the purposes of the Regulations.

E *Effect* of minister's failure to consult Bulawayo City Council before declaring the Bulawayo-Victoria Falls road before Nyamandlovu turn-off a toll point

Section 3(2) of the Act provides:

> "Before declaring a road to be a toll-road in terms of subsection (1), the Minister F shall consult the local authority concerned, where the road is within the area of jurisdiction of a local authority."

It is *common* cause that the Minister did not consult the Bulawayo City Council before making the declaration. The Minister's position is that there was no need to consult Bulawayo City Council, because the Ministry G of Local Government, Public Works and Urban Development granted his Ministry authority over this Bulawayo-Victoria Falls road. That the toll point is in area within Bulawayo City Council is beyond dispute. What the Minister is alleging is that, although this road runs through the City of Bulawayo, that section of the road itself outside the jurisdiction of the city. In the circumstances, the Minister argues that the requirement for consulting H the City Council falls away as the section of the road is already under its

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Ndou J

authority. I agree with the first respondent that once the road was placed A under first respondent's authority, the need to consult the local authority falls away. The Bulawayo-Victoria Falls road is no longer under the jurisdiction of the Bulawayo City Council so s 3(2) of the Act is not applicable. If the road in question was under the jurisdiction of the Bulawayo City Council, s 3(2) would be applicable and failure to consult Bulawayo City Council B would have rendered the declaration of the disputed toll point a nullity: *South African Roads Board* v *Johannesburg City Council* 1991 (4) SA 1 (A) and *Public Carriers Association and Others* v *Tolcon Road Concessionaries (Pty) Ltd and Others* 1989 (4) SA 574 (N). But *in casu*, the road is no longer under the jurisdiction of the local authority but that of the first respondent. The toll point is on the trunk road and not in the area controlled by the C Bulawayo City Council.

Did the Minister fail to comply with the provisions of s 3(1), (2) and (3) of the Administrative Justice Act [*Chapter 10:28*]?

The Minister is an administrative authority in terms of s 2(1)(c) of Administrative Justice Act [*Chapter 10:*28] and as such he is enjoined to D act lawfully, reasonably and fairly as required by s 3(1), *supra*. From what the applicant outlined in detail in his founding affidavit, the Regulations are partial and unequal in their operation as between people who are ratepayers and residents of the City of Bulawayo. The objective of the location of this toll point, that is, to enhance traffic catchment, is disproportionate with financial oppression it is causing to residents Norwood in the applicant's position. The E declaration of the disputed toll point is manifestly unjust and discriminatory to residents of Norwood who are ratepayers of Bulawayo City Council. The declaration is partial and unequal in its operation as between different classes of the City of Bulawayo ratepayers. It is trite that delegated legislation, like these Regulations, can be declared *ultra vires* the primary legislation F if it is grossly unreasonable. Gross unreasonableness is present when the provisions of the enactment entail discrimination, are disproportionate, vague or uncertain. See L Baxter *Administrative Law* (1984) at pp 522-3; *R* v *Jeremiah* 1955 SR 260; 1956 (1) SA 8 (SR); *ZAPU* v *Minister of Justice* 1985 (1) ZLR 305 (S); *S* v *Nyamapfukudza* 1983 (2) ZLR 43 (S) and *S* v *Delta Consolidated (Pvt) Ltd and Others* 1991 (2) ZLR 234 (S). The court G has inherent jurisdiction to declare as null and void subsidiary legislation on the ground that it is *ultra vires* if it cannot be construed so as to accord with primary legislation. It is presumed that Parliament, which is the maker of primary legislation, intended that regulations should be enacted only where reasonably necessary to further the objects of primary legislation. In the circumstances I make the following order. H

Ndou J

A It is declared that

> "1. The declaration by the first respondent of the toll point the Bulawayo-Victoria Falls road before the Nyamandlovu turn-off, between the 12.5 kilometre peg and 13.5 kilometre peg, is unjust, grossly unfair and discriminatory and therefore a nullity for non-compliance with B s 3 of the Administrative Justice Act [*Chapter 10:18*]

2. In terms of s 4(2)(e) of the Administrative Justice Act, *supra*, the first respondent, within 30 days of the granting of this order, relocate the toll point described in paragraph (1), above, to a convenient point outside area of jurisdiction of the third respondent."

C *Marondedze, Mukuku, Ndove and Partners*, applicant's legal practitioners

Civil Division, Attorney General's Office, first respondent's legal practitioners

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BOK ESTATES (PVT) LTD v MASARA & ORS 2009 (2) ZLR 466 (H)

Citation	2009 (2) ZLR 466 (H)
Case No	Judgment No. HH-148-09
Court	High Court, Harare
Judge	Bere J
Heard	5 December 2009
Judgment	5 December 2009
Counsel	*E Hamunakwadi,* for the applicant *G N Mlotshwa,* for the first and second respondents Third respondent in person *P Ndhlovu,* for the fourth respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Property and real rights – *spoliation order – locus standi – unlawful occupier of land – person occupying land which had been acquired by State – another person receiving offer letter from State in respect of such land – such person not entitled to deprive occupier of possession – need for occupier to be lawfully evicted before holder of offer letter entitled to occupy property* D

Headnote

If the legislature recognizes and provides for a systematic way of evicting those who wish to cling on to acquired land, the process of such eviction must be followed to the letter. There can be no question of allowing those with offer letters or other beneficiaries to take the law into their own E hands, because to allow that to happen would be to sanction illegality and to nourish chaos in the land acquisition exercise. The process of eviction is not for the offeree to initiate by using violence or force; it must be civilly conducted by those who are lawfully authorized to do so. Where an offeree has not acquired vacant possession he cannot take it upon himself to evict the former farm owner from the land. That F prerogative is for the acquiring authority.

Spoliation is a remedy available even to a thief. By parity of reasoning, a former farm owner who opts to illegally continue squatting on acquired land is entitled to this remedy. It would be sanctioning illegality if the court were to make an order that would ratify the unlawful conduct of G offerees who use force to evict the farmer.

Cases cited

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

Chisveto v Min of Local Govt 1984 (1) ZLR 248 (H)

Pondoro (Pvt) Ltd & Anor v Nemakonde & Anor 2008 (1) ZLR 6 (H) H

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Bere J

Case information

A *E Hamunakwadi,* for the applicant

G N Mlotshwa, for the first and second respondents

Third respondent in person

P Ndhlovu, for the fourth respondent

Judgment

B **BERE J**: The aspect of bringing this matter on an urgent basis was vehemently challenged by counsel for the first and second respondents. Counsel for the applicant was of a very strong view that given the averments as contained in the certificate of urgency, as well as the applicant's founding affidavit, looked at in conjunction with what the second respondent alleges in his opposing affidavit, one cannot help but conclude that this matter was justified C to be heard on an urgent basis. I agree. In my view the applicant was indeed justified to bring this matter to court on an urgent basis. I do not see how else this matter could have been dealt with other than the position adopted by the applicant. The preliminary point raised is therefore not sustainable.
Locus standi in judicio

D It was argued by Mr *Mlotshwa* for the first and second respondents that upon the acquisition of the farm in question by the State on 1 February 2008, the applicant ought to have vacated the farm after 90 days of such acquisition in accordance with s 3(2) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. Counsel went on further to argue that the defiant attitude of the applicant constituted an act of criminal conduct, thereby divesting E itself of any right to bring proceedings against the respondents who are now the rightful owners of the land in question as evidenced by the offer letters which they have.

Mr *Mlotshwa*'s argument assumed another dimension when he argued that the applicant could not possibly have *locus standi* to bring this action to F court owing to its own illegal occupation of the farm in question. To buttress counsel's argument reference was made to *Airfield Investments (Pvt) Ltd* v *Minister of Lands& Ors* 2004 (1) ZLR 511 (S).

In my view, reference to *Airfield Investments (Pvt) Ltd* was clearly out of context and was made to cloud issues. That case is distinguishable from the G instant case. In the *Airfield* case the court was dealing with an application for an interim interdict brought by the former farm owner which sought to prohibit the State from proceeding with the compulsory acquisition of the farm in question for resettlement purposes pending the determination of the constitutionality of certain sections of the Land Acquisition Act [*Chapter 20*:*10*], whereas in the instant case the applicant is merely seeking a H spoliation remedy having been despoilt of its occupation of the farm through

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Bere J

a combination of subtle threats and force as captured in paras 12-17 of the A applicant's founding affidavit.

I do not read the *Airfield* case and a long line of similarly decided cases to be authority for the proposition that the *mandament van spolie* remedy has been extinguished from our law. In fact it is

quite significant that in the *Airfield* case itself their Lordships emphasized the need to respect the B residual rights of the defiant former farm owner who chooses to remain on the farm at a time he ought to have vacated. In this regard Malaba JA stated at 515F as follows:

> "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 or occupier cease to exist and by operation of law he must leave the land *or be evicted by order of court*" C (my emphasis).

It is clear that the learned Judge of Appeal was not advocating the use of violence or force to force the former farm owner or occupier out of the land as what is reported to have happened in this case.

That sanity must always prevail is further provided for in the Gazetted Land D (Consequential Provisions) Act [*Chapter 20:10*], s 3(5) of which calls for the criminal prosecution of those former owners or occupiers who defiantly choose to remain on the acquired land.

If the legislature in its wisdom recognizes and provides for a systematic way of evicting those who wish to desperately cling on to acquired land, surely the process of such eviction must be followed to the letter. There can be no E question of allowing those with offer letters or beneficiaries to take the law into their own hands because allowing that to happen would be sanctioning illegality and nourishing chaos in the land acquisition exercise.

The process of eviction is not for the offeree to initiate by using violence or force but it must be civily conducted by those who are lawfully authorized F to do so.

Given the allegations by the applicant as captured in the founding affidavit and the responses by the first and second respondents, I am unable to agree with the respondents' counsel that the applicant has no locus standi to bring this application for spoliation. G

I hold a very firm view that where an offeree has not acquired vacant possession, he cannot take it upon himself to evict the former farm owner from the land. That prerogative is for the acquiring authority. I am fortified in this view by the position adopted by my brother Hungwe when he summed up the procedure in the following:

> "There is a specific procedure for eviction in respect of land acquired in terms H

Bere J

> A of the Gazetted Land (Consequential Provisions) Act [*Chapter20*:*28*]. The right to claim eviction is only exisable 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."

See Pondoro (Pvt) Ltd & Anor v Nemakonde & Anor 2008 (1) ZLR 6 (H).

It has been held that spoliation is a remedy available even to a thief: *per* B Reynolds J in *Chisveto* v *Minister of Local government and Town Planning* 1984 (1) ZLR 248 (H) at 250A-D. By parity of reasoning a former farm owner who opts to illegally continue squatting on acquired land is entitled to this remedy. In my view it would in fact be sanctioning illegality if this court were to make an order that would ratify the unlawful conduct of the C first and second respondents (who have used force to evict the applicant).

On the merits

I have already alluded to the uncontroverted allegations referred to by the applicant in its founding affidavit.

The whole motive of opposition to this application by the first and second D respondents achieves nothing except to re-affirm the first and second respondents' misconceived view that they had a right to evict the applicants by whatever means possible because of their offer letter, and the fact that the applicant had stayed on the farm beyond the statutory period provided by law.

As for the third respondent, having had the privilege of hearing him in court in addition to his own filed opposing affidavit, I am satisfied that the applicant E must be deemed to have accepted his occupation of the portion of the farm which he is occupying. For a long time the applicant's representative has seen the third respondent working on the piece of land and for such a long time the applicant never raised any objection. In any event, the filed founding affidavit does not seem to

suggest that the third respondent has attempted F to despoil the applicant. The third respondent was, in my view, improperly roped into these proceedings.

It is against the first and second respondents that I make the following order.

It is ordered:

1. That the first and second respondents and all those claiming and or acting G through them be and are hereby ordered to refrain from:
   1.1 Ploughing and planting the fields on Eendarg farm also known as the remainder of Claire or Claire Estate Ranch;
   1.2 Constructively evicting the applicant and his workers from the said piece of land.

H 2 That pending determination of the matter the Zimbabwe Republic

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Bere J

Police at Nyazura be and are hereby ordered to assist the applicant if A they breach the terms of this order or commit criminal offences against the applicant's directors, employees or agents or its property.

3. Service of this order shall be effected by the applicant's legal practitioners.

Maunga & Associates, applicant's legal practitioners B

Antonio, *Mlotshwa & Company*, first & second respondents' legal practitioners

Attorney-General's *Office*, fourth respondent's legal practitioners C

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