Document 1 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1

Volume 1

Madamombe v Bindura Municipal Council & Ors	2010 (1) ZLR 1 (H)
Zimbabwe Broadcasting Holdings v Gono	2010 (1) ZLR 8 (H)
Muguti v Uboxit Worldwide (Pvt) Ltd & Ors	2010 (1) ZLR 13 (H)
In re Estate Matimura	2010 (1) ZLR 17 (H)
CFX Bank Ltd v RTO Engineering (Pvt) Ltd & Anor	2010 (1) ZLR 23 (H)
S v Mavasa	2010 (1) ZLR 28 (H)
Zimbabwe Mining Development Corporation & Anor v African Consolidated Resources plc & Ors	2010 (1) ZLR 34 (S)
S v Bennett (1)	2010 (1) ZLR 42 (H)
Rodger & Ors v Muller & Ors	2010 (1) ZLR 49 (H)
Gramara (Pvt) Ltd & Anor v Govt of Zimbabwe & Ors	2010 (1) ZLR 59 (H)
Gula-Ndebele v Bhunu NO	2010 (1) ZLR 78 (H)
Forrester Est (Pvt) Ltd v Vengesayi & Anor	2010 (1) ZLR 86 (H)
Central Africa Building Society v Ndahwi	2010 (1) ZLR 91 (H)
S v Bennett (2)	2010 (1) ZLR 97 (H)
Sahawi International (Pvt) Ltd & Anor v Bredenkamp & Anor	2010 (1) ZLR 102 (H)
Medical Investments Ltd v Pedzisayi	2010 (1) ZLR 111 (H)
Route Toute BV & Ors v Sunspun Bananas (Pvt) Ltd & Anor	2010 (1) ZLR 117 (H)
Jhamba v Mugwisi	2010 (1) ZLR 124 (H)
UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira	2010 (1) ZLR 127 (S)
Produtrade (Pvt) Ltd v Continental Bakeries (Pvt) Ltd & Anor	2010 (1) ZLR 132 (H)

Munyani v Liminary Investments & Anor	2010 (1) ZLR 138 (H)
Spencer & Anor v Minister of Lands & Ors	2010 (1) ZLR 144 (H)
John Strong (Pvt) Ltd & Anor v Wachenuka (1)	2010 (1) ZLR 151 (H)
Gwiriri v Highfield Bag (Pvt) Ltd	2010 (1) ZLR 160 (H)
Moyo & Ors v Zvoma NO & Anor	2010 (1) ZLR 178 (H)
Mavindidze & Anor v Mukonoweshuro	2010 (1) ZLR 191 (H)
TM Supermarkets (Pvt) Ltd v Chadcombe Properties (Pvt) Ltd	2010 (1) ZLR 196 (H)
DHL International (Pvt) Ltd v Madzikanda	2010 (1) ZLR 201 (H)
African Consol Resources PLC & Ors v Minister of Mines & Ors	2010 (1) ZLR 208 (H)
Sibanda v Mushapaidze	2010 (1) ZLR 216 (H)
S v Never	2010 (1) ZLR 222 (H)
Stationery Box (Pvt) Ltd v Natcon (Pvt) Ltd & Anor	2010 (1) ZLR 227 (H)
Mutetwa v Dixon & Ors	2010 (1) ZLR 234 (H)
Sibanda v Sibanda & Anor	2010 (1) ZLR 242 (H)
Church of the Province of Central Africa v Jakazi & Ors (1)	2010 (1) ZLR 246 (H)
Cotton Co of Zimbabwe Ltd v Mobil Oil Zimbabwe (Pvt) Ltd & Anot	2010 (1) ZLR 251 (H)
Church of the Province of Central Africa v Jakazi (2)	2010 (1) ZLR 262 (H)
Diocesan Trustees, Diocese of Harare v Church of the Province of Central Africa	2010 (1) ZLR 267 (S)
Chinjayani v Minister of Home Affairs & Ors	2010 (1) ZLR 280 (H)
SMM Holdings Ltd v Minister of Justice	2010 (1) ZLR 286 (S)
Zimbabwe Banking & Allied Workers' Union & Anor v Beverley Building Society & Ors	2010 (1) ZLR 292 (S)
Gardner v Dampier Development& Ors	2010 (1) ZLR 306 (H)
Mtengwa v Mtengwa	2010 (1) ZLR 312 (H)
Matapo & Ors v Bhila NO & Anor	2010 (1) ZLR 321 (H)

Jakazi & Anor v Church of Province of Central Africa & Ors	2010 (1) ZLR 335 (H)
Chilufya v Commissioner-General of Police & Ors	2010 (1) ZLR 339 (H)
Church of the Province of Central Africa v Diocesan Trustees, Diocese of Harare	2010 (1) ZLR 346 (H)
S v Prandini	2010 (1) ZLR 354 (H)
Dongo v Registrar-General & Anor	2010 (1) ZLR 361 (S)
S v Sabau	2010 (1) ZLR 370 (H)
Jirira v Zimcor Trustees Ltd & Anor	2010 (1) ZLR 375 (H)
S v Stanley	2010 (1) ZLR 380 (H)
S v Hunda & Anor	2010 (1) ZLR 387 (H)
Ex parte Ndoro	2010 (1) ZLR 399 (H)
S v Choruma & Anor	2010 (1) ZLR 403 (H)
S v Mafusire	2010 (1) ZLR 417 (H)
John Strong (Pvt) Ltd v Wachenuka & Anor (2)	2010 (1) ZLR 429 (H)
Old Mutual Life Assurance Co (Pvt) Ltd v Raftopoulos	2010 (1) ZLR 439 (H)
Venetian Blinds Specialists Ltd v Apex Holdings (Pvt) Ltd	2010 (1) ZLR 451 (H)
Central African Building Construction Co (Pvt) Ltd v Construction Resources Africa (Pvt) Ltd	2010 (1) ZLR 464 (H)
Gray & Anor v Registrar of Deeds	2010 (1) ZLR 471 (H)

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Document 2 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/MADAMOMBE v BINDURA MUNICIPAL COUNCIL & ORS 2010 (1) ZLR 1 (H)

MADAMOMBE v BINDURA MUNICIPAL COUNCIL & ORS 2010 (1) ZLR 1 (H)

Citation 2010 (1) ZLR 1 (H)

Case No	Judgment No. HH-161-09
Court	High Court, Harare
Judge	Gowora J
Heard	27 May 2009
Judgment	13 January 2010
Counsel	*J Bamu*, for the applicant *S Mushonga*, for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Local government – *mayor – election of – election by council – not competent for council to rescind election – circumstances in which council may elect a new mayor*

Headnote

D The applicant was one of the councillors elected to a municipal council at a general election. When the council first met, he was elected mayor. Two months later, a meeting of the council was called at which a motion was presented for the rescission of the applicant's election as mayor. The motion was passed and another councillor was elected as mayor. E The applicant sought an order declaring that the council's decision was void and that he remained the mayor.

Held, that in terms of s 103 of the Urban Councils Act [*Chapter 29:15*], where an election has taken place after a meeting of the council, a mayor or his deputy shall hold office until the appointment of a successor. A successor is only appointed if an election is held following a vacancy in F the office of the mayor or his deputy, such vacancy having arisen either through resignation or by virtue of the operation of s 78 of the Act. In terms of s 78, the office becomes vacant if a councillor resigns, ceases to be qualified for election as councillor, is absent without leave of council from ordinary meetings of council during a consecutive period of two months, or from meetings of committees to which the councillor has G been appointed for a consecutive period of two months, or is absent from ordinary council meetings for a period of six calendar months whether or not leave has been obtained, ceases to be a councillor in terms of s 22 of the Provincial Administration Act [*Chapter 29:11*], or has been suspended in terms of s 114 for a period in excess of thirty days, in which H case his seat in council becomes vacant by operation of law. The Act

Gowora J

does not provide for the vacation of the seat of a mayor or his deputy A except in those situations. An election to fill the seat is only held if a vacancy arises from those situations. Since the position of mayor is a creation of statute, the election can only be changed in terms of the statute and the removal from office of a person from the position can only be effected under the provisions of the Act that created the position. Once B a mayor ceases to hold office, the respective council can then exercise its powers under the Act and elect a successor as provided for in s 103 (1) and (2). The Act has not provided for the passing of a resolution to remove the mayor from office and any resolution purporting to have that effect, in the absence of a statutory provision providing for the same, is clearly illegal and unprocedural. There is no provision for council to C pass a resolution to remove the mayor who has been duly elected from office except under the provisions of s 103. While s 89 of the Act does provide for the rescission or alteration

of a resolution passed by council at a subsequent meeting to that wherein the resolution being sought to be rescinded was passed, the section is not intended to apply to the D election and vacation of office by an elected mayor, which position is specifically provided for under s 103.

Cases referred to

Cape Town Municipality v Abdulla 1974 (4) SA 428 (C)

City of Gweru v Kombayi 1991 (1) ZLR 333 (S) E

S v Kachipare 1998 (2) ZLR 271 (S)

S v Nottingham Ests (Pvt) Ltd 1995 (1) ZLR 253 (S)

Legislation considered

Urban Councils Act [*Chapter 29:15*], ss 78, 103 and 114 F

Case information

J Bamu, for the applicant

S Mushonga, for the respondents

Judgment

GOWORA J: On 29 March 2008 the applicant was one of the councillors successfully elected to the Bindura Municipal Council. He does not appear to G remember his ward but that is of no import for the resolution of the dispute before me. The second and third respondents were also elected as councillors for the same municipal council. The fourth respondent is the town clerk for the council. This council held its first meeting on 1 August 2008 and at that meeting the applicant was elected mayor for the Bindura Municipal Council. The third respondent was in turn elected as deputy mayor. On 13 October H

Gowora J

A 2008, one of the councillors moved a motion to rescind resolution 1406/08 which confirmed the election of the applicant to the position of mayor. On 24 October 2008 the fourth respondent called a meeting at which a motion was introduced for the rescission of the resolution in terms of which the applicant had been elected as mayor of the first respondent. The applicant queried the correctness of the procedure and, when he received no support, he declared B the meeting closed and left the chamber. Three other councillors left with him. Undeterred, the other council members carried on with the motion with the result that the said resolution was rescinded and the appointments of the applicant and second respondent as mayor and deputy mayor respectively were rescinded. The third respondent was then appointed mayor and the C second respondent deputy mayor. It is as a result of that resolution that the applicant has launched these proceedings, wherein he seeks a declaratur to the effect that the meeting of 28 October 2008 be declared null and void and further that he is the duly elected mayor for the municipal council of Bindura. The application is opposed by all the four respondents and the opposing affidavit has been deposed to by the second respondent on behalf D of all four. In short, the respondents contend that the applicant was correctly and legally removed as mayor and that the incumbent is legally entitled to occupy the position.

In view of the contention by counsel for the respondents that, legally, a resolution could be issued for an elected mayor to be removed, I requested E that counsel on both sides of the divide file additional heads on the point. This has been done and I am grateful to counsel for their diligence. I turn then to determine the merits of the application. It is necessary, in my view, to examine the provisions of the Urban Councils Act [*Chapter 29:15*] as it relates to the appointment and removal of mayors. That, I believe, is the F only issue for determination for the resolution of this dispute.

The elections of office bearers for urban councils are provided for in Part VII of the Act, in particular s 103 of which provides as follows:

> "Election of Mayor, Deputy Mayor, Chairperson and Deputy Chairperson
>
> (1) At the first meeting of a council after it has been established and thereafter at the first meeting held – G
>
> (a) after the general election of councillors; or

(b) after an initial election of councillors referred to in section 17(1)(c);

the councillors present at that meeting shall, under the chairmanship of the district administrator, or, in the case of the Harare and Bulawayo municipal councils, the provincial administrator within whose province the municipal H council lies, elect –

Gowora J

(c) in the case of a municipal council, one councillor or other person to be A mayor and thereafter another councillor to be a deputy mayor;

(d) in the case of a town council, one councillor to be chairperson and thereafter another councillor to be deputy chairperson.

(2) A person elected in terms of subsection (1) shall forthwith enter upon his or her office and shall hold office until the election of his or her successor in office. B

(3) A person elected in terms of subsection (1) shall cease to hold office as such when his or her successor is elected in terms of that subsection:

Provided that –

(i) if a deputy mayor is elected in terms of subsection (4) to be mayor, he or she shall cease to hold office as deputy mayor with effect from that election; C

(ii) if a deputy chairperson is elected in terms of subsection (4) to be chairperson, he or she shall cease to hold office as deputy chairperson with effect from that election;

(iii) if a mayor, chairperson, deputy mayor or deputy chairperson resigns, by notice in writing addressed to the town clerk, he or she shall cease to hold office with effect from the date the notice is received by the town clerk: D

(iv) if the seat of the councillor who is mayor, chairperson, deputy mayor or deputy chairperson becomes vacant by virtue of section seventy-eight (2)(b), (c), (d), (f), or (g), he or she shall cease to hold office with effect from the date that seat becomes vacant."

Subsection (4) is to the following effect:

"Where the office of mayor, chairperson, deputy mayor or deputy chairperson E becomes vacant before a meeting referred to in subsection (1), the councillors present at a meeting of the council held not later than thirty days after such vacancy shall elect a successor who shall serve for the unexpired term of office of his or her predecessor."

In interpreting a statutory provision, the court must endeavour to arrive at the intention of the legislature from an examination of the provision being F construed. Therefore it is a principle of statutory interpretation that the ordinary and literal meaning of a statutory provision be given effect unless to do so would lead to an absurdity. In *S* v *Nottingham Estates (Pvt) Ltd* 1995 (1) ZLR 253 (S) Gubbay CJ made the following remarks at 256D-F:

"The primary rule of interpretation is, of course, to endeavour to ascertain G the intention of the lawmaker from an examination of the provisions under consideration, placed in proper context. A court will commence its enquiry by giving the word its grammatical significance, unless it is clear that the literal sense when so applied, defeats the legislative intendment. In such event, a deviation from the ordinary meaning is justified, provided always that the word is sufficiently flexible to admit of another meaning by which such intention can be better effected. See *Ebrahim* v *Min of the Interior* 1977 (1) SA 665 (A) at H

Gowora J

A 678A-C; *Birch* v *Klein Karroo Agricultural Co-operative Ltd* 1993 (3) SA 403 (A) at 411E-G."

The same principle for statutory interpretation was stated by McNally JA in *S* v *Kachipare* 1998 (2) ZLR 271 (S) thus:

"I take the view that one is entitled to look closely at the wording of the section in order to find an interpretation which achieves sense rather than nonsense, B justice rather than injustice, in the application of the section in a situation almost certainly not contemplated by the legislature. This must be especially so in a statute which deals with procedure rather than substantive law."

The remarks by McNally JA are particularly significant *in casu* when regard is had to the provisions under scrutiny. What is at issue herein is the C procedures that attach to the election of a mayor by councillors of an urban municipal council. The provisions are not concerned with substantive law but procedure. It is pretty obvious that the language in the provisions relating to the election of a mayor, his deputy, a chairperson and his deputy are clear and unambiguous. According to s 103,

where an election has taken place after a meeting of the council, a mayor, his deputy, a chairperson or his D deputy shall hold office until the appointment of a successor. A successor is only appointed if an election is held following a vacancy in the office of the mayor, his deputy, a chairperson or his deputy, such vacancy, having arisen either through resignation or by virtue of the operation of s 78 of the Act. In terms of s 78, the office becomes vacant if a councillor resigns, E ceases to be qualified for election as councillor, is absent without leave of council from ordinary meetings of council during a consecutive period of two months, or from meetings of committees to which the councillor has been appointed for a consecutive period of two months, or is absent from ordinary council meetings for a period of six calendar months, whether or not leave has been obtained, ceases to be a councillor in terms of s 22 of the F Provincial Administration Act [*Chapter 29:11*], or has been suspended in terms of s 114 for a period in excess of thirty days, in which case his seat in council becomes vacant by operation of law. The Act does not provide for the vacation of the seat of a mayor, his deputy, a chairperson or his deputy except for the instances referred to above. An election to fill the seat is only held if a vacancy arises from the situations outlined above. Thus the position G of mayor, being a creation of statute, and provided for in terms of the Act, the election can only be changed in terms of the statute and the removal from office of a person from the position can only be effected under the provisions of the Act that created the position. Once a mayor ceases to hold office, the respective council can then exercise its powers under the Act and H elect a successor as provided for in s 103(1) and (2).

Gowora J

In casu, the council did not follow the provisions of the Act in removing the A mayor because there is no provision in the Act for such removal. Therefore no successor was elected. Thus the procedure followed in removing the mayor was unprocedural and illegal. The Act has not provided for the passing of a resolution to remove the mayor from office and any resolution purporting to have that effect, in the absence of a statutory provision providing for the B same, is clearly illegal and unprocedural. There is thus no provision for council to pass a resolution to remove the mayor who has been duly elected from office except under the provisions of s 103.

The respondents contend that the procedure followed was provided for in terms of s 89 of the Act. The section on which the respondents seek reliance does provide for the rescission or alteration of a resolution passed by council C at a subsequent meeting to that wherein the resolution being sought to be rescinded was passed. The further contention by the respondents is that a resolution was passed in terms of which the applicant was appointed mayor and that therefore the council had the power to rescind the earlier resolution appointing the applicant as mayor and rendering as a result the position D vacant, thus paving way for the election of a successor. As authority for this proposition the respondents have referred me to *City of Gweru* v *Kombayi* 1991 (1) ZLR 333 (S). I am at a loss as to why this particular authority was quoted, as it does not make a pronouncement on the issue sought to be relied on by the respondents in advancement of their argument, as it relates to resolutions by the council in ordinary meetings. It is not intended to apply E to the election and vacation of office by an elected mayor, which position is specifically provided for under s 103. Indeed the judgment speaks about the need to observe the provisions of the Urban Councils Act. It does not speak of one resolution rescinding another. The next authority I have been referred to is *Cape Town Municipality* v *Abdulla* 1974 (4) SA 428 (C). In this case Baker J did confirm that a responsible committee could legally F pass a resolution which directly impacted on an interest of the respondents. As the Urban Councils Act empowers the council and any committees set up under its authority to make resolutions, I do not find that this takes the respondents case any further than they had in their initial heads of argument.

The question that they had to address was whether or not a councillor elected G as mayor could be lawfully removed from that position by way of a resolution passed by the councillors in meeting, in the absence of the seat of mayor having fallen vacant as is required under s 103, which section does does not provide for the passing of such a resolution. The provisions of s 103(2) are peremptory and, in the absence of a cogent argument as to why the council should not comply with the said provision, I am unable to find that s 89 H

Gowora J

A applies in the removal of a mayor from office. The resolution passed for the removal of the applicant is thus declared to be null and void and of no force and effect. It follows, therefore, that the election of the second respondent to the post of mayor is itself illegal. The applicant is, in the result, entitled to an order in terms of the draft.

In the result I make an order in the following terms: B

1. It is hereby declared that the resolution 1422/FC/08 rescinding the election of the applicant as mayor and I Matanhire as his deputy be and is hereby declared to be null and void and of no force and effect.
2. It is declared that the election of the second respondent as mayor of the first respondent on 24 October 2008 be and is hereby declared to be null C and void and of no force and effect.
3. It is hereby declared that the applicant is the duly elected mayor for the first respondent.
4. The respondents be and are hereby ordered to pay the applicant's costs jointly and severally, the one paying, the others to be resolved.

D *Mbidzo, Muchadehama & Makoni*, legal practitioners for the applicant

Mushonga, Mutsvairo & Associates, legal practitioners for the respondents.

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Document 3 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/ZIMBABWE BROADCASTING HOLDINGS v GONO 2010 (1) ZLR 8 (H)

ZIMBABWE BROADCASTING HOLDINGS v GONO 2010 (1) ZLR 8 (H)

2010 (1) ZLR p8

Citation	2010 (1) ZLR 8 (H)
Case No	Judgment No. HH-162-09
Court	High Court, Harare
Judge	Gowora J
Heard	27 May 2009
Judgment	13 January 2010
Counsel	*J C Muzangaza*, for the applicant *T S Manjengwa*, for the respondent
Case Type	Opposed Application
Annotations	Link to case annotations

Flynote

Employment – *contract – termination – benefits flowing from contract – employee's right to continue with such benefits – right to benefits ceasing with termination of contract*

Headnote

The applicant was the respondent's employer. In March 2008, following D conciliation through an arbitrator, the dismissal of the respondent from the ranks of the applicant's employees was confirmed. As a result, the parties' formal relationship came to an end. At the time, the respondent was in possession of a vehicle belonging to the applicant. Sometime before these events the applicant had requested that the respondent use E her own vehicle for the business of the applicant. In return, the applicant undertook to have the vehicle serviced and repaired at its own cost. The vehicle required certain repairs and, as a result, the respondent was given use of the applicant's vehicle on the understanding that it would be returned once hers had been properly repaired. When the relationship was terminated, the respondent's vehicle was still undergoing repair. F Some time thereafter the applicant sent the respondent's vehicle to her with a request that its own be returned. The respondent refused and the applicant launched a vindicatory action for the return of the vehicle.

Held, that once an employee has been suspended or dismissed from employment, any benefits extended to that employee from that relationship G cease. The respondent's use of the applicant's vehicle was by virtue of her employment with the applicant and her right to retain possession terminated with her dismissal from employment. Therefore the onus was on her to establish a defence to the claim for the return of the applicant's vehicle. She contended that the applicant was obliged to repair, service and register, in her name, the vehicle she had purchased from the former H

Gowora J

A and which was still in its name. She did not produce a written contract and sought to rely on an alleged oral agreement which the applicant disclaimed. Whatever obligations the applicant assumed under that agreement, those obligations were not tied to the respondent's use of her officially allocated vehicle as a member of staff of the applicant. The obligation by the applicant to service and repair the respondent's vehicle B arose from the use by the respondent of her vehicle on the applicant's business and this usage had occurred before she was suspended from duty.

Cases cited

Chisipite Schools Trust (Pvt) Ltd v Clark 1999 (2) ZLR 324 (S)

Mashave v Standard Bank of SA Ltd 1998 (1) ZLR 436 (S)

C *SA Crushers (Pty) Ltd v Ramdass* 1951 (2) SA 543 (N)

Stanbic Finance Zimbabwe Ltd v Chivhunga 1999 (1) ZLR 262 (H)

Case information

J C Muzangaza, for the applicant

T S Manjengwa, for the respondent

Judgment

D **GOWORA J:** The applicant is a duly registered corporate entity under the laws of this country. On 30 March 2008, following conciliation through an arbitrator, the dismissal of the respondent from the ranks of the applicant's employees was confirmed. As a result, the parties' formal relation came to E an end. At the time the respondent was in possession of a vehicle belonging to the applicant. Some time prior to these sad events the applicant had requested that the respondent use her own vehicle for the business of the applicant. In turn, the applicant undertook to have the vehicle serviced and repaired at its own cost. The vehicle required certain repairs and, as a result, the respondent was given use of the applicant's vehicle on the understanding F that it would be returned once hers had been properly repaired. When the relationship was terminated, the respondent's vehicle was still undergoing repair. Some time thereafter the applicant sent the respondent's vehicle to her with a request that its own be returned. The respondent refused and it is that refusal that has prompted the applicant to launch these proceedings for a *rei vindicatio* for the return of the vehicle. The respondent has opposed G the granting of the relief in question.

Our law is to the effect that once an employee has been suspended or dismissed from employment, any benefits extended to such employee from that relationship cease. In *Chisipite Schools Trust (Pvt) Ltd* v *Clark* 1999 (2) ZLR 324 (S) Gubbay CJ stated:

> H "Pending the removal of the suspension, the respondent was not entitled to the

> continued enjoyment of the benefits comprising the free occupation of the A Headmistress's house and the continued use of the motor vehicle. A labour relations officer cannot order the respondent to surrender these particular benefits. Consequently, the applicant being unable to resort to self-help approached the High Court for relief. I consider it was justified in doing so".

I respectfully associate myself with the remarks of the learned Chief Justice. The respondent stands dismissed and a conciliator has ruled in favour of B the applicant. The respondent has noted an appeal to the Labour Court, but the noting of the appeal cannot give her the right to retain the property that she had possession of as a result of the contract of employment which is currently terminated. She has then to return the property in the absence of a recognizable defence to the claim by the applicant for the return of its C property. See *Stanbic Finance Zimbabwe Ltd* v *Chivhunga* 1999 (1) ZLR 262 (H) and *Mashave* v *Standard Bank of SA* 1998 (1) ZLR 436 (S). In the latter case, the Supreme Court *per* McNally JA at 438C-D stated authoritatively:

> "The Roman-Dutch law protects the right of an owner to vindicate his property, and as a matter of policy favours him as against an innocent purchaser. See for instance *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20A-C. The innocent purchaser's D only defence is estoppel."

This dictum was quoted by Malaba J (as he was then) in the *Stanbic Finance* case*. In casu,* the respondent does not claim a right to retain the vehicle through an agreement to purchase the vehicle, as was the case in the two cases quoted above. Rather, she seeks to rely on what has been termed E an antecedent agreement between the parties. In his heads of argument, Mr *Manjengwa* argued that the parties had an agreement which imposed consecutive obligations on each other. He contended that the applicant had to finance and service the respondent's motor vehicle to a satisfactory and roadworthy condition, facilitate its transfer into the respondent's name and thereafter deliver it to the respondent. It was only then, so the argument goes, F that the applicant would be entitled to have the Toyota Corolla returned to it. He relied on *SA Crushers (Pty) Ltd* v *Ramdass* 1951 (2) SA 543 (N) for this submission. At 546D-F Shaw J stated

> "Mr *Cooper*, for the respondent, submitted that the two obligations could not be separated in this way, although practically they would have to be performed consecutively. The passage above cited from *Mackenzie*'s case indicates, however, G that where the obligations fall to be performed consecutively, the party who must first perform is not entitled to withhold performance merely because the other party has not tendered performance *pari passu* or expressed his willingness to perform at a later date."

I did not understand Mr *Muzangaza* to challenge the correctness of this principle. His contention was that there were no consecutive obligation H

A imposed by the parties on the return to the applicant by the respondent of the vehicle in question, and that this was a defence mounted by the respondent as an afterthought to the vindicatory claim. It is necessary therefore to consider the facts.

The vehicle was a benefit afforded to the respondent in terms of a contract of B employment with the applicant. That contract has since been terminated. The respondent has therefore to establish a defence to the claim by the applicant for the return of its vehicle to its possession. The respondent has contended that the applicant was obliged to repair, service and register in her name the vehicle she had purchased from the former and which was still in its name. The respondent has not produced a written contract and seeks to rely on an C alleged oral agreement which the applicant disclaims.

The return of the vehicle was claimed by the applicant by way of a written communication to the respondent dated 6 October 2008 but delivered to the respondent on 8 October 2008. Her own vehicle was returned under cover of the letter in question. The respondent received and retained her own vehicle but refused to surrender the applicant's. She wrote a note in which she raised D the lack of insurance on the vehicle (hers), the lack of a licence and that the vehicle, presumably hers, had

nothing to do with her contract as "GM Finance and Corporate Affairs". On 9 October 2008, acting on instructions from their client, the applicant's legal practitioners addressed a suitable letter to the respondent demanding a return of the vehicle. The letter received a E prompt reply from the respondent's legal practitioners, who requested for an extension to 27 October 2008 for their client, the respondent to have use of the vehicle. The alleged contract now being sought to be relied on as a defence was not alluded to by the legal practitioners in question. The request was acceded to by letter dated 21 October 2008 and on 22 October the respondent's legal practitioners then wrote a letter to the applicant's legal F practitioners requesting an indefinite extension for their client to return the vehicle. This was turned down and a repeated demand was made for the return of the vehicle, ultimately resulting in the launching of these proceedings by the applicant for the recovery of its vehicle.

The respondent's use of the applicant's vehicle was by virtue of her G employment with the applicant and her right to retain possession terminated with her dismissal from employment. She did buy a vehicle from the applicant and, whatever obligations the applicant assumed under that agreement, those obligations were not tied to the respondent's use of her officially allocated vehicle as a member of staff of the applicant. It is clear on the facts that the obligation by the applicant to service and repair the respondent's vehicle arose H from the use by the respondent of her vehicle on the applicant's business and

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that this usage had occurred prior to her being suspended from duty. In any A event, the communication from herself and her legal practitioners prior to the institution of these proceedings does not mention an oral agreement as alleged by her for the rectification of defects on her vehicle. There was no demand by her for the alleged service and repairs to be effected before she could return the applicant's vehicle. Indeed, as submitted by Mr *Muzangaza,* B repairs to her vehicle was not a condition upon which the parties had agreed for her to retain the applicant's vehicle. Rather, she is seeking to justify her retention of the vehicle on the basis of claims arising out of her contract of employment which she has not even litigated upon.

In the premises I find that the applicant is entitled to an order as prayed. I therefore make an order in the following terms: C

It is ordered that:

1. The respondent, within 24 hours of the date of service of this order upon her, shall deliver the applicant's vehicle *viz*, a Toyota Corolla registration number AAP 6950 to the applicant's premises at Pockets Hill, Highlands, Harare. D
2 In the event that the respondent fails to comply with para 1. above, then the Sheriff of Zimbabwe or his lawful deputy is hereby ordered and authorized and required to seize the aforementioned vehicle from the respondent or from whomsoever or wherever it may be found and to deliver the same to the applicant.
3 The Deputy Sheriff is authorized in the execution of his duties above E to enlist the assistance of members of the Zimbabwe Republic Police as he may deem necessary.
4. The respondent shall pay the costs of this application.

Muzangaza Mandaza & Tomana, legal practitioners for the applicant F

Wintertons, legal practitioners for the respondent.

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Document 4 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/MUGUTI v UBOXIT WORLDWIDE (PVT) LTD & ORS 2010 (1) ZLR 13 (H)

MUGUTI v UBOXIT WORLDWIDE (PVT) LTD & ORS 2010 (1) ZLR 13 (H)

Citation	2010 (1) ZLR 13 (H)
Case No	Judgment HH-05-10
Court	High Court, Harare
Judge	Makarau JP
Heard	19 November 2009
Judgment	13 January 2010
Counsel	Plaintiff in person Defendants in default
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Contract – illegality – *rule against illegal contracts – courts will not compel performance by either party of an illegal contract – par delictum rule – where parties are equally in the wrong the loss will lie where it falls – relaxation of rule – discretion of court to do justice between man and* D *man so as to prevent an unjust enrichment of one party at the expense of the other– unjust enrichment – part payment of contract fee – no evidence to show that services rendered were out of proportion to payment made – loss should lie where it falls*

Headnote

E The law applicable to illegal contracts is quite clear. Where the contract has not been preformed the courts will not compel performance by either party to the contract. The rule is absolute and admits of no exceptions. Where the parties are equally in the wrong; the loss will lie where it falls, unless, in its discretion, the court is of the view that one party will thereby be enriched at the expense of the other. In such cases, the courts F will relax the *in pari delicto potior est conditio possidentis* rule to do simple justice between the parties.

In July 2008, the defendants contracted with a freight company to transport certain consignments from Zimbabwe to Zambia for the sum of US$6 500, of which, after payments of a deposit, the sum of US$3 500 remained outstanding. At the time the contract was entered into, the official currency G of Zimbabwe was the now defunct local currency. As the contract price was reflected in American dollars, the contract was in contravention of the Exchange Control Regulations, 1996, and thus unlawful. The freight company ceded its rights under the contract to the plaintiff, who sought to recover the outstanding sum of US$3 500. At the trial, at which the H defendants were in default, the plaintiff conceded the illegality but argued

Makarau JP

that in order to do simple justice between man and man, the rule against A illegal contracts should be relaxed so as to prevent the defendants from being unjustly enriched. The plaintiff, however, led no evidence as to the true value of the services rendered to defendants.

Held, dismissing the plaintiff's claim, that in the absence of such evidence, the court could not hold that the freight services were so out of proportion B with the payment made for such services that it should interfere by relaxing the rule operating against the contract.

Cases cited

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

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

Mudzivo v Nyamakope HH-120-09

Tawodzera & Anor v Masukuma HH-124-09

Case information

Plaintiff in person

Defendants in default D

Judgment

MAKARAU JP: At the trial of this matter, the defendants were in default. They were duly served with the notice of the trial on 1 October 2009 at their chosen address for service. The plaintiff moved for default judgment to be entered against the defendants as prayed for in the summons. Entertaining doubts as to whether or not the plaintiff's claim was sound, I requested the E plaintiff to address me on whether or not the original contract between the parties was not in contravention of the Exchange Control Regulations 1996 and thus unlawful. The plaintiff, who appeared before me in person, opted to file written head of argument even though in terms of the rules, he is not required to do so.

The plaintiff's written submissions have now been filed. F

The facts giving rise to this claim are commonplace. They epitomize the trading G pattern in the country prior to February 2009 when the fiscal authorities officially authorised the populace to trade in multi-currencies that they identified.

On 31 July 2008, the defendants contracted with a freight company trading under the name Dunquist Freight (Private) Limited to convey consignments from Harare and Mazoe to Lusaka. The parties agreed on a fee of US$6 500. This was at a time when the official currency of trade in the country was the now defunct local currency. A deposit in the sum of US$3000 was paid leaving a balance of $3500. The freight company ceded its rights to collect the debt to the plaintiff who, on 12 March 2009, issued summons against H

A the defendants claiming the balance due.

In view of the fact that the defendants were in default at the trial of the matter, it is not necessary, in my view, that I set out the details of the plea that they had filed in the matter. Suffice it to say that the matter was defended and a pre-trial conference held at which the parties filed to settle the matter, which, B in my view, is quite simple. As I have indicated above, the issues raised in the defendants' plea fell by the wayside when the defendants failed to attend court for trial and, had I been satisfied with the plaintiff's cause of action, I would have been enjoined to enter judgment in favour of the plaintiff as prayed.

The issue that raised my concern in the above matter is the legality of the original contract of services. It is not in dispute that the parties agreed to C transact using "foreign currency" then as a medium of exchange. The plaintiff accepts that this was illegal. He, however, pleads with me to relax the rule against illegal contracts and allow him to collect the balance due under the contract. This, in his view, will prevent an injustice and will ensure simple justice between man and man.

D In my view, the admission by the plaintiff that the original contract between the parties was illegal was well made. In testing whether a transaction that is paid for in foreign currency is illegal or not, I have invariably sought guidance from the decision by Chinhengo J in *Matsika v Jumvea Zimbabwe (Pvt) Ltd & Anor* 2003 (1) ZLR 71 (H). In that case, both parties, as in this case, were resident in Zimbabwe. The one sold to the other a motor E vehicle. The price of the vehicle was denominated in foreign currency. The court held that the transaction was illegal as it contravened the provisions of the regulations.

I see no distinction between the facts in the *Matsika* case and the facts before me.

F It appears to me that the law applicable to illegal contracts is quite clear and business people are well advised to take heed of this law before they institute litigation over contracts whose illegality may be questionable. Two rules are of general application. Where the contract has not been performed, the courts will not compel performance by either party to the contract. This rule is absolute and admits of no exceptions. Where the parties are equally in the G wrong, the loss will lie where it falls unless, in its discretion, the court is of the view that one party will thereby be enriched at the expense of the other. In such cases, the courts will relax the *in pari delicto potior est condutio possidentis* rule to do simple justice between the parties.

In casu, it is common cause that the contract was performed in part. The H defendants have thus made some payment towards the services that the

Makarau JP

freight company rendered them. They are not seeking to reap where they A have not sown, as was the case in *Dube* v *Khumalo* 1986 (2) ZLR 103 (S) where the Supreme Court relaxed the application of the *in pari delicto* rule.

It has not been advanced before me that to make the loss lie where it falls will enrich the defendants at the expense of the plaintiff. The true value of the services rendered to the defendants have not been shown to me and, B in the absence of such evidence, I cannot hold that the freight services rendered the defendants are so out of proportion with the payment made for such services that I must interfere by relaxing the rule operating against the contract. See *Mudzivo & Anor* v *Nyamakope* HH-120-09 and *Tawodzera & Anor* v *Masukuma* HH-124-09.

On the basis of the foregoing, I cannot grant default judgment as prayed for. C

In the result I make the following order:

The plaintiff's claim is dismissed with costs.

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Document 5 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/IN RE ESTATE MATIMURA 2010 (1) ZLR 17 (H)

IN RE ESTATE MATIMURA 2010 (1) ZLR 17 (H)

Citation	2010 (1) ZLR 17 (H)
Case No	Judgment No. HH-12-10
Court	High Court, Harare
Judge	Bere J
Heard	21 December 2009
Judgment	18 January 2010
Counsel	*M Hungwe*, for the estate
Case Type	Taxation matter
Annotations	Link to case annotations

Flynote

Costs – taxation – *fees charged by legal practitioner – reliance on Law Society's tariff – not permissible to use current tariff to calculate fees earned before such tariff came into operation*

Headnote

D The executor for a deceased estate was a legal practitioner. The administration of the estate had taken place over several years, due to the involved nature of the estate. When the executor presented his bill of costs to the taxing officer, he relied on the Law Society's tariff of fees, which came into effect on 1 April 2009 and was expressed in US dollars. His bill E included the work he had done during the currency of previous Law Society tariffs, which were then expressed in Zimbabwe currency. By the time his bill was presented, the Zimbabwe dollar though officially still in existence, in practice had disappeared from circulation. The taxing master rejected the bill for fees incurred before 1 April 2009 on the grounds that the tariff for each particular year should be that on F which the fees for that year were based.

Held, that the taxing officer is not merely there to rubber stamp any bill for taxation presented to him. A cursory reading of Order 38 of the High Court Rules shows that he has a lot of discretion thrust upon him and he is therefore not always expected to be in agreement with any bill presented to him. In determining whether the fees charged are reasonable, G the officer has to *inter alia* refer to the relevant tariff, which was precisely what he did in this matter. He was within his rights to demand that work done before 1 April 2009 be charged in accordance with the relevant and applicable Law Society tariff for the year in question. It was certainly not competent for the executor to seek to rely on the latest H tariff in his computation of fees due to him for any work done before it

Bere J

came into effect. The issues of the current value of the Zimbabwe dollar A required the intervention of the legislature, not that of the courts. The legislature must come up with an acceptable method of giving value to the Zimbabwe dollars that have literally been locked out of circulation. This has affected almost every citizen or enterprise in the country; the executor's predicament was not peculiar to him. B

Cases cited

Chanakira & Anor v Maikai Real Estate Development Trust HH-44-09

Kwindima v Mvunduma 2009 (1) ZLR 168 (H)

Legislation considered C

High Court Rules 1971 (RGN 1047 of 1971), rr 308(3) & 313

Case information

M Hungwe, for the estate

Judgment

BERE J: Mr Hungwe of Messrs Hungwe and Partners, Legal Practitioners, D Harare is the duly appointed executor in the above referred estate. The executor has been involved with this estate from 2005 up until now. Counsel has yet to draw up the final estate account.

It is noted that this estate has been quite involved as it necessitated some quite protracted litigation in order to trace and fully account for some of the state assets. E

In presenting his bill to the taxing officer, the executor has sought to rely on the Law Society tariff of 2009 for work done from the year 2005 up to 2009. The taxing officer felt constrained to pass the

bill, as he felt it was not competent for the executor to rely on the Law Society of Zimbabwe tariff for work done before that particular tariff came into operation. The F executor thought it was proper to do so and this culminated in the taxing officer referring the matter to me in terms of the rules of this court [1].

It is necessary to re-state the arguments raised by the parties involved in this case since no formal papers were filed as the cited rule does not seem to provide for the filing of proper court papers. G

The executor's position, as I understood it, was that this particular estate has been quite involved and can be traced back to the year 2005 when he was duly appointed executor. The executor worked on this matter from 2005 up until March of 2009, when he had to attend court to note judgment in one

A of the cases involving the estate, which, incidentally, I had the privilege to preside over.

Counsel's uncontroverted argument was that, in his capacity as executor, services were rendered and reasonable costs incurred, which costs his law firm is entitled to recover from the estate itself.

B In buttressing his position the executor sought to rely on the letter of 15 December 2009 from the Law Society of Zimbabwe, as well as the case of *Kwindima* v *Mvunduma* 2009 (1) ZLR 168 (H). I will comment on these later in my judgment.

It was further argued by the executor that he could not have presented his bill of costs to the taxing officer before he had finished all the work involving C the estate in question, hence the delay in compiling and presenting the bill for taxation.

The executor firmly believed that, once he had presented the bill to the taxing officer, the taxing officer could not raise any objection *mero moto* unless such officer had some interest in the matter. In fact the executor's argument D was blunt – he argued the taxing officer had no authority to deny his law firm the fees as per his bill of costs.

Mr Mudefi ("the taxing officer"), whilst accepting that he had no qualms with the compilation of the bill *per se,* raised concern with the executor's use of the 2009 Law Society fees tariff for work that was done long before E that tariff came into operation.

The taxing officer's position was that he believed that every year the Law Society of Zimbabwe publishes its tariff for fees in order to guide legal practitioners in recovering their fees for work done and that the tariff applicable in each year must be restricted to the work done in that particular year.

It was also the taxing officer's position that his duty was not merely to F rubber stamp bills of costs presented to him, but to raise objections if he felt such bills did not comply with the relevant tariff, and in this case the Law Society tariff. The officer was of the view that, if he felt the fees charged were a departure from those allowed by the relevant tariff, and therefore unreasonable, he could on his own initiative raise an objection, even in the G absence of the other party to the litigation.

The Legal Position

In my view this matter ought not to have ended up on my desk for guidance. I consider the issues raised to have been fairly straight forward and that recourse ought to have been had to the relevant High Court rules on taxation.

H The rule in question reads as follows:-

> "In the taxation of costs in respect of work done in connection with any matter A not referred to in subrule (2), including the taxation of costs as between a legal practitioner and his own client in respect of work done in connection with judicial proceedings, a taxing officer *shall be guided as far as possible by any tariff by the Law Society of Zimbabwe or recommended by the Council of the Society under the Legal Practitioners Act* [*Chapter 27:07*]" (my emphasis) [2]

It is quite apparent to me that the above referred rule makes it mandatory for B the taxing officer to be guided by the Law Society of Zimbabwe. The taxing officer's discretion is limited to the

guidelines as provided for by the Law Society of Zimbabwe and he has every reason to demand full compliance with the relevant tariff in the taxation of fees charged by any legal practitioner.

It is clear that the taxing officer was within his rights to demand that work C done in 2005 be charged in accordance with the relevant and applicable Law Society tariff as at that year. In my view, the subsequent years ought to have followed the same approach. It was certainly not competent for the executor to seek to rely on the tariff of September 2009 in his computation of fees due to him for any work done before that date. Such an approach was clearly a violation of the Law Society guidelines. D

Once there was disagreement between the taxing officer and the executor it became unavoidable for the matter to be referred to a judge in chambers for a determination hence the referral of the matter to me.

The approach adopted by the taxing officer is specifically provided for under r 313 of the High Court Rules [3] and that rule requires no interpretation. E

There can be no question that the taxing officer is not merely there to rubber stamp any bill for taxation presented to him. A cursory reading of Order 38 shows that the taxing officer has a lot of discretion thrust upon him and he is therefore not always expected to be in agreement with any bill presented to him. In determining whether the fees charged are reasonable, the officer has *inter alia* to refer to the relevant tariff and this is precisely what he did F in this matter.

The executor in this matter has sought to rely on the letter from the Law Society of Zimbabwe as authority for the proposition that he was justified to rely on the tariff of 2009 to charge for work done prior to that date.

With respect, the letter from the Law Society of Zimbabwe cannot possibly G be relied upon as authority for the proposition to flout the Law Society's own regulations for the levying of legal fees. That letter is not precedent. If anything it is no more than an ordinary letter carrying the opinion of the

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Bere J

A executive secretary of the Law Society as an organisation.

The Law Society in its own wisdom has year after year created tariffs which must be used in the computation of legal fees by its members. None of those tariffs are to be used with retrospective effect in the absence of the Law Society specifically stating so. In any event, it is inconceivable, in my view, B that the Law Society would encourage its members to recoup their legal fees in United States dollars for the time when it was illegal in this country to deal in foreign currency without complying with the relevant exchange control regulations.

The executor has also sought to rely on *Kwindima* v *Mvunduma supra* as another authority to justify the use of the Law Society tariff of 2009 for use C for work done prior to that date. The argument raised was that the estate would be unjustly enriched if the executor were to be forced to rely on tariffs which would result in him getting the valueless local currency.

I have gone through the referred case and I am afraid this case has been quoted out of context. The *ratio* in *Kwindima's* case (*supra*) has either been completely misunderstood or there has been an conscious effort to hijack it. D In the first place, that case was specifically dealing with a claim for damages and the instant case has nothing to do with such a claim.

The issue in the instant case is simply whether or not the executor should use the Law Society tariff of 2009 for work that was done prior to that year. The much talked about tariff clearly states in its preamble that it is to be "with E effect from 1 April 2009". If the Law Society wanted the tariff to be used for any period other than that stated then it should have stated so.

I am aware of the difficulties which have dissuaded the executor from relying on the tariffs for 2005, 2006 and 2007. The effect of relying on such tariffs is that the executor will be laden with a bill in local currency, which currency F has been rendered obsolete or otiose by the advent of dollarization. Although officially the local currency remains legal tender in this country, it is not a secret that the introduction of the multi-currency regime has literally led to the debasement of the Zimbabwe dollar and its subsequent and unceremonious disappearance from circulation.

In my view, the issues to do with the current value of the Zimbabwe dollar G are issues which require the intervention of the legislature and not the courts. The legislature must come up with an acceptable method of giving value to the Zimbabwe dollars that have literally been locked out of circulation. This has affected almost every citizen or enterprise in the country. The predicament the executor finds himself in is therefore not peculiar to him. I did comment H in an almost related matter on this aspect in the case of *Chanakira & Anor*

Bere J

v *Maikai Real Estate Development* Trust HH-44-09. A

In conclusion, I am more than satisfied that the method of computing fees desired by the executor is untenable. The taxing officer must be commended for his vigilance, for he was justified to decline passing the executor's bill.

The matters raised are of some significance and for that reason there shall be no order as to costs. B

1 Order 38 rule 313, High Court Rules 1971
2 Order 38 r 308(3) of High Court Rules 1971
3 Order 38 r 313 of High Court Rules 1971

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Document 6 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/CFX BANK LTD v RTO ENGINEERING (PVT) LTD & ANOR 2010 (1) ZLR 23 (H)

CFX BANK LTD v RTO ENGINEERING (PVT) LTD & ANOR 2010 (1) ZLR 23 (H)

Citation	2010 (1) ZLR 23 (H)
Case No	Judgment No. HH-8-10
Court	High Court, Harare
Judge	Karwi J
Heard	20 January 2010
Judgment	20 January 2010
Counsel	*B Chidziva*, for the applicant *F Mutangamira*, for the first respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

C **Criminal procedure** – *compensation – order for compensation to complainant following conviction – not suspended by noting of appeal – amount of order – not limited by magistrate's civil monetary jurisdiction*

Headnote

An order for compensation following conviction for a criminal offence may D be made in terms of s 363 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. If the accused person notes an appeal, the requirement to pay compensation is not thereby suspended. This is shown by the provisions of s 370 of the Act. This provides that a court which makes or order of compensation may require the injured party to give security E for repayment of the compensation, in case the award is reversed on appeal or review. This clearly suggests that payment of compensation is immediate and is not suspended by an appeal or review. If an order of restitution was suspended by noting an appeal, the legislature would not have provided for security to be given by the injured party. The need to provide security by the injured party presupposes that compensation F would have been paid soon after the sentence is passed.

Under s 367 of the Act, the amount of an order for compensation is not limited by the civil monetary jurisdiction of the magistrate making the order.

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 367, 370 & 372

G Magistrates Court Act [*Chapter 7:10*], s 63

Case information

B Chidziva, for the applicant

F Mutangamira, for the first respondent

Judgment

H **KARWI J:** This is an urgent chamber application for stay of execution

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Karwi J

pending review. The relevant background to this matter is as follows. On 14 A December 2009, the regional court sitting at Harare convicted the applicant bank of contravening s 136 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] and sentenced the applicant to pay a fine of $500 and also ordered the applicant to compensate the first respondent the sum of $250 000 .The magistrate suspended the payment of the fine to the next day, B 15 December 2009. Immediately after the sentence, the applicant noted an appeal against both conviction and sentence. That appeal is still pending before this court.

Mr Clemence Zingoni, who deposed to an affidavit on behalf of the applicant, says that he was shocked to hear on 17 December 2009, that on the same day, the second respondent, armed with a writ of execution together with a C bond of indemnity, had been at the applicant's head office with the intent to attaching property in order to satisfy the order of restitution. Mr Zingoni averred that the issuing of the writ was improper and unlawful, as the effect of noting of an appeal against the magistrate's decision was to suspend its execution. The writ was therefore defective as it could not be issued in those D circumstances. It was Mr Zingoni's further contention that the value of the writ exceeded the jurisdiction of the regional magistrate as prescribed by SI 21 of 2009. It was also contented that, in terms of s 372 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], any court purporting to enforce a restitution order made in criminal proceedings can only do so if it has monetary jurisdiction in the first instance. E

Following the service of the writ of execution on the applicant, its legal practitioners immediately filed an *ex parte* application on 18 December 2009 in the magistrate's court for stay of execution. The application was dismissed by a magistrate on the same day. Immediately thereafter, the applicant filed an application for review of the magistrate's judgment. That F application for review was filed simultaneously with this application for stay of execution. It is worth noting that, in its application for the review of the conduct of the magistrate who dismissed the *ex parte* application, the messenger and the clerk of court, the applicant concedes that the noting of an appeal does not suspend the execution of any sentence of imprisonment, fine or community service, as is provided

in s 63 of the Magistrates Court G Act [*Chapter 7:10*]. However, the applicant's argument is that the order which is subject of these proceedings is neither a term of imprisonment, nor a fine, nor an order for community service. It is an order for restitution. It is further argued that restitution is not specifically mentioned by the said Act and therefore in accordance with rules of interpretation, the express mention of the other forms of punishment excludes what is not stated in s 63 of the H

A Magistrates Court Act.

It was also submitted on behalf of the applicant that the trial magistrate, in ordering restitution in the sum of USD250 000, applied a parallel market exchange rate to the sum of ZWD16.1 trillion, which was unlawful and was not supported by evidence led at the trial and was contrary to the Reserve B Bank of Zimbabwe letter designating an exchange rate of ZWD30 000 to USD1 as being the exchange rate.

The correct version of facts on which the applicant were charged and convicted is that on 6 March 2008, and in Harare, RTO Engineering (Pvt) Limited supplied the applicant and not an individual employee with Z$16.1 trillion which was to be transferred into some beneficiaries' accounts for the purposes C of securing free funds, which funds were intended to buy some mechanized farm equipment. The applicant thereafter unlawfully misrepresented to RTO Engineering that it had transferred the money into the beneficiaries' accounts by originating "swift transfers" and by means of that misrepresentation caused RTO Engineering to believe that the transactions had been effected, when D in fact only a portion had been so effected, causing an actual prejudice of USD$250 000. The court was advised that the court *a quo* had accepted the fact that upon being paid by RTO Engineering (Pvt), the applicant generated "SWIFT" confirmations, which are electronic printouts that can only be generated by an authorised dealer after logging onto the international SWIFT platform. "SWIFT" is short for "Society for Worldwide Interbank Financial E Telecommunications".

Upon being paid, the applicant generated the SWIFT transfer to Tatumarchesan in Brazil for an amount of $100 000 only. The amount paid by RTO Engineering had been meant to raise $351 000, of which $100 000 was sent to Brazil. $251 000 disappeared and it is that amount for which the court ordered F compensation in the sum of USD$250 000. It is therefore not correct for the applicant to argue that the court *a quo* failed to use the exchange rate applicable at the time. The court was correct in ordering compensation in the amount actually suffered by RTO Engineering.

It was also submitted on behalf of the applicant that the issuance of the writ of execution by the clerk of court was improper as it was issued at a time G when an appeal had been filed. The subsequent attachment by the messenger of court was equally defective. It was further argued that the order of compensation, which prompted the writ of execution, had been suspended by the appeal which the applicant had filed.

Section 63 of the Magistrates Court Act provides as follows:

H "The execution of any sentence of imprisonment, fine or community service

shall not be suspended by – A

(a) …

(b) the noting of an appeal referred to in section *sixty* unless –

(i) in the case of imprisonment or fine, bail is granted by a judge or magistrate in terms of section 163 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]; or B

(ii) in the case of community service, an application is granted by the magistrate to suspend the operation of the sentence pending determination of the appeal."

What this means is that the payment of the fine is not suspended by the appeal. The Magistrates Court Act does not, however, mention whether or not an order of compensation is suspended by an appeal. C

In terms of s 370 of the Criminal Procedure and Evidence Act, "a court which makes an award or order in terms of this Part may require the injured party to give security for repayment of the compensation or the return of the property, in case the award is reversed on appeal or review."

This clearly suggests that payment of compensation is immediate and is not suspended D by an appeal or review. If an order of restitution was suspendable by an appeal or review, the legislature would not have provided for security to be given by the injured party. The need to provide security by the injured party presupposes that compensation would have been paid soon after the sentence is passed. E

It is also my considered view that the regional court had the jurisdiction to order compensation as it did, for s 367 of the Criminal Procedure and Evidence Act provides that:

> "Notwithstanding any enactment limiting the civil jurisdiction of the court concerned, any court, including the court of a regional magistrate, may:
>
> (a) award compensation in terms of section *three hundred and sixty-two , three* F *hundred and sixty-three or three hundred and sixty-four* in any amount; or
>
> (b) make an order in terms of section *three hundred and sixty-five* for restitution of property, whatever the value of the property concerned."

I am of the view that the applicant has no chances of success on review, for the reason that both the clerk of court's and the messenger of court's actions G were within the confines of the law. Neither of them exercised any judicial functions which are reviewable. See s 372 of the Criminal Procedure and Evidence Act. Further, there was no record of proceedings of the court *a quo* furnished in this court, which the applicant seeks to be reviewed. No recognized basis was laid before me for that review.

It is for the above reasons that the applicant cannot be assisted with the relief, H

Karwi J

A such as a stay of execution, because it is founded on a hopeless application for review. Accordingly the application is dismissed with costs.

Kantor & Immerman, applicant's legal practitioners

Mutamangira & Associates, first respondent's legal practitioners

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Document 7 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/S v MAVASA 2010 (1) ZLR 28 (H)

S v MAVASA 2010 (1) ZLR 28 (H)

Citation	2010 (1) ZLR 28 (H)
Case No	Judgment No. HH-13-10
Court	High Court, Harare
Judge	Makarau JP and Chatukuta J
Heard	20 January 2010
Judgment	20 January 2010
Counsel	Details not supplied
Case Type	Criminal review

Annotations No case annotations to date

Flynote

Criminal procedure *(sentence) – general principles – juvenile offenders – general approach to sentence – need for courts to get information and support from Social Welfare Department – such support not available – court should look for information from other sources*

Headnote

The accused pleaded guilty and was convicted of rape. He was 16 years old D at the time of the crime and the complainant, his younger sister, was aged 12. He had inserted his penis into the complainant's vagina; she removed it when she pushed the accused away. There was legal penetration, even though such penetration could not be medically detected when the complainant was examined some three days later. The magistrate E sentenced him to 12 years' imprisonment, of which three years were suspended. The trial magistrate took a long time before sentencing the accused as he was waiting for a probation officer's report. The report never came and, in the end, the trial magistrate had to proceed to assess sentence without the report. The reason for the lack of a report was shortage of staff in the Social Welfare Department. The issue on review F was the challenge that faces the courts in handling matters of juvenile offenders in the absence of the requisite support structures to inform them on how to manage such offenders.

Held, that under s 351 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a discretion is given to the court convicting a juvenile on the options G available for the management of the young person. It is clear from the section that there must be close liaison between the court convicting the juvenile and the Social Welfare Department about training institutions or reform schools where convicted offenders may be referred to. Such liaison appears to have died down with the passage of time, leaving trial magistrates with no options but to sentence juvenile offenders to H

Makarau JP

A imprisonment as occurred here. There is an urgent need for this liaison to be resuscitated if the management of juvenile offenders is to be done in accordance with the law and for the rehabilitation of young offenders.

Held, further, that our laws and procedures have for long recognized that it is wrong to sentence juvenile offenders as if one is dealing with an adult offender. The thrust of the criminal justice delivery system in B sentencing adults is to punish them for their wrongdoing, whilst in dealing with juveniles, the thrust is to reform them. A court should thus be exceedingly slow to expose a convicted juvenile to the same rigours of punishment which it would impose on an adult, because the purposes for imposing the sentences are different. Even in the absence of probation officers and C probation officers' reports, a trial court handling the matter of a juvenile should be innovative and seek information from the school, family or community of the juvenile before coming up with a management scheme or sentence.

Held, further, that the need to protect the complainants in sexual offences need not strip the youthful offender of his status as such and the consequent D need on his part to be protected by the courts from his immaturity. The court should always strike a balance between the two competing rights. One is not greater than the other.

Held, further, that the sentence would be altered to one which would ensure the accused's immediate release.

Cases cited E

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

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

Legislation considered

F Criminal Procedure and Evidence Act [*Chapter 9:07*], s 351

Judgment

MAKARAU JP: The accused appeared before the magistrates court facing one count of contravening s 65(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (rape). He pleaded guilty to the charge and was duly convicted. He was sentenced to 12 years' imprisonment, with three years G suspended for five years on conditions of good behaviour.

The facts giving rise to the charge and conviction may be summarized as follows. The accused and the complainant are brother and sister respectively. At the time of the offence, the accused was aged 16 whilst his sister, the complainant, was aged 12. During the day of 27 May 2006, the accused went H for a beer drink with his parents. Upon his return to the residence, he found

the complainant and a younger brother alone. The two ran away when the A accused arrived as they were afraid. Presumably they mistook him for an intruder. The complainant and the accused's young brother prepared their respective sleeping places in their mother's room. The accused joined them and insisted on sleeping in the same room with them. He then spread his own blankets in between the two and they all proceeded to sleep. Later during B the night, the accused crept under the complainant's blanket and forcefully removed her shorts. He then inserted his penis into the complainant's vagina. She resisted him and pushed him away. He did not persist with this conduct.

The medical affidavit adduced in evidence did not reveal any evidence of penetration. No tests for any sexually transmitted disease were done on the complainant. C

The conviction of the accused is proper and raises no issues. The trial magistrate correctly noted that the facts of the matter constituted an offence, as the accused inserted his penis into the vagina of the complainant, who removed it when she pushed the accused away. There was legal penetration, even though such penetration could not be medically detected when the D complainant was examined some three days later. In this regard, the words of the accused when entering his plea to the charge are, in my view, telling. This is what he had to say:

> "I forced her but I did not have sexual intercourse with her. I inserted my penis and she removed it."

It is the sentence that was imposed upon the accused that has caused concern E in this matter. Two issues arise.

Firstly, the record indicates that the trial magistrate took long in sentencing the accused as he was waiting for a probation officer's report. The report never came and, in the end, the trial magistrate had to proceed to assess sentence without the report. In doing so, he observed that there was an acute F shortage of staff at the Social Welfare Department. He presumably could not continue waiting for a report that was not forthcoming. This situation must face a number of magistrates across the country who have to come up with sentencing options for juvenile offenders. The issue that then presents itself to me is the challenges that face the courts in handling matters of juvenile G offenders in the absence of the requisite support structures to inform them on how to manage such offenders.

The Criminal Procedure and Evidence Act [*Chapter 9:07*] has a number of sections that specifically provide for how the courts should deal with juvenile offenders and juvenile witnesses appearing before them. It is the age old practice of our courts to treat juveniles differently from adults. Section 351 H

A of that Act deals specifically and in detail with how convicted juveniles should be handled. The import of the section is to give discretion to the court convicting a juvenile on the options available for the management of the young person. It is also clear from the section that there must be close liaison between the court convicting the juvenile and the Ministry responsible for Social Welfare where training institutions or reform schools where convicted B offenders may be referred to. Such

liaison appears to have died down with the passage of time, leaving trial magistrates with no option but to sentence juvenile offenders to imprisonment as occurred in this matter.

In casu, it would appear that the trial magistrate did not make the necessary inquiries with the relevant Ministry, presumably because he felt that there C would be no response as he had failed to obtain a probation officer's report in the first instance. It would appear to me that there is urgent need for this liaison to be resuscitated if the management of juvenile offenders is to be done in accordance with the law and for the rehabilitation of young offenders.

In addition to the statutory provisions I have cited above, there is a long D line of decided cases in this jurisdiction discussing the manner in which convicted juveniles are to be treated. Our laws and procedures have for long recognized that it is wrong to sentence juvenile offenders as if one is dealing with an adult offender. The thrust of the criminal justice delivery system in sentencing adults is to punish them for their wrongdoing, whilst in dealing with juveniles, the thrust is to reform them. See *S* v *Zaranyika & Ors* 1995 (1) ZLR 270 (H). E A court should thus be exceedingly slow to expose a convicted juvenile to the same rigours of punishment which it would impose on an adult, because the purposes for impsing the sentences are different.

In *S* v *Tendai & Anor* 1998 (2) ZLR 423 (H) Gillespie J, admirably in my view, discusses the management of juvenile offenders instead of the punishment or F sentencing of such offenders. The use of such language, which is deliberate, highlights the differences in approach that a court should take when dealing with juvenile offenders as opposed to adult offenders. In that case, Gillespie J discusses the importance of a probation officer's report in assisting the court in coming up with the most apt management scheme for each child that is found to be in conflict with the law. He further discusses the need to G involve the family of the child, which he holds to be just as important as the probation officer's report for the formulation of a management scheme for the juvenile. Thus, where the child has a stable family environment and there are responsible members of the family who are willing and capable of taking responsibility for the rehabilitation of the minor, such a minor should be H given a chance to rehabilitate under the supervision of such family members.

Makarau JP

The issue that has presented itself to me is that, even in the absence of A probation officers and probation officers' reports, a trial court handling the matter of a juvenile must be innovative and seek to involve the family of the juvenile before coming up with a management scheme or sentence. To simply proceed without both the probation officer's report and involvement of the juvenile's family is, in my view, akin to proceeding in complete darkness. B

Thus, while the trial magistrate is to be commended for having waited for the probation officer's report, which was never provided, I would venture to suggest that trial magistrates in similar positions should be innovative and seek to gain an insight into the circumstances of the juvenile before them from other reliable sources such as the school, family or community of the accused. A little bit of light is always better than no light at all, in my view. C

Secondly, it appears to me that the trial magistrate *in casu* treated the accused as an adult offender, even though he noted in his reasons for sentence that the accused is a juvenile offender. The sentence he imposed clearly falls within the range of sentences ordinarily imposed upon adult offenders. It is common cause that the accused had unlawful sexual intercourse with his D sister and that this constitutes an aggravating feature of the matter. However, this alone would not strip the accused of his status as a juvenile offender. In *Zaranyika supra,* Bartlett J laid down a guideline to assist magistrates in assessing sentences for juvenile sexual offenders. He had this to say:

> "I would finally emphasise that it is hoped that this judgment will provide a guideline to assist regional magistrates in the difficult task of assessing sentence E in rape matters where the accused is aged 17 or 18 (and to a somewhat lesser extent where the accused is aged 19). It is not suggested or intended that the approach laid down should be regarded as being engraved in stone. There may well be cases where the aggravating features are such that a more severe sentence is required. Such aggravating features could, for example, be: a multiplicity of counts; the infection of the complainant with a sexually transmitted disease; or F the suffering of serious physical and/or psychological harm. There may equally very well be cases where the mitigating factors are such that a much more lenient approach is required. Such mitigating factors could, for example, be: clear and verifiable indication of minimal physical or psychological harm or a probation officer's report which, for good reason, after a detailed assessment of the offence and the offenders' background, recommends a lesser punishment such as corporal punishment or committal to an institution." G

I am not aware of any later judgment that has the effect of varying or diluting the guidelines laid down in this case. I am, however, aware that there has been a noticeable shift by trial magistrates to emphasize the gravity with which the courts view the offence of rape and how this offence traumatizes the victims. This is indeed the correct approach to adopt in such matters H

Makarau JP

A but, in my view, the need to protect the complainants in sexual offences need not strip the youthful offender of his status as such and the consequent need on his part to be protected by the courts from his immaturity. The court should always strike a balance between the two competing rights. One is not greater than the other.

B *In casu,* the trial magistrate did not aver to any aggravating features that would justify a departure from the approach that was suggested in *Zaranyika supra*. I have not been able to find any such features in the matter. If it were appropriate to use such language in rape cases, I would venture to suggest that there were minimal aggravating features in this case. The complainant pushed off the accused, who did not persist with his attack. The medical report C does not reveal any physical injury to the complainant, who was luckier than most complainants whose cases have come before the courts. On the basis of the foregoing, it is my view that the sentence imposed upon the accused is severe and induces a sense of shock. It cannot stand.

In the result, the sentence imposed on the accused is set aside and in its place is substituted the following:

> D "5 years' imprisonment of which 2 years are suspended for 5 years on condition the accused does not within that period commit an offence of a sexual nature and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine."

The accused person was sentenced on 2 June 2006. He has by now served E the full term of his sentence. He is entitled to his immediate release and a warrant for his liberation should issue.

Chatukuta J agrees.

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Document 8 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/ZIMBABWE MINING DEVELOPMENT CORPORATION & ANOR v AFRICAN CONSOLIDATED RESOURCES PLC & ORS 2010 (1) ZLR 34 (S)

ZIMBABWE MINING DEVELOPMENT CORPORATION & ANOR v AFRICAN CONSOLIDATED RESOURCES PLC & ORS 2010 (1) ZLR 34 (S)

Citation	2010 (1) ZLR 34 (S)
Case No	Judgment No. S-01-10
Court	Supreme Court, Harare
Judge	Chidyausiku CJ
Heard	20 October 2009; 18 November 2009
Judgment	25 January 2010
Counsel	*J R Tsivama,* for the first applicant *J Muchada,* for the second applicant

J Samukange, for the first to the sixth respondent
N Mutsonziwa, for the seventh respondent

Case Type Chamber application

Annotations No case annotations to date

Flynote

Appeal – *execution – order for – court in the main judgment ordering that successful litigant may execute notwithstanding the noting of an appeal* D *– such order only proper in exceptional circumstances – losing litigant's right to an appeal not to be abrogated lightly and without due process*

Appeal – *execution – pending appeal – application to execute pending appeal – when such application should be made – need for special application for leave to execute after noting of appeal – right of losing litigant to respond to such application* E

Appeal – *noting – effect – judgment of court a quo suspended – court's power to give leave to execute notwithstanding the noting of an appeal*

Practice and procedure – *execution – pending appeal – application – full reasons for the application must be given to court – if application granted, full reasons therefor must be stated – failure of court to set* F *out such reasons – effect – serious misdirection justifying the setting aside of the order*

Headnote

At common law a court granting judgment enjoys inherent jurisdiction to order the execution of that judgment despite the noting of an appeal. G The successful party, however, has to make a special application for such relief. The respondent is entitled to an opportunity to respond to the application.

Only in exceptional circumstances is it proper for a judge to include in his main judgment an order authorizing execution despite the noting of an appeal against that judgment. In the absence of exceptional circumstances, H

2010 (1) ZLR p35

Chidyausiku CJ

A due process must be observed before issuing such an order. A litigant's right to appeal should not be abrogated lightly and without due process.

In an application in the High Court, the respondents (then the applicants) had successfully sought an order, the broad effect of which was that they obtained the return from the applicants (respondents in the High Court) of a large quantity of diamonds. In terms of para 7 of the order, the respondents B were granted authority to execute in spite of any appeal against the order being noted by the applicants. In his reasons for judgment, the judge *a quo* failed to set out why he ordered that the respondents should be so authorized to execute notwithstanding the noting of an appeal, nor did it appear from the papers that any detailed basis therefor had been given to C him. The applicants duly noted an appeal and, pending the appeal, filed a chamber application before the Supreme Court, seeking to set aside para 7 of the order of the court *a quo* which provided that its judgment be not suspended upon the noting of an appeal.

Held, that the court *a quo*, having not been provided with sufficient details in support of an application for leave to execute despite the noting of an D appeal, was not in a position properly to exercise its discretion.

Held, further, that the failure of the court *a quo* to give reasons in respect of para 7 of its order was a serious misdirection justifying the setting aside of that part of its order.

Held, further, that the noting of an appeal has the effect of suspending a E judgment. It is only then that the successful party can make a special application for leave to execute the judgment despite the noting of an appeal. The losing litigant is entitled to respond to that application and it is only after hearing both parties to the special application for leave to execute that a court can properly exercise its discretion. *In casu*, all this was not done.

F *Held,* further, that the leave of the court *a quo* to execute notwithstanding the noting of an appeal should be set aside.

Cases cited

South Cape Corporation (Pvt) Ltd v Engineering Mgmt Svcs (Pty) Ltd G 1977 (3) SA 534 (A)

Case information

J R Tsivama, for the first applicant

J Muchada, for the second applicant

J Samukange, for the first to the sixth respondent

N Mutsonziwa, for the seventh respondent

Chidyausiku CJ

Judgment

CHIDYAUSIKU CJ: This is a chamber application in which the applicants A seek to set aside an order by Hungwe J. The order sought to be set aside provides that the learned Judge's judgment will not be suspended by the noting of an appeal. The order of the court *a quo* provides as follows:

"I therefore issue the following order:

1 The African Consolidated Resources P/L claims issued to the third, fourth, B fifth and sixth applicants within the area previously covered by Extension Prospecting Order 1523 held by Kimberlitic Searches P/L are valid and have remained valid since the date they were originally pegged.

2 The right granted to the third respondent by virtue of the Special Grant shall not apply in respect of the African Consolidated Resources P/L claims area as indicated on annexure 'B' to the papers. In that regard, it is hereby C ordered that the third respondent cease its prospecting and diamond mining activities in the said area.

IT IS FURTHER ORDERED AS FOLLOWS:

3 That the second respondent return to the applicants possession of the 129 400 carats of diamonds seized from the applicants' offices in Harare on 15 January 2007. D

4 The second respondent return to the applicants all diamond(s) acquired by the second respondent from the African Consolidated Resources (P/L) claims area using the register kept by the second respondent in compliance with the Kimberley Process Certification Scheme.

5 That the fourth respondent be and is hereby ordered to direct (the) police to cease interfering with the applicants' prospecting and mining activities. E

6 That the first, second and third respondents (pay) the applicants' cost(s) on a legal practitioner and client scale, the one paying the other to be absolved.

7 Any appeal noted against this order shall not suspend the operation of the order."

Paragraph 7 of the above order authorises the respondents to execute F the judgment despite the noting of an appeal against that judgment. The applicants are dissatisfied with the order and, having noted an appeal against the judgment, have filed this chamber application.

The applicants contend that Hungwe J misdirected himself in ordering execution of his judgment despite the noting of an appeal. They submitted that the grant of such an order prior to the noting of an appeal was irregular G and should be set aside. The applicants' case is set out in paras 13-15 of the founding affidavit, which provide as follows:

"13. During argument, the respondents who were the applicants in that matter indicated to the court *a quo* that they would be amending their draft order to include a seventh paragraph to the effect that any appeal noted against that order would not suspend its operation. H

Chidyausiku CJ

14. Although A no submissions were made by the first to the sixth respondents to justify the proposed amendment it was submitted on the applicants' behalf that such order was incompetent at this stage. It was also submitted that an applicant's recourse would be to apply for leave to execute pending appeal. It was further submitted that it is only after judgment has been delivered that any

proper assessment can be made whether there has been B any misdirection or not and that sometimes the aggrieved party may even easily show to the satisfaction of the court that indeed there has been such [misdirection].

15. The court *a quo* in its judgment handed down later that day (the 24th of September 2009) granted the order as amended such that the appeal that the applicants subsequently filed under Case No. SC 230/09 did not suspend the operation of that order. A copy of the operative part of the judgment is C attached hereto and marked '**A**' and the yet to be typed full judgment as ANNEXURE 'B'."

The respondents did not file any opposing affidavits. Mr *Samukange*, for the first to the sixth respondents (hereinafter referred to as "the respondents"), during the course of his submissions, made averments to the effect that the D application for execution of judgment despite the noting of an appeal was made during the course of the main hearing before judgment was given. He, however, did not give details of the application. I will assume no detailed basis for the application was submitted to the court *a quo*.

The law on the effect of the noting of an appeal against a judgment is well settled. At common law the noting of an appeal against a judgment suspends E the operation of that judgment. It is also trite that at common law the court granting the judgment enjoys inherent jurisdiction to order the execution of that judgment despite the noting of an appeal. In the leading case of *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) Corbett JA at pp 544-546 had this to say:

F "Whatever the true position may have been in the Dutch courts, and more particularly the court of Holland (as to which see *Ruby's Cash Store (Pty) Ltd* v *Estate Marks and Anor* 1961 (2) SA 118 (T) at 120-3), it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. G To obtain such leave, the party in whose favour the judgment was given must make special application. (See generally *Olifants Tin 'B' Syndicate* v *de Jager* 1912 AD 377 at p 481; *Reid and Anor* v *Godart and Anor* 1938 AD 511 at p 513; *Gentiruco AG* v *Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 667; *Standard Bank of SA (Pty) Ltd* v *Stama (Pty) Ltd* 1975 (1) SA 730 (A) at 746). The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to H prevent irreparable damage from being done to the intending appellant, either

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Chidyausiku CJ

by levy under a writ of execution or by execution of the judgment in any other A manner appropriate to the nature of the judgment appealed from (*Reid's* case *supra* at 513). The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see *Voet* 49.7.3; *Ruby's Cash Store (Pty) Ltd* v *Estate Marks and Anor supra* at 127). This discretion is part and parcel of the inherent jurisdiction which the B court has to control its own judgments (cf. *Fismer* v *Thornton* 1929 AD 17 at 19). In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:

(1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (the respondent in the application) if leave to execute were to be granted; C

(2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (the applicant in the application) if leave to execute were to be refused;

(3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some D indirect purpose, e.g., to gain time or harass the other party; and

(4) where there is the potentiality of irreparable harm or prejudice to both [the] appellant and [the] respondent, the balance of hardship or convenience, as the case may be.

(See in this connection *Ruby's* case *supra* at pp 127-8; also *Rood* v *Wallach* 1904 TS 257 at 259; *Weber* v *Spira* 1912 TPD 331 at 333-4; *Rand Daily Mails* E *Ltd* v *Johnston* 1928 WLD 85; *Frankel* v *Pirie* 1936 EDL 106 at 114-6; *Leask* v *French and Ors* 1949 (4) SA 887 (C) at 892-4; *Ismail* v *Keshavjee* 1957 (1) SA 684 (T) at 688-9; *Du Plessis* v *van der Merwe* 1960 (2) SA 319 (O)). Although most of the cases just cited dealt with the exercise of the court's discretion under a statutory provision or rule of court, the statute or rule concerned did not prescribe the nature of the discretion except in broad general terms (e.g. ss 36 and 39 of Proc. 14 of 1902 (T) empower the court to give directions as F

'may in each case appear to be most consistent with real and substantial justice')

and the same general approach would be appropriate to the exercise of a discretion under the aforementioned rule of practice."

The *South Cape Corporation* case *supra* is clear authority for the proposition G that before a court can exercise the discretion to order execution despite the noting of an appeal, the successful party has to make a special application for such relief. For the court to be able to exercise this discretion properly, the special application must set out in some detail the basis for seeking such relief. The respondent is entitled to an opportunity to respond to the application.

It is common cause that none of the respondents (then the applicants) in this H

2010 (1) ZLR p39

Chidyausiku CJ

A case made a special application for leave to execute. They simply applied to amend the draft order to include para 7 at some stage in the course of proceedings before judgment. This, in my view, is totally inadequate because the court was not provided with details necessary for the proper exercise of its discretion.

B The *South Cape Corporation* case *supra* sets out in some detail the factors that a court takes into account in determining whether to grant or refuse the relief of execution despite the noting of an appeal.

There is no indication on the record, in particular in the reasons for judgment, that the learned judge in the court *a quo* gave consideration to these or any other factors. The reasons for judgment do not indicate what the learned C judge took into account and what he did not take into account in arriving at the conclusion that there should be execution despite the noting of an appeal. Without reasons, it is impossible to understand the learned judge's reasoning. Failure to give reasons in an application to execute despite the noting of an appeal is a serious misdirection justifying the setting aside of D such a determination.

On this ground alone, I would set aside the court *a quo's* order that there should be execution despite the noting of an appeal.

I have serious reservations on the propriety of a judge including in his main judgment an order authorising execution despite the noting of an appeal E against that judgment. It is only in exceptional circumstances that such an order should be made part of the main judgment. For instance, if in a dispute over the custody of a minor child it is clear that the noting of an appeal will be used to facilitate the removal of the minor child from the jurisdiction of the court, such a course might be justified. In the absence of exceptional circumstances, due process must be observed before issuing such an order. I F hold this view because the litigant's right to appeal should not be abrogated lightly and without due process.

The right of appeal is fundamental and critical to our justice system. Where the law confers the right of appeal on a litigant it should not be rendered nugatory or abrogated without due process. Due process requires that a case proceeds to finality, namely the giving of a judgment. Once a judgment is given, the G losing party who has a right to appeal is entitled, if he so wishes, to note an appeal. The noting of an appeal has the effect of suspending the judgment. It is only then that the successful party can make a special application for leave to execute the judgment despite the noting of an appeal. The losing litigant is entitled to respond to that application. It is only after hearing both parties to H the special application for leave to execute that a court can properly exercise

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2010 (1) ZLR p40

Chidyausiku CJ

its discretion on the matter. No doubt in the making of that determination, A the court will be guided by the factors set out in the *South Cape Corporation* case *supra* and other factors relevant to the application.

This was not done in this case. The applicants' right to be heard by the highest court in the land was rendered nugatory without any semblance of due process. No reasons were given. The failure to give reasons in this case B smacks of arbitrariness and the ruling cannot be allowed to stand.

After taking into account the facts of this case, it was clear to me that the diamonds in question could easily disappear without trace pending the hearing of the appeal irrespective of which of the

parties had possession of the diamonds and that any mining activities pending the appeal had the C potential of causing irreparable damage to the party who was not mining during that period. For these reasons, I concluded that a standstill position pending the appeal was the most equitable solution.

I made it very clear to the parties at the conclusion of their submissions that I intended to set aside the order to execute judgment despite the noting of an appeal made by Hungwe J and that I intended to substitute that order with a D more equitable arrangement. To that end, I directed the parties to nominate a banker who could keep the diamonds in dispute pending the determination of this matter on appeal. The parties subsequently advised that they were unable to agree on a banker to act as an honest broker.

When I was advised of this, I directed the parties to enquire from the Reserve E Bank of Zimbabwe ("the Reserve Bank") if it could keep the diamonds pending the appeal. As the Reserve Bank was not a party to these proceedings, the parties were directed to jointly enquire into the attitude of the Reserve Bank. Mr *Samukange*, for the respondents, advised that the Reserve Bank was agreeable to this arrangement. In a letter dated 18 November 2009 the F applicants submitted their position. Regrettably the letter from the applicants was filed in the case file without being brought to my attention. The letter only came to my attention on 23 January 2010 when the applicants advised the Registrar that the respondents were seeking to execute against the diamonds on the basis of the judgment of Hungwe J, which had not been formally set aside. I immediately issued the following order on 25 January 2010 pending G these reasons for judgment:

> "IT IS ORDERED THAT:
>
> (1) All the diamonds referred to in paragraphs 3 and 4 of the High Court Order in judgment no. HC 6411/07 of the High Court be surrendered to the Reserve Bank of Zimbabwe for safekeeping pending the determination of the appeal noted against that judgment. H

> (2) Execution of costs A granted in terms of paragraph 6 of the same order is suspended pending the determination of the said appeal.
>
> (3) Costs of this chamber application will be costs in the cause."

Shortly after the issuance of the above order, through correspondence to the Registrar, I learned that the respondents were seeking to evict the applicants B from the disputed claim on the basis of the judgment of Hungwe J and that the parties were seeking guidance on whether my order of 25 January 2010 suspended the eviction of the applicants. I directed the Registrar to advise both parties that the effect of my order was to suspend the enforcement of Hungwe J's order. Her letter to the parties reads as follows:

> "Previous correspondence refers.
>
> C Please be advised that the Honourable Chief Justice has advised that the order granted on 25 January 2010 suspends the whole of the Honourable Mr Justice Hungwe's judgment as will appear more fully in the reasons for judgment that His Lordship will hand down shortly."

Paragraph 1 of my order of 25 January 2010 is very explicit. In terms of that paragraph, the diamonds are to be kept at the Reserve Bank until the D finalisation of the appeal. To interpret the letter of the Registrar to the parties as reversing my very clear order of 25 January 2010 that the diamonds are to be kept at the Reserve Bank pending appeal is the height of mischief. If anyone has removed the diamonds from the Reserve Bank, he has done so unlawfully and in contempt of the order of this court. The diamonds must be E returned to the Reserve Bank immediately in order to purge the contempt. Failure to do so should attract serious consequences.

As regards the situation on the disputed claims, the fact of the matter is that the applicants are in physical control of those claims. The balance of convenience favours the applicants remaining on the site of the claims pending appeal F but they must cease all mining activities and it is so ordered. Allowing the applicants to continue mining pending appeal has the potential of causing irreparable damage to the respondents should the appeal fail.

As indicated in my order of 25 January 2010 the costs in this case will be costs in the cause.

G *Sawyer & Mkushi*, first applicant's legal practitioners

Dube, Manikai & Hwacha, second applicant's legal practitioners

Venturas & Samukange, first, second, third, fourth, fifth and sixth respondents' H legal practitioners

Chidyausiku CJ

Civil Division of the Attorney-General's Office, seventh respondent's legal A practitioners

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Document 9 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/S v BENNETT (1) 2010 (1) ZLR 42 (H)

S v BENNETT (1) 2010 (1) ZLR 42 (H)

Citation	2010 (1) ZLR 42 (H)
Case No	Judgment No. HH-15-10
Court	High Court, Harare
Judge	Bhunu J
Heard	19 January 2010
Judgment	25 January 2010
Counsel	*J Tomana,* with him Mrs *F Ziyambi* and *C Mutangadura,* for the State Mrs *B Mtetwa*, with her *T Maanda,* for the defence
Case Type	Application to impeach State witness
Annotations	No case annotations to date

Flynote

Criminal procedure – *witness – hostile – impeachment of – when witness may be declared hostile – basis of impeachment not restricted to previous inconsistent statements – court may also examine witness's attitude towards State*

Headnote

D The State sought to have its principal witness declared hostile in order that it could cross-examine him. The witness had previously made a statement to the police, which had implicated the accused in the present trial. The witness had challenged the admissibility of the statement, on the E grounds *inter alia* that he had not been correctly warned and cautioned. The prosecution in that trial did not attempt to introduce the statement in evidence. The witness was subsequently convicted and sentenced to a term of imprisonment, which he served.

When notified that he would be subpoenaed to give evidence against the accused, the witness made it clear that he absolved the accused of any F wrong doing. Nonetheless, the prosecution called him and his evidence was favourable to the accused and against the State case.

Held, that the witness's statement to the police was inadmissible against him and *a fortiori* inadmissible against the accused. In any event, being an alleged confession by the witness, it

was, in terms of s 259 of the Criminal G Procedure and Evidence Act [*Chapter 9:07*], inadmissible against any other person. It could not be used for the purpose of impeaching the witness.

Held, further, that the basis for impeachment is not restricted to previous inconsistent statements. There are various ways of proving hostility and proof of previous inconsistent statement is only one of them. The basis H of impeachment proceedings is adversity or hostility on the party of a

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witness against a party calling him. A witness can only be considered A adverse, or hostile, if he is shown to bear a hostile *animus* towards the party calling him and so does not give his evidence fairly and with the desire to tell the truth. Hostility may be inferred through various considerations, which include his demeanour in the witness stand. *In casu*, the witness considered that he had been unjustly prosecuted and B convicted and served a prison term at the instance of the State and he still viewed the State as an adversary. He would therefore be declared hostile and the State would be entitled to cross-examine him.

Cases cited

S v Mazhambe & Ors 1997 (2) ZLR 587 (H) C

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 259 & 316

Case information

J Tomana, with him Mrs *F Ziyambi* and *C Mutangadura,* for the State

Mrs *B Mtetwa*, with her *T Maanda,* for the defence D

Judgment

BHUNU J: In this case the state is seeking the impeachment of its main witness, one Michael Peter Hitschman in terms of s 316 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] on the grounds that the witness has materially departed from his previous statements. The section provides that: E

> "**316 Impeachment and support of witness credibility**
>
> It shall be competent for any party in criminal proceedings to impeach or support the credibility of any witness called against or on behalf of that party in any manner and by any evidence in and by which, if the proceedings were before the Supreme Court of Judicature in England, the credibility of such witness might be impeached or supported by such party, and in no other manner and by no other evidence whatever: F
>
> Provided that any such party who has called a witness who has given evidence in any such proceedings, whether that witness is or is not, in the opinion of the judge or judicial officer presiding at such proceedings, adverse to the party calling him, may, after the said party or the said judge or judicial officer has asked the witness whether he has or has not previously made a statement with which his testimony in the said proceedings is inconsistent and after sufficient G particulars of the alleged previous statement to designate the occasion when it was made have been mentioned to the witness, prove that he previously made a statement with which his said testimony is inconsistent."

It is trite and a matter of elementary law that a party calling a witness may not contradict, discredit or challenge its own witness's evidence unless that witness has been declared a hostile or adverse witness by the court. If H

A however any authority is required for that proposition of law, one need not look further than the case of *S* v *Mazhambe & Ors* 1997 (2) ZLR 587 (H).

J W Horn in his article "Discrediting One's Own Witness" published in 1961 *Rhodesia and Nyasaland Law Journal* at p 80 defines an adverse witness in the following terms:

> B "An adverse witness is one who shows himself to have a mind hostile to the party calling him, or to the interests of such party. Such hostility may be inferred from one or more of the following: his demeanour in

the witness stand, his relationship with either party, his previous conduct or the fact that he has made a previous statement inconsistent with his evidence."

Having said that, the learned author proceeds to say that once a witness has C been declared adverse, the party calling the witness is free to cross-examine him. Where the witness gives evidence which is inconsistent with a statement made by him previously, the party calling him may prove such statement.

The nature of the previous statement takes many forms. The learned author states that: D

"5. Such a statement may be oral, or written, and need not have been made to the party calling the witness, or for the object of being used in the proceedings in which the witness is testifying.

6. The witness should be given sufficient particulars of the alleged statement to designate the occasion upon which it was made.

7. The witness should then be asked whether he admits to having made a E statement on the occasion specified. If the statement is signed he may be asked to admit or deny his signature.

8. *The previous statement must be shown to be inconsistent with the testimony of the witness by the party desiring to produce it. Any statement or part of any statement which would be inadmissible if led as evidence cannot be relied upon to show such inconsistence." (Emphasis added).*

F The facts giving rise to these impeachment proceedings are to a large extent common cause. The brief undisputed facts are that on 6 March 2006 the witness was found in possession of a large quantity of firearms, ammunition and arms of war. He was then arrested and detained together with the recovered weapons and ammunition at Adams Barracks by a group of State agents comprising the police, army and CIO personnel. He was later transferred to G police custody on charges of insurgency, terrorism, sabotage and unlawful possession of firearms.

While under detention the witness made certain written statements and indications. On 7 March 2006 he made a handwritten statement at Adams Barracks and on 11 March 2006 he made a typewritten affidavit at CID H offices. The witness also made indications which were captured on videotape

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at Adams Barracks. In all those statements and indications he confessed and A admitted having committed the offence in collusion with others, including the accused. He implicated the accused, alleging that he was responsible for financing the whole criminal enterprise to violently effect regime change through force of arms.

The witness admitted in open court that he made the said statements and B indications to State authorities. He however placed the admissibility of the statements and indications in issue saying that they were involuntarily extracted from him through torture under unfriendly and hostile circumstances.

It is common cause that when the witness made the said statements and indications he had not been properly warned and cautioned. The handwritten statement was not signed or witnessed by anyone. The witness told the court C that his tormentors were drunk and disorderly, such that in their drunken state they omitted to make him sign the statement. Having noted the omission, he then deliberately refrained from signing it, signifying his lack of free volition.

The witness was subsequently charged with substantially the same charges as the accused. He appeared before Chitakunye J whose verdict reads as follows: D

"From the above, this court is of the view that the accused cannot be found guilty of the main charge. He (is)*found not guilty and acquitted*on the main charge. He is instead found *guilty* of the possession of dangerous weapons in contravention of s 13 (1) of POSA",

He was then sentenced to four years imprisonment of which one year was suspended on appropriate conditions. He has since completed serving the E prison term although he has an appeal pending in the Supreme Court.

Upon being served with a subpoena to give evidence as a State witness in these proceedings, the witness responded by delivering to the Attorney-General an affidavit in November 2009. In para 12 of that affidavit he absolves the accused of any wrongdoing or complicity in the commission of any related F charges. In para 12 he had this to say:

> "Consequently therefore, and as the police are fully aware there is no relevant testimony I can give in respect of the charges now being brought against Mr Leslie Roy Bennett who was not involved in my firearms business or in any dealings I had with firearms. In any event I do not believe that I have been validly subpoened and unless advised to the contrary, I do not intend to appear G in court on 9 November 2009."

Despite his protests the witness attended to give evidence as a State witness at the accused's trial. It is also common cause that the Attorney-General called the witness to give evidence with the full knowledge that he was likely to give evidence adverse to the State case.

Not surprisingly, when he appeared in court, the witness gave evidence which H

Bhunu J

A is unfavourable to the State case and heavily leans in favour of the accused. It is on that basis that the State put in motion these impeachment procedures.

I now turn to consider the admissibility of the previous inconsistent statements upon which the State relies in its bid to impeach its own witness. It is not in dispute that both statements and indications were made at the instance B of State authorities. It is a legal requirement that the police must properly warn and caution an accused person before asking him to make a statement for production in court. It is also common cause that the witness was not properly warned and cautioned according to law before making the statements.

That being the case, the statements were obviously inadmissible against the witness; this explains why they were not used at his own trial. It follows, C as a matter of common sense, that if the statements and indications were inadmissible against the witness they were equally inadmissible against his alleged accomplice, that is to say the accused.

Having examined the statements and indications in question I have no doubt that they are not ordinary witness statements. They are in fact confessions D made by the witness not in his capacity as a witness but as an accused person pending his own prosecution.

Section 259 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that:

> "**259 Confession not admissible against other persons**
>
> No confession made by any person shall be admissible as evidence against any E other person."

The section is couched in such simple clear language that it needs no further elucidation. It constitutes a prohibition, thereby making its provisions peremptory and absolute. I accordingly hold that the statements and indications in question if tendered as evidence will be inadmissible against the accused.

F It will be remembered that J W Horn taught us in "Discrediting One's Own Witness" that an inadmissible statement cannot be used for the purposes of proving the inconsistency. That being the case, I hold that the alleged previous inconsistent statements cannot be used for the purpose of impeaching the witness.

G The basis for impeachment is however, not restricted to previous inconsistent statements. In the *Mazhambe* case, *supra,* Gillespie J at 590F-591A traced the history of our law on impeachment to the Supreme Court of Judicature in England as at 1865. The relevant statute provides as follows:

> "A party calling a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion H of the judge, prove adverse, contradict him by other evidence, or, by the leave

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Bhunu J

> of the judge, prove that he has made at other times a statement inconsistent with A his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement".

My understanding of the above English statute, which has been domesticated into our law, is that the basis of impeachment proceedings is adversity or B hostility on the part of a witness against a party calling him. There are various ways of proving hostility and proof of previous inconsistent statements is only one of them.

In articulating the law in the *Mazhambe* case *supra,* Gillespie J observed at 591B that: C

> "The word 'adverse,' in this section does not only mean 'unfavourable'. It means hostile. A party may not cross-examine his own witness unless the judge is of the opinion that he is hostile. A witness can only be considered adverse, or hostile, if he is shown to bear a hostile *animus* towards the party calling him and so does not give his evidence fairly and with a desire to tell the truth …
>
> The South African precedents are accordingly persuasive. These show that D the mere fact that a witness gives evidence which is unexpected by the party calling him does not render him hostile. Neither is his having made a previous inconsistent statement conclusive of the point, though it may be a factor to be taken into account*; the crucial thing is the witness's… demeanour in the witness box"*

The above articulation of the law accords with Horn's definition of a hostile witness particularly when he says that: E

> "Hostility may be inferred through various considerations which include his demeanour in the witness stand, his relationship with either party, his previous conduct or the fact that he has made a previous statement inconsistent with his evidence."

I now turn to consider the witness's demeanour in the witness box to determine whether or not he can be said to be an adverse or hostile witness. F The witness gave his evidence at the instance of the State with the greatest reluctance, as expressly stated in his affidavit of November 2009. It is clear that the witness only turned up to give evidence in court as a State witness because he had no option as he is a competent and compellable witness.

In the witness stand, he portrayed the demeanour of a deeply aggrieved citizen G who has an axe to grind with the State and its functionaries. He presented himself as a melancholic wounded weeping soul who has been gravely brutalized and tortured at the hands of the State, its organs and functionaries.

He views his former colleagues in the police force and the intelligence services as corrupt and incompetent. The witness was at pains to explain that he lost his job in the police force because he was competent and incorruptible. His H

Bhunu J

A corrupt colleagues instigated his dismissal because they feared that he would expose their incompetence and corruption.

He was bitter that all the other suspects in related cases had charges dropped against them, except for him and the accused, who happen to be of a different race.

B He considers that he was unjustly prosecuted, convicted and served a prison term at the instance of the State. He still views the State as an adversary because he has a pending appeal case against the State in the Supreme Court on related charges. He thus took the unusual stance of seeking the services of his lawyer to protect his interests against being trampled upon by the State while he was giving evidence in this matter.

C When asked how he came to know the accused, he said that it was through a video clip in which the accused was assaulting a Government Minister in Parliament. He openly told this court that he found the video clip amusing and entertaining. One wonders whether he would have found the same episode amusing and entertaining had the facts been the other way round.

D The witness engaged in slanging matches with the Attorney-General whom he sought to portray in open court as an incompetent State functionary who was wasting the court's and everyone else's time by calling him as a witness when he knew that he was not going to implicate the accused.

It is a fact that the witness was found in possession of arms of war. The State is alleging that the accused was involved in the commission of the offence. E The witness has, however, vehemently sought to absolve the accused from any involvement in the commission of the offence. His contact in this case is obviously against the State's interests.

Having seriously considered the matter and carefully weighed the evidence before me, the history of this matter and the witness's performance and F demeanor in court, I have no option but to find that the witness Peter Michael Hitschmann is an adverse or hostile witness to the State case. Peter Michael Hitschmann is accordingly declared an adverse or hostile State witness and the State is at large to cross-examine him.

G *Attorney General's Office,* State's legal practitioners

Mtetwa & Nyambirai, accused's legal practitioners

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Document 10 of 62

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RODGER & ORS v MULLER & ORS 2010 (1) ZLR 49 (H)

Citation	2010 (1) ZLR 49 (H)
Case No	Judgment No. HH-2-10
Court	High Court, Harare
Judge	Patel J
Heard	2 July 2009
Judgment	26 January 2010
Counsel	Mrs *J B Wood*, for the applicants *A P de Bourbon SC*, for the first, second and third respondents *R M Fitches*, for the fourth respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Practice and procedure – *parties – joinder – failure to cite party with direct interest in outcome and determination of matter – such non-joinder fatal*

Statutes – *Parks and Wildlife Act [Chapter 20:14] – s 37 – grant of hunting rights in safari area – section providing that period of such rights shall* D *not exceed 10 years – does not preclude grant of further concession to prior holder*

Headnote

In terms of s 37 of the Parks and Wildlife Act [*Chapter 20:14*], the National Parks and Wildlife Management Authority, with the concurrence of the E Minister, may "grant hunting or other rights over or in a safari area to such persons as he [*sic*] deems fit", subject to such terms and conditions as he [*sic*] may impose. The period of such rights shall not exceed 10 years.

While the non-joinder of a party is not necessarily and invariably fatal to the continuance or determination of any matter, r 87(1) of the High Court Rules does not absolve a litigant of the obligation to cite all relevant F parties. The discretion of the court in this regard must be exercised so as to ensure that all persons who might be affected by its determination of the issues in dispute be afforded the opportunity to be heard before that determination is actually made.

The wording of s 37 means that the concurrence of the Minister is an essential statutory *sine qua non* to the grant of any hunting rights in a safari area. G Although it is the Authority that actually administers and grants such hunting rights, it can only do so "with the concurrence of the Minister" and "subject to such terms and conditions as he may impose". Where the Minister has already approved the grant of hunting rights, he must of necessity be concerned with any dispute concerning the exercise or non-exercise of such rights. Where legal proceedings are brought and the H

Patel J

A determination of the court will impact upon and interfere with decisions already taken by the Minister, he is undoubtedly a highly relevant party to the proceedings with a very direct interest in the outcome and determination thereof. Failure to cite the Minister as a party would be fatal to the proceedings.

The stipulation in s 37 that the period of hunting or other rights shall not B exceed 10 years clearly means is that any single hunting concession granted cannot exceed the period of 10 years. It may at any one time be granted for the maximum period of 10 years or for any shorter period. However, the provision does not preclude the grant of a further concession to a prior holder who has held one or more concessions amounting to 10 years, so long as the new concession does not exceed the maximum C period prescribed.

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 87(1)

Parks and Wildlife Act [*Chapter 20:14*], s 37

Case information

D Mrs *J B Wood*, for the applicants

A P de Bourbon SC, for the first, second and third respondents

R M Fitches, for the fourth respondent

Judgment

PATEL J: The first and second applicants are directors of the third applicant, E which operates safari activities in the Zambezi Valley area. The first and second respondents are directors of the third respondent, which is also a safari operator. The fourth respondent is the National Parks and Wildlife Management Authority ("the Authority") responsible for managing all safari operations in Zimbabwe.

F **Background**

The applicants were granted two written concessions to operate hunting safaris in the Rifa Safari Area for a period of 10 years expiring on 31 December 2007. Before this date, on 18 October 2007, the Authority conducted an auction for a new five year concession in respect of the applicants' concession area. At that auction, the applicants were prevented from bidding for the concession G because they had failed to furnish the requisite bank guarantee.

According to the first applicant, he then approached the first respondent who undertook to bid on behalf of the applicants after exhausting the respondents' own bidding limit. The first respondent won the final bid for the sum of $750 billion. The first applicant then thanked him and was congratulated by all H present for having retained the concession. Subsequently, on 20 October

Patel J

2007, the respondents reneged on their arrangement and sought to retain A the concession for themselves.

The respondents deny the applicants' averments. They contend that all bidders at the auction were fully aware of the bank guarantee stipulation, as was clearly stated in the Authority's prospectus, and that there was no arrangement between the parties prior to the auction. They did subsequently

B discuss the possibility of sub-letting part of the concession area to the applicants but nothing concrete materialised thereafter. They further aver that, if their concession agreement with the Authority were to be cancelled, they would suffer irreparable harm.

The Authority avers that the application is fatally defective in that it does C not cite the Minister of Environment and Tourism (the Minister) as required by the Parks and Wildlife Act [*Chapter 20:14*]. Moreover, the Act stipulates a maximum period of 10 years for hunting concessions and, therefore, the applicants cannot be granted any further extension.

On 19 February 2008, the applicants filed an urgent application to assert D their rights and, on 22 February, they were granted a provisional order interdicting the respondents from evicting the applicants from the Rifa Safari Area and from interfering with the applicants' operations in that area. They now seek a final order confirming the above relief and further interdicting the respondents from exercising any rights in the applicants' concession E area pending the determination of Case No. HC 891/08. In that case, the applicants seek the setting aside of the written concession granted by the Authority to the respondents in November 2007. The concession agreement was signed by the Minister on 10 January 2008.

Preliminary Issues F

At the hearing of this matter, counsel for the applicants submitted that the respondents were in contempt for having acted contrary to the requirements of the provisional order and were therefore barred from being heard. Counsel for the respondents countered this submission on the basis that they had appealed against the provisional order and that the respondents were therefore not in G contempt. For the reasons handed down at the hearing, I ruled that in the circumstances of the case the effect of the provisional order was not purely interlocutory but fairly definitive in terms of the future conduct of all the parties concerned. It therefore did not preclude the respondents from appealing against it without the leave of this court. Accordingly, the respondents were not in contempt and were entitled to be heard in these proceedings. H

Patel J

A **Issues for Determination**

The issues for determination herein, as I perceive them and as concurred by counsel, are as follows:

1. Whether the non-citation of the Minister as a party to these proceedings is fatally defective. B
2. Whether *Chapter 20:14* precludes the grant of hunting concessions to any safari operator beyond the period of 10 years.
3. Whether there was a clear agreement between the applicants and the respondents whereby the first respondent was to bid on behalf of the applicants at the auction. C
4. Whether the agreement between the applicants and the respondents, if any, was legally binding and enforceable as against the Authority.
5. Whether the balance of convenience favours the grant or refusal of the relief sought by the applicants.

Non-citation of Minister

D It is submitted by Mrs *Wood* for the applicants that the non-citation of the Minister in these proceedings is not fatal for two reasons. Firstly, she relies upon r 87(1) of the High Court Rules 1971, which stipulates that non-joinder of a party does not preclude the determination of the issues in dispute. Secondly, she argues that the applicants are not presently seeking the grant of any concession from the Minister and that, in any event, the Minister is E simply required to concur with the grant of a concession by the Authority in respect of a specific area and is not concerned with the identity of the grantee.

As regards the non-joinder and misjoinder of parties, r 87(1) provides as follows:

> "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder F of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

Section 37 of *Chapter 20:14* empowers the grant of leases and hunting rights in safari areas as follows:

"The Authority, with the concurrence of the Minister, may – G

(a) lease sites in a safari area to such persons and for such purposes as it deems fit;

(b) grant hunting or other rights over or in a safari area to such persons as he deems fit;

subject to such terms and conditions as he may impose:

H Provided that –

2010 (1) ZLR p53

Patel J

(a) the period of a lease in terms of paragraph (a) shall not exceed twenty-five A years;

(b) the period of hunting or other rights in terms of paragraph (b) shall not exceed ten years;

(c) a grant of hunting or other rights in terms of paragraph (b) shall not prohibit persons from entering into the safari area concerned for purposes other than those for which the rights have been granted." B

While I accept that the non-joinder of a party is not necessarily and invariably fatal to the continuance or determination of any matter, it is trite that r 87(1) does not absolve a litigant of the obligation to cite all relevant parties. The discretion of the court in this regard must be exercised so as to ensure that all persons who might be affected by its determination of the issues in C dispute be afforded the opportunity to be heard before that determination is actually made.

Turning to s 37(b) of the Act, it is abundantly clear that the concurrence of the Minister is an essential statutory *sine qua non* to the grant of any hunting rights in a safari area. Although it is the Authority that actually administers and grants such hunting rights, it can only do so "with the concurrence D of the Minister" and "subject to such terms and conditions as he may impose". This is clearly recognised, not only in the concession granted to the first applicant in 2003 but is also explicitly declared in the preamble to the concession agreement concluded with the third respondent in 2007. In short, the Minister's direct and personal involvement in the approval of any E hunting concession cannot be obviated.

By the same token, where the Minister has already approved the grant of hunting rights, he must of necessity be concerned with any dispute concerning the exercise or non-exercise of such rights. In the instant case, the applicants seek an order interdicting their eviction from the Rifa Safari Area and any interference with their operations in that area as well as an order interdicting F the respondents from exercising any rights in the same concession area. In essence, the relief that they seek impinges upon rights previously conferred upon the first applicant in 2003 and those granted to the third respondent in 2007. In both instances, the determination of this court will impact upon and interfere with decisions already taken by the Minister. In my view, he is G undoubtedly a highly relevant party to these proceedings with a very direct interest in the outcome and determination thereof.

It follows that the failure to cite the Minister in this matter is fatal and that the application should be dismissed simply on that preliminary basis. However, given the possibility that my conclusion in this regard is incorrect, I shall proceed to consider and determine the merits of this case. H

2010 (1) ZLR p54

Patel J

A **Maximum Period of Hunting Concessions**

At the hearing of this matter, Mr *de Bourbon* did not persist with this point but Mr *Fitches* reiterated the Authority's stance that the applicants were precluded by s 37 of the Act from being granted any hunting concession beyond the limit of 10 years.

B Proviso (b) to s 37 stipulates that "the period of hunting or other rights in terms of paragraph (b) shall not exceed ten years". What this clearly means is that any single hunting concession granted under the section cannot exceed the period of 10 years. It may at any one time be granted for the maximum period of 10 years or for any shorter period. However, the provision does not, in my view, preclude the grant of a further concession to a prior holder C who has held one or more

concessions amounting to 10 years, so long as the new concession does not exceed the maximum period prescribed.

It follows that the Authority's contention in this regard cannot be sustained and that the applicants are therefore not barred from being granted further hunting rights under the Act.

D **Agency Agreement between the Parties**

The affidavit evidence filed by the parties is markedly conflicting as to what precisely transpired during the bidding process at the auction held in October 2007. Nevertheless, the applicants' version of events is strongly supported by the affidavits deposed to by several independent individuals who were E present on the day. These corroborating affidavits (by Messrs Evans, Jolliffe, Fundira, Townsend, Dziya and Duckworth) confirm, firstly, that the first applicant and the first respondent had concluded some arrangement for the latter to bid on behalf of the former and, secondly, that the first applicant was congratulated by those present for having retained his concession.

F Having regard to the foregoing evidence, the applicants' version in this respect is more credible than that of the respondents. Accordingly, on a balance of probabilities, it is reasonably clear that there was an agreement between the parties, the effect of which was that the first respondent would act as agent for the applicants in the bidding process at the auction.

Whether Agreement Legally Binding and Enforceable

G In terms of the prospectus governing the auction conducted in October 2007, the conditions for participation which are presently pertinent were as follows. Firstly, only citizens or representatives of wholly owned Zimbabwean companies with no relevant criminal records would be permitted to bid. Secondly, all current hunting concession holders "with the exception of H the current concession lessee" (*viz* the first applicant) were not allowed to

participate. Thirdly, bidders were required to submit proof of funds by way A of a bank guarantee to be furnished to the Authority two hours before the auction; prospective bidders who failed to do so would not be allowed to bid. Fourthly, the Authority reserved to itself the right to vet all bidders.

It is also necessary to consider the concession conditions of sale set out in the prospectus. These conditions directed all participants to obtain auction B participation forms on payment of the prescribed fee and to pay a refundable participation deposit of $20 million. At the conclusion of the auction, "the highest accepted bidder will be declared the purchaser, subject to the reserve price [and] further vetting" and immediate payment of a surety deposit of $5 billion followed by payment for the concession itself within 14 days.

Although the registration status of the third applicant was questioned by Mr C *de Bourbon*, by dint of a typographical error in the founding affidavit, I am satisfied that the third applicant is not a South African entity but a company registered in terms of the laws of Zimbabwe. What is more relevant *in casu* is the applicants' contention that they were assured by the Authority that they would not be required to provide any bank guarantee in order to be able to bid D at the auction. Apart from this bald assertion, there is no documentation to support this contention. Moreover, the above-cited conditions for participation make it clear that all prospective bidders, including the first applicant *qua* current concession holder, were obliged to provide the requisite bank guarantee, failing which they would not be allowed to bid at the auction. Equally significantly, the applicants have proffered no evidence whatsoever E that they paid the stipulated auction participation deposit.

Notwithstanding these deficiencies, Mrs *Wood* submits that the first respondent was duly qualified to bid not only for himself but also as agent for the first applicant. Since there was nothing to prevent the first respondent from bidding or participating as an agent, it is his status rather than that of the F first applicant which must be considered for present purposes.

As already indicated, the Authority reserved the right to vet all bidders before the auction in order to ensure, *inter alia*, that they were citizens or representatives of local companies and that they had no criminal record for any of the offences specified. More importantly, at the end of the auction, even G the successful bidder was subject to further vetting to ascertain his suitability as a hunting concession holder before the concession could be granted.

These vetting requirements clearly demonstrate that the identity and attributes not only of the winning bidder but also of the grantee are crucial to the selection of the concession holder. The appointment of an agent to bid on behalf of the prospective grantee would clearly subvert and negate the H

Patel J

A vetting and selection process since it is the agent rather than his principal who would have been subjected to full scrutiny. Although the bidding agent might be a local citizen and otherwise suitably qualified, his principal might well be a foreigner or even a convicted fraudster or perpetrator of parks and wildlife offences.

B I am fortified in this view by having regard to the terms and conditions incorporated in the concession agreements *in casu*. Clause 23 of the first applicant's expired concession agreement is virtually identical to clause 23 of the third respondent's current agreement. This latter clause recognises that "the right to operate on the Concession has been given to the right holder and to no other person solely in consideration of the right holder's successful bid C of the right to hunt". It then stipulates that, in the case of a corporate right holder, no shares may be issued or transferred and no new director may be appointed without the Authority's prior written approval. Additionally, the clause prohibits in absolute terms any cession or assignment of any right or obligation under the agreement or of the right holder's annual quota of animals. It also prohibits any sublease or sub-occupation or any hypothecation D or encumbrance of the concession without the prior written consent of the Authority. All of this reaffirms the critical significance of the grantee's identity and the fact that the rights conferred and obligations imposed under the concession are personal and peculiar to the grantee.

Taking all of the foregoing into account, I am of the firm opinion that any E agency agreement of the nature presently under review would operate to circumvent the Authority's vetting requirements and the clear objective behind those requirements. Any such arrangement, even if it were not contrived as a deliberate subterfuge, cannot be utilised to dilute the obvious privity of contract envisaged between the successful bidder-cum-grantee on the one hand and the Minister and the Authority on the other.

F It follows that the agency agreement *in casu*, whatever its legal implications and consequences as between the applicants and the respondents, is not legally binding on the Authority and cannot be enforced as against it. It also follows that the applicants have failed to establish the infraction of any clear right entitling them to the interdictory relief that they seek.

G **Balance of Convenience**

The above conclusion renders it unnecessary for me to consider the final issue relating to the balance of convenience as between the parties. However, for the sake of completeness, I deem it appropriate to dispose of this aspect as well.

As regards the applicants, the withdrawal of the hunting concession has H obviously entailed the loss of profit and will necessitate the removal of their

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Patel J

assets from the concession area. However, their losses are not irreparable A and could be redressed by a claim for damages in respect of lost profits and future hunting rights. Moreover, in terms of clause 14 of the first applicant's concession agreement, he was given ample time to remove his improvements and is entitled to compensation from the Authority in respect of those improvements that are retained *in situ* by agreement. B

Insofar as concerns the respondents, almost two years have elapsed since the third respondent was granted its hunting concession. If this subsisting concession agreement were to be cancelled or temporarily suspended, the respondents would incur huge losses in terms of moneys already expended on the auction and concession area and the withdrawal of firm contracts with foreign clients amounting to US$350 000 Moreover, the practical effect of C the final order sought by the applicants would be to suspend all operations in the concession area until the action in Case No. HC

891/08 is finalised. As is apparent from questions put to counsel, the time frame for the final determination of that matter is presently uncertain.

As for the Authority, the suspension of hunting operations in the Rifa Safari D Area will result in the substantial loss of revenue by way of hunting fees payable under the subsisting concession agreement. Any such suspension will also involve a diminution in other income generated from foreign and local tourists within the concession area.

All in all, I am abundantly satisfied that the balance of convenience does not E favour the applicants. The granting of the relief sought in this matter would cause greater harm and inconvenience to the respondents and the Authority than the harm and inconvenience that the refusal of that relief would cause to the applicants.

Disposition

I have found that there was an agreement between the applicants and the F respondents whereby the first respondent was to bid as agent for the applicants at the auction conducted on behalf of the Authority in October 2007. However, in my view, this agreement is not legally binding and enforceable as against the Authority and the applicants have therefore failed to establish any clear right apropos the relief that they seek. In any event, even if it were to be G shown that some right of the applicants has been infringed, the balance of convenience clearly favours the refusal of the order sought by the applicants.

In the result, the application is dismissed with costs.

Venturas & Partners, applicants' legal practitioners H

2010 (1) ZLR p58

Patel J

A *Costa & Madzonga*, first, second and third respondents' legal practitioners

Chinamasa, Mudimu, Chinogwenya & Dondo, fourth respondent's legal practitioners

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Document 11 of 62

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GRAMARA (PVT) LTD & ANOR v GOVT OF ZIMBABWE & ORS 2010 (1) ZLR 59 (H)

2010 (1) ZLR p59

Citation	2010 (1) ZLR 59 (H)
Case No	Judgment No. HH-169-09
Court	High Court, Harare
Judge	Patel J
Heard	24 November 2009
Judgment	26 January 2010
Counsel	*L Uriri,* for the applicants Mrs *F Maxwell*, for the respondents *G N Mlotshwa*, for the intervener

Case Type Opposed court application

Annotations Link to case annotations

Flynote

International law – *treaties – how State which is party to treaty may be bound by treaty – SADC Treaty – Zimbabwe bound by Treaty and amendment* D *thereto – SADC Tribunal established under Protocol to Treaty – judgment of Tribunal – registration and enforcement thereof – not enforceable if contrary to public policy – meaning of public policy – contrary to public policy to violate international obligations – effect of judgment contrary to Constitution of Zimbabwe and undermining authority of Supreme Court – practical consequences of compliance – must also be considered* E

Practice and procedure – *judgment – foreign judgment - registration and enforcement of – judgment of tribunal not specified under Civil Matters (Mutual Assistance) Act [Chapter 8:02] – when may be enforced by courts – public policy considerations – effect of* F

Headnote

The applicants were among the successful parties in a matter that was adjudicated by the SADC Tribunal, arising out of the appropriation of their farm by the Government. They sought to register the Tribunal's decision for the purposes of its enforcement in Zimbabwe. The respondents argued that, in terms of Article 22 of the SADC Treaty, before its amendment, G the Protocol of the Tribunal required ratification by a member State in order for that State to be bound by it. Since Zimbabwe had not ratified the Protocol, it was not bound by it and was not subject to the jurisdiction of the Tribunal.

Held, that the overall effect of the relevant provisions of the SADC Treaty and the Protocol of the Tribunal was that the decisions of the Tribunal H

2010 (1) ZLR p60

Patel J

A were binding and enforceable within the territories of Member States, which are under an obligation to take the measures necessary for the execution of those decisions. Such enforcement is governed by the rules of civil procedure for the registration and enforcement of foreign judgments which are in force in the territory of the particular State in which the particular judgment is to be enforced.

B *Held,* further, that Zimbabwe has not taken any specific internal measures to domesticate the SADC Treaty or the Protocol of the Tribunal or to transform its obligations into effectual provisions of the municipal law. However, a State cannot invoke its own domestic deficiencies in order to avoid or evade its international obligations or as a defence to C its failure to comply with those obligations. The fundamental tenet of international law is that *pacta sunt servanda*, that is, that every party to a treaty is required to perform its obligations in good faith and may not invoke the provisions of its internal law, including its Constitution, as justification for its failure to perform the treaty. But it does not follow that the primacy of treaty obligations at international law must necessarily D and invariably be taken into account in applying domestic law at the municipal level, even where there is a clear conflict between the two regimes. Any 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 E reparations in order to satisfy its international responsibility.

Held, further, that under s 3 of the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*], the judgments of any international tribunal designated under the Act may be registered. The SADC Tribunal has not been registered under the Act, but under the common law, although a foreign judgment is not directly enforceable, it constitutes a cause of action and F will be enforced by our courts provided, *inter alia*, (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as "international jurisdiction or competence"); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition G and enforcement of the judgment would not be

contrary to public policy; (iv) that the judgment was not obtained by fraudulent means. Provided that the judgment in question has been duly delivered by a court of recognised international competence and jurisdiction, it would be contrary to principle to restrict the scope of recognition proceedings by reference H to the specific remedies enjoined by a given foreign judgment.

2010 (1) ZLR p61

Patel J

Held, further, that State parties to a treaty are at liberty to agree on the A conclusion of a treaty by means other than the traditionally accepted procedure of signature followed by ratification or accession. It is therefore perfectly possible for a treaty or an amendment of the treaty to be adopted and enter into force for all the adopting States instantly, without further ratification or any other formality, if that is the means B of adhesion agreed to by those States. In the case of the SADC Treaty, ratification by two-thirds of the signatory States is a pre-requisite for the entry into force of the Treaty itself. However, amendments to the Treaty are governed by an entirely different procedure: a decision of three-quarters of all the members of the Summit of the Heads of State or Government of SADC. A decision of the Summit to adopt an amendment C is binding on all Member States. The amendment becomes operative immediately thereafter and there is no need for any further ratification by Member States in order to bring the amendment into force and effect. The Protocol of the Tribunal constituted an integral part of the Treaty and became binding on all Member States without the need for its further D ratification by them. It also follows that Zimbabwe thereupon became subject to the jurisdiction of the Tribunal and that the jurisdictional competence of the Tribunal in this case could not now be disputed. It would be legally unsustainable to espouse a major facet of the amended SADC regime and to simultaneously eschew those features of the same regime that are deemed to be politically inexpedient and unpalatable. E

Held, further, that public policy must be considered not only in the confines of the domestic sphere but also in the regional and international context. In principle, it would generally be contrary to public policy for any State to violate its international obligations within the domestic realm. Because Zimbabwe is bound by the decisions of the SADC Tribunal at international law, by dint of its treaty obligations as well as international F custom, it would be inconsistent with the public policy of Zimbabwe not to recognise and enforce any decision of the Tribunal at the municipal level, except insofar as that decision conflicts with statute or prior judicial precedent. Further, by adhering to the SADC Treaty as well as the Amendment Agreement and, therefore, by submitting to the G jurisdiction of the Tribunal, the Government of Zimbabwe created an enforceable legitimate expectation, both within and beyond the borders of Zimbabwe, that it would comply with the requirements of the Treaty and abide by the decisions of the Tribunal. However, this general rule is subject to a consideration of the facts of each individual case and the legal and practical consequences of recognising and enforcing the H

2010 (1) ZLR p62

Patel J

A Tribunal's decision in that particular case in Zimbabwe.

Held, further, that an indirect consequence of the Tribunal's judgment would be to impugn the legality of the land reform programme sanctioned by the Supreme Court. The potential conflict between the two decisions was actualized *in casu* because the effect of registering the Tribunal's judgment in Zimbabwe would be to challenge the decision of the B Supreme Court within its jurisdictional domain and thereby undermine the authority of that court in Zimbabwe. Further, if the Tribunal's judgment were to be registered and subsequently voluntarily complied with or enforced by court orders, the Government would be required to contravene and disregard what Parliament has specifically enacted in C s 16B of the Constitution in respect of compensation for appropriated farms. Any feature of the judgment that conflicts with the Constitution could not, as a matter of public policy, be recognised or enforced in Zimbabwe. The notion of public policy cannot be deployed under cover of the common law to circumvent or subvert the fundamental law of the land. It would be patently contrary to the public policy of any country, D including Zimbabwe, to require its Government to act in a manner that is manifestly incompatible with what is constitutionally ordained.

Held, further, that the enforcement of the decision would ultimately necessitate the Government having to reverse all the land acquisitions that have taken place since 2000. Apart from the

political enormity of any such E exercise, it would entail the eviction, upheaval and eventual relocation of many, if not most, of the beneficiaries of the land reform programme. This programme, despite its administrative and practical shortcomings, is quintessentially a matter of public policy. While the applicants were absolutely correct in expecting the Government of Zimbabwe to comply with its obligations under the SADC Treaty and to implement the F decisions of the Tribunal, there is an incomparably greater number of Zimbabweans who shared the legitimate expectation that the Government would effectively implement the land reform programme and fulfil their aspirations thereunder. Given these countervailing expectations, public policy, as informed by basic utilitarian precept, would dictate that the G greater public good must prevail.

Editor's Note: The SADC Tribunal judgment referred to is *Mike Campbell (Pvt) Ltd & Ors v Republic of Zimbabwe* SADC 2/07, reported in 2008 (2) ZLR 343 (SADC T).

Patel J

Cases cited A

Barker McCormac (Pvt) Ltd v Government of Kenya 1983 (2) ZLR 72 (S)

Jones v Krok 1995 (1) SA 677 (A)

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 343 (SADC T)

Minister for Immigration & Ethnic Affairs v Teok (1995) 183 CLR 273; B (1995) 128 ALR 353)

Nyamweda v Georgias 1988 (2) ZLR 422 (S)

Purser v Sales 2001 (3) SA 445 (SCA)

Rose v Arnold & Ors 1995 (2) ZLR 17 (H)

Route Toute BV & Ors v Minister of Lands 2009 (2) ZLR 351 (H) C

Legislation considered

Civil Matters (Mutual Assistance) Act [*Chapter 8:02*], ss 3 & 25

Constitution of Zimbabwe, ss 3, 16A, 16B & 89

SADC Treaty, arts 1, 4(c), 9.1(f), 9A, 10, 16, 19, 22, 32, 36.1, 39, 40, 41 & 42 D

SADC Treaty Protocol, arts 32, 35 & 38

Vienna Convention on the Law of Treaties (1969), arts 11, 24, 26, 27 & 39

Case information

L Uriri, for the applicants

Mrs *F Maxwell*, for the respondents

G N Mlotshwa, for the intervener E

Judgment

PATEL J: The two applicants herein were parties, together with 77 others, in a matter that was adjudicated by the Southern African Development Community Tribunal (the Tribunal) in the case of *Mike Campbell (Pvt) Ltd & Others* v *The Republic of Zimbabwe* Case No. SADC(T) 2/2007. The F Tribunal gave its judgment in favour of the applicants on 28 November 2008. They now seek an order for the registration of the decision of the Tribunal for the purposes of its enforcement in Zimbabwe.

Before dealing with the main issues in this matter, it is necessary to determineseveral preliminary issues that have arisen. G

Applications for Condonation

The applicants filed and served their heads of argument herein on 6 July 2009. Four months later, on 5 November 2009, the respondents filed an application for the condonation of the late filing of their heads and for the admission into evidence of a supplementary affidavit. The intervener was even more sluggish, and only filed his heads of argument one day before the hearing H

Patel J

A of this matter. His counsel then sought condonation at the hearing itself.

In view of the importance of this case and in order that all the relevant issues be fully ventilated, both applications were granted by consent. However, given the inordinate delay in filing their application, the respondents were ordered to pay the applicants' costs in respect of this application for condonation.

B **Application for Joinder**

The intervener avers that he is the holder of an offer letter to hold, use and occupy the property held by the applicants and that the effect of the relief sought by the applicants would be to nullify his offer letter. He accordingly submits that he has a direct personal and legal interest in the outcome of this case and should therefore be joined in opposition as the 3rd respondent. The C applicants oppose the intervener's application for joinder on the grounds that he does not have any direct or substantial interest in the subject-matter of these proceedings and that, in any event, he has not furnished any written proof of his acceptance of the State's offer. Moreover, registration of the Tribunal's judgment *per se* will not have the effect of dispossessing him D of his right to occupy the property. That would only occur at a later stage, if and when separate proceedings are instituted for the enforcement of the judgment by way of eviction proceedings against him.

In terms of s 16B(2) of the Constitution, ownership of the property in question vests in the State. Any right of occupation conferred by the offer letter is E in the nature of a personal right, deriving from the State's ownership of the property. Therefore, even if the intervener were to establish his acceptance of the State's offer, which on the papers he has failed to do, his right to occupy the land is purely derivative.

On the other hand, the papers indicate that there are two other matters currently pending before this court which involve a dispute between the F applicants and the intervener concerning their respective rights to occupy and use the farm in question. The effect of granting the relief sought *in casu* would be to pre-empt and render academic the outcome of those two cases. More significantly, it seems somewhat artificial and casuistic to argue that registration of the Tribunal's judgment is entirely separate and distinct from G the consequential enforcement of that judgment. While proceedings for the enforcement of the judgment may entail a different process, registration of the judgment will substantially operate to negate the intervener's rights in terms of the offer letter and he will be left with no defence whatsoever to any action taken by the applicants in enforcing the judgment. If he is not afforded the opportunity to be heard at this stage, he would clearly be prejudiced in H the assertion and protection of the personal contractual right of occupation

Patel J

that he claims to the property *in casu*. See *Rose* v *Arnold & Ors* 1995 (2) ZLR 17 (H); A N*yamweda* v *Georgias* 1988 (2) ZLR 422 (S).

In the event, I am satisfied that the intervener has established a sufficiently direct and substantial interest in the outcome of these proceedings. His application to be joined as a party to this case is accordingly granted, but with no order as to costs. B

Enforcement of Tribunal's Judgments

The jurisdiction and powers of the Tribunal are spelt out in the Treaty of the Southern African Development Community ("the SADC Treaty") and in the Protocol of the Tribunal. (The jurisdictional competence of the Tribunal, which competence is challenged by the respondents, is a matter that I shall revert C to at a later stage). As regards the enforcement of the Tribunal's decisions, that is governed by Article 32 of the Protocol as follows:

"1. The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement.

2. States and institutions of the Community shall take forthwith all measures D necessary to ensure execution of the decisions of the Tribunal.

3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.

4. Any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.

5. If the Tribunal establishes the existence of such a failure, it shall report its E finding to the Summit for the latter to take appropriate action."

The overall effect of these provisions is that the decisions of the Tribunal are binding and enforceable within the territories of Member States, which are under an obligation to take the measures necessary for the execution of those decisions. However, such enforcement is governed by the rules of civil F procedure for the registration and enforcement of foreign judgments which are in force in the territory of the State in which the particular judgment is to be enforced. In other words, it is the domestic rules of procedure of each Member State, as opposed to any uniform adjectival law of the Tribunal, which must govern the enforcement of a given judgment in the territory of that State. G

Where any Member State fails to comply with a specific decision of the Tribunal that it is bound by, such non-compliance is referable in the first instance to the Tribunal, which must then refer the matter to the Summit for the latter to take appropriate action. However, Article 32 does not explicate what remedial action may be taken, or by which authority or institution, in H

Patel J

A the event of a Member State's failure to comply with its broad obligation to take the measures necessary for the execution of the decisions of the Tribunal generally.

It is common cause that Zimbabwe has not taken any specific internal measures to domesticate the SADC Treaty or the Protocol of the Tribunal. B More specifically, no legislative or administrative steps have been taken to implement Zimbabwe's obligations under Article 32 or to transform those obligations into effectual provisions of the municipal law.

Nevertheless, as is correctly contended for the applicants, a State cannot invoke its own domestic deficiencies in order to avoid or evade its international obligations or as a defence to its failure to comply with those obligations. C The fundamental tenet of international law is that *pacta sunt servanda*, viz. every party to a treaty in force is required to perform its obligations thereunder in good faith and, as a corollary to that obligation, such party may not invoke the provisions of its internal law, including its constitution, as justification for its failure to perform the treaty. See arts 26 and 27 of the Vienna Convention on the Law of Treaties (1969); see also Shaw: *International* D *Law* (4 ed 1997) at 104.

However, it does not follow, as is further contended on behalf of the applicants, that the primacy of treaty obligations at international law must necessarily and invariably be taken into account in applying domestic law at the municipal level, even where there is a clear conflict between the two E regimes. As I have recently had occasion to opine in *Route Toute BV & Ors* v *Minister of Lands & Ors* 2009 (2) ZLR 351 (H) at 368E:

> "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 their respective domains. See Brownlie *Principles of Public International Law* (4 ed) at pp. 34-35. The resultant divergence between F 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 Brownlie *op cit* at pp 35-37."

Registration of Foreign Judgments in Zimbabwe

G Insofar as concerns the registration of foreign civil judgments, the relevant statutory provisions presently in force in Zimbabwe are contained in the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*] ("Chapter 8:02"). Section 3 of Chapter 8:02 extends the application of the Act to the judgments of any international tribunal designated for that purpose. The word "judgment" is defined

in s 2 of the Chapter 8:02 to mean "a judgment or order given or H made by any court or tribunal requiring the payment of money, and includes

Patel J

an award of compensation or damages to an aggrieved party in criminal A proceedings". The judgment that the applicants seek to register herein is essentially declaratory and injunctive in nature and is not one sounding in money. Moreover, it is common cause that the decisions of the SADC Tribunal are not registrable or enforceable in terms of Chapter 8:02 for the simple reason that the Tribunal has not been specifically designated under the Act. B

In any event, Chapter 8:02 is clearly not exhaustive in the coverage of its provisions. Section 25 expressly acknowledges that the Act does not derogate from other laws and provides that:

> "This Act shall be regarded as additional to, and not as limiting, the provisions of any other law relating to the recognition and enforcement of foreign judgments, the service of process or the taking of evidence, whether on commission or C otherwise."

It follows that Chapter 8:02 does not purport to override or exclude the operation of any other law, including the common law, pertaining to the recognition and enforcement of foreign judgments. In effect, s 25 accords with the general rule of statutory interpretation that the common law cannot be ousted except by clear language or in express terms. Both in England and D in South Africa, it is well established that foreign judgments are cognisable and enforceable under the common law. See North and Fawcett *Cheshire and North's Private International Law* (13 ed 2004) at 407; Forsyth *Private International Law* (4 ed 2003) at 389. In South Africa, the procedure for, and scope of, recognition proceedings are lucidly expounded in Joubert E *The Law of South Africa* (First Reissue, 1993) Vol 2 at para 476, as follows:

> "… the present position is that a foreign judgment is not directly enforceable in South Africa; but if it is pronounced by a proper court of law and certain requirements are met, any determination therein (for example of a party's rights or status) will be recognised and the judgment will in fact found a defence of *res judicata* if it would have founded such a defence had it been a South F African judgment. In addition, an authenticated foreign judgment constitutes a cause of action and as such is enforceable by ordinary action in a South African court, including, where appropriate, an action for provisional sentence or for a declaratory order or for default judgment.
>
> A South African court will not pronounce upon the merits of any issues of fact or of law tried by the foreign court and will not review or set aside its findings G though it will adjudicate upon a 'jurisdictional fact' establishing international competency".

The general requirements for recognition and enforcement of foreign judgments are set out in Joubert *op cit* at para 477. These requirements were adopted and applied by the Appellate Division in *Jones* v *Krok* 1995 (1) SA 677 (A) at 685B-E and in *Purser* v *Sales* 2001 (3) SA 445 (SCA) at 450D- H

Patel J

A G. In *Jones's* case Corbett CJ summarised these requirements as follows:

> "As is explained in Joubert …, the present position in South Africa is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our courts provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred B to as 'international jurisdiction or competence'); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended."

C In the present matter, counsel have not referred me to any Zimbabwean case authority on the subject, either following or deviating from the South African position, and I have been unable to locate any. I accordingly take the view, pursuant to the provisions of s 89 of the Constitution governing the law to be administered by our courts, that our common law position is *ad idem* D with the common law of South Africa as stated in the authorities cited above and that it has not been overtaken or significantly modified by local statute.

One further aspect that was not raised by counsel, but which I need to canvass, relates to the scope of recognition proceedings *vis-à-vis* the nature of the remedies that may properly be recognised and enforced through a foreign judgment. The provisions of Chapter 8:02 and the two cases cited E above deal primarily with judgments sounding in money. They do not address judgments and rulings with broader proprietary implications and administrative consequences as is the case with the SADC Tribunal decision *in casu*. Nevertheless, having regard to the general rules articulated in Joubert *op cit* at para 476, coupled with considerations of international comity in a F globalised world, and provided that the judgment in question has been duly delivered by a court of recognised international competence and jurisdiction, it seems to me that it would be contrary to principle to restrict the scope of recognition proceedings by reference to the specific remedies enjoined by a given foreign judgment.

Issues for Determination

G Notwithstanding the plethora of affidavit evidence and written legal arguments filed of record, counsel for the parties concur that there are essentially two issues for determination *in casu*. The first is whether the SADC Tribunal was endowed with the requisite jurisdictional competence in the case before it. The second is whether the recognition and enforcement of the Tribunal's H decision in that case would be contrary to public policy in Zimbabwe.

Patel J

Jurisdictional Competence A

It is trite that any jurisdictional fact which negates the existence of any obligation imposed by a foreign judgment constitutes an effective bar to the actionability of that judgment. One such obvious negativing fact would be that the party impeaching the judgment owes no duty to obey the command of the court or tribunal purporting to impose the obligation. B

The respondents' position on the status of the Tribunal is as follows. The Agreement amending the SADC Treaty ("the Amendment Agreement"), which was signed on 14 August 2001, never entered into force because it was not ratified by Zimbabwe or by the prescribed number of SADC Member States. Therefore, in terms of Article 22 of the Treaty as unamended, the Protocol C of the Tribunal still requires the ratification of a Member State in order for that State to be bound by it. Since Zimbabwe has not ratified the Protocol, it is not bound by it and is not subject to the jurisdiction of the Tribunal. Consequently, the Tribunal lacked the requisite competence to adjudicate the *Campbell* case and, therefore, its judgment in that case cannot be registered and enforced in Zimbabwe or anywhere else. D

The Vienna Convention on the Law of Treaties (1969) is generally recognised as an authoritative restatement of established or emergent rules of international customary law on the subject of treaties. See Brownlie *op cit* at 604. Article 39 of the Convention states the general rule regarding the amendment of treaties, as follows: E

> "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

Part II of the Convention regulates the conclusion and entry into force of treaties and, by dint of Article 39, it also governs the conclusion and entry into force of treaty amendments. Article 11 prescribes the means of F expressing consent to be bound by a treaty and provides that:

> "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

Article 24 of the Convention governs the entry into force of treaties and, in G its relevant portions, stipulates that:

> "1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
>
> 2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States." H

Patel J

A Taken together, these provisions of the Convention illustrate the flexibility inherent in the conclusion and entry into force of treaties as well as amendments thereto. In particular, art 11 makes it clear that the consent of States to be bound by a treaty may be expressed by signature, exchange of instruments, ratification or accession, *or by any other means if so agreed*. Thus, the States concerned are at liberty to agree on the conclusion of a treaty by means other B than the traditionally accepted procedure of signature, followed by ratification or accession. It is therefore perfectly possible for a treaty or an amendment of the treaty to be *adopted* and enter into force for all the adopting States instantly, without further ratification or any other formality, if that is the means of adhesion agreed to by those States. See Aust *Modern Treaty Law* C *and Practice* (2000) at 90.

Turning to the SADC Treaty itself, arts 39, 40 and 42 of the Treaty deal respectively with signature and ratification of, and accession to, the Treaty. Article 41 governs the entry into force of the Treaty as follows:

> "This Treaty shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the States listed in the Preamble."

D Article 39 makes it abundantly clear that ratification by two-thirds of the signatory States was a pre-requisite for the entry into force of the Treaty itself. However, amendments to the Treaty are governed by an entirely different procedure prescribed in Article 36.1, as follows:

> "An amendment of this Treaty shall be adopted by a decision of three-quarters E of all the Members of the Summit."

The term "Summit" is defined in Article 1 of the Treaty as:
" … the Summit of the heads of State or Government of SADC established by Article 9 of this Treaty".

Article 10 of the Treaty (in its unamended form) is instructive as to the F composition of the Summit and its decision-making process. It provides as follows in its relevant portions:

> "1. The Summit shall consist of the heads of State or Government of all Member States, and shall be the supreme policy-making institution of SADC.
>
> 3. The Summit shall adopt legal instruments for the implementation of the provisions of this Treaty … . G
>
> 8. Unless otherwise provided in this Treaty, the decisions of the Summit shall be by consensus and shall be binding."

The combined effect of these provisions is that an amendment to the Treaty is not concluded by way of ratification by Member States but is adopted by a decision of not less than three-quarters of the Summit, comprising the heads H of State or Government of all Member States. Furthermore, the decision of

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the Summit to adopt the amendment is binding on all Member States. The A amendment becomes operative immediately thereafter and there is no need for any further ratification by Member States in order to bring the amendment into force and effect.

Turning to the Amendment Agreement itself, the Preamble thereto, in its relevant portions, declares that: B

> "We, the heads of State or Government of [all the Member States] … HAVE AGREED, pursuant to Article 36 of the Treaty, to amend the Treaty as follows: … ."

Article 32 of the Agreement provides for its entry into force, in conformity with art 36.1 of the Treaty, as follows:

> "This Agreement shall enter into force on the date of its adoption by three-quarters C of all Members of the Summit."

Article 22 of the SADC Treaty, both in its original and its amended form, requires the signature and ratification of any Protocol approved by the SADC Summit. Article 9.1(f) as read with art 16 provides for the establishment of the SADC Tribunal. Article 16.2, as amended, provides that: D

> "The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol *which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty*, adopted by the Summit."[amendment emphasised]

The meaning and effect of the amending words are clear, to wit, the Protocol of the Tribunal forms an integral part of the Treaty without the need for its E ratification by the Member States. To clarify this position and dispel any doubt on the matter, all the Member States, including Zimbabwe, concluded and signed the Agreement Amending the Protocol of the Tribunal on 3 October 2002. By virtue of Articles 16 and 19 of this Agreement, arts 35 and 38 of the Protocol of the Tribunal, which required ratification of the Protocol by F two-thirds of the Member States, were repealed *in toto*, thereby obviating the need to ratify the Protocol.

To conclude this aspect of the case, my assessment of, and determination on, the jurisdictional capacity of the Tribunal is as follows. On 14 August 2001, the Amendment Agreement was signed by 13 of the 14 Heads of State or Government of the Member States, including Zimbabwe, thereby concluding G the process of its adoption and entry into force. In my view, there can be no doubt whatsoever that the Agreement was duly adopted in terms of art 36.1 of the Treaty and that it became binding upon all the Member States on the date of its adoption. It follows that, as from that date, by virtue of art 16.2 of the Treaty as amended, the Protocol of the Tribunal constituted an integral part of the Treaty and became binding on all Member States without H

Patel J

A the need for its further ratification by them. It also follows that the Republic of Zimbabwe thereupon became subject to the jurisdiction of the Tribunal and that the jurisdictional competence of the Tribunal in the *Campbell* case, which was heard and determined in 2008, cannot now be disputed.

The respondents' position in this regard, premised on the *ex post facto* B official pronouncements repudiating the Tribunal's jurisdiction, is essentially erroneous and misconceived. Their position is rendered even more untenable by the conduct of SADC Governments, including the Government of Zimbabwe, subsequent to the adoption of the Amendment Agreement, which conduct has been entirely consistent with the provisions of the Treaty as amended by the Agreement. I refer, in particular, to the establishment of the C Troika system and the Organ on Politics, Defence and Security Cooperation, in terms of Articles 9 and 9A of the Treaty (as amended by Articles 9 and 10 of the Agreement), and note that Zimbabwe has fully participated, together with all the other Member States, in the Troika system and the business of the newly constituted Organ. It seems to me legally unsustainable to D espouse a major facet of the amended SADC regime and to simultaneously eschew those features of the same regime that are deemed to be politically inexpedient and unpalatable.

Before concluding, I think it necessary to mention one jurisdictional issue that was not canvassed by the parties, either in their affidavits or in argument, E relative to the scope of the Tribunal's jurisdiction in terms of the SADC Treaty and its governing Protocol. In the case before it, the Tribunal relied upon the provisions contained in arts 4(c) and 16 of the Treaty, as read with arts 14 and 15 of the Protocol, to conclude that it was duly empowered to adjudicate any dispute concerning human rights, democracy and the rule F of law. The jurisdiction of the Tribunal encompasses all disputes between States and between natural and legal persons and States relating to the interpretation and application of the Treaty. Despite this broad formulation, I am not entirely persuaded that the general stricture enunciated in art 4(c) of the Treaty, which requires SADC and the Member States to act in accordance with the principles, *inter alia*, of "human rights, democracy and G the rule of law", suffices to invest the Tribunal with the requisite capacity to entertain and adjudicate alleged violations of human rights which might be committed by Member States against their own nationals. Be that as it may, that is not an issue that was specifically raised in these proceedings and it would therefore be inappropriate for me to deal with this jurisdictional point H *mero motu* at this juncture.

Patel J

Public Policy A

As already stated above, a foreign judgment cannot be recognised and enforced if it is contrary to public policy. As is succinctly put in Joubert *op cit* at para. 425:

> "… a foreign judgment will not be recognised or enforced if it is in conflict with an overriding statute, if its terms conflict with public policy or if it was obtained B without observance of the principles of natural justice."

What constitutes public policy in any given country is a matter that eludes precise definition. The notion is clearly not immutable and must perforce vary with time, place and circumstances, in tandem with changing social *mores*. Antecedent case authorities are obviously highly persuasive but may not always be germane or decisive. C

In the instant case, public policy must be considered not only in the closed confines of the domestic sphere but also in the larger regional and international context. In principle, it would generally be contrary to public policy for any State to violate its international obligations within the domestic realm. As already stated above, every State party to a treaty in force is required to D perform its obligations in good faith and, concomitantly, it cannot invoke its municipal law so as to absolve itself from its obligations at international law. Apart from being embodied and codified in arts 26 and 27 of the Vienna Convention on the Law of Treaties (1969), these rules also form part of international customary law. See Shaw *op cit* at 104. E

As was stated in the *Route Toute* case *supra*, 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. This position was affirmed by the Supreme Court, albeit *obiter*, in *Barker McCormac (Pvt) Ltd* v *Government of Kenya* 1983 (2) ZLR 72 (S) at 77, where it was observed that customary international law forms F part of the law of Zimbabwe except to the extent that it is in conflict with statute or prior judicial precedent. Inasmuch as Zimbabwe is bound by the decisions of the SADC Tribunal at international law, by dint of its treaty obligations as well as international custom, it would be inconsistent with the public policy of Zimbabwe not to recognise and enforce any decision of G the Tribunal at the municipal level, except insofar as that decision conflicts with statute or prior judicial precedent.

There is a further international dimension to the public policy of Zimbabwe. By adhering to the SADC Treaty as well as the Amendment Agreement and, therefore, by submitting to the jurisdiction of the Tribunal, the Government of Zimbabwe has created an enforceable legitimate expectation, both within and H

Patel J

A beyond the borders of Zimbabwe, that it would comply with the requirements of the Treaty and abide by the decisions of the Tribunal. Moreover, in terms of Article 32 of the Protocol of the Tribunal, the Government has bound itself to enforce the decisions of the Tribunal in accordance with domestic procedural law, and has thereby created a further legitimate expectation that it would act accordingly.

B These points are illustrated by the decision in *Minister for Immigration and Ethnic Affairs* v *Teoh* (1995) 183 CLR 273; (1995) 128 ALR 353 where Australia had ratified the United Nations Convention on the Rights of the Child but had not taken any steps to implement the Convention by statute. It was held by the High Court of Australia that, despite the failure C to incorporate the Convention in the domestic law of Australia, individuals had a legitimate expectation that the government would act in accordance with the Convention. In the instant case, the legitimate expectation that the Government would adhere to the decisions of the Tribunal and take steps to enforce those decisions in the domestic sphere must be regarded as an intrinsic aspect of public policy in Zimbabwe. On that basis, the recognition D and enforcement of the Tribunal's decisions would not be contrary to the public policy of Zimbabwe.

The above propositions must be taken to apply in principle to the decisions of the Tribunal generally. In other words, as a rule, public policy dictates that the Tribunal's decisions, made within the bounds of its international E jurisdictional competence, be recognised and enforced in Zimbabwe. However, in my view, the application of this general rule is subject to a consideration of the facts of each individual case and the legal and practical consequences of recognising and enforcing the Tribunal's decision in that particular case in Zimbabwe.

Turning specifically to the decision in the *Campbell* case, the findings and F ruling of the Tribunal, insofar as they are relevant *in casu*, may be summarised as follows: (i) fair compensation is payable to the applicants, and must be paid by a fixed date to three of the applicants who have already been evicted, for their lands compulsorily acquired by the Government of Zimbabwe; (ii)

the Government is in breach of its obligations under Articles 4(c) and 6(2) G of the SADC Treaty (pertaining to human rights, democracy and the rule of law and the principle of non-discrimination); (iii) Amendment 17 (see below) is in breach of Articles 4(c) and 6(2) of the Treaty; (iv) the Government is directed to take all necessary measures to protect the possession, occupation and ownership of the lands of the applicants and to ensure that no action is taken, pursuant to Amendment 17, to evict the applicants from their lands H or to interfere with their peaceful residence thereon.

2010 (1) ZLR p75

Patel J

It is common cause that the Government of Zimbabwe embarked on A a programme of land reform in the year 2000. The programme was constitutionally recognised in s 16A of the Constitution, which section was introduced by the Constitution of Zimbabwe Amendment (No. 16) Act 2000. Subsequently, the programme was further entrenched when the Legislature enacted s 16B through the Constitution of Zimbabwe Amendment (No. 17) B Act 2005. The legal effect of s 16B(2)(a) was to compulsorily acquire all agricultural land that was identified in the notices of acquisition itemised in the newly inserted Schedule 7. Consequently, 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. In terms of s 16B(6), it was envisaged C that an Act of Parliament would be framed to make it a criminal offence for any person, without lawful authority, to possess or occupy any land referred to in s 16B. Subsequently, such legislation was duly enacted in the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] which came into operation on 20 December 2006.

The legality of the land reform programme was considered in D *Mike Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor* 2008 (1) ZLR 17 (S). In essence, the Supreme Court confirmed the constitutionality of the programme as implemented under s 16B of the Constitution. Counsel for the respondents submitted that the judgment of the SADC Tribunal is in total disharmony with the decision of the Supreme Court in the *Mike Campbell* case *supra*. E Although I do not perceive any direct conflict between the two decisions, inasmuch as the Supreme Court was seized with the constitutionality of the programme under domestic law while the Tribunal's judgment centres on the violation of rights and obligations under the SADC Treaty, it must nevertheless be accepted that the indirect consequence of the Tribunal's judgment is to impugn the legality of the programme sanctioned by the F Supreme Court. The potential conflict between the two decisions is actualized in the instant case because the effect of registering the Tribunal's judgment in Zimbabwe would be to challenge the decision of the Supreme Court within its jurisdictional domain, and thereby undermine the authority of that court in Zimbabwe. Any such result could surely not be contemplated as conforming G with public policy in Zimbabwe and must militate against the registration of the Tribunal's decision by this court.

In any event, there is a further and more direct basis for declining the registration and consequent enforcement of the Tribunal's decision in this country. As indicated above, the decision directs the Government of Zimbabwe to do several things. In particular, the Government is ordered to protect the H

2010 (1) ZLR p76

Patel J

A possession, occupation and ownership of the lands of the applicants. It must also ensure that no action is taken to evict the applicants from their lands or to interfere with their peaceful residence thereon. In addition, it is required to pay fair compensation to the applicants for their lands compulsorily acquired by the Government.

B As already indicated, the applicants' lands were acquired by the Government in terms of s 16B of the Constitution without any compensation payable in respect of the land itself. If the Tribunal's judgment were to be registered by this court and subsequently voluntarily complied with or enforced by court orders, the Government would be required to contravene and disregard what Parliament has specifically enacted in s 16B of the Constitution. This, C in my view, simply cannot be countenanced as a matter of law, let alone as an incident of public policy. Section 3 of the Constitution proclaims what is axiomatic, viz. that:

> "This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

D The obvious implications of the supremacy of the Constitution are twofold. Firstly, to the extent that the common law is invoked to enforce a foreign judgment, the common law must be construed and applied so as to conform with the Constitution and any feature of the judgment that conflicts with the Constitution cannot, as a matter of public policy, be recognised or enforced E in Zimbabwe. The notion of public policy cannot be deployed and insinuated under cover of the common law to circumvent or subvert the fundamental law of the land. Secondly, I consider it to be patently contrary to the public policy of any country, including Zimbabwe, to require its Government to act in a manner that is manifestly incompatible with what is constitutionally ordained.

F Although the Tribunal's decision, strictly regarded, is confined to the 79 applicants before it, its ramifications extend to the former owners of all the agricultural land that has been acquired by the Government since 2000 in terms of s 16B of the Constitution. In effect, enforcement of the decision *vis-à-vis* the 79 applicants in particular, and compliance with it generally, would ultimately necessitate the Government having to reverse all the G land acquisitions that have taken place since 2000. Apart from the political enormity of any such exercise, it would entail the eviction, upheaval and eventual relocation of many, if not most, of the beneficiaries of the land reform programme. This programme, despite its administrative and practical shortcomings, is quintessentially a matter of public policy in Zimbabwe, H conceived well before the country attained its sovereign independence.

Patel J

As for the doctrine of legitimate expectation, the applicants before the A Tribunal and others in their position are absolutely correct in expecting the Government of Zimbabwe to comply with its obligations under the SADC Treaty and to implement the decisions of the Tribunal. However, I take it that there is an incomparably greater number of Zimbabweans who share the legitimate expectation that the Government will effectively implement the B land reform programme and fulfil their aspirations thereunder. Given these countervailing expectations, public policy, as informed by basic utilitarian precept, would dictate that the greater public good must prevail.

In the result, having regard to the foregoing considerations and the overwhelmingly negative impact of the Tribunal's decision on domestic law and agrarian reform in Zimbabwe, and notwithstanding the international C obligations of the Government, I am amply satisfied that the registration and consequent enforcement of that judgment would be fundamentally contrary to the public policy of this country.

Costs

The applicants have not succeeded in the eventual outcome of this case. D Nevertheless, it cannot be doubted that the issues raised herein are matters of paramount public importance and that their proper ventilation in these proceedings is of public value and benefit. I therefore deem it just and equitable that the parties should bear their own legal costs.

The application is accordingly dismissed with no order as to costs. E

Gollop & Blank, applicants' legal practitioners

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

Mlotshwa & Co, intervener's legal practitioners F

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Document 12 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/GULA-NDEBELE v BHUNU NO 2010 (1) ZLR 78 (H)

GULA-NDEBELE v BHUNU NO 2010 (1) ZLR 78 (H)

Citation	2010 (1) ZLR 78 (H)
Case No	Judgment No. HH-14-10
Court	High Court, Harare
Judge	Makarau JP
Heard	12 November 2009
Judgment	27 January 2010
Counsel	*H Zhou*, for the applicant. *W R Chingeya*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Administrative law – *review – proceedings which may be reviewed – proceedings of tribunal appointed to enquire into allegations against Attorney-General – when such proceedings may be reviewed*

Administrative law – *review – when review proceedings must be commenced* D *– dismissal of applicant from office by President – requirement for review proceedings to be commenced within eight weeks – when such period of time starts to run*

Constitutional law – *Attorney-General – removal from office – procedure – may only be removed by President acting on recommendation of tribunal* E *– President bound to act on recommendation – notice of removal – how should be given – need for Attorney-General to be notified personally*

Criminal procedure – *Attorney-General – removal from office – procedure*

Practice and procedure – *parties – citation – President – when should be cited – President's act in removing Attorney-General from office – President* F *acting according to recommendation of tribunal – not permissible to cite tribunal members only without citing President as well*

Headnote

The purpose of s 110(3) of the Constitution of Zimbabwe, 1980 is to protect the Attorney-General from arbitrary removal from office by the President. The section ties down the President and binds him only to act on the G recommendations of a tribunal of experts. He cannot lawfully remove the Attorney-General from office in the absence of a recommendation to that effect.

Prior to May 2008, the applicant had been Attorney-General of Zimbabwe. In terms of s 110(5) of the Constitution, a tribunal was set up to H inquire into his alleged misbehaviour. After considering the matter, the

Makarau JP

tribunal, under the chairmanship of the respondent, recommended that A the applicant be removed from office and the President was notified accordingly. Acting on the recommendation, the President removed the applicant from office. On 16 May 2008 a notice was published in the *Gazette* informing the public of his removal from office. On 23 May 2008 a letter to the same effect, and written on behalf of the President, B was sent to the applicant. On 14 July 2008, the applicant commenced proceedings, taking the decision of the tribunal, which had recommended his dismissal from office, upon review. In so doing, however, he did not seek his reinstatement as Attorney-General and, for this reason, he chose not to cite the President as a party to the proceedings. When the matter was argued, the respondent took the point that, in terms of r 259 C of the High Court Rules, the applicant was out of time in commencing proceedings as the prescribed eight week period had expired. He argued that the period of time had commenced to

run on 16 May 2008, when notice of the applicant's dismissal had been published in the *Gazette*. The applicant argued that the period had only started on 23 May 2008 D when the letter on behalf of the President had been sent to him. Thus, he submitted, proceedings had been launched timeously. As his main point, however, the respondent argued that the applicant's dismissal was, in fact, a Presidential decision which in terms of s 31K(2) of the Constitution, the court had no jurisdiction to review. The court chose not to deal with this point but rather raised the question, *meru moto*, of the non-citation E of the President in the proceedings. In so doing, and having regard to s 110(5) of the Constitution, the court inquired of counsel whether the recommendation of the tribunal, once acted upon, continued to have an independent existence and could be impugned without necessarily impugned the action of the President in implementing its recommendation.

Held; that the public notification which was published in the *Gazette* on 16 F May 2008 was not intended as a personal notice to the applicant of the decision to dismiss him from office. This was only effected in terms of the subsequent letter of 23 May 2008 and it was this latter date which was the operative date upon which the eight week period, prescribed by r 259 of the High Court Rules, started to run. The applicant had, G therefore, commenced his review proceedings timeously.

Held, further, that like the proceedings of any other quasi-judicial body, the proceedings of the tribunal, if tainted by procedural irregularities recognizable at law as vitiating such proceedings, could be set aside before they are concluded and before any recommendation was made. Even after the inquiry was complete but before its recommendation H

Makarau JP

A was acted upon, the proceedings and the consequent recommendation of the tribunal could have been set aside on review. In both instances, there would be no need to cite the President in review proceedings to set aside the decision of the tribunal. However, where the recommendation of the tribunal has been implemented as required by the Constitution, then the decision of the tribunal ceases to have any independent status B and becomes imbedded in and forms an integral and inseparable part of the action of the President.

Held, further, that in terms of s 110 of the Constitution, the Attorney-General can only be removed from office by the President if the President is so advised by the recommendation of the tribunal. The President does not C take any decision in the matter but is bound simply to implement the recommendation and advice of the tribunal to that effect. The removal of the Attorney-General from office is thus not a decision that the President can reach *mero motu* or against the recommendation of the tribunal. He cannot act without a recommendation and advice from a tribunal. While the recommendation and advice can exist on its own before D implementation, once they are implemented, the two become one. The implementation cannot exist on its own without the recommendation and once the recommendation is lawfully set aside, the implementation fails to have a basis in law and becomes unconstitutional.

Held, further that the non-citation of the President in the application was fatal to the proceedings. Although it may have been possible to review the E proceedings of the tribunal before its recommendation was implemented by the President, the position was different after it had been implemented. The applicant could not attack the recommendation of the tribunal without affecting the act of the President in removing him from office. To attack the one was, of necessity, to attack the other.

Cases cited F

Nair v Naicker 1942 NPD 3

Legislation considered

Constitution of Zimbabwe, 1980, s 110(3)

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

Case information

H Zhou, for the applicant.

W R Chingeya, for the respondent

Judgment

H **MAKARAU JP:** The applicant was the Attorney-General for the Republic

Makarau JP

of Zimbabwe up to May 2008 when he was removed from that office.. His A removal from office was publicly announced by a notice appearing in the *Government Gazette* of 16 May 2008. Following this, a letter was dispatched to him by the Chief Secretary to the President and Cabinet on 23 May 2008, informing him of the termination of his services as Attorney-General.

Prior to the removal of the applicant from office, the respondent and two B other members were appointed to form a tribunal as provided for in s 110(5) of the Constitution of Zimbabwe to inquire into the question of and make recommendations on the removal of the applicant from office for alleged misbehaviour. The respondent has been cited in this application in his capacity as Chairperson of that tribunal. C

It is common cause that the tribunal recommended that the applicant be removed from office and, after receiving this recommendation, the President acted on it.

On 14 July 2008, the applicant filed this application, seeking to have reviewed the decision of the tribunal to recommend that he be removed from office for misbehaviour. In attacking the decision of the tribunal, the applicant D alleged that it was grossly unreasonable and utterly perverse in its defiance of logic and reason that no tribunal, properly addressing its mind to the facts before it and to the law, and having regard to the evidence before it, could have arrived at such a decision. He further alleged that, having regard to the totality of the report of the report produced by the tribunal and its E assessment of the evidence adduced before it, the tribunal was biased against him. He concludes his attack on the decision of the tribunal by alleging that the recommendation made by it to the President arose not only out of bias against him but also as a result of the consideration of improper motives.

The application was opposed. F

Firstly, in opposing the application, it was contended on behalf of the respondent that the application, which, in terms of Order 33 r 259 of the High Court Rules, must be filed within eight weeks of the termination of the proceedings sought to be impugned, was filed out of time.

Secondly, it was contended that the applicant's application did not comply with the rules of this court in that it did not state on its face the clear and G concise grounds upon which the applicant sought to have the proceedings of the tribunal set aside.

Finally, it was contended that the decision of the tribunal was actually the decision of the President in terms of s 31K(2) of the Constitution and that being the case, this court has no review jurisdiction over the decision. H

Makarau JP

A At the hearing of the application, the second objection, alleging that the applicant's application does not state the grounds of review clearly and concisely on its face, was not pursued.

I return to the first point.

It is trite that unless the time is extended by the court for good cause shown, an B application for review must be filed within eight weeks of the decision being impugned. The calculation of time for the purposes of the rules is governed by common law. The rule is to include the last day when the event occurred and to exclude the last day. Thus the eight week period is to be reckoned from the date when the applicant was notified of the fact that the proceedings against him had terminated. See *Nair* v *Naicker* 1942 NPD 3 at 6ff.

C The issue that falls for decision in this matter is the actual date upon which the applicant was notified of the decision to terminate his appointment. The applicant contends that it is the date of the letter from the Chief Secretary to the President and Cabinet, whereas the respondent contends that it is the date of the publication of the termination in the *Government Gazette*.

D I have not been advised in argument the legal provision that bears out the contentions of the respondent in this regard. My attention has not been drawn to any provision of the Constitution or any other law that requires the termination of the appointment of the Attorney-General to be published in the *Gazette*. My own limited research into the matter reveals no such requirement. It would appear to me that the publication of the termination E of the applicant's appointment was intended to give notice to the public at large that the applicant was no longer the Attorney-General of the Republic and that the public should be guided accordingly. In my view, publication of the termination of the applicant's appointment could not have been meant to constitute personal notice to the applicant of the fact. Personal notification F of the termination of his appointment was effected through the letter of 23 May 2008.

It is my finding that that the operative date upon which the eight weeks that the applicant had to challenge the decision terminating his employment was the date of the letter advising him of such and not the date of the publication of the termination in the *Gazette*.

G He was not out of time in filing the application for review.

Assuming that I have erred in holding that the eight weeks within which the applicant had to file his application for review was reckoned from 23 May 2008 and not from 16 May 2008, I would have condoned the delay by the applicant in this matter. The delay in filing the application was by four days H only and the importance of this matter is, in my view, such that it must be

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determined on its merits. A

I now turn to the final issue in this application.

The respondent has argued that the decision of the tribunal to recommend the termination of the applicant's appointment is actually a decision of the President and one which this court has no jurisdiction to review.

In my view, it is not necessary that I decide the matter on this basis. B

At the hearing of the matter, I raised the non-citation of the President as an issue and requested the parties to address me on whether or not such was fatal to the applicant's case. The parties addressed me on this point during the hearing and Mr *Zhou* took advantage of my invitation to the parties at the end of the hearing and has since filed additional written submissions C on the issue.

The issue that has exercised my mind as a consequence of the non-citation of the President is whether the recommendation of the tribunal, once acted upon, continues to have an independent existence and can be impugned without necessary impugning the action of the President in implementing D the recommendation. I will explain in some detail.

It is common cause that the applicant deliberately chose not to cite the President as a respondent as he is not seeking reinstatement as the Attorney-General of Zimbabwe. He wishes his removal from that office to remain extant. In other words, he does not seek in these proceedings to attack the action E of the President in implementing the recommendation of the tribunal. He argues that the process of his removal from office consisted of two separate juristic acts, the inquiry by the tribunal and his actual removal from office by the President. He is thus seeking to impugn the first and not the second. Therein lies my difficulty.

It appears to me that before a tribunal, such as the one chaired by the F respondent, has made its recommendation to the President, its proceedings may competently be set aside on review. I must hasten to qualify that I am not expressing this as a firm position at law as I have not received full argument on the matter nor does the issue specifically arise before me. It appears to me, however, that, like the proceedings of any other quasi- judicial G body, the proceedings of the tribunal, if tainted by procedural irregularities recognizable at law as vitiating such proceedings, may be set aside before they are concluded and before any recommendation is made. I do not read anything in the Constitution that would have the meaning of ousting the review jurisdiction of this court over the proceedings of a tribunal set up under s 110 of the Constitution. H

A It further appears to me, following the reasoning above, that even after completing its inquiry but before its recommendation is acted upon, the proceedings and the consequent recommendation of the tribunal can be set aside on review. In both instances, it appears to me that there may be no need to cite the President in review proceedings to set aside the decision of the tribunal. Again I express this view tentatively, as the issue does not arise before B me. I simply highlight my views in this regard for the purposes of contrasting the position after the President has implemented the recommendation and has taken the action stipulated in the section.

It presents itself clearly to me however that where the recommendation of the tribunal has been implemented, as required by the Constitution, then the C decision of the tribunal ceases to have any independent status and becomes imbedded in and forms an integral and inseparable part of the action of the President.

Section 110(3) of the Constitution provides:

> "Such person shall be removed from office by the President if the question of his D removal from office has been referred to a tribunal appointed under subsection (5) and that tribunal has advised the President that he ought to be removed from office for inability to discharge his functions or for misbehaviour."

In my view, the literal and grammatical meaning of the section is that the person to whom the section applies can only be removed from office by the President if the President is so advised by the recommendation of the E tribunal. Thus, the President does not take any decision in the matter but is enjoined simply to implement the recommendation and advice of the tribunal to that effect. The removal of the Attorney-General from office is thus not a decision that the President can reach *mero motu* or against the recommendation of the tribunal. He cannot act without a recommendation F and advice from a tribunal.

My reading of the section suggests that the President is bound by the Constitution to act on the recommendation of the tribunal and once he does that, the removal of the Attorney-General from office becomes the action of the President, albeit on the recommendations and advice of the tribunal. The two then become inseparable in my view. While the recommendation G and advice can exist on its own before implementation, once implemented, the two become one. On the other hand, the implementation cannot exist on its own without the recommendation and once the recommendation is lawfully set aside, the implementation fails to have a basis in law and becomes unconstitutional.

H Viewed from another angle, the converse of the above is, in my view, to

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hold that the President cannot lawfully remove the Attorney-General from A office in the absence of a recommendation to that effect. Any such attempt will be unconstitutional and thus unlawful.

It appears to me that the purpose of the section is to protect the Attorney-General from arbitrary removal from office by the President. I cannot envisage a stronger provision protecting the office of the Attorney-General B from arbitrary decision by the President than this. The section ties down the President and binds him to only act on the recommendations of a tribunal of experts. In my view, to read the section in any other way would be to dilute the protection that the section offers and thus offend against the clear intention of the legislature.

On the basis of the foregoing, I find the argument by the applicant untenable. C To separate the proceedings and recommendation of the tribunal from the ultimate act of terminating the appointment of the Attorney-General is, in my view, to suggest that the President can act without such a recommendation of a duly constituted tribunal of experts as provided for in the Constitution.

It is therefore my finding that the non-citation of the President in this D application is fatal to the applicant's application. As indicated above, it is untenable for the applicant to suggest that he can attack the recommendation of the tribunal only, without affecting the act of the President to remove him from office. The act of removing him from office cannot lawfully exist without the requisite recommendation and thus to attack one is of necessity to attack the other. In that regard and to be procedurally correct, the President E must be made a party to the proceedings. This court cannot make an order adversely affecting the action of the President without affording him the right to be heard.

In the result, I make the following order:

The application is dismissed with costs. F

Gula-Ndebele & Partners, applicant's legal practitioners.

Chingeya Mandizira, respondent's legal practitioners.

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Document 13 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/FORRESTER EST (PVT) LTD v VENGESAYI & ANOR 2010 (1) ZLR 86 (H)

FORRESTER EST (PVT) LTD v VENGESAYI & ANOR 2010 (1) ZLR 86 (H)

Citation	2010 (1) ZLR 86 (H)
Case No	Judgment No. HH-19-10
Court	High Court, Harare
Judge	Patel J
Heard	26 January 2010
Judgment	2 February 2010
Counsel	*J Shekede,* for the applicant *G N Mlotshwa,* for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

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* D *occupier to be lawfully evicted before holder of offer letter entitled to occupy property*

Headnote

The applicant had obtained a spoliation order against the respondent, who had moved onto its farm after receiving a letter of offer for the farm. E The farm had been expropriated by the State. The respondent noted an appeal and moved back onto the farm. The applicant sought leave to execute pending appeal. The respondent argued that he had good prospects of success on appeal.

Held, that the preponderance of case authority was against the respondent's argument. An offer letter does not entitle the holder to occupy the land F allotted to him before the current occupier has been duly evicted by due process of the law. Consequently, the offeree cannot resort to self-help in order to dispossess or eject the occupier, no matter how intransigent the latter may be in his refusal to vacate the property. The offeree must wait until the State has taken steps to evict the occupier through a court order granted by a court of competent jurisdiction under the Gazetted G Land (Consequential Provisions) Act [*Chapter 20:28*] or otherwise. In the absence of

such court order or the consent of the current occupier, the offeree has no self-executing right to occupy the land. The full bench of the Supreme Court in *Botha & Another* v *Barrett* 1996 (2) ZLR 73 (S) at 79 enunciated the traditional requirements for the grant of a spoliation H order. This traditional approach has been adopted in the overwhelming

Patel J

majority of the decisions of the High Court and should continue to be A followed, for the fundamental reason that recognising any resort to self-help without a court order is the surest recipe for disorder, degenerating into possible violence and the abnegation of the rule of law.

Cases cited

Bok Estates (Pvt) Ltd v Masara & Ors 2009 (2) ZLR 466 (H) B

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

Chikafu v Dodhill (Pvt) Ltd & Ors 2009 (1) ZLR 293 (S)

Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd 1998 (1) ZLR 149 (H)

Forrester Estate (Pvt) Ltd v Makununu HC 6586/07

Karori (Pvt) Ltd & Anor v Mujaji 2007 (1) ZLR 105 (H) C

Pondoro (Pvt) Ltd & Anor v Nemakonde & Anor 2008 (1) ZLR 6 (H)

Route Toute BV & Ors v Min of Lands & Ors 2009 (2) ZLR 351 (H)

South Cape Corp (Pty) Ltd v Eng Mgmt Svcs (Pty) Ltd 1977 (3) SA 534 (A)

Top Crop 1976 (Pvt) Ltd v Min of Lands & Anor HH-74-09

Legislation considered D

Constitution of Zimbabwe 1980, ss 16B(2)(a), 16B(3)(a) and Schedule 7

Case information

J Shekede, for the applicant

G N Mlotshwa, for the first respondent E

Judgment

PATEL J: On 9 September 2009, the applicant obtained a spoliation order against the first respondent, in Case No. HC 3989/09, evicting him from the property in question (Frogmore Farm). On the same day, the first respondent appealed against this order in Case No. SC 216/09. Relying on his offer letter from the second respondent and the notice of appeal, he then reoccupied F the property on 15 September 2009 without the applicant's consent. The applicant now seeks leave to execute the order in Case No. HC 3989/09 pending appeal. The first respondent resists the application on the ground that he has good prospects of success on appeal.

Leave to Execute Pending Appeal G

The test to be applied in an application of this nature is essentially twofold. The court is called upon to assess, firstly, the prospects of success on appeal and, secondly, the preponderance of equities as between the parties. See *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545; *Econet (Pvt) Ltd* v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H) at 154. H

Patel J

A In the instant case, the prospects of success on appeal hinge upon two questions: (i) whether the property *in casu* has been duly acquired by the State and (ii) whether the first respondent's offer letter entitles him to occupy the property before the applicant has been lawfully evicted therefrom.

Acquisition of Property

B The notice in the *Gazette* identifying the land *in casu* for acquisition was first published in GN No. 591/2001 on 16 November 2001. It was later listed as item 30 in Schedule 7 to the Constitution (as amended by Act No. 5 of 2005).

The original acquisition of the property was set aside by default in Case No. HC 8592/02 through a provisional order which was granted on 27 November 2002 and later confirmed on 6 November 2002. Subsequent decisions of this C court (in Cases Nos. HC 7030/06, HC 6116/07 and HC 6586/07, determined on 27 June 2006, 15 February 2008 and 29 July 2009, respectively) have all reaffirmed or recognised the decision in Case No. HC 8592/02. These later decisions were premised on the default judgment granted in the original case. Their overall effect was to confer upon the applicant rights *in rem* which are D operative *erga omnes* and which can only be overridden by clear statutory provision to that effect.

Section 16B of the Constitution and Schedule 7 thereto were brought into operation in September 2005 through Act No. 5 of 2005. The clear object of s 16B as read with item 30 of Schedule 7 was to acquire Frogmore Farm in September 2005 and vest title therein in the State. Although s 16B does E not explicitly override pre-existing court decisions, the specific and clear intention of the Legislature was to validate the acquisition of all the properties listed in Schedule 7 and to effectuate the vesting of title in the State. By necessary implication, this was intended notwithstanding any prior decisions of the courts to the contrary. This intention emerges fairly unequivocally F not only from s 16B(2)(a), which acquires all the lands listed in Schedule 7, but also from the wording of s 16B(3)(a), which precludes any challenge to these acquisitions before the courts. It is abundantly clear, therefore, that Frogmore Farm was duly acquired by the State in terms of s 16B and continues to vest in the State.

Prospects of Success on Appeal

G I now turn to consider the rights and status of the first respondent under the offer letter issued to him by the second respondent. Despite the position taken in *Top Crop 1976 (Pvt) Ltd* v *Minister of Lands & Anor* HH-74-09, it seems to me that the preponderance of case authority supports and fortifies the contrary position. An offer letter does not entitle the holder to occupy H the land allotted to him before the current occupier has been duly evicted by

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due process of the law. Consequently, the offeree cannot resort to self-help in A order to dispossess or eject the occupier, no matter how intransigent the latter may be in his refusal to vacate the property. The offeree must wait until the State has taken steps to evict the occupier through a court order granted by a court of competent jurisdiction under the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] or otherwise. In the absence of such court B order or the consent of the current occupier, the offeree has no self-executing right to occupy the land. See *Forrester Estate (Pvt) Ltd* v *Makununu* HC 6586/07 at p 4; *Karori (Pvt) Ltd & Anor v Mujaji* 2007 (1) ZLR 105 (H) at 109-110; *Pondoro (Pvt) Ltd & Anor* v *Nemakonde & Anor* 2008 (1) ZLR 6 (H); *Bok Estates (Pvt) Ltd* v *Masara & Ors* 2009 (2) ZLR 466 (H) at 468. See also my observations in *Route Toute BV & Ors* v *Minister of National Security* C *& Ors* 2009 (2) ZLR 351 (H) at 362.

It follows that, in my view, the first respondent has minimal prospects of success on appeal against the order in Case No. HC 3989/09. In this regard, I am cognisant of the view expressed by Chidyausiku CJ in *Chikafu* v *Dodhill (Pvt) Ltd & Ors* 2009 (1) ZLR 293 (S) at 298, to the effect that because of the divergence of opinion in the decided cases of this court "whichever D party lost in the High Court had prospects of success" on appeal before the Supreme Court. This observation was made *obiter* in the context of an application for leave to appeal. With the greatest of respect, it cannot be relied upon to overrule the decision of the full bench of the Supreme Court in *Botha & Another* v *Barrett* 1996 (2) ZLR 73 (S) at 79, enunciating the E traditional requirements for the grant of a spoliation order. This traditional approach has been adopted in the overwhelming majority of the decisions of this court. I have no hesitation in continuing to follow that approach for the fundamental reason that recognising any resort to self-help without a court order is the surest recipe for disorder, degenerating into possible violence and the abnegation of the rule of law. F

Balance of Convenience

In any event, even if I am wrong as to the first respondent's prospects of success on appeal, it remains necessary to consider the balance of convenience and the potentiality of prejudice to the parties in casu. According to the papers before the court, at the time of instituting this application the applicant had G emplaced over 1000 head of cattle on the farm and planted various crops on circa 66 hectares of land. In contrast, the first respondent had only taken several preparatory steps, by securing a loan and purchasing seed, but had not as yet commenced farming operations.

Although both parties have demonstrated the potentiality for harm or H

Patel J

A inconvenience to themselves, the balance of hardship or convenience clearly favours the applicant. In my view, greater prejudice would be sustained by the applicant if leave to execute were to be refused than the prejudice that is likely to be suffered by the first respondent if leave to execute were to be granted.

B **Disposition**

In the result, the applicant is entitled to the order sought granting leave to execute pending appeal, as follows:

1. Leave be and is hereby granted to the applicant to execute the judgment granted by this Honourable Court in Case No. HC 3989/09 pending the determination of the appeal noted by the first respondent C in Case No. SC 216/09.
2. The first respondent shall pay the costs of this application.

Wintertons, applicant's legal practitioners

D *Antonio, Mlotshwa & Co*, first respondent's legal practitioners

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Document 14 of 62

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/CENTRAL AFRICA BUILDING SOCIETY v NDAHWI 2010 (1) ZLR 91 (H)

CENTRAL AFRICA BUILDING SOCIETY v NDAHWI 2010 (1) ZLR 91 (H)

Citation	2010 (1) ZLR 91 (H)
Case No	Judgment No. HH-18-10
Court	High Court, Harare
Judge	Makarau JP
Heard	14 January 2010
Judgment	3 February 2010
Counsel	Mrs *R Matsika*, fo the applicant Mrs *J B Wood*, for the respondent
Case Type	Opposed application

Annotations Link to case annotations

Flynote

Practice and procedure – *judgment – summary judgment – pleadings – amendment of – not permitted – claim must be unanswerable and verified by affidavit – summary judgment may not be granted on basis of incorrectly stated claim*

Practice and procedure – *pleadings – amendment of – when may be allowed* D *– application for summary judgment – amendment of pleadings not permitted*

Headnote

The plaintiff had loaned the defendant a sum of money, which was not repaid by due date. Summons was issued. The defendant entered appearance E to defend. The plaintiff applied for summary judgment, which the defendant opposed, on the grounds that the sum loaned was a lower figure than that being claimed. At the hearing, the plaintiff applied to amend its summons by correcting the amounts stated in the declaration. The effect of the amendment would be to increase the amount claimed. The application for amendment was opposed. F

Held, that the general approach of the courts to the amendment of pleadings generally is well settled: the court will endeavour to permit the parties to a dispute to bring before it any issue upon which they seek to rely to avoid the possibility of stifling, upon technical grounds, an attempt by a party to bring up material facts before the court. Amendments to G pleadings are generally granted unless there is some special reason to the contrary. However, summary judgment proceedings demand different considerations. This is because summary judgment is a drastic remedy that is based on the supposition that the plaintiff's claim is beyond impeachment on any material basis and that the plaintiff is merely being held back from getting judgment by the rigours of a full trial which H

Makarau JP

A are then curtailed to his advantage. For the plaintiff to gain such an unusual advantage over the defendant, he must meet the very stringent requirements as set out by the rules.

Held, further, that plaintiffs wishing to use the speedy procedure of summary judgment must bring themselves squarely within the provisions of the rules. A plaintiff resorting to summary judgment must therefore have B an unanswerable claim as pleaded in his summons and declaration and as verified in the affidavit that must be filed in terms of the rules. It follows that where the plaintiff's claim, as pleaded in the summons or declaration, is erroneously stated or is inaccurate – for whatever reason – and requires amendment, summary judgment cannot be granted on that C claim, because the incorrect claim is not beyond reproach. Secondly, an incorrectly stated claim is not verifiable and thus cannot be the basis of an application for summary judgment. It cannot be amended for the procedure of summary judgment. Finally, a supplementary affidavit further verifying the claim cannot be filed. A supplementary affidavit can be filed for the purposes of dealing with issues raised in the opposing D affidavit that have the effect of catching the plaintiff by surprise. The plaintiff cannot have two bites at the cherry and must ensure that the declaration and the verifying affidavit are unanswerable at the time of filing.

Cases referred to

E *Chiadzwa v Faulkner* 1991 (2) ZLR 33 (S)

Middeldorf v Zipper NO 1947 SR 4; 1947 (1) SA 565 (SR)

Scropton Trading (Pvt) Ltd v Khumalo 1998 (2) ZLR 313 (S)

Stannic Bank Zimbabwe Ltd v Dickie & Anor 1998 (1) ZLR 205 (H)

Stenslunde & Co (Pvt) Ltd v Benwell Engineers Ltd 1988 (2) ZLR 327 (H)

Case information

F Mrs *R Matsika*, fo the applicant

Mrs *J B Wood*, for the respondent

Judgment

MAKARAU JP: This is an application for summary judgment.

The plaintiff issued summons against the defendant on 10 September 2009 G claiming the following:

1. Payment of the amount of US$52 579.51 with interest thereon capitalized monthly at the rate of 12 per cent per annum from 7 September 2009 to date of payment in full;
2. Costs of suit on the scale between legal practitioner and client together H with collection charges

Makarau JP

3. An order declaring the mortgaged property to be especially executable. A

In its declaration, the plaintiff pleaded the cause of action between the parties as a loan advanced to the defendant on 29May 2009 in the sum of US$50 000. It was allegedly a term of the loan agreement that the full amount of the loan together with interest thereon, would become payable in full on or before 29 August 2009. B

On 24 August, the defendant passed a mortgage bond over a certain piece of land as security for the loan advanced to him by the plaintiff. It was a specific term of the mortgage bond that the defendant would repay the first installment agreed upon between the parties on or before 7 September 2009. It was allegedly a further term of the mortgage bond that in the event the defendant failed to pay the first installment on due date, the full amount C of the loan together with interest thereon would become due and payable. It was alleged in the declaration that the defendant had failed to make the payment on due date, hence the issuance of the summons three days later.

The defendant entered an appearance to defend the claim on 23 September 2009. D

On 5 October 2009, the plaintiff filed this application for summary judgment. To the application was attached an affidavit deposed to by one Sinikiwe Elizabeth Mukondiwa, ("Mukondiwa"), the plaintiff's Back Office Operations Manager. In her affidavit, Mukondiwa deposes that she is duly authorised to depose to the affidavit on behalf of the plaintiff and that the facts deposed to in the affidavit are within her personal knowledge. E

Mukondiwa proceeds to state boldly, and baldly in my view, that she verifies the plaintiff's cause of action in the matter and the amount claimed by the plaintiff. She does not, however, state how the amount claimed is arrived at before she proceeds to observe that the defendant has entered appearance to defend the matter solely for the purposes of delay as it is her belief that he F does not have a *bona fide* defence to the claim. In the affidavit, Mukondiwa gives a history of the loan transaction between the parties. She deposes that the defendant was obliged to pay the first installment on 1 July 2009 but failed to do so. She further narrates how the defendant made three payments during the month of July 2009 which, in her view, fell short of the demand made by the plaintiff to the defendant. This led the plaintiff to claim the full G amount of the loan and the interest accrued thereon, she concludes.

The application for summary judgment was opposed.

In opposing the application, the defendant alleged that the issuance of summons in the matter was premature as the debt was not yet due and payable. He further averred that the plaintiff did not give him notice of its H

A intention to foreclose on the mortgage bond and that the amount of the claim

Makarau JP

was incorrectly stated, as he borrowed $50 000 and not the $52 579.51 that is being claimed.

At the hearing of the matter, Mrs *Matsika* for the applicant applied to amend the plaintiff's summons by correcting the amounts that are stated in para 6 of the declaration. The effect of the amendment is to increase the amount of B interest that has accrued on the capital loan from $579.51 to $2

579.51 and the amount of the total amount claimable from the defendant from $52 058.93 to $52 579.51. In her oral application for the amendment, she stated that the figures had been incorrectly typed into the declaration.

The application to amend the declaration at this stage in the proceedings C was opposed.

In opposing the application, Mrs *Wood* submitted that it is incompetent to amend the pleadings in an application for summary judgment proceedings as the amendment necessarily implies that the plaintiff's claim as stated in the declaration filed of record is incorrect.

D Secondly, I understood Mrs *Wood* to be submitting that the amendment, if granted, would need to be freshly verified by a person who can swear positively to the facts for the summary judgment application to proceed. The affidavit purportedly filed on behalf of the plaintiff of record verified the incorrectly stated claim and cannot be used to verify the amended claim as it predates the amendment.

E I find merit in the submissions by Mrs *Wood.*

In my view, the general approach of this court to the amendment of pleadings generally is well settled. The court will endeavour to permit the parties to a dispute to bring before it any issue upon which they seek to rely to avoid the possibility of stifling, upon technical grounds, an attempt by a party to bring F up material facts before the court. Amendments to pleadings are generally granted unless there is some special reason to the contrary. [1]

However, summary judgment proceedings demand different considerations. This is so because summary judgment as a procedure is extraordinary, in that it takes away from the defendant some of the safeguards that are guaranteed G by a full trial. It is a drastic remedy that is based on the supposition that the plaintiff's claim is beyond impeachment on any material basis and that the plaintiff is merely being held back from getting judgment by the rigors of a full trial which are then curtailed to his or her advantage. For the plaintiff to gain such an unusual advantage over the defendant, he or she must meet

certain very stringent requirements as set out by the rules. It has thus been A

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held time and again that plaintiffs wishing to use the speedy procedure of summary judgment must bring themselves squarely within the provisions of the rules. [2]

As stated by Gubbay CJ in *Scropton Trading (Pvt) Ltd* v *Khumalo supra*, one simply cannot ignore the requirements of r 64 of the High Court Rules B 1971 or request the court to condone a departure from strict observance of this rule. To do so would, in my view, take away the extraordinary nature of the procedure and also to further erode the protection that defendants have to the right to be heard in full before judgment is given against them. Applications for summary judgment will then resemble all the other opposed applications where the court is enjoined to take a robust view of the facts C and condone departures from the observance of the rules in the interests of doing justice as between the parties.

The nature of the procedure that is summary judgment, in my view, is ample justification for the requirement that a plaintiff resorting to summary judgment must have an unanswerable claim as pleaded in his or her summons D and declaration and as verified in the affidavit that must be filed in terms of the rules.

Two issues immediately present themselves from this requirement of the law. Firstly, it appears to me that where the plaintiff's claim, as pleaded in the summons or declaration is erroneously stated or is inaccurate, for whatever E reason, and requires amendment, summary judgment cannot be granted on that claim. This is so because the incorrect claim is not beyond reproach.

Further, it appears to me axiomatic that an incorrectly stated claim is not capable of verification unless the deponent to the verifying affidavit is not telling the truth or is unaware of the facts giving rise to the claim. F

It is my view that an incorrectly stated claim is not verifiable and cannot thus be the basis of an application for summary judgment. It cannot be amended for the procedure of summary judgment.

Where the amount claimed in the summons differed from the amount verified in the verifying affidavit, this court dismissed an application for summary judgment. [3] Thus one cannot rely on the amount of the claim in the verifying G affidavit as the correct amount for the purposes of granting of summary

A judgment. The same amount must appear in both the pleadings and in the verifying affidavit. In my view, one cannot even rely on those portions of

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Makarau JP

the amount that are not in dispute for the purposes of obtaining summary judgment and discard those that are in doubt.

So stringent are the requirements for summary judgment that, without the B leave of the court, a supplementary affidavit further verifying the claim cannot be filed. A supplementary affidavit can be filed for the purposes of dealing with issues raised in the opposing affidavit that have the effect of catching the plaintiff by surprise. The plaintiff cannot have two bites at the cherry and must ensure that the declaration and the verifying affidavit are unanswerable at the time of filing.

C *In casu,* the plaintiff wishes to amend its declaration before proceeding with the application for summary judgment already filed of record. I have a difficulty with us proceeding in this fashion.

Firstly, the declaration as filed of record is clearly not without answer. It contains an error that is patent and one which the plaintiff itself realizes must D be corrected before proceeding further. Secondly, the verifying affidavit filed of record cannot be used to verify the amounts of the amended claim. In my view, a fresh affidavit will need to be filed, verifying the plaintiff's cause of action as pleaded in the amendment.

While I am not determining the application for summary judgment itself, it E appears to me that it is inadequate for a deponent to an affidavit verifying the plaintiff's claim and amount claimed, if any, to simply state boldly and baldly that he or she verifies the claim and the amount claimed without giving details. Verifying the claim, in my view, denotes more than restating the claim and amount claimed in the same language employed in the pleadings. It requires, in the case where an amount is claimed, to break down the amount, F where appropriate, and to show how the total amount of the claim is arrived at, especially in matters where there is an accounting element.

In my view, had the deponent to the verifying affidavit in this matter correctly verified the claim and detailed how the amount of the claim was arrived at, appropriating the payments already made by the defendant to either capital G or interest, the plaintiff would have realized that the amount of the interest claimed in the summons was understated and may have taken corrective steps much earlier.

In the result, I make the following order:

The application to amend the plaintiff's declaration is dismissed with H costs.

Makarau JP

Wintertons, plaintiff's legal practitioners A

Venturas & Samkange respondent's legal practitioners

1 See *Middeldorf* v *Zipper NO* 1947 SR 4; 1947 (1) SA 545 (SR).
2 See *Scropton Trading (Pvt) Ltd v Khumalo* 1998 (2) ZLR 313 (S), *Chiadzwa v Paulkner* 1991 (2) ZLR 33 (S) and *Stanbic Bank Zimbabwe Ltd v Dickie & Anor* 1998 (1) ZLR 205 (H)
3 See *Stenslunde & Co (Pvt) Ltd* v *Benwell Engineers Ltd* 1988 (2) ZLR 327 (H)

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Document 15 of 62

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/S v BENNETT (2) 2010 (1) ZLR 97 (H)

S v BENNETT (2) 2010 (1) ZLR 97 (H)

Citation	2010 (1) ZLR 97 (H)
Case No	Judgment No. HH-33-10
Court	High Court, Harare
Judge	Bhunu J
Heard	5 February 2010
Judgment	5 February 2010
Counsel	*J Tomana (Attorney-General)*, with him Mrs *F Ziyambi* and *C Mutangadura*, for the State Mrs *B Mtetwa*, for the defence
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

C **Criminal procedure** – *evidence – conspiracy – proof of – conspiracy need not be proved before evidence in connection with conspiracy may be led*

Evidence – *conspiracy – evidence of acts in connection with conspiracy – may be led before conspiracy itself proved*

Headnote

D During the course of the accused's trial, the prosecution sought to introduce evidence of e-mails allegedly downloaded from a computer said to have belonged to the State's main witness. The e-mails were said to tend to implicate the accused. The defence objected to the production of the e-mails without previous proof of a conspiracy. In order to show that the E e-mails were not genuine, the defence sought to introduce an admittedly false e-mail which purported to emanate from the Attorney-General, who was leading the prosecution. The argument was that a fake e-mail could be made anywhere in the world and therefore the exhibit was a fake e-mail which could have been made anywhere in the world.

Held, that in cases involving allegations of conspiracy, a foundation must F be laid by proof – sufficient evidence in the opinion of the court – to establish *prima facie* the fact of conspiracy. It does not matter whether the evidence in connection with the conspiracy is admitted before a conspiracy is proved, provided that a conspiracy is eventually proved. If it were found at the conclusion of the case for the prosecution that a common purpose had not been established, then the evidence would have G to be rejected and could not be regarded as evidence against the accused.

Held, further, that the mere fact that a fake e-mail can be created anywhere in the world does not necessarily mean that the exhibit is fake. Conversely, the mere fact that genuine e-mails can be created anywhere in the world is no proof that the exhibit is genuine. Once the defence has alleged that H the e-mails are fake documents, the State bears the burden of proving

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Bhunu J

their authenticity beyond reasonable doubt. A

Cases cited

S v Banda & Ors 1990 (3) SA 466 (B)

Case information

J Tomana (Attorney-General), with him Mrs *F Ziyambi* and *C Mutangadura*, B for the State

Mrs *B Mtetwa*, for the defence

Judgment

BHUNU J: The accused is charged with various counts involving terrorism, sabotage and illegal possession of firearms in contravention of the Public Order and Security Act [*Chapter11:17*] and the Firearms Act [*Chapter10:09*]. C

As the trial progressed the State called a witness who testified as to how she downloaded e-mails from Hitschmann's laptop which tend to implicate the accused, which e-mails have since been admitted in evidence herein referred to as "exhibit 13". They were admitted for the purpose of showing that they were downloaded by the witness and not for the truthfulness or otherwise of D their contents. In my judgment of 5 January, I sounded a caution to counsel not to confuse the weight of evidence with the admissibility of evidence. That caution appears to have escaped Mrs *Mtetwa* when she complained bitterly to the court in the following vein:

> "My Lord, it looks like there is a reversal of onus in the manner this matter is proceeding … E
>
> My Lord, there is already a finding of fact before the court that the e-mails were created before the assault took place. This means [that] my Lord has accepted that the e-mails were created by Hitschmann. That is a finding of fact, my Lord. You have already found that Hitschmann is a convicted co-conspirator. Those are findings of fact that my Lord has made this morning." F

In admitting exhibit 13 the court in its discretion chose to follow the procedure laid down in *S* v *Banda & Ors* 1990 (3) SA 466 at 506. In that case it was held that in cases involving allegations of conspiracy, a foundation must be laid by proof, sufficient evidence in the opinion of the court to establish *prima facie* the fact of conspiracy. In that case Friedman J made the pertinent observation that: G

> "A foundation must be laid down by proof, sufficient evidence in the opinion of the court to establish *prima facie* the fact of conspiracy between the accused and then every act and declaration of each member of the conspiracy in pursuance of the original concerted plan, and with reference to the common objects, in contemplation of the law, the act and declaration of them all and is original evidence against each of them. *R* v *Heyne & Ors (supra)*.
>
> It does not matter whether the evidence is admitted before a conspiracy is proved, H

Bhunu J

> A *provided, however, that a conspiracy is eventually proved*.
>
> In *R* v *Levy* 1929 AD 312, certain schedules and other records kept by one accused were admitted before the proof of the conspiracy. Curlewis JA at 326-8 said:
>
> > '… Sometimes for the sake of convenience, the acts or declarations of one are admitted in evidence before proof is given of the conspiracy, the prosecutor, undertaking to furnish such proof in a subsequent stage of the case. But such mode of proceeding rests in the discretion of the judge… B The schedules were therefore in my opinion, properly admitted… as acts done in the course of the acting and a step in the proof of common purpose. *Of course, if it were found at the conclusion of the case for the prosecution that a common purpose had not been established, then the schedules would have to be rejected and could not be regarded as evidence against the accused'"* (my emphasis).

Those remarks apply to my admission of the facts and e-mails as tendered C by the State at this stage. The court's acceptance of exhibit 13 is contingent upon the State proving that they constitute genuine communication between the alleged conspirators, that is to say, the accused and Hitschmann. That being the case, the question of reversal of onus does not arise. The State still bears the burden of proving beyond reasonable doubt what it alleges. D In particular, the State has to prove that the e-mails accepted by the court comprise genuine communication between the alleged conspirators regarding the execution of the crime. Of course, if it were found at the

conclusion of the trial that a common purpose has not been established beyond reasonable doubt, I will have no option but to reject the e-mails and the facts upon which they were admitted. Thus the admission of the e-mails constitutes a step by E the State towards discharging its burden of proof.

Now, it appears that the defence, labouring under the erroneous belief that the admission of the e-mails constitutes a reversal of the onus of proof, has embarked on a spirited endeavour to prove its defence. In its mistaken belief the defence has sought to rely on a fake e-mail it deliberately created in the F name of the Attorney-General, Mr *Tomana*. In cross-examining the State witness the defence has vehemently refused to let the prosecution have sight of the fake e-mail

It appears to me that the refusal by the defence to disclose the contents of the fake e-mail is a deliberate attempt to emasculate unfairly the State and to pre-empt any objections which the State might have regarding the use of the G fake e-mail in this trial. If there is anything objectionable in the fake e-mail there will be no point in objecting to its use after the proverbial horses have bolted, so to speak. The e-mail which the defence seeks to rely on is different from those relied upon by the State in two material respects.

Firstly, exhibit 13 constitutes questioned documents. Their authenticity is in H issue. There is therefore need to prove their authenticity or otherwise. On the

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Bhunu J

other hand, the defence e-mail is not a questioned document; it is a known A fake document. A known fake document is one which undoubtedly tells a lie about itself There is no need to prove its falsity or otherwise. This is for the simple but good reason that it is an established fact that it is a false document.

Secondly, exhibit 13 does not seek to embroil or incorporate the name of the defence counsel into the proceedings as part of the State's evidence against B the accused. On the other hand, the defence e-mail deliberately seeks to embroil the Attorney-General's name into the evidence based on false facts. For that reason I consider it highly improper, if not unethical, for defence counsel to use the Attorney-General's name in a false document while at the same time denying him sight of the fake document, so that he cannot take appropriate and timely action regarding the use of a document which C admittedly contains false information concerning him or his office.

I have said time and again in the course of this trial that a criminal trial is not a game of chance or hide and seek where one party seeks to take advantage of the other by deliberately concealing facts or evidence. It appears to me an abuse of process for the defence to deliberately cite the Attorney-General or D his office in a fake document which has no bearing on him or his office and then deny him sight of the document before it is used against the State case. E

For those reasons I hold that it is inappropriate and not permissible to use the Attorney-General's name or office in a false document with the object of proving the defence case.

Counsel for the defence has disclosed to the court that the purpose of seeking to use the false e-mail is to prove that a fake e-mail can be made anywhere in the world and therefore the State e-mail is a fake e-mail which could have been made anywhere in the world. With respect, it appears to me that counsel for the defence is missing the point. The mere fact that a fake e-mail can be created anywhere in the world does not necessarily mean that exhibit 13 F are fake documents. For instance, if the defence were to allege that the guns before this court are toy guns, the mere fact that toy guns can be manufactured anywhere in the world is no proof that the guns before us are toys. By the same token, the mere fact that genuine e-mails can be created anywhere in the world is no proof that exhibit 13 are genuine documents. G

My understanding of the rules of procedure is that the crisp issue before the court is the authenticity of exhibit 13. Once the defence has alleged that the e-mails are fake documents the State bears the burden of proving their authenticity beyond reasonable doubt. If however, the defence wants to assume the responsibility of proving that the e-mails are in fact forgeries they are free to do so, but what happens if they fail to prove what they allege? H

Bhunu J

A The witness has openly told this court that she is not an expert witness. She does not know how fake e-mails are created. She gave no evidence concerning the authenticity or otherwise of the e-mails in exhibit 13. She did not read them. All that she did was to extract the e-mails from the laptop. Her evidence has no bearing whatsoever on the authenticity or otherwise of the e-mails before us.

B The purpose of cross-examination is to seek clarification, to dispute the veracity of the witness's evidence or to attack her credibility. Common sense dictates that there is nothing to clarify or dispute when she has made it clear that she has no evidence to give concerning the authenticity of the e-mails. There is equally no basis for attacking the witness's credibility based on evidence she C has not given. It is therefore unfair and inappropriate to confront her with a fake document with the object of establishing that a different document is a forgery. Whilst in cross-examination counsel is allowed a wide berth, that is no license to quiz the witness on evidence that she has not given and has no knowledge of. That can only amount to harassment of the witness without providing any probative value to the evidence. The Attorney-General is not D a witness to these proceedings. That being the case, deliberately citing his name or office in a false document might have the effect of forcing him to give evidence in rebuttal. This is wholly inappropriate, considering that it is common cause that the defence e-mail is in fact a false document. The Attorney-General cannot be both prosecutor and witness in the same case. The defence is however free to confront any witness who gives any evidence E concerning the authenticity of exhibit 13 documents without incorporating the Attorney-General's name or his office in a false document.

I accordingly hold that it is inadmissible to question the witness on the basis of the fake e-mail presented to her by defence counsel.

F *Attorney-General's Office,* State's legal practitioners

Mutetwa and Nyambirai, accused's legal practitioners.

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Document 16 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/SAHAWI INTERNATIONAL (PVT) LTD & ANOR v BREDENKAMP & ANOR 2010 (1) ZLR 102 (H)

SAHAWI INTERNATIONAL (PVT) LTD & ANOR v BREDENKAMP & ANOR 2010 (1) ZLR 102 (H)

Citation	2010 (1) ZLR 102 (H)
Case No	Judgment No. HH-24-10
Court	High Court, Harare
Judge	Makarau JP
Heard	19 October 2009; 20 October 2009; 23 October 2009
Judgment	10 February 2010
Counsel	*A Bava*, with him *L Uriri*, for the plaintiffs *A P de Bourbon SC*, for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Legal practitioner – *conduct and ethics – practitioners acting for parties to litigation – should not enter into correspondence with judge – correspondence to and from the court to be conducted through the registrar* D

Legal practitioner – *practising certificate – issue of – Law Society's exclusive right to issue certificate – allegation that certificate improperly issued – need to bring Law Society's decision on review*

Legal practitioner – *residence in Zimbabwe – practitioner ceasing to be normally resident in Zimbabwe – in absence of a residence exemption* E *certificate, practitioner may be deleted from the register of legal practitioners – removal from register at instance either of legal practitioner himself or Law Society – legal practitioner ceasing to be normally resident not automatically losing right of audience*

Headnote

The defendants' counsel had been admitted as a legal practitioner in 1981 F (having previously practised as an advocate, before the re-organisation of the profession) but had moved to Cape Town in 2003. The plaintiffs' legal practitioners complained that he had been issued a practising certificate on the basis of a misrepresentation that he was a partner in a law firm in Harare. They also claimed that he no longer satisfied the G residence requirements stipulated in s 5 of the Legal Practitioners Act [*Chapter 27.07*]. They argued that he should not have been issued by the Law Society with a practising certificate unless he was in possession of a residence exemption certificate issued to him by the Minister of Justice. They contended that the loss of normal residence in Zimbabwe by the defendants' counsel meant that he automatically lost his right H

Makarau JP

A of audience before the courts in Zimbabwe. They contended that any person can approach the courts for an order denying him such right. In making the complaint, the plaintiff's legal practitioners wrote to the Law Society and to the Minister, with copies being sent to the presiding judge.

Held, that it is a trite rule of professional ethics that the parties to litigation do not enter into any correspondence0020with the presiding judge. All B correspondence to and from the court should be conducted through the office of the registrar. While the plaintiffs had every right to write to the Minister in connection with the matter, the fact that such a letter was copied to the presiding judge acted as an open invitation to the Minister to enter into direct correspondence with the court. Although C the Minister correctly addressed his comments to the registrar and not directly to the judge, the contents of the letter, which were meant for the judge's attention, ought to have been placed before the court in the form of an affidavit and not as an unsworn statement.

Held, further, that in terms of s 6(2) and (3) of the Legal Practitioners Act [*Chapter 27:07*], when a legal practitioner ceases to be ordinarily resident D in Zimbabwe or a reciprocating country and has not been issued with a residence exemption certificate, he or she may be deleted from the register of legal practitioners and such de-registration can be at the instance of the legal practitioner or of the Law Society of Zimbabwe. It is not the position, however, that a duly registered legal practitioner, who possesses E a practising certificate and who loses his normal residence in Zimbabwe, automatically loses his right of audience before the courts and that any person can approach the court for an order denying him such right.

Held, further, that the issuance of practising certificates for legal practitioners is a matter that is in the exclusive administrative domain of the Law Society of Zimbabwe. Where it has acted irregularly in issuing a F practising certificate, the court can play the role of overseer that it plays with regard to all inferior courts and other quasi-judicial tribunals. The correct procedure to adopt in approaching the court for an order setting aside a practising certificate is by way of review proceedings. This will enable an applicant to allege the ground upon which the decision to issue the certificate can be impugned.

G *Held*, further, that practising certificates are issued on an annual basis. The certificate issued to the defendants' counsel had lapsed by effluxion of time and could not be used to enforce a right of audience. It was therefore unnecessary to decide whether to condone a departure from the rules of court in order to convert the issues into a review.

Makarau JP

Legislation considered A

Legal Practitioners Act [*Chapter 27:07*], ss 5(1), 6(2) and 6(3)

Case information

A Bava, with him *L Uriri*, for the plaintiffs

A P de Bourbon SC, for the defendants

Judgment

MAKARAU JP: On 25 August 2008, the plaintiffs issued summons out of B this court claiming from the defendants the sum of US$3 872 123 together interest thereon at the rate of per cent per annum capitalized monthly and calculated from 1 February 2001 to date of payment in full. It was alleged in the plaintiffs' declaration that the debt claimed arose from certain advances and loans made to the defendants by the plaintiffs at the defendants' special C instance and request during the period 1 February to 9 November 2001. It was further alleged that the total sum advanced and lent to the defendants amounted to $4 272 123 and that the defendants had repaid the sum of $400 000 leaving the balance claimed. It was also alleged that at one stage, the defendants deposited the sum of $3 508 000 into the account of the D plaintiffs after selling off a mine in the Democratic Republic of Congo, which deposit was, however, reversed by the plaintiffs' bank, leaving the defendants indebted to the plaintiff in the amount of the claim.

The claim was resisted.

After being furnished with further and further and better particulars to the E plaintiffs' claim, the defendants filed their pleas.

In the main, the first defendant denied the contract and averred that such a contract would have required the approval of the exchange control authority which the plaintiffs did not have. The first defendant further averred that he was, however, aware of certain monies that were advanced by plaintiff to a company that is registered and domiciled in the Democratic Republic of F Congo and in which he has some interests.

In its plea, the second defendant denied the contract *in toto* and put the plaintiffs to the proof thereof.

The matter proceeded to a pre-trial conference, where four issues were settled for trial. I will paraphrase the issues as follows: G

1. Whether the second plaintiff should be a party to the proceedings?
2. Whether the contract of the loan was between the plaintiffs and KMC Limited (a company registered and domiciled in the Democratic republic of Congo)?
3. What amount if any is due to the defendants? and, H

Makarau JP

A 4. Whether the lending of money by the plaintiffs required the approval of the exchange control authorities.

The trial of the matter was initially set down before me during the week commencing 18 May 2009. The trial was aborted by consent and for cogent reasons given. The matter was then postponed to the 19th of September 2009.

B During the brief hearing conducted to deal with the postponement, the terse and unusually stiff exchanges between counsel did not assume the significance that they did when the hearing of the matter resumed.

Five days prior to the resumed hearing of the matter, the plaintiffs' legal practitioners wrote to the Secretary of the Law Society and copied the letter directly to me and to a number of other addressees. In the letter, the C plaintiffs expressed their concerns over the fact that Mr *de Bourbon* had been issued with a practicing certificate for the year 2009 on the strength of the

misrepresentation that he was a partner in the law firm Costa and Madzonga and that, in their view, Mr *de Bourbon* had no right of audience in the courts of this country. The plaintiffs' legal practitioners also highlighted their view D that Mr *de Bourbon* no longer satisfied the residence requirement stipulated in s 5 of the Legal Practitioners Act [*Chapter 27.07*] ("the Act"). The letter concludes by requesting the Law Society to approach the courts in terms of s 6(2) of the Act for Mr *de Bourbon* to be deleted from the register of legal practitioners.

On the same day, the plaintiffs' legal practitioners addressed a letter to the E Minister of Justice and Legal Affairs, enclosing to him a copy of their letter to the Law Society and raising the same concerns with him. The letter ends by inquiring from the Minister whether he had issued defendants' counsel with a residence exemption certificate in terms of the Act. Again the letter was copied directly to me.

F At the hearing of the matter, Mr *Uriri* objected to the presence of Mr *de Bourbon* at the bar and as representing the defendants. At the time he raised the objection, he had not yet handed over to me the written objection that the plaintiffs had filed earlier on in the morning. Taken by surprise not by the objection itself but by the fact that it was being raised before me as an issue in view of the approaches that had been made to the Law Society and to the G Minister, I briefly adjourned the matter and summonsed counsel to chambers. It was then that I was furnished with the written objection that had been filed with the court. A copy of same was also served upon Mr *de Bourbon*.

In the objection, the plaintiffs contended that Mr *de Bourbon* had ceased to be resident within Zimbabwe and, in terms of the provisions of the Legal H Practitioners Act, he should not have been issued with a practising certificate

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for the year 2009 unless he was in possession of a residence exemption A certificate issued to him by the Minister.

In view of the importance of the matter being raised by the plaintiffs, the hearing of the objection resumed in open court. Again in view of the issues that the plaintiffs were raising, the hearing had to be adjourned to enable Mr *de Bourbon* to respond in writing to the allegations leveled against him. *Mero* B *motu,* I directed that the objection be served upon the Law Society with an invitation that the Society appear at the hearing of the matter.

Mr *de Bourbon* filed an affidavit, prompting the plaintiffs to file an answering affidavit. The Law Society in turn filed a document in which it laid out its position in the matter.

I shall return to deal in detail with the nature and manner of filing of documents C in this matter when I deal with issues of procedure.

The issue raised by the plaintiffs is very easy to understand and in my view equally easy to determine. It is whether Mr *de Bourbon* continues to enjoy the right of audience before these courts in view of his assumption of residence in Cape Town, South Africa. Put this way, the answer almost D suggests itself and one would assume that this is a matter that is capable of resolution outside a formal hearing and without the unnecessary acrimony that accompanied the hearing of the objection.

Before I proceed to determine the objection on the merits, I wish to express my disquiet at the manner in which the objection was brought up and the E heated arguments that have been characteristic of the hearing. It is my hope that the conduct of the parties herein will not set any precedent for future conduct in this court.

Firstly, I was disconcerted by the practice of the plaintiffs to write directly to me in connection with the matter. It is a trite rule of professional ethics that the parties to litigation do not enter into any correspondence with the F presiding judge. All correspondence to and from the court is through the office of the registrar.

Secondly, while the plaintiffs had every right to write to the Minister in connection with the matter, the fact that such a letter was copied to the presiding judge acted as an open invitation to the Minister to enter into direct G correspondence with the court. I must, however, commend the Minister for at least addressing his letter to the registrar and not directly to me. However, the contents of the letter, which were meant for my attention, in my view, ought to have been placed before the court in the form of an affidavit and not an unsworn statement. The letter gave an

opinion on the applicable law and the interpretation to be placed on that law. It concluded by requesting H

2010 (1) ZLR p107

Makarau JP

A the registrar to advise me to be guided accordingly.

Such, in my view, is the danger of requesting parties to correspond with the court outside the parameters set by the rules of court.

Further, it was clear to the plaintiffs prior to the hearing of the matter that the Law Society had issued a practising certificate to Mr *de Bourbon* for the year B 2009. The plaintiffs were challenging the validity of that certificate, alleging that that it had been issued at best erroneously and at worst fraudulently. Despite such knowledge, no formal application was filed to have the practising certificate struck down.

The correct manner to approach the court to set aside the decision of the Law Society to issue Mr *de Bourbon* with a practising certificate was clearly C by way of review. That this was not done in this matter is now common cause. The net effect, however, of not following the correct procedures was the filing of an objection to which no founding affidavit was attached, the filing of a voluminous opposing affidavit by Mr *de Bourbon* in which he attempted to answer the objection, both factually and on points of law, and D a hastily filed statement by the Law Society which is neither an affidavit nor heads of argument. I further have a floating letter from the Minister, not attached to any affidavit and whose status in the proceedings is not clear to me and to which no one made specific reference as to its probative value or binding nature.

Be that as it may, I proceeded to hear the objection on its merits in view of E the fact that the parties were desirous that I hear and determine the matter despite my earlier misgivings as to the state of the papers filed of record.

As indicated above, the plaintiffs objected to Mr *de Bourbon* having the right of audience in the matter before me. The plaintiffs were quite clear, even in the oral submissions by Mr *Bava,* that they do not seek the deletion of Mr F *de Bourbon* from the register of legal practitioners.

In taking the objection, the plaintiffs contended that Mr *de Bourbon* had ceased to be resident within Zimbabwe and in terms of the provisions of the Legal Practitioners Act, he should not have been issued with a practising certificate for the year 2009 unless he was in possession of a residence exemption certificate issued to him by the Minister.

G It is clear to me that the plaintiffs have in their objection co-joined two issues that are separate and distinct. These are the issues of normal residence and of possession of a valid practising certificate. In my view, the issue of normal residence goes towards the registration and de-registration of a legal practitioner, whilst the issue of a valid practising certificate goes towards H th issue of who, of the registered legal practitioners, can have the right of

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2010 (1) ZLR p108

Makarau JP

audience before the courts. A

I will explain.

Mr *Bava* for the plaintiffs submitted that I should seek guidance from the provisions of s 5(1) of the Act. In his submission, Mr *Bava* was quite passionate about the need for re-establishing the rule of law in this jurisdiction and how no-one should be above the law. B

Section 5(1) of the Act provides for the registration of legal practitioners in this jurisdiction. Before the court can register a legal practitioner, it must be satisfied that the applicant –

(a) has complied with the formalities laid down in the regulations; and

(b) possesses the requisite qualifications prescribed in the rules made by C the Council for Legal Education and has had such practical experience if any, as may be prescribed in the rules; and

(c) is normally resident in Zimbabwe or a reciprocating country or has been granted a residential exemption certificate; and

(d) is of or above the age of majority; and D

(e) is not an unrehabilitated insolvent or has not assigned his estate for the benefit of his creditors and

(f) is a fit and proper person to be so registered.

(The emphasis is mine).

The issue before me does not however concern the registration of Mr *de* E *Bourbon* as a legal practitioner. That was done in 1981. In my view, the issue that arises in this matter is the admitted fact by Mr *de Bourbon* that at the time of the hearing, he was residing in Cape Town where he is leasing a flat in Kenilworth. In his opposing affidavit, he deposed that in November 2003, he relocated to Cape Town but always with the wish that one day he F would return to Zimbabwe and rejoin the Bar. That he is no longer normally resident in Zimbabwe for the purposes of the Act appears to me to be beyond dispute. The issue is the legal effect, if any, of his loss of normal residence in Zimbabwe.

The plaintiffs contend that the loss of normal residence in Zimbabwe by Mr G *de Bourbon* means that he automatically loses his right of audience before the courts in Zimbabwe and that any person can approach the courts for an order denying him such right.

I fear that I do not agree.

There is no specific provision in the Act that bears out the contentions by the plaintiffs. The provision of the law that appears to me to cover the situation H

Makarau JP

A that Mr *de Bourbon* finds himself in is to be found in s 6(2) and (3) of the Act. It provides:

> "(2) The council of the Law Society may, where there is reason to believe that a registered legal practitioner has ceased to be normally resident in Zimbabwe or a reciprocating country and that such legal practitioner has not been granted a residential exemption certificate, apply to the High Court for an order calling B upon the registered legal practitioner concerned to show cause why his name should not be deleted from the register.
>
> (3) Upon the return day of an order granted in terms of subsection (2), the High Court may, if satisfied that the registered legal practitioner concerned has ceased to be ordinarily resident in Zimbabwe or a reciprocating country or has not been granted a residential exemption certificate, direct the registrar to make C the appropriate deletion from the Register."

It further appears to me that, in terms of the law, when a legal practitioner ceases to be ordinarily resident in Zimbabwe or a reciprocating country and has not been issued with a residence exemption certificate, he or she may be deleted from the register of practitioners and that such de-registration can be at the instance of the practitioner himself or herself or of the Law Society. D The letter from the plaintiffs' legal practitioners to the Law Society correctly captures the legal position when it requests the Law Society to approach the court for Mr *de Bourbon* to be deleted from the register of legal practitioners.

The issue as to whether any person, including a person such as the plaintiffs before me, can bring an application to this court under s 6(2) of the Act for E the de-registration of a legal practitioner is an interesting one and calls for the examination of the rights of the public to bring in applications at common law in the public interest.

The issue does not arise before me and I do not have to determine the *locus standi* of the plaintiffs to bring an application in terms of s 6 (2) of the Act or at common law for de-registration of Mr *de Bourbon*. As I have emphasized F above, the plaintiffs do not seek such de-registration. They simply object to him having a right of audience before me in the trial of their matter.

This then brings me to the next issue raised by the plaintiffs.

It appears trite to me that a registered legal practitioner to whom the Law Society has issued a practising certificate enjoys the right of audience in our G courts until the practising certificate lapses by effluxion of time, is lawfully withdrawn or is set aside on review.

It is further trite that the issuance of practising certificates is a matter that is in the exclusive administrative domain of the Law Society. Where the Society has acted irregularly in issuing a certificate, the court can play the H role of overseer that it plays with regard to all inferior courts and other quasi

Makarau JP

judicial tribunals. It is not the ordinary role of the court in this jurisdiction A to administer the issue of practising certificates to legal practitioners even though these are registered as officers of this court.

I have above indicated that, in my view, the correct procedure to adopt in approaching the court for an order setting aside a practising certificate is by way of review proceedings. This will enable the applicants in that matter B to allege the ground upon which the decision to issue the certificate can be impugned. I have already observed that this has not been done *in casu.*

Having been persuaded to deal with the matter on its merits, I have examined the papers filed of record by the plaintiffs to see if there is a minimum basis upon which I can regard the objection before me as an application for review. I have taken the contentions by the plaintiffs that the practising certificate C issued to Mr *de Bourbon* for 2009 was issued on the false premise that he was practising as a partner in Costa and Madzonga, yet he has continued to openly practise as an advocate as a basis upon which I can interfere with the administrative discretion of the Law Society on review.

In my view, the above may have constituted a recognizable ground for D reviewing the decision of the Law Society to set aside the practising certificate issued to Mr *de Bourbon* as being grossly unreasonable. I may have been sufficiently moved to set aside the practising certificate on the basis that the decision to do so on the basis of the application filed was grossly unreasonable.

I deem it unnecessary that I embark on the exercise of condoning all the E departures from the rules that will be necessary in this matter to enable me to convert the objection by the plaintiff into a review application as the practising certificate under probe has now lapsed by effluxion of time. Practising certificates in this jurisdiction are issued on a yearly basis. The practising certificate for 2009 is now invalid for other reasons and cannot be used to enforce the right of audience before this court. F

In the result, I make the following order;

The objection is dismissed with costs.

Mhiribidi & Ngarava, plaintiffs' legal practitioners

Atherstone & Cook, defendants' legal practitioners G

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Document 17 of 62

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MEDICAL INVESTMENTS LTD v PEDZISAYI 2010 (1) ZLR 111 (H)

Citation	2010 (1) ZLR 111 (H)
Case No	Judgment No. HH-26-10
Court	High Court, Harare
Judge	Makarau JP
Heard	14 January 2010
Judgment	10 February 2010

Counsel *J Chagonda,* for the applicant
Ms *R Nemaramba,* for the respondent

Case Type Civil application

Annotations Link to case annotations

Flynote

Employment – *Labour Court – jurisdiction – dispute between former employer and employee – dispute not arising from contract of employment – Labour Court having no jurisdiction*

Headnote

D The respondent, who had been employed by the applicant for some six years, resigned from her job. During her employment she had been allocated a motor vehicle, which she retained possession of when she left the job. She argued that in terms of the scheme under which she was allocated a vehicle, she was entitled to purchase the car. The applicant sought the E return of the car. The application was opposed on the grounds that the matter was essentially a labour dispute in respect of which the High Court did not have jurisdiction.

Held, that the Labour Court has jurisdiction in all matters where the cause of action and the remedy for that cause of action are all provided for in the Labour Act [*Chapter 28:01*]. Where the cause of action and the F remedy are at common law, the jurisdiction of the High Court is not ousted. The applicant and the respondent were no longer employer and employee respectively. The dispute between the parties centred on the possession of the applicant's motor vehicle to which the respondent was claiming a right. While the respondent's claim of right to the motor car arose from her terminated contract of employment with the applicant, G this did not mean that there was a labour dispute between the parties that could find a remedy or resolution in terms of the Act. The resolution of the dispute between the parties was not entwined with the resolution of the contract of employment. Where the validity of the suspension of the employee or the termination of employment is still pending, the *rei* H *vindicatio* cannot properly lie at the instance of the employer. However,

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Makarau JP

where the status of the former employee is without dispute, the *rei* A *vindicatio* can lie at the instance of the employer in appropriate cases and the matter thereby falls outside the purview of the Labour Court, as it is not a matter that can be heard or determined in terms of the Labour Act or any other related enactment. B

Cases cited

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

Zimtrade v Makaya 2005 (1) ZLR 427 (H)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 449(1)(b) C

Labour Act [*Chapter 28:01*], s 89(1) & (6)

Case information

J Chagonda, for the applicant

Ms *R Nemaramba,* for the respondent

Judgment

MAKARAU JP: The applicant and the respondent were employer and D employee respectively. The respondent was employed by the applicant as its Chief Pharmacist with effect from 1 December 2002 up to November 2008. It was a specific term of her employment that the respondent would be entitled to the use of a motor vehicle during the course of her employment. At the time of her joining the applicant, there was no policy in place regulating the E use and entitlement to the vehicle. Such was put in place later and there is no dispute between the parties that it applied to the respondent.

In terms of her contract of employment, the applicant was allocated a VW Polo, registration number AAG 1727.

On 30 October 2008, the respondent wrote to the applicant, giving notice of F her intention to resign from employment. In her letter, she indicated that her last working day would be 17 November 2008. She indicated that she had some days that had accrued to her as leave which she intended to forfeit in lieu of the requisite notice period. It may be pertinent to note at this stage that while the parties wrangled for some time as to whether the respondent G had given adequate notice or not, that dispute is not before me and has since been resolved. The status of the respondent as a former employee of the applicant is thus not in dispute.

On 14 November 2008, three days before her last working day, the respondent wrote to the applicant seeking to clarify her calculation of the notice period she had given to the applicant. In the second paragraph of the letter she wrote H

A that she was entitled to purchase the motor vehicle in her possession. It is not clear on the papers how this issue had arisen.

On 17 November 2008, the respondent left the employment of the applicant, taking the motor vehicle with her. The applicant, not being persuaded that the respondent was entitled to retain possession of the vehicle after the termination of her employment, wrote to the respondent requesting her to B surrender the vehicle. The respondent did not return the vehicle, maintaining that she was entitled to purchase the vehicle. This prompted the applicant to file this application seeking an order compelling the applicant to surrender the vehicle to it.

The application was opposed. In opposing the application, the respondent C objected to the jurisdiction of this court, arguing that the dispute between the parties is essentially a labour issue over which the Labour Court has exclusive jurisdiction. Further, the respondent argued that, notwithstanding that her last working day was in November 2008, she remained an employee of the applicant until her notice period had run out and as at the time she left employment, the applicant's motor vehicle policy applied to her, entitling D her to purchase the vehicle. She further alluded to an agreement between the parties wherein the applicant's agent had agreed that the applicant would sell the vehicle to her and that the only remaining issue to be agreed upon was the currency in which the transaction was to be concluded.

I will deal with each of the issues arising from the respondent's opposing E affidavit.

The issue of when the jurisdiction of this court is ousted in favour of the exclusive jurisdiction of the Labour Court has been before this court in a number of instances. In my view, it is the settled position at law now that the jurisdiction of all other courts is excluded in matters where the Labour Court has been granted specific jurisdiction by the Labour Act [*Chapter* F *28.01*] ("the Act"). See *Tuso* v *City of Harare* 2004 (1) ZLR 1 (H) at 3F and *Zimtrade* v *Makaya* 2005 (1) ZLR 427 (H).

The issue that falls for determination in this application is whether the dispute before me is a dispute over which the Labour Court has exclusive jurisdiction.

Section 89(6) of the Labour Act provides that:

> G "(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 subsection (1)"

Section 89(1) provides:

> "(1) The Labour Act shall exercise the following functions – H
>
> (a) hearing and determining appeals in terms of this Act or any other enactment

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Makarau JP

And A

(b) hearing and determining matters referred to it by the Minister 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;

(d) appointing an arbitrator from the panel of arbitrators referred to in subsection B (6) of section *ninety-eight* to hear and determine an application;

(d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;

(e) doing such other things as may be assigned to it in terms of this Act or any other enactment." C

In interpreting these two sections of the Act, this court has, in the authorities I have cited above, held that the Labour Court has exclusive jurisdiction in all applications and matters that are not only defined but are determinable in terms of the Act. In other words, the Labour Court has jurisdiction in all matters where the cause of action and the remedy for that cause of action are all provided for in the Act. D

In all other matters, where the cause of action and the remedy are at common law, the jurisdiction of this court is not ousted.

It is common cause that the applicant and the respondent are no longer employer and employee respectively. The resignation of the respondent as the applicant's Chief Pharmacist is not in dispute. The dispute between the E parties centres on the possession of the applicant's motor vehicle to which the respondent claims a right.

While it has to be accepted that the respondent's claim of right to the motor vehicle arises from her terminated contract of employment with the applicant, this is a far cry from holding that there is a labour dispute between the parties F that can find a remedy or resolution in terms of the Act. The resolution of the dispute between the parties is not entwined with the resolution of the contract of employment, as was the case in *Zimtrade* v *Makaya supra.* There, pending determination of the contract of employment, the employer sought to repossess its assets from the employee using the *rei vindicatio*. It appeared to me then to be the correct position at law that where the validity G of the suspension of the employee or the termination of their employment is still pending, the *rei vindicatio* could not properly lie at the instance of the employer. I am still of the same view. On the contrary, where the status of the former employee is without dispute, the *rei vindicatio* can lie at the instance of the employer in appropriate cases and the matter thereby falls outside the purview of the Labour Court as it is not a matter that can be heard H

Makarau JP

A or determined in terms of the Labour Act or any other related enactment. It is my view that the *rei vindicatio* is not a cause of action whose remedy can be granted in terms of the Act as a stand-alone remedy in the absence of a dispute that is specifically provided for under the Act.

On the basis of the foregoing, I would dismiss the point *in limine* raised by the respondent and hold that the jurisdiction of this court over this matter B remains.

I now turn to the second issue.

The applicant seeks an order compelling the respondent to surrender to it possession of the motor vehicle that was allocated to her during the course of her employment. The respondent has opposed the order on the basis that C she is entitled to purchase the motor vehicle. She argues, and validly so in my view, that she exercised the option to purchase the motor vehicle during the subsistence of her employment with the applicant.

It is common cause that the applicant's motor vehicle policy provided in clause 5 thereof that a vehicle allocated to an employee would be replaced D after four years and that such a vehicle would be sold to the user at 50 per cent of its market value if the user opted to purchase the vehicle. It is also not in dispute that the vehicle allocated to the respondent had reached its retirement age and, further, that the respondent indicated her option to purchase the vehicle before she left employment, albeit during the very last days of her employment, as if the purchase of the vehicle was an afterthought. That E the respondent has the right to purchase the motor vehicle appears to me to be above reproach.

In its founding affidavit, the applicant deposed to its belief that the respondent was not entitled to purchase the motor vehicle in dispute as she had resigned when she purported to exercise her right as given under the contract of F employment.

The applicant was erroneous in its belief in this regard. As correctly conceded by Mr *Chagonda* during the hearing of the matter, the respondent exercised her option to purchase the motor vehicle whilst still an employee of the applicant and the applicant is bound to sell the motor vehicle to her. In this regard, reference has to be made to the letter of the respondent of 14 G November 2008 wherein she inelegantly referred to her entitlement to the vehicle without specifically spelling it out that she was electing to purchase the vehicle. The option was however exercised and when it was exercised, the respondent was still an employee of the applicant. It is common cause that she ceased to be an employee on 17 November 2008 and not before.

H The issue that remains for my determination in this matter is whether the

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Makarau JP

respondent is entitled to retain possession of the motor vehicle pending the A finalization of the agreement of sale between the parties.

I am unaware of any law that entitles a prospective purchaser to have possession of the *merx* against the wishes of the seller, prior to delivery of the *merx* in terms of the sale agreement. I was not referred to any such law during the hearing of the matter. My limited research has not yielded any. B

I am aware that in some instances, where there is an amicable relationship between the parties, for instance where the employer-employee relationship still subsists or was amicably terminated, the seller may allow the prospective purchaser who is already in possession of the *merx* to retain possession pending finalization of the sale. Another instance that immediately suggests itself is where a tenant purchases the leased property from the landlord. Such a tenant C may remain in occupation pending finalization of the agreement of sale and transfer. An analysis of the two examples I have given above will reveal that they are borne out of consent. They cannot thus be cited as precedent for creating any right or entitlement on the part of similarly circumstanced prospective purchasers to enforce possession against the wishes of the seller. D Where the arrangement obtains, in my view, it is simply an incidence of an owner willingly parting with possession of his property pending transfer of ownership in favour of the possessor. Such willingness on the part of the seller cannot be compelled by an order of court.

On the basis of the foregoing, I am of the view that, notwithstanding my finding above that the respondent has the right to purchase the motor vehicle E in question in terms of the provisions of the applicant's motor vehicle policy, she is nevertheless not entitled to retain possession of the vehicle against the wishes of the applicant pending the finalization of the agreement of sale.

In the result, I make the following order:

1. The respondent or any person possessing through her shall, upon F service of this order, surrender to the applicant a motor vehicle, namely a VW Polo, registration number AAG 1727, failing which the Deputy Sheriff is hereby empowered to take possession of the same and hand it over to the applicant.
2. The respondent shall bear the costs of this application. G

Atherstone & Cook, applicant's legal practitioners

Kawonde & Co, respondent's legal practitioners H

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Document 18 of 62

Source:

ROUTE TOUTE BV & ORS v SUNSPUN BANANAS (PVT) LTD & ANOR 2010 (1) ZLR 117 (H)

Citation	2010 (1) ZLR 117 (H)
Case No	Judgment No. HH-27-10
Court	High Court, Harare
Judge	Chatukuta J
Heard	27 January 2010
Judgment	10 February 2010
Counsel	*G Chikumbirike*, for the applicants *J Samkange*, for the first respondent *G N Mlotshwa*, for the second respondent
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

Practice and procedure – *application – urgent application – certificate of urgency – who may sign such a certificate – no requirement that must be signed by legal practitioner from a firm other than applicant's legal* D *practitioner's firm*

Property and real rights – *land – crops growing thereon – ownership of – vests in owner of land*

Headnote

The applicants were the owner of a farm which had been compulsorily acquired E by the State in 2005. The second respondent had been allocated the farm and proceeded to move onto it. The applicants obtained a spoliation order in 2006, which order was confirmed in 2009. The order confirmed the applicants' right to continue occupying the farm until a valid notice of eviction was issued as well as their right to all plantations crops, crops and movable property on the farm until those were acquired in accordance F with the law. In spite of the order, agents of the second respondent moved onto the farm. A further spoliation order was acquired. In spite of the spoliation orders, the second respondent harvested crops that were grown on the farm by the applicant and sold them to the first respondent. When the first respondent became aware of the dispute, it stopped taking crops G from the farm. The proceeds of the crops delivered were deposited in a lawyer's trust account. The applicants sought an order preventing the second respondent from taking any more of the applicants' crops and delivering it to the first respondent or anyone else, and to prevent the sum deposited in trust from being delivered to the second respondent.

The second respondent *in limine* raised two points: (1) that the certificate H of urgency was not proper as it was signed by a legal practitioner from

Chatukuta J

the same firm as that representing the applicants; (2) that the applicants A had no *locus standi*, as ownership of the land and the crops thereon vested in the State.

Held, that the rules of court do not state that a legal practitioner who signs a certificate of urgency must not be from the same firm that represents the applicant in that matter. There was no conflict of interest, but even if there were a conflict, the application would still be urgent. B

Held, further, that the spoliation order referred to crops "belonging" to the applicants. In terms of s 16(1) of the Constitution, as well as the common law, growing things accede to the land. One cannot separate the produce derived from the plantation from the plantation itself. The applicants ceased to own the plantation and the crops therefrom when the farm C was acquired by the State. The applicants, not being the owners of the farm, therefore did not have the *locus standi* to seek the relief claimed.

Cases referred to

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

Bangure v Gweru City Council 1998 (2) ZLR 396 (H) D

Chafanza v Edgars Store Ltd & Anor 2005 (1) ZLR 299 (H)

de Beers Consol Mines v London & SA Exploration Co (1893) 10 SC 359

Mandindi Farm Settlers v Mazowe RDC & Anor HH-53-04

Scheepers v Robbertse 1973 (2) SA 508 (N) E

Legislation considered

Constitution of Zimbabwe 1980, s 16(10)

Land Acquisition Act [*Chapter 20:10*], s 2

Case information

G Chikumbirike, for the applicants

J Samkange, for the first respondent F

G N Mlotshwa, for the second respondent

Judgment

CHATUKUTA J: There have been long running legal battles between the applicants on one side and the second respondent on the other over occupation of the farm. The background to the battles is that the applicants were the G owners of Fangudu Farm in the Umtali District. The farm was acquired by the State in 2005. Subsequent to the acquisition, the second respondent was issued by the Minister of Land and Rural Resettlement with an offer letter dated 11 July 2006 to occupy the land and he proceeded to do so.

The first application was an urgent chamber application by the applicants following the second respondent's occupation of the farm. On 22 November H

Chatukuta J

A 2006, Chitakunye J granted a spoliatory order in case No. HC 7170/06. In November 2009, Patel J granted a judgment in favour of the applicants in case No. HH 128/2009, being confirmation of the provisional order granted in HC 7170/06. The judgment by Patel J declared the present applicants' rights to: B

(a) continue occupying the farm until a valid notice of eviction is issued;

(b) all plantations crops, crops and movable property on the farm until the same is acquired in accordance with the law.

The judgment is extant. However, the second respondent has filed an application in the Supreme Court for leave to appeal against the judgment out of time.

C After having moved from the farm following the order in HH 128/09, persons acting on the authority of the second respondent moved back onto the farm. The applicants filed another urgent chamber application in case No. HC 6541/09 seeking yet again spoliatory relief. A third judgment

was issued by Karwi J, in default of the second D respondent, ordering the second respondent to vacate the property.

The battle is ongoing with the second respondent having, in case No. HH 16/2010, successfully sought an order of stay of execution of the order granted in case No. HC 6541/09. The applicant has also filed the present urgent chamber application seeking the following interim relief:

> E "That the second respondent desist forthwith from uplifting applicants' produce and delivering it to the first respondent or any other person or party and that the first respondent be interdicted from transferring the sum of $14 361, currently held in the trust account of Venturus and Samkange to the second respondent."

The facts leading to the present application are that the second respondent has been harvesting bananas from the plantation and selling the same to the F first respondent. The applicants claim that this is in defiance of the order by Patel J in case No. HH 128/09 where their right to the plantation crops was affirmed.

Mr *Samkange*, for the first respondent, submitted that the proceeds from the sale of the bananas delivered to first respondent have been deposited in the trust account of Venturus and Samkange pending determination of G the ownership wrangle over the bananas. He submitted that the application would abide by the court's decision as to who should receive the money. He further submitted that first respondent has, since becoming aware of the dispute, refused to take any further deliveries from the second respondent.

Mr *Mlotshwa*, the second respondent's legal practitioner, raised three points H *in limine* on behalf of the second respondent. The first point was that the

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certificate of urgency is not proper as it was signed by a legal practitioner A from the same firm as that representing the applicants. The impropriety of the certificate would therefore render the application not urgent. In support of this contention, Mr *Mlotshwa* referred me to *Chafanza* v *Edgars Stores Ltd* & *Anor* 2005 (1) ZLR 299 (H).

I am persuaded by Mr *Chikumbirike*'s submissions that the rules do not B prescribe that a legal practitioner who signs an urgent certificate must not be from the same firm that represents the applicant in that matter. Rule 242(2) simply prescribes that where an applicant is legally represented in an urgent chamber application, the application must be accompanied by a certificate from a legal practitioner supporting the urgency of the application. As Mr *Mlotshwa* conceded, the decision in the *Chafanza* case is not binding. It is C my view that there is no conflict of interest. Even if there was such a conflict, it does not seem that the conflict would render the application not urgent. I am therefore of the view that nothing much turns on the propriety of the certificate of urgency.

The second point was that the matter was *lis pendens* as there was an D application pending before Musakwa J in case No. HC 128/09 wherein the second respondent in the present application was seeking an application for stay of execution. It appears that the issue fell by the wayside as Mr *Mlotshwa* produced a judgment by Musakwa J.

The last issue was that the applicant did not have *locus standi* to bring the E application as the farm had been acquired by the state. Mr *Mlotshwa* submitted that the farm was gazetted and therefore now vested in the state. He submitted that s 2 of the Land Acquisition Act [*Chapter 20:10*] defined "land" to include anything permanently attached or growing on land. As the plantations were growing on the land, they formed part of the land and therefore were also vested in the state. Mr *Mlotshwa* referred me to *Mandindindi Farm Settlers* v F *Mazowe Rural District Council & Anor* HH-53-04. The second respondent's contention was that in light of *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S), the applicant does not have the *locus standi* to seek an interdict against the second respondent.

Mr *Chikumbirike* submitted that the judgment by Patel J declared the G applicant's ownership of the plantation and the fruits therefrom. The second respondent did not appeal against the decision and therefore the judgment is binding on him.

It appears to me that the determination of this matter rests on the interpretation of the judgment by Patel J, whether or not the order declared the applicants' entitlement to all the plantation's fruits as

contended by the applicants. H

2010 (1) ZLR p121

Chatukuta J

A My understanding of the judgment by Patel J is different from that of Mr *Chikumbirike*. It is necessary to cite the exact order granted by Patel J in respect of the plantation crop. The relevant paragraph reads as follows:

> "3. It be declared that all plantation crops, crops and movable property on Fangudu *belonging* to the applicants are not subject to compulsory acquisition by the first respondent [Minster responsible for land] or to appropriation by B any person other than a representative, employee or invitee of the applicants, except in accordance with the law" (my emphasis).

It is common cause that, at the time of the order, acquisition of the farm had already taken place and the farm now belonged to the State. It appears to me that the operative word in that order is "belonging". A proper interpretation of the order, in my view, is that the crops which were owned by the applicants C were protected from compulsory acquisition except in compliance with the law. It does not declare the applicants as the owners of the plantation crops. The word, in my view, that connotes a declaration of ownership would have been the word "belong". Had the court intended to declare the applicants the owners of the plantation crops, it appears to me that it would have used D the word "belong" instead of "belonging".

The interpretation attributed to the order by Mr *Chikumbirike* would be inconsistent with s 16(10) of the Constitution which defines the word "land" to include "anything permanently attached to or growing on land;". The definition provided in the Constitution is identical to that which appears in s 2 E of the Land Acquisition Act referred to by Mr *Mlotshwa*. The interpretation as provided in the Constitution is consistent with the common law that provides that growing things accede to the land. See *Bangure* v *Gweru City Council* 1998 (2) ZLR 396 (H), *Mandindindi Farm Settlers* v *Mazowe Rural District Council & Anor supra*, Silberberg *The Law of Property* 2 ed p 214 and *Scheepers* v *Robbertse* 1973 (2) SA 508 (N).

F In *Bangure* v *Gweru City Council (supra*) Gillespie J observed at 398C-F as follows:

> "If there is any basis for the application, therefore, it must be found in the common law. It may be said generally that improvements to property adhere to the property and are acquired by the owner of the property through the process of *accessio*. *Inaedificatio* is the type of non-natural accession by which movables G accede to immovables when sufficiently attached and become the property of the landowner. [1]*Plantatio* or *satio* are the means of non-natural accession by which, subject to any agreement to the contrary between planter and landowner, growing things accede to the soil and become the landowner's property. [2] The

2010 (1) ZLR p122

Chatukuta J

> intention of the planter is irrelevant to the operation of this law. [3] A
>
> Possessors or occupiers of property who improve the property retain certain rights in respect of the improvements. Thus the improver or planter enjoys the *ius tollendi*. The right, during the currency of occupation of the property, to remove the improvement if this can be done without damage to the earlier state of the property itself. [4] A further right enjoyed by the possessor or occupier who improves property is an entitlement to compensation for the improvements, and B even a *ius retentionis* to enforce that claim, is permitted to various classes of possessor or occupier of property. [5]"

The order by Musakwa J appears to have restored the status *quo ante* which was prevailing before the spoliatory order by Karwi J. The second respondent cannot remain on the land pending the determination of the application for rescission of case No. HC 6541/09. The applicants would therefore not be C said to be still in occupation of the farm or in possession of the plantation and therefore would not be entitled to the plantation crops. They would, in my view, be entitled to compensation from the second respondent in the event that their occupation of the farm and possession of the crops is restored to them.

I believe that one cannot separate the produce derived from the plantation D from the plantation itself. It would be untenable where one person owns the plantation and another owns the produce therefrom. The case of *Scheepers* v *Robertse supra* (cited with approval in *Bangure* v *Gweru City Council* and Silberberg) is pertinent in this regard as it relates to question of ownership of produce of a plantation. In that case, the plaintiff bought a farm from the defendant with all improvements

thereon. There were 94 acres of wattle E plantations on the farm. The defendant had a bark quota granted to her in terms of an Act of Parliament. The farm was transferred into the name of the plaintiff in October 1969. In September 1970, the defendant proceeded to sell and transferred the bark quota to a third party.

Harcourt J ruled at p 510 that the trees in question had struck roots and F therefore the plantation had therefore acceded to the farm. The bark quota also went with the farm as the quota could not be separated from the plantation.

It is therefore my view that the only proper interpretation of Patel J's order is that the applicants ceased to own the plantation and the crops therefrom when the farm was acquired by the State. This would be consistent with the Constitution and common law. It was stated in the *Airfield* case that the G appellants in that case had lost their rights of ownership in the land when the

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Chatukuta J

A land was acquired by the State and vested in the State. The applicants ceased to be the owners of the land, plantations and fruits in issue when the farm was acquired by the State. The applicants, not being the owners of the farm, therefore do not have the *locus standi* to seek the relief in the draft order.

In the result, the application is dismissed with costs.

B *Chikumbirike & Associates*, the applicants' legal practitioners

Venturus & Samkange, the first respondent's legal practitioners

G N Mlotshwa & Co, second respondent's legal practitioners

1 Carey-Miller *The Acquisition and Protection of Ownership* p 22
2 *Ibid* p 20.
3 *Scheepers* v *Robbertse* 1973 (2) SA 508 (N) at 517C.
4 *de Beers Consolidated Mines* v *London and South African Exploration Co* (1893) 10 SC 359.
5 See generally Silberberg & Schoeman *The Law of Property* 3 ed p 150 *et seq*.

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Document 19 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/JHAMBA v MUGWISI 2010 (1) ZLR 124 (H)

JHAMBA v MUGWISI 2010 (1) ZLR 124 (H)

Citation	2010 (1) ZLR 124 (H)
Case No	Judgment No. HB-1-10
Court	High Court, Bulawayo
Judge	Cheda J
Heard	26 November 2009
Judgment	11 February 2010
Counsel	Mrs *N Chanayiwa*, for the plaintiff

Defendant in default

Case Type Application for default judgment

Annotations No case annotations to date

Flynote

Damages – *assessment of – delictual – actio injuriarum – adultery – damages claimable for contumelia and for loss of consortium – need to specify amount of claim under each head – loss of consortium – need to examine all circumstances – plaintiff aware of adultery and condoned it – no action for divorce – high damages not appropriate* D

Headnote

Damages for adultery are claimable on two entirely separate and distinct grounds: firstly, on the grounds of the injury or *contumelia* inflicted upon the plaintiff; and secondly, on the grounds of the loss of comfort, society and services of the other spouse (*consortium*). It is wrong for E a plaintiff to lump her claims in one, mixing both *contumelia* or injury and loss of *consortium.* Loss of *consortium* is the main element in the estimation of damages for adultery. The quantum should reflect all the circumstances surrounding the occurrence of the adultery, including the plaintiff's own conduct in the matter.

Where the defendant had been having an illicit relationship with the plaintiff's F husband for over 20 years, resulting in four offspring, the plaintiff could not say that she was not aware of his sexual escapades. She chose to ignore the situation and thereby condoned the adultery. She did not sue for divorce. Consequently, damages for loss of *consortium* could not be high. G

Cases cited

Biccard v Biccard & Fryer (1892) 9 SC 473

Bruwer v Joubert 1966 (3) SA 334 (A)

Gwatiringa v Matake HB-119-09

Viviers v Kilian 1927 AD 449 H

2010 (1) ZLR p125

Cheda J

Case information

A Mrs *N Chanayiwa*, for the plaintiff

Defendant in default

Judgment

CHEDA J: This is an application for a default judgment for adultery damages.

On 26 November 2008 the plaintiff sued the defendant for adultery damages B in the sum of US$50 000. I granted the application for default but granted an order for damages of US$500, with an undertaking to give my reasons for the reduction of the sum. The following are my reasons.

The plaintiff and her husband entered into a monogamous marriage under the Marriages Act [*Chapter 5:11*] on 17 August 1974 and the marriage still subsists. From 1988, on diverse occasions, the plaintiff's husband and the C defendant illicitly engaged and associated in an adulterous sexual relationship which resulted in the birth of four children, the last one been born in December 1996. The plaintiff sued the defendant for adultery damages. The defendant entered appearance to defend, but failed to file a plea and hence an application for default judgment was applied for. Nothing turns on this matter other than D the question of *quantum*.

The plaintiff's husband has been committing adultery with the defendant for 21 years. The plaintiff, according to the papers, did nothing about it until 2009. She is indeed legally entitled to damages, but I doubt if the circumstances surrounding this case justifies the claim made, namely that of US$50 000. It is clear that the defendant intruded into the plaintiff's marriage and for E that misdemeanour she should be punished. However, there are two issues which I must deal with.

Firstly, the plaintiff claimed US$50 000 for damages without stating what part of that amount is for the injury she has suffered for *contumelia* and what part is for the loss of society and comfort or *consortium*. The correct legal F position is that adultery damages are claimable on two entirely separate and distinct grounds: firstly, on the grounds of the injury or *contumelia* inflicted upon the plaintiff, and, secondly, on the grounds of the loss of comfort, society and services of her husband (*consortium*). See *Viviers* v *Kilian* 1927 AD 449. It was therefore wrong for the plaintiff to lump her claims together, mixing damages for both *contumelia* or injury and *consortium.*

G Secondly, the *quantum* should be reflective of all the circumstances surrounding the occurrence of the adultery, inclusive of the plaintiff's own conduct in the matter. The defendant has been having this illicit relationship with the plaintiff's husband for over 20 years, which resulted in four children. Surely she cannot say that she was not aware of his sexual escapades, and H she does not shed light on this aspect of her knowledge thereof or otherwise.

Cheda J

In the absence of her denial of this knowledge, with all due respect to A her, it is reasonable to assume that she must have known of this at some point, bearing in mind the length of time of the existence of the adulterous relationship between her husband and defendant. She, however, chose to ignore it. By her inaction, therefore, she condoned the adultery, thereby allowing it to continue. To claim adultery damages for a large sum of money B for a relationship which has been in existence for over 20 years later is, in my view, to remove the sting the effect of the adultery usually has on the offended party. In addition, she seems not to have sued for divorce, which is normally the case in adultery cases. She is, however, entitled either to sue the third party alone or and at the same time to sue her spouse for divorce. If she had sued her husband for divorce, then this would go to show that C she has indeed lost the *consortium* of her husband and thus her claim for a higher sum would have been justified. In *Biccard* v *Biccard & Fryer* (1892) 9 SC 473 at 476 de Villiers CJ ably stated:

> "Unless the breach between a husband and his adulterous wife is final, I should not be inclined to award damages to the husband for two reasons. There is not that complete loss of the wife's society which constitutes the main element in D the estimation of damages, and there remains the strong probability that the husband may be trading upon his wife's dishonour."

It is the position of our law that loss of *consortium* is a main element in the estimation of damages for adultery. See also *Bruwer* v *Joubert* 1966 (3) SA 334 (A). E

In *Gwatiringa* v *Matake* HB-119-09 I dealt with this issue. I still hold the same view that the fact that the plaintiff, with full knowledge of the adulterous relationship of the defendant with her husband, still chooses to keep the marriage but sues for adultery damages only, her choice should therefore influence the *quantum*. It is for the above reasons that I reduced the *quantum* from US$50 000 to US$500, as I felt that by awarding the plaintiff her claim F as prayed would amount to allowing her trade on her husband's dishonour.

The circumstances surrounding this case do not, in my view, justify the claim made. It is ordered that:

(1) An order for payment in the sum of US$500 (five hundred United States dollars) being damages for adultery against defendant be and G is hereby granted.

(2) The defendant pays interest at the prescribed rate on the sum of US$500 mentioned in (1) above from the date of service of summons to date of full and final payment.

(3) An order for payment of costs of suit at an attorney and client scale. H

A *Dube-Banda, Nzarayapenga and partners*, plaintiff's legal practitioners

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Document 20 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/UZ-UCSF COLLABORATIVE RESEARCH PROGRAMME IN WOMEN'S HEALTH v SHAMUYARIRA 2010 (1) ZLR 127 (S)

UZ-UCSF COLLABORATIVE RESEARCH PROGRAMME IN WOMEN'S HEALTH v SHAMUYARIRA 2010 (1) ZLR 127 (S)

Citation	2010 (1) ZLR 127 (S)
Case No	Judgment No. S-10-10
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA and Garwe JA
Heard	16 February 2010
Judgment	16 February 2010
Counsel	*I Chagonda,* for the appellant *D Dindikwa,* for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Employment – *contract – termination – dismissal – unfair dismissal – employee on fixed term contract – failure to renew contract – what employee must show to establish unfair dismissal*

Employment – *Labour Court – jurisdiction – application for declaratory order – Labour Court having no jurisdiction to make such order* D

Headnote

In terms of s 89(1)(a) of the Labour Act [*Chapter 28:01*], the Labour Court is empowered to hear and determine "…all applications in terms of this Act or any other enactment". This necessarily means that the Act or other enactment must specifically provide for an application, to the Labour Court, of the type that the applicant seeks to bring. As there is nothing E in the Act, or any other enactment, empowering it to issue a declaratory order, the court has no jurisdiction to do so. Any such application should be dismissed for want of jurisdiction.

An employee engaged on a fixed term contract can, in terms of s 12B(3)(b) of the Labour Act, claim for wrongful dismissal in the event of the contract F not being renewed if he shows that (a) he had a legitimate expectation to be re-engaged *and* (b) another person was engaged in his stead, that is, to do his work. Where the employee has signed a letter of renewal in which he agreed that the renewal would not give rise to a legitimate expectation to be re-employed, he cannot possibly have entertained a legitimate expectation to be re-engaged. Proof that others were engaged G in different capacities is insufficient to show that another person was engaged in his stead.

Cases cited

NRZ v Zimbabwe Railway Artisans' Union & Ors 2005 (1) ZLR 341 (S). H

Ziyambi JA

Legislation considered A

Labour Act [*Chapter 28:01*], ss 12B(3)(b) and 89(1)(a)

Case information

I Chagonda, for the appellant

D Dindikwa, for the respondent

Judgment

B **ZIYAMBI JA:** This is an appeal in terms of s 92 of the Labour Act [*Chapter. 28:01*] ("the Act"). It comes to us with leave of the Labour Court. The facts forming the background of the appeal are as follows.

The respondent was employed by the appellant from 2001 on a six month contract which was renewed on several occasions. On 30 November 2007, C the appellant wrote to the respondent setting out the terms of renewal of the contract for a further 6 months from 1 December 2007 to 30 June 2008. Paragraph 3 of the letter reads as follows:

> "It should be noted that this contract is a fixed term contract which may or may not be renewed depending on various circumstances including but not limited to performance, availability of finance, restructuring of the organization or for any D reason whatsoever. Accordingly this renewal should not by any means create a right to or legitimate expectation of any further renewals."

On 9May 2008 the appellant wrote to the respondent advising him that on the expiry of his contract he would not be re-employed. The respondent was aggrieved by the letter and filed an urgent chamber application in the Labour E Court. He alleged that his dismissal was unlawful and a contravention of s 12B of the Act, in that he had a legitimate expectation to be re-employed by the appellant. He sought a declaration that the termination of his contract with the appellant was null and void and an order that he be reinstated to his former employment with the appellant without loss of salary or benefits. The Labour Court granted the application with costs.

F The appellant raised two points on appeal. Firstly, that the Labour Court had no jurisdiction to entertain an application of this nature; and, secondly, that the dismissal was not unlawful in that the respondent had not proved, in terms of s 12B of the Act, that he had a legitimate expectation to be re-employed at the end of the contract. I deal with the issues raised in turn.

G Jurisdiction

It was contended by the appellant that s 89 of the Act which sets out the powers of the Labour Court does not empower the Labour Court to entertain applications of the type brought by the respondent. Section 89 (1) of the Act states as follows:

> H "**89 Functions, powers and jurisdiction of Labour Court**

Ziyambi JA

> (1) The Labour Court shall exercise the following functions – A
>
> (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 in terms of this Act; and
>
> (c) referring a dispute to a labour officer, designated agent or a person appointed B by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;
>
> (d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section ninety-eight to hear and determine an application;
>
> (d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;
>
> [Subparagraph as inserted by section 29 of Act 7 of 2005] C
>
> (e) doing such other things as may be assigned to it in terms of this Act or any other enactment."

Mr *Dindikwa,* on the other hand, relied on s 89(1)(a) and submitted that in terms of this subsection the application was properly entertained by the Labour Court. D

In *NRZ* v *Zimbabwe Railway Artisans' Union & Ors* 2005 (1) ZLR 341 (S), this court had occasion to consider what constitutes "applications in terms of the Act". They are those applications for which the Act specifically makes provision. Thus at p 346E -347D of the judgment it was said:

> "It was contended by the appellant that the Labour Court erred in dismissing the E point *in limine* raised by the appellant, namely, that the Labour Court had no jurisdiction to entertain an application of this nature, which was for an interdict. The Labour Court dismissed the point *in limine* on the basis that in terms of s 89(1)(a), as read with s 89(2)(d), of the Act, it was empowered to hear the application.
>
> There is, I think, judging from the cases which have come before us, a misconception generally held by the Labour Court, namely, that it is, in terms of F s 89 of the Act, endowed with jurisdiction to entertain all applications brought before it.
>
> Section 89(1)(a) of the Act provides:
>
> '(1) The Labour Court shall exercise the following functions:
>
> (a) hearing and determining application and appeals *in terms of this Act or any other enactment*' (emphasis mine). G
>
> Thus, before an application can be entertained by the Labour Court, it must be satisfied that such an application is an application "in terms of this Act or any other enactment". This necessarily means that the Act or other enactment must specifically provide for an application to the Labour Court, of the type that the applicant seeks to bring: see *PTC* v *Chizema* S-108-04. In that case, it was pointed out that an application brought in terms of s 93(7) of the Act would H

Ziyambi JA

> A correctly be termed an application 'in terms of this Act'.
>
> Section 92C of the Act (which provides for applications for rescission or alteration by the Labour Court of its own decisions) is a further example of an application that can be brought in terms of the Act.
>
> Section 89(2)(d) of the Act, in my view, emphasizes the point sought to be made. It provides that the Labour Court may –
>
> B '(d) in the case of an application other than one referred to in paragraph (b) or (c), or a reference, *make such determination or order or exercise such powers as may be provided for in the appropriate provision of this Act*' (emphasis mine).
>
> Thus, the application and the remedies obtainable thereby must be authorized in the Act or the enactment authorizing the application to the Labour Court.
>
> C Nowhere in the Act is the power granted to the labour Court to grant an order of the nature sought by the respondents in the court *a quo*, nor have I been referred to any enactment authorizing the Labour Court to grant such an order."

So, too, in this case, there is no provision in the Act (nor have I been referred to any provision in any other enactment) authorizing the Labour Court to D issue the declaratory order sought by the respondent. It is therefore my view that the Labour Court ought to have dismissed the application for want of jurisdiction. Accordingly, the appeal succeeds on this point.

The determination of this issue, on its own, is sufficient to dispose of this appeal. However, since the interpretation of s 12B(3) of the Act was argued before us, it was submitted by Mr *Chagonda*, and we are in agreement with E his submission, that we ought to deal with the second issue in order to clarify the law in this regard.

Whether the respondent had a legitimate expectation to be re-employed

Section 12B of the Act states as follows:

> **"12B Dismissal**
>
> F (1) Every employee has the right not to be unfairly dismissed.
>
> (2) …
>
> (3) An employee is deemed to have been unfairly dismissed –
>
> (a) if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment G intolerable for the employee;
>
> (b) if, on termination of an employment contract of fixed duration, the employee –
>
> (i) had a legitimate expectation of being re-engaged; and
>
> (ii) another person was engaged instead of the employee."

In relation to subs (3)(b), the onus is on the employee to prove firstly, that H he had a legitimate expectation to be re-engaged and, secondly, that another

Ziyambi JA

person was engaged in his stead, that is, to do his work. The respondent A failed to discharge the onus. Having signed a letter of renewal in which he agreed that the renewal would not give rise to a legitimate expectation to be re-employed by the appellant, he could not possibly have entertained a legitimate expectation to be re-engaged by the appellant. Secondly, the respondent produced no evidence that another person was engaged in his B stead. Proof that others were engaged in different capacities is insufficient for the purposes of this subsection. Thus, the respondent failed to show that he was unfairly dismissed in terms of s 12B of the Act and the appeal succeeds on the second ground as well.

It was for the above reasons that after hearing counsel, we allowed the appeal with costs and gave the following order: C

"1. The appeal is allowed with costs.

2. The order of the Labour Court is set aside and substituted by the following:

'the application is dismissed with costs'." D

SANDURA JA and GARWE JA concurred

Atherstone & Cook, applicant's legal practitioner

Hute & Partners, respondent's legal practitioner E

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Document 21 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/PRODUTRADE (PVT) LTD v CONTINENTAL BAKERIES (PVT) LTD & ANOR 2010 (1) ZLR 132 (H)

PRODUTRADE (PVT) LTD v CONTINENTAL BAKERIES (PVT) LTD & ANOR 2010 (1) ZLR 132 (H)

Citation	2010 (1) ZLR 132 (H)
Case No	Judgment No. HH-29-10
Court	High Court, Harare
Judge	Chatukuta J
Heard	22 April 2009
Judgment	17 February 2010
Counsel	*B Venturas,* for the applicant *O Mutero,* for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Interest – *in duplum rule – applicability – delays caused by justice delivery system – effect of – not a reason to waive or vary in duplum rule*

D **Practice and procedure** – *judgment – correction of – when permissible – omission in judgment – court entitled to correct judgment*

Headnote

The first respondent bought a consignment of flour from the applicant but did not pay for it by the due date, 4 February 2005. Summons was issued in April 2005, claiming the sum due plus interest from 4 February 2005. E An application for summary judgment was made in May 2005. The application was granted in July 2006 although the order did not state from what date interest was to run.

The respondents noted an appeal, but in March 2007 tendered a sum which represented the money due, plus interest. The appeal was then withdrawn. The applicant accepted the sum tendered but without prejudice, reserving F the right to claim interest on the sum tendered. In November 2007 the applicant filed the present application, seeking payment of interest due on the capital sum from 4 February 2005 until the date of payment. The applicants argued that the order sought was to correct an ambiguity or omission in the order granted in July 2006. It also argued that the *in duplum* rule should not apply because proceedings had already been G instituted and the delay was attributable to the justice delivery system.

Held, that the effect of the relief sought by the applicant was a correction of the order granted in July 2006, where the question of interest was indeed determined and an order was granted. However, there was an omission as to the date from which interest was to commence running, H so the order was incomplete and inoperative. The matter could therefore

Chatukuta J

be determined in terms of r 449 (1)(b) of the High Court Rules. A

Held, further, that the basic principle is that, upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which the cause of action was instituted. The debtor is equally not in control B of the process by which interest accumulates, so the respondent could not be held accountable for the delays caused by the legal system. It therefore should not be penalised for enforcing its own rights to defend an action, particularly in such a case where there is a divergence of views on the application of the *in duplum* rule. It would not be in the public interest to penalise the debtor. There were no grounds for not applying C the *in duplum* rule in this case.

Cases cited

CBZ Ltd v MM Builders & Suppliers (Pvt) Ltd & Ors 1996 (2) ZLR 420 (H)

Conforce (Pvt) Ltd v City of Harare 2000 (1) ZLR 445 (H) D

Ehlers v Standard Chartered Bank Zimbabwe Ltd 2000 (1) ZLR 136 (H)

Standard Bank of South Africa v Oneanate Invstms (Pty) Ltd 1998 (1) SA 811 (SCA)

Legislation considered E

High Court Rules 1971 (RGN 1047 of 1971), r 449 (1)(b)

Case information

B Venturas, for the applicant

O Mutero, for the first respondent F

Judgment

CHATUKUTA J: On 19 July 2006, the applicant obtained judgment in this court in case No. HC 2433/2005 in the sum of $485 316 000. The order provided for interest in the following terms:

> "Interest is due on the above amount at the prevailing overdraft interest rate as quoted by Stanbic Bank Limited."

On 10 September 2007, the applicant filed the present application seeking G the following relief:

> "1. That the applicant be and is hereby entitled to levy interest on the capital debt in case No. HC 1929/2005 from 4 February 2005 to date of payment.
> 2. Costs on the legal practitioner/client scale (*sic*)."

The material facts giving rise to this application are that the applicants issued H

Chatukuta J

A summons on 22 April 2005 in case No. HC 1929/05 claiming the sum of $485 316 000, interest at the rate of 115 per cent calculated from 4 February 2005 to the date of payment, and costs on a higher scale. The claim arose from an agreement of sale between the applicant and the first respondent in terms of which the applicant was required to deliver flour to the value of $485 316 000 to the first respondent. The flour was duly delivered on 25 B January 2005. The first respondent was obliged under the agreement to pay the purchase price for the flour by 4 February 2005. The second respondent bound himself as surety and co-principal debtor in respect of the first respondent's liability. The purchase price was not paid on the due date, resulting in the claim. The respondents defended the claim.

C On 27 May 2005 the applicant filed an application for summary judgment in case No. HC 2433/05. The judgment was duly granted in favour of the applicant on 19 July 2006. The respondent appealed against that judgment on 26 July 2006. However, on 22 March 2007, the respondents tendered payment of $970 632 000, being the judgment debt plus interest. In a letter dated 13 April 2007, the applicant accepted the payment on a "without D prejudice" basis, and reserved the right to claim interest accrued on the sum of $970 632 000. Following the payment, the notice of appeal was withdrawn on 26 March 2007.

On 18 November 2007, the applicant then filed the present application claiming interest on the capital debt in case No. HC 1929/2005 from 4 E February to the date of payment. Before the applicant addressed me on the merits of the application, I queried the nature of relief that the applicant sought and whether or not the applicant had, in view of the judgment in case No. 2433/05, adopted the proper procedure.

Mr *Venturas*, for the applicant, submitted that the applicant was seeking a F declarator that interest was due from 4 February 2005 to the date of payment. He submitted that the applicant was not seeking a variation of the order in case No HC 2433/05.

Mr *Mutero*, for the respondent, submitted that the matter, and in particular the question of interest, had already been adjudicated on in case No. HC 2433/05. He submitted that the applicant was seeking a variation of the order. The G applicant could only do so in terms of r 449 of the High Court Rules. He further submitted that, as the applicant had adopted the wrong procedure, the application should be dismissed with costs.

Despite Mr *Venturas'* submissions, it appears to me that Mr *Mutero* is correct in stating that the effect of the relief sought by the applicant is a correction H of the order granted on 19 July 2006. The question of interest was indeed

---

Chatukuta J

determined in Case No. HC 2433/05 and an order was granted by this court. A However, it appears to me that there was an apparent omission as to the date when interest was to commence running. The applicant had clearly stated in its prayer in the declaration the date from which interest would commence running. The order is therefore incomplete and inoperative. It is for this reason that I am of the view that I can proceed to determine the matter in B terms of r 449(1)(b). The rule provides that:

"(1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order –

(a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or

(b) *in which there is an ambiguity or a patent error or omission, but only* C *to the extent of such ambiguity, error or omission;* or

(c) that was granted as the result of a mistake common to the parties" (my emphasis).

The court in Case No. HC 2433/05 did not indicate in the judgment why the effective date when interest would run was not included. Had it so indicated, D the matter would have been *res judicata* as contended by Mr *Mutero*. It would have been difficult for this court to evoke its powers in terms of r 449. The silence in the judgment and the order itself appears to me to have been a clear omission.

The next issue for determination is whether or not it is competent for me E to correct the order and provide as requested by the applicant that interest should have commenced to run from 4 February 2005 to date of payment despite the *in duplum* rule. The applicant contended that the *in duplum* rule does not apply in the present case because proceedings had already been instituted and the delay was attributable to the justice delivery system. In support thereof, the applicant referred me to *Standard Bank of South Africa* F v *Oneanate Investments (Pty) Ltd* 1998 (1) SA 811 (SCA) and *Ehlers* v *Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136 (H). Mr *Venturas* contended that the effect of the order sought by the applicant is that interest continues to run until payment in full is made irrespective of the *in duplum* rule.

The respondent urged me to follow the cases of *CBZ Ltd* v *MM Builders* G *& Suppliers (Private) Limited & Ors* 1996 (2) ZLR 420 (H) and *Conforce (Pvt) Ltd* v *City of Harare* 2000 (1) ZLR 445 (H).

The proposition that interest ceases to run when it has reached the capital amount and only commences to run afresh upon judgment is found in the *CBZ Limited v MM Builders* case (*supra*) at 441E-F where Gillespie J states that:

"Upon judgment being given interest on the full amount of the judgment debt H

A commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which the cause of action was instituted."

Therefore the *in duplum* rule applies where the interest reaches the judgment debt.

It appears to me that the reasoning by Malaba J (as he then was) in *Ehler*s B case does not take into account the fact that the debtor is equally not in control of the process by which interest accumulates. At p 139G-140B he stated:

"The learned judges preferred the view that interest only commences to run anew as from the date of judgment. I must, with respect, express my dissent from the decision in *Commercial Bank of Zimbabwe's* case *supra* on the date from which interest commences to run afresh in a case where the *in duplum* rule applies. C This view of the law does not give effect to the policy behind the *in duplum* rule, nor does it recognize the discretion enjoyed by the court in the matter.

In *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) at 495D Gubbay CJ said that the *in duplum* rule is based upon a public policy designed to protect borrowers from the exploitation of lenders by prohibiting usurious abuse. The principle that interest commence to run D afresh from the date of *litis contestatio*, which in this case is the date of service of summons, is based upon the recognition of the fact that from that date the creditor ceases to be in control of the process by which interest accumulates."

In the present case, the respondent cannot be held accountable for the delays caused by the legal system. It therefore should not be penalised for enforcing its own rights to defend an action particularly in such a case where there is a E divergence of views on the application of the *in duplum* rule. I do not believe that it would be in the public interest to penalise the debtor.

I am however, persuaded by the remarks of Chinhengo J in the *Conforce* case *supra* at 457B-D which seems to reflect the true position regarding the application of the *in duplum* rule on a judgment debt. At 458A-F he noted:

F "I venture to say that the public interest served by the *in duplum* rule is not identified with sympathy for the debtor, so as to protect him. I view the public interest involved as encompassing a wider spectrum of

interests, from the protection of the debtor, to securing fiscal discipline on the part of lenders, to considerations of justification for charging interest in the first place i.e. to compensate the creditor for deprivation of use of the money due until payment (*Mawere* v *Mukuna* 1997 (2) ZLR 360 (H) at 364G) and to the interests of commerce generally and G perhaps many more interests. Thus the public interest cannot be restricted to one or two considerations i.e. the protection of the debtor and the dictates of modern commerce. But even if it were to be so restricted, I cannot see anything incompatible with the rule serving those interests if it were to be applied in the manner advocated for in *MM Builders'* case. The creditor's claim for interest would be limited to an amount that does not exceed the capital. In my view, the H danger in adopting the approach in *Oneanate* and *Ehlers* cases *supra* is that an

2010 (1) ZLR p137

Chatukuta J

unscrupulous creditor only has to institute action to defeat the *in duplum* rule. A He may so act as to ensure that the institution of proceedings and the attainment of the double coincide with the result that the rule is rendered inoperative. I do not see anything that is against the public interest or the interest of modern finance, if the *in duplum* rule operates in the manner outlined by Gillespie J and the old Roman Dutch authorities which espouse the view that once the double has been reached, interest must stop to run regardless of the institution B of proceedings, or that the stage of *litis contestatio* has been reached. Where in particular the double has not been reached, I find no relevance at all of the event of institution of proceedings. Interest must continue to run until it equates to the capital amount amd then cease to run. It may thus equate to the capital amount soon after or long after the institution of proceedings, but that is immaterial. I am therefore unpersuaded by the conclusion reached on this point in *Oneanate* and *Ehlers* cases. I must respectfully express my dissent from those judgments." C

As rightly submitted by Mr *Mutero,* the decision in *Oneanate*'s case is merely persuasive. The decision in the *CBZ Ltd* v *MM Builders* was decided by a full bench of the High Court and is therefore binding on me.

In the result, it is ordered that:

1. The application be and is hereby granted. D
2. The order granted in HC1929/05 on 19 July 2006 be and is hereby amended by the deletion of paragraph 2 and substitution with :

   "Interest is due on the above amount at the prevailing overdraft interest rate as quoted by Stanbic Bank Limited with effect from 4February 2005 to date of payment." E
3. The respondent shall pay the costs of the application.

Byron Venturas & Partners, applicant's legal practitioners

Sawyer & Mkushi, respondents' legal practitioners F

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Document 22 of 62

Source:
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MUNYANI v LIMINARY INVESTMENTS & ANOR 2010 (1) ZLR 138 (H)

2010 (1) ZLR p138

Citation	2010 (1) ZLR 138 (H)
Case No	Judgment No. HH-28-10
Court	High Court, Harare
Judge	Makarau JP
Heard	11 February 2010

Judgment 24 February 2010

Counsel *P K Mangwengwende*, for the applicant
Ms *M Matimati*, for the first respondent
Second respondent in default

Case Type Opposed application

Annotations No case annotations to date

Flynote

Contract – variation – *when permitted – quasi-mutual assent – one party giving out a certain position and other party accepting – first party bound*

Headnote

The applicant sold a house to the first respondent. Part of the purchase price D was paid at the time the agreement was concluded and it was agreed that the balance would be paid by a third party within three months. It was provision of the agreement of sale that transfer would be effected on payment of the purchase price in full. In spite of this provision, the applicant, of her own volition, allowed the first respondent to take E possession of the property before the purchase price was paid in full. Part of the balance was paid but before the remainder was paid the third party died. The applicant sought the eviction of the first respondent.

Held, that the applicant would be bound by her act. She was so bound, not because she waived any rights to retain possession of the property pending transfer (as contended by the first respondent), but because she agreed F to a variation of the term of the agreement regulating occupation, to her prejudice. Where, by word or deed, one party to a contract gives out to the other a certain position and that position is accepted, both parties are bound. This is referred to the quasi-mutual assent doctrine, which is an intrinsic part of objectively establishing consensus *ad idem* between the parties to a contract. The application of this doctrine meant that the G applicant was bound by the variation in the terms of the agreement.

Held, further, that the law does not restrict the parties' power to vary their own contract. They are at liberty to change their minds as many times as it suits them, as long as, each time that they do so, they are acting in concert and their minds meet. The law will only restrict their power H to vary their own contract where they have, in the contract, restricted

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Makarau JP

their own power to do so by inserting a non-variation clause. Typically, A a non-variation clause provides that no subsequent agreement between the parties shall be valid and binding as between the parties unless it is reduced to writing and signed by both parties. There was no such clause in this case. It did not matter that the applicant viewed her conduct in parting with possession prior to the agreed date as an indulgence on B her part. That mental reservation was not communicated to the first respondent. What was communicated to the first respondent, and accepted by it, was that occupation would no longer await transfer.

Cases referred to

Musgrove & Watson (Rhod) (Pvt) Ltd v Rotta (1) 1978 RLR 129 (G); C 1978 (2) SA 918 (R)

S Ltd v CoT 1984 (1) ZLR 290 (S)

Case information

P K Mangwengwende, for the applicant

Ms *M Matimati*, for the first respondent

Second respondent in default D

Judgment

MAKARAU JP: The facts of this matter are largely common cause. I set them out as follows.

On 27 March 2009, the applicant and the first respondent entered into a written agreement of sale in terms of which the applicant sold to the first E respondent certain immovable property fully described as Stand 2902 Bluff Hill Township of Bluff Hill Township measuring 3738 square metres, for the sum of US$230 000. It was a specific term of the agreement of sale that the purchase price would be paid as to a deposit of $130 000 upon the signing of the agreement and the balance on or before 30 June 2009. It was also a specific term of the agreement of sale that all payments due from the first F respondent under the agreement of sale would be paid off by a Dr Mushonga. Transfer of the property was to be effected in favour of the first respondent upon the payment of the purchase price in full. In terms of clause 7 of the agreement of sale, occupation of the property would be given to the purchaser on the date of transfer. G

It is further common cause that the deposit stipulated in terms of the agreement of sale and a further payment of $37 000 were made by Dr Mushonga to the applicant, making a total payment of $167 000. This left a balance in the sum of $63 000. Despite demand, the balance of the purchase price was not paid during the lifetime of Dr Mushonga who passed away in August 2009.

Prior to the passing away of Dr Mushonga, the applicant had parted with H

A possession of the property and had allowed the first respondent to take occupation of the same. This was on the understanding that Dr Mushonga would pay up the balance of the purchase price on due date. In view of the fact that the balance of the purchase price remained outstanding after due date, the applicant wrote to the first respondent and to Dr Mushonga, demanding payment within seven days, failing which she would require the premises B for her own occupation. The demanded payment was not made and the first respondent did not vacate the property, prompting the applicant to file this application, seeking the eviction of the first respondent from the property.

The application for eviction was resisted. In opposing the application, the first respondent took no issue with the facts of the matter as narrated by the C applicant in her founding affidavit. The deponent to the opposing affidavit, one Emerenciana Mapurisa, who is in beneficial occupation of the property, however added that the applicant of her own volition offered the first respondent occupation of the property even before the first installment was paid under the agreement of sale. While not disputing that the agreement of sale stipulated that occupation would be given upon transfer, the first respondent contended D that this clause was never implemented as the applicant waived her right to enforce this provision by granting the first respondent occupation on an earlier date and before the full purchase price had been paid.

It is instructive, in my view, at this stage to set out in full the applicant's averments as to how and why she parted with possession of the property. E This is what she said in para 12 of her founding affidavit:

> "In good faith, I allowed the first respondent to take occupation of the property prior to full settlement of the purchase price on the understanding that the late Dr Mushonga would pay the outstanding amount in terms of the agreement of sale by 30 June 2009. This indulgence was in no way a waiver of my rights to possess the property which right continues to subsist as long as final payment of US$63 000 has not been paid."

F The issue that arises in this application is, in my view, simple. It is whether the applicant is bound by her act "in good faith' of parting with possession of the property and allowing the first respondent to take occupation thereof prior to and pending transfer.

It is quite clear to me that she is. She is bound, not because she waived any G rights to retain possession of the property pending transfer, as contended by the first respondent, but because she agreed to a variation of the term of the agreement regulating occupation, to her prejudice.

Generally speaking, the law does not restrict the parties' power to vary their own contract. In keeping with the notion of freedom of contract, the H parties are at liberty to change their minds as

many times as it suits them,

Makarau JP

as long as at each time that they do so, they are acting in concert and their A minds meet. The law will only restrict the parties' power to vary their own contract where the parties themselves have, in the contract, restricted their own power to do so by inserting a non-variation clause. Typically, a non variation clause provides that no subsequent agreement between the parties shall be valid and binding as between the parties unless it is reduced to writing and signed by both parties. B

I note that the parties before me did not seek to protect themselves against variations to the terms of the agreement by inserting a non-variation clause in the agreement. Thus, their power to vary the agreement remained unlimited. The only issue that arises is whether the parties' minds met as regards the variation. C

The applicant has sought to argue that she did not intend to part with possession before transfer but acted out of good faith and in the belief that Dr Mushonga would come through with the balance of the purchase price.

In my view, it matters not that the applicant viewed her conduct in parting with possession prior to the agreed date as an indulgence on her part. However, that D mental reservation was not communicated to the first respondent. What was communicated to the first respondent and accepted by it was that occupation would no longer await transfer as per the written agreement. Occupation was coming sooner, as per the new arrangement between the parties.

It is a trite principle of the law of contract that where, by word or deed, one E party to a contract gives out to the other a certain position and that position is accepted, both parties are bound. This is referred to as the quasi-mutual assent doctrine which is an intrinsic part of objectively establishing *consensus ad idem* between the parties to a contract.

In this regard, I can do no better than refer to the words of Goldin J in *Musgrove & Watson (Rhod) (Pvt) Ltd* v *Rotta (1)* 1978 RLR 129 (G) at 134; F 1978 (2) SA 918 (R) at 922E-G where he had the following to say:

> "There are cases in which a contract is treated as having come into existence notwithstanding that one party's conduct conflicts with his real intention. (*I Pieters & Co* v *Salomon* 1911 AD 121 at 137; *Levy* v *Banket Holdings (Pvt) Ltd* 1956 R&N 98; 1956 (3) SA 558 (FC) at 561-3; *Collen* v *Rietfontein Engineering Works* 1948 (1) SA 413 (A).) This type of contract is sometimes called 'quasi- G mutual assent' (Wille and Millin *Mercantile Law of South Africa* 16 ed at 17; Lee *Introduction to Roman-Dutch Law* at 220; *van Ryn Wine & Spirit Co* v *Chandos Bar* 1928 TPD 417 at 422.) It has also been described as 'the objective theory of contract' (*Williston on Contracts* revised ed vol 1 para 98, and *Peri-Urban Areas Health Board* v *Breet NO and Another* 1958 (3) SA 783 (T) at 789 - 90)."

The doctrine of quasi-mutual assent has been a part of our contract law from H

Makarau JP

A time immemorial and it is on its application that the applicant is bound by the variation in the terms of the agreement.

Mr *Mangwengwende* has strenuously argued that the applicant was indulging the first respondent in allowing her to take occupation of the property prior to the date of transfer. He proceeded to submit that, since this was an indulgence, B it could be withdrawn at any time as the agreement between the parties provided that any indulgences or extensions of time which one party may grant to the other in respect of the performance of that other party's obligation under the agreement would not prejudice the party granting the indulgence.

It is common cause that all the purchaser's obligations under the agreement relating to the payment of the purchase price were delegated to Dr Mushonga. C The first respondent remained with no obligations to perform under the contract, for the delegation of its obligations with the consent of the applicant acted as a novation of the original agreement of sale and divested the first respondent of its obligations and vested and burdened Dr Mushonga with everything that remained to be performed under the contract. See *S Ltd* v *Commissioner of Taxes* 1984 (1) ZLR 290 (S). In my view, it follows that if D there were any indulgences to be granted in the performance of the

contract, such indulgences could only have been for the benefit of Dr Mushonga and not the respondent. The creation of the new relationship between the applicant and Dr Mushonga, while not terminating the original contract between the applicant and the first respondent, had the effect of removing the respondent E from the contractual equation as far as performance under the contract was concerned. In other words, if there were to be any extensions granted by the applicant, these could only have been granted to Dr Mushonga who still carried the burden of performance under the contract.

It is therefore my finding that the granting of occupation of the property to F the first respondent by the applicant at the inception of the agreement of sale was not an indulgence as envisioned in clause 12 of the agreement of sale.

Ms *Matimati* sought to argue that the applicant waived her right to retain the premises until the date of transfer by allowing the respondent occupation of same prior to that date. In my view, waiver is not the correct legal principle applicable in this matter. Waiver is usually pleaded as a defence to an alleged G breach of a term of a contract. In that regard, the party alleging waiver will be trying to stop the other party from relying on the breach on the basis that the right to do so has been waived or abandoned.

In casu, the applicant is not alleging breach of the agreement by the first respondent at all. In fact, the applicant, correctly in my view, accepts that H the first respondent has no obligations under the contract and so cannot be in

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Makarau JP

breach of any term of the contract. I understand the applicant to be somehow A alleging ownership of the property which she seeks to vindicate from the first respondent on the basis that the invitation she extended to the respondent to occupy the property prior to transfer has now been withdrawn.

I might have found merit in the applicant's argument had I not found that the parties varied the agreement of sale as to the date of occupation of the B sold property.

In the result, I make the following order:

The application is dismissed with costs.

Ziumbe & Mtambanengwe, applicant's legal practitioners C

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

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Document 23 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/SPENCER & ANOR v MINISTER OF LANDS & ORS 2010 (1) ZLR 144 (H)

SPENCER & ANOR v MINISTER OF LANDS & ORS 2010 (1) ZLR 144 (H)

Citation	2010 (1) ZLR 144 (H)
Case No	Judgment No. HB-11-10
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	25 January 2010; 3 February 2010

Judgment 25 February 2010

Counsel Ms *N Ncube*, for the applicants
S S Mazibisa, for the third respondent
No appearance for the first and second respondents

Case Type Opposed application

Annotations Link to case annotations

Flynote

Property and real rights – *spoliation order – entitlement to – unlawful occupier of land – person occupying land which has been acquired by the State – another person receiving offer letter from the State in respect of such land – such person not entitled to deprive occupier of* D *possession – need for occupier to be lawfully evicted before holder of offer letter entitled to occupy property*

Property and real rights – *ownership – vindicatory action – need for applicant to establish ownership – action not available until ownership obtained*

Headnote

E The applicants sought a spoliation order against the third respondent, who had moved onto their farm. The farm had been expropriated by the State and allocated to the third respondent. The applicants had remained on the farm and continued farming operations beyond the periods allowed by the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. No steps had been taken by the State to have them prosecuted and evicted F in terms of the Act.

Held, that there was no doubt that the applicants were occupying, holding or using gazetted land unlawfully. They had no legal basis to occupy, hold or use the farm and living quarters and were, in law, guilty of an offence for which there are high penalties. Evicting them without following the procedure laid down in s 3(5) of the Act would, however, be G improper as the law protects even unlawful possessors. The respondents should not take the law into their own hands as such conduct cannot be countenanced or condoned. A person in possession of property, however unlawful his possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his possession H except by the due process of law, and if he is interfered with, the court

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Kamocha J

will restrain such interference pending the taking of action against him A for ejectment by those who claim that he is in wrongful possession. The fact that the applicants had no legal right to continue to live on the farm and would have no defence to proceedings for ejectment does not mean that proceedings for ejectment can be dispensed with, nor does it make any difference to the illegality of the respondent's conduct that B the occupation by the applicants carried with it penal consequences.

Cases cited

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

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

Mutsotso & Ors v Comr of Police & Anor 1993 (2) ZLR 329 (H) C

Nino Bonino v de Lange 1906 TS 120

Legislation considered

Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*], s 3

Case information

Ms *N Ncube*, for the applicants D

S S Mazibisa, for the third respondent

No appearance for the first and second respondents

Judgment

KAMOCHA J: The applicants in this matter sought and were granted a provisional order on 7 January 2010. The terms of the order are as follows: E

"Interim relief granted

Pending determination of this matter, the applicants are granted the following relief:

(1) The respondents are interdicted from taking any steps to evict applicants from the property described herein or from carrying out any building or farming operation or from removing any stock or cattle being the property F of the applicant or from introducing onto the farm any stock or cattle either owned by the third respondent or by any third party.

(2) It is ordered that until such time as the relief set out in the final order is determined the applicants and all those who occupy the farm through them are entitled to remain in peaceful and undisturbed possession of the farm and further entitled to continue farming operations on the property and the G third respondent is interdicted from taking any steps to occupy the farm either himself (*sic*) or through any agent, servant or employee or to hinder or disturb the applicant in his occupation thereof."

The third respondent has anticipated the application, seeking to have the provisional order discharged. The final order being sought by the applicants was in these terms:- H

Kamocha J

A "Terms of final order sought

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

(1) That until such time as the ownership or right to occupy the property known as Orange Grove (hereinafter called "the farm") is determined by a court of competent jurisdiction and until such time as the applicants are lawfully B evicted by such court and have exhausted all legal remedies available to them, the respondents are interdicted from evicting the applicants or from taking occupation of the farm. It is further ordered that the respondents are interdicted from interfering in any way with any of the farming operations carried out by the applicants, and from taking any steps to occupy the farm either personally or through their employees or servants or from entering the farm or placing property or employees thereon (save as may be provided C by law).

(2) That in the event that by the time this order is granted the applicants have been evicted or the third respondent has taken occupation of the farm, then it is ordered that the third respondent or any person occupying the farm through him (*sic*), be and is hereby evicted and the applicants be restored to possession thereof. D

(3) That the respondents jointly and severally, one paying the others to be absolved pay, the costs of this application."

The facts of this matter, which are common cause, may be summarized as follows. The applicants used to own Orange Grove Estate situate in the District of Bulilima (hereinafter referred to as "the farm") which was properly E acquired by Government under the Land Reform Programme in terms of s 16(B)(2)(a)(ii) of the Constitution of Zimbabwe. The notice of acquisition was published in the *Government Gazette* of 19 June 2009. The applicants are now former owners of the said farm. Section 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] (hereinafter referred to as "Chapter 20:28") stipulates what a former owner of gazetted land is entitled F to do while at the same time it lays down what he or she is prohibited from doing. The provisions are

"3. Occupation of Gazetted land without lawful authority

(1) Subject to this section, no person may hold, use or occupy Gazetted land without lawful authority.

G (2) Every former owner or occupier of Gazetted land -

(a) referred to in paragraph (a) of the definition of 'Gazetted land' in section 2(1) shall cease to occupy, hold or use that land forty-five days after the fixed date, unless the owner or occupier is lawfully authorized to occupy, hold or use that land;

(b) referred to in paragraph (b) of the definition of 'Gazetted land' in section H 2(1), shall cease to occupy, hold or use that land forty-five days after the

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2010 (1) ZLR p147

Kamocha J

date when the land is identified in accordance with section 16B(2)(a)(iii) A of the Constitution, unless the owner or occupier is lawfully authorized to occupy, hold or use that land:

Provided that -

(i) the owner or occupier of that land referred to in paragraph (b) may remain in occupation of his or her living quarters on that land for a B period of not more than ninety days after the date when the land is identified;

(ii) the owner or occupier shall cease to occupy his or her living quarters after the period referred to in proviso (i).

(3) If a former owner or occupier of Gazetted land who is not lawfully authorized to occupy, hold or use that land C does not cease to occupy, hold or use that land after the expiry of the- appropriate period referred to in subsection (2)(a) or (b) or, in the case of a former owner or occupier referred to in section 2(b), does not cease to occupy his or her living quarters in contravention of proviso (ii) to section 2(b), he or she shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period of not exceeding two years or to both such fine and such imprisonment.

(4) Any person, other than a person referred to in subsection (3), who contravenes D subsection (1), shall be guilty of an offence and liable to a fine not exceeding level seven or 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 which the offence relates." E

It is common cause that the period of 45 days permitted by the provisions of s 3(2)of Chapter 20:28 have expired and so have the 90 days permitted in terms of the proviso thereto. The applicants should have ceased to occupy, hold or use the farm. They also should have ceased to occupy their living quarters. It, therefore, admits of no doubt that they are occupying, holding F or using Gazetted land unlawfully. They have no legal basis to occupy, hold or use the farm and living quarters. They are, in law, guilty of an offence for which they are liable, on conviction, to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment. The applicants contend, however, that they can only G be removed from the farm in terms of the law, which stipulates that they should be prosecuted and on conviction the court should, in addition to the sentence imposed, issue an order to evict them from the farm and living quarters. This has not yet been done.

It is true that although the applicants are now illegally occupying, holding or using gazetted land they can only be removed therefrom through an eviction H

2010 (1) ZLR p148

Kamocha J

A order issued by the convicting court, they may not seek an interdict from a court of law to sanction the perpetuation of an illegality. The ownership of the farm that they used to own vested in the state when it was acquired. They therefore have no *locus standi* to approach the court for an interdict because they cannot establish a clear right, since upon acquisition the farm vested in the State leaving them without any rights.

B In*Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR 511 (S) Malaba JA, as he then was, had this to say at 520C-D:

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

The applicants' farming operations are unlawful and so is their occupation of the living quarters. They should not approach the court to sanction their D illegal activities on the farm. It is quite clear that they are refusing to vacate the farm in defiance of the clear provisions of the law. The authorities should have prosecuted them so that, upon conviction, an eviction order could be issued by the trial court in terms of s 3(5) of Chapter 20:28.

Evicting them without following the procedure laid down in s 3(5) of Chapter 20:28 would, in my view, be improper as the law protects even E unlawful possessors. The legislature was alive to this, which is why it laid down the procedure to be followed in order to avoid self-help and anarchy. The respondents should not take the law into their own hands as such conduct cannot be countenanced or condoned. This is a well established principle. When dealing with the principle Robinson J, in *Mutsotso & Ors* F v *Commissioner of Police & Anor* 1993 (2) ZLR 329 (H) at 333B-H, had this to say about the general principle as stated by Innes CJ in *Nino Bonino* v *de Lange* 1906 TS 120 at 122:

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

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

> "What the court is doing is to insist on the principle that a person in possession H of property, *however unlawful his possession may be and however exposed he*

Kamocha J
may be to ejectment proceedings, cannot be interfered with in his possession A except by the due process of law, and if he is interfered with the court will restrain such interference pending the taking of action against him for ejectment by those who claim that he is in wrongful possession. The fact that the applicants have no legal right to continue to live in this slum and would have no defence to proceedings for ejectment, does not mean that proceedings for ejectment can be dispensed with, nor does it make any difference to the illegality of the B respondent's conduct that the occupation by the applicant carried with it penal consequences" (emphasis added).

The learned judge went on to explain that in that case the court held that the conduct of the respondents to demolish certain premises, which were dilapidated, verminous and generally unsanitary, without legal process in order to secure the ejectment of the occupiers, constituted acts of spoliation C and they were therefore interdicted from demolishing those premises further.

The applicants *in casu* are now illegal occupiers of the farm and the living quarters and it admits of no doubt that they would have no defence at all to an action for their ejectment therefrom. But that does not mean that the respondents can interfere with their possession without due process of law. D The applicants are liable to a fine equal to level seven or to imprisonment for a period not exceeding two years. The penalty is indeed a severe one but it still does not mean that the respondents, in particular the third respondent, can just occupy part of the farm, thereby despoiling the applicants. The respondents should not take the law into their hands. That is forbidden by law and the court cannot condone that. Robinson J in the *Mutsotso* case E *supra* at 33H-334A continued thus:

> "As stated by Diemont J in *Fredericks & Anor* v *Stellenbosh Divisional Council* 1977 (3) SA 113 (C) at 117C:-
>
> 'This court is not concerned with the nature of the applicants' occupation. What it is concerned with is that the respondent should not take the law into F its own hands … Such conduct cannot be countenanced or condoned'."

The third respondent is the holder of an offer letter in respect of a portion of the said farm now known as subdivision 1 of Orange Grove. She accepted the offer on 17 December 2008. Armed with the offer letter she moved onto the farm. Whilst there she did the following:-

(a) cleared a homestead site 100 metres by 100 metres and constructed a 3 G metre security fence right round the homestead;

(b) constructed workers houses comprising two rooms of brick under galvanized iron and a one-roomed flat roof house with galvanized iron sheets;

(c) repaired a borehole and fitted a Lister pump engine and constructed a H

Kamocha J

A brick under galvanized iron sheets pump house;

(d) installed some steel water pipes from the borehole to the homestead measuring 150 metres and installed a 5 000 litre water tank;

(e) cleared a boundary line of approximately 2.5 kilometres and constructed a perimeter fence measuring 2.5 kilometers using four strand barbed B wire with steel posts strainers; and

(f) fitted a three metre steel gate and employed 10 full-time workers and some casual workers.

The third respondent did all this without due process of law. The applicants should have been prosecuted, convicted and sentenced to whatever sentences the court saw fit, plus eviction orders. The third respondent took the law into C her hands, conduct which this court cannot countenance or condone. Similarly, this court cannot grant an interdict which has the effect of perpetuating the applicants' illegal use, holding or occupation of Gazetted land. In the result I would discharge the provisional order and issue the following order:

It is ordered that: D

(1) Until the applicants are lawfully evicted pursuant to an order of a court of competent jurisdiction in terms of section 3(5) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*], the respondents are interdicted from evicting the applicants or from taking occupation of the farm; E

(2) The third respondent or any person occupying the farm through her, be and is hereby evicted and the applicants be restored to their possession thereof until they are evicted through due process of law; and

(3) The third respondent shall meet the costs of this application.

F *Webb, Low & Barry,* applicants' legal practitioners

Cheda & Partners, third respondent's legal practitioners

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Document 24 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/JOHN STRONG (PVT) LTD & ANOR v WACHENUKA (1) 2010 (1) ZLR 151 (H)

JOHN STRONG (PVT) LTD & ANOR v WACHENUKA (1) 2010 (1) ZLR 151 (H)

Citation	2010 (1) ZLR 151 (H)
Case No	Judgment HH-44-10
Court	High Court, Harare
Judge	Chatukuta J
Heard	24 February 2010
Judgment	3 March 2010
Counsel	Mrs *J B Wood,* for the applicants Respondent in person
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Costs – *litigant in contempt of court orders – award of costs on legal practitioner and client scale – award on the higher scale appropriate to give effect to the court's displeasure*

Court – *contempt of – failure to comply with court orders – what amounts* D *to contempt of court — wilful and mala fide refusal or failure to comply with court order – proceedings for contempt of court – onus of proof – belief by litigant that a court order was invalid – duty notwithstanding to obey such order until set aside an appeal or review*

Court – *contempt of – need for court to enforce its orders – appropriate punishment for contempt of court – committal to prison appropriate* E *upon failure to purge the contempt*

Practice and procedure – *parties – citation of – contempt proceedings – party not required to perform any acts or to desist from any conduct – such party need not be cited*

Practice and procedure – *application – application by a company – affidavit* F *by person purporting to represent company – such person must establish authority to represent the company – exceptions to rule – each case must depend on its merits*

Practice and procedure – *locus standi — former owner of farm acquired by the State – locus standi to bring contempt proceedings – former owner* G *having provisional order of court in his favour – locus standi deriving from the provisional order*

Headnote

Civil contempt is the wilful and mala fide refusal or failure to comply with an order of court. Before holding a respondent to have been in contempt of court, it is necessary for the court to be satisfied both that the order H

2010 (1) ZLR p152

Chatukuta J

A was not complied with and that the non-compliance was wilful on the respondent's part. Once the applicant has established that the respondent had failed to comply with the order, the onus shifts to the respondent to establish that he was not wilful and mala fide.

The applicants were the owners of a farm which had been acquired by the State and subsequently allocated to the respondent in terms of an offer B letter. Upon occupying the farm, the respondent denied the applicants access to the infrastructure on the farm. In August 2008, the applicants sought a court order allowing it peaceful and undisturbed access to the farm. The order was granted by consent. For a few months the respondent complied with the order but in December 2008, he denied the applicants C access to the tobacco barns and interfered with the tobacco curing. The applicants successfully sought a spoliation order from the court. For a few months, the respondent complied, granting the applicants access to the farm. In April 2009, however, the respondent once again denied the applicants access to the farm and again they sought the assistance of the High Court. On 4 May 2009, the court, with the consent of the D respondent, made a provisional order, the effect of which was to allow the applicants the use and access to the tobacco barns, grading sheds and the farm equipment. Notwithstanding his having consented to the granting of the provisional order, and in defiance thereof, the respondent evicted the applicants' manager and once again denied them access to the E farm. The applicants thereupon sought an order from the court placing the respondent in contempt of court.

In opposing the granting of order of contempt, the respondent raised a number of procedural points, as well as alleging that the High Court order of 4 May 2009 had been improperly obtained and thus was invalid. He submitted that the applicants lacked the locus standi, being in unlawful F occupation of the farm, to seek the contempt order and that they had failed to cite the minister responsible for the allocation of land which had been acquired by the State. He also pointed to the fact that the deponent to the applicant's founding affidavit did not appear to have authority to institute proceedings, notwithstanding that he had also been the deponent in the two previous applications in which the respondent G had consented to the grant of the order.

Held, that the applicants had merely sought to enforce the provisional order and derived their locus standi from that fact.

Held, further, that the minister responsible for lands was not enjoined in the provisional order of 4 May 2009 to perform acts or to desist from any H conduct. Therefore, he was not part of the present proceedings and need

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2010 (1) ZLR p153

Chatukuta J

not be cited as a party thereto. A

Held, further, that while it is trite that a person purporting to represent a company must establish his authority to do so, such is not always the case and each case must depend on its merits. In casu, in two of the applications, the respondent had consented to the orders granted by the court, including the order which the respondent stood accused of B defying. In these circumstances it was not necessary for the court to require such proof.

Held, further, that on the facts, it could not be said that the provisional order of 4 May 2009 was improperly obtained. But even if this was not so, a person who believes that an order is invalid must generally comply with that order. He may seek to have the order set aside by way of review C or appeal, but this, the respondent did not do. He could not, therefore, proceed as if the order did not exist.

Held, further, that declaring the respondent to be in contempt of court, that he should be committed to prison for 90 days. However, so as to compel compliance with the court's order, that period of imprisonment should be purged on condition that he complies his contempt by complying with D the provisional court order of 4 May 2009 within 48 hours.

Held, further, that so as to give effect to the court's displeasure at his behaviour, the respondent should be ordered to pay the applicants costs on the legal practitioner and client scale. E

Cases cited

Capital Radio (Pvt) Ltd v Min of Information & Ors (3) 2000 (2) ZLR 289 (H)

Direct Response Marketing (Pvt) Ltd v Shepherd 1993 (2) ZLR 218 (H)

Harare West Rural Council v Sabawu 1985 (1) ZLR 179 (H)

Lindsay v Lindsay (2) 1995 (1) ZLR 296 (S) F

Macheka v Moyo 2003 (2) ZLR 49 (H)

Scheelite King Mining Co (Pvt) Ltd v Mahachi 1998 (1) ZLR 173 (H)

Thelma Court Flats (Pvt) Ltd *v McSwigin* 1954 (3) SA 457 (C)

Whata v Whata 1994 (2) ZLR 277 (S)

Case information

Mrs *J B Wood,* for the applicants G

Respondent in person

Judgment

CHATUKUTA J: This is an application for contempt of court. The background to this application is that the applicants were the owners of Disi Farm (the farm). The farm has since been acquired by the state. The respondent was H

Chatukuta J

A issued with an offer letter for subdivision 7 (Plot 7) of the farm by the minister responsible for land resettlement on 24 June 2008. When he moved onto the plot, he locked the tobacco grading shed, the irrigation pump station and borehole, thereby denying the applicants access to the infrastructure. The applicants approached this court and on 18 August 2008, successfully obtained, in case No. HC 4110/08, an order directing the respondent to B remove the locks and desist from interfering with the applicants' peaceful and undisturbed occupation of the farm. The order was granted with the consent of the respondent.

The respondent complied with the court order until the beginning of December 2008 when he denied the applicants access to barns on the farm and interfered C with the curing of the applicants' tobacco. The applicants approached this court again on 11 December 2008 seeking an order for restoration of access to the barns. A spoliatory order was issued by Gowora J on 16 December 2008 in case No. HC 7003/08 in default of the respondent. The order was served on the respondent's wife on 12 January 2009.

It appears access to the barns was granted following the service of the order. D In April 2009, the applicant again approached this court after the respondent had again denied the applicant access to the barns and sheds and to water. On 4 May 2009 Patel J issued an order, with the consent of the respondent, in case No. HC 1916/09. The following were the terms of the provisional order:

> "1. First respondent and all those claiming occupation through him be and are E hereby ordered to forthwith restore to applicants and their employees full possession, use and access to the tobacco barns, grading sheds, workshop, office and irrigation pump station on plot 7 and all farming implements owned by applicants and located thereon so as to restore the status quo prevailing on plot 7 as at 15th April 2009.
>
> 2. First respondent and all those claiming occupation through him permit the applicants and their employees to grade their tobacco and remove it for F sale thereafter.
>
> 3. First respondent desists from threatening any of applicants workers (*sic*) or management in carrying out their normal duties.
>
> 4. First respondent shall be entitled to the full use and occupation of Plot 7, other than the structures and equipment referred to in paragraph1 and the applicants shall refrain from interfering with first respondent's farming G activities, equipment and employees on Plot 7.
>
> 5. Should the applicants or first respondent breach any provision of this order the Zimbabwe Republic Police Guruve is hereby authorized to enforce the terms of this order."

This is the order (Patel J's order) which is the subject of this application.

H The basis of this application is that the applicant averred that, in defiance of

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this order, the respondent forcibly evicted the second applicant's manager A from the office on Plot 7. He has again locked the gates to Plot 7, thereby denying the applicants possession, access to and use of workshop, barns and sheds. It is on the basis of this defiance that the applicant seeks an order of contempt.

The respondent raised three preliminary issues. The first issue is that the B minister responsible for lands should be joined to the present application. The second issue is that Robert Strong, who deposed to the founding affidavit, did not produce authority from the applicants to institute the present proceedings. The third issue is that the applicants do not have the *locus standi* to institute these proceedings as they are in unlawful occupation of the farm.

I shall deal with the first and last issues jointly, as they are linked. As the C applicants rightly observed, the remedy sought in this application is intended to ensure that the respondent, and not the minister responsible for lands, complies with Patel J's order. The order compelled the respondent to restore the status *quo ante* obtaining as at 15 April 2009 and to desist from interfering with the applicants' activities. The respondent seems not to appreciate the D import of this application. It is not an application for the confirmation of the provisional order granted in case No. HC. 1916/09. It is an application for contempt of court in which the respondent is alleged to have disregarded that provisional order. The minister responsible for lands is not enjoined in that order to perform any acts or desist from any conduct. It seems to me that the minister cannot, therefore, be part of these proceedings. E

Turning to the second preliminary issue, the applicants cannot, under the circumstances, be said to lack *locus standi* to seek the enforcement of Patel J's order. The applicants merely seek to enforce the order. They derive the *locus standi* from that order.

The last preliminary issue is that Robert Strong appears not to have the F authority to institute the present contempt of court proceedings. It is trite that a person purporting to represent a company must establish his authority to do so. See *Thelma Court Flats (Pty) Ltd* v *McSwigin* 1954 (3) SA 457 (C) and *Direct Response Marketing (Pvt) Ltd* v *Shepherd* 1993 (2) ZLR 218 (H). However, this is not always the case. Each case depends on its own merits. G See *Thelma Court Flats (Pty) Ltd* v *McSwigin supra* and *Direct Response Marketing (Pvt) Ltd* v *Shepherd supra* at 221E-222D.

It is not in issue that Robert Strong is the deponent to the founding affidavits in all the applications brought by the applicants. In two of the said applications the respondent consented to orders granted by this court. One of such order is Patel J's order which the respondent stands accused of defying. H

Chatukuta J

A *In casu*, it appears to me not proper to dismiss the application on the basis that Robert Strong has not produced the said authority. This was the position in *Thelma Court Flats (Pty) Ltd* v *McSwigin supra*. In that case, the deponent to the founding affidavit did not even go as far as Robert Strong did, to aver that he had authority to institute proceedings on behalf of Thelma Court Flats (Pvt) Ltd. He merely averred that he was a director. It appears to me that in B the present case, it is not necessary for me to require such proof. This is so in view of the previous proceedings in which the respondent consented to orders granted by this court where Robert Strong was the deponent.

I therefore find that all the preliminary issues raised by the respondent have no merit.

C I now turn to the merits of the application. Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. Before holding the respondent to have been in contempt of court, it is necessary for the court to be satisfied both that the order was not complied with and that the non-compliance was wilful on the respondent's part. See *Lindsay* v D *Lindsay* 1995 (1) ZLR 296 (S) at 299B, *Macheka* v *Moyo* 2003 (2) ZLR 49 (H), *Scheelite King Mining Co (Pvt) Ltd* v *Mahachi* 1998 (1) ZLR 173 (H) at 177H-178C. Once the applicant has established that the respondent has failed to comply with the order, the onus shifts to the respondent to establish that he or she was not wilful and *mala fide.* See Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 1 ed p 657 and E *Macheka* v *Moyo* 2003 (2) ZLR 49 at 53G-54A.

The respondent *in casu* was required under the order of Patel J to restore to the applicants and its employees full possession, use and access to the tobacco barns, grading sheds, workshop, office and irrigation pump station on Plot 7. The respondent was allowed in the order to the full use and occupation of F the plot other than the structures and equipment referred to above.

The applicants averred that the respondent is in wilful defiance of the order in case No. HC 1916/09 in that he forcibly evicted the second applicant's manager from the offices, on Plot 7 and locked out the respondent from that plot and thereby denied them possession, use and access to the infrastructure on the plot. The applicants approached the Deputy Sheriff for assistance to G enforce the order. The respondent denied the Deputy Sheriff access to the plot. The applicants attached a supporting affidavit from the Deputy Sheriff.

The respondent contended that he has complied with the court order and the applicants have moved off the plot on their own accord. He averred that the applicants requested that they remove their property and he allowed them to H do so. He further averred that he gave the applicants access but later denied

Chatukuta J

them the same when they vandalised the property. A

The respondent further stated that the offer letter issued to him entitles him to own and control the entire infrastructure on Plot 7. He intended to use the facilities for storing his beans, sunflower and seed maize and curing his tobacco. He further stated in the opposing affidavit that the order by Patel J was not properly obtained, as the order by Gowora J in case No. HC 7003/09 B was then extant. He stated that the order by Gowora J was granted on the understanding that the applicants would move from the farm by 15 April 2009 when the order would take effect. He refuted the allegations that he denied the Deputy Sheriff access onto Plot 7. He stated that it is the applicants who denied the Deputy Sheriff access and that the Deputy Sheriff was bribed by one Tob Strong to depose as she did in the supporting affidavit. C

The respondent's explanation of what transpired is contradictory. In one instance, he stated that when the applicants moved off the plot, they removed their property from the plot on their own accord. In the next breath, he confirmed that he allowed the applicants access to remove their property for a limited period but later denied them further access because they were D vandalizing the infrastructure on the plot.

It appears that the access referred to by the respondent is access which was granted the applicants in terms of an order issued by Karwi J on 2 November 2009 in case No HC 5270/09. The order by Karwi J was issued following an urgent chamber application filed by the applicants on 29 October 2009. E The applicants had again approached this court seeking firstly, the setting down of the

present application urgently because of continued defiance of the order by Patel J and secondly, claiming the return of movable property that the respondent had unlawfully taken or denied them access to.

It is evident from the opposing affidavit and heads of argument that the respondent is under the impression that, because he has an offer letter, he F owns all the buildings on the farm and the applicants do not have any claim irrespective of the orders that have been issued by this court. He even stated in para 5 of his heads of argument that he does not have a legal duty to allow the applicants use of the infrastructure on Plot 7. Despite having consented to the order by Patel J, he still does not believe that he must comply with it. He G believes that the order was improperly obtained. It is difficult to comprehend the basis upon which that belief is founded considering that he consented, in person, to the granting of that order.

The applicants conceded in the founding affidavit that the order would subsist until 15 April 2009. The understanding when the order was granted was that thereafter, the applicants would seek a formal lease to use the H

Chatukuta J

A barns and facilities on Plot 7 from the Ministry of Lands, Agriculture and Resettlement. The applicants, however, continued with the use of the infrastructure until they were again locked out by the respondent leading to the application before Patel J. Whilst the understanding between the parties before Gowora J is conceded by the applicants, the fact still remains that after 15 April 2009, the applicants were issued with an order to continue to B possess and use the infrastructure on Plot 7. As indicated earlier, the order was issued with the consent of the respondent and therefore cannot be said to have been improperly obtained.

Assuming that I have erred in holding that the order was not improperly obtained, a person who believes that an order is invalid must generally C comply with that order. He may seek to have the order set aside by way of review or appeal. See *Capital Radio (Pvt) Ltd* v *Minister of Information & Ors* 2000 (2) ZLR 289 (H) at 293C-F and *Whata* v *Whata* 1994 (2) ZLR 277 (S) at 281G-282A. The respondent did not seek to have the order set aside. He therefore cannot proceed as if the order does not exist.

D The respondent's conduct, in my view, not only demonstrates that he has willfully disobeyed a court order but that he has also acted *mala fide*. The applicants have had to approach this court in four different cases over the past two years in order to assert their rights against respondent. In two of the cases, which include, the case in which Patel J granted the order in issue, orders were granted with the respondent's consent, yet he has still proceeded E to defy those orders. The applicant has not been able to obtain compliance of the order by Patel J through the normal execution process set out in the rules. The respondent has even denied the Deputy Sheriff access to Plot 7. This is an demonstration of utter disdain of a court order. Court orders must be respected and obeyed. It is the responsibility of this court to ensure that its F orders are ordered. It appears to me that this is one of those instances where the court must ensure compliance with its order by ordering the committal of the respondent. Any lesser penalty would not adequately reflect the court's displeasure at the respondent's conduct.

It is trite that the primary object of contempt procedure is to compel compliance with the court's orders. It is for this reason, that I will suspend the order G of committal to prison to afford the respondent an opportunity to purge his contempt. See *Harare West Rural Council* v *Sabawu* 1985 (1) ZLR 179 (H) at 183D; *Lindsay* v *Lindsay* (2) 1995 (1) ZLR 296 (S) at 299F, *Scheelite King Mining Co (Pvt) Ltd* v *Mahachi (supra*) at 178D and *Macheka* v *Moyo (supra*) at 51C.

H The applicants asked for costs on a higher scale. It was contended that the

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Chatukuta J

applicants have had to approach this court on numerous occasions because A of the respondent's defiance of court orders. This has resulted in additional and unwarranted expenses to the applicant. The court has been asked to express it displeasure by awarding costs on a higher scale. I am persuaded by the applicants' submissions. An award of costs on a higher scale is justified under the circumstances. B

Mrs *Wood*, for the applicants, conceded, and rightly so, that the applicants have not justified their prayer that the noting of appeal against my order should not suspend the operation of the order. It is therefore not necessary to make any determination on their prayer in this regard.

In the result, it is ordered that:

1. The respondent be and is hereby declared to be in contempt of this court.
2. The respondent be and is hereby committed to prison for a period of 90 days.
3. The order for committal be and is hereby suspended on condition that the respondent purges his contempt by complying with the order given in this court in case No. HC1916/09 on 4 May 2009 within 48 hours of the service of this order.
4. The respondent shall pay the costs of this application on a legal practitioner and client scale.

Venturas & Samkange, applicants' legal practitioners

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Document 25 of 62

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GWIRIRI v HIGHFIELD BAG (PVT) LTD 2010 (1) ZLR 160 (H)

Citation	2010 (1) ZLR 160 (H)
Case No	Judgment no. HH-20-10
Court	High Court, Harare
Judge	Chitakunye J
Heard	18 May 2009; 21 May 2009; 22 May 2009
Judgment	3 March 2010
Counsel	*G Mhlanga,* for the plaintiff *N Moyo,* for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Damages – *assessment – damages resulting from personal injuries – loss of amenities – meaning of – factors to be considered – loss of earnings – factors to consider – plaintiff not rendered completely helpless – duty to use remaining faculties and to mitigate his loss by engaging in meaningful activity*

Headnote

The plaintiff claimed damages for pain and suffering, loss of amenities and loss of future earnings after he had effectively lost the use of his right hand during an accident at work. The accident was caused by the negligence of his employer.

Held, that the concept of the loss of amenities of life has been tersely but aptly defined as a diminution in the full pleasure of living. The amenities of life may further be described as those satisfactions in one's everyday existence which flow from the blessings of an unclouded mind, a healthy body, and sound limbs. The amenities of life derive from such simple but F vital functions and faculties as the ability to walk and run; the ability to sit or stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Factors that may influence the amount to be awarded include the age and sex of the injured person, as well as the disfigurement and its influence on the plaintiff's personal and G professional life: for instance, how many of the activities he was able to do or participate in is he still able to, or has he been incapacitated and what did those activities mean in his life?

Held, further, that the assessment of an appropriate award for loss of earnings is not as easy as just multiplying figures based on the plaintiff's previous H earnings. There are several contingencies that must be taken into account.

2010 (1) ZLR p161

Chitakunye J

As a starting point it is important, wherever possible, to deal with the matter A on an arithmetical, actuarial basis as opposed to a "gut feeling" basis. While the court will generally have a regard to arithmetical calculation and to actuarial evidence of probabilities to assist it in its assessment, ultimately it must decide whether the results of such calculations and evidence accord with what is a fair and just award in each particular case. B It is a fact of life that it is not in every case that one reaches retirement age. The probabilities or possibilities of early retirement or retirement due to ill-health from natural causes, retrenchment and discharge by employer on other grounds have to be considered.

Held, further, that *in casu* the plaintiff was not rendered useless by the disability. What has been rendered of not much use was the right hand. C His other limbs, his mental faculties and other abilities were unaffected by the injury. He should be in a position to learn how to effectively use the one remaining hand and embark on another career, which he did not seem to have done. Damages of the nature sought could not sustain him. He was not useless or hopeless. He had to mitigate his loss by engaging in meaningful activities. Due to the fact that he would be using one D arm, there would be limits to the nature and extent of the employment or activities he could engage in. It is that deficiency or limitation that must be compensated by an award for loss of earnings.

Cases cited E

Administrator-Gen, South West Africa & Ors v Kriel 1988 (3) SA 275 (A)

Chamunorwa v Soweto & Anor HH-212-93

de Klerk & Ors v Makwiro HH-31-92

Mabvoro & Anor v Muza HH-199-85

Marufu v Mawona & Ors 1996 (1) ZLR 593 (H)

Min of Defence & Anor v Jackson 1990 (2) ZLR 1 (S) F

Rusike v Tenda Transport (Pvt) Ltd & Anor 1997 (1) ZLR 495 (H)

Santam Ins Co Ltd v Paget (1) 1981 ZLR 73 (A)

Legislation considered

National Social Security Authority (Accident, Prevention and Workers' G Compensation Scheme) Notice 1990 (SI 68of 1990), ss 8 & 9(1),(2) & (3)

Case information

G Mhlanga, for the plaintiff

N Moyo, for the defendant H

2010 (1) ZLR p162

Chitakunye J

Judgment

A **CHITAKUNYE J:** The plaintiff is a former employee of the defendant. The defendant is a duly incorporated company in terms of the laws of Zimbabwe.

The plaintiff was employed by the defendant from 1990 to 2006. He was employed as a Cibra Machine Operator. Later he was assigned to work as an Assistant Tapeline II Machine Operator.

B On the 19 to 20 April 2006 the plaintiff was involved in a workplace accident. His right hand was trapped between machine rollers of the tapeline II machine as he tried to insert some broken plastic strands. He sustained a crushed right hand assessed at 65 per cent disability. After the accident he was taken to hospital. He remained hospitalised from 20 April 2006 to 4 September 2006. Upon discharge from hospital he was later discharged from employment on C medical grounds with effect from 1 June 2007.

As the defendant was a contributor to the National Social Security Authority Scheme (hereinafter referred to as NSSA), relevant documents were completed and the plaintiff was awarded compensation in terms of the NSSA scheme.

Upon receipt of the compensation the plaintiff approached his employer for D more compensation as he stated that the compensation from NSSA was too little. The defendant declined to compensate the plaintiff, contending that he had been adequately compensated in terms of the NSSA scheme.

The plaintiff being dissatisfied sued the defendant in this court for more compensation in the form of damages. The plaintiff alleged that the accident E was caused by the negligence of the defendant. The particulars of negligence he alluded to were that:

1. the defendant compelled the plaintiff to operate the Tapeline II Machine of which he had no requisite knowledge of its operation since he was a novice at that time F
2. the defendant failed to provide safe working conditions for the plaintiff
3. the defendant did not take the necessary steps to avoid such a happening as the machine had no emergency devices at all, regardless of being informed on innumerable times that the machine was faulty.

The plaintiff's employment was terminated as the defendant contended he G could not continue working with one arm.

The plaintiff's claim, as amended on the date of trial was for:

(a) Payment of USD30 000, being damages for loss of future earnings

(b) Payment of USD10 000, being damages for pain and suffering; and

(c) Payment of USD60 000, being damages for permanent disfigurement H and loss of amenities of life

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(d) Costs of suit A

The defendant denied liability and contended that it was the plaintiff's negligence that led to the accident in question.

In its plea, the defendant contended that the plaintiff had been operating similar machines throughout the 10 years or so of his employment with the defendant. The defendant went on to say the plaintiff had been operating B this particular Tapeline II Machine for more than a year.

In para 3 of its plea the defendant stated that:

> "… At the time of the accident the plaintiff was employed as an operator on the Tapeline II Machine and had been employed in that capacity for more than a year." C

The defendant further stated that the working conditions were totally safe and the plaintiff had been trained in work and safety procedures. Shortly before the accident he had in fact attended and participated in a safety training workshop at the workplace which was conducted by NSSA. Further, the defendant stated in its plea that the Tapeline II Machine in question had and still has cut off switches at a very accessible level, which the plaintiff D should have used to stop the machine when

the plastic strand broke instead of inserting his hand into moving machinery. When his hand got trapped the plaintiff should have used this cut off switch to stop the machine.

The machine had never been faulty and neither the plaintiff nor his assistant had ever notified anybody that the machine was faulty. As far as the defendant E is concerned therefore, it was the plaintiff's own negligence which led to him being injured. The plaintiff also contravened laid down work procedure and safety rules by inserting his hand into the moving rollers to try and reconnect the plastic strand leading to his hand being trapped in the rollers.

It was the defendant's further contention that the plaintiff had no claim at common law as the plaintiff was compensated fully in terms of Zimbabwean F law and there was no further claim for damages. The defendant also disputed the quantum of damages as claimed by the plaintiff.

The issues for determination were identified as:

1. Whether the plaintiff was a Tapeline II Machine Operator or was asked to do a job he was not familiar with G
2. Whether or not the injury suffered by the plaintiff was a result of the defendant's negligence.
3. Whether there is any basis at common law on which the defendant could be liable to the plaintiff for damages.
4. What is the quantum of damages, if any? H

Chitakunye J

A The plaintiff gave evidence and called two witnesses, Mr Themba Mazvipunza and Mr Tawanda Murindi. Two defence witnesses, Mr Reginald Takura Kawonza and Mr Chrispen Singe, thereafter gave evidence.

A number of documentary exhibits were tendered into evidence. In an effort to acquaint the court with the machine in question an inspection *in loco* B was conducted during which the operations of the machine were explained segment by segment. The position where the plaintiff was operating from was shown together with the rollers that trapped his hand.

Issues

1. *Whether the plaintiff was a Tapeline II Machine Operator or was asked to do a job he was not familiar with.*

C The plaintiff's evidence was to the effect that he was not a Tapeline II Machine Operator. He was a Cibra Machine Operator. He was assigned to go and work at the Tapeline II Machine as an assistant to Themba Mazvipunza in March 2006 when there was a shortage of raw materials for his Cibra Machine.

He categorically denied the defendant's contention that he started working D as Assistant Tapeline II Machine Operator in August 2005. He maintained that he was only assigned to assist Themba Mazvipunza in March 2006.

As Assistant Tapeline II Machine Operator, his duties comprised taking job cards to the workshop, mixing the material used to make plastics and pouring the mixture into the hooper. He would also be sent by the operator E on errands. He was very clear that his duties did not include operating the machine as the operator.

Mr Themba Mazvipunza gave evidence next. He was the Tapeline II Machine Operator. His evidence was to the effect that the plaintiff was not a Tapeline II Machine Operator, but a Cibra Machine Operator. He confirmed the F plaintiff's evidence on the circumstances that led to the plaintiff joining him on the Tapeline II Machine.

He also confirmed that the plaintiff was assigned to assist him in March 2006 and not in August 2005. The plaintiff was thus his assistant from March 2006 to 19 April 2006. During that period the plaintiff had not worked as an operator of the Tapeline II Machine but only as his assistant.

G Mr Themba Mazvipunza further confirmed that there was no formal training given to the plaintiff. Whatever the plaintiff learnt was by observing what Themba Mazvipunza was doing.

It is clear from the plaintiff's evidence and that of Mr Mazvipunza that, at the time the plaintiff was asked to operate the Tapeline II Machine, he had H not received any training as a Tapeline II

Machine Operator. He had merely

Chitakunye J

been an assistant to Themba Mazvipunza for a few weeks. A

The defendant's contention on this aspect was without support. Mr Reginald Takura Kawonza, the defendant's Human Resources Officer, gave evidence. Unfortunately as he confirmed himself, at the time of the accident he was not yet employed by the defendant. He thus had no first hand evidence on the events in question. He could not confirm that the plaintiff was a Tapeline B II Operator. He did not produce any documentary proof of the plaintiff's status at the time of the accident.

The defendant's second witness was Chrispen Singe, also known as Nyikadzino. He was the plaintiff's supervisor. As a supervisor he exercised some authority over the plaintiff. Mr Singe's evidence was to the effect that the plaintiff was assigned to work as Themba Mazvipunza's assistant on the C Tapeline II Machine in August 2005.

He confirmed that there was no formal training for the job but one had to train on the job by observing what the Tapeline II Machine Operator was doing. Though Mr Singe insisted that the plaintiff was assigned as assistant to Themba Mazvipunza in August 2005, he could not produce any evidence D to confirm the date of the assignment. It thus remained a question of his word against that of the plaintiff and Mr Mazvipunza. On the status of the plaintiff at the time of the accident, Mr Singe confirmed what both the plaintiff and Mr Mazvipunza said that he was an assistant Tapeline II Machine Operator. The night of the incident was his first time to act as the operator of the Tapeline II machine. E

Mr Singe's evidence contradicted the defendant's defence as depicted in the plea and summary of evidence in some material ways. Firstly, on the status of the plaintiff; whilst in the plea and summary of evidence the defendant contended that the plaintiff was employed as a Tapeline II Operator, Mr Singe confirmed the plaintiff's assertion that he was an assistant Tapeline II operator. F

Secondly, whilst in its plea the defendant contended that the plaintiff had been operating similar machines throughout the 10 years of his employment with the defendant, Mr Singe did not support this contention. Mr Singe said the plaintiff only started working at the Tapeline II Machine in August 2005 as an assistant to Mr Themba Mazvipunza. The machine that the plaintiff G had been operating prior to that was a Cibra machine. That machine was in no way similar to the Tapeline II machine.

The inspection *in loco* revealed that the Cibra machine was a much simpler machine comprising one station, whereas the Tapeline II machine is a heavy duty machine with several segments operating at the same time. It is no doubt a much more complicated machine than the Cibra machine. H

Chitakunye J

A According to the defendant's summary of evidence, Mr Singe was to come and say that the plaintiff was in fact the substantive operator of the Tapeline II machine and he had no assistant. The person who had gone for a funeral was working on a different machine altogether.

Unfortunately Mr Singe's evidence was not to that effect. He in fact confirmed B that the substantive operator of this machine was Mr Themba Mazvipunza with the plaintiff as his assistant. It is Mr Themba Mazvipunza who had gone for a funeral thus leaving the plaintiff alone at the machine.

In the summary of evidence it was contended that there existed laid down procedures and safety regulations that the plaintiff contravened. Mr Singe did not confirm this. He could not tender any such laid down procedures C and safety regulations that the plaintiff had been trained in when operating the Tapeline II machine.

The inconsistencies and contradictions between Mr Singe's evidence and the defendant's plea and summary of evidence creates doubt about the veracity of the defendant's version of events. Mr Singe was the defendant's D key witness, yet his testimony was materially different from the defendant's plea and summary of evidence. It is thus difficult to rely on Mr Singe's evidence or the defendant's evidence, especially were it conflicts with the plaintiff's evidence.

On issue number one, it appears common cause from all who testified on it E that the plaintiff was not a Tapeline II Machine operator.

2. *Whether he was asked to do a job he was not familiar with.*

That should follow from the above finding.

The plaintiff had never operated the machine in question. He had not received any formal training. The person who was expected to have trained him on the F job, Themba Mazvipunza, confirmed that no formal training had occurred. The few weeks the plaintiff worked with Mr Mazvipunza were spent as an assistant Tapeline II Operator performing duties expected of an assistant.

Mr Singe did not say there was any time the plaintiff was trained to be a Tapeline II Machine Operator neither did he ever witness the plaintiff G operating the machine as the operator. Thus, even from the defendant's evidence, there was no concrete evidence to rebut the assertion that the plaintiff was not familiar with the job of a Tapeline II Machine Operator. From the evidence adduced, I am inclined to believe the plaintiff when he said that he did not volunteer to operate the machine. The probabilities are that he could not have volunteered to operate a machine he had never H operated before. Mr Singe, as the supervisor, had authority over him and so

Chitakunye J

when his initial refusal was turned down the plaintiff proceeded to do the A job as instructed by the supervisor. He had to comply with the order of the supervisor, more so as he knew that the supervisor had consulted another senior person. It was thus not proper for Mr Singe to order the plaintiff to operate the machine in the circumstances.

3. *The next issue is whether or not the injury suffered by the plaintiff was* B *a result of the defendant's negligence.*

The defendant contended that it was not negligent at all. It is the plaintiff who was negligent in attempting to insert the broken plastic strands in between the rollers when the machine was in motion.

The plaintiff, on the other hand, said that he was not negligent at all. C

It should be apparent from my findings on the first issue that the plaintiff was a novice in the operations of the machine in question. The plaintiff had only been the assistant to Themba Mazvipunza for about 5 weeks. He had not received any training on how to operate the machine. All he had learnt was from observing Mr Mazvipunza operating the machine whilst he performed D his duties as an assistant.

During these operations he had observed Mr Mazvipunza connect and insert broken plastic strands into the rollers without first stopping the machine.

That novice operator was assigned a novice assistant operator, Mr T. Murindi. Mr Murindi confirmed that he had not worked on the machine before and so he did not know much about this particular machine. There was no denying E that Mr Murindi had not been trained or even been introduced to the safety procedures and emergency devices on this machine. It was thus a tale of two novices being ordered to operate the Tapeline II Machine which they were clearly not familiar with.

Since the plaintiff had seen Mr Mazvipunza reconnect or insert the broken F plastic strands into the rollers without first stopping the machine, he proceeded to do the same.

Mr Mazvipunza in his evidence confirmed that he would connect the broken plastic strands whilst the machine was in motion, just as the plaintiff had tried to do. He would only stop the machine when a lot of the strands broke. In G cases of only 1 or 2 strands breaking he did not stop the machine to connect the strands.

It was in a bid to do what he had seen Mr Mazvipunza doing, inserting the broken strands in the rollers whilst the machine was in motion, that the plaintiff's overall was trapped on the arm. When this happened a fellow novice who had no clue about the safety or emergency device of the machine, H

Chitakunye J

A was expected to switch off the machine.

The plaintiff indicated that at the time of the accident no emergency switch was in place and within reach. Though Mr Singe indicated that there was such an emergency device within reach, the inspection *in loco* confirmed that the one he referred to could not effectively and swiftly turn off the machine.

B It needed to be wound for sometime before it could stop the machine. It also needed to be wound by someone who had knowledge about its operations.

In casu, both the plaintiff and Mr Murindi were not shown to have been trained in its effective use. A more effective emergency device was only put in place after the accident.

C A number of scenarios maybe observed.

Had Mr Singe not ordered the plaintiff to operate a machine he was not familiar with, probably the accident would not have occurred. Equally had the defendant put protective bars, as it has now done on the rollers, the plaintiff would not have had his hand trapped by the rollers. It may also be said that had the plaintiff been trained on the operation of the machine and D on the dangers associated with the machine he would probably not have been tempted to do as he had seen Mr Mazvipunza doing.

It is also apparent that had the defendant installed a more effective emergency stop device and ensured that only trained personnel worked on that machine, either the plaintiff or Mr Murindi could possibly have stopped the machine E as soon as the plaintiff's hand was trapped.

I thus conclude that the defendant was negligent. It is that negligence that caused the plaintiff to be injured.

4. *The next issue is whether there is any basis at common law on which the defendant could be liable to the plaintiff for damages.*

F The defendant contended that the plaintiff had no claim against the defendant at common law as the injury occurred in the course of the plaintiff's employment with the defendant and the plaintiff was fully compensated in terms of the Zimbabwean law.

In their addresses, counsel for both parties referred to compensation schemes in terms of the National Social Security Authority Act [*Chapter 17:04*]. G The National Social Security Authority (Accident, Prevention and Workers Compensation Scheme) Notice 1990 (SI 68 of 1990), hereinafter referred to as the Notice, sets out the compensation payable in the event of the death or injury of an employee.

The defendant's contention was based on s 8 of the Notice. That section H states that:

Chitakunye J

"From and after the 1st January, 1960 A

(a) no action at common law shall lie by a worker or any dependant of a worker against such worker's employer to recover any damages in respect of any injury resulting in the disablement or death of such worker arising out of and in the course of his employment; and

(b) no liability for compensation shall arise save under and in accordance with this scheme in respect of such disablement or death; …" B

The plaintiff, on the other hand, argued that his case was for additional compensation as provided for under s 9 of the Notice, as the employer was negligent.

Section 9(1) of the Notice states that:

"Notwithstanding anything to the contrary contained in this Scheme if a worker C meets with an accident which is due –

(a) to the negligence –

(i) of his employer; or

(ii) of a person entrusted by his employer with the management or in charge of such employer's trade or business or any branch or department thereof; or D

(iii) of a person having the right to engage or discharge workers on behalf of his employer; or

(b) to a patent defect in the condition of the premises, works, plant or machinery used in such trade or business, which defect his employer or any person referred to in paragaph (a) has knowingly or negligently failed to remedy or caused; E

the worker or, in the case of his death as a result of such accident, his representative, may, proceed by action in a court of law against his employer:

Provided that in the case of an action in which the employer and the general manager are joined, nothing in this section shall be construed to mean that any compensation awarded under this section is payable by the employer". F

In casu, it is common cause that the plaintiff was paid the compensation ordinarily payable under the scheme.

It was after that, that he approached his employer for more compensation as he deemed the compensation paid inadequate. He also alleged negligence on the part of his employer. G

In his correspondence to his employer dated 31 July 2007 and 25 September 2007 (exhibits 9 and 12 respectively) he made it clear the employer was at fault in forcing him to operate a machine he was not familiar with with another person who was also new to the machine. In his level of English he wrote thus:

"It was caused by some illegitimate inference of management which forced me H

Chitakunye J

A to operate a machine which I was not great at".

(See para 1 of exhibit 12)

It is clear from the correspondence that what the plaintiff was seeking was additional compensation due to the employer's negligence.

In order for the plaintiff to be entitled to such additional or further B compensation, he must show that his case falls within the provision of s 9 of the Notice, that is that the employer was negligent in one or more of the ways stated therein.

The plaintiff based his claim on the negligence of the employer as provided for in s 9(1)(c)(i) and also on the fact that the machine was not safe because C it did not have emergency stop devices.

When ruling on the second issue, I found the defendant to have been negligent. The question of the lack of emergency stop devices on the machine was quite evident.

Whilst the defendant contended that there was an emergency switch, even as on the date of the accident, that switch as observed during the inspection D *in loco* was not that effective.

The report by the Inspector of Factories, Mr Marufu, dated 12 March 2008, confirmed as much. That report shows that the safety provisions on the machine were highly inadequate. Mr Marufu made a number of findings which included that: E

"1. The machine had no emergency switch-off button.

2. Nip points of the machine were not guarded

3. The operator was not trained on the safe procedure of the machine".

Those findings were consistent with the plaintiff's evidence on the lack of an emergency switch-off device and lack of training. The lack of an emergency F switch-off device was something that the employer was well aware of as confirmed by Themba Mazvipunza. The employer had nevertheless not seen fit to attend to the issue. The appropriate emergency stop devices were only put in place after the accident.

Section 9(2) of the Notice provides that:

"If the court is satisfied that the accident was due to any such negligence or defect G as is referred to in subsection (1), it shall award the applicant such additional compensation as it would deem equitable to award as damages in an action at common law".

It is my view that in this case I am satisfied that the plaintiff is entitled to be awarded damages.

Chitakunye J

5. *The next issue is the quantum of such damages* A

Quantum of Damages

The plaintiff's claim for damages is under three headings, namely:

(a) Loss of future earnings USD30 000

(b) For pain and suffering USD10 000 B

(c) Permanent disability and loss of amenities of life USD60 000.

As the damages are being considered in terms of s 9 of the Notice the provisions of s 9(3) of the Notice are pertinent. That subsection states that:

> "In making any award under this section the court shall have regard to the amount of compensation which has been paid or in the court's opinion will be paid under other provisions of this Scheme" C

I will thus consider the fact that the plaintiff was paid compensation and is expected to be receiving monthly compensation. It is not clear how much he will be paid as he said only last week he received USD20 after several months of waiting. He was not advised for what period that USD20 covered.

In considering the three heads I will consider the loss of future earnings last. D

(b) Pain and suffering

In *The Law of Delict* P Q R Boberg Vol 1 (1984) at p 516, the learned author had this to say about the remedy for pain and suffering:

> "Compensation may be awarded not only for actual physical pain but also shock, discomfort and mental suffering, disfigurement, loss of amenities of life and E disability; and loss of expectation of life. For convenience we speak simply of 'pain and suffering', but the concept embraces all these non-pecuniary misfortunes – past and future – of an injured person. Nor is the list a closed one".

By virtue of its description, it is not an easy task to provide for pain and suffering in monetary terms in an exact manner. There is no hard and fast rule by which the various aspects constituting pain and suffering can be F measured to come up with an exact figure.

The "pain and suffering" experienced by each individual varies. No two people can experience the same level of such pain and suffering. This makes it hard to rely on past cases with any certainty except as general guidelines.

Indeed in *Minister of Defence and Another* v *Jackson* 1990 (2) ZLR 1 (S) G Gubbay JA (as he then was) had this to say at p 7.

> "It must be recognised that translating personal injuries into money is equating the incommensurable money cannot replace a physical frame that has been permanently injured. The task of assessing damages for personal injury is one of the most perplexing a court has to discharge".

The learned judge went on to highlight eight broad principles that should H

Chitakunye J

A guide a court in assessing such damages.

These include that:

"1. General damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrong-doer.

2. Compensation must be so assessed as to place the injured party, as far as possible, in the position he would have occupied if the wrongful act causing B him the injury had not been committed. See *Union Govt* v *Warnecke* 1911 AD 651 at 665.

3. Since no scales exist by which pain and suffering can be measured, the *quantum* of compensation to be awarded can only be determined by the broadest general considerations. See *Sandler* v *Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199. C

4. The court is entitled, and it has the duty, to heed the effect its decision may have upon the course of awards in the future. See *Sigournay* v *Gillbanks* 1960 (2) SA 552 (A) at 555H.

5. The fall in the value of money is a factor which should be taken into account in terms of purchasing power, 'but not with such an adherence to mathematics as may lead to an unreasonable result': *per* Schreiner JA in D *Sigournay's* case, *supra,* at 556C See also *Southern Insurance Association Ltd* v *Bailey NO* 1984 (1) SA 98 (A) at 116B-D, *Ngwenya* v *Mafuka* S-18-89 (not reported) at p 8 of the cyclostyled copy.

6. No regard is to be had to the subjective value of money to the injured person, for the award of damages for pain and suffering cannot depend upon or vary according to whether he be a millionaire or a pauper. See *Radebe* v E *Hough* 1949 (1) SA 380 (A) at 386.

7. Awards must reflect the state of economic development and current economic conditions of the country. See *Mair's* case *supra* at 29H; *Sadomba* v *Unity Insurance Co Ltd & Another* 1978 RLR 262(G) at 270F; 1978 (3) SA 1094 (R) at 1097C; *Minister of Home Affairs* v *Allan* 1986 (1) ZLR 263 (S) at 272. They should tend towards conservatism lest some injustice be done F to the defendant See *Bay Passenger Transport Ltd* v *Franzen* 1975 (1) SA 269 (A) at274H.
8. For that reason, reference to awards made by the English and South African courts may be an inappropriate guide since conditions in those jurisdictions, both political and economic are so different".

See also *Marufu* v *Mawona & Ors* 1996 (1) ZLR 593 (H), *de klerk & Ors* G v *Makvura* HH-31-92.

In casu, the plaintiff went through shock and excruciating pain as his hand was being crushed by the rollers. He cried in much pain but his assistant could not switch off the machine. The machine had to be stopped by workers summoned from another section who had to break a chain as the machine H would not respond to any of the switches. That must have been an agonizing

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experience. It is one that adversely affects one's mental faculties, to watch A one's hand being crushed. Thereafter the plaintiff was hospitalised from 20 April 2006 to 4 September 2006. Whilst in hospital he was in pain as well. For all this pain and suffering the plaintiff claimed a sum of USD10 000.

Previous awards in this jurisdiction were in Zimbabwean dollars. With the advent of the use of multi-currencies the previous awards in Zimbabwean B currency may not be very useful. They are nevertheless a guide.

In *Minister of Defence & Another* v *Jackson (supra*) the plaintiff was a 26 -year-old medical doctor. He suffered a shortened leg, loss of smell, double vision, memory loss, laboured speech, and emotional instability. He was awarded $35 000 for pain and suffering, loss of amenities and disfigurement. C

In *Chamunorwa* v *Soweto & Another* HH-212-93, a 50-year-old woman was injured. She had metal plates put in her arm, and she was left with facial scars. She suffered a 40 per cent disability. She was awarded $15 000 for shock, pain and suffering, and loss of amenities of life.

In *Marufu* v *Mawona & Others (supra*) the plaintiff suffered injuries to D his limbs. Both his lower legs and the right femur were broken. The bones protruded. Pins were inserted in both legs. His right leg was now shorter than the other and he had to wear special shoes. He suffered 40 per cent disability. He was awarded $50 000 (Zimbabwean dollars) for pain suffering and loss of amenities of life.

In *Mabvoro & Another* v *Muza* HH-199-85 the two plaintiffs were injured E in a road traffic accident. They were husband and wife. The husband was aged 30 years and the wife 24 years. The husband suffered a fracture of the left leg below the knee and at the right wrist. He sustained serious cuts and bruises and was unconscious for some hours. He was hospitalised for two weeks. He was awarded $15 000 (Zimbabwean dollars) for pain and F suffering, loss of amenities and disfigurement.

The wife had fractures in both legs above the knees and a malunion of the other bone in the right leg which was ¾ of an inch shorter than the left. She also had recurrent pain in her legs for the rest of her life. She was awarded $20 000 (Zimbabwean dollars) for pain and suffering, loss of amenities and G disfigurement.

The awards were all in Zimbabwean dollars. It is not easy to translate that into United States dollars, more so currently when the real value of the United States dollar does not seem to be well appreciated. What is clear is that in the periods above the United States dollars was generally stronger than the Zimbabwean dollar. H

A Going by the above awards, which were not just for pain and suffering, it should be apparent that $10 000 US dollars for pain and suffering only is rather high. The award should not be punitive but compensatory for pain and suffering.

It is not in dispute that the plaintiff suffered pain as the rollers crushed his hand. It is also not disputed he was hospitalised. Even after discharge from B hospital it was not disputed that the hand had not completely healed. The pain and discomfort continued. I am of the view that a sum of US$3 000 would be adequate compensation for pain and suffering.

(c) Permanent disability and loss of amenities.

Under this heading the plaintiff claimed US$60 000.

C The disability that the plaintiff suffered is the loss of part of his right hand, as this was crushed. He has thus lost the use of his right hand. This is a disability he will have to live with for the rest of his life.

The concept of loss of amenities is not an exact concept. In *Administrator-General, South West Africa & Ors* v *Kriel* 1988 (3) SA 275 (A) at 288D-G D Hoexter JA had this to say about this concept:

> "The concept of the loss of amenities of life has been tersely but aptly defined by Lord Devlin in *H West and Son Ltd* v *Shephard* [1963] 2 All ER 625 (HL) at 636G-H as:
>
> 'a diminution in the full pleasure of living'
>
> The amenities of life may further be described, I consider, as those satisfactions E in one's everyday existence which flow from the blessings of an unclouded mind, a healthy body, and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to walk and run; the ability to sit or stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Upon all such powers individual human self sufficiency, happiness and dignity are undoubtedly highly dependent".

F Factors that may influence the amount to be awarded include the age and sex of the injured person and the disfigurement and its influence on the plaintiff's personal and professional life. For instance, how many of the activities he was able to do or participate in is he still able to or has he been incapacitated, and what did those activities mean in his life?

G The plaintiff indicated that he is right-handed and so the loss of the use of his right hand was devastating. He now has to learn to use the left hand. He is no longer able to participate in any activities that require the use of both hands. The disfigurement is visible and he will have to live with that discomfort. As far as employment is concerned he can no longer be employed where H the use of both hands or the right hand is needed.

Chitakunye J

The disfigurement, whilst prominent, does not appear to be as serious as A that in *Ministry of Defence and Another* v *Jackson supra*. As already alluded to, in that case a 26-year-old medical doctor suffered injuries that affected many aspects of his life such as shortened leg, loss of smell, double vision, memory loss, laboured speech and emotional instability. In that case an award of $35 000 Zimbabwean dollars was made. B

I am of the view that an appropriate award would be in the sum of $6 000.

(a) Loss of future earnings

It is common cause that as a result of the disability, the plaintiff was discharged from the defendant's employment on medical grounds. That discharge was accompanied by a loss of salary and other benefits that employees in his C grade were entitled to. Unfortunately no evidence was adduced as to the salary such a grade was entitled to from the time of his discharge.

The plaintiff claimed a sum of USD$ 30 000 for loss of earnings. He based his claim on what he said employees in his grade are currently earning. In his computation of damages in this regard the plaintiff multiplied the current monthly wages and benefits for employees in his grade by the number of D years left to retirement from time of the accident. At the time of the accident he was 37 years old and he said the retirement age was 60 years. He was therefore left with 23 years of working life. The current earnings of employees in his grade were stated as follows:

Basic monthly wage	USD 88.00 E
Accommodation allowance	USD 15.00
7 per cent Basic wage being shift allowance	USD 6.16

Total monthly	USD109.16

Multiplying that by 12 months a year and then by 23 years gives a total of USD30 128.16 of which he claimed USD 30 000. F

The assessment of an appropriate award for loss of earnings is not as easy as just multiplying figures. There are several contingencies that must be taken into account.

In *Rusike* v *Tenda Transport (Pvt) Ltd & Anor* 1997 (1) ZLR 495 (H) at p 497-498C Bartlett J had this to say on the assessment of loss of earnings: G

> "As a starting point it is important, wherever possible, to deal with the matter on an arithmetical, actuarial basis as opposed to a 'gut feeling' basis – to use a word often referred to in the authorities . The basic approach is as referred to in Corbett Buchanan and Gauntlett 3ed p. 60-61, where the learned authors quote at length the observations made by Nicholas JA in *Southern Ins. Assn* v *Bailey NO* 1984 (1) SA 98 (A) at 113F to 114E. I must also, I feel, take account of the H

Chitakunye J

A observations made in Carsten NO v Southern Ins Assn Ltd 1985 (3) SA 1010 (C) where, referring to the headnote it is stated:

> 'While the court will generally have a regard to arithmetical calculation and to actuarial evidence of probabilities to assist it in its assessment, ultimately it must decide whether the results of such calculations and evidence accord with what is a fair and just award in each particular case'."

B Where there is insufficient evidence on the exact figures to use the court is still enjoined to make an award. In *Santam Ins Co Ltd* v *Paget (1)* 1981 ZLR 73 (A) the court held that:

> "A court should make some award in cases where damages are claimed for loss of future earning capacity if it is satisfied that the plaintiff has suffered such a loss, even where there is insufficient information to assess the loss accurately C and the court has to pluck a figure out of the air".

I raise the above point because there appears to be a gap in the plaintiff's evidence. The evidence adduced did not state the wages that were being paid to workers in the grade as from the time he was discharged to when dollarisation of our economy took place in 2009.

D In the assessment of such loss of future earnings there are contingencies to be taken into account.

It is a fact of life that it is not in every case that one reaches retirement age. The probabilities or possibilities of early retirement or retirement due to ill health from natural causes, retrenchment and discharge by employer on E other grounds have to be considered.

In casu the plaintiff was not rendered useless by the disability. What has been rendered of not much use is the right hand. His other limbs were unaffected by the injury. His mental faculties and other abilities were not affected. He should be in a position to learn how to effectively use the one remaining F hand and embark on another career. It is unfortunate that, from the evidence adduced, he did not seem to have embarked on any other career other than to mourn his lost arm. He should be reminded that damages of the nature sought cannot sustain him. He is not useless or hopeless. He has to mitigate his loss by engaging in meaningful activities.

Due to the fact that he will be using one arm, there will, of cause, be limits G to the nature and extent of the employment or activities he can engage in. It is that deficiency or limitation that must be compensated by an award for loss of earnings.

The plaintiff's case is such that he needs time within which to learn how to use his left hand. As this may take time, I am of the view that the compensation H of the award be done in a progressive manner.

Chitakunye J

Thus, for the first few years he must be awarded as per the earnings of A employees in his grade as he clearly will be adjusting to the use of the left hand. A period of about three years should be

adequate for this adjustment. After that period he would need to gain experience in the use of the left hand as part of the adjustment. His level of efficiency will be expected to progressively improve. The next stage will thus be for about five years. B These years will be assessed at a 50 per cent of the earnings. The balance of the years to be assessed at a rate of 1/3 of the wages for the grade. The calculations will thus be as follows:

USD 109-16 x 12 months x 3 years	= USD 3 929.76
USD 109-16/2 x 12 months x 5 years	= USD 3 274.80 C
USD 109-16/3 x 3 x 12 months x 11 years	= USD 4 803.04
Total	= USD 12 007.60

Taking into account the contingences already alluded to and the fact that he has been compensated in some way and he will continue receiving some money from NSSA, albeit the amount was not clear, a provision of 5 per cent for contigencies should meet the justice of the case. D

An award of USD11 407 will thus be just and fair in the circumstances for loss of future earnings.

Accordingly judgment is hereby entered for the plaintiff and against the defendant as follows:

1. USD 3 000, being damages for pain and suffering. E
2. USD 6 000, being damages for permanent disfigurement and loss of amenities of life.
3. USD 11 407, being damages for loss of future earnings
4. Costs of suit. F

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners

Coghlan, Welsh & Guest, defendant's legal practitioners

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Document 26 of 62

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MOYO & ORS v ZVOMA NO & ANOR 2010 (1) ZLR 178 (H)

Citation 2010 (1) ZLR 178 (H)

Case No Judgment No. HH-28-10

Court High Court, Harare

Judge Patel J

Heard 9 July 2009

Judgment 9 March 2010

Counsel *T Hussein*, for the applicants
Ms *C Damiso*, for the first respondent
M Chaskalson, for the second respondent

Case Type Opposed application

Annotations Link to case annotations

Flynote

Constitutional law – *Parliament – Speaker – election of – procedure – requirement for secret ballot – meaning of "secret ballot" – display by small number of members of their voting papers after having cast their votes in secret – not a reason to vitiate election*

D **Practice and procedure** – *parties – joinder – non-joinder of possibly relevant parties – determination of issues not directly affecting their rights and interests – court's discretion to allow matter to proceed without joining them*

Practice and procedure – *parties – locus standi – members of Parliament* E *challenging election of Speaker – such members having direct interest in outcome of election and thus having locus standi*

Review – *domestic remedies – exhaustion of before bringing matter on review – members of Parliament challenging election of Speaker – no procedure in Standing Orders of Parliament allowing for formal objections during* F *election of Speaker – members entitled to approach court for relief*

Headnote

The applicants were members of Parliament; the first respondent was the Clerk of Parliament and the second was the Speaker. The applicants challenged the validity of the second respondent's election as Speaker on several grounds and sought an order setting aside his election.

G Following the swearing-in of members of Parliament, the first respondent announced the procedure for the election of the Speaker. As there was more than one person proposed as Speaker, the election was to be conducted by secret ballot as enjoined by Parliamentary Standing Orders 4 and 6. The evidence showed that, although the members of H Parliament voted in secret, about six members of the Speaker's party

2010 (1) ZLR p179

Patel J

openly displayed their ballot papers to their colleagues to show how thy A had voted. Several queries were raised by certain members during the election process but the first respondent refused to take any questions throughout the election. It was not clear whether the queries that were raised were by way of formal objection or mere interjection.

The second respondent challenged the applicants' *locus standi* on the grounds B that they did not allege any violation of their own right to vote by secret ballot and that the losing candidate who should have been the principal applicant. He also contended that, in addition to the respondents in casu, the applicants should have cited all other members who participated in the election, as well as the MDC-T party itself. Finally, he averred that the applicants did not lodge any formal objection or complaint with C the first respondent before the election result was announced. It was incumbent upon the applicants to have exhausted relevant Parliamentary processes before approaching the court.

Held, that the applicants were clearly entitled as members to participate in the election conducted by the first respondent and they unquestionably D had a real and substantial interest in the outcome of that election. That being so, they were also entitled to challenge the legitimacy of the election process to ensure that it was conducted in accordance with the prescribed procedures and that it yielded a legitimate result. Section 3(1)(a) of the Administrative Justice Act [*Chapter* 10:28] requires every administrative authority which has the responsibility or power E to take any administrative action which may affect the rights, interests or legitimate expectations of any person to "act lawfully, reasonably and in a fair manner". In terms of s 4(1), any person who is aggrieved by the failure of an administrative authority to comply with s 3 may apply to the High Court for relief. The conduct of the Speaker's election F affected the interests and legitimate expectations of the applicants in the outcome of the election. If they claimed to be aggrieved by the first respondent's alleged failure to act lawfully, reasonably and fairly in the conduct of that election, they were eminently entitled to approach the court for appropriate relief.

Held, further, that it was the first respondent, whose conduct was impugned G by the applicants, and the second respondent, who was declared the winner of the election, who were the most apposite respondents in the present contestation. It was their specific actions that were challenged and their interests that were directly affected by the declaratory relief being sought. Although not all possibly relevant parties had been cited as respondents, their non-joinder was not fatal to the proceedings, inasmuch H

A as the determination of the issues in dispute would not directly impact upon their rights and interests.

Held, further, that as a general rule, Parliament is at large to regulate its own proceedings without external interference. However, it is well-established that, in a constitutional democracy, this general immunity is necessarily and invariably subject to the provisions of the Constitution. B This subordination to the primacy of the Constitution is entrenched and clearly recognised in ss 3 and 49 of the Constitution. The election of the Speaker is a process that is not exclusive to parliamentary privileges and powers, being explicitly regulated by s 39 of the Constitution. It was thus a matter that is justiciable by the courts to ensure due compliance C with the Constitution and the Standing Orders. Nevertheless, the court should be loath to interfere with the internal proceedings of Parliament unless it is shown that the applicants had attempted to exhaust relevant parliamentary processes in the first instance.

Held, further, that although the conduct of normal parliamentary business does admit the possibility of formal objections, there is no equivalent D procedure prescribed in the Constitution or in the Standing Orders with respect to the election of the Speaker that enables the Clerk of Parliament to deal with formal objections. The Standing Orders do not prescribe any procedure for the raising of formal objections during the election of the Speaker and before the election result is announced. In the absence E of any such procedure, there was no internal parliamentary process that the applicants could be required to exhaust before approaching the court for relief.

Held, further, that the term "secret ballot" means the expression of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be F identified with the choice expressed. With regard to the open display of votes by at least six of the voting members, the provisions of s 39(2) of the Constitution as read with Standing Order No. 6 are peremptory and must be strictly complied with. Thus, if it is shown that the requirements of a secret ballot have been violated in any election to the position of Speaker, the election result should in principle be declared a nullity, G unless it is shown that this would lead to great injustice or public inconvenience. The gravamen of a secret ballot is that each voter is enabled to cast his vote privately and in secret, without fear of having his voting choice identified or ascertained by others. In this respect, it is incumbent upon the regulating authority to provide the requisite H wherewithal for that purpose. The courts should not interfere unless it is

shown that the objective conditions put in place for the election precluded A the possibility of a secret vote. Beyond this, it is then a matter purely for the individual voter if he chooses to divulge, whether publicly or in private, the specific manner in which he has cast his vote. If he does so of his own volition, without any external coercion or intimidation, and howsoever his conduct might influence other voters, this cannot B detract from the secrecy of his vote or vitiate the secrecy of the ballot as a whole. There is nothing to show that any of the members did not cast their votes in secret or that the members who did display their votes did so under any threat or duress. They did so of their own free will and, more significantly, after having cast their votes in secret.

Cases referred to C

Chrmn, PSC & Ors v Zimbabwe Teachers' Assn & Ors 1996 (1) ZLR 637 (S)

Doctors for Life International v Speaker of the National Assembly & Ors 2006 (6) SA 416 (CC)

Pio v Franklin NO & Anor 1949 (3) SA 442 (C) D

Smith v Mutasa NO & Anor 1989 (3) ZLR 183 (S)

Steel & Engineering Industries Federation & Ors v National Union of Metalworkers of SA (2) 1993 (4) SA 196 (T)

Trans-Africa Credit & Savings Bank Ltd v Union Guarantee & Ins Co Ltd 1963 (2) SA 92 (C) E

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

Legislation considered

Administrative Justice Act [*Chapter 10:28*], ss 3(1)(a) & 4(1)

Constitution of Zimbabwe 1980, ss 3, 39(2) & 49

High Court Act [*Chapter 7:06*], s 14 F

High Court Rules 1971 (RGN 1047 of 1971), s 87(1)

Standing Orders of the House of Assembly, orders 6, 7, 17, 49 & 61

Privileges, Immunities & Powers of Parliament Act [*Chapter 2:08*], s 5

Case information

T Hussein, for the applicants G

Ms *C Damiso*, for the first respondent

M Chaskalson, for the second respondent

Judgment

PATEL J: The applicants in this matter are all duly elected Members of Parliament. The first respondent is the Clerk of Parliament, cited herein in his official capacity. The second respondent was elected to the position of H

Patel J

A Speaker of the House of Assembly on 25 August 2008.

The applicants challenge the validity of the second respondent's election as Speaker on several grounds. They originally sought an order setting aside the second respondent's election and, consequentially, an order nullifying all acts performed by him *qua* Speaker. However, at the hearing of this case, B counsel for the applicants conceded the excessiveness and enormity of the consequential relief sought and opted not to pursue that aspect.

Background

By virtue of s 39(2) of the Constitution of Zimbabwe, the Speaker must be elected in accordance with the Standing Orders of the House of Assembly. C On 25 August 2008, following the swearing-in of Members of Parliament ("members"), the first respondent announced the procedure for the election of the Speaker. As there was more than one person proposed as Speaker, the election was to be conducted by secret ballot as enjoined by Orders 4 and 6.

According to the applicants, what ensued in Parliament thereafter was chaotic and disorderly and quite contrary to the requirements of a secret ballot. D The first respondent concedes that there was an unprecedented number of members in the chamber on that day but denies that the voting process was disorderly or improper. The second respondent supports this position and also raises several preliminary objections to the application, pertaining to *locus standi*, non-joinder and the exhaustion of domestic remedies.

E **The Issues**

In his opposing papers, the second respondent questioned the jurisdiction of this court and the nature of the relief claimed by the applicants. In particular, it was averred that the matter fell

within the purview of Parliamentary privilege and was therefore not justiciable and that the declaratory relief sought by the F applicants could not properly be granted in the circumstances of this case. However, these objections were withdrawn and not specifically pursued by counsel at the hearing of this matter.

In the event, the preliminary and substantive issues for determination in this matter, as I perceive them, are as follows: G

(i) Whether the applicants have *locus standi* herein.

(ii) Whether other members and entities should have been cited as respondents.

(iii) Whether the applicants should have exhausted domestic remedies available in Parliament before approaching this court.

(iv) Whether the first respondent conducted the election of the Speaker H properly and procedurally and whether members belonging to the MDC-T

Patel J

party displayed their votes to their colleagues in Parliament. A

(v) Whether the requirements of a secret ballot as enjoined by Standing Orders and the Constitution were violated.

(vi) Whether the above irregularities, if any, justify setting aside the election of the second respondent as Speaker.

Locus Standi **of Applicants** B

The second respondent challenges the applicants' *locus standi* on the grounds that they do not allege any violation of their own right to vote by secret ballot and that it is the losing candidate, one Paul Themba Nyathi, who should have been the principal applicant in this case.

The latter point is untenable for the simple reason that Mr. Nyathi, who C was not an MP on the date of the election, has chosen, for reasons known only to himself, not to attack the election process. As for the applicants themselves, they were clearly entitled as members to participate in the election conducted by the first respondent and they unquestionably had a real and substantial interest in the outcome of that election. That being so, D they are also entitled to challenge the legitimacy of the election process to ensure that it is conducted in accordance with the prescribed procedures and that it yields a legitimate result.

In the present context, s 3 of the Administrative Justice Act [*Chapter 10:28*], which codifies and restates the common law position, is directly relevant. Section 3(1)(a) requires every administrative authority which has E the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person to "act lawfully, reasonably and in a fair manner". In terms of s 4(1), "any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply to the High Court for relief". F

There can be no doubt, in my view, that the conduct of the Speaker's election affected the interests and legitimate expectations of the applicants in the outcome of the election. If they claim to be aggrieved by the first respondent's alleged failure to act lawfully, reasonably and fairly in the conduct of that election, they are eminently entitled to approach this court for appropriate relief. I am therefore satisfied that the applicants have the requisite *locus* G *standi* in this matter and that the first respondent's objection thereto cannot be sustained.

Non-joinder of Other Respondents

The second respondent contends that, in addition to the respondents *in casu*, the applicants should have cited all other members who participated in the H

Patel J

A election as well as the MDC-T party itself. Because a *declaratur* is sought, so it is argued, the court should proceed on the basis of full information from all relevant parties.

I must confess that I am unable to see any merit in this contention. In terms of Order 6, the first respondent is assigned the responsibility for conducting the election of the Speaker. It is the first respondent, whose conduct is B impugned by the applicants, and the second respondent, who was declared the winner of the election, who are the most apposite respondents in the present contestation. It is their specific actions that are pointedly challenged and their interests that are directly affected by the declaratory relief presently sought.

Quite apart from the practical and logistical implications of citing over 200 C respondents, the other members and the MDC-T party were not responsible for administering the election process and are not being called upon to rectify the conduct complained of. If the second respondent's argument were to be taken to its logical conclusion, it would warrant the citation of every Zimbabwean as having some legitimate interest in the election to the highest office of Parliament.

D Rule 87(1) of the rules of this court provides that "no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party". Even where any misjoinder or non-joinder does occur, the court remains with the discretion to "determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or E matter". While I accept that not all possibly relevant parties have been cited as respondents herein, I do not think that their non-joinder is fatal to these proceedings inasmuch as the determination of the issues in dispute will not directly impact upon their rights and interests.

Exhaustion of Domestic Remedies

F The second respondent avers that the applicants did not lodge any formal objection or complaint with the first respondent before the election result was announced. It was incumbent upon the applicants to have exhausted relevant parliamentary processes before approaching this court. In this regard, Mr *Chaskalson* relies upon the decision in *Doctors for Life International* v *Speaker of the National Assembly & Ors* 2006 (6) SA 416 (CC) at 491-492 G (para 218). He submits, quite correctly, that the nature of the relief sought by the applicants carries far-reaching implications for the separation of powers doctrine because it asks the judiciary to interfere with the internal proceedings of Parliament. Consequently, the court should not recognise the applicants' *locus standi* to claim such relief unless they have made proper H and diligent attempts in Parliament to redress the conduct complained of or

provide a satisfactory explanation for their failure to do so. A

As is clearly recognised in s 5 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*], members enjoy full freedom of speech and debate in Parliament and the proceedings of Parliament are generally immune from being questioned or impeached in any court of law. In other words, as a general rule, Parliament is at large to regulate its own proceedings without B external interference. However, it is well-established that, in a constitutional democracy such as ours, this general immunity is necessarily and invariably subject to the provisions of the Constitution. This subordination to the primacy of the Constitution is entrenched and clearly recognised in ss 3 and 49 of the Constitution. See *Smith* v *Mutasa NO & Anor* 1989 (3) ZLR 183 (S) at 190; *Chairman, Public Service Commission & Ors* v *Zimbabwe Teachers* C *Association & Ors* 1996 (1) ZLR 637 (S) at 651 and 656.

The election of the Speaker is a process that is not exclusive to Parliamentary privileges and powers. It is explicitly regulated by s 39 of the Constitution and there can be no doubt that it is a matter that is justiciable by the courts to ensure due compliance with the Constitution and the Standing Orders. D Nevertheless, I fully endorse the approach enunciated by the Constitutional Court of South Africa in the *Doctors for Life* case, *supra*, and concur that this court should be loath to interfere with the internal proceedings of Parliament unless it is shown that the applicants have attempted to exhaust relevant Parliamentary processes in the first instance. E

In the instant case, it appears from the first applicant's affidavit that several queries were raised by certain members during the election process but the first respondent refused to take any questions throughout the election. What is not clear from the papers is whether the queries that were raised were by way of formal objection or mere interjection. In this respect, Ms *Damiso* submits that the first respondent was entitled to ignore informal F protests or interjections and that any MP wishing to

be heard had to make a formal objection by standing up and raising a "point of order" as envisaged in Orders 49 and 61. As against this, Mr *Hussein* argues that, although the conduct of normal parliamentary business does admit the possibility of formal objections, there is no equivalent procedure prescribed in the Constitution G or in the Standing Orders with respect to the election of the Speaker that enables the Clerk of Parliament to deal with formal objections.

Having regard to the Standing Orders taken as a whole, I am inclined to agree with Mr *Hussein*. Order Nos. 49 and 61, relating to formal speeches and objections, are contained in the section titled "Public Business" and, more specifically, in the subsection titled "*Order in House and Rules of* H

Patel J

A *Debate"*. As appears from Orders 7 and 17, the Speaker holds the chair for the conduct of public business generally. In the absence of the Speaker, the Deputy Speaker assumes the chair and, in the absence of both, the chair is assigned to the Deputy Chairperson of Committees or a member of the Chairperson's panel. At no stage does the Clerk of Parliament exercise the B powers of the chair in the conduct of ordinary public business to which the procedures outlined in Orders 49 and 61 apply. The only occasion on which the Clerk holds the chair is for the purpose of conducting the election of the Speaker in terms of Orders 3 to 7. These Standing Orders are contained in the Section titled "Proceedings on Meeting of New Parliament". As I have already noted, Orders 49 and 61, which provide for formal objections, are C to be found in an entirely different section and, therefore, they do not apply to Orders 3 to 7 governing the election of the Speaker. Arguably, the power of the chair to take and deal with formal objections could and should be implied, *mutatis mutandis*, in the latter context as well. However, a strict interpretation of the Standing Orders precludes any such importation in the absence of clear language to that effect.

D It follows from all of this that the Standing Orders do not prescribe any procedure for the raising of formal objections during the election of the Speaker and before the election result is announced. It also follows that, in the absence of any such procedure, there was no internal parliamentary process that the applicants could be required to exhaust before approaching E this court for the relief that they seek. That being so, the second respondent's preliminary objection in this regard cannot succeed and must be dismissed.

Conduct of Election

At the beginning of the election *in casu*, the first respondent laid out in some detail the procedure to be followed. However, during the election process, F there were several deviations from the procedure prescribed, as appears from the papers and exhibits filed herein. In particular, some members folded their completed ballot papers outside the polling booth and several MDC-T members openly displayed their ballot papers to their colleagues. Again, most of the members did not leave the chamber after casting their votes. All in all, it would appear that the first respondent did not stamp his G authority on the conduct of the proceedings and was unable to prevent or stop the above-mentioned irregularities.

In his opposing papers, the first respondent explains that the membership of the House of Assembly had increased from 150 to 210 members, all of whom were now elected and the majority of whom were opposition MDC members. H These factors contributed to a more exuberant atmosphere in the House which

Patel J

affected the dynamics of the election process. However, according to the A first respondent, the proceedings were not disorderly or chaotic and all the members in the House were able to vote freely and without any impediment.

Violation of Secret Ballot Requirements

Mr *Hussein* submits that the displaying of votes by participants in any election, as a matter of principle, violates the secrecy of the ballot because the votes B displayed become known and influence the voting behaviour of the other participants. In the specific case of an election to the position of Speaker, there are several compelling reasons for maintaining the secrecy of the ballot.

On the one hand, the person elected to that position should remain unaware of how particular members voted in order to retain his or her impartiality in the proceedings of the House. On the other hand, members should be able C to elect a Speaker endowed with the requisite authority and independence without fear of sanction from their political party or constituency. Moreover, according to the *Lectric Law Library Lexicon* (at www.lectlaw.com), the term "secret ballot" is defined as:

> "the expression by ballot, voting machine or otherwise but in no event by proxy, D of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed".

As against this, Ms *Damiso* contends that only 6 out of the total number of 208 members were specifically identified by the applicant as having displayed their votes. Therefore, there was substantial compliance with the secret ballot E requirement. In any event, she submits that the definition relied upon by the applicants is overly theoretical and technically deficient. A more functional definition is provided in *Webster's New College Dictionary* with the following essential elements: the provision of official ballot papers printed at public expense; on which the names of the nominated candidates appear; which are distributed only at the polling place; and which are marked in secret. F Again, in *Steel and Engineering Industries Federation & Others* v *National Union of Metalworkers of South Africa (2)* 1993 (4) SA 196 (T) at 200-201, the requirements for a secret ballot were held to be as follows: only those qualified must vote; the number of votes cast and the votes for and against must be counted; each voter must be able to vote privately and in secret; only G the votes of eligible voters must be counted. In essence, so long as voters are able to cast their votes in secret, they are entitled to voluntarily display their votes to others, in keeping with the freedom of expression guaranteed by s 20 of the Constitution.

Mr *Chaskalson* also relies on the *Steel* case, *supra*, for the proposition that the requirements of a secret ballot are designed to protect voters from having H

Patel J

A to display their votes. Therefore, a voter can waive the secrecy of his own vote by free choice. This is a right vested in the voter himself. In the instant case, the crucial question is whether or not it was reasonably possible for the members in the House to cast their votes in secret. In this regard, he submits that all the members marked their ballots in secrecy within the polling booths provided. None of the members complained of having been coerced B or pressurised to expose their votes. Moreover, the applicants' claim that the majority of the MDC-T members displayed their votes is not borne out by the evidence. In any event, those members who did display their votes did so purely voluntarily without complaining that their voting rights had been violated. In short, such voluntary disclosure did not violate the secrecy of C the election vote.

Whether Setting Aside of Election Justified

As regards the conduct of the election *in casu* generally, the papers before the court evince several conflicts of fact as to what transpired at the time. The applicants' assertions that the proceedings were brazenly unruly are D squarely rebutted by the averments of the first respondent. In this situation, the approach to be adopted was explained by Gubbay JA (as he then was)in *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) at 339, as follows:

> "It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must E take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact."

F Having regard to the overall scenario prevailing in the House on the day in question, it seems reasonably clear that the election proceedings under review were not conducted in an ideal manner. Nevertheless, despite the imperfections alluded to above, it cannot be said that the process was so disorderly as to be utterly chaotic. On the contrary, all the members in the House were duly called upon to vote and were able to cast their votes in the G polling booths provided. Taking into account the usual volatility associated with the conduct of Parliamentary business generally, I am inclined to take the robust view that the election proceedings as a whole were sufficiently regulated to enable the election to take place to a satisfactory conclusion.

Turning to the open display of votes by at least six or possibly more of the H voting members, I agree with Mr *Hussein* that the provisions of s 39(2) of

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Patel J

the Constitution as read with Standing Order 6 are peremptory and must be A strictly complied with. Thus, if it is shown that the requirements of a secret ballot have been violated in any election to the position of Speaker, the election result should in principle be declared a nullity. This would be so unless it is shown that nullification would lead to great injustice or public inconvenience. See *Pio* v *Franklin NO & Another* 1949 (3) SA 442 (C); B *Trans-Africa Credit and Savings Bank Ltd* v *Union Guarantee and Insurance Co Ltd* 1963 (2) SA 92 (C).

Having regard to the dictionary definitions and the case authorities cited by counsel, the gravamen of a secret ballot, in my view, is that each voter is enabled to cast his vote privately and in secret, without fear of having C his voting choice identified or ascertained by others. In this respect, it is incumbent upon the regulating authority to provide the requisite wherewithal for that purpose. The courts should not interfere unless it is shown that the objective conditions put in place for the election precluded the possibility of a secret vote. Beyond this, it is then a matter purely for the individual voter if he chooses to divulge, whether publicly or in private, the specific manner D in which he has cast his vote. If he does so of his own volition, without any external coercion or intimidation, and howsoever his conduct might influence other voters, this cannot detract from the secrecy of his vote or vitiate the secrecy of the ballot as a whole.

On the evidence before this court, there is nothing to show that any of the E members in the House did not cast their votes in secret or that the members who did display their votes did so under any threat or duress. It is fairly clear that the Mr Biti took the lead in brandishing his vote and that several of his colleagues were then emboldened into emulating his possibly impolitic example. However, they did so of their own free will and, more significantly, F they did so after having cast their votes in secret.

In the present context, it is necessary to bear in mind that declaratory relief of the nature sought *in casu* is always discretionary. This is clearly recognised in s 14 of the High Court Act [*Chapter 7:06*]. In principle, suitable circumstances must be shown to exist to justify any exercise of the court's G declaratory discretion. As I have already stated earlier, Parliament is generally at large to regulate its own proceedings without external interference. As a rule, the courts should be loath to interfere with the internal proceedings of Parliament unless there is a failure to comply with constitutional strictures. In the instant case, I do not perceive any such failure and am unable to find any other basis for setting aside the election of the Speaker. H

Patel J

A **Disposition**

It follows from all of the foregoing that the applicants have failed to establish any justification, either as regards the general conduct of the impugned election or with respect to the secrecy of the votes cast or otherwise, for setting aside or nullifying the election of the second respondent as Speaker B of the House of Assembly.

On the other hand, I am unable to discern any valid ground for penalising any one or all of the applicants with a punitive award of costs as is claimed by the second respondent. I do not understand this application to be merely frivolous or vexatious or to have been actuated by malice or other ulterior motive.

C In the result, the application is dismissed with costs on the ordinary scale.

Hussein Ranchod & Co, applicants' legal practitioners

Atherstone & Cook, second respondent's legal practitioners

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Document 27 of 62

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/MAVINDIDZE & ANOR v MUKONOWESHURO 2010 (1) ZLR 191 (H)

MAVINDIDZE & ANOR v MUKONOWESHURO 2010 (1) ZLR 191 (H)

Citation	2010 (1) ZLR 191 (H)
Case No	Judgment No. HH-43-10
Court	High Court, Harare
Judge	Patel J
Heard	15 September 2009
Judgment	9 March 2010
Counsel	*T Govere*, for the plaintiffs *W P Zhakazha,* for the defendant
Case Type	Opposed civil application
Annotations	Link to case annotations

Flynote

Practice and procedure – *provisional sentence – acknowledgement of debt – need for acknowledgement of debt to be valid – transaction behind acknowledgement tainted by breach of statutory provisions – not proper for provisional sentence to be granted – matter stood over for trial* D

Headnote

The plaintiffs claimed provisional sentence founded on an acknowledgement of debt signed by the defendant. The defendant resisted the claim on various grounds relating to the nature and correctness of the capital sum claimed, the application of the *in duplum* rule, the liquidity of the acknowledgement of debt and the legality of the entire transaction. E

Held, that the acknowledgement, being in writing, signed by all the parties and clearly stipulating the amounts owed by the defendant to the plaintiffs, constituted a liquid document within the ordinary meaning of r 20 of the High Court Rules 1971. However, it is not clear that the acknowledgement is a valid acknowledgment for the purposes of F granting provisional sentence. If the acknowledgment was founded on a genuine investment, it fell foul of s 5(1) of the Asset Management Act [*Chapter 24:26*]. If it was premised on a disguised loan, the total sum, inclusive of capital and interest, claimed by the plaintiffs might well exceed the amount legally claimable under the *in duplum* rule. Further, the acknowledgement and the loan underlying it fell to be governed by G the provisions of the Moneylending and Rates of Interest Act [*Chapter 14:14*]. The established principle of our law is that anything done contrary to a direct statutory prohibition is generally void and of no legal effect. The mere prohibition operates to nullify the act, particularly where it is visited with a criminal sanction. It follows that the transaction and the acknowledgement are susceptible to scrutiny for compliance with the *in* H

Patel J

A *duplum* rule as well conformity with the governing statutes. Moreover, if the transaction were found to be tainted with illegality, it would be necessary to consider the relevant facts surrounding its conclusion, as well as the respective degrees of turpitude attributable to the parties, in order to determine the extent of its illegality and its enforceability under the *par delictum* rule. It would be patently improper for the court B to grant provisional sentence on a liquid document that was evidently fraught with illegality. The matter should stand over for trial.

Cases cited

Funding Initiatives (Pvt) Ltd v Mabaudi HH-20-07

Hattingh & Ors v van Kleek 1997 (2) ZLR 240 (S)

C *Jajhbay v Cassim* 1939 AD 537

Young v van Rensburg 1991 (2) ZLR 149 (S)

Legislation considered

Asset Management Act [*Chapter 24:26*], s 5(1) & (6)

D Moneylending and Rates of Interest Act [*Chapter 14:14*], ss 3, 8, 9, 11 & 19

Case information

T Govere, for the plaintiffs

W P Zhakazha, for the defendant

Judgment

E **PATEL J:** The plaintiffs claim provisional sentence founded on an agreement of settlement ("the Agreement") concluded between the parties on 22 July 2008 followed by an acknowledgement of debt ("the Acknowledgement") signed on 15 November 2008. The total claim is for the sum of US$90 000 together with interest thereon at the rate of 20 per cent per annum calculated F from the due date of 14 December 2008. The defendant resists the claim on various grounds relating to the nature and correctness of the capital sum claimed under the Agreement, the application of the *in duplum* rule, the liquidity of the Acknowledgement and the legality of the entire transaction.

The terms of the Agreement refer to a failed investment made by the plaintiffs through the defendant and the defendant's consequent indebtedness to the G plaintiffs in the sum of US$80 000, payable in two instalments of US$70 000 and US$10 000, due by 31 October and 30 November 2008 respectively. The Acknowledgement cites the defendant's failure to pay as agreed and recalculates the defendant's indebtedness to be the sum of US$90 000, payable by 14 December 2008, together with 20 per cent interest on the outstanding H amount. In the event that the money debt is not settled, the defendant is

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Patel J

obligated to transfer "a property of like value or more". A

Submissions

Mr *Govere*, for the plaintiff, was unable to explain how the original debt of US$80 000 was arrived at in the Agreement, but argued that this was irrelevant as the Acknowledgement clearly stipulates an agreed debt of US$90 000. He submitted that both the Agreement and the Acknowledgement refer to B investments, as opposed to any loan, and that therefore the *in duplum* rule does not apply. He further submitted that the Acknowledgement is a liquid document signed by all parties and that it clearly indicates the capital sum, interest and costs owed by the defendant. In this regard, he relied upon several authorities for the proposition that the alternative obligation to C transfer immovable property also constitutes a liquid claim. Finally, he contended that even if the original transaction between the parties is found to be contrary to statute, the court has a discretion to enforce the

agreement despite its illegality in order to avoid the unjust enrichment of one party at the expense of the other.

As against this, Mr *Zhakazha* averred that there was a fundamental error in D calculating the debt in the Agreement. The original sum owing in 2006 was US$2 284 and the defendant paid back a total of US$14 913 from July 2006 to November 2008. In any event, the defendant's basic position was that the debt *in casu* did not arise from any investment but was essentially a disguised loan of several amounts borrowed from the plaintiffs in 2006. The defendant E was not a registered asset manager and therefore could not invest funds on behalf of the plaintiffs or anyone else. In this respect, Mr *Zhakazha* submitted that the so-called investment agreement between the parties was designed to circumvent the relevant statutory provisions governing the management of assets and permissible rates of interest. He therefore submitted that the Agreement and Acknowledgement, having been premised on an illegal F transaction, must be declared null and void and consequently unenforceable.

Disposition

Rule 20 of the High Court Rules provides as follows:

> "Where the plaintiff is the holder of a valid acknowledgement in writing of a debt, commonly called a liquid document, the plaintiff may cause a summons G to be issued claiming provisional sentence on the said document."

It is reasonably clear from the papers that the Acknowledgement *in casu* constitutes a liquid document within the ordinary meaning of r 20. It is in writing and signed by both parties and it clearly stipulates the amounts owed by the defendant to the plaintiffs. As to whether the alternative obligation to transfer immovable property also constitutes a liquid claim, it seems to me H

Patel J

A that this obligation is not entirely satisfactorily formulated. Nevertheless, it is not necessary for me to decide this point as the summons is based solely on the monetary debt due and does not make any claim for transfer of property in the alternative.

What does not emerge clearly from the papers is whether the Acknowledgement B is a valid acknowledgement for the purposes of granting provisional sentence. If it is founded on a genuine investment, as the plaintiffs contend, it falls foul of s 5(1) of the Asset Management Act [*Chapter 24:26*]. Section 5(1) stipulates that no person shall carry on the business of asset management, as defined in s 3(1) of the Act, unless the person is incorporated as a private or public company and is registered in terms of the Act or of SI 16 of 2004. C Section 5(6) of the Act makes it an offence for any person to contravene s 5(1). It is common cause that the defendant is neither an incorporated company nor registered as an asset manager under the Act.

If, on the other hand, the Acknowledgement was premised on a disguised loan, as is contended by the defendant, the total sum inclusive of capital and interest claimed by the plaintiffs may well exceed the amount legally D claimable under the *in duplum* rule. More significantly, the Acknowledgement and the loan underlying it fall to be governed by the provisions of the Moneylending and Rates of Interest Act [*Chapter 14:14*] (hereinafter referred to as "the Moneylending Act") which regulates the moneylending activities of licensed or professional moneylenders as well as unlicensed lenders who E lend money otherwise than in the course of business. In terms of 3 of the the Moneylending Act, a lender is defined to mean any person making a loan of money, including the holder of any instrument of debt. Section 19 of the Moneylending Act makes it clear that the Act applies to every transaction which, whatever its form may be, is substantially one of moneylending and whether or not the transaction forms part of any other transaction. Section 8 F of that Act provides that no lender shall stipulate for, demand or receive from the borrower interest at a rate greater than the prescribed rate of interest and that any lender who contravenes this prohibition shall be guilty of an offence. Insofar as concerns civil claims, s 9 of the Moneylending Act precludes the recovery of excess interest and, where a borrower has paid excess interest, G s 11 of that Act entitles him to recover such excess.

As I held in *Funding Initiatives International (Pvt) Ltd* v *Mabaudi* HH-20-07, at p 7 in relation to the Moneylending Act:

"The established principle of our law is that anything done contrary to a direct statutory prohibition is generally void and of no legal effect. The mere prohibition operates to nullify the act, particularly where it is visited with a criminal sanction. H See *Schierhout* v *Minister of Justice* 1926 AD 99, at 109; *Metro Western Cape*

2010 (1) ZLR p195

Patel J
(Pty) Ltd v Ross 1986 (3) SA 181 (A) at 188-189. A

Having regard to the direct and unambiguous prohibition spelt out in section 8 of the Act, I am in no doubt that its provisions cannot be waived by agreement and that any contractual stipulation to the contrary must be treated as being null and void *ab initio*. Moreover, as is made crystal clear in s 9, any interest charged or agreed in excess of the prescribed maximum is unenforceable and irrecoverable, whether through civil proceedings or otherwise. Consequently, B where usurious interest is charged in contravention of the Act, the borrower is entitled, in terms of section 11, to recover the excess amount paid within a period of two years after the date of payment."

It follows, therefore, whether the transaction *in casu* was a genuine investment or a disguised loan, that the transaction and the Acknowledgement premised upon it are susceptible to scrutiny for compliance with the *in duplum* rule C as well conformity with the governing statutes. Moreover, if the transaction is found to be tainted with illegality, it will be necessary to consider the relevant facts surrounding its conclusion, as well as the respective degrees of turpitude attributable to the parties, in order to determine the extent of its illegality and its enforceability under the *par delictum* rule. See *Jajbhay* v *Cassim* 1939 AD 537 at 544-545; *Young* v *van Rensburg* 1991 (2) ZLR 149 (S) at 156-157; D *Hattingh & Ors* v *van Blerk* 1997 (2) ZLR 240 (S) at 246.

In my view, all of the above-mentioned aspects of this case cannot be properly determined on the papers before the court. They require thorough ventilation by way of *viva voce* evidence in a full trial of the matter. Moreover, it would be patently improper for the court to grant provisional sentence on a liquid E document that is evidently fraught with illegality. The granting of provisional sentence in this case is therefore not justified and must be refused.

In the result, the application for provisional sentence in terms of r 20 is hereby dismissed and the case is ordered to stand over for trial in terms of r 34 of the High Court Rules. The summons shall stand as summons in an ordinary F action and the defendant shall enter appearance to defend within five days of the handing down of this judgment. Thereafter, the rules of procedure in an ordinary action shall apply unless the court gives other directions. The costs of this application shall be costs in the cause.

Coghlan, Welsh & Guest, plaintiffs' legal practitioners G

Chinamasa, Mudimu, Chinogwenya & Dondo, defendant's legal practitioners

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Document 28 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/TM SUPERMARKETS (PVT) LTD v CHADCOMBE PROPERTIES (PVT) LTD 2010 (1) ZLR 196 (H)

TM SUPERMARKETS (PVT) LTD v CHADCOMBE PROPERTIES (PVT) LTD 2010 (1) ZLR 196 (H)

2010 (1) ZLR p196

Citation	2010 (1) ZLR 196 (H)
Case No	Judgment No. HH-30-10
Court	High Court, Harare
Judge	Patel J and Omerjee J

Heard 14 January 2010

Judgment 9 March 2010

Counsel *E W W Morris*, with him *S Njerere,* for the appellant
J Samkange, for the respondent

Case Type Civil appeal

Annotations Link to case annotations

Flynote

Contract – interpretation – *clause giving options open to innocent party in event of breach of contract – options separated by "either" and "or" – effect – innocent party not entitled to exercise both options – must* D *elect one or another*

Contract – interpretation – *use of words "either" and "or" – normally treated as disjunctive unless compelling indication that it is conjunctive*

Contract — lease — *breach – failure of lessee to pay rental – interpretation of agreement – three options available to lessee in terms of the agreement* E *– right to terminate lease "or" to continue lease and claim rental or to take or enforce any other right or action – word "or" to be treated as disjunctive – lessee could not exercise both actions in respect of the same breach*

Costs – *higher scale – appeal – legal practitioner belatedly raising a point* F *of no substance during argument – award of costs on the higher scale appropriate*

Words and phrases – *"or" – word "or" to be treated as disjunctive unless there is a compelling indication to the contrary*

The word "or" *is usually treated as disjunctive unless there is a compelling indication that in its context it means "and" (dicta per Gubbay JA in S* G *v Ncube & Ors 1987 (2) ZLR 246 (S) at 264 followed).*

Headnote

Where, in the course of an appeal, a belated objection, of no substance whatsoever, was taken by a legal practitioner as to the state of the record, an award of costs on the higher scale may be ordered so as to give effect H to the court's displeasure.

Patel J

In an action to evict the lessee from certain premises, the evidence disclosed A that the lessee had breached its written agreement of lease with the lessor by not paying the rentals for several months. As a result, the lessor wrote to the lessee giving it fourteen days to bring its rental payments up to date, failing which it would terminate the lease. The lessee thereupon made due payment within the allotted fourteen day period. Notwithstanding B this, the lessor, relying on clause 18 of the lease agreement, which set out the remedies available to the lessor in the event of any breach by the lessee, sought to terminate the lease and evict the lessee from the premises. In terms of that clause, the lessor was entitled, in the event of such a breach, either (a) to terminate the lease and evict the lessee or (b) to continue the lease and claim the rental or the remedy of any other C breach or (c) in either event to take or enforce any other action or right for damages or otherwise arising from the lessees breach. The court *a quo*, relying on clause 18(c), found for the lessor (the respondent). It held that the breach, even though rectified by the full rental payment, was sufficient to entitle the lessor to cancel the lease and thereby to D evict the lessee (the appellant). Against this ruling the lessee appealed.

Held, allowing the appeal and setting aside the application to evict the lessee (respondent), that clause 18(c) of the lease agreement was confined to any other action or right, including damages. It did not include the right to terminate the lease and evict the lessee (appellant) in terms of clause 18(b). It could not, however, exercise both options in respect of E the same breach.

Cases cited

Masukusa v Tafa 1978 RLR 167 (A)

Agricultural Finance Corporations v Pocock 1986 (2) ZLR 229 (S)

Stracon Development (Pvt) Ltd v Gruer 1990 (1) ZLR 354 (H) F

Parkview Properties (Pvt) Ltd v Chimbwanda 1998 (1) ZLR 408 (H)

S v Ncube & *Ors* 1987 (2) ZLR 246 (S)

Croco Holdings (Pvt) Ltd v Hubert Davies Employees Trust (Pvt) Ltd & *Ors* Case No. SC 236/08 G

Case information

E W W Morris, with him *S Njerere,* for the appellant

J Samkange, for the respondent

Judgment

PATEL J: This is an appeal against the decision of the provincial magistrate sitting at Harare magistrates court on 30 July 2009. The magistrate granted an order terminating the lease agreement between the parties and requiring H

Patel J

A the appellant to vacate the leased premises, failing which the appellant would be evicted by the messenger of court.

The appellant initially noted four grounds of appeal. However, at the hearing of the appeal, counsel for the appellant abandoned two of these grounds, the first relating to the absence of any notice cancelling the lease agreement B and the second to the supposed granting of leave to execute pending appeal. Consequently, the two remaining grounds for determination in this appeal are as follows: that the court *a quo* erred in finding (i) that the lease agreement entitled the respondent to cancel the lease after the breach complained of had been rectified and (ii) that clause 18 (c) of the agreement entitled the respondent to accept rectification and still proceed to cancel the agreement.

C **Objection as to Record of Appeal**

In the midst of the appeal hearing, after full argument by counsel for the appellant, Mr *Samkange* raised the objection that the record of appeal was incomplete because the proceedings in the court *a quo* had not been transcribed and because pp 3 and 4 of the record had not been duly certified. This objection D was put forward for the first time in these proceedings, almost two months after the record of appeal had been prepared and filed by the appellant.

Despite this startling 13th hour objection, the court proceeded with the hearing, having been satisfied by Mr *Morris* and Ms *Njerere* that there were no proceedings in the court below to be transcribed as the matter was heard E by way of application. It was also explained that the ruling at p 3 of the record was a typed version that had been signed by the magistrate herself. This was confirmed by a copy of the original hand written ruling which was produced at the court's direction after the hearing and after it had been stamped by the relevant clerk of court.

In any event, I take the view that counsel's belated objection and the cavalier F manner in which it was raised constitute palpably unacceptable conduct, almost verging on contempt of court. Accordingly, the Registrar is hereby directed to write to Mr *Samkange* firmly cautioning him against similar misconduct in the future.

Background and Decision of Court Below

G The relevant facts for the purposes of this appeal are as follows. On 3 June 2009, the respondent's lawyers wrote to the appellant indicating that the appellant was in breach of clause 5 of the lease agreement relating to the payment and computation of monthly rentals. In particular, it was stated that the appellant had failed to pay rentals since January 2009 and that "unless H we receive rentals within fourteen days, our client will have no option but

Patel J

to terminate this lease and to eject you from the premises". Thereafter, on A 10 July 2009, the respondent wrote to the appellant confirming that "you delivered the outstanding rentals of $3915.00 ... to Venturas & Samkange on 8 June 2009" and intimating that this was received without prejudice.

In her ruling on 29 July 2009, the magistrate confined herself to the late payment of rentals and did not address the other alleged breaches referred B to in the letter from the respondent's lawyers. She found that the appellant had failed to pay rentals timeously. Relying upon clause 18(c) of the lease agreement, she then proceeded to hold as follows:

> "That breach, even though it may have been rectified, is sufficient to cause the lessor to elect to cancel the lease. The lease is hereby so cancelled."

Merits of Appeal C

Before turning to the lease agreement *in casu*, I should note that the case authorities cited by Mr *Morris* do not provide any meaningful guidance in this matter. The cases relied upon include *Masukusa* v *Tafa* 1978 RLR 167 (A), *Agricultural Finance Corporation* v *Pocock* 1986 (2) ZLR 229 (S), *Stracon Development (Pvt) Ltd* v *Gruer* 1990 (1) ZLR 354 (H) and D *Parkview Properties (Pvt) Ltd* v *Chimbwanda* 1998 (1) ZLR 408 (H). These cases are essentially concerned with the acceptance of subsequent timeous payments following previous late payments or underpayments of rent. They are therefore not directly relevant to the issues at hand.

Clause 18 of the lease agreement between the parties stipulates the remedies of E the lessor in the event of any breach of the agreement by the lessee. Pursuant to any such breach, the lessor is entitled either (a) to forthwith terminate the lease and eject the lessee or (b) continue the lease and claim rental or remedy of any other breach or (c) in either event, take or enforce any other action or right for damages or otherwise arising from the lessee's breach.

In the instant case, the appellant breached the lease agreement by not paying F the rentals due for several months. However, it then remedied that breach by making payment to the respondent's lawyers on 8 June 2009, within the time limit of 14 days given by them and in accordance with their specific instructions. In essence, the respondent elected to proceed in terms of clause 18(b) of the agreement by accepting the late payment of rentals and continuing with the lease. G

In my view, the options given to the lessor under clause 18 of the lease agreement are not conjunctive but disjunctive, as is clear from the use of the words "either" and "or". See *S* v *Ncube & Others* 1987 (2) ZLR 246 (S) at 264, where Gubbay JA (as he then was) observed that:

> "the word 'or' is usually treated as disjunctive unless there is a compelling H

Patel J

A indication that in its context it means 'and'. See Colonial Treasurer v Eastern Collieries Ltd 1904 TS 716 at 719; Hayward, Young and Co (Pty) Ltd v Port Elizabeth Municipality 1965 (2) SA 825 (A) at 829B; Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board & Ors 1982 (4) SA 427 (A) at 444C-D."

Having regard to clause 18 taken as a whole, it is abundantly clear that B clause 18(c) is confined to any other action or right, including damages, and does not include the right to terminate the lease and evict the lessee in terms of clause 18(a). Again, the lessor can elect either to terminate the lease under clause 18(a) or continue with the lease under clause 18(b). On a proper construction of clause 18, the lessor cannot straddle both options of formally demanding and accepting the late payment of rent on the one hand C and then claiming the right to terminate the lease on the other. In short, the lessor cannot purport to exercise both options in respect of the same breach.

It follows from the foregoing that the magistrate below clearly erred in holding that although the respondent had rectified its breach of clause 5 of the agreement, as was specifically required by the respondent's lawyers, that D breach was sufficient to justify the cancellation of the lease agreement. The appeal accordingly succeeds with costs.

Disposition

As regards costs, I am fully persuaded by Mr *Morris* that a special award of costs is warranted in this case in view of the shocking and deplorable manner E in which it has been litigated by the respondent's legal practitioners. The award claimed is for costs at current Law Society Tariffs, as was recently ordered by the Supreme Court in *Croco Holdings (Pvt) Ltd* v *The Hubert Davies Employees Trust (Pvt) Ltd & Others* S-236-08. I also note that a similar level of costs was granted by this court in favour of the appellant in an earlier postponement of this appeal.

F In the result, it is ordered as follows:

1. The appeal is allowed with costs on the Law Society Tariff of legal practitioner and own client.
2. The decision and order of 29 July 2009 by the court *a quo* are hereby set aside and substituted with: "The application is dismissed with G costs".

OMERJEE J agreed.

Honey & Blanckenberg, appellant's legal practitioners

H *Venturas & Samkange*, respondent's legal practitioners

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Document 29 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/DHL INTERNATIONAL (PVT) LTD v MADZIKANDA 2010 (1) ZLR 201 (H)

DHL INTERNATIONAL (PVT) LTD v MADZIKANDA 2010 (1) ZLR 201 (H)

Citation	2010 (1) ZLR 201 (H)
Case No	Judgment No. HH-51-10
Court	High Court, Harare
Judge	Makarau JP
Heard	14 January 2010
Judgment	17 March 2010
Counsel	*K E Kadzere,* for the applicant Respondent in person
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Employment – Labour Court – *jurisdiction – dispute between former employer and employee – unresolved dispute about lawfulness of termination of contract of employment – employee holding employer's property – employer seeking return of property – High Court having no jurisdiction to determine issue* D

Headnote

Generally, the Labour Court has no jurisdiction to entertain claims that are brought at common law. It can only determine applications and appeals among others that are brought in terms of the Labour Act. Where, however, a dispute can either found a cause of action at common law E and or in terms of the Act, a case of apparent concurrent jurisdiction between the High Court and the Labour Court appears to arise, but the apparent conflict can be easily resolved by paying regard to the overall intention of the legislature in creating the Labour Court. In such a case, the Labour Court's jurisdiction, being special, must prevail. It would make a mockery of the clear intention of the legislature to create a special F court as the jurisdiction of such a court could be defeated by the mere framing of disputes into common law causes of action where the Act has made specific provisions for the same. If the dispute is provided for in the Act, the Labour Court has exclusive jurisdiction even if the dispute is also resolvable at common law. G

There appears to be a general misconception amongst employers that one can easily avoid the jurisdiction of the Labour Court by seeking to recover property in the possession of an employee without first exhaustively dealing with the termination of the employment of that employee. The Labour Court has exclusive jurisdiction in matters relating to suspensions from employment and termination of employment. The possession of H

Makarau JP

A the employer's property by an employee in terms of the contract of employment is so interdependently linked to the contract that one cannot decide on one without deciding on the other. In the result, because the Labour Court has exclusive jurisdiction over the one, it follows that it also has exclusive jurisdiction over the other. The conditions of service of an employee are simply the terms upon which that employee is B employed and to try and separate the contract from its terms is legally untenable and, in any event, highly undesirable.

Vindication is a remedy that is available to an owner against the world at large. By reason of his rights of ownership, an owner is competent at law to demand possession of his property from anyone who cannot invoke a C right against him to keep the property. To succeed in such an action, one must allege and prove that one is the owner of the property in question and that the defendant is in possession of it. The right of the owner to possess his property is not absolute, however, and may be subject to some other right that the possessor may have against the owner. Thus, where the defendant held the plaintiff's property in terms of a contract D of employment, and the lawfulness of the termination of the contract of employment is in dispute, the defendant would have successfully discharged the onus on him to prove the right to possess the property against the plaintiff, pending the determination of the dispute.

Cases cited

E *Chetty v Naidoo* 1974 (3) SA 13 (A)

Hefer v van Greuning 1979 (4) SA 952 (A)

Medical Investments Ltd v Pedzisayi 2010 (1) ZLR 111 (H)

NRZ v Zimbabwe Railway Artisans' Union & Ors 2005 (1) ZLR 341 (S)

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

F *van der Merwe & Anor v Taylor & Ors* 2008 (1) SA 1 (CC)

Zimtrade v Malaya 2005 (1) ZLR 427 (H)

Case information

K E Kadzere, for the applicant

Respondent in person

Judgment

G **MAKARAU JP:** The respondent was employed by the applicant as its Finance Manager up to July 2009 when allegations of misconduct were leveled against him. A disciplinary hearing was convened to determine the validity of the allegations and it found him guilty as charged. He appealed to the

applicant's area managing director against the dismissal without success. He then appealed to the Labour Court arguing that his dismissal H

Makarau JP

was racially motivated and in any event, the penalty meted against him was A unduly harsh. The appeal to the Labour Court was pending at the time of the hearing of this application.

After the respondent had lost his appeal to the area managing director, the applicant demanded the return of certain of its assets that were in the possession of the respondent, being assets that the applicant had put into B his possession in fulfillment of his conditions of service. The respondent did not hand over to the applicant a motor vehicle, an Isuzu truck bearing the registration number AAG 0764. This prompted the applicant to file this application, seeking an order compelling the respondent to deliver the vehicle.

The application was opposed. C

In opposing the application, the respondent denied that he was properly dismissed from employment and submitted that he has bright prospects of success on appeal. It was his view that the justice of the matter demands that he retains the motor vehicle pending the determination of his appeal by the Labour Court.

In his heads of argument, the respondent argued in limine that this court has D no jurisdiction to determine the matter, exclusive jurisdiction in the matter having been reposed in the Labour Court by the provisions of s 89 of the Labour Act [*Chapter 28:01*] ("the Act").

In my view, two issues arise. Firstly, I have to determine whether this court has jurisdiction over the dispute between the parties. If this court does enjoy E jurisdiction in the matter, I must proceed to determine whether or not, pending determination of the respondent's appeal in the Labour Court, the applicant can retrieve its motor vehicle from the respondent using the *rei vindicatio*.

The issue of when the jurisdiction of this court is ousted by the provisions of the Act has been before this court in a number of cases before. See *National* F *Railways of Zimbabwe* v *Zimbabwe Railway Artisans Union & Others* 2005 (1) ZLR 341 (S) and *Tuso* v *City of Harare* 2004 (1) ZLR 1 (H). In my view, I think the position is now settled that a dispute falls to be determined exclusively by the Labour Court if such arises from a cause of action that has been specifically provided for in the Act and for which a remedy is also provided in the Act. G

Section 89(1)(a) of the Act provides that:

> "(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 ..."

Section 89(6) then proceeds to provide that – H

Makarau JP

> A "(6) No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determineany application, appeal or matter referred to in subsection (1)."

The literal and grammatical meaning of the two sections read together have been held in the cases that I have referred to above to mean that if the dispute is provided for in the Act both in terms of cause of action and remedy or B remedies, then the Labour Court has exclusive jurisdiction over the dispute.

In casu, it has been argued on behalf of the applicant that the applicant has brought a common law vindicatory claim against the respondent in which it seeks to recover its motor vehicle from the respondent. In this regard, the applicant is relying on the common law cause of action that allows an owner C to vindicate its property from whosoever is in unlawful possession of the same and therefore the dispute falls outside the purview of the Labour Court which cannot determine common law causes of action.

As a general statement, it is correct that the Labour Court has no jurisdiction to entertain claims that are brought at common law. It can only determine applications and appeals among others that are brought in terms of the Act. D Where, however, a dispute can either found a cause of action at common law and or in terms of the Act, a case of apparent concurrent jurisdiction between this

court and the Labour Court appears to arise. I say "appears to arise" because the apparent conflict can be easily resolved by paying regard to the overall intention of the legislature in creating the Labour Court. In E my view, in such a case, the Labour Court's jurisdiction, being special, must prevail. It would make a mockery of the clear intention of the legislature to create a special court if the jurisdiction of such a court could be defeated by the mere framing of disputes into common law causes of action where the Act has made specific provisions for the same. In my view, if the dispute is provided for in the Act, the Labour Court has exclusive jurisdiction even if F the dispute is also resolvable at common law.

From the number of similar disputes being filed with this court one would say that there appears to be a general misconception amongst employers that one can easily avoid the jurisdiction of the Labour Court by seeking to recover property in the possession of an employee without first exhaustively G dealing with the termination of the employment of that employee. I have had occasion to consider a similar question in *Zimtrade* v *Makaya* 2005 (1) ZLR 427 (H). In that matter, which was unopposed, I declined jurisdiction. My reasoning in that matter was firstly that the Labour Court has exclusive jurisdiction in matters relating to suspensions from employment and termination of employment. Secondly, I reasoned that the possession of the H employer's property by an employee in terms of the contract of employment

Makarau JP

is so interdependently linked to the contract that one cannot decide on one A without deciding on the other. In the result, because the Labour Court has exclusive jurisdiction over the one, it follows that it also has exclusive jurisdiction over the other. The conditions of service of an employee are simply the terms upon which that employee is employed and to try and separate the contract from its terms appears to me legally untenable and in any event, highly undesirable. B

In the arguments that have been made on behalf of the applicant, I find nothing that persuades me to move from the views I expressed in the *Zimtrade* case.

On the basis of the above, I would hold that this court has no jurisdiction in the above matter.

Assuming that I have erred in holding that this court has no jurisdiction in C this matter, I still would have dismissed the application at common law.

Vindication is a remedy that is available to an owner against the world at large. By reason of his or her rights of ownership, an owner is competent at law to demand possession of his or her property from anyone who cannot invoke a right against him or her to keep the property. For one to succeed D in such an action, one must allege and prove that they are the owners of the property in question and that the respondent or defendant is in possession of the property. See *van der Merwe and Anor* v *Taylor NO & Ors* 2008 (1) SA 1 (CC).

Whilst it is not necessary for the owner to allege that the possession of the E respondent/defendant is unlawful for them to establish a valid cause of action, such considerations come into play when the court is determining the application. The right of the owner to possess his property is not absolute and may be subject to some other right that the possessor may have against the owner. See *Chetty* v *Naidoo* 1974 (3) SA 13 [AD]; *Hefer* v *Van Greuning* 1979 (4) SA 952 (A) and *van der Merwe and Anor* v *Taylor NO & Ors (supra*). F

Mr *Kadzere,* for the applicant, submitted, and correctly so in my view, that the onus rests with the respondent to prove the right to possess the motor vehicle against the owner.

It appears to me that, *in casu,* the right of the applicant to possess the motor vehicle is subject to the rights that the respondent has to the vehicle in terms G of his employment with the applicant. Whilst the applicant has deposed to the fact that the respondent has been dismissed from employment, that dismissal is subject to appeal. It is still in dispute and so are the entitlements of the respondent under the contract of employment. In contrast, I may at this stage mention that on the same day that I heard argument in this matter, I also heard argument in the matter of the matter of *Medical Investments* H

Makarau JP

Ltd v *Pedzisayi* 2010 (1) ZLR 111 (H) wherein I found that the applicant in that case was entitled to vindicate its vehicle from the respondent, a former employee, as the employer-employee relationship between the parties had terminated on account of the resignation of the respondent. In that matter, the status of the former employee as such was not in doubt. *In casu,* it appears to me that the status of the respondent has not been finally determined as it is pending the appeal before the Labour Court. As such, the facts of this matter are distinguishable from that of the *Medical Investments Ltd* case.

On the basis of the foregoing, even if this court had jurisdiction to determine this dispute at common law, I would have found that the respondent has successfully discharged the onus on him to prove the right to possess the motor vehicle against the applicant, pending determination of the appeal that is pending in the Labour Court.

Finally, Mr *Kadzere* has further submitted that in view of the provisions of s 92E of the Act, the respondent stands dismissed from employment as the noting of an appeal to the Labour Court does not suspend the decision appealed against. Again, *Mr Kadzere* is correct. Section 92E of the Act provides:

(1) An appeal in terms of this Act may address the merits of the determination or decision appealed against.

(2) An appeal in terms of subs (1) shall not have the effect of suspending the determination or decision appealed against.

(3) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires.

In my view, the amendment to the law in 2005 to provide that appeals to the Labour Court would not suspend the decision appealed against was clearly meant to vary the common law position that was prevailing prior to the amendment. That for the purposes of the Act the employee is regarded as dismissed pending the determination of the appeal appears to me to be beyond dispute.

However, it appears to me that the provisions of s 92E of the Act have no effect on the claim of right that the respondent is raising at common law. While the law regards the respondent as dismissed, he has never accepted that position and is challenging his purported dismissal before the Labour Court. For as long as his challenge is alive and not fully determined, his claim of right remains alive with it. It is only when his challenge is invalidated at law that he loses the basis for his claim of right. The claim that the respondent has is not in my view dependent upon whether the law regards him as an employee or not. Rather, it is dependant upon whether or not the dispute between the parties has been definitively resolved. In this instance, the dispute

between the parties is pending before the Labour Court and resultantly, the claim of right remains alive.

On the basis of the above, assuming that this court had jurisdiction in the matter, I would have dismissed the application on the basis that it is premature. The respondent has a claim of right to the motor vehicle that can only be determined after the appeal before the Labour Court has been finalized. To approach this court before the hearing of the appeal is incompetent as the relationship upon which the applicant allowed the respondent possession of the vehicle has not been definitively determined.

It is however my finding, as detailed above, that this court has no jurisdiction in this matter.

In the result, I make the following order:

The application is dismissed.

Gill Godlonton & Gerrans, applicant's legal practitioners

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Document 30 of 62

Source:
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AFRICAN CONSOL RESOURCES PLC & ORS v MINISTER OF MINES & ORS 2010 (1) ZLR 208 (H)

Citation	2010 (1) ZLR 208 (H)
Case No	Judgment No. HH-57-10
Court	High Court, Harare
Judge	Uchena J
Heard	9 March 2010; 12 March 2010
Judgment	18 March 2010
Counsel	Mrs *J B Wood*, for the applicant *F Mutamangira*, for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Administrative law – *review – application for – domestic remedies available under relevant legislation – domestic remedy already being sought – not proper for court to hear matter until domestic remedies exhausted* D *– judicial deference – meaning of*

Headnote

The simultaneous filing of an application before the High Court, and an appeal under the relevant legislation, places the court in competition with the determiner of the domestic remedy. When that happens, this court E must defer to domestic proceedings, and allow them to be exhausted before it can hear the dispute between the parties. In terms of s 7 of the Administrative Justice Act [*Chapter 10:28*], the court can decline to hear an application, based on an alleged failure to comply with the provisions of the Act, if it is of the view that the applicant has other legal remedies through which he can obtain the remedy sought before F it and it considers that such remedy should first be exhausted. The court can exercise its discretion to hear the matter, but it should not do so in a manner that terminates pending domestic remedies unless there are compelling reasons for it to do so. The intention of the legislature in providing domestic remedies must be respected by the courts, and the G officials charged with the authority to determine domestic appeals or reviews must be allowed to do their work before the court intervenes. The court should only intervene in cases where it is obvious that domestic remedies will not do justice in the case before it. This approach is consistent with the principle of judicial deference. H

Uchena J

Cases referred to A

Bato Star Fishing (Pty) Ltd v Min of Environmental Affairs & Ors 2004 (4) SA 490 (CC)

Comr, SARS v Hawker Air Svcs (Pty) Ltd 2006 (4) SA 292 (SCA)

Ekurhuleni Metropolitan Municipality v Dada NO & Ors 2009 (4) SA 463 (SCA)

B *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 243 (S)

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H)

Legislation considered

Administrative Justice Act [*Chapter 10:28*], s 7

Case information

C Mrs *J B Wood*, for the applicant

F Mutamangira, for the respondents

Judgment

UCHENA J: The first applicant is a public company listed on the London Stock Exchange. The second to fifth applicants are Zimbabwean companies D duly incorporated in terms of the laws of Zimbabwe. They are wholly owned subsidiaries of the first applicant. The second to fifth applicants are holders of registered mining claims in the Chiadzwa diamond mining area of Manicaland. Their claims have been subjected to cancellations and litigation over such cancellations. The claims were declared valid by Hungwe J in E HC 6411/07. The respondents appealed against that decision to the Supreme Court, where the appeal is still pending.

The first respondent is the Minister of Mines and Mining Development. The second respondent is the Permanent Secretary in the Ministry of Mines and Mining Development. The third respondent is the Chief Mining Commissioner F in the Ministry of Mines and Mining Development.

The second respondent gave notice to the second to fifth applicants of his intention to cancel their claims with effect from 10 March 2010. The notice is dated 28 January 2010. The cancellations are premised on the applicants' claims having been registered over a reserved area in contravention of the Mines and Minerals Act [*Chapter 21:05*] the ("Mines Act"). He advised the G applicants that the area was reserved against pegging and prospecting by reservation 1558, dated 19 February 2004.

The applicants filed an urgent application on 5 March 2010, seeking a provisional order interdicting the respondent's from canceling their claims on 10 March 2010. The respondents opposed the application and raised the H following preliminary issues:

Uchena J

1. That the application was not urgent. A
2. That the applicants had not exhausted their domestic remedies, and had not complied with Order 33 of the High Court Rules
3. That the second to fifth applicants, who are the holders of the claims, did not exist at the time the claims were registered.

Urgency B

Mr *Mutamangira* for the respondents submitted that the applicants' application is not urgent because the applicants, who where notified of the cancellations on 28 January 2010, waited until the eleventh hour, before filing their application. He further submitted that the applicants have not exhausted domestic remedies provided in s 50(2) of the Mines Act. He further submitted C that the applicants appealed to the Minister on 9 March 2010, therefore that process must be completed before this court can intervene.

Mrs *Wood* for the applicants submitted that the delay was caused by the applicants' attempt to persuade the second respondent to withdraw the cancellation. The applicants had previously succeeded in getting D the respondents to withdraw the 8 December 2009 cancellations. They believed communication with the second respondent would achieve similar results. She further submitted that the applicants had applied to this court against the 8 December 2009 cancellations, and appealed to the minister. Those proceedings were rendered academic by the second

respondents' withdrawal of the 8 December cancellations. The applicants had incurred E heavy litigation expenses and wanted to avoid the same in respect of the 28 January cancellations

The second to fifth applicant received the 8 December 2009 notices to cancel from the Acting Mining Commissioner Manicaland. They challenged the cancellations, by pointing out that there was no Mining Commissioner for F Manicaland. That led to the withdrawal of that cancellation by the second respondent in this case. In his letter of 28 January 2010, the second respondent advised the applicants that he had, in terms of s 341 of the Mines Act, taken over the functions of the Mining Commissioners, Harare, Masvingo and Manicaland, and was withdrawing the 8 December 2009 cancellations to avoid unnecessary litigation. The second respondent then gave the 28 G January 2010 notices of the cancellation of the second to fifth applicants' claims. He again advised them that he had in terms of s 341 of the Mines Act assumed the functions of .the aforesaid Commissioners. The second respondent's conduct was clearly aimed at correcting the error pointed out by the applicants, and to personally repeat the same act with resolve. The fact that the withdrawal and the subsequent cancellations took place on the H

A same day must have been of significance to the applicants.

The applicants attached to their application the letters they wrote to and received from the second respondent before they filed this application. They attached the second respondents' letters dated, 28 January 2010, 12, 19 and 23 February 2010, and their letters to the second respondent dated 1, 11, 16, 23 and 24 February 2010.

B The correspondence reveals the applicants' attempt to settle the dispute without litigation and the second respondent's insistence that the cancellations were not going to be reversed. It is clear that the applicants genuinely wanted to avoid litigation, and hoped the second respondent could be persuaded to withdraw the cancellation. It is also equally clear from the second respondent's letters C that the applicants' attempts were not going to be acceded to. This must have warned the applicants that their delay in applying to the courts or appealing to the Minister may in the circumstances be to their own disadvantage.

I am therefore satisfied that the applicants' explanation for the delay is not satisfactory.

D Mr *Mutamangira* made forceful submissions on the effect of the applicants' coming to this court before exhausting domestic remedies. He submitted that s 50(2) of the Mines Act provides for an appeal to the Minister. The second respondent in his notices of cancellation drew the applicants' attention to their right to appeal. He submitted that the applicants had not appealed to the Minister when they filed this application. He further submitted that this E was a deliberate abstention from exhausting domestic remedies. He further submitted that the applicants have now appealed to the Minister. They did so on 9 March 2010, a day before the date of cancellation, and four days after they filed this application.

Mrs *Wood* submitted that the applicants had no hope of a fair hearing before F the Minister. She referred to Hungwe J's comments in HC 6411/07 where the applicants' chance for a fair hearing by the Minister was compared to that of "an ice block against hell fire". She pointed out the applicants' allegations of the Minister's alleged involvement with companies which have been granted rights to mine diamonds from the disputed claims. If these were the true facts they would have been a fair response to Mr *Mutamangira*'s submissions.

G An analysis of the applicants' appeal to the Minister is revealing. It seeks the Minister of Mines and Mining Development's recusal from considering the applicant's appeal. This means if that request is acceded to, the Minister, who is alleged to be biased, will not decide the applicant's appeal. If he considers the appeal against them without good grounds for refusing to recuse himself H the applicants can take his decision on review. The applicants therefore have

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a fair chance of their appeal being properly considered on the merits. A

The appeal was submitted a day before the date of cancellation, and four days after this application was filed. The filling of the appeal places this court in competition with the Minister on the

determination of the dispute between the parties. When such a situation arises the court must defer to the determination of the issues through domestic remedies.

That is consistent with the courts' clear position on the need for a party to first exhaust domestic remedies before seeking a remedy before this court. In *Girjac Services (Pvt) Ltd* v *Mudzingwa* 1999 (1) ZLR 243 (S) at 249B-E Gubbay CJ, commenting on the need to exhaust domestic remedies, said:

> "In its opposing affidavit, the appellant specifically raised the complaint that the respondent had adopted the wrong procedure in applying to the High Court for relief rather than following the domestic procedure outlined in the code of conduct. In his answering affidavit, the respondent significantly proffered no explanation for taking the route he did. He appears to have been of the view that both options were open; the choice being uninhibited.
>
> The learned judge a *quo* did not deal with this issue although it was argued and the relevant authorities referred to him. He ought to have done so.
>
> In *Tutani* v *Minister of Labour & Ors* 1987 (2) ZLR 88 (H) at 95D, Mtambanengwe J observed that where domestic remedies are capable of providing effective redress in respect of the complaint and, secondly, where the unlawfulness alleged has not been undermined by the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for not doing so. The same approach was applied by Smith J in *Musandu* v *Chairperson Cresta Lodge Disciplinary and Grievance Committee* HH-115-94 (not reported); and was referred to with approval by Malaba J in *Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H) at 191 D -192B. I respectfully endorse it."

In this case, the applicants did not only come to court before exhausting domestic remedies. They are asking this court to determine the legality of the respondents' handling of the cancellations when an appeal is pending before the first respondent or another Minister who will decide the case if the first respondent accedes to the applicants' request for his recusal.

The latter should in terms of the case law referred to above, and s 7 of the Administrative Justice Act [*Chapter 10:28*], hereinafter referred to as "the AJ Act", be sought first. The simultaneous filing of an application before this court, and an appeal before the first respondent, or his substitute, as already said places this court in competition with the determiner of the domestic remedy. When that happens, this court must defer to domestic proceedings, and allow them to be exhausted before it can hear the dispute between the parties. The pendency of the domestic remedy would, in my view, take away

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Uchena J

urgency from an application to this court.

Section 7 of the AJ Act provides as follows:

> "Without limitation to its discretion, the High Court may decline to entertain an application made under section *four,* if the applicant is entitled to seek relief under any other law, whether by way of appeal or review or otherwise, and the High Court considers that any such remedy should first be exhausted".

My understanding of s 7 is that this court can decline to hear an application, based on an alleged failure to comply with the provisions of the AJ Act, if it is of the view that the applicant has other legal remedies through which he can obtain the remedy sought before it and it considers that such remedy should first be exhausted. The court can exercise its discretion, but it should not do so in a manner that terminates pending domestic remedies unless there are compelling reasons for it to do so. The intention of the legislature in providing domestic remedies must be respected by the courts, and the officials charged with the authority to determine domestic appeals or reviews must be allowed to do their work before this court intervenes. In my view, this court should only intervene in cases where it is obvious that domestic remedies will not do justice in the case before it. This approach is consistent with the principle of judicial deference, commented on in the South African cases of *Bato Star Fishing (Pty) Ltd* v *Minister of Environmental Affairs & Ors* 2004 (4) SA 490 (CC) at 513, and *Ekurhuleni Metropolitan Municipality* v *Dada NO & Ors* 2009 (4) SA 463 (SCA) at p 468, where Hurt AJA commented on judicial deference as follows:

> "In *Logbro Properties CC* v *Bedderson NO* & *Ors* 2003 (2) SA 460 (SCA); [2003] 1 All SA 424, para 21, Cameron JA referred, in the context of a necessity for 'judicial deference', with approval to the following passage from an article by Cora Hoexter entitled *The Future of Judicial Review in South African Administrative Law* (2000) 117 *SALJ* 484 at 501-2, which is to the following effect:

F '… the sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of these agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with G a concern for individual rights and a refusal to tolerate maladministration.'

This passage was also referred to with approval and the theme taken up by Schutz JA in Minister of Environmental Affairs and Tourism & Ors v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & Ors v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA); [2003] 2 All SA 616, paras 52 and 53, where, after quoting the passage set out above, the learned judge said:

H 'I agree with what is said by Hoexter (*op cit* at 185).

2010 (1) ZLR p214

Uchena J

The important thing is that judges should not use the opportunity of scrutiny A to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal'.

Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better B his allocations, unless we conclude that his decision cannot be sustained on rational grounds".

In the present case the urgency of the application is diluted by the applicants' conduct. They appealed to the Minister a day before the date of cancellation when this application was already pending before this court. They knew, C from 28 January 2010, that they had a right to appeal to the Minister. They avoided that option, preferring to communicate with the Minister's subordinate, whose letters show that he was not prepared to budge. They then applied to this court before appealing to the Minister, well knowing that they would also appeal to the Minister. They appeared before this court D on 9 January 2010, when the case was postponed, to 12 March 2010, with the respondents' counsel undertaking to ensure that the applicants' claims would not be cancelled before the determination of this application. They therefore resorted to applying to this court simultaneously with an appeal to the Minister. This tends to show that the applicants deliberately delayed appealing to the Minister, so that they could apply to this court on the pretext E that they did not expect justice from the Minister, when they knew that they would appeal to the Minister and ask him to recuse himself so that their appeal would be heard by an impartial acting minister. No explanation was given as to why the applicants did not appeal to the Minister in the manner they did before 9 March 2010. The delay in approaching this court or appealing F to the Minister was therefore a result of a deliberate abstention from acting when the urgency arose on 28 January 2010.

In *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (H) at 193F-G Chatikobo J said:

"What constitutes urgency is not only the imminent arrival of the day of reckoning; G 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 dead line draws near is not the type of urgency contemplated by the rules."

In the circumstances it cannot be said that the application is urgent as I have to defer to the appeal under domestic remedies. I therefore hold that the applicants' application is not urgent H

2010 (1) ZLR p215

Uchena J

A **Other points** *in limine*

The respondents had also sought the dismissal of this application, on the grounds that the application does not comply with Order 33 of the High Court Rules, and that the applicants had not yet been incorporated when they registered the claims in dispute. Mr *Mutamangira* submitted that the B fact that they were not in existence when the claims were registered, means the registration is invalid in terms of the Mines Act.

In view of my finding that the application is not urgent, I need not determine the other preliminary issues. Once a case is judged to be not urgent, no further consideration should be given to any other

aspect of it. This is because urgency is the key entitling a case to this court's attention on an urgent basis C and ahead of other cases awaiting the court's attention.

The appropriate order

Mr *Mutamangira* urged this court to dismiss the application if the court found in favour of any of the respondents' preliminary issues. As I cannot deal with other issues in view of my finding that the application is not D urgent, the order sought by the respondents is not appropriate. A finding that a case is not urgent does not mean that the applicant's case has no merits. It means the case does not qualify for hearing on an urgent basis in terms of r 244 of the High Court Rules. It should therefore be set down and heard like any other case. It should simply take its place among cases awaiting to be set-down for hearing in terms of the rules applicable to none urgent E applications. See the comments of Cameron JA in *Commissioner, South African Revenue Services* v *Hawker Air Services (Pty) Ltd*; *Commissioner, South African Revenue Service* v *Hawker Aviation Partnership* & *Ors* 2006 (4) SA 292 (SCA) at 299F-300A.

A case judged to be not urgent should simply be struck off the roll for it to F be proceeded with like any other case.

In the result the applicant's application is struck off the roll.

Venturas & Samkange, applicants' legal practitioners

Mutamangira & Associates, respondents' legal practitioners

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Document 31 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/SIBANDA v MUSHAPAIDZE 2010 (1) ZLR 216 (H)

SIBANDA v MUSHAPAIDZE 2010 (1) ZLR 216 (H)

2010 (1) ZLR p216

Citation	2010 (1) ZLR 216 (H)
Case No	Judgment No. HH-56-10
Court	High Court, Harare
Judge	Makarau JP
Heard	14 January 2010; 21 January 2010
Judgment	24 March 2010
Counsel	Ms *D Mushambi,* for the plaintiff *M Ushe,* for the defendant
Case Type	Opposed court application
Annotations	Link to case annotations

Flynote

Practice and procedure – *provisional sentence – acknowledgement of debt – liquid document – what constitutes – any clear, unequivocal and unambiguous written promise to pay – liquid document embodying illegal agreement – provisional sentence not proper* D

Headnote

Rule 20 of the High Court Rules, 1971 provides that where the plaintiff is the holder of a valid acknowledgement in writing of a debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence on the said document. The term "liquid document" is not defined in the Rules, but the courts have held that E any clear, unequivocal and unambiguous written promise to pay a debt constitutes a liquid document. Thus, any letter, to the extent that it is clear, unequivocal and unambiguous and contains an acknowledgment of debt, can constitute a liquid document for the purposes of the Rules on provisional sentence. Where the letter is ambiguous, or where an F offer to make payment is conditional, the letter would not constitute a "liquid document".

Provisional sentence may not be granted on a liquid document that embodies an illegal agreement, as to do so is tantamount to giving legality to the agreement, albeit provisionally.

Cases cited G

Allied Holdings Ltd v Myerson 1948 (2) SA 961 (W)

CSD Entprs (Pvt) Ltd v S & T Import and Export (Pvt) Ltd & Ors 1980 ZLR 238 (G)

Oostelike Transvaal Ko-Operasie Bpk v Kruger 1958 (2) SA 329 (T)

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

Makarau JP

Legislation considered A

High Court Rules 1971 (RGN 1047 of 1971), r 20

Case information

Ms *D Mushambi,* for the plaintiff

M Ushe, for the defendant

Judgment

B **MAKARAU JP:** On 6 July 2009 the applicant issued summons against the respondent, claiming provisional sentence in the sum of US$ 8 920 together with interest thereon at the rate of 5 per cent per annum reckoned from the date of the issue of summons to date of payment in full. In the summons, the plaintiff alleged that the claim is based on a letter written by the defendant's C legal practitioners dated 11 June 2009 in which the debt was allegedly acknowledged. A copy of the letter was attached to the summons.

The defendant did not satisfy the claim upon the provisional sentence summons being served on him. Instead, he filed a notice of opposition supported by an opposing affidavit. In the opposing affidavit, he took the point *in limine* that the letter by his legal practitioners of 11 June 2009 was D not a liquid document in terms of the rules governing provisional sentence procedures. Regarding the merits of the matter, he averred that there was a dispute as to the correct amount owing and further that the debt was not yet due and payable. Finally he averred that he has a counterclaim against the plaintiff's claim.

E The plaintiff filed an answering affidavit in which he denied most of the facts raised by the defendant in the opposing affidavit. In addition, the plaintiff maintained his position that the letter written by the defendant's legal practitioners was a liquid document as it contained an acknowledgment of indebtedness by the defendant in the amount of the claim.

F It is appropriate in my view that at this stage I set out in some detail the contents of the letter that the plaintiff relied on in issuing provisional sentence summons in this matter. It reads:

> "The above matter refers, and pertinent is your letter dated 4th of June 2009. We have since forwarded your proposal to our client. He has instructed us to inform you that he unfortunately has to decline to sign your acknowledgement of debt. G There is no prudence in committing oneself to something that he has neither the ability nor the means to perform.
>
> However, our client has also instructed us to increase his offer to pay off the balance to US800-00 per month. Should your client accept, ours is prepared to make the first payment immediately."

In the next paragraph, the legal practitioners make reference to certain H schedules of payments that had been exchanged between the parties and

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highlighting the differences in these schedules. In the paragraph that follows, A they wrote:

> "If you calculate the total amount paid, according to your client's records, it amounts to US$4 830.00. If you look at annexure 'C', which is a copy of the letter of demand sent to ours by yours, you will find that the payments made so far have been pegged at US$5 730.00. Clearly your client's record of payments is inaccurate and unreliable. *Secondly, if you refer again to annexure 'C' and* B *calculate the amount owing with the figures as provided by your client on the letter of demand, you will find that there is a calculation error and the balance owing should actually be US$8 920.00*. It is unclear where your client is getting the figure of US$5 730.00 because his records show payments of US$ 4 830.00." (The emphasis is mine).

It is equally unclear to me what the various figures the parties were referring C to represented as none of the schedules referred to in the letter were attached to the summons for provisional sentence. In issuing summons for provisional sentence, the plaintiff relied on the sentence in the letter by the legal practitioners which I have highlighted above as representing the acknowledgment of indebtedness by the defendant. D

The issue that falls for determination in this matter is whether or not the letter written by the defendant's legal practitioners is a liquid document for the purposes of the provisional sentence procedure. Order 4 r 20 of the High Court Rules, 1971, provides that where the plaintiff is the holder of a valid acknowledgement in writing of a debt, commonly called a liquid document, E the plaintiff may cause a summons to be issued claiming provisional sentence on the said document. The term "liquid document" is not defined in the rules.

This court has, however, held that any clear, unequivocal and unambiguous written promise to pay a debt constitutes a liquid document. Thus, any letter, to the extent that it is clear, unequivocal and unambiguous and contains an acknowledgment of debt, can constitute a liquid document for the purposes F of the Rules on provisional sentence.

In *CSD Enterprises (Pvt) Ltd* v *S & T Import and Export (Pvt) Ltd & Others* 1980 ZLR 238 (G), the court had to determine whether a written agreement of cession in terms of which the defendants had undertaken to liquidate the original debtor's debt by way of fixed monthly installments was a liquid G document for provisional sentence purposes. In finding that the cession agreement was a liquid document, the court found, firstly, that a clear and unambiguous written promise to pay fixed monthly amounts constitutes a liquid document. In this regard, the court followed the decision in *Oostlike Transvaal Ko-Operasie Bpk* v *Kruger* 1958 (2) SA 329 (T), wherein a letter to pay a certain fixed monthly sum was held to be a liquid document to the H

A extent that it contained a promise to pay the sum each month. It was the clear, unequivocal and unambiguous undertaking to discharge the indebtedness on a monthly basis in the *Oostlike* case *supra* that persuaded the court to hold that the letter offering the monthly payments was a liquid document. Likewise, in the *CSD* case *supra*, the learned judge found that there was little difference between the undertaking given in the *Oostlike* case and the undertaking to B pay that was embodied in clause 2 of the cession agreement that was before him. It was his specific finding that the provisions of clause 2 of the cession agreement was a clear unequivocal and unambiguous undertaking binding the first defendant to liquidate a definite indebtedness which came into being when the cession agreement was signed.

C *In casu*, it appears to me that the letter attached to the summons for provisional sentence is part of an exchange of correspondence where the amount of the indebtedness was in dispute and was being debated as between the parties. To that extent, the amount of the indebtedness was not

certain or definite. Further, it also appears to me that in the letter, the defendant's legal practitioners were challenging the calculations done by the plaintiff. They instead offered the D defendent's own calculations and the resultant balance outstanding, which was different from the amount demanded by the plaintiff. To this extent, I view the letter as more of an arithmetical upstaging exercise of the plaintiff by the defendant's legal practitioners, rather than an unequivocal acceptance by the defendant that this was the sum outstanding and that he was promising to liquidate it.

E It is therefore my finding that the letter attached to the summons is not a clear undertaking to pay any amount accepted as outstanding. It is fairly ambiguous, as one cannot tell whether the defendant's legal practitioners were merely showing that the correct calculations on plaintiff's own figures would give a different result or were actually giving the correct calculations F and the correct amount owing.

I have considered whether the offer made by the defendant to increase his offer to US$800 per month can be considered as a clear, unequivocal and unambiguous undertaking to pay off the debt, as was held in the *Oostlike* case *supra*. I have compared the language that was used by the defendant G in that case and the language used by the defendant's legal practitioners in this case. In that case, the defendant personally wrote:

> "With reference to our discussion in connection with the above amount, (the sum of £185.13.9.), I wish to confirm that I will pay to you a minimum of £5 per month with interest at 6 per cent. Enclosed please find a cheque for an amount of £5 being payment for July 1952."

H I agree that the above constituted a clear and unequivocal undertaking to

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pay off the amount of the debt at the rate stated. In contrast, the defendant A before me made a conditional offer to settle the debt at the rate of US$800 per month on condition the plaintiff accepted the offer. In my view, the offer was equivocal to the extent it would be considered binding upon the parties if the plaintiff found it acceptable. Apart from the equivocal offer to settle the debt at US$800 per month, I do not read the letter as containing any other B undertaking to pay off the debt. On the basis of the foregoing, I will hold that the letter attached to the plaintiff's summons for provisional sentence is not a liquid document. Accordingly, I decline provisional sentence in this matter.

Assuming that I have erred in refusing to hold the letter as a liquid document, I still would have declined provisional sentence in this matter on another basis. From the correspondence that the parties attached to their pleadings in C this matter, it is common cause that the transaction giving rise to the dispute between the parties was a sale of certain equipment. The sale was concluded in September 2008. The equipment was sold for US$14 650.00. This was prior to the date when the exchange control authorities allowed the use of foreign currencies for ordinary trade within the jurisdiction, and thus the D agreement fell foul of the relevant exchange control regulations of the time that prohibited individuals from exchanging goods or services for foreign currency without prior approval of the exchange control authorities. In this regard, the transaction between the parties was tainted with illegality. See *Matsika v Jumvea Zimbabwe (Pvt) Ltd & Anor* 2003 (1) ZLR 71 (H).

It is the settled position at law that where the court is faced with an E agreement that is tainted by illegality, the court may allow the loss to lie where it falls, or may relax the rule against illegality to do justice between the parties. Whether to allow the loss to lie where it falls or to relax the rule against illegal agreements to do justice between the parties is an issue to be determined at the trial of the matter and cannot be debated at provisional F sentence stage. Provisional sentence procedure is a summary procedure that allows the holder of a liquid document to obtain judgment and execute upon that judgment before the trial of the matter. In that regard, it may be termed an extraordinary remedy procedure, although it has been part of our civil procedure for decades.

In taking the above approach, I am guided by the remarks by Price J in G *Allied Holdings Ltd* v *Myerson* 1948 (2) SA 961 (W) at 968, where he had the following to say:

> "It is recognized, of course that a liquid document, which on the face of it, speaks unequivocally, must have the story of the transaction behind it and that an investigation into that story may show that the defendant is not liable in terms of the liquid document; but once we go behind the liquid document the onus is H

Makarau JP

A on the defendant to show that if evidence were heard the probabilities are that he would succeed."

In casu, it is not in dispute that the agreement antecedent to the alleged liquid document related to a sale of equipment for United States dollars at a time when the legal tender for all transactions within the jurisdiction was the local currency. The defendant, whilst not denying the letter, is in my view B going behind the letter to show that the antecedent transaction was tainted with illegality and may be unenforceable against him. It is my view that provisional sentence may not be granted on a liquid document that embodies an illegal agreement, since to do so is tantamount to giving legality to the agreement, albeit provisionally. On the basis of the foregoing I would have declined provisional sentence in the matter.

C In the result, I make the following order:

1. Provisional sentence is refused.
2. The matter is hereby ordered to stand over for trial
3. The defendant shall enter appearance to defend within 10 days of D the date of this order.
4. Costs of this hearing shall be costs in the cause.

Gula-Ndebele and Partners, plaintiff's legal practitioners.

Muchineripi and Associates, defendant's legal practitioners.

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Document 32 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/S v NEVER 2010 (1) ZLR 222 (H)

S v NEVER 2010 (1) ZLR 222 (H)

Citation	2010 (1) ZLR 222 (H)
Case No	Judgment No. HH-66-10
Court	High Court, Harare
Judge	Kudya J and Assessors
Heard	9 March 2010
Judgment	7 April 2010
Counsel	*F I Nyahunzvi*, for the State *W Zhangazha*, for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Statutes – *Protection of Wild Life (Indemnity) Act [Chapter 20:15] – s 3 – indemnification of acts done in good faith in connection with suppression of unlawful hunting – "in good faith" – meaning – onus on State to show that act not done in good faith – need for honesty and an absence of an ulterior motive in the performance of his duties by an indemnified person* D

Headnote

In terms of s 3 of the Protection of Wild Life (Indemnity) Act [*Chapter 20:15*], no criminal liability shall attach to any person who, at the relevant time, was an indemnified person as defined in s 2(b) of the Act (which definition includes a game ranger employed by the Parks and Wild Life E Management Authority), in respect of any act or thing done by him in good faith for the purposes of or in connection with the suppression of the unlawful hunting of wild life. The words "in good faith" accentuate the need for honesty and hence for the absence of an ulterior motive, in relation to anything done for the purposes of or in connection with the discharge of his duties by an indemnified person. In a prosecution for F murder by such a person, the onus would lie upon the State to prove that the accused acted dishonestly or with an ulterior motive in shooting and killing the deceased.

Cases cited

S v Gwevera & Ors 1978 RLR 466 (G) G

S v Kachipare 1998 (2) ZLR 271 (S)

Legislation considered

Protection of Wild Life (Indemnity) Act [*Chapter 20:15*], ss 2(b), 3 and 4(b) H

2010 (1) ZLR p223

Kudya J

A *F I Nyahunzvi,* for the State

W Zhangazha, for the accused

Judgment

KUDYA J: This is an application made in terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for the discharge of the accused person at the close of the State case.

B The accused person was (and still is) a game ranger employed by the Parks and Wild Life Management Authority at the time he shot Panganayi Muromba on the left thigh and killed him in the Mupfurudzi Game Park in Shamva. He was charged with murder after the Attorney-General authorised his prosecution in terms of s 4(b) of the Protection of Wild Life (Indemnity) C Act [*Chapter 20:15*]. The events leading to the death of the deceased on 29 October 2005 at 3 a.m. were set out by the evidence of seven State witnesses. The evidence of Sergeant Simon Hlongwane, Sergeant Nala and Dr Kujinga were accepted into evidence by consent in terms of s 314 of the Criminal Procedure and Evidence Act, *supra*. Maxmore Mukubvu, William Mukubvu, Tawanda Magora and Marko Chimudende gave oral testimony D of the events of that fateful morning. Dr Gwiza was called in the absence of Dr Kujinga to explain the meaning of the medical terms used in the *post mortem* report, exh 1.

Maxmore Mukubvu, William Mukubvu and Tawanda Magora left Muromba Village in Chief Nyajina's area in the Uzumba Maramba Pfungwe district E of Mashonaland East Province in the company of the deceased in the early hours of 29 October 2005 to hunt for wildlife in the Mupfurudzi Game Park. They were armed with spears and axes and had a pack of 12 dogs. In the game park they first killed a hare before they cornered a klipspringer which ran up a nearby rock. Maxmore went up the rock while his fellow hunters advanced from the right hand side of the rock towards their quarry. He saw F the accused person grab hold of deceased by his belt and assault him with the butt of his rifle before he ran away from the scene. As he was running away, he heard the sound of three gunshots fired in rapid succession. When he was a kilometer away he heard another round of three gunshots.

Under cross examination he averred that the accused first fired three warning G shots into the air before he grabbed hold of the deceased. He saw all his colleagues take to their heels at the sound of the gun. As he scampered down the rock, he saw the accused grab hold of the deceased and belabour him with the butt of his rifle. He changed his version and averred that the accused held the

deceased with his left hand by his belt and used the right hand to fire three shots into the air while supporting the rifle with his right thigh. H Thereafter he hit deceased with the butt of the rifle twice on his buttocks.

2010 (1) ZLR p224

Kudya J

The statement he gave to the police on 16 September 2006 was produced A as exh 2. He told the police that his two friends who testified with him were on one side of the rock while the deceased was on the other side of the rock. He also stated in the statement that the accused set upon the deceased and hit him on his back above the waist with the butt of the rifle which he held in both his hands. He also told the police that after running for a kilometre B he heard a gunshot.

The discrepancies in Maxmore's version demonstrate that he did not fully observe the actions of the accused person towards the deceased because he was busy scampering down the rock in a bid to make good his escape without detection.

William testified that as they were surrounding the klipspringer, the accused C suddenly appeared and set upon the deceased whom he hit once on the back just above the waist with the rifle butt as he shouted the word "poachers" twice. The witness and Tawanda Magora ran away, leaving Maxmore on top of the rock. The deceased never ran away from the scene where he was apprehended by the accused. As William was running away he heard the sound D of three gunshots which were followed ten minutes later by another three shots. Under cross examination, he stated that the accused was four metres from the witness when he fired the rifle in his direction. He conceded that he did not wish to shoot him as he would not have missed him at such a short distance. His version in court was different from the one he gave to the police E on 16 September 2006 in exh 3, as regards the number of shots he heard. In his statement, he averred that he heard two shots fired in rapid succession and, after he had run for a distance of 500 metres he heard another shot.

Tawanda Magora was prompted to run off the scene by William who threw away his hunting weapons before he took to his heels. He had run for about 20 metres when he heard the sound of three gunshots. A fourth shot rang F out after he had run for about five minutes. In his statement to the police in September 2006 he stated that he first heard two gunshots and then a single gunshot later.

Marko Chimudende testified that he was on anti-poaching patrol duties in the game park in question with the accused person. They divided the area of G patrol between them and agreed to meet at a certain rendezvous in the game park. When he reached the rendezvous he heard the three gunshots ringing in the air in rapid succession. The accused made a report to him of how he shot one of the poachers as he tried to shoot one of the fleeing hunting dogs. The two went to check the deceased and found him in the throes of death bleeding from the thigh injury. When the police arrived, they picked three H

2010 (1) ZLR p225

Kudya J

A spent cartridges from the three different spots.

Dr Edmore Gwiza, a medical practitioner with the Family Support Clinic in Harare, explained the medical terms recorded by Dr Kujinga in the *post mortem* report. The pathologist recorded that the deceased sustained a gunshot wound on the left upper thigh. The bullet entered from the side on the back B of left upper thigh and exited from the middle of the front part of the same thigh. He concluded that death was a result of bleeding from that injury.

The State closed its case and Mr *Zhangazha* for the accused applied for his discharge and acquittal. He relied on the provisions of s 3 of the Protection of Wild Life (Indemnity) Act, *supra*, which reads:

> "No criminal liability shall attach to any person who, at the relevant time, was C an indemnified person, in respect of any act or thing whatsoever advised, commanded, directed or done or omitted to be done by him, whether before, on or after the date of commencement of this Act, in good faith for the purposes of or in connection with the suppression of the unlawful hunting of wild life".

The statute in question came into operation on 8 September 1989. The D deceased was shot and killed on 29 October 2005 at around 3 a.m. while he was poaching with fellow villagers. His partners in crime testified that they all knew that they were committing a criminal offence by hunting in a

game park without a requisite licence. That they were aware that they were not permitted to hunt in the game park was further demonstrated by the fact that they went to do so in the witching hours of the morning. The discrepancies E in the testimony of Maxmore on what he saw the accused doing demonstrate his unreliability as a witness. It seems to me that as they were hunting in the dark it was difficult for him to clearly observe the actions of the accused in relation to the deceased. His version was at variance with that of his partner in crime, William. It was clear to me that on sensing the presence F of the accused amongst them, William took flight, as did Tawanda. These witnesses' testimony demonstrated that the shots were first fired after they had commenced flight and not before they did so as stated by Maxmore. The probabilities seem to be that on sensing the presence of the accused amongst them, all the poachers including the deceased ran away. After all, they were all engaged in the illegal hunting of wildlife.

G The testimony of Marko showed that the accused was an employee of the Parks and Wild Life Management Authority who is an indemnified person as defined in para (b) of s 2 of the Protection of Wild Life (Indemnity) Act, *supra*.

In dealing with the Indemnity and Compensation Act, 1975, which was similarly worded, Beck J with the concurrence of Smith J in *S* v *Gwevera* H *& Ors* 1978 RLR 466 (G) at 467G stated that:

2010 (1) ZLR p226

Kudya J

> "The words 'in good faith"'have been used in s 4 to accentuate the need for A honesty, and hence for the absence of an ulterior motive, in relation to anything done for the purposes of, or in connexion with the suppression of terrorism."

The onus lay on the State to prove a *prima facie* case against the accused person that he acted dishonestly or with an ulterior motive in shooting the deceased. The testimonies of the State witnesses lack evidence upon which a B reasonable court, acting carefully, might properly convict. See *S* v *Kachipare* 1998 (2) ZLR 271 (S) at 276D-E. It does not show that the accused was not acting in good faith or that he acted with an ulterior motive for the purposes of or in connection with the suppression of the unlawful hunting of wild life. The concession by Mr *Nyahunzvi*, for the State, for the discharge of the accused at the close of the State case was therefore properly made. C

In the result, I decline to place the accused person on his defence. He is found not guilty and is acquitted of the charge of murder or any other competent verdict that might arise therefrom.

Attorney General's Office, legal practitioners for the State D

Chinamasa, Mudimu, Chinogwenya & Dondo, accused person's legal practitioners

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Document 33 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/STATIONERY BOX (PVT) LTD v NATCON (PVT) LTD & ANOR 2010 (1) ZLR 227 (H)

STATIONERY BOX (PVT) LTD v NATCON (PVT) LTD & ANOR 2010 (1) ZLR 227 (H)

2010 (1) ZLR p227

Citation	2010 (1) ZLR 227 (H)
Case No	Judgment No. HH-64-10
Court	High Court, Harare
Judge	Makarau JP
Heard	11 March 2010

Judgment 14 April 2010

Counsel *N Madya,* for the plaintiff
P Chiutsi, for the defendants

Case Type Civil application

Annotations Link to case annotations

Flynote

Practice and procedure – *judgment – summary judgment – application – onus on defendant wishing to resist application – what defendant must show*

Headnote

D The test to be applied in summary judgment applications is clear and settled. The onus resting on a defendant resisting summary judgment has been described as amongst the lightest that the rules of procedure cast on litigants. He does not have to prove his defence. He must merely allege facts which, if he can succeed in establishing them at the trial, would E entitle him to succeed in his defence. The defence so set up must, however, be plausible and *bona fide*. Obviously implied in this test, but oft overlooked by legal practitioners, is that the defendant must raise a defence. The facts alleged must lead to and establish a defence that meets the claim squarely. If the facts that he alleges, fascinating as they may be and which he may very well be able to prove at the trial of the F matter, do not amount to a defence at law, the defendant would not have discharged the onus on him and summary judgment must be granted. To defend a claim arising out of a contract of sale, the purchaser must attack either the existence of the agreement itself or the fact that the goods sold were not delivered to him. If other defences are raised, they G must be raised explicitly. It is not the function of the court to put words into the defendant's mouth and thereby establish a possible defence on his behalf when the defendant fails to do so in his opposing affidavit.

Cases cited

Beresford Land Plan (Pvt) Ltd v Urquhart 1975 (1) RLR 260 (A)

H *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* S-139-86

Makarau JP

Omarshah v Karasa 1996 (1) ZLR 584 (H) A

Standard Bank of SA Ltd v Panayiotis 2009 (3) SA 363 (W)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 67 B

Case information

N Madya, for the plaintiff

P Chiutsi, for the defendants

Judgment

MAKARAU JP: This is an application for summary judgment.

On 6 October 2009, the plaintiff issued summons against the defendants claiming the sum of US$4 568.85 in respect of certain goods allegedly sold C and delivered at the first defendant's special

instance. In its declaration, the plaintiff alleged that during the period 22 April to 20 May 2009, the plaintiff supplied stationery to the first defendant valued at $9 932.85. On 20 May 2009, the second defendant bound himself as co- principal debtor and surety for the debt due by the first defendant, which at the date of the suretyship, D stood at $8 700.00. It was further alleged that the first defendant made several payments to the plaintiff, leaving the balance claimed in the summons.

On 13 October 2009, the defendants filed an entry of appearance to defend, prompting the plaintiff to file this application for summary judgment.

The application was opposed. E

In opposing the application, the second respondent, who deposed to the affidavit on behalf of both respondents, denied that the first respondent had purchased the stationery from the plaintiff. He averred that the first respondent received an order from its client for the stationery and it in turn sourced the stationery from the plaintiff. When its client failed to pay for the stationery, mainly chalk it would appear, the first respondent advised the F plaintiff of the fact. The plaintiff however refused to accept the chalk back. It is further averred that an agreement was reached between the parties in terms of which the first respondent would sell the chalk, presumably to other of its customers and remit periodic payments to the applicant. This the first respondent had been doing prior to the issuing of summons. G

At the hearing of the application, the applicant applied for leave to file an answering affidavit. In terms of the rules, the proper term for this affidavit should be "supplementary affidavit" and not answering affidavit. The name of the affidavit is to be derived from the wording of r 67 of the High Court Rules 1971, which I refer to below, which grants discretion to the court to allow a plaintiff to supplement his founding affidavit. No answer is permissible H

Makarau JP

A in summary judgment proceedings.

In the affidavit, the plaintiff denied that it sold the stationery to the first defendant on consignment. It maintained that it had sold the stationery to the first respondent outright and further denied the alleged arrangement between the parties to the effect that the purchase price would be remitted to the applicant as and when the first respondent was able to sell the stationery B to its customers.

The filing of a supplementary affidavit is restricted in the discretion of the court to instances where a defence that was not anticipated by the applicant is raised in the opposing affidavit. See *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975 (1) RLR 260 (A) and *Omarshah v Karasa* 1996 (1) ZLR 584 (H).

C As stated above, para (c) to the proviso to r 67 of the High Court Rules 1971 grants power to the court to permit the plaintiff to supplement his founding affidavit with a further affidavit dealing with either matters raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit or the question whether, at the time the application D was instituted, the plaintiff was or should have been aware of the defence.

Rule 67 provides as follows:

> "No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, nor may either party cross-examine any person who gives evidence *viva voce* or by affidavit:
>
> Provided that the court may do one or more of the following – E
>
> (a) permit evidence to be led in respect of any reduction of the plaintiff's claim;
>
> (b) put to any person who gives oral evidence questions –
>
> (i) to elucidate what the defence is; or
>
> (ii) to determine whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence; F
>
> (c) permit the plaintiff to supplement his affidavit with a further affidavit dealing with either or both of the following –
>
> (i) any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit; or
>
> (ii) the question whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence.

G *In casu*, I allowed the filing of the answering affidavit on the turn and indicated that my reasons would follow. It is convenient that I now set them out.

The plaintiff's claim against the defendant is for the sum of $4 568.85 in respect of goods sold and delivered. Correspondence between the parties, prior to the issuance of summons, which are attached to the founding H affidavit, indicated that the defendants had failed to collect the purchase

price from their customer and were in the process of collecting the chalks A back. The sale agreement between the parties was not denied in any of this correspondence. Liability was also not specifically or impliedly denied at this stage. The logistical arrangement relating to the return of the chalk was informing the plaintiff not as a defence to the claim. It was simply by way of information with a request that the defendants be granted two weeks B to finalise (this arrangement). In my view, it was therefore not reasonably expected of the plaintiff to deal with the issue of the return of the chalk in its founding affidavit, as such return was a mere logistical arrangement that the defendants felt they had to attend to. It was not suggested as a defence to the claim for the payment of the balance of the purchase price.

In opposing the application for summary judgment, the defendant used the C return of the chalk as a defence and the plaintiff needed to deal with this unexpected alleged defence.

It is on the basis of the above that I allowed the supplementary affidavit, wrongly headed "Answering Affidavit", to be filed.

The test to be applied in summary judgment applications is clear and settled D in the authorities. The defendant must allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence. Obviously implied in this test but oft overlooked by legal practitioners is that the defendant must raise a defence. His facts must lead to and establish a defence that meets the claim squarely. If the facts that he alleges, fascinating E as they may be and which he may very well be able to prove at the trial of the matter, do not amount to a defence at law, the defendant would not have discharged the onus on him and summary judgment must be granted.

In casu, the defendants allege that after they had obtained the chalk from the plaintiff and having in turn delivered the chalk to their own customer, they failed to get the customer to pay for the chalk. This may very well be F true and I have no doubt that the defendant may be able to prove that this is what happened. The issue to be determined is whether this amounts to or constitutes a defence to the claim raised by the applicant for the balance of the purchase price of the chalk.

The general rule is that once the parties are in agreement over the *merx* and G the payment of the purchase price payable for the *merx,* a valid contract of sale comes into being between the parties. The contract then casts upon the seller the obligation to deliver the *merx* sold, and upon the purchaser, the obligation to pay the purchase price. To defend a claim under an agreement of sale, then, the purchaser must attack either the existence of the agreement itself or the fact that the goods sold were not delivered to him. H

A The defendants before me have denied that they purchased the chalk from the plaintiff. Such denial is not only bare but is contradicted by their further averments that they indeed received the chalk from the plaintiff and that they have paid part of the purchase price to the plaintiff. In the face of such an admission, the defence that there was no agreement of sale between the parties is untenable and the plaintiff must succeed.

B The plaintiff has generously interpreted the facts alleged by the defendant in the opposing affidavit as raising a contract of consignment. I say "generously" because the defendants have not so alleged in their papers.

At this stage, I believe that it is pertinent that I set out in full the contents of what I regard as the operative part of the defendants' opposing affidavit. In C response to the averments verifying the plaintiff's cause of action and the fact that the defendants had entered appearance to defend solely for the purposes of delay, the defendants had this to say in para 4 of their joint affidavit:

"This is disputed. The applicant did not supply any stationery to the first respondent. The brief facts are that:-

1.1 The first respondent obtained an order for chalks from its customer Kingstons D which it in turn sourced from the applicant.

1.2 After receiving the chalks Kingstons failed to pay for them and returned the chalks, the applicant was advised and the applicant refused to accept the chalks back.

1.3 An agreement was reached with the applicant in terms of which the respondent E would sell the chalk and remit payments to the applicant as and when any quantity was sold.

1.4 The first respondent has been selling the chalks and remitting the proceeds of the sold quantities to the applicant.

1.5 Indeed the applicant's Annexure 'A' confirms this arrangement."

As was remarked by McNally JA in *Mbayiwa* v *Eastern Highlands Motel* F *(Pvt) Ltd* S-139-86 at pp 4-5 of the judgment, quoting from *Maharaj* v *Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426D:

"… while the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence and material facts upon which it is based, with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence".

G I find the contents of the defendants' opposing affidavit contradictory, confusing and lacking the sufficient clarity and completeness that McNally JA referred to.

Whilst the defendants deny that the applicant delivered to them any chalk, they proceed to concede that they sourced chalk from the applicants which H somehow ended up with their customer. In this regard, for instance, it is

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not clear whether the defendants are setting up the defence of agency, in A which case they would not be liable for the purchase price of the chalk. The defendants do not clearly raise agency as a defence and it would appear from their subsequent averments that the relationship was not between the plaintiff and Kingstons directly but that Kingstons was a customer of the defendants only. B

Similarly, it is equally not clear whether the facts alleged by the defendants as detailed above raise a contract of consignment. I do not think so. I do not read any allegation of a contract whereby the plaintiff, as one trader, entrusted the chalk to the first defendant for the chalk to be sold by the first defendant on behalf of the plaintiff. The opposing affidavit spells out clearly, in my view, that the defendants obtained an order from their own customer C for the chalk. They then approached the plaintiff for the chalk. The plaintiff did not seek the defendants out for them to sell its chalk on consignment, in which case even the plaintiff would be obliged to accept back whatever portion of the consignment remains unsold. Rather, it appears to me quite clear that it was only after their customer had failed to pay for the chalk that D the defendants approached the plaintiff with the news and sought to return the chalk to the plaintiff.

In my view, the facts alleged by the defendant do not in themselves constitute a defence. If it was the intention of the defendant to deny liability for the purchase price of the chalk and instead to allege that the customer who failed to pay for the chalk was actually liable for the payment of the chalk E directly to the plaintiff, on the basis of either agency or consignment, such must have been alleged clearly.

In my view, it is not the function of the court to put words into the defednant's mouth and thereby establish a possible defence on his behalf when the defendant fails to do so in his opposing affidavit. F

I have also considered whether the alleged subsequent agreement between the parties that the defendants would proceed to sell the chalk and remit periodic payments to the plaintiff would constitute a defence to a claim for the purchase price of the chalk. In this regard I have considered whether this subsequent arrangement, if proved, would constitute a variation of the terms of the original agreement between the parties. G

It would have assisted me greatly had this been pleaded or argued before me. Instead, even the original agreement of sale is denied in the defendants' papers. How then can I *mero motu* hold that the defendants are raising a possible defence to the plaintiff's claim, to the effect that the terms of the original agreement were varied by a subsequent agreement? H

Makarau JP

A The onus resting on a defendant resisting summary judgment has been described as amongst the lightest that the rules of procedure cast on litigants. The defendant does not have to prove his defence. He must merely set up facts, which if he can prove at the trial, will entitle him to succeed in his defence. The defence so set up must however be plausible and *bona fide*.

B *In casu,* I find the possible defences set up by the defendants not only to be contradictory but also not plausible. They are inherently and seriously unconvincing, giving rise to the inference that they were raised solely for the purposes of delay. See *Standard Bank of SA Ltd v Panayiotis* 2009 (3) SA 363 (W).

On the basis of the foregoing, I find that the plaintiff's claim is clearly unanswerable.

C In the result, I make the following order:

1. Judgment is hereby entered for the plaintiff in the sum of $4 568.85.
2. The defendants shall bear the costs of suit.

D *Wintertons,* applicant's legal practitioners

P Chiutsi Legal Practitioners, defendants' legal practitioners

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Document 34 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/MUTETWA v DIXON & ORS 2010 (1) ZLR 234 (H)

MUTETWA v DIXON & ORS 2010 (1) ZLR 234 (H)

Citation	2010 (1) ZLR 234 (H)
Case No	Judgment No. HH-67-10
Court	High Court, Harare
Judge	Makarau JP
Heard	11 March 2010
Judgment	14 April 2010
Counsel	*T Tandi*, for the applicant *J Shekede*, for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Contract – *sale – sale of immoveable property – double sale – sale to one person, then to another – principles*

Contract – *specific performance – when may be granted – agreement tainted with illegality – specific performance should not be granted – grant of* D *specific performance resulting in injustice – grant would give applicant valuable asset for virtually nothing*

Headnote

The applicant bought a house from the first respondent, who was about to emigrate from Zimbabwe. The purchase price was expressed in local currency and the agreement of sale specified that the price was to be paid E in full within five days, failing which the agreement would be considered null and void. The parties, immediately after executing the agreement, agreed verbally that the purchase price of the property be converted to a sum expressed in US dollars and that payment be made into an overseas bank account. The applicant paid a quarter of the sum agreed on, then F defaulted. When pressed for payment of the balance of the purchase price in foreign currency, the applicant tendered local currency, which was spurned by the first respondent. The first respondent's estate agent wrote to the applicant cancelling the agreement of sale. The applicant took no steps to enforce the sale. In due course, the property was sold jointly to two other purchasers. Before transfer was made, the applicant G obtained an order restraining the first respondent from doing so. In the meantime, the second purchasers took occupation of the property. The applicant filed an application, seeking an order compelling the first respondent to pass transfer of the property to him against payment of the sum of expressed in local currency and evicting the first respondent and all those occupying through him from the property. The second H

2010 (1) ZLR p235

Makarau JP

A and third respondents (executors of the estates of the joint purchasers) opposed the application. They claimed that the full purchase price had been paid and that the applicant was in breach of the contract between himself and the first respondent.

Held, that this was a double-sale situation. Where A sells a piece of land to B and then to C, and where transfer has been passed to neither, B, in the B absence of special circumstances affecting the balance of equities, can interdict A from passing transfer to C and obtain specific performance on the contract, and in that event, C's only remedy is an action for damages against A.

Held, further, that the next issue was whether the applicant was entitled to C specific performance on the written contract of sale. If he was, his right to the property should prevail unless there were special circumstances in the matter that favour the second purchasers. Specific performance is a discretionary remedy. Specific performance of the second agreement of sale could not be granted because (a) the applicant had not sought specific performance of this arrangement; and (b) it was tainted with D illegality, being in breach of the exchange control laws. As for the first agreement, the actions of the parties showed that it was a sham; they did not intend to be bound by it at all. In any case, the applicant had breached the first agreement by not making payment within five days.

Held, further, that specific performance would also be refused because it E would result in injustice. The local currency had now gone into disuse and was valueless. The order sought would grant transfer of a valuable asset against the payment of a valueless currency.

Cases referred to

Crundall Bros (Pvt) Ltd v Lazarus NO & Anor 1991 (2) ZLR 125 (S)

F *Express Svcs (Pvt) Ltd v Nuanetsi Ranch (Pvt) Ltd* 2009 (1) ZLR 326 (S)

Farmers' Co-op Soc (Reg) v Berry 1912 AD 343

Haynes v King Williamstown Municipality 1951 (2) SA 371 (A)

Case information

T Tandi, for the applicant

G *J Shekede*, for the respondents

Judgment

MAKARAU JP: In or about January 2006, the applicant and the first respondent entered into an agreement of sale in respect of certain immovable property called Stand number 584 Greystone Park Township of Greystone. In terms of the written agreement, the purchase price for the property was the sum of H $400 000 000 and this was to be paid in full within 5 days of the signing of

Makarau JP

the agreement. The payments clause in the agreement of sale provided that A the purchase price was payable in full upon the signing of the agreement but a special condition of the agreement, provided that the payment be made within five working days of the signing of the agreement, failing which the agreement would be considered null and void.

It is common cause that the applicant did not pay the full purchase price B within the stipulated period or at any time thereafter. The parties appear to have agreed immediately after executing the agreement that the purchase price of the property be converted to the sum of US120 000 and that payment be made into a Channel Islands bank account whose details were furnished to the applicant by the first respondent. This variation to the written agreement was not itself reduced to writing C

In pursuance of the new agreement, the applicant paid the sum of US$30 000 to the applicant by making a deposit into the nominated account. He also paid the estates agents' commission in local currency in the sum of $30 000 000 directly to the estate agents who had arranged the sale.

In due course, the first respondent pressed for payment of the balance of D the purchase price in foreign currency as the applicant was taking too long to remit same. The applicant tendered local currency which was spurned by the first respondent. On 22 February 2007, the estate agency acting on behalf of the first respondent wrote to the applicant cancelling the agreement of sale. In the letter, the agency alleged that the applicant was in breach of E the written agreement of sale in that he had failed to pay the full purchase price within five working days of the execution of the agreement of sale. The applicant denied that he was in breach of the agreement but did not thereafter take any steps to enforce the agreement of sale against the first respondent. In due course, the property was sold jointly to the late Samuel Mushaninga and the late Salome Kudzai Chisvo. Before transfer could be F effected in favour of the second purchasers, the applicant obtained an order restraining the first respondent from doing so. In the meantime, the second purchasers took occupation of the property.

On 10 July 2009, the applicant filed this application, seeking an order compelling the first respondent to pass transfer of the property to him against G payment of the sum of Z$370 000 000 and also evicting the first respondent and all those occupying through him from the property. It may be pertinent at this stage to note that the applicant brought a similar application in 2007, which he withdrew in June 2009, with a tender of costs.

The first respondent was served with the application through service upon one Violet Tanda at the disputed property. It is not indicated on the certificate H

Makarau JP

A of service who Tanda is and in what capacity she accepted service of the court application on behalf of the first respondent, as it is common cause that first respondent left the country immediately after selling the property to the applicant and that the families of the late Mushaninga and the late Chisvo are the ones in occupation of the property.

B Not surprisingly, the first respondent did not oppose the application.

I have considered but have not decided on the issue whether the purported service on the first respondent in this matter is proper. In view of the conclusion that I reach in this matter, it is not necessary that I determine the issue. I simply raise it to highlight that in another forum the issue will have to be determined before an order can be made against the first respondent.

C The second and third respondents did oppose the application. Of material importance in the opposing affidavits filed by the second and third respondents is a narration of how the late Mushaninga and the late Chisvo purchased the property from the first respondent and paid the full purchase price. The respondents also sought to argue that the applicant was in breach of the D

contract between himself and the first respondent, prompting the applicant to challenge their *locus standi* to make such allegations.

The situation presented by the facts of this matter depicts to me the classic double sale situation. The first respondent first sold the property in dispute to the applicant and thereafter to the late Mushaninga and the late Chisvo, who purchased the property jointly. The first purchaser now approaches E court for an order of specific performance ahead of the second purchasers.

As stated above, at the hearing of the matter, the applicant took the point *in limine* that the second and third respondents had no *locus standi* in the matter to challenge the validity of the contract between the applicant and the first respondent. In this regard, the use of the term "*locus standi*" was, in F my view, misplaced. *Locus standi* relates to the standing of the party before the court. It does not relate to the weight that should attach to the evidence of a party that was not close to the transaction and who has no personal knowledge of such. The issue of *locus standi* does not arise in this matter, as the second and third respondents have each an interest to protect in the property in dispute. In any event, the applicant cited the second and third G respondents in this application and it cannot lie in his mouth to deny them *locus standi* after he has dragged them to court.

It appears to me that what the applicant intended to do was to urge the court not to attach any weight to the averments of the respondents regarding the alleged breach of the sale agreement by the applicant as they were not close H to the transaction. As will emerge from this judgment, the breach of the

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agreement by the applicant is, in my view, self confessed. A

The law relating to double sales is well settled.

The principles which apply where a person sells a property to two or more persons separately were set out by this court in *Crundall Brothers (Pvt) Ltd* v *Lazarus NO & Anor* 1991 (2) ZLR 125 (S) at 132G-133C. Relying on Professor E M Burchell "Successive Sales" (1974) 91 *SALJ* 40, this court B adopted the approach set out by the late Professor R G McKerron in his article, "Purchaser with Notice"(1935) 4 *SA Law Times* 178. The conclusions reached at by Professor McKerron appeared in his article as follows:

> "It is submitted that where A sells a piece of land to B and then to C … the rights of the parties are as follows:
>
> (1) Where transfer has been passed to B, B acquires an indefeasible right, and C C's only remedy is an action for damages against A.
>
> (2) Where transfer has been passed to C, C acquires an indefeasible right if he had no knowledge, either at the time of the sale or at the time he took transfer, of the prior sale to B, and B's only remedy is an action for damages against A. If, however, C had knowledge at either of those dates, B , in D the absence of special circumstances affecting the balance of equities, can recover the land from him, and in that event, C's only remedy is an action for damages against A.
>
> (3) Where transfer has been passed to neither, B, in the absence of special circumstances affecting the balance of equities, can interdict A from passing transfer to C and obtain specific performance on the contract, and in that event, C's only remedy is an action for damages against A." E

The facts of the matter before me fall into the third conclusion reached by the late Professor McKerron. Transfer has passed to neither. The issue that immediately falls to be determined is whether the applicant is entitled to specific performance on the written contract of sale as he prays for. If he is so entitled, his right to the property should prevail unless there are special F circumstances in the matter that favour the second purchasers.

Specific performance is a discretionary remedy. Generally speaking, any party to a binding contract, who is ready to carry out his own obligations, has a right to demand from the other party, so far as this is possible, reciprocity. See *Farmer's Co-op Society (Reg)* v *Berry* 1912 AD 343 and *Haynes* v *Kingswilliamtown Municipality* 1951 (2) SA 371 (A) at 378-379C. G

It is trite that before a party can approach the court for specific performance, he or she must set up a contract, whose terms are clear and unequivocal and in terms of which the order is to be granted. Trite as it may be, the issue arises before me as to what contract the applicant is setting up before me and upon whose terms I must grant specific performance as the applicant has deposed H

Makarau JP

A to two possible agreements between the parties. I find, however, that each is fraught with fatal difficulties.

It is convenient that I dispose of the second agreement first. As stated above, after the parties had concluded the written agreement of sale, they verbally agreed that the purchase price be converted to the sum of US$120 000 and that B payments be made into an offshore account whose details the first respondent furnished to the applicant. The applicant part performed under this verbal agreement and when he failed to pay the balance of the US$120 000, the first respondent purportedly cancelled the agreement of sale.

I cannot grant specific performance of the second agreement of sale for two good reasons. Firstly, and this should effectively close the matter, the C applicant has not sought specific performance of this arrangement. He urges me to ignore it and for me to revert to the written agreement between the parties. Secondly, even if I could find that this was the effective agreement between the parties, as I am inclined to, I would not have been able to grant specific performance on it as it was tainted with illegality. The parties, D whilst resident in this country and without the prior approval of the foreign exchange authorities, had sought to trade in foreign currency for a property in Zimbabwe.

It appears to me that, being aware of the illegality tainting the second arrangement and, most probably, also wishing to avoid the onerous obligations imposed upon him by the arrangement, the applicant has urged me to enforce E the written agreement between the parties wherein the purchase price was payable in local currency. The applicant has not given me a reason why I should revert to the written agreement in view of the subsequent developments between the parties.

It is common cause that almost immediately after concluding the written F agreement of sale, the parties entered into the verbal arrangement, the details of which I have already given. It is further common cause that the applicant did not pay the local purchase price of the property in local currency within the stipulated five days or at all.

In my view, the fact that the second arrangement was entered into almost G at the same time as the written agreement and was acted upon whilst the terms of the written agreement were not, strongly suggests that the parties did not intend to be bound by the written agreement at all. It was a sham. It was not contracted with the necessary *animus*. It was never meant to be binding between the parties but to clothe the transaction between the parties with some legality in the event that the transaction attracted the scrutiny of H the authorities. I am fortified in reaching this conclusion from the actions of

Makarau JP

the parties. The first respondent never demanded payment of the purchase A price in local currency. The applicant himself did not approach the court to enforce the contract by tendering the purchase price in local currency. It was as if the written contract was never written until the applicant failed to raise the balance of the foreign currency. Then, for convenience, the first respondent alleged breach of the written agreement. B

Assuming that I have erred in holding that the written agreement was concluded without the necessary *animus* and is thus not binding between the parties, I still would have refused the applicant an order of specific performance on the same. By his own confession, the applicant is in breach of the agreement. It was a specific term of the agreement that the purchase C price in full be paid within five working days of the agreement. Failure to pay within the stipulated period would render the agreement of no force and effect. Thus, the failure by the applicant to make the stipulated payment on due date made the agreement lapse *ipso facto*. At the time he brought his application to court, the contract had long lapsed and could not be revived for enforcement. D

Finally and in any event, assuming that the contract had not automatically lapsed when the applicant failed to make the stipulated payment on due date, I would have withheld my discretion to grant specific performance in the circumstances of this matter. In *Zimbabwe Express Services (Pvt) Ltd* v *Nuanetsi Ranch (Pvt) Ltd* 2009 (1) ZLR 326 (S), the Supreme Court declined E to order specific performance of a contract whose contract price had been determined in 2003 and had been eroded into nothing by inflation at the time specific performance was sought. In declining to order specific

performance, the court was of the view that, were it to grant specific performance, the appellant it that matter would take delivery of 280 heifers for a very small amount of money. In other words, the court reasoned, the appellant would F take possession of a herd of cattle worth a considerable sum of money for which it would have paid virtually nothing.

In the matter before me, it is common cause that the applicant is seeking an order compelling the first respondent to transfer the immovable property to him against payment of the sum of Z$370 million. It is not in dispute that G the local currency has now gone into disuse and is accordingly valueless currently. The order that the applicant seeks is for him to obtain transfer of a patently valuable asset against the payment of a valueless currency. While this court upholds the principle of the sanctity of contracts, it will also not grant specific performance of a contract where to do so will result in an apparent injustice. H

2010 (1) ZLR p241

Makarau JP

A I do not see any features in the application before me that would distinguish the case from the case that was before the Supreme Court.

It is therefore my finding that, even without the advent of the second purchasers, the applicant would not have succeeded in enforcing any of the two agreements of sale that he concluded with the first respondent in respect of the property in dispute.

B In view of the conclusions I reach in this matter, it appears unnecessary to me that I embark on an exercise of determining whether there are any special circumstances in this matter that disentitle the applicant from obtaining an order transferring the property to him ahead of the second and third respondents. It is my finding that the applicant has not been able to establish that he is C entitled to specific performance of the contract that he seeks to rely on.

In the result, I make the following order:

1. The application is dismissed.
2. The applicant is to bear the respondents' costs.

D *Kantor & Immerman*, applicant's legal practitioners

Wintertons, second and third respondent's legal practitioner

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Document 35 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/SIBANDA v SIBANDA & ANOR 2010 (1) ZLR 242 (H)

SIBANDA v SIBANDA & ANOR 2010 (1) ZLR 242 (H)

2010 (1) ZLR p242

Citation	2010 (1) ZLR 242 (H)
Case No	Judgment No. HB-16-10
Court	High Court, Bulawayo
Judge	Ndou J
Heard	9 April 2010
Judgment	15 April 2010
Counsel	*J Sibanda,* for the applicant

M Mathonsi, with him Mrs *N Ncube,* for the first respondent

Case Type Urgent application

Annotations No case annotations to date

Flynote

Family law – *husband and wife – domestic violence – protection order under Domestic Violence Act [Chapter 5:16] – purpose of – courses open to party objecting to terms of order granted against him or her.*

Headnote

The applicant and the first respondent were husband and wife. They were D separated. The separation was an acrimonious one. The first respondent instituted proceedings against the applicant under s 11 of the Domestic Violence Act [*Chapter 5:16*]. She sought a provisional protection order against him. An interim protection order was granted and subsequently confirmed. In addition, the magistrate granted emergency monetary relief E in favour of the first respondent against the applicant. The applicant noted an appeal against the confirmation of the protection order and the granting of the emergency monetary relief. In spite of the noting of the appeal, the clerk of court issued a directive against the applicant's salary. The applicant sought to have this directive reviewed and simultaneously F filed an application to stay the directive. The main complaint by the applicant in these two applications is that he was not notified of the directive before it was issued. The applicant based his application for review on failure to comply with the provisions of s 9(2) and (3) of the Maintenance Act [*Chapter 5:09*].

Held, that the applicant did not seek revocation in terms of s 12 of the Domestic G Violence Act, but chose to approach the court for review of the clerk of court's act. The purpose of that Act is to provide relief to victims on an interim basis whilst the other competent courts are still determining the main issues. In cases of divorce, the complainant party must be protected against violence. The complainant and the children must be maintained in the interim period. Children cannot wait for determination of the divorce or maintenance between their parents without provision for their maintenance. The Act provides instant relief orders to cater for this interim period. To allow suspension of such orders pending the determination H

Ndou J

A of the main matter would defeat the purpose of the Act and the court should guard against abuse of its process to defeat the protective measures enshrined in the Act.

Legislation considered B

Domestic Violence Act [*Chapter 5:16*], s 11

Maintenance Act [*Chapter 5:09*], ss 9(1) & 18

Case information

C *J Sibanda,* for the applicant

M Mathonsi, with him Mrs *N Ncube,* for the first respondent

Judgment

NDOU J: The applicant seeks a provisional order in the following terms:

" Terms of order sought D

(a) The execution of a direction issued against the applicant's salary by second respondent in case number S 20/09 (Maintenance Court) be and is hereby suspended pending the resolution of case number HC 577/10 between the parties hereto.

(b) That the first respondent pays the costs of this application.

Interim order sought

E Pending the confirmation or the discharge of this order this order shall operate as a temporary order having the effect.

(a) Suspending the execution and coming into operation of a direction against the applicant's salary."

The background facts of this matter are the following. The applicant and the F first respondent are husband and wife. They are on separation and there are divorce proceedings pending between them. The separation is acrimonious. In October 2009 the first respondent sued the applicant for maintenance. The matter was set down for hearing on 29 October 2009. On that day there was a preliminary enquiry on the first respondent's application. The matter was postponed to a later date in November 2009 to enable the applicant to G produce proof of his earnings. On the later date the first respondent was not in attendance resulting in the matter being removed from the roll.

Thereafter, in March 2010, the first respondent instituted proceedings against the applicant in the juvenile court under s 11 of the Domestic Violence Act [*Chapter 5:16*] ("the Domestic Violence Act"). In this application, the first H respondent sought against the applicant a provisional protection order. The

interim protection order was granted and the return date was set down for 12 A March 2010. On 12 March 2010, the magistrate confirmed the provisional protection order and, in addition granted emergency monetary relief in favour of the first respondent against the applicant in the sum of US$2 000 per month. The applicant protested the confirmation of the protection order and the granting of the emergency monetary relief by noting an appeal on 17 B March 2010. Notwithstanding the noting of the appeal, the second respondent issued a directive against the applicant's salary. This is what this application is all about. Stung by the prospects of US$2 000 being deducted monthly from his salary, the applicant sought to have directive by the second respondent reviewed. He simultaneously filed this application to stay the directive against his salary under a certificate of urgency. The main protest by the applicant C in these two applications is that he was not notified of the directive before it was issued by the second respondent. The applicant bases his application for review on such failure to comply with the provisions of s 9(2) and (3) of the Maintenance Act [*Chapter 5:09*] ("the Maintenance Act").

Section 9 (1) of the Maintenance Act clearly states that that section applies D to orders made under the Maintenance Act and maintenance orders of other courts registered in terms of s 18 of Maintenance Act. The crux of the matter is whether an emergency monetary relief, an order under s 11(d) of the Domestic Violence Act, is an order registered in terms of s 18 of the Maintenance Act. Section 11(1) of the Domestic Violence Act creates three main kinds of relief orders, namely, a protection order, emergency monetary E relief and award of temporary custody. The protection order is final by operation because s 11(2) provides:

"Subject to subsection (3), a protection order shall remain in force for a minimum period of five years or until revoked or varied by court in terms of section 12."

The emergency monetary relief and award of temporary custody are emergency temporary orders. Section 11(3) of the Domestic Violence Act provides – F

"Any direction to pay emergency monetary and any award of temporary custody of any person which is contained in a protection order shall remain in force for such period not exceeding six months as the court may specify unless, prior to the expiry of that period, the direction or award is revoked or extended by court in terms of section 12 or an order or award is made in respect of the same matter by any other competent court: G

Provided that no such extension shall exceed a period of three months at a time."

In casu, the applicant did not seek revocation in terms of s 12 of the Domestic Violence Act, but chose to approach this court for review of the act of the second respondent. The purpose of the Domestic Violence Act is to provide relief to victims on an interim basis, whilst the other competent courts are H

A still determining the main issues. In cases of divorce, as is the case here, the complainant party must be protected against violence. Such party and the children must be maintained in the interim period. Children cannot wait for determination of the divorce or maintenance between their parents without provision for their maintenance. The Domestic Violence Act provides for instant relief orders to cater for this interim period. To allow the suspension B of such orders pending the determination of the main matter would defeat the purpose of the Domestic Violence Act. This court should guard against abuse of its process to defeat such protective measures enshrined in the Domestic Violence Act. *In casu*, the applicant approached this court directly without even exhausting the domestic remedies provided for in s 11 of the Domestic Violence Act. The applicant brought this application for the C purpose of denying the first respondent emergency monetary relief granted to her in terms of the Domestic Violence Act. On this point alone I find that the application is without merit and I dismiss it with costs.

Job Sibanda and Associates, applicant's legal practitioners

D *Coghlan & Welsh,* first respondent's legal practitioners

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Document 36 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/CHURCH OF THE PROVINCE OF CENTRAL AFRICA v JAKAZI & ORS (1) 2010 (1) ZLR 246 (H)

CHURCH OF THE PROVINCE OF CENTRAL AFRICA v JAKAZI & ORS (1) 2010 (1) ZLR 246 (H)

Citation	2010 (1) ZLR 246 (H)
Case No	Judgment No. HH-70-10
Court	High Court, Harare
Judge	Uchena J
Heard	8 April 2010
Judgment	16 April 2010
Counsel	*H Zhou*, for the applicant *G Chikumbirike*, for the first and second respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Evidence – *hearsay evidence – admissibility in civil cases – application proceedings – when hearsay evidence admissible – need for source of information to be disclosed – rules not the same as those for trial actions* D

Practice and procedure – *application – urgent – interlocutory proceedings – when hearsay evidence permissible.*

Headnote

Section 27(1) of the Civil Evidence Act [*Chapter 8:01*], which relates to the admissibility of first hand hearsay, only applies to such evidence in action proceedings. It does not apply in application proceedings. The rules of E admission of hearsay evidence applicable to interlocutory proceedings are not the same as those which apply to trial actions. Such evidence given in affidavit form in such applications is not necessarily excluded because it is hearsay, provided that the source of the information is disclosed. First, the court must examine the evidence given in this form F and ascertain whether the prejudice which might result to the opposite party, if the evidence is later shown to be incorrect, would be irremediable. Second, the court must examine the passages to see whether there is some justification, such as urgency, for the evidence being placed before it in hearsay, and not in direct, form (*dicta per* Beadle CJ in *Johnstone* v *Wildlife Utilisation Services (Pvt) Ltd* 1966 RLR 596 (G); 1966 (4) SA 685 (R) at p 686 applied). G

Cases cited

Comr, SA Revenue Service v Hawker Aviation Partnership & *Ors* 2006 (4) SA 292 (SCA).

Johnstone v Wildlife Utilisation Services (Pvt) Ltd 1966 RLR 596 (G); 1966 (4) SA 685 (R) H

Uchena J

A **Legislation considered**

Civil Evidence Act [*Chapter 8:01*], ss 27(1) and 56

Case information

H Zhou, for the applicant

B *G Chikumbirike*, for the first and second respondents

Judgment

UCHENA J: The applicant is the Church Of the Province Of Central Africa and is responsible for the affairs of the Anglican Church in Central Africa. The first respondent is its Bishop for Manicaland with whom it has pending cases before the courts for the determination of whether or not he is still its Bishop. C The first respondent leads a faction of the Anglican Church in Manicaland. The second respondent is an estate agent operating in Mutare. It was in August 2009 given a mandate by the first respondent's faction to sell two pieces of land belonging to the AnglicanChurch. The third respondent is the Registrar of Deeds and was cited in his official capacity as the official responsible for the registration of transfer of title over land in Zimbabwe.

D The applicant filed this urgent application on the following facts. On 18 March 2010 the applicant's registrar, who is the deponent of its founding affidavit, received a call from a member of the public who inquired from him "whether the purchase price of stands number 91 and 92 Second Street Mutare were negotiable". These are church assets over which the two E factions of the Anglican Church in Manicaland have a case pending before the courts. The applicant and the first respondent had, on 12 October 2009, agreed to a consent order being made under case Nos HC 4700/09 and HC 4804/09 regulating the control of church assets, including these stands. The first respondent's faction had in August 2009 given the second respondent a mandate to sell stands 91and 92.

F Alarmed by the inquiry, the applicant filed this urgent application seeking a provisional order interdicting the respondents from selling or in any way effecting transfer of the church's assets. It had obtained a copy of the mandate from the second respondent. The first respondent does not deny giving the second respondent the mandate to sell the stands, but says it suspended the G mandate when it agreed to the consent order of 12 October 2009.

The first and second respondents opposed the application and raised the following preliminary issues:

1. that the application is not urgent;
2. that the matter is *res judicata*; and H
3. that the applicant and the first respondent do not have *locus standii* to

Uchena J

sue and be sued in this case. A

Urgency

Mr *Chikumbirike,* for the first and second respondents, submitted that the application is not urgent because the mandate was given in August 2009 and nothing happened until 18 March 2010. He further submitted that the mandate was overtaken by the consent order of 12 October 2009. He further B submitted that the urgency is premised on hearsay evidence. He argued that if the hearsay evidence is excluded then there is no urgency at all, as the cause of action arose in August 2009.

Mr *Zhou,* for the applicant, submitted that the case is urgent as the stands are being sold as demonstrated by the inquiry of 18 March 2010. He further C submitted that the case is urgent as the respondents did not say that the mandate had been suspended after the parties agreed on the consent order of 12 October 2009. He later withdrew the latter submission when Mr *Chikumbirike* referred to a paragraph in the first respondent's opposing affidavit in which he specifically said the mandate had been suspended. The application's urgency therefore depends on the admissibility of the inquiry D of 18 March 2010. Mr *Zhou* submitted that the evidence of inquiry is not inadmissible hearsay, as first hand hearsay is admissible in terms of s 27 of the Civil Evidence Act [*Chapter 8:01*]. He further submitted that hearsay evidence is admissible in urgent interlocutory applications.

Mr *Chikumbirike,* in response, submitted that s 27 of the Civil Evidence Act E deals with *viva voce* evidence and is therefore not applicable to cases were the hearsay evidence is tendered in application proceedings. He insisted that the applicant should have filed a supporting affidavit from the inquirer. On the issue of hearsay evidence being admissible in urgent cases, he submitted that the applicant filed this application on 26 March 2010, a week after the date of inquiry. Therefore it had ample time within which it could have F obtained a supporting affidavit from the inquirer.

I agree with Mr *Chikumbirike* that s 27 (1) of the Civil Evidence Act does not apply to first hand hearsay evidence in application proceedings. Section 27 provides as follows.

> "(1) Subject to this section, evidence of a statement made by any person, whether G orally or in writing or otherwise, shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statement, if direct oral evidence by that person of that fact would be admissible in those proceedings"

The use of the words "if direct oral evidence by that person of that fact would be admissible in those proceedings", suggests that s 27(1) applies to first hand hearsay evidence in action proceedings. H

Uchena J

A The evidence of the caller's inquiry, is therefore not admissible under s 27 (1) of the Civil Evidence Act.

I must now consider the admissibility of the caller's inquiry on the basis of urgency. Mr *Zhou's* submission that hearsay evidence is admissible in urgent cases is a correct statement of our law of evidence. It is made admissible by B the provisions of s 56 of the Civil Evidence Act which provides as follows:

> "Where an issue as to the admissibility of any evidence or the competence or compellability of any witness arises which is not provided for in this Act, the issue shall be determined according to the law applicable in similar cases before the Supreme Court of Judicature in England."

According to our case law, such evidence is admissible under rules which C allows for its admission in interlocutory proceedings. See *Johnstone v Wildlife Utilisation Services (Pvt) Ltd* 1966 RLR 596 (G); 1966 (4) SA 685 (R) at 686 where Beadle CJ commenting on the admissibility of hearsay evidence in urgent applications said:

> "It is accepted in our practice that the rules of admission of hearsay evidence applicable to interlocutory proceedings are not the same as those that apply to D trial actions. Such evidence given in affidavit form in such applications is not necessarily excluded because it is hearsay, provided the source of the information is disclosed. As I understand our practice it is this: first, the court must examine the evidence given in this form and ascertain whether the prejudice which might result to the opposite party, if the evidence is later shown to be incorrect, would be irremediable. Second, the court must examine the passages to see whether E there is some justification, such as urgency, for the evidence being placed before it in hearsay, and not in direct, form. In any event, the court will always attach less weight to evidence which is placed

before it in hearsay form than to that which is placed before it in direct form. But the weight to be attached to it does not necessarily affect its admissibility, provided it is relevant."

In this case, the source of the statement is not properly disclosed. He is F merely referred to as a member of the public. This means the evidence of the content of the caller's statement is inadmissible hearsay. Such hearsay evidence is only admissible if the source of the information is disclosed. The result is that this court cannot admit or rely on such evidence. Even if the caller's statement was admissible, the fact that the caller's identity was not revealed makes it impossible for this court to consider the aspects it should G consider when it is to proceed on such evidence.

We would in the result end up with a situation where a call was received from someone who was inquiring about the price of the stands. We do not know when the caller had received information that the stands were being sold. The inference that the caller had recently been informed of the stands being H on sale is not the only reasonable inference which can be drawn from the

Uchena J

facts of this case. He may well have, for a long time, known of their being A on sale but decided to inquire at the time he did for reasons only known to himself. He may have received the information from people who knew of their having been on sale. What is clear is that there is no evidence that the caller had recently received information about the stands being on sale. In the absence of that evidence, it could still not be said that the application is B urgent. There would be no proof of an imminent sale of the stands to justify the hearing of the application on an urgent basis. It would still have to be heard as an ordinary application as it could not be said that it could not wait.

In this case, I agree with Mr *Chikumbirike* that the time which lapsed between the date of inquiry and the date this application was filed would have enabled the applicant to obtain a supporting affidavit from the caller. It does not C therefore justify the placing of hearsay evidence before this court. In the absence of that evidence, there is no proof of an imminent sale of the stands.

I therefore conclude that the application is not urgent. It should therefore await its turn to be heard in terms of the rules applicable to non-urgent applications. In view of my finding that the application is not urgent I will D not determine the other preliminary issues, as doing so would amount to hearing a non-urgent application on an urgent basis.

Mr *Chikumbirike* sought the dismissal of the application if the court found in the applicant's favour on the preliminary issues he raised. The application cannot be dismissed because of its lack of urgency, as urgency merely determines whether or not it can be heard on an urgent basis ahead of other E cases awaiting the court's attention. See *Commissioner, South African Revenue Service* v *Hawker Aviation Partnership & Ors* 2006 (4) SA 292 (SCA) at 299F- 300A.

The application is therefore struck off the roll.

The applicant shall pay the respondent's costs. F

Gill Godlonton & Gerrans, applicant's legal practitioners.

Chikumbirike & Associates, first and second respondent's legal practitioners

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Document 37 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/COTTON CO OF ZIMBABWE LTD v MOBIL OIL ZIMBABWE (PVT) LTD & ANOT 2010 (1) ZLR 251 (H)

COTTON CO OF ZIMBABWE LTD v MOBIL OIL ZIMBABWE (PVT) LTD & ANOT 2010 (1) ZLR 251 (H)

Citation 2010 (1) ZLR 251 (H)

Case No	Judgment No. HH-69-10
Court	High Court, Harare
Judge	Makarau JP
Heard	23 March 2009; 24 March 2009; 25 March 2009; 15 March 2010
Judgment	21 April 2010
Counsel	*R M Fitches,* for the plaintiff *A B Chinake,* for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Prescription – *date on which debt arose – date on which plaintiff becomes aware of debtor's identity – second defendant's identity only being revealed during trial of matter between plaintiff and first defendant – prescription only commencing at* D *date of revelation of second defendant's identity*

Headnote

The plaintiff brought an action against the first defendant in March 2005. The claim arose out of an allegation that, during a period ending in December 2002, the first defendant had not delivered the amount of E fuel that had been paid for by the plaintiff. The trial began in October 2008. In March 2009, at the conclusion of the trial, the plaintiff applied to have the second defendant joined in the proceedings. It had emerged during the proceedings that in 2006 the first defendant had disinvested from Zimbabwe and sold all its assets to the second defendant. After the application for joinder, the second defendant filed a special plea, F alleging that the plaintiff's claim had prescribed. The plaintiff argued that the identity of the second defendant as a debtor was unknown to the plaintiff until the trial of the matter, when the disposal of assets by the first respondent to the second respondent was disclosed and accordingly, in terms of s 16(3) of the Prescription Act [*Chapter 8.11*], the debt was not due.

G *Held*, that ordinarily the defences available to the first defendant were also available to the second defendant. On the merits, the second defendant had no independent defence to offer as it did not transact with the plaintiff before it took over the first defendant's assets and business in 2006. Had the first defendant successfully raised the issue of prescription, H this would have equally shielded the second defendant. However, the

Makarau JP

second defendant could not rely on the facts that would have sustained A a plea of prescription against the first defendant, as the causes of action that the plaintiff had against each defendant, whilst the same, arose on different dates. The plaintiff's right to sue the second defendant only accrued in March 2009 during the trial, when the disposal of assets to the second defendant was revealed. Before that, the plaintiff had no cause B of action against the second defendant as it was unaware of its identity and of the facts that would make the second defendant liable for the debts of the first defendant. Prescription against the second defendant could only have commenced running from the date of the disclosure. It should be remembered that the whole purpose of the Prescription Act and other statutes of limitations is to penalize the dilatory creditor but C not a creditor who is unaware, through no fault of his own, of the cause of action at his disposal.

Cases cited

Hodgson v Granger & Anor 1991 (2) ZLR 10 (H)

Street v Evans 1977 (1) RLR 293 (A); 1977 (3) SA 950 (RA) D

Legislation considered

Prescription Act [*Chapter 8:11*], s 16(3)

Case information

R M Fitches, for the plaintiff

A B Chinake, for the defendants E

Judgment

MAKARAU JP: The claim in this matter was filed against the first defendant in March 2005. Trial commenced in October 2008 and has spanned some 18 months. The cumulative delay between the time of the filing of the summons and the handing down of judgment is a record five years. The telling point F though is that there is no letter of complaint from the plaintiff over the time it has taken to get this matter finalized.

It may be pertinent at this stage to note that at the conclusion of the trial of the matter in March 2009, but before counsel had made their closing submissions, Mr *Fitches* for the plaintiff indicated that he intended to make an application G for joinder, to join to the proceedings Total Zimbabwe (Pvt) Ltd, as second defendant. This was to enable the plaintiff to get satisfaction of whatever judgment I may hand down in its favour from the second defendant, as it emerged during the trial of the matter that the first defendant disinvested from Zimbabwe in or about 2006 and sold all its assets to the second defendant. I postponed the hearing of the matter to enable the plaintiff to file and serve H

Makarau JP

A the intended application on all parties.

After the application for joinder to be filed and served, the second defendant filed a special plea, alleging that the plaintiff's claim had prescribed.

At the resumption of the hearing of the matter, it emerged that the first defendant had no objections to the proposed joinder, which I accordingly B granted. Both parties also indicated that they did not wish to call for or lead any further evidence in the matter. I then called for submissions from counsel. Written submissions were only filed on 8 April 2010, hence the unusual delay in the handing down of this judgment.

The Claim

C The plaintiff issued summons against the defendant on 16 March 2005, seeking an order compelling the defendant to deliver to it 522 763 litres of diesel. In the declaration, it was alleged that the parties had an oral agreement in terms of which the defendant would supply diesel to the plaintiff. It was further alleged that over a period stretching from July 2000 to December 2002, the plaintiff ordered and paid for 2 398 000 litres of diesel from the defendant and that in breach D of the agreement between the parties, the defendant delivered 1 875 237 litres only, leaving the balance that forms the subject of the claim. In the alternative, the plaintiff claimed the sum of ZW$2 091 052 000, being the market value of the diesel allegedly not delivered.

The claim was defended.

E In the main, while accepting the arrangement between the parties, the defendant averred that it had delivered all the diesel that the plaintiff ordered and paid for, thus putting the onus squarely on the plaintiff to prove the alleged shortfall.

The Evidence

At the trial of the matter, the plaintiff called one Webster Nhamo Dongo as F its first witness. At the time he testified, he was the plaintiff's purchasing manager. In that position, he was responsible for all the purchases of the plaintiff, including that of fuel. At the time of the transactions between the parties giving rise to the claim, he was the senior purchasing officer. He and the then plaintiff's purchasing manager set the transaction up with the defendant.

G The witness gave a detailed account of the processes that were involved in the transactions between the parties, from the generation of a *pro forma* invoice through to the delivery of the product. He also testified that an audit carried out by the plaintiff revealed the shortfall that forms the plaintiff's claims.

Under cross-examination, the witness conceded that the parties had an H arrangement whereby the plaintiff could collect the ordered fuel on its

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own. To the best of his knowledge, however, this had never happened. A This question followed up on his evidence that the shortfall alleged by the plaintiff arose from a comparative study of the fuel that was delivered to the plaintiff by the defendant as captured on its internal documents called "goods received vouchers", against the orders that the plaintiff had placed with the first defendant. B

In my view, the witness gave his evidence well. He testified mainly as to the general relationship between the parties. These are issues that are largely common cause between the parties. He did not attempt to reconcile the orders against the deliveries, reserving this for the second witness. It is my further view that he fared well under cross–examination. I have no reason to disbelieve him. C

Next to testify on behalf of the plaintiff was one Caspa Mangwiro, the plaintiff's materials and logistics officer. During the relevant period, he was responsible for monitoring the fuel that was delivered to the plaintiff's depots. He investigated the matter of the alleged shortfall in the diesel delivered by the defendant. In carrying out this investigation, he compiled D the telegraphic transfers that reflected payment for the fuel ordered, together with the invoices that the plaintiff received from the defendant. He obtained information from the plaintiff's various depots concerning the deliveries made. He then reconciled the *pro forma* invoices against the deliveries to come up with the shortfall.

It was his testimony that for each delivery received, the plaintiff would raise E a goods received voucher. This was done by the store's person at each of the plaintiff's depots throughout the country.

The witness adduced into evidence, as exhibit "1", a summary of the reconciliation that he did for all the plaintiff's depots. He compiled the exhibit personally. In compiling this exhibit, he used invoices from the F defendant and copies of telegraphic transfers from the plaintiff's bank on one hand, and the goods received vouchers from the plaintiff's depots and the delivery notes from the defendant on the other. These mismatched to the extent of the shortfall.

Finally, the witness adduced into evidence fifteen flat files. In each file was the G *pro-forma* invoice and proof of payment made on that invoice. These fifteen files related to fifteen of the nineteen transactions that the parties conducted over the period in question. In respect of the remaining four transactions, the witness testified that the files had gone missing.

Under cross-examination, the witness admitted that the plaintiff could at times collect diesel from the defendant. He testified that he had not prepared H

A a schedule showing any such collections and that these did not form part of his reconciliation. He also admitted that at one stage the plaintiff ordered diesel on behalf of its chairman but could not confirm whether delivery of such fuel had been effected directly to him by the defendant, in which case, such delivery would not be captured on any goods received voucher issued by the plaintiff.

B The witness also confirmed that whilst he had these documents in his possession, he had not adduced into evidence the goods received vouchers for a number of the plaintiff's depots that received delivery of diesel from the defendant.

Also under cross-examination, the witness was shown an assessment that C had been carried out by the defendant on the documentation relating to two depots of the plaintiff. The assessment revealed that a total of 38 000 litres delivered to the plaintiff had not been captured in the plaintiff's schedule. This he conceded. He also conceded that the summary of transactions that he had compiled might not be entirely correct

D When it was suggested to him in cross-examination that he did not complete the reconciliation, in that orders that were made in December 2001 could have been delivered in January or February 2002, he testified that he went by a certain cut-off date and that diesel delivered after the cut-off date, if any, was not taken into account. The cut-off date as captured on the reconciliation schedule is 31 December 2001.

E The witness impressed me as a measured man. He gave his evidence very slowly and took time to verify figures and information from his volumes of files. Understandably, he had to rely on his records for details of the transactions between the parties as the transactions were many and were for the period 2000 to 2001, some seven years before the trial. Any shortcoming F that I find in his evidence is not a reflection on his credibility but an attack on the integrity of the records he had to use and the record keeping system that was employed by the plaintiff at the time.

After this witness, the plaintiff closed its case.

The first defendant called one Benjamin Matanda as its only witness. He G is employed by the second defendant as customer care manager. At the relevant time, he was employed by the first defendant in the same capacity. He is familiar with the business relationship and arrangements that obtained between the plaintiff and the first defendant. To the best of his knowledge, the defendant delivered all the diesel that the plaintiff ordered from it. The deliveries were completed in early 2002. Again, according to his knowledge, H some of the invoices were not paid by the plaintiff. These are, however,

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included in the plaintiff's schedule as outstanding deliveries. A

The witness also testified that the defendant carried out an independent investigation into the matter of the alleged short deliveries and examined ledger cards availed to it by the plaintiff. From his personal examination of the ledger card relating to Bindura depot, he established that the total volume of diesel delivered as recorded on the plaintiff's reconciliation schedule for B this depot was understated. The same was found to be true for Gokwe and Kadoma depots.

The witness also compared the documents that he had for the Chinhoyi depot and found that 77 000 litres of diesel that had been delivered to the depot was not captured and recorded in plaintiff's reconciliation schedule. C He did not agree with the suggestion by Caspa Mangwiro on behalf of the plaintiff that such diesel had been mis-recorded on the ledger card as the invoice numbers appear to have dropped by one digit. He testified that it was quite normal for one customer to pick up the same volume of diesel twice a day on two different but consecutive invoices, as delivery depended on the configurations of the delivery truck. D

Under cross-examination, the witness parried all questions put to him with ease. I did not notice any hesitation on his part in responding to any of the questions. Generally, I gained the impression that the witness was honest. I shall rely on his evidence.

After the evidence of this witness, the first defendant closed its case. E

Prescription

The first issue that arises in this matter is whether or not the plaintiff's claim against the second defendant has prescribed.

The first defendant did not raise the issue at all.

In resisting the plea, the plaintiff has sought to rely on the provisions of F s 16(3) of the Prescription Act [*Chapter 8:11*], which reads:

> "A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises:

> Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care." G

It has been submitted on behalf of the plaintiff that the identity of the second defendant as a debtor was unknown to the plaintiff until the trial of this matter, when the disposal of assets by the first respondent to the second respondent was disclosed.

In his submissions on the plea, Mr *Chinake* makes out the case that the H

2010 (1) ZLR p257

Makarau JP

A plaintiff's cause of action against the first defendant has prescribed. As stated above, it is not necessary that I determine whether this is so as the plea of prescription has been filed by the second defendant only. I cannot determine the issue in respect of the first defendant *mero motu* and outside of the pleadings between the parties..

B The issue that has exercised my mind in this matter is whether the same facts that can sustain a plea of prescription against the first respondent can be relied upon by the second defendant.

It is common cause that the second defendant has been cited as a defendant before me as the successor in title to the first defendant. No culpability is alleged against the second defendant which has been joined in the proceedings C merely to enable the plaintiff, if successful, to obtain satisfaction of its judgments against the assets of the second defendant, formerly owned by the first defendant.

It appears to me that, ordinarily, the defences that are available to the first defendant are also available to the second defendant. In fact, it appears to D me that on the merits of the matter, the second defendant has no independent defence to offer as it did not transact with the plaintiff prior to its taking over of the first defendant's assets and business in 2006. It also appears to me quite clear that had the first respondent successfully raised the issue of prescription, this would have equally shielded the second defendant. It is the reverse situation that I need to determine in this matter.

E It appears to me that the second defendant cannot rely on the facts that would have sustained a plea of prescription against the first defendant as the causes of action that the plaintiff has against each defendant, whilst the same, arose on different dates. Whilst it may be correct that the plaintiff's cause of action against the first defendant arose in or about December 2001 F when the last invoice was made out between the parties, as submitted by Mr *Chinake,* the same is not true or correct with regards to the second defendant. As was observed by Lewis JP in *Street* v *Evans* 1977 (1) RLR 293 (A);1977 (3) SA 950 (RA) at 951D:

> "When dealing with the question of prescription, one has to ask oneself what is it that is being prescribed. What is being prescribed is one's right to sue. The G right to sue depends on having a cause of action which has accrued to one …"

It presents itself clearly to me that the plaintiff's right to sue the second defendant only accrued in March 2009 during the trial of the matter between the plaintiff and the first defendant when the disposal of assets to the second defendant was revealed. Prior to that revelation, the plaintiff had no cause H of action against the second defendant as it was unaware of its identity and

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2010 (1) ZLR p258

Makarau JP

of the facts that would make the second defendant liable for the debts of A the first defendant. Prescription against the second defendant can only have commenced running from the date of the disclosure. It was then successfully interrupted by the joinder of the second defendant to these proceedings.

Again in arriving at the conclusion that I do, I am guided by the remarks by Greenland J in *Hodgson* v *Granger & Another* 1991 (2) ZLR 10 (H) at 16 B to the effect that the whole purpose of the Prescription Act and other statutes of limitations is to penalize the dilatory creditor but not a creditor who is unaware, through no fault of his own, of the cause of action at his disposal.

On the basis of the foregoing, I would dismiss the plea of prescription as against the second defendant.

Whether the defendant failed to deliver all the diesel that the plaintiff C ordered

In my view, the above represents the sole issue that falls for determination in this trial. It is not a legal issue *strictu sensu*. It is a reconciliation issue. It is my further view that the exercise of reconciling what can be proved to have been ordered and what can prove to have been delivered could effectively D have been done by the parties' logistical officers prior to trial. It is an issue that should have been settled at pre-trial conference had all parties effectively played their role in the matter.

In essence, the plaintiff is alleging a short delivery of the diesel that it ordered and paid for. To prove its case, all the plaintiff had to do was to set E up its paper trail, showing the order, proof of payment on that order and the deliveries received against that order, thereby revealing the alleged non-delivery of the diesel duly ordered and paid for. This may sound simple and, in my view, it is indeed a simple exercise where proper and comprehensive records are kept of all transactions of this nature, something that I expected an establishment of the plaintiff's stature to do. F

It became apparent, however, during the trial that the plaintiff did not keep a comprehensive paper trail of each order of diesel made from date of order to date and place of delivery. What the plaintiff sought to do at the trial was to show a general deficiency between the total of all orders allegedly made and deliveries received without necessarily showing which particular orders G were paid for but were not received at all or were received in part.

In my view, having chosen to show a general deficiency, the plaintiff bore the onus of showing accurately what it is that it had ordered and paid for, to establish the opening entry of the account as it were. Having done so, it still would have borne the onus of proving what was delivered, again accurately, to establish the closing entry of the account, thereby revealing the deficiency H

2010 (1) ZLR p259

Makarau JP

A claimed. Anything short of this would be fatal to its claim.

It is trite that a general deficiency cannot be proved without first proving what was due, even if one can accurately prove what has been received.

During the trial, the plaintiff's second and key witness conceded that the plaintiff did not have a full set of documents relating to four of the transactions B listed in its summary of transactions as the files for these transactions had gone missing. As indicated above, he only adduced into evidence fourteen files instead of nineteen. The transactions for which no documents were adduced into evidence relate to invoices number 8 dated 2 April 2001, number 1039 dated 4 May 2001, invoice number 1061 dated 4 May 2001 and invoice number 13861 dated 10 December 2001. There was no evidence adduced C before me in respect of these transactions to show that either the order had been made or that payments had been made in respect of the orders. All I had was the evidence of the witness that these were valid transactions for which he could not produce supporting documents.

The issue that arises is to what extent the court can rely on second hand D hearsay evidence to prove a fact that a contemporaneously made document ought to have proved.

It appears to me that where a document was made contemporaneously with a transaction, recording that transaction, that document and that document alone is the only admissible evidence of that transaction. Any first hand hearsay evidence purporting to give the details of the transaction is inadmissible.

E It is the general rule that no evidence is admissible to prove the contents of a document other than the original document itself. L H Hoffmann and D T Zeffertt *South African Law of Evidence* 4 ed p 390 refer to this general rule as one of the most important surviving remnants of the best evidence rule. As with any general rule, there are a number of exceptions to this rule but F these are, in my view, of no application in this case. The plaintiff seeks,1977 (1) RLR 293 (A); by oral evidence of its second witness, to prove what was contained in various documents that have since gone missing. The witness purported to testify on orders for diesel that had been placed seven years ago. Such evidence is inherently unreliable, especially in view of the fact that some of the documents whose contents he purported to testify on were G still awaited from the plaintiff's bank. He had not even seen the document. It may not exist. Even assuming that he had at some time seen the documents he seeks to testify on, his recollection of what he saw on the documents constitutes inadmissible hearsay evidence as to the contents of the documents as he was not the author of any of the documents in issue.

H I may have been inclined to accept the oral evidence of the witness that he

Makarau JP

saw some documents that prove that some transactions occurred between A the parties but such documents are no longer in his possession. It is another thing for me to accept the oral evidence of the witness to prove the contents of the missing documents.

In view of the fact that the plaintiff could not prove that it ordered or paid for the diesel in the four transactions under dispute, it cannot be said that B the first defendant failed to deliver such diesel.

The total of the diesel in the four disputed transactions is 338 000 litres. I would have simply deducted this amount from the plaintiff's total claim were I satisfied that the plaintiff has accurately proven before me what diesel it received from the first defendant. I am not.

The plaintiff did not produce before me all the source documents from C which it concluded that there had been a shortfall in the delivery of the diesel that it had ordered. It is common cause that the plaintiff compiled its reconciliation from the goods received vouchers generated by its depots. Not all of these vouchers were produced before the court. All I have is the oral evidence of the plaintiff's witnesses testifying as to the quantity of the D diesel allegedly received by the plaintiff. Such oral evidence is not the best evidence of delivery as each delivery was recorded in a document that was made contemporaneously with the delivery. I would even venture to suggest that such evidence is hearsay as the witnesses did not make any of the entries that are allegedly on the vouchers.

Further, and in any event, assuming that the oral evidence of the plaintiff's E witnesses is admissible, the accuracy of the figures given by the witnesses is in doubt.

It is common cause that the parties had an arrangement whereby the plaintiff could collect some of the diesel directly from the defendant. In this event, some other document and not a goods received voucher would be generated. F The first witness testified that whilst he was aware of the arrangement, he was not aware of any collections that the plaintiff may have made. The second witness again admitted knowledge of the arrangement and testified that he had not taken these into account when he did his reconciliation. He did not prepare a schedule of such collections, which according to him, were done G by the plaintiff's Muzarabani and Glendale depots.

It was also not in dispute that one of the transactions had been for and on behalf of the plaintiff's chairman. The invoice indicated that delivery would be effected to him. It was not clear from the plaintiff's evidence whether such delivery had been effected directly to the chairman, in which event there would be no goods received voucher generated. H

Makarau JP

A As indicated above, the issue before me is one of reconciling two entries in an account that must balance at the end of the exercise. It is an accounting issue to be resolved on the basis of what the records reveal and not on the basis of the credibility of the witnesses who testified before me. Where the relevant records are incomplete, the calculations cannot be done on the speculative basis of what the witnesses say.

B On the basis of the above, it is my finding that the plaintiff has failed to prove the accurate quantity of diesel that it ordered and paid for. It has also failed to prove that the diesel that it ordered was not all delivered.

In the result, I make the following order:

1. The defendant is absolved from the instance. C
2. The plaintiff shall meet the defendant's costs of suit.

Dube Manikai & Hwacha, plainitff's legal practitioners

Kantor & Immerman, defendant's legal practitioners

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Document 38 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/CHURCH OF THE PROVINCE OF CENTRAL AFRICA v JAKAZI (2) 2010 (1) ZLR 262 (H)

CHURCH OF THE PROVINCE OF CENTRAL AFRICA v JAKAZI (2) 2010 (1) ZLR 262 (H)

Citation	2010 (1) ZLR 262 (H)
Case No	Judgment No. HH-73-10
Court	High Court, Harare
Judge	Makarau JP
Heard	11 February 2010; 24 February 2010
Judgment	28 April 2010
Counsel	*R Moyo*, for the plaintiff/respondent *G C Chikumbirike*, for the defendants/excipients
Case Type	Exception
Annotations	No case annotations to date

Flynote

Costs – *wasted costs – payment of – when may be ordered – principles – other party being put to expense – wasted costs must be awarded*

Headnote

The plaintiff church (respondent in the exception) issued summons against D the 12 defendants (excipients) seeking an order declaring that they had seceded from the plaintiff and that they should be restrained from holding themselves out to be officer bearers in the church. The defendants opposed the claim on various grounds and, following a pre-trial conference, filed an exception to deal with the various issues they E had raised. The exception was set down for hearing, then withdrawn. At the same time as the exception was withdrawn, the defendants filed a notice to amend their plea, to add a special plea. The special plea was worded in the same language as the withdrawn exception. The issue that arose what whether the defendants should be ordered to pay the costs of the withdrawal of the exception. F

Held, that rules of court are silent as to what order as to costs the court may make when an exception has been withdrawn. The general rule is that any party to the suit is entitled to withdraw any of its pleadings, provided this does not cause any injustice to the other party. A defendant may thus withdraw an exception and substitute it with a special plea or a different G exception, provided the withdrawal does not cause any injustice to the plaintiff and which injustice cannot be cured by an order of costs. The issue is not whether or not the same dispute is still before the court. It is whether the plaintiff has been put to some expense. The award of costs in its favour is restricted to the consideration of the withdrawn pleading and has little if anything to do with the outcome of the hearing H

Makarau JP

A on the pleading.

Case referred to

Hackleton Invstms (Pvt) Ltd v Time Bank of Zimbabwe Ltd 2000 (1) ZLR 60 (H)

Case information

B *R Moyo*, for the plaintiff/respondent

G C Chikumbirike, for the defendants/excipients

Judgment

MAKARAU JP: This is an exception with an exception. It is but a skirmish in the battle of suits, applications and counter applications that the two factions C of the "Anglicans" have brought against each other before this court, a spate of litigation that is now assuming nuisance value. The application was partly argued before me and, prior to the resumed hearing, it was withdrawn without a tender of costs. The issue of costs was then raised for my determination.

For a full appreciation of the nature of the dispute before me, it is in my view necessary that I set out the history of this matter in some detail.

D The plaintiff issued summons against the twelve defendants on 1 October 2008. In the summons, it sought an order declaring that the twelve had seceded from the plaintiff and that they should be restrained from holding themselves as office bearers in the Manicaland Diocese of the plaintiff. The order also sought the eviction of the twelve defendants from the plaintiff's property.

E The claim was defended.

In their plea, the defendants denied the allegation that they seceded from the plaintiff church and put the plaintiff to the proof thereof. They further averred that, if the plaintiff had proceeded to relieve the defendants of their posts within the church, such divesture was not in accordance with the canons of F the plaintiff and was therefore illegal.

Two of the defendants denied that they were office bearers and averred that they were employees of the church whose contracts of employment were still extant.

In particular, the first defendant averred that the decision to withdraw the Diocese of Manicaland from the plaintiff was a decision of the Standing G Committee of the Diocese and that this decision could not be brought before the courts without citing the body that made the decision. It was further averred that, in any event, the decision to withdraw from the plaintiff had been rescinded and the fact communicated to the plaintiff.

Regarding the eviction of the defendants sought by the plaintiff from the H plaintiff's properties, it was averred that the properties occupied by the

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Makarau JP

defendants were registered in the name of the Diocese of Manicaland, which A is run by a board of trustees and that failure to cite the board of trustees was fatal to the plaintiff's claim.

After the pleadings had closed, the matter proceeded to a pre-trial conference. In their draft minutes of the pre-trial conference, the defendants raised the issues of the *locus standi* of the plaintiff to bring the proceedings against B them, the non-citation of the board of trustees to the action, the fate of the contracts of employment of the second and third defendants and whether the plaintiff could seek the eviction of the defendants from properties built and owned by the Diocese of Manicaland.

The issue of the *locus standi* of the plaintiff and the role of the board of C trustees of the Diocese of Manicaland appear to have weighed heavily with the judge presiding over the pre-trial conference, who then directed that the defendants file an exception outside the time limits provided for in the Rules, to deal specifically with these issues. The judge also directed that the exception be filed on or before 29 April 2009 and that, thereafter, the matter proceed in terms of the rules. D

While the issue is not at all before me, it however appears to me that this matter will be before the courts for a while longer than is necessary as it is not clear, procedurally, what should happen now after the withdrawal of the exception. The pre-trial conference was not concluded. It is not clear whether the matter should now proceed to trial as there is no such referral E and issues for trial have not been agreed upon. I simply note this in passing. The parties may have to make a further approach to this court for directions.

On 27 April 2009, the defendants filed a special plea and exception in which it was alleged that the claim brought by the plaintiff against the defendant was bad in law and does not set out a valid cause of action. It was further alleged that in terms of the Acts of the Diocese of Manicaland, all legal F proceedings relating to the property of the Diocese is to be brought by and in the names of the trustees.

The exception was opposed and in due course was set down before me for hearing. It is not necessary that I detail the proceedings relating to the hearing of the exception. Suffice it to say that the hearing was postponed G and, prior to the resumption of same, the defendants withdrew the exception by written notice dated 24 February 2010. At the same time, the defendants filed a notice to amend its plea at the trial of the matter, to add a special plea.

It is pertinent at this stage to observe that, unless it is further amended, the special plea to be raised at the trial of the matter is worded in the exact language used in the exception that has been withdrawn before me. To the special H

Makarau JP

A plea is, however, attached a copy of the Acts of the Diocese of Manicaland.

The issue that arose before me is whether, in the circumstances, the defendants should be made to pay the costs of the withdrawal of the exception.

The defendants argued that they should not be made to meet the costs of the withdrawn exception, as they have in essence substituted it with a special B plea which they filed on the date of the withdrawal of the exception.

Order 21 of the High Court Rules 1971, which provides for the filing of exceptions and special pleas, does not provide for how these are to be disposed of and what order as to costs, if any, a court may make where an exception has been withdrawn.

C It is trite that in a legal system in which the procedures are driven by the parties to the suit, as opposed to a system where the process is managed by the court, the general rule appears to me to be that any party to the suit is entitled to withdraw any of its pleadings provided this does not cause any injustice to the other party. Following this general rule, it is trite that the defendants before me were at liberty to withdraw their exception and special D plea, provided the withdrawal did not cause any injustice to the plaintiff and which in justice could not be cured by an order of costs.

In casu, the withdrawal of the exception by the defendants is not in issue. By the time the exception was withdrawn, however, both parties had incurred some costs as the parties appeared before me for oral argument. This was E after both had filed heads of argument in the matter. Counsel argued the matter for the best part of the morning before seeking a postponement. For all these procedures and necessary attendances, both parties had to pay legal fees to their respective legal practitioners.

In view of the above, the defendants should have tendered the plaintiff's wasted F costs caused by the withdrawal. This is standard practice in this jurisdiction.

Mr *Chikumbirike* has argued that the defendants should not be ordered to pay the costs occasioned by the withdrawal of the exception, as they have substituted the withdrawn exception by a special plea filed on the same date as the withdrawal.

I cannot agree.

G Firstly, the defendants have withdrawn an exception and have substituted it with what purports to be a special plea. It presents itself clearly to me that the issues raised in the special plea filed by the defendants are the same issues that arise from its plea on the merits. As indicated above, the issues arose from the defendants' draft minutes of the pre-trial conference. They H form part of the very issues that have to be determined at the trial of the

Makarau JP

matter. It may be that they are decisive and their determination will render A unnecessary the determination of the rest of the proposed issues. That, in my view, is besides the point. In any event, the issue can only be heard at the trial of the matter, as that is when the amendment to incorporate the special plea into the record will be made.

That the parties will now argue the merits of the trial is hardly a defence B against an award for costs that were occasioned by the withdrawal of the exception.

Secondly, it appears to me to be the correct position that, even if the defendants had withdrawn one exception and substituted it with another exception, they still would have been liable for the plaintiff's costs in considering the withdrawn exception. The issue is not whether or not the same dispute is still C before the court. It is whether, by the actions of the defendants in filing the first exception, the plaintiff has been put to some expense. The award of costs in its favour is restricted to the consideration of the withdrawn pleading and has little if anything to do with the outcome of the hearing on the pleading. Smith J in *Hackleton Investments (Pvt) Ltd* v *Time Bank of Zimbabwe Ltd* 2000 (1) ZLR 60 (H) at 61H-62B aptly summarises the position as follows: D

> "I can see no reason why a party should not be permitted to withdraw an exception or special plea which he or she realizes is not in order, or can be improved upon, and replace it with an improved draft, if that is done timeously. If the other side has been put to some expense in considering or dealing with the exception or special plea that is withdrawn, then the party filing the exception or special plea would have to tender wasted costs." E

I am aware that costs are in the discretion of the court. It is trite that such discretion must be exercised judiciously and must be guided by general approaches established by precedent. *In casu,* I see no reason to depart from the general rule of compensating a party who has been put to some expense in considering or dealing with a pleading that is subsequently withdrawn. F

In the result, I make the following order:

The defendants are to pay the plaintiff's wasted costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Chikumbirike & Associates, defendants' legal practitioners. G

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Document 39 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/DIOCESAN TRUSTEES, DIOCESE OF HARARE v CHURCH OF THE PROVINCE OF CENTRAL AFRICA 2010 (1) ZLR 267 (S)

DIOCESAN TRUSTEES, DIOCESE OF HARARE v CHURCH OF THE PROVINCE OF CENTRAL AFRICA 2010 (1) ZLR 267 (S)

Citation	2010 (1) ZLR 267 (S)
Case No	Judgment No. S-9-10
Court	Supreme Court, Harare
Judge	Malaba DCJ (in chambers)
Heard	4 November 2009
Judgment	3 May 2010

Counsel *G Chikumbirike,* for the applicant
H Zhou, for the respondent

Case Type Application to dismiss appeal

Annotations Link to case annotations

Flynote

Appeal – *dismissal of – failure by appellant to provide security for costs – judge's discretion as to whether to dismiss appeal – matters to consider – need for appellant to seek condonation and extension of time – appellant* D *failing to do so – no basis upon which judge can exercise discretion in appellant's favour*

Appeal – *dismissal of – failure by appellant to provide security for costs – whether judge obliged to dismiss appeal upon proof that security for costs not provided*

E **Interpretation of statutes** – *"Golden rule" – when "may" should be construed as "must" – principles*

Headnote

The applicant obtained from the High Court a rule *nisi* calling upon the respondent church to show cause why an order should not be made F declaring that the consecration of a new bishop for the diocese of Harare be stopped until the church complied with the provisions of its constitution governing termination of the term of office of the incumbent bishop and ordination of a new bishop for a diocese. The church had been planning to consecrate Chad Gandiya as the bishop of Harare. The church noted an appeal against the provisional order, the grounds of appeal were that G the judge *a quo* misdirected himself in refusing to recuse himself from hearing the application and exercising jurisdiction over the respondent whose affairs, it was alleged, were governed by canon and ecclesiastical law. The noting of the appeal had the effect of suspending the operation and execution of the interim order. The respondent took advantage of H the appeal procedure to consecrate Chad Gandiya as the new bishop of

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Malaba DCJ

the diocese of Harare as originally planned. A

The respondent was required by r 46(2) of the Rules of the Supreme Court to provide security for the applicant's costs of appeal, and failing agreement as to the amount, to have the amount or nature of the security to be determined by the Registrar. It was obliged under r 46 (5) to furnish such security within a month of the noting of the appeal. The respondent B failed to provide security and the applicants applied under r 36(1) for the appeal to be dismissed. The respondent prayed for dismissal of the application and for an order directing the Registrar to determine the amount or nature of the security to be provided for the applicant's costs of appeal. The applicants argued that r 36(3) obliged the judge to dismiss the appeal upon proof that the respondent failed to furnish C security for the applicant's costs of appeal within the period prescribed. The respondent argued that the judge had a discretion, as the subrule used the word "may", and that the nature of the dispute between the parties would justify the exercise of the discretion in favour of the respondent.

Held, that the general rule is that when the word "may" is used in a statute D which confers power on a public official to do a thing, the intention is to confer the power only, without a duty to exercise it. The statute must be construed as conferring on the repository of the power a discretion to decide whether or not to do the thing, unless there is something in the subject matter to which the statute relates which shows that the word "may" is used in an imperative sense to impose a duty on the E public official to exercise the power. The "something" referred to may be in the nature of the thing the public official is empowered to do, in the object for which the thing is to be done or in the conditions under which it is to be done, or in the title of the persons for whose benefit the power is to be exercised. It may couple the power to a duty and

make it an obligation on the person in whom the power is reposed to exercise F it when called upon to do so.

Held, further that there is nothing in the subject-matter of r 36(3) of the Rules of the Supreme Court to show that, upon proof of the fact that the respondent failed to furnish security for the applicant's costs of appeal within the prescribed period, the judge must, as a matter of course, G dismiss the appeal. The subrule confers power on the judge to dismiss the appeal and to make any such other order as he thinks fit, which is not the dismissal of the appeal as sought by the applicant.

Held, further, that in considering whether to exercise the discretion, the court had to remember that at the time the respondent filed the opposing affidavit, it was under an automatic bar imposed on it as a result of the H

2010 (1) ZLR p269

Malaba DCJ

A failure to furnish the security for costs of appeal within the prescribed period. Because of the position of no right on the part of the respondent arising from its own non-compliance with the Rules, the applicant acquired the right to make the application for dismissal of the appeal. The respondent had to formalize its legal capacity to ensure that what it put forward in the opposing affidavit could properly be considered by B the judge, in the exercise of his or her discretion in its favour; but there was no application by the respondent for condonation and extension of time. The rule is that whenever a party realizes that it has not complied with a rule of court, which it is under a duty to observe, it should, to protect its rights, apply for condonation without delay. A litigant who C knows that the prescribed period for complying with a rule of court has elapsed and that an application for condonation is necessary is not entitled to hand over the matter to its legal practitioner and then wash its hands of it.

Held, further, that the obligation imposed on a respondent under r 36(1) of the Rules of the Supreme Court to give an appellant notice of the intention D to apply for dismissal of the appeal by reason of the failure to provide security confers on the appellant the right to receive the notice. It does not, *ipso facto,* confer on the appellant the right to put before the judge information which the judge is then obliged to consider when deciding the question before him or her. The respondent was aware that security had E not been provided but took no steps to apply for condonation. Without an application for condonation, there was no basis on which the discretion vested in the judge could be exercised in favour of the respondent. The making of an application for condonation would properly have placed matters before the judge for consideration which were in favour of the respondent and triggered the exercise of his or her discretion to make F the order extending the time within which the respondent should comply with the requirement to provide security as the alternative to the order sought by the applicant for dismissal of the appeal. A judicial discretion cannot be exercised in favour of a party which has not placed before the judicial officer an explanation for non-compliance with a mandatory rule of court and asked for indulgence. Indulgence cannot be extended G to a party that has not asked for it.

Held, further, that the respondent had blamed the failure on an "oversight", presumably on the part of its legal practitioner, but the judge could not consider absolving the respondent from the consequences of lack of diligence committed by its legal practitioners when there was no H suggestion in its papers that the "oversight" was that of a legal practitioner.

2010 (1) ZLR p270

Malaba DCJ

Held, further, that the appeal was a legal stratagem designed to achieve A the indirect purpose of securing the suspension of the operation of the interim order, so as to enable the respondent to consecrate a new bishop for the diocese of Harare. When a party abuses the legal process in this way, it should not expect protection from the court.

Cases cited B

Annison v District Auditor for St Pancras Borough Council [1961] 3 All ER 914 (QBD); [1962] 1 QB 489

Forestry Commission v Moyo 1997 (1) ZLR 254 (S)

Masiyiwa v TM Supermarkets 1990 (1) ZLR 166 (S)

Moyo v President, Board of Inquiry & Ors 1996 (1) ZLR 318 (H) C

Moraliswani v Mamili 1989 (4) SA 1 (A)

Salisbury Financial Hldgs (Pvt) Ltd v van Niekerk 1974 (1) RLR 333 (G)

Saloojee & Anor v Min of Community Development 1965 (2) SA 135 (A)

Legislation considered

Supreme Court Rules 1964 (RGN 380 of 1964), rr 36, 46(2) & 46(5) D

Case information

G Chikumbirike, for the applicant

H Zhou, for the respondent

Judgment

MALABA DCJ: This is an application in terms of r 36(1) of the Rules of E the Supreme Court ("the Rules") for dismissal of the appeal filed by the respondent against a provisional order made by the High Court. The grounds on which the dismissal of the appeal is sought is that the respondent failed to enter into good and sufficient security for the applicant's costs of appeal or, failing agreement to have the amount or nature of the security to be provided, to have the issues determined by the Registrar as required by r 46(2) and F to furnish such security within a period of one month from the date of the filing of the notice of appeal as required by r 46(5).

The facts are as follows. The applicant (hereinafter to be also referred to as "the Trustees" as the context requires) obtained out of the High Court a rule *nisi* calling upon the respondent to show cause, on the return date, G why an order should not be made declaring Dr Nolbert Kunonga to be the bishop for the diocese of Harare until it complied with the provisions of its constitution governing termination of the term of office of the incumbent bishop and ordination of a new bishop for a diocese. The Trustees knew, when the rule *nisi* was issued, that the respondent planned to consecrate Chad Gandiya as the new bishop of the diocese of Harare on 26 July 2009. To H

A maintain the status *quo* and protect the applicant's rights against irremediable prejudice should the planned consecration take place before the discharge or confirmation of the provisional order, an interim interdict was sought and obtained which provided that:

> "(a) 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 B confirmation of this order on the return date."

The interim interdict was made on 24 July 2009. On the same day, the respondent filed a notice of appeal against the provisional order. The manner in which the grounds of appeal were stated are left open for debate the question whether the respondent (also referred to as the appellant when necessary) C had a right to appeal against the provisional order without the leave of the judge who granted it. The question would, in any case, be a matter for determination by a full court of not less than three judges of appeal. As a single judge, sitting to exercise the limited jurisdiction conferred by r 36(3) of the Rules, has no power to determine the question, an application for dismissal of an appeal can only be made and defended in terms of r 36(1), on the assumption that the appeal was validly instituted in terms of r 29. The parties had their cases argued D on the assumption of the validity of the appeal. In the circumstances, I accepted that the notice of appeal was properly filed in terms of r 29.

The terse grounds of appeal were that the learned judge misdirected himself E in refusing to recuse himself from hearing the application and exercising jurisdiction over the respondent, whose affairs, it was alleged, were governed by canon and ecclesiastical law.

The noting of the appeal had the effect of suspending the operation and execution of the interim order. The respondent took advantage of the appeal procedure to consecrate Chad Gandiya on 26

July as the new bishop of the F diocese of Harare as originally planned. To preserve the appeal, the respondent was required, under subr (2) of r 46, in the absence of a waiver of the right to security, to enter into good and sufficient security for the applicant's costs of appeal, and failing agreement, to have the amount or nature of the security to be provided, determined by the Registrar. It was obliged under subr (5) of r 46 to furnish such security for the costs of appeal within a period of one G month from the date of the filing of the notice of appeal in terms of r 29.

The respondent failed to act in accordance with the requirements of subr (2) and (5) of r 46 of the Rules. The period prescribed under subr (5) expired on 24 August. Rule 36 provides:

> "(1) If an appellant who is required to furnish security for the respondent's costs H of appeal fails to furnish such security within the period prescribed in subrule

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Malaba DCJ

> (5) of rule 46, the respondent may forthwith give notice to the appellant that on A the date specified in the notice, being not less than five days after service of the notice, he will apply to a judge for dismissal of the appeal by reason of such failure and for such order specified in the notice as he may require.
>
> (2) …
>
> (3) The judge on an application for dismissal by the respondent brought in terms of subrule (1), may dismiss the appeal and, additionally or alternatively, may B make such other order as he thinks fit, including an order as to costs, whether or not one or other or both the parties to the appeal appear at the hearing."

On 16 September the applicant filed an application with the Registrar for dismissal of the appeal by reason of the failure by the respondent to comply with the requirements of subr (2) and (5) of r 46. A notice to the effect that the C application was to be made on 29 September was served on the respondent on the same day. The filing of the application and service of the notice on the same day was in contravention of r 36(1). The rule requires that the notice should indicate that the application is to be made on a date in future, not less than five days from the date of its service on the respondent.

Nothwithstanding the irregularity committed by the applicant in the filing of D the application, the respondent was alerted to its failure to comply with the requirements of subrr (2) and (5) of r 46. An opposing affidavit was prepared on its behalf by the diocesan Registrar on 17 September. He stated therein that the respondent was making what was called a "counter-application." The relief sought was dismissal of the application and an order directing the E Registrar to determine the amount or nature of the security to be provided. In the meantime a letter was written by the respondent's legal practitioners to the applicant on 16 September, addressing the issue of the failure to furnish security of costs for appeal. It reads:

> "We refer to our appeal in this matter. It has come to our attention that the appellant in this F matter did not tender security for the respondent's costs of appeal in this matter in terms of rule 46(2) of the Supreme Court Rules. By copy of this letter we tender an amount of US$ 2000 as security costs. Please let us know whether you are agreeable to this amount to enable us to consider this matter further. In the event that we may not be able to agree an amount we shall then refer the matter to the Registrar for determination."

Upon realizing that a valid application for dismissal of an appeal under G r 36(3) of the Rules had to be made not less than five days after the service on the respondent of the notice of the intention to make the application, the applicant's legal practitioners withdrew the purported application on 22 September. It was properly made on 2 October 2009. The opposing affidavit was, this time, deposed to by the respondent's legal practitioner. The contents of the opposing affidavit prepared by the diocesan registrar, including the H

Malaba DCJ

A "counter-application" were incorporated by reference. The respondent, once again, prayed for dismissal of the application and an order directing the Registrar to determine the amount or nature of the security to be provided for the applicant's costs of appeal.

In each opposing affidavit, the averment was made that the failure to furnish B security for the applicant's costs of appeal within the period prescribed under subr (5) of r 46, was caused by an "oversight" on the part of the respondent. The applicant was accused of being opportunistic and seeking to take advantage of a technical omission to apply for dismissal of the appeal, rather than

have it determined on the merits. The plea was that it would be in the interests of the majority of the parishioners for the appeal to be determined on the merits.

C Mr *Chikumbirike,* for the applicant, argued that r 36(3) of the Rules gives the judge hearing an application for dismissal of an appeal a power, coupled with a duty, to exercise it, upon proof that the respondent failed to furnish security for the applicant's costs of appeal within the period prescribed under subr (5) of r 46. The contention was that the word "may" is used in r 36(3) in an D imperative sense, to signify the imposition on the judge of an obligation to dismiss the appeal by reason of the failure to furnish security for the costs of appeal within the period prescribed under subr (5). The principle on which the argument is based, as stated in a number of decided cases, is that it is not uncommon for the legislature to use the word "may" in a statute to impose on a public official, on whom power to do an act is conferred, a duty to exercise E the power once the pre-condition for its exercise exists. See *Masiyiwa* v *TM Supermarkets* 1990 (1) ZLR 166 (S) at 170B-171A and *Moyo* v *President, Board of Inquiry & Ors* 1996 (1) ZLR 318 (H) at 338A-B.

Mr *Zhou*, for the respondent, on the other hand, argued that the word "may" is used in r 36(3) in accordance with its ordinary and natural meaning, to F denote a discretion in the repository of the power to decide whether or not to exercise the power. He submitted that an examination of the provisions of r 36(3), shows that the power conferred on the judge to dismiss the appeal is not coupled with the obligation to do so, even where failure to furnish security of costs of appeal within the period prescribed under subr (5) of r 46 has been proved. He argued that the judge has freedom to decide whether or G not to dismiss the appeal, taking into consideration all the circumstances of the case, including the failure by the respondent to furnish security within the prescribed period.

I accept that, according to its ordinary and natural meaning, the word "may" is a permissive word. The question is whether, in the context of r 36(3), H the word should be construed in accordance with its ordinary and natural

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Malaba DCJ

meaning as importing a discretion in the exercise of the power conferred A on the judge by the statute, to dismiss the appeal by reason of the failure by the respondent to furnish security of costs of appeal within the period prescribed under subr (5) of r 46.

The general rule is that when the legislature uses the word "may" in a statute by which it confers power on a public official to do a thing, the intention is B to confer the power only, without a duty to exercise it. The statute must be construed as conferring on the repository of the power a discretion to decide whether or not to do the thing, unless there is something in the subject-matter to which the statute relates which shows that the word "may", is used in an imperative sense to impose a duty on the public official to exercise the power. C

The something referred to in the general rule may be in the nature of the thing the public official is empowered to do, in the object for which the thing is to be done, in the conditions under which it is to be done or in the title of the persons for whose benefit the power is to be exercised. That something may couple with the power, an obligation on the person in whom the power is reposed to exercise it when called upon to do so. If, upon consideration of D the subject-matter to which the statute relates, the only reasonable conclusion that can be reached is that the intention of the legislature is that the repository of the power would have no justification for failing to exercise the power, the word "may" must, in such a case, be held to mean "shall". See *Craies on Statute Law* 7 ed p 284; *Annison v District Auditor for St Pancras Borough Council* [1962] 1 QB 489 (QBD) at 497; [1962] 1 QB 489; E *Salisbury Financial Holdings (Pvt) Ltd* v *van Niekerk* 1974 (1) RLR 333 (G) at 335D-E.

There is nothing in the subject-matter of r 36(3), to show that upon proof of the fact that the respondent failed to furnish security for the applicant's costs of appeal within the period prescribed under subr (5) of r 46, the judge F hearing the application must, as a matter of course, dismiss the appeal. An examination of subr (3) of r 36 shows that it confers power on the judge to dismiss the appeal and add any such order as he thinks fit. It is also clear that he has power to make any other order that he thinks fit which is not the dismissal of the appeal as sought by the applicant. G

There are other matters contingent on the failure by the respondent to furnish security for the applicant's costs of appeal within the prescribed period which the judge may have to take into consideration, before deciding whether or not to order the dismissal of the appeal or make such

other order as he thinks fit. The word "may" in r 36(3) must be construed as used to confer on the judge a discretionary power. In other words, the exercise of the power to H

Malaba DCJ

A dismiss the appeal is made dependent on the decision by the judge whether or not to do so and not upon proof of the failure by the respondent to furnish security for the applicant's costs of appeal within the period prescribed in subr (5) of r 46.

The question is whether there is anything on the basis which it would be in B the interests of justice to exercise the discretion under r 36(3) in favour of the respondent. Mr *Zhou* submitted that the nature of the dispute between the parties would justify the exercise of the discretion in favour of the respondent. He argued that dismissing the application and making the order directing the Registrar to determine the amount or nature of the security for costs of appeal to be provided by the respondent, would allow the appeal to C be debated on the merits. The contention was that dismissal of the appeal would mean that Dr Kunonga remained the bishop of the diocese.

My view of the matter is that, whatever the consequences of the exercise of the discretion would be, it is clear from the nature of the order appealed against that what would be restored if the appeal were dismissed, is the status D *quo ante* the noting of the appeal. Whether that, to the respondent, would be a fair result or not, is an irrelevant consideration. The result would be in conformity with the legal position as determined by the provisional order made by the court *a quo*.

What are the factors that should be taken into consideration in deciding whether or not to exercise the discretion in favour of the respondent? At the E time the respondent filed its opposing affidavit, it was under an automatic bar imposed on it as a result of the failure to furnish the security for costs of appeal within the period prescribed under subr (5) of r 46. It is because of the position of no right on the part of the respondent arising from its own conduct of non-compliance with the Rules, that the applicant acquired the F right under r 36(1) to make the application for dismissal of the appeal. The respondent had to normalize its legal capacity to ensure that what it put forward in the opposing affidavit could properly be considered by the judge in the exercise of his or her discretion in its favour. There was no substantive application for condonation of non-compliance by the respondent with the requirements of subrs (2) and (5) of r 46 and an extension of time within G which to comply with the Rules.

Mr *Zhou* argued that it was not necessary for the purposes of the exercise of discretion under r 36(3) for the respondent to have made an application for condonation. The effect of that contention would be that an appellant who fails to comply with the mandatory provisions of subr (2) and (5) of r 46 would H not have to seek the indulgence of the judge to comply with the Rules. By

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Malaba DCJ

filing an opposing affidavit in an application for dismissal of the appeal, the A appellant would compel the judge to ignore the bar imposed on him and make such other order as he thinks fit in his favour. That would be done without considering the question whether the information in the opposing affidavit could properly be taken into consideration in the exercise of discretion, in the absence of an application for condonation of non-compliance with subrr (2) and (5) of r 46. B

The principle governing the determination of the question, as stated in numerous decided cases, is that whenever a party realizes that he has not complied with a rule of court which he is under a duty to observe, he or she should, to protect his or her rights, apply for condonation without delay. The rule is buttressed by the principle that a litigant who knows that the prescribed C period for complying with a rule of court has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his or her legal practitioner and then wash his or her hands of it: *Saloojee & Anor* v *Minister of Community Development* 1965 (2) SA 135 (A) at 141.

Whilst it is correct to say that under r 36(3), the judge has a discretion to D dismiss the appeal or to make such other order as he or she thinks fit as an alternative to dismissal, it is clear that the judge is enjoined to exercise the discretion judicially. He or she must take into consideration matters contingent to the failure to furnish security for costs of appeal within the prescribed period if they have been properly included in the circumstances to be considered in the determination of the question whether or not to dismiss E the appeal. The obligation imposed on a respondent under r

36(1) to give an appellant notice of the intention to apply for dismissal of the appeal by reason of the failure to comply with subr (2) and (5) of r 46, confers on the appellant the right to receive the notice. It does not, *ipso facto,* confer on the appellant the right to put before the judge information which the judge is then under an obligation to consider in the determination of the question before F him. The judge would, surely, have to consider whether it is information the appellant has a right to have considered by the judge. As the right to make an application for dismissal of an appeal is given to a respondent under r 36(1) on the clear assumption that there has been no compliance by the appellant with subr (2) and (5) of r 46, the appellant is taken to have been aware of G the rule that whenever a party realises that it has not complied with a rule of court, it should apply for condonation without delay.

In this case, the respondent was made aware on 16 September of its failure to furnish security for the applicant's costs of appeal within the period prescribed under subr (5) of r 46. The letter of that date, written to the applicant by the respondent's legal practitioners, is an admission of the fact that the H

Malaba DCJ

A requirements of subrr (2) and (5) had not been complied with. Yet even as late as the time when the opposing affidavit was filed on 29 September, no substantive application for condonation and extension of time within which to act in terms of the Rules in question was made.

Absent a substantive application for condonation of non-compliance with B the Rules, there was no basis on which the discretion vested in the judge under r 36(3) could be exercised in favour of the respondent. It would have been the making of the application for condonation that would properly have placed matters for consideration which were in favour of the respondent and triggered the exercise of discretion, to make the order extending the time within which the respondent should comply with the requirements of subr C (2) of r 46 as the alternative to the order of dismissal of the appeal sought by the applicant. How could a judicial discretion be exercised in favour of a party when that party had not placed before the judicial officer an explanation for non-compliance with a mandatory rule of court and asked for indulgence? Indulgence cannot be extended to a party that has not asked for it. See *Moraliswami* v *Mamili* 1989 (4) SA 1 (A) and *Forestry Commission* D *v Moyo* 1997 (1) ZLR 254 (S) at 260.

The view I have of the facts is that the respondent adopted a casual attitude to a grave problem. Without an application for condonation, it proceeded to claim relief as if non-compliance with the Rules was an inconsequential matter. The cavalier approach to the problem is seen also in the rather cryptic statement, E by both the diocesan Registrar and the respondent's legal practitioner, that the failure to furnish security for the applicant's costs of appeal within the period prescribed under subr (5) of r 46, was caused by an "oversight" on the part of the respondent. The respondent is an organization which can only act through a natural person. Oversight is *prima facie* evidence of negligence. Whose negligence was it that caused non-compliance with the Rules? Was F it that of the diocesan Registrar or of the legal practitioner?

Although in argument Mr *Zhou* suggested that the failure to comply with the relevant rules was wholly attributable to the respondent's legal practitioners, there was no admission of negligence by the legal practitioner who deposed to the opposing affidavit on behalf of the respondent on 29 September. One G cannot consider absolving the respondent from the consequences of lack of diligence committed by its legal practitioners when there is no suggestion in its papers that the "oversight" was that of the legal practitioner. It would have been after the responsible legal practitioner had filed an affidavit admitting fault and explaining in some detail what happened, that the judge would be in a position to decide whether the respondent should not be visited with H the sins of its legal practitioners. Where no factual basis for making such a

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Malaba DCJ

distinction of culpability has been provided, the judge would have no right to A draw it. It must follow that without an affidavit from the person responsible for the "oversight" admitting fault and explaining the circumstances under which he or she overlooked the rules, one is at a loss for the reason why it was found necessary to state in the opposing affidavit that an "oversight" on the part

of the respondent was the cause of non-compliance. The procedure B adopted by the respondent is another example of lack of care to ensure that the rules were complied with.

It is also clear from the promptitude of the action taken by the respondent, in noting the appeal on the same day the interim order was made that the procedure was not adopted for the *bona fide* purpose of testing the judgment of the court *a quo*. The substantive questions in dispute between the parties C were yet to be determined on the return date. The interim order decided nothing of substance. The appeal was clearly not on the matters which affected the substantial dispute between the parties. In my view, the appeal was a legal stratagem designed to achieve the indirect purpose of securing the suspension of the operation of the interim order made by the learned D judge in order to enable the respondent to consecrate a new bishop for the diocese of Harare. When a party abuses legal process in this way, it should not expect protection from the court, when the other party seeks redress of his conduct. I am unable to exercise the discretion reposed in the judge under r 36(3) of the Rules in favour of the respondent.

Mr *Chikumbirike* applied for costs on a legal practitioner and client scale. E The reason was that not only did the respondent fail to act in terms of subr (2) and (5) of r 46, it also refused to acknowledge the fact that it was under a bar by reason of non-compliance with the Rules. As a result, it refrained from taking appropriate steps to have the failure to furnish security for the applicant's costs of appeal within the period prescribed under subr F (5) of r 46 condoned. Mr *Zhou,* on the other hand, argued that not every case of non-compliance with the Rules attracts an order of costs on a legal practitioner and client scale. He said the respondent had to be guilty of highly reprehensible conduct or unacceptable abuse of court process, for costs on a legal practitioner and client scale to be awarded against it.

Taking into consideration the disdainful attitude to the requirements of the G Rule, coupled with the ulterior motive of securing the consecration of the new bishop for the diocese of Harare in noting the appeal, I am of the opinion that this is an appropriate case for an award of costs on a legal practitioner and client scale.

It is ordered that the appeal noted in case No. SC 180/09 be and is hereby H

2010 (1) ZLR p279

Malaba DCJ

A dismissed in terms of r 36(3) of the Supreme Court Rules with costs on a legal practitioner and client scale.

Chikumbirike & Associates, applicant's legal practitioners

Gill Godlonton & Gerrans, respondent's legal practitioners

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Document 40 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/CHINJAYANI v MINISTER OF HOME AFFAIRS & ORS 2010 (1) ZLR 280 (H)

CHINJAYANI v MINISTER OF HOME AFFAIRS & ORS 2010 (1) ZLR 280 (H)

2010 (1) ZLR p280

Citation	2010 (1) ZLR 280 (H)
Case No	Judgment No. HH-76-10
Court	High Court, Harare
Judge	Uchena J

Heard 14 April 2010; 27 April 2010

Judgment 3 May 2010

Counsel *K Gama,* for the applicant
L Msika, for the respondents

Case Type Chamber application

Annotations No case annotations to date

Flynote

Criminal procedure – *seizure of article – without warrant – requirements – need to show effect of delay in obtaining warrant – seizure with warrant – warrant must be issued before seizure – warrant issued after seizure having no retrospective effect* D

Headnote

A police officer effecting the seizure of a article without a warrant in terms of s 51(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] must believe on reasonable grounds that the warrant would be issued to him in terms of s 50(1)(a) of the Act and that the delay in obtaining the warrant would prevent the seizure or defeat the object of the search, as E the case may be. The requirements of both subparas (i) and (ii) of s 51(1)(b) must be satisfied before a seizure without a warrant can be lawful. Even if the officer has reasonable grounds for believing that a warrant would be issued, he must also, if the seizure is to be lawful, explain the effect of the delay in seizing the article while awaiting the issuance of F a warrant of seizure. If the issue of the effect of delay is unexplained, the seizure cannot stand.

In order for a police officer to seize an article with a warrant issued in terms of s 50(1) of the Act, the warrant must be in existence before the seizure is made. It does not have a retrospective effect.

Cases cited G

Hako v Min of Safety and Security & Anor 1996 (2) SA 891 (T)

Ndlovu v Min of Police, *Transkei* & Ors 1993 (3) SA 91 (Tk)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 50(1), 50(2) H

Uchena J

A and 51(1)(b)

Case information

K Gama, for the applicant

L Msika, for the respondents

Judgment

B **UCHENA J:** The applicant is the registered owner of a Toyota Chasser motor vehicle registration number ABL 2611. It was registered in her name on 9 November 2009. The first respondent is the Minister of Home Affairs, cited in his official capacity as the Minister responsible for the Zimbabwe Republic Police.

The second respondent is the Commissioner-General of the Zimbabwe C Republic Police, cited in his official capacity as the head of the Zimbabwe Republic Police. The third respondent is the investigating officer of the frauds, whose proceeds are believed to have been used to purchase the motor vehicle in question.

The applicant's motor vehicle was, on 8 April 2010, seized by the third D respondent without a warrant. It was seized because the police had information that it had been bought with proceeds from frauds committed by the applicant's brother Roderick Chongo against his employer FBC Banking Limited Mutare. The frauds are being investigated by the third respondent under Mutare Central CRs 07/02/10, 41/02/10 and 42/02/10.

E The third respondent's investigations had, by the time he seized the applicant's motor vehicle, established that the applicant had on two occasions been given large sums of money by her brother (who is now on the run) to buy a house and household goods in her own name. The agreement of sale states that the applicant is the purchaser. The applicant had confessed to the police in an affidavit that the house belonged to her brother, who asked her to purport F to be the buyer on his behalf.

The applicant applied to this court for a provisional order, ordering the respondents to release the motor vehicle to her on the ground that the third respondent had unlawfully seized it without a warrant. She further said that she did not consent to its seizure.

G The third respondent does not dispute seizing the motor vehicle without a warrant. He in para 4 of his opposing affidavit says:

> "I hold a reasonable suspicion that this vehicle is the product of the proceeds of a fraud which is under investigation under Mutare Central CRs 07/02/10, 41/02/10, and 42/02/10, and I believe that a warrant which I have already applied for will be issued to me thus the seizure cannot at this particular point be pronounced H unlawful."

Uchena J

Mr *Gama* for the applicant submitted that the seizure of property without A a warrant must be in terms of s 51(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (hereinafter called the CP&E Act), which provides as follows:

> "(1) A police officer may, without warrant, search any person or container or premises for the purposes of seizing any article referred to in section *forty-nine* and additionally, or alternatively, seize any such article – B
>
> (a) if the person concerned consents to the search for and additionally, or alternatively, the seizure of the article in question or if a person who may consent to the search of the container or premises consents to such search and additionally, or alternatively, the seizure of the article in question; or
>
> (b) if he on reasonable grounds believes that – C
>
> (i) a warrant would be issued to him in terms of paragraph (a) of subsection (1) of section *fifty* if he applied for one; and
>
> (ii) the delay in obtaining a warrant would prevent the seizure or defeat the object of the search, as the case may be".

He submitted that there was no basis for the seizure of the motor vehicle without a warrant as the applicant had given the third respondent a certified D copy of the motor vehicle's registration book.

Mr *Musika,* for the respondents, submitted that the seizure was in terms of s 51(1)(b)(i) and (ii) of the CP&E Act, as the third respondent believed on reasonable grounds that the warrant he had applied for would be issued.

A seizure without a warrant in terms of s 51(1)(b) must satisfy the two E requirements of s 51(1)(b)(i) and (ii) of the CP&E Act. The officer effecting the seizure must on reasonable grounds believe that, a warrant would be issued to him in terms of para (*a*) of subs (1) of s 50 if he applied for one; and that the delay in obtaining a warrant would prevent the seizure or defeat the object of the search, as the case may be.

In this case, Mr *Gama* submitted that the third respondent did not have F reasonable grounds for believing that the delay in obtaining a warrant would prevent the seizure or defeat the object of the search, as the third respondent had, just before the seizure, been given a certified copy of the motor vehicle's registration book.

I agree with Mr *Gama* that seizure without a warrant is only permissible if G the two requirements of s 51(1)(b)(i) and (ii) are met. In this case, the first requirement is satisfied by the third respondent's narration of the basis of his suspicion that the applicant was being used by her brother to spend proceeds of the frauds on properties which were being registered in her name. The third respondent was therefore justified in believing that the applicant had also been used by her brother to purchase and register the motor vehicle H

Uchena J

A in her name. That *modus operandi* between the applicant and her brother had been established by her deposing an affidavit (Annexure C to the third respondent's opposing affidavit) in the presence of her legal practitioner, in which she agreed to having bought the house mentioned in Annexure B for her brother in her own name. She had again been given money by her brother to buy household goods from the seller of the house. A total of B US$137 000 cash was spend on the house and household goods. She had also during the relevant period bought a stand in Goromonzi for US$25 000. The third respondent had also established that the applicant did not, during the relevant period, have such large sums of money in her bank account. See annexure E to the third respondent's opposing affidavit. The Goromonzi C stand was bought on 8 October 2009. The Marlborough house was bought on 12 December 2009. The motor vehicle in issue was registered in the applicant's name on 9 November 2009. The cumulative effect justifies the third respondent's suspicion that proceeds of frauds were used to buy the motor vehicle in question and that if he applied for a warrant of seizure on those facts it would be granted. If that was all that he had to prove, he would D have been able to defend his seizure of the motor vehicle without a warrant.

The use of the word "and" at the end of s 51(1)(b)(i), and before s 51(1)(b)(ii), means that the requirements of both subss (i) and (ii) must be satisfied before a seizure without a warrant can be lawful.

An examination of the third respondent's opposing affidavit, however, reveals E that he did not deal with the effect of the delay in seizing the motor vehicle while awaiting the issuance of a warrant of seizure. That leaves the issue of the effect of delay unexplained, and the seizure cannot, in the absence of that explanation, stand. In *Hako* v *Minister of Safety & Security & Anor* 1996 (2) SA 891 (Tk) at 897 Miller AJ, commenting on the South African provision on seizure without a warrant (which is identical to ours) said:

> F "Lieutenant Colonel Westraad also avers that the seizure was performed in terms of s 22(b)(i) of the Criminal Procedure Act. He gives no reasons or explanation as to why the police officials did not obtain a search warrant prior to the seizure. Section 22(b)(i) cannot be read in isolation – it must be read together with s 22(b)(ii). This is so because of the word 'and' which appears immediately after s 22(b)(i). There is absolutely nothing on record to suggest that a delay in obtaining a G search warrant would defeat the object of the search."

See also *Ndlovu* v *Minister of Police, Transkei*, *& Ors* 1993 (3) SA 91 (Tk).

In this case the absence of an explanation of the effect of a delay in seizing the motor vehicle, while awaiting the issuance of a warrant of seizure is fatal. The application for the provisional order must therefore be granted.

H I could not, however, lose sight of the fact that the third respondent had in

Uchena J

his opposing affidavit said he had before seizing the motor vehicle applied A for a warrant of seizure. It became necessary to find out the result of that application, because if a warrant of seizure was granted before the seizure; it might have an effect on the order this court has to grant. The parties were called back for them to clarify whether or not the warrant was issued and when it was issued. Mr *Musika* for the respondents confirmed that it was, B and produced it as exh 1, by consent. The warrant of seizure was issued by a magistrate on 20 April 2010. It was therefore issued twelve days after the applicant's motor vehicle had been seized without a warrant. The warrant does not have retrospective effect. It could only have been acted upon after it was issued. It therefore took effect from 20 April 2010 onwards.

A reading of s 50(1) and (2) confirms that a warrant takes effect from the C time it is issued. Section 50(1) and (2) provides as follows;

> "(1) Subject to sections *fifty-one*, *fifty-two* and *fifty-three*, an article referred to in section *forty-nine* shall be seized only by virtue of a warrant issued –
>
> (a) …
>
> (b) … D
>
> (2) A warrant issued in terms of subsection (1) shall require a police officer to seize the article in question and shall to that end authorize such police officer, where necessary –
>
> (a) to search any person identified in the warrant; or
>
> (b) to enter and search any premises identified in the warrant, or any premises within an area identified in the warrant, and to search any person found E upon or in those premises."

Section 50(1) clearly states that an article "shall be seized only by virtue of a warrant issued". This means the warrant must be in existence before the seizure. Section 50(2) clarifies the above by stating that "a warrant issued in terms of subsection (1) shall require a police officer to seize the article in F question and shall to that end authorize such police officer, where necessary ..." Therefore the warrant must pre-exist the seizure for it to "require a police officer to seize the article" and to authorise such officer to search persons and enter premises where necessary. The police officer must in those circumstances ascertain, from the warrant, the extent of the authority it gives him.

In this case, there is a clear distinction between the third respondent's conduct G on 8 April 2010 when he clearly acted without a warrant, and what he may do in future in terms of the warrant issued on 20 April 2010.

Mr *Gama* and Mr *Musika* agreed that the issue of the granting of an application for a warrant for the seizure of the applicant's motor vehicle will be the subject of separate litigation. That, however, does not affect the determination of H

Uchena J

A this case, as the parties in this application only dealt with the seizure of the motor vehicle without a warrant. This court's decision must therefore only determine that issue and no other.

I will therefore grant the interim order sought in terms of the draft order.

In the result it is ordered as follows.

> B Pending the finalization of this matter, the applicant is granted the following order:
>
> The respondents be and are herby ordered to release into the applicant's custody a Toyota Chasser motor vehicle registration number ABL 2611.

C *Madzivanzira, Gama & Associates*, applicant's legal practitioners

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

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Document 41 of 62

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/SMM HOLDINGS LTD v MINISTER OF JUSTICE 2010 (1) ZLR 286 (S)

SMM HOLDINGS LTD v MINISTER OF JUSTICE 2010 (1) ZLR 286 (S)

Citation 2010 (1) ZLR 286 (S)

Case No Judgment No. S-5-10

Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ & Sandura JA
Heard	5 October 2009
Judgment	11 May 2010
Counsel	*A P de Bourbon SC*, for the appellant *E I Manikai*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Companies – *legal proceedings – company subject to reconstruction order under Reconstruction of State-Indebted Insolvent Companies Act [Chapter 24:27] – associate company – only administrator entitled to bring action on behalf of such company or any associate company* D

Practice and procedure – *parties – locus standi – company – company subject to reconstruction order – associate company – only administrator entitled to bring action on behalf of such company or any associate company*

Headnote

The appellant, a company incorporated in the United Kingdom, was the sole shareholder of SMM Holdings (Pvt) Ltd ("SMMZ"), a company E incorporated in Zimbabwe. In September 2004 a reconstruction order was issued in respect of SMMZ by the respondent Minister, initially in terms of temporary legislation; the order was confirmed by the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*].

The appellant brought an application in the High Court challenging the F issue of the reconstruction order and seeking to have it set aside. The founding affidavit was signed on behalf of the appellant by one Mawere, the beneficial shareholder of a company which was the beneficial owner of the appellant. The respondent took three preliminary points: (1) the appellant was an associate company of SMMZ and therefore was itself a company under reconstruction and so could not launch legal proceedings G in its own name. (2) Since Mawere was a specified person in terms of the Prevention of Corruption Act [*Chapter 9:16*], he was prohibited from swearing an affidavit on behalf of the appellant without the leave of his investigator. (3) The application for review was filed out of the time stipulated in r 259 of the High Court Rules for the filing of a review. The High Court upheld these points and dismissed the application without H

Chidyausiku CJ

A going into the merits. On appeal:

Held, that under s 4(3) of the Reconstruction Act, a reconstruction order is deemed to be issued in respect of every associate company of that company in respect of which the order was issued. Accordingly, the appellant was also a company under reconstruction. Under s 18(1)(e) of the Act, the power to bring and defend legal proceedings on behalf B of a company under reconstruction is vested in the administrator who, to the exclusion of anyone else, has the *locus standi* to bring an action on behalf of a company under reconstruction.

Held, further, that while the Act may well not have extra-territorial operation, it applies to everybody, foreigner or not, who commences action in this C jurisdiction.

Held, further, that Mawere stated in his affidavit that he represented the appellant, which made him an agent of the appellant. He was not simply filing that affidavit as a witness in proceedings

concerning the appellant. That being the case, he was prohibited in terms of s 10(1)(e) and (f) of the Prevention of Corruption Act from acting on behalf of the appellant D without the authority of his investigator.

Legislation considered

Prevention of Corruption Act [*Chapter 9:16*], s 10(1)(e) and (f)

Reconstruction of State-Indebted Companies Act [*Chapter 24:27*], E ss 4(3), 6(a) and 18(1)(e)

Case information

A P de Bourbon SC, for the appellant

E I Manikai, for the respondent

Judgment

CHIDYAUSIKU CJ: The facts in this case are common cause. They are F clearly set out in the applicant's founding affidavit and are aptly summarised by the Heads of Argument of the applicant. The facts are as follows.

The appellant is a company incorporated in the United Kingdom. It is the sole shareholder of SMM Holdings (Private) Limited (hereinafter called "SMMZ"), a company incorporated in Zimbabwe. On 6 September 2004 a G reconstruction order was issued in respect of SMMZ by the respondent in terms of the Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies) Regulations, 2004 (hereinafter referred to as "the Regulations"). On 25 February 2005 the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*] (hereinafter referred to as "the Act") was promulgated. In terms of s 38 of the Act, every order made H and every action or decision taken or thing done by the present respondent

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or any administrator in terms of the Regulations was deemed to have been A done in terms of the Act.

The present application was brought in the High Court challenging the issue of the reconstruction order on review and seeking to have it set aside. The founding affidavit was signed on behalf of the appellant by Mutumwa Dziva Mawere (hereinafter referred to as "Mawere"). At the time of the application B being launched, Mawere was a citizen of, and resident in, South Africa. He was the beneficial shareholder of Africa Construction Limited and in turn of Africa Resources Limited, which company was the beneficial owner of the appellant. After an unsuccessful attempt to extradite Mawere from South Africa on exchange control charges, the respondent declared Mawere to be a specified person in terms of the Prevention of Corruption Act C [*Chapter 9:16*]. The legality of that specification is the subject of separate court proceedings, which are yet to be concluded.

A number of preliminary points were taken against the appellant in the court *a quo*. Firstly, the respondent took the point that the appellant was an associate company of SMMZ and therefore was itself a company under D reconstruction. It was argued that the appellant cannot launch legal proceedings in its own name. Section 18(e) of the Act vests in the administrator, in my view, to the exclusion of everyone else, the power to commence and defend legal proceedings on behalf of a company under reconstruction. The second preliminary point taken was that since Mawere was a specified person he was prohibited from swearing an affidavit on behalf of the appellant without E the leave of his investigator. Thirdly, it was submitted that the application for review did not comply with r 259 of the High Court Rules, in that it was filed out of the time stipulated for the filing of a review.

All three preliminary points raised by the respondent were answered in favour of the respondent. Accordingly, the court *a quo* did not examine the F merits of the application for review, but dismissed it on any one of the three preliminary points taken by the respondent.

The appellant now appeals against the finding of the court *a quo* on those three preliminary points. Thus the issues that fall for determination in this court are: (1) whether or not the appellant has *locus standi* to commence G these proceedings; (2) whether or not Mawere could depose to the

founding affidavit without the leave of his investigator; and (3) whether the application for review was filed timeously and if not whether condonation should have been granted.

Dealing firstly with the competency of the appellant to bring this application, the learned judge in the court *a quo* found that the appellant company is H

Chidyausiku CJ

A deemed to be a company under reconstruction. This is quite apparent from p 3 of her judgment. Having concluded that the appellant was deemed to be a company under reconstruction, the learned judge concluded that this application could not be brought by the appellant on its own behalf.

The relevant provision of the Act is s 4(3), which reads as follows:

> B "(3) A reconstruction order shall, in addition to the company named therein, be deemed to be issued in relation to every –
>
> (a) associate company of that company; …".

The appellant, on its own admission, has stated that it is the sole shareholder of SMMZ. On that basis, the appellant is inevitably an associate company of SMMZ, a company under a reconstruction order. Indeed, Mr *de Bourbon*, for C the appellant, did not in any way attempt to argue that the appellant is not an associate company of SMMZ. This is clearly understandable, given the clear and unambiguous language of s 4(3) of the Act and the direct shareholding link between the two companies.

In terms of s 18(1)(e) of the Act the power to bring and defend legal proceedings on behalf of a company under reconstruction is vested in the D administrator. It provides as follows:

> "**18 General powers of administrator in relation to company under reconstruction**
>
> (1) The administrator in reconstruction shall have the following powers, which he or she may exercise without the authority of the directors or shareholders of E the company under reconstruction –
>
> (a) – (d) …;
>
> (e) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature and, subject to any law relating to criminal procedure, any criminal proceeding; …".

The effect of s 18(1)(e), as read with s 6(a) of the Act, which provides that the F administrator shall assume the control and management of the company, is to vest in the administrator, to the exclusion of anyone else, the *locus standi* to bring an action on behalf of a company under reconstruction.

Mr *de Bourbon*, for the appellant, as I have already stated, never argued that the appellant is not an associate company of SMMZ and therefore by G operation of the law a company under a reconstruction order. He, however, submitted that ss 4(3) and 18(1)(e) of the Act do not apply to the appellant because the appellant is a foreign registered company. He argued that the above sections, and indeed the whole of the Act, do not have extra-territorial application and accordingly do not apply to the appellant. I am not persuaded by this argument. In fact, I do not think that this argument is worthy of any H close examination.

Chidyausiku CJ

The language of the Act is explicit and it applies to everybody, foreigner or A not, who commences action in this jurisdiction. The probabilities are that the disability placed on the appellant and Mawere by the Act would not apply if they were suing in a British court, or in any court outside this country for that matter. To that extent, Mr *de Bourbon* may be correct in submitting that the Act does not have extra-territorial application. B

I have no doubt in my mind that the Act applies to everybody, whether a foreigner or a citizen of Zimbabwe, who seeks to bring proceedings in this jurisdiction.

Accordingly, I agree with the learned judge in the court *a quo* that the appellant lacks *locus standi* in terms of s 18(1)(e) as read with s 6(a) of the Act to launch these proceedings. C

Turning to the issue of whether or not Mawere had the authority to sign the founding affidavit, for the purposes of this application, it is common cause that Mawere is a specified person. Mawere makes the following averment in para 1 of the founding affidavit:

"I MUTUMWA DZIVA MAWERE, do hereby make oath and swear that: D

1. As I explain hereunder, I represent the applicant in this matter. The facts set out hereunder are within my personal knowledge and are true and correct."

Mawere does not expressly say in what capacity he is making the affidavit. He, however, avers that he represents the appellant, which makes him an agent of the E appellant, and is deposing to the affidavit as an agent of the appellant. He is not simply filing that affidavit as a witness in proceedings concerning the appellant. While it may be debatable whether Mawere can give evidence, either oral or in the form of an affidavit, as a witness in proceedings involving the appellant, he is prohibited in terms of s 10(1) (e) and (f) of the Prevention of Corruption Act [*Chapter* 9*:*16] from acting on behalf of the appellant without the authority of his investigator. The section reads: F

"**10 Transactions by specified persons**

(1) Subject to this section, a specified person shall not –

(a) – (d) …;

(e) perform any act as a director of a company or as a partner in a partnership or in any manner conduct or manage the business or affairs of a company G or partnership;

(f) perform any act as an agent of a company or partnership that is also a specified person without the approval of the investigator assigned to the specified person or otherwise than in accordance with any conditions imposed by the investigator;

without the approval of the investigator assigned to that specified person or otherwise than in accordance with any conditions imposed by the investigator." H

2010 (1) ZLR p291

Chidyausiku CJ

A The conduct of Mawere in bringing this application as a representative or agent of the appellant amounts to conducting or managing the business of the appellant contrary to the provisions of the above sections. Clearly Mawere lacks capacity to do what he did without the approval of his investigator.

The conclusion of the court *a quo* on this issue cannot be faulted.

B I have concluded that both the appellant, as the applicant in the court *a quo*, and Mawere, as deponent of the founding affidavit, lacked legal capacity for their actions. It follows that the application for review was not properly before the court *a quo*. As there was no proper application before the court *a quo,* the issue whether such application was brought timeously or not does not arise. Accordingly the third issue falls away.

C Before concluding, I wish to make the following observation. Mawere is the author of his own misfortune. The Act does not bar him from deposing to an affidavit. The Act requires him to obtain the leave of the investigator. Once he has obtained such leave, he can depose to the affidavit. It is clear on the papers that Mawere is dissatisfied with the Act and has challenged the constitutionality of the Act in other proceedings. But until that Act has D been ruled unconstitutional, compliance with the provisions of the Act is mandatory.

In the result, the appeal is dismissed with costs.

MALABA DCJ and SANDURA JA concurred.

E *Costa & Madzonga*, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners

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Document 42 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume

ZIMBABWE BANKING & ALLIED WORKERS' UNION & ANOR v BEVERLEY BUILDING SOCIETY & ORS 2010 (1) ZLR 292 (S)

Citation	2010 (1) ZLR 292 (S)
Case No	Judgment No. S-3-10
Court	Supreme Court, Harare
Judge	Malaba DCJ, Sandura JA & Cheda JA
Heard	10 November 2008
Judgment	11 May 2010
Counsel	*L T Biti*, for the appellants *H Zhou*, for the first respondent No appearance for the other respondents No appearance for the second, third, fourth and fifth respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Banking – bank – *distinction from building society – whether building society can be regarded as a bank*

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights* D *– s 21 (freedom of association) – right to join trade union – effect of such right – right of worker to join union for industry other than that in which worker is engaged – such right not obliging employer to pay union fees to that trade union*

Employment – *trade union – trade union registered for particular sector* E *– whether employees entitled to join another trade union – whether employer obliged to deduct union dues for union not registered for that sector*

Words and phrases – *"concerned" – meaning in a statute when word "concerned" follows a noun*

Headnote

The first appellant, a trade union, was registered in February 1991 to cover F banking institutions. In March 1999 it entered into a collective bargaining agreement with the Banking Employers Association under the auspices of the relevant employment council. The collective agreement provided for the use of a "check-off" scheme whereby employers in the industry, with the consent of their employees who were members of the first G appellant, deducted union dues from the employees' remuneration and paid them to the first appellant. Section 1 of the collective agreement provided that it was binding on "all employers and employees in the undertaking who are members of the employers' organisation or the trade union respectively". The second respondent, another trade union, was registered to represent the interests of members employed in the H

Malaba DCJ

A commercial sector. In 1993 it entered into a collective bargaining agreement for the commercial sector. The agreement also contained a provision for the use of a "check-off" scheme. The first respondent, a building society, belonged to the commercial sector and was a member of the employers' association for that industry. In 2004, the second appellant, the workers' committee for the building society, informed the B building society that most of the society's employees had

withdrawn from the commercial trade union and joined the banking trade union. It demanded that the society should use the check-off system to pay to the banking union the dues deducted from the employees. The building society rejected the demand on the ground that, as it belonged to the C commercial sector, it was under no obligation to deduct money from its employees' remuneration and pay it to a trade union not registered for that industry, even if the employees had become members of the trade union concerned.

The appellants sought an order from the High Court to compel the building society to pay the dues to the first appellant. It was argued that the building D society carried on the business of financial institutions and thus should belong to the banking industry for which the first appellant is registered. The refusal by the society to deduct union dues from the remuneration of employees who were members of the first appellant and pay the money to it was a violation of the fundamental right of the employees to join E a trade union of their own choice. It was also argued that under s 54(1) of the Labour Act [*Chapter 28:01*] the banking union was entitled to demand that the building society respect the check-off scheme and deduct the contributions from the remuneration of its employees who are its members and pay them to it.

The respondents argued that the building society was not a banking institution F and did not belong to the banking industry. Although the building society respected the rights of the employees to belong to whatever trade union they chose, the exercise of the right given to a registered trade union to levy and collect union dues was qualified by the requirements under the provisions of s 52(1) and s 54(1) of the Act. Section 52(1) restricted the exercise of the right to collect union dues from members employed G in the industry or undertaking for which the trade union is registered.

The High Court rejected the application. On appeal:

Held, that the building society did not belong to the banking industry or undertaking. The banking industry comprises banking institutions, which are companies registered in terms of the Banking Act [*Chapter* H *24:20*]. The business ordinarily carried on by financial institutions falls

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Malaba DCJ

within the banking industry or undertaking when it is carried on by the A registered bank itself or a subsidiary of such a bank. The carrying on of the business ordinarily carried on by a financial institution would not justify the inclusion of building societies in the banking industry. The core business of the building society is not carried on by registered banks or subsidiaries of such banks. The intention in defining banking B institutions under s 3 of the Banking Act to exclude building societies is to keep the two kinds of institutions as separate undertakings or industries.

Held, further, that the refusal by the building society to act in accordance with the demands made by the appellants was not a violation of the fundamental right of its employees to join a trade union of their choice. That right is a personal right, the exercise of which depends on the free will of the C individual employee. Upon registration, a trade union becomes a legal entity separate from its members, with its own rights and obligations which it can exercise and discharge. Under s 29(4)(h) of the Labour Act, a registered trade union is given the right to levy and collect "union dues" provided it complies with the requirements prescribed by s 52(1) D as read with s 54(1) of the Act. The exercise of the right of freedom of association does not impose an obligation on the employer to deduct union dues from its employees who have joined a trade union and pay the money to the union without proof of the existence of the further factor, prescribed by the Act, that the trade union is registered for the undertaking or industry to which the employer belongs. E

Held, further, that the words "the trade union concerned" used in s 54(1) of the Act are not capable of two meanings. When a noun is used with the word "concerned" following it, the phrase is intended to refer to the subject forming the substance of the enactment which has been specifically identified earlier in the same section or in preceding sections, F in order to avoid repetitive mention of the subject or object by its specific designation each time the need to refer to it arises. Here, the words refer to a registered trade union capable of claiming the rights the first appellant claimed against the employer in the position of the first respondent. A trade union is registered by its founders for a particular undertaking or industry for the specific purpose of representing the interests of members G employed in that undertaking or industry. Registration of a trade union in terms of s 36(1) of the Act is not a matter of mere formality. It is a matter of substance. It identifies the employees whose interest the trade union is under the obligation to

represent in the collective bargaining process in its own right or in the capacity of an "agent union" in terms of s 31 of the Act. It provides the basis on which all the rights specified H

2010 (1) ZLR p295

Malaba DCJ

A under s 29(4) of the Act are conferred on the "trade union concerned." One of the rights conferred on a registered trade union under s 29(4) of the Act is the right to levy and collect union dues. Section 52(1) makes it clear that "union dues" can be levied and collected by a registered trade union from members who are employed or engaged in the undertaking or industry for which it is registered for the purpose of using the money B to fulfil its obligations to represent the members in that undertaking or industry. Section 54(1) requires that "union dues" be collected by an employer from his employees and transferred to "the trade union concerned". The ordinary and natural meaning of the words "the trade union concerned" as used in s 54(1) is the registered trade union concerned C with the matters of the exercise of the rights and the performance of the duties relating to the levying and collection of union dues for the particular purpose of representing members employed in the undertaking or industry for which it is registered. Since s 52(1) gives the right to a registered trade union to levy and collect "union dues" as defined in s 2 for that specific purpose, as long as its registration remains valid, a trade D union not registered for the undertaking or industry in which its members are employed has no right to demand that an employer should deduct money from the remuneration of his employees who are its members and pay the amounts to it.

Decision of Patel J in *Zimbabwe Banking & Allied Workers Union & Anor* E *v Beverley Bldg Soc & Ors* 2007 (2) ZLR 117 (H) upheld.

Legislation considered

Banking Act [*Chapter 24:20*], s 3

Constitution of Zimbabwe 1980, s 21(1)

Labour Act [*Chapter 28:01*], ss 4(1)(a), 29(4)(h), 34, 36(3)(b), 52(1), F 54(1) & 54(6)

Case information

L T Biti, for the appellants

H Zhou, for the first respondent

No appearance for the other respondents

G No appearance for the second, third, fourth and fifth respondents

Judgment

MALABA DCJ: This appeal raises the question whether a trade union registered for one undertaking or industry can use a check-off system and have an employer belonging to a different undertaking or industry deduct contributions from remuneration of his employees who are its members and H pay the money to it.

2010 (1) ZLR p296

Malaba DCJ

On 15 February 1991 the first appellant was registered to represent the A interest of its members employed in the banking industry. On 29 March 1999 it entered into a collective bargaining agreement with the Banking Employers Association under the auspices of the Employment Council for the banking undertaking. The collective agreement, SI 273 of 2000, made provision in s 12(1)(b) for the use of a check-off scheme whereby employers B in the industry, with the consent of their employees who are members of the first appellant, deduct union dues from the employees' remuneration and pay them to the first appellant. Section 1 of the collective agreement provides that it is binding on "all employers and employees in the undertaking who are members of the employers orgnisation or the trade union respectively".

The second respondent was registered to represent the interests of members C employed in the commercial sector. In 1993 it entered into a collective bargaining agreement for the commercial

sector published under SI 45 of 1993. The collective agreement also contains a provision for the use of a check-off scheme whereby employers in the commercial sector with the consent of their employees who are members of the second respondent deduct D union dues from their remuneration and pay them to the trade union. The first respondent belongs to the commercial sector and is a member of the employers' association for that industry. It complied with the requirements of the provisions of the collective agreement relating to the check-off scheme.

In 2004 the second appellant, with the support of the first appellant, alleged E to the first respondent that all but five of its employees had withdrawn their membership from the second respondent and joined the first appellant. They demanded that the first respondent should respect the check-off scheme operating in the commercial sector and pay to the first appellant the amounts of money deducted from the remuneration of its employees who had taken up membership in the first appellant. F

The first respondent rejected the demand on the ground, that as it belonged to the commercial sector, it was under no obligation to deduct money from its employees' remuneration and pay it to a trade union not registered for that industry, even if the employees had become members of the trade union concerned. It denied the allegation that all but five of its employees had G become members of the first appellant.

On 23 September 2005 an application was made to the High Court for an order to the effect that:

> "1. Forthwith the first respondent shall respect the check-off system and deduct and forward to the first applicant trade union dues by and from its members in its employment. H

Malaba DCJ

> A 2. The Collective Bargaining Agreement of the Commercial Sectors contained in SI 45 of 1993 does not interfere with the rights of the first applicant's members of belonging to the first applicant or any other union of their choice.
>
> 3. The first respondent pays costs of suit or alternatively in the event of any other respondents opposing this matter, then such respondents jointly and severally must pay costs of suit."

B The grounds on which the relief was sought were pleaded in the founding affidavit and supporting documents. The averments were as follows. The first respondent carries on the business of financial institutions. As such, it should belong to the banking industry for which the first appellant is registered. The refusal by the first respondent to deduct union dues from the remuneration of employees who are members of the first appellant and pay the money to it C is a violation of the fundamental right of the employees to join a trade union of their own choice. Section 4(1)(a) of the Labour Act [*Chapter 28:01*] ("the Act"), as read with s 21(1) of the Constitution of Zimbabwe, provides that every employee shall, as between himself and his employer have the right to be a member of a trade union of his own choice.

D A registered trade union is given the right under s 29(4)(h) of the Act to levy and collect union dues from its members. As it is obliged under s 54(1) of the Act to collect the union dues through the employer by means of a check-off system and the employer is prohibited under threat of criminal sanctions by s 54(6) of the Act from failing or refusing to collect union dues and transfer them to "the trade union concerned", the first appellant was E entitled to demand that the first respondent respect the check-off scheme and deduct the contributions from the remuneration of its employees who are its members and pay them to it.

Section 54 of the Act provides that:

> "(1) Union dues shall be collected by an employer from his employees and F transferred to the trade union concerned –
>
> (a) by means of a check-off scheme or in any other manner agreed between the trade union and the employees and the employer or employers organization concerned; or
>
> (b) failing such agreement as referred to in paragraph (a) by authorisation in writing of an employee who is a member of the trade union concerned."

G The words "the trade union concerned" as used in the context of s 54(1) of the Act refers to any registered trade union in which an employee has taken up membership.

The respondents opposed the application. They averred as follows. Building societies do not belong to the banking industry or undertaking. Section 3 H of the Banking Act [*Chapter 24:20*] expressly excludes building societies

Malaba DCJ

from the definition of banking institutions. It provides that the Act "shall not A apply to a building society registered in terms of the Building Societies Act [*Chapter 24:02*]". The business of financial institutions is relevant to the banking industry when it is being carried on by the registered bank itself or by a subsidiary of such a bank. When the business of financial institutions is carried on by a building society, it does not make it part of a banking industry or undertaking. B

The right of any employee to be a member of a trade union of his own choice has always been acknowledged and respected by the first respondent. No action was taken to hinder the employees from taking up membership with the first appellant. It was, however, not true to say that all but five employees had withdrawn their membership from the second respondent and joined C the first appellant.

The exercise of the right given to a registered trade union to levy and collect union dues is clearly qualified by the requirements under the provisions of ss 52(1) and 54(1) of the Act. Section 52(1) restricts the exercise of the right to collect union dues from members employed in the industry or undertaking for which the trade union is registered. It provides that: D

> "(1) For the purpose of fulfilling its obligation to represent the interests of its members employed or engaged in the undertaking or industry for which it is registered or certified a registered or certified trade union … may subject to this Act, levy, collect, sue for and recover union dues."

Section 54(1) of the Act then provides that the collection shall be done through E the employer at the same time prescribing the means by which the union dues may be collected. The words "the trade union concerned" as used in the context of s 54(1) of the Act refer to the registered trade union collecting union dues in terms of s 52(1) and using any of the devices prescribed under the subsection.

Three issues were determined by the court *a quo*. These were: F

1. whether the first respondent belonged to the banking industry;
2. whether the first respondent acted in a manner violative of the fundamental right of its employees to join a trade union of their choice when it refused to deduct money from the remuneration of those of its employees who may have joined the first appellant and pay it to the trade union; G
3. whether the words "the trade union concerned" as used in s 54(1) of the Act referred to any registered trade union in which employees decide to take up membership or to the trade union registered for the industry and exercising the right under s 52(1) of the Act.

The learned judge determined each of the issues in favour of the respondents. H

Malaba DCJ

A He dismissed the application with costs for the relief in para 1 of the draft order but granted the declarator in para 2 of the draft order. The grounds of appeal attack the correctness of the determination of each of the three questions argued before the learned judge.

I take the first ground of appeal. I am of the opinion that, on the proper B construction of the relevant provisions of the statutes establishing banking institutions and building societies, the learned judge correctly held that the first respondent did not belong to the banking industry or undertaking. The banking industry comprises banking institutions. These are companies registered in terms of the Banking Act [*Chapter 24:20*] to conduct any class of the business of accepting deposits withdrawable or repayable on demand C or after a fixed period or after notice and the employment of those deposits in whole or in part by lending or any other means for the account and at the risk of the person accepting the deposits.

The business ordinarily carried on by financial institutions falls within the banking industry or undertaking when it is carried on by the registered D bank itself or a subsidiary of such a bank. The carrying on of the business ordinarily carried on by a financial institution would not justify the inclusion of building societies in the banking industry. The core business of the first respondent is not carried on by registered banks or subsidiaries of such banks. The intention in defining banking institutions under s 3 of the Banking Act [*Chapter 24:20*] so as to exclude building societies is to keep the two kinds E of institutions as separate undertakings or industries.

Ironically, the relief sought by the appellants could only be granted in its terms upon a finding that the first respondent is a party to the collective bargaining agreement for the commercial sectors contained in SI 45 of 1993. The granting of the relief would have the effect of giving some form F of legitimacy to the encroachment by one trade union registered for one undertaking or industry into the area of influence under the registration of another trade union, contrary to the conscious principle of industrial unionism on which the efficacy of collective bargaining as a mechanism for effective representation of the interests of employees in an undertaking or industry depends.

G On the second ground of appeal, the learned judge was correct in holding that the refusal by the first respondent to act in accordance with the demands made by the appellants was not a violation of the fundamental right of its employees to join a trade union of their choice. The fundamental right is a personal right, the exercise of which depends on the free will of the individual H employee. Upon registration, a trade union becomes a legal entity separate

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from its members with its own rights and obligations which it can exercise A and discharge. Under s 29(4)(h) of the Act, a registered trade union is given the right to levy and collect "union dues" provided it complies with the requirements prescribed by s 52(1) as read with s 54(1) of the Act.

An employer is prohibited from making deductions of any description from any remuneration of an employee except amounts which the employer is B compelled by law to pay on behalf of an employee to a third party. Section 52(1) as read with s 54(1) of the Act is a law creating an exception to the prohibition against an employer making deductions of any description from the remuneration of his employees. The obligation imposed on the employer to deduct "union dues" from the remuneration of his employees who are members of a registered trade union is a right conferred on the trade union C subject to all the requirements prescribed being met. Deductions confer financial benefits on the trade union as an organization on account of complete membership. The employees concerned would have exercised their free will and joined the first appellant by the time the demand for the deductions to be made from their remuneration was communicated to the first respondent. D

The exercise of the right of freedom of association does not entail the imposition of the obligation on the employer to deduct union dues from the remuneration of its employees who have joined a trade union and pay the money to it without proof of the existence of the further factor, prescribed by the statute, that the trade union is registered for the undertaking or industry to which the employer belongs. The refusal by the first respondent to act E in accordance with the demand made by the appellants was a disclaimer of the existence of any legal relation between it and the first appellant on the basis of which it could be said that it was under an obligation to make the deductions claimed for the benefit of the latter. The first respondent was entitled to challenge the legality of the demand made by the appellants if on reasonable grounds it believed that they were not entitled to make it. F

The question was, therefore, whether the first appellant was entitled as against the first respondent to exercise the right to collect union dues from the employees who were its members by means of the check-off scheme. The issue was not whether the refusal by the first respondent to act in accordance with the demand by the first appellant to deduct the money referred to as G "union dues" from employees who were its members and pay the amounts to it violated the fundamental right of the employees to join a trade union of their choice, because the refusal clearly did not have such effect. There was no genuine dispute for resolution by the court over the exercise by the employees of their fundamental right to join a trade union of their choice. The cause of action was premised on the fact that the employees concerned H

A had voluntarily taken up membership in the first appellant without hindrance from their employer.

That takes me to the third ground of appeal. Mr *Biti* argued on behalf of the appellants that the learned judge held that the first respondent was not under any obligation to deduct the money claimed by the first appellant from the B remuneration of its employees who had taken up membership in it because he erroneously put a restrictive interpretation on the words "the trade union concerned" in s 54(1) of the Act to mean the trade union registered for the undertaking or

industry to which the employees belonged. His contention was that the phrase referred to a registered trade union in which employees would have taken up membership. On the other hand, Mr *Zhou* for the first C respondent contended that s 54(1) is clear and unambiguous. He said the words "the trade union concerned" in the context of s 54(1) of the Act can only mean the registered trade union referred to in s 52(1), that is to say, the registered trade union which represents the undertaking or industry for which it is registered.

D The learned judge said at 125E-126B:

> "The critical question to be answered is this: what is the meaning that should be ascribed to the phrase 'the trade union concerned?' In favour of ZIBAWU it might well be argued that the terminology employed in s 54 differs materially from that used in s 52. Thus 'the trade union concerned' in s 54 must mean the trade union of which the employees concerned are members rather than the trade E union registered in the industry or undertaking in which they are employed. As against this, it seems preferable to read s 52 together with s 54 in an holistic fashion so as to confine the application of the latter to the trade union referred to in the former. In other words, the employer's obligation under s 54 must be restricted to a trade union registered in the industry or undertaking in which its members are employed. Such trade union in effect constitutes 'the trade union concerned' for the purposes of levying union dues. To interpret these provisions F otherwise would mean that an employer would be obliged to collect and transfer union dues to a trade union with no capacity to represent the interests of the employees from whom those dues are levied. That would surely negate the very purpose of collecting union dues from employees *viz* effective trade union representation of these employees in the industry or undertaking in which they are employed. Of course, there is nothing in law to stop an employee from G joining and paying subscriptions to a trade union which does not represent his industry or undertaking. However, that does not oblige his employer to collect and transfer union dues to that trade union in accordance with ss 52 and 54 of the Act".

The conclusion reached by the learned judge on the construction he placed on the relevant provisions of the Act is correct. I prefer to examine the problem H as a question of the enforceability of a claim for collection of union dues

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Malaba DCJ

made against an employer by a trade union registered for an undertaking or A industry different from that to which the employer belongs. In the process, two questions have to be answered: what registered trade union can under the Act claim the rights for the collection of union dues by means of a check-off scheme against an employer subject to the discharge of the duties that go with them? Is the first appellant such a registered trade union with the B right to claim the collection of union dues by means of the check-off scheme against the first respondent?

It is clear that the words "the trade union concerned" used in s 54(1) of the Act are not capable of two meanings. When a noun is used in a statute together with the word "concerned" following it, the phrase is intended to refer to the subject or object of the rights or obligations respectively forming C the substance of the statute which has been specifically identified earlier in the provisions of the section in which the words are used or in the provision of preceding sections, to avoid repetitive mention of the subject or object by its specific designation each time the need to refer to it arises. They refer to a registered trade union capable of claiming the rights the first appellant D claimed against the employer in the position of the first respondent. A trade union is registered by its founders for a particular undertaking or industry for the specific purpose of representing the interests of members employed in that undertaking or industry.

It is a requirement under s 34 of the Act that those who form a trade union E and decide to have it registered must state in the application for registration the coverage of the proposed trade union "with regard to the undertakings or industries concerned." The Registrar is required under s 36(3)(b) of the Act to enter in the register "every undertaking or industry in respect of which the trade union … is registered" once he grants the application for registration. It is the practice of the registrar to enter the same information in the certificate F of registration issued to the trade union concerned.

Not only are specific rights and obligations conferred on a registered trade union on account of its registration, but persons against whom it is entitled to claim the rights and for whose benefit it must discharge the obligations are also stated on the basis of the registration. The rights are expressly rendered G unclaimable while the registration of a trade union is suspended or after it has been rescinded. It appears to me that a registered trade union is under an obligation not to do what it has not been registered to do.

Registration of a trade union in terms of s 36(1) of the Act is therefore not a matter of mere formality. It is a matter of substance. It identifies the employees whose interest the trade union is under the obligation to represent H

2010 (1) ZLR p303

Malaba DCJ

A in the collective bargaining process in its own right or in the capacity of an "agent union" in terms of s 31 of the Act. It provides the basis on which all the rights specified under s 29(4) of the Act are conferred on the "trade union concerned."

One of the rights conferred on a registered trade union under s 29(4) of B the Act is the right to levy and collect union dues. "Union dues" is defined under s 2 of the Act as "money levied by a trade union in terms of section 52." Section 52(1) makes it quite clear that "union dues" can be levied and collected by a registered trade union from members who are employed or engaged in the undertaking or industry for which it is registered for the purpose of using the money to fulfil its obligations to represent the members C in that undertaking or industry.

Section 54(1) requires that "union dues" be collected by an employer from his employees and transferred to "the trade union concerned". The means by which an employer must collect union dues from his employees who are members of "the trade union concerned" are prescribed under s 54 of the D Act. One of these means is a check-off scheme defined in s 2 of the Act as "a scheme whereby an employer, with the consent of the employees concerned, deducts union dues directly from the remuneration of his employees and remits such dues to the trade union representing them".

The ordinary and natural meaning of the words "the trade union concerned" as used in s 54(1) of the Act is the registered trade union concerned with E the matters of the exercise of the rights and the performance of the duties relating to the levying and collection of union dues for the particular purpose of representing members employed in the undertaking or industry for which it is registered. The conclusion is inescapable, because s 54(1) must not be read in isolation, but together with the other sections under Part VII of the F Act dealing with the registration of trade unions, the rights and obligations conferred on them and the requirements prescribed for their exercise.

On its own, s 54(1) simply declares that union dues shall be collected by an employer and paid to the trade union concerned with having them collected and paid to it. Without looking back at the substance of the preceding sections, the fact that the trade union in question would have had to satisfy specific G requirements to enter into a legal relationship with the employer in which the latter assumed the obligation to deduct union dues from the remuneration of its employees who are members of the trade union and pay them to it would be lost sight of. That would give rise to the untenable construction of the statute which conceives of any registered trade union in which employees H have taken up membership making demands on their employers to deduct

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2010 (1) ZLR p304

Malaba DCJ

money from their remuneration and pay it to that trade union, when it has A no obligation to represent the interests of the employees concerned in the collective bargaining process for the undertaking or industry to which they belong.

The crucial provision is s 52(1) of the Act, with reference to which the concept of "union dues" finds its meaning which it must be taken to bear B in the context of its use in s 54(1). Section 52(1) is the only section which gives a registered "trade union" the right to collect union dues by means of a check-off scheme and prescribes the conditions which have to be satisfied for the exercise of the right by the "trade union concerned" with the discharge by the employer of the obligation imposed on him under s 54(1) of the Act. C

The concept of "union dues" mentioned in s 52(1) is also found in the definition of "check-off scheme", thereby limiting the right to receive remittances of union dues to a registered trade union representing the employees from whose remuneration the union dues would have been deducted by their employer. A trade union is registered for a particular undertaking or industry to represent members employed in that undertaking or industry. When regard is had to the D fact that s 52(1) of the Act gives the right to a registered trade union to levy and collect "union dues" as defined in s 2 for the specific purpose of fulfilling the obligation assumed by it upon registration to represent its

members employed in the undertaking or industry for which it is registered and as long as its registration remains valid, a trade union which is not registered for the E undertaking or industry in which its members are employed has no right to demand that an employer should deduct money from the remuneration of his employees who are its members and pay the amounts to it.

I accept the contention advanced by Mr *Zhou*, on behalf of the respondents, to the effect that s 52(4) as read with 52(1) of the Act cannot be used to justify the imposition of the obligation on an employer to deduct union dues from F his employees who are its members and pay them to a trade union registered for an undertaking or industry different from the undertaking or industry to which the employer belongs. The words "the trade union concerned", as used in s 54(1) of the Act, do not include the first appellant in so far as its claim against the first respondent to deduct union dues from the remuneration of its G members employed by the first respondent by means of a check-off scheme is concerned, because it is not registered for the undertaking or industry to which the first respondent belongs.

It was not necessary for the learned judge to grant the declaration because the respondents did not dispute that SI 45 of 1993 does not interfere with the rights of the first respondent's employees to belong to the first appellant or H

2010 (1) ZLR p305

Malaba DCJ

A any other trade union of their choice. There has been no cross appeal against the propriety of the granting of the order. A minor correction needs to be made. The declarator states that SI 45 of 1993 does not operate to prevent or "interfere with the right of the first applicant's members to belong to the first applicant … ". I think it should be amended to state that SI 45 of 1993 does not operate to prevent or "interfere with the right of the first respondent's B employees to belong to the first applicant …".

Except for the amendment to the declarator the appeal is dismissed with costs.

SANDURA JA and CHEDA JA concurred.

Honey & Blanckenberg, appellants' legal practitioners

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

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Document 43 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/GARDNER v DAMPIER DEVELOPMENT& ORS 2010 (1) ZLR 306 (H)

GARDNER v DAMPIER DEVELOPMENT& ORS 2010 (1) ZLR 306 (H)

2010 (1) ZLR p306

Citation	2010 (1) ZLR 306 (H)
Case No	Judgment No. HH-72-10
Court	High Court , Harare
Judge	Makoni J
Heard	1 June 2009
Judgment	12 May 2010
Counsel	*L Uriri*, for the applicant

N R Mutasa, for the first respondent
H Zhou, for the fourth respondent

Case Type Opposed application

Annotations Link to case annotations

Flynote

Contract – *sale – res litigiosa – whether res litigiosa may be alienated – sale of property to third party – rights of successful litigant against third party – sale to fourth party – sale genuine and bona fide – successful litigant having no claim against fourth party* D

Headnote

In July 2004 the applicant and the first respondent entered into an agreement of sale in respect of a certain piece of land. A misunderstanding arose regarding payment of the purchase price. This culminated in the applicant suing the first respondent for an order of specific performance. Judgment was entered in favour of the applicant on 4 April 2006. The first respondent E appealed against the judgment but later withdrew the appeal. About a month before judgment was given, the first respondent sold the same property to the second and third respondents. It effected transfer of the property on 13 April 2006. The second and third respondents subsequently sold and transferred the property to the fourth respondent on 18 September F 2007. The applicant sought an order declaring that the first respondent had lost *dominium* over the property and that the subsequent sales were void. He argued that he retained an absolute right to repossess the property from whoever had title at the time of judgment, if such title was obtained subsequent to joinder of issues. Once the pleadings were closed, the matter became *litis contestatio*. The parties lost *dominium* over the G property, which became *res litigiosa*. As such, the property could not be disposed of before the termination of the proceedings. Accordingly, he was entitled to vindicate the property. The first respondent argued that the mere operation of the doctrine of litigiosity does not result in *dominium* over property being lost. A *res litigiosa* can be alienated. At no time did the applicant become the owner of the property. He did not H

Makoni J

A pay the purchase price and he could not therefore seek to vindicate the property, which is now owned by the fourth respondent.

Held, that one of the essential elements of an *actio rei vindicatio* is that a party seeking such relief must establish the right of ownership. The action is not available to those who have not yet obtained ownership. What the applicant acquired through the judgment was a personal right. The B doctrine of *res litigiosa* applies in an action *in rem* and not in a personal action. The defendant's real rights as *dominus* in a *res litigiosa* were not lost, but were diminished to the extent to which he could not dispose of the thing to the prejudice of the plaintiff.

Held, further, that the fact that a thing is *res litigiosa* does not preclude or C prevent it from being alienated or similarly dealt with, so long as the rights of the non-alienating litigant in the *res* are protected. Where property is sold to a third party, the agreement of sale of the *res litigiosa* between the litigating party and the third party is valid *inter partes*. The purchaser is bound by the judgment in the action and the successful party can recover it from the new possessor by execution and without fresh proceedings. D However, this case involved a sale to a fourth party. If the sale to the fourth party was a genuine, and not a simulated, transaction, and the transfer to the fourth party was *bona fide*, that transfer would be valid.

Cases cited

Ex p *Deputy Sheriff Salisbury,* in re *Doyle v Salgo* 1957 (3) SA 740 (SR)

E *Menezes v McGaili* 1971 (2) SA 12 (C)

Supa Plant Invstms (Pvt) Ltd v Chidavaenzi 2009 (2) ZLR 132 (H)

Case information

L Uriri, for the applicant

N R Mutasa, for the first respondent

F *H Zhou*, for the fourth respondent

Judgment

MAKONI J: The applicant and the first respondent entered into an agreement of sale in respect of a 4.2 per cent undivided share, being share number E 8, and 90.15 per cent undivided share, being share number J 4, of a certain G piece of land situate in the District of Salisbury called the Remaining Extent of Stand 759 A, Greystone Township ("the property"). This was sometime in July 2004.

A misunderstanding arose regarding payment of the purchase price which culminated in the applicant suing the first respondent for an order of specific performance in 2004. Judgment was entered in favour of the applicant on 4 H April 2006. The order was to the effect that the applicant was to tender the

purchase price and the first respondent would then transfer its rights, title A and interest in the property to the applicant. The first respondent appealed against the judgment and later withdrew the appeal.

In the meantime, sometime in March 2006, the first respondent sold the property to the second and third respondents. It effected transfer of the property to the second and third respondents on 13 April 2006. The second B and third respondents subsequently sold and transferred the property to the fourth respondent on 18 September 2007.

Against this background, the applicant then brought the present application seeking an order declaring that:

1. The first respondent lost *dominium* in the property, with the closure of C pleadings in case No. HC 11495/04 ("the earlier case").
2. The sale and transfer of the property by the first respondent to the second and third respondents, and the subsequent sale and transfer of the property by the second and third respondents to the fourth respondent is accordingly null and void. D
3. The sale and transfer of the property by the first respondent to the second and third respondents, and the subsequent sale and transfer of the property by the second and third respondents to the fourth respondent are set aside.
4. The first respondent shall tender transfer of the property to the applicant. E

The applicant averred that he tendered payment in accordance with the judgment in the earlier case and it was rejected by the first respondent. He contended that the sale of the property to the second and third respondents was void because the first respondent had lost *dominium* of the property with the closure of pleadings. He retained an absolute right to repossess the property from whoever had title at the time of judgment if such title was F obtained subsequent to joinder of issues.

The first respondent opposed the matter on the basis that the property was sold to the second and third respondents before the judgment had been delivered. He disputed that it lost *dominium* over the property.The applicant's application to interdict the first respondent from disposing of the property G was dismissed. It did not accept that the second and third respondent's title to the property was defective in any way. The fourth respondent opposed the application on the same grounds as advanced by the first respondent.

It was submitted on behalf of the applicant that once the pleadings in the earlier case were closed, the matter became *litis contestatio*. The parties lost *dominium* over the property, which became *res litigiosa*. As such, the H

Makoni J

A property could not be disposed of before the termination of the proceedings. The proceedings in the earlier case were only terminated with the withdrawal of the first respondent's appeal. It was further submitted that the sale of the property to the second and third respondents, and subsequently to the fourth respondent, was void because at the material time the first respondent had no *dominium* over it. The applicant is entitled to vindicate the property.

B It was submitted by Mr *Mutasa* that the mere operation of the doctrine of litigiosity does not result in *dominium* over property being lost. It is an accepted principle of law that *res litigiosa* can be alienated. He further submitted that at no time did the applicant become the owner of the property. because he did not pay the purchase price. He cannot therefore seek to C vindicate property which is now owned by the fourth respondent. The fourth respondent associated itself with the argument by the first respondent. Mr *Zhou* further submitted that the agreement of sale between a litigating party and the third party is valid *inter partes.*

Mr *Mutasa* argued that the present application was equated to the vindicatory action in Ex p *Deputy Sheriff Salisbury* in re *Doyle* v *Salgo* 1957 (3) SA 740 D (SR). One of the essential elements of an *actio rei vindicatio* is that a party seeking such relief must establish the right of ownership. Carey Miller *The Acquisition and Protection of Ownership* (1986) at p 256, after making the above point, goes on to stress that:

> "As Voet points out, the action is not available to those who have not yet obtained E ownership as, for example, a purchaser who has paid the price but not yet obtained delivery. Nor, indeed, is it enough for the plaintiff to gain ownership *pendente lite* because it cannot be competent for a party to institute a vindicatory action anticipating the acquisition of ownership".

It is not in dispute that the applicant is not, and has never been, the owner of the property. Further what the applicant acquired through the judgment is a F personal right. The doctrine of *res litigiosa* applies in an action *in rem* and not in a personal action. In para 1 of the draft order, the applicant seeks a declarator that the first respondent lost *dominium* in respect of the property with the closure of pleadings in the earlier case. The issue then is whether the operation of the doctrine of litigiosity results in *dominium* over property being lost. No authority to that effect was quoted to the court by the applicant G and he had been unable to find any.

Mr *Uriri,* in his reply, made a concession that *dominium* is not lost but that it is diminished. He did not however seek to amend para 1 of the draft order.

The concession was properly made. The defendant's real rights as *dominus* in a *res litigiosa* are diminished to that extent to which he cannot dispose of H the thing to the prejudice of the plaintiff. See *Doyle supra* and Silberberg

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Makoni J

and Schoeman *The Law of Property* 3 ed at p 304. *Dominus* is not lost as a A result of litigiosity. Paragraph 1 of the draft order is therefore not the correct position in law. In view of my finding, the relief being sought by the applicant in para 1 of the draft order cannot be granted.

In para 2 of the draft order, the applicant seeks a declarator to the effect that the sale of the property to the first and second respondents and the B subsequent sale and transfer of the property to the fourth respondent is accordingly null and void. From the wording of para 2, in particular the use of the word "accordingly", it would appear that the granting of para 2 is linked to the granting of para 1. Having made a finding that I cannot grant para 1, it follows that I cannot grant para 2 C

Assuming that I am wrong on this point, I will proceed to determine the next issue, which is the validity of the sale of the property to the first and second respondents and the subsequent sale and transfer of the property to the fourth respondent.

It is now settled in our law that the fact that a thing is *res litigiosa* does not preclude or prevent it from being alienated or similarly dealt with, so long D as the rights of the non-alienating litigant in the *res* are protected. The above position come out clearly in the recent case of *Supa Plant Investments*(*Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H) at 138-139 where Makarau JP analysed the authorities on the point.

Silberberg and Schoeman *op cit* at p 304 made the point that the agreement E of sale of the *res litigiosa* between the litigating party and a third party is valid *inter partes*. They go further to say

that the purchaser is bound by the judgment in the action and the successful party can recover it from the new possessor by execution and without fresh proceedings.

The issue that confronts me in this matter is not that of a third party who contracts with the litigating party but that of a party who F purchases from the third party. It was submitted by Mr *Zhou* that recovery of the property would only apply if the property is in the hands of the second and third respondents and not if it is held by the fourth respondent. I was referred to *Menezes* v *McGaili* 1971 (2) SA 12 (C). In that case, a certain van Schoor had been prohibited by an order of court from passing transfer of certain property to G any person other than McGaili. In breach of the prohibition, van Schoor passed transfer to one Eckard, who in turn sold the property to Menezes. McGaili argued that because of the existence of the prohibition, Menezes had not validly acquired ownership. It was held that the transfer from van Schoor to Eckard had not been void, even though it was done in violation of a court order. Steyn J at 14G made the following remarks: H

Makoni J

> A "Provided, however, that the transaction between van Schoor and Eckard complied with the requirements of a valid sale, in that, e.g., it was a genuine and not a simulated transaction negotiated with the object of defeating the court's order, the mere prohibition would not, in my opinion, render the transfer from van Schoor to Eckard void. Probably such transfer is voidable, but until it has been set aside, it stands, and if then Eckard transfers the property to a *bona fide* transferee, the latter transfer is valid".

B The learned judge went further and explained his reasoning, which was the consideration that if a transfer effected in breach of an order of court were to be held void, a series of transfers might have to be set aside. This would constitute a serious inroad upon the unassailable title of a *bona fide* transferee and could lead to grave inconvenience and uncertainity.

C I share the views expressed by Steyn J. The applicant has not alleged any *mala fides* on the part of the fourth respondent. The fourth respondent would therefore be a *bona fide* transferee. In any event, the applicant only acquired a personal right, if any, through the court order and he cannot successfully claim the property from the fourth respondent as his rights are only enforceable against the first respondent.

D Carey Miller *op cit* lends support to the point that the successful litigant can recover the *res* by execution from the third party only when he states at p 257:

> "In essence the successful plaintiff could recover the thing *from the one who had acquired from the defendant* merely by recourse to execution – based upon the judgment against the defendant and without the need for vindication". (my own E emphasis).

In the result, and on the basis of the foregoing, I make the following order:

1. The application is dismissed.
2. The applicant to pay costs of suit.

F *Kantor & Immerman*, applicant's legal practitioners

Costa & Madzonga, first respondent's legal practitioners

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Document 44 of 62

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MTENGWA v MTENGWA 2010 (1) ZLR 312 (H)

Citation 2010 (1) ZLR 312 (H)

Case No Judgment No. HH-78-10

Court	High Court, Harare
Judge	Musakwa J
Heard	1 September 2008; 8 September 2008; 9 September 2008; 12 September 2008; 24 November 2008
Judgment	13 May 2010
Counsel	*J Shekede,* for the plaintiff Ms *M Mutsvangwa,* for the defendant
Case Type	Divorce action
Annotations	No case annotations to date

Flynote

Family law – *child – custody – award of – best interests of child – factors to be considered in determining what is in best interests of child — presumption in favour of the mother where custody of daughter sought – best interests of the child can be served by awarding custody to father* D

Family law – *husband and wife – divorce – division of property following divorce – objective of courts – needs of the parties more important than their individual contributions*

Headnote

In considering the provisions of s 7 of the Matrimonial Causes Act [*Chapter 5:13*], which deals with the division of the matrimonial property, "it E is time to recognize that the legislative intent, and the objective of the courts, is more weighted in favour of ensuring that the parties' needs are met, rather than their contributions are recouped" (*dicta per* Gillespie J in *Shenje* v *Shenje* 2001 (2) ZLR 160 (H) at pp 163-164, followed).

In a divorce action involving the parties, two of the main points of dispute F between them concerned the custody of their seven year old daughter and the division of the matrimonial property. The plaintiff, who was the mother, submitted that the gender of the child was a major consideration in determining who should have custody. The plaintiff conceded, however, that the child preferred to be with her father, the defendant. Despite the child having been taken away by the defendant against the plaintiff's G will, it was the view of the court that the plaintiff exhibited no desire to be reunited with her. The evidence also established that, even before the separation of the parties, the plaintiff had not helped her daughter with her homework. She had not sought any information as to her progress at school, nor had she paid the child's school fees, which had been paid by the defendant. H

2010 (1) ZLR p313

Musakwa J

A As far as the proprietary rights of the parties were concerned, the evidence disclosed that, while the plaintiff was the major contributor to the matrimonial home, it was owned jointly by the parties. It was on this basis that the plaintiff sought a 70 per cent share of the proceeds from the sale of the house. She did, however, own another house which she had inherited from her father. The defendant, on the other hand, had no B other house apart from the matrimonial home upon which to fall back.

Held, granting the divorce (which had not been contested by the parties), that the best interests of the child were served by awarding custody of the child to the defendant, with the plaintiff exercising right of access. Any presumption that the interests of a female child are best served in the custody of the mother were not applicable in this case.

C *Held,* further, that in exercising its discretion in regard to the division of the property for the purposes of s 7 of the Matrimonial Causes Act [*Chapter 5:13*], to award the plaintiff a greater share of the proceeds of the sale of the matrimonial home would result in an inequitable distribution. This was so, notwithstanding that the plaintiff had contributed more to the D matrimonial home than had the defendant. Unlike the defendant, the plaintiff had another house to fall back on and it was the defendant who would have to shoulder the burden of looking after the parties' daughter.

Held, further, that the matrimonial home should be valued by an estate agent and thereafter sold to best advantage, with the proceeds of the sale divided equally between the parties.

Cases cited E

Goba v Muradzikwa 1992 (1) ZLR 212 (S)

McCall v McCall 1994 (3) SA 201 (C)

Shenje v Shenje 2001 (2) ZLR 160 (H)

F *Takafuma v Takafuma* 1994 (2) ZLR 103 (S)

Zvorwadza v Zvorwadza 1996 (1) ZLR 404 (S)

Legislation considered

Matrimonial Causes Act [*Chapter 5:13*], s 7

Case information

G *J Shekede,* for the plaintiff

Ms *M Mutsvangwa,* for the defendant

Judgment

MUSAKWA J: The plaintiff issued summons in which she sought a decree of divorce, custody and maintenance in respect of their minor child, a division H of matrimonial assets and an order that the defendant be ordered to purchase

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Musakwa J

63 120 First Mutual shares or, alternatively, pay their equivalent value and A costs of suit.

At the pre-trial conference stage the parties agreed that the marriage relationship had irretrievably broken down. They also settled on the sharing of movables.

The plaintiff testified to the effect that she married the defendant according B to custom in 1998. The marriage was subsequently solemnized in terms of the Marriages Act on 18 March 2000. She confirmed that the marriage had irretrievably broken down. The parties have one child, a girl, N, born on 27 February 2001.

The plaintiff's reasons for claiming custody were the child's gender and C that she goes to work and returns home by 5 pm. On that basis, she said she would have adequate time to spend with the child. On the other hand, she stated that the defendant sometimes returned home late. At the time of trial she was residing in the matrimonial home in Westlea and did not know where the defendant was residing with the child. The defendant moved out of the matrimonial home with the child during the plaintiff's absence at the D beginning of June 2008.

The defendant is said to have undertaken to return the child. However, the plaintiff only stayed with the child overnight. Subsequently the child only visited the plaintiff twice during weekends. They then agreed that the defendant would take the child to school as he had at his disposal a company vehicle and fuel allowance. On the other hand the plaintiff was self-employed. E

The plaintiff was asked to respond to claims that the defendant is the one who used to help the child with homework. She explained that, when they started to experience problems with their marriage, the child would inform her that she had already done homework with the defendant. On claims that she used not to take the child to school during the defendant's absence, she explained F that she

would take the child to school if the defendant communicated his absence. In the event that custody is awarded to the defendant, the plaintiff stated that she would prefer to be with the child every weekend and school as well as public holidays.

Under cross-examination the plaintiff conceded that the child enjoys staying G with the defendant, although she attributed this to her age. The weekend the child visited her, she elected to go back to the defendant. The plaintiff also agreed that, if custody is granted to the defendant, she should be granted rights of access every alternate holiday. She also conceded that the defendant paid most of the fees for the child.

In respect of the matrimonial home, the plaintiff testified that she paid the H

A entire purchase price for the stand without a contribution from the defendant. The property is registered in their joint names. Development of the stand commenced in 1999 and was completed in 2001. She conceded that whilst she solely funded the construction of the house, the defendant was responsible for food. She furnished proof of payments she made either in her name or, in some instances, their joint names or through the company of which she B was a director.

The plaintiff claims a 70 per cent share of the matrimonial home with the defendant getting the balance. According to the plaintiff, the house should be valued within 40 days of the granting of the divorce order with the parties sharing the costs equally. Thereafter, she argued, the house should be sold C with the parties sharing the net proceeds as suggested

[*The learned judge then outlined the evidence given by both parties and their witnesses and continued:*]

It is well established that the determining factor in a custody dispute are the best interests of the child. In support of this submission Mr *Shekede* cited D *Zvorwadza v Zvorwadza* 1996 (1) ZLR 404 (H). He also submitted that the plaintiff is better placed to be granted custody as she has more earning power than the defendant. Mr *Shekede* also submitted that the sex of the child should be taken into account and cited *Goba v Muradzikwa* 1992 (1) ZLR 212 (S). In that case, after the dissolution of the parties' customary law union, the wife went to her parents' home with their two daughters. E The husband subsequently sought custody of the children. The community court granted custody of one of the children to the husband whilst the wife retained custody of the other. In upholding the appeal by the wife Gubbay CJ had this to say at 214:

> "In this case I am satisfied that the presumption that the interests of female children of tender years are better served in the custody of their mother, was not rebutted F by the respondent. I need only refer to the sagacious words of Broome J (as he then was) in the celebrated case of *Dunsterville v Dunsterville* 1946 NPD 594 at 597:C:
>
> > '… it is often said that the best person to look after young children is their mother. So far as mere physical well-being is concerned, I do not think this is a matter of any importance. Few mothers are capable of attending G to the bodily needs of their offspring as efficiently as an institution-trained nurse. But that is not the end of the matter. Experience goes to show that a child needs both a father and a mother, and that, if he grows up without either, he will, to some extent, be psychologically handicapped. But the maternal link is forged earlier in the child's life than the paternal, and if not forged early may never be forged at all. The psychological need for a H father, on the other hand, only arises later. It seems to me that if the father

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> > is awarded the custody of these young children they will in all probability, A notwithstanding the loving care which they will undoubtedly receive from their paternal grandmother, grow up as motherless children, with all the attendant psychological disadvantages. If, on the other hand, the mother is awarded their custody, at any rate during their years of infancy, they will not necessarily grow up as fatherless children, for the relationship between a father and his young children is never one of continuous intimacy, but is B necessarily intermittent. The children will realise that they have a father, notwithstanding that they do not see him every day. And when they reach the age at which a father becomes an important factor in their lives, there will be nothing to hinder the forging of the paternal link.'"

Notwithstanding the above remarks, the underlying consideration is the best interests of the child and each case must be decided on its own facts. C Mr *Shekede* also cited *McCall v McCall* 1994 (3) SA 201 (C), which went into great detail on what constitutes the best interests of the child. The case concerned an application for variation of a consent order in which custody of the minor child had been granted to the respondent. King J had this to say about what constitutes the best interests of the child, at 204-205:

> "In determining what is in the best interests of the child, the court must decide D which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following: E
>
> (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
>
> (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
>
> (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings. F
>
> (d) the capacity and disposition of the parent to give the child the guidance which he requires;
>
> (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security; G
>
> (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
>
> (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
>
> (h) the mental and physical health and moral fitness of the parent;
>
> (i) the stability or otherwise of the child's existing environment, having regard H

Musakwa J

> A to the desirability of maintaining the status quo;
>
> (j) the desirability or otherwise of keeping siblings together;
>
> (k) the child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
>
> (l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 (and Rowan is almost 12) should be B placed in the custody of his father; and
>
> (m) any other factor which is relevant to the particular case with which the court is concerned."

The above excerpt is quite useful is determining which parent should be granted custody of the minor child in the present case. The defendant took C away the minor child and one might be tempted to say took advantage of that to secure the affections of the child. However, it can also be noted that he facilitated communication between the child and the plaintiff and this happened the first weekend after the separation. It is common cause that the child did not want to remain with the plaintiff.

D It is also not in dispute between the parties that the child prefers to be with the defendant. From the evidence led before this court it is clear that the plaintiff did not prove why she is a better parent. Despite the child having been taken away against the plaintiff's will, she did not exhibit any desire to be reunited with the child. Even before separation, it was the defendant who always assisted the child with its homework and paid school fees. After E separation, the plaintiff did not make meaningful efforts to be apprised of the child's progress at school. It must be pointed out that both parties were fair in that they did not mind custody being granted to either of them. Even without the court having interviewed the child, it was also common cause that the child prefers staying with defendant. I would therefore hold that the best interests of the child are best served by awarding custody to the defendant.

F On the matrimonial home, the starting point is that the parties have equal shares as the property is registered in their joint names. In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 105-6, cited by plaintiff's counsel, McNally JA had this to say:

"The registration of rights in immovable property in terms of the Deeds Registries G Act [*Chapter 139*] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of 'real right' in s 2 of the Act. The real right of ownership, or *jus in re propria*, is 'the sum total of all the possible rights in a thing' – see *Wille's Principles of South African Law* 8 ed p 255.

H The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the

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2010 (1) ZLR p318

Musakwa J

exercise of a considerable discretion, but it is a discretion which must be exercised A judicially. The court does not simply lump all the property together and then hand it out in as fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term 'his', 'hers', and 'theirs. Then it will concentrate on the third lot marked 'theirs'. It will apportion this lot using the criteria set out in s 7(3) of the Act. Then it will allocate to the husband the items marked 'his', plus the appropriate share of the items marked 'theirs'. And the same to the wife. That is the first stage. B

Next it will look at the overall result, again applying the criteria set out in s 7(3) and consider whether the objective has been achieved, namely, 'as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses … in the position they would have been in had a normal marriage relationship continued …'.

Only at that stage, I would suggest, should the court consider taking away from C one or other of the spouses something which is actually 'his' or 'hers'."

The plaintiff produced proof of the various payments that were made to the contractor who constructed the house. They cover the period between 4 February 1999 and 12 June 2001. The payments were recited to Tadex Trading (Pvt) Ltd and Zectopine Investments (Pvt) Ltd, which are the two D companies in which the plaintiff holds directorships. These payments, including the purchase price for the stand, amounted to Z$3 532 230. The plaintiff also produced invoices relating to quotations for other work done or items supplied but in relatively smaller amounts.

On the other hand, apart from claiming that he made some indirect E contributions, the defendant did not tender any documentary proof. For example, it should not have been difficult to give evidence on the value of the contracts he secured with the clients he mentioned. From the pay slips belonging to the defendant that were produced by the plaintiff, the defendant's net earnings between April 1999 and September 2001 roughly averaged Z$12 488 per month. F

Ms *Mutswangwa* submitted that the court should take into account the provisions of the s 7 of the Matrimonial Causes Act as, among other things, it provides that in making an award the court should place the parties in the position they would have been had a normal marriage relationship continued. She also submitted that the defendant should not impoverished by the divorce. G

The plaintiff also owns another house which was acquired for her by her father before she got married. In making an award the court will have to take that into account.

This court was also referred to *Shenje v Shenje* 2001 (2) ZLR 160 (H) in which Gillespie J, in considering the provisions of s 7 of the Matrimonial Causes Act, had this to say at 163-164: H

2010 (1) ZLR p319

Musakwa J

A "In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. A number of the more important, and more usual, circumstances are listed in the subsection. The list is not complete. It is not possible to give a complete list of all the possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all relevant factors, aimed at achieving a reasonable, B practical and just division which secures for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantages, to the extent they are inevitable, of becoming divorced."

The factors listed in the subsection deserve fresh comment. One might form the impression from the decisions of the courts that the crucial consideration is that of the respective contributions of the parties. That would be an error. The matter of contributions made to the family is the fifth listed of seven considerations. C The first four listed considerations all address the needs of the parties rather than their dues. Perhaps, it is time to recognize that the legislative intent, and the objective of the courts, is more weighted in favour of ensuring that the parties' needs are met rather than that their contributions are recouped."

In the exercise of my discretion and taking into account the provisions of s 7(4), I am satisfied that notwithstanding that the plaintiff contributed more to D the matrimonial home, awarding her a greater share than the defendant would result in an overall inequitable distribution. This is because she has another property to fall back on, whereas the defendant has none. Consideration must also be taken that the defendant is going to shoulder the burden of looking after the parties' daughter.

E The claim in respect of First Mutual shares is unsustainable. The plaintiff appears to be a meticulous person who keeps records of her transactions as evidenced by the documentation she produced in respect of the development of the matrimonial home. It is unlikely that she could have failed to document the very significant transaction in respect of the undertaking by the defendant to buy back the shares. It is also inconceivable that she would not have F assisted in bailing out her spouse, who was in trouble with his employers. The disposal of the shares took place in 2005 and a written demand was only made in 2007 when most probably the marriage relationship had soured. Going by the defendant's average net income, as stated earlier, it could have taken him ages to buy back the shares.

G In the result it is ordered as follows –

1. That a decree of divorce be and is hereby granted.
2. That custody of the minor child, N, be granted to the defendant with the plaintiff exercising access during every weekend, public holidays and school holidays. H
3. That the movable assets of the marriage be shared in accordance with

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Musakwa J

para 10 of the declaration. A

4. That stand 6295 Warren Park Township of Warren Park be shared equally between the parties.
5. That within 40 days of this order the property described in para 4 above shall be valued by an estate agent agreed to between the parties, failing which the registrar shall appoint one such estate agent and in either case B the parties shall equally share the costs of such valuation.
6. Upon such valuation the property shall be sold to best advantage with the parties sharing the proceeds equally.
7. The claim for delivery of 63 120 First Mutual shares or payment of their equivalent value is hereby dismissed. C
8. That each party shall bear their own costs.

Wintertons, plaintiff's legal practitioners

Mutswangwa & Partners, defendant's legal practitioners

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Document 45 of 62

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MATAPO & ORS v BHILA NO & ANOR 2010 (1) ZLR 321 (H)

Citation 2010 (1) ZLR 321 (H)

Case No Judgment No. HH-84-10

Court High Court, Harare

Judge Uchena J

Heard 29 April 2010; 10 May 2010

Judgment 14 May 2010

Counsel *C Warara,* for the applicants
T R Zvakare, for the second respondent

Case Type Civil application

Annotations Link to case annotations

Flynote

Court – *judicial officer – recusal – application for – grounds – bias – appearance of bias – application must be based on reasonable litigant's apprehension of bias and apprehension itself must be reasonable – refusal to grant postponement – not in itself an indication of bias – previous* D *knowledge of case – magistrate having convicted an accomplice who was to be called as witness in subsequent trial – reasonable to fear that he would not dispassionately assess accomplice's evidence*

Criminal procedure – *review – uncompleted proceedings – when court may entertain application for review*

Headnote

E The applicants had been arraigned before the first respondent, a regional magistrate, for trial on charges of escaping from prison. The trial did not start at the planned time. When it resumed, counsel for four of the applicants was not present. The magistrate nevertheless, in spite of the applicants' protests and a request for postponement, ordered the F applicants to give their defence outlines. Counsel returned when the first applicant was giving his defence outline. He asked the magistrate to recuse himself on the grounds that he had presided in the cases of two men who were participants in the applicants' alleged attempted escape from prison. They had pleaded guilty and been sentenced to terms of G imprisonment. It was argued that the applicants reasonably believed that the magistrate's knowledge of their case gained from his presiding over the other case would make it impossible for him to impartially assess their evidence, in view of the fact that the two men would testify for the State in the applicants' trial. The magistrate refused to recuse himself, and an urgent application was made to the High Court seeking a stay H of the proceedings before the magistrate pending review by the High

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2010 (1) ZLR p322

Uchena J

Court. It was argued that the dismissal of the applicants' applications for A postponement when their counsel failed to appear in time at 11.30 a.m., and his requiring them to immediately give their defence outlines, reflected an extraordinary eagerness of the magistrate and the Attorney-General to fast track the trial and that this raised a reasonable apprehension of bias in the applicants. It was also argued that, as the magistrate had B presided over the applicants' accomplices' trial, this created a reasonable appearance of bias as the magistrate was most likely to believe the accomplices when they testified that an attempt to escape from prison occurred, than to believe the applicants if they were to say it did not.

Held, that generally the High Court does not encourage the bringing of uncompleted proceedings for review. There are, however, circumstances C which may justify the reviewing of such proceedings. This means that the court will not lightly stay proceedings pending review. An application of this nature can only succeed if the application for review has prospects of success. It would be prejudicial to the accused, and a waste of time and resources, for the trial court to carry on with a trial which is likely to be declared a nullity. D

Held, further, that judicial officers generally recuse themselves on their own motion or on application by a party, on realizing the presence of facts disqualifying them from presiding over a case. If the judicial officer does not recuse himself in such circumstances, a party who applies for the judicial officer's recusal and has his application turned down is most E likely to succeed if

he applies for the stay of the proceedings pending review. The present case was not one where the reason for recusal was easily identified. It fell into the class of cases where the reasons for recusal were not actual bias, but an appearance of bias, which is the applicants' perception of how the magistrate was conducting their case, based on how he handled preliminary applications in their case, his exposure to F information about their case and his refusal to recuse himself.

Held, further, that an application for recusal must be based on a reasonable litigant's apprehension of bias and the apprehension must itself be reasonable. Mere apprehensiveness on the part of a litigant that a judge will be biased – even a strongly and honestly felt anxiety – is not enough. G The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law. A judicial officer is expected to manage his court in the interests of justice and the efficient H

2010 (1) ZLR p323

Uchena J

A administration of justice. The circumstances in which the applications for postponement were dismissed must therefore be carefully considered. A judicial officer can, in a proper case, insist that a scheduled trial must begin. That would not, in the absence of other apparent motives, be an indication to a reasonable litigant of bias. A supine approach towards B litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. The need for efficient court management by judicial officers must, however, give way to the delivery of quality justice, which must be seen to be done. In short, a judicial officer must be firm and fair, allowing genuine applications for postponement, and turning down those made for dilatory purposes. Here, C the magistrate was merely exercising firm control of the proceedings in circumstances where he was justified in suspecting delaying tactics on the part of the applicants and their legal practitioner.

Held, further, that the fact that a judicial officer previously made a decision about substantially the same dispute between the same parties and that D he must therefore be biased when he presides over the same parties' dispute for the determination of a further issue arising from the one already decided, is answered by the principle of *res judicata,* putting that judicial officer in the same position as any other judicial officer. In such a case, there would be no reason for the judicial officer to recuse himself, because once a matter is *res judicata* it cannot be decided again E on the same issue. Here, however, the two disputes were not between the same parties. The applicants' apprehension of bias could not be defeated by the principle of *res judicata*. In this case the issue of there having been an attempt to escape from prison was not *res judicata* as between the applicants and the State. It had never been decided between F them. Justice will not be seen to be done when a magistrate who has convicted an accomplice has to determine whether that accomplice is telling the truth when he comes before him as a witness to tell the same story, but now for the purpose of securing the unconvicted accomplices' conviction. Even though the magistrate was a trained judicial officer, and there was a presumption of judicial impartiality in his favour, that G could not convince the applicants to believe that he will dispassionately assess the evidence of witnesses he previously believed and convicted, having accepted that they correctly confessed their part in the crime the applicants were facing. The applicants' apprehension was reasonable, and the proceedings before the magistrate would be stayed.

2010 (1) ZLR p324

Uchena J

Cases cited A

Dancarl Diamonds (Pty) Ltd v Wilmans NO (Vize Toetredend) 2001 (4) SA 1123 (NC)

Masedza & Ors v Magistrate, Rusape & Anor 1998 (1) ZLR 36 (H)

Silwana & Anor v Magistrate, District of Piketberg, & Anor 2003 (5) SA 597 (C) B

South African Commercial Catering & Allied Workers Union & Ors v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC)

Take & Save Trading CC & Ors v Standard Bank of South Africa Ltd 2004 (4) SA 1 (SCA) C

Case information

C Warara, for the applicants

T R Zvakare, for the second respondent

Judgment

UCHENA J: The applicants were arraigned for trial before the first respondent, a Regional Magistrate sitting at Harare Magistrate's Court. The first respondent will in this judgment be referred to as the "magistrate". The second respondent D is the Attorney-General of Zimbabwe. He is the prosecuting authority whose officer is prosecuting in the applicants' trial.

The applicants were on 27 April 2010 arraigned before the magistrate to answer charges of contravening s 185(1)(b) of the Criminal Law (Codification and Reform Act) [*Chapter 9*:*23*]. They are alleged to have attempted to escape E from Chikurubi Prison. The case did not take off at the scheduled time. It was adjourned to 11.30 a.m. When it resumed at 11.30 a.m. Mr *Warara* for the first, fourth, fifth, and sixth applicants, who had been in attendance when the case was adjourned to 11.30, was now not in attendance. The first applicant sought a postponement, because their legal practitioner was not in court. The magistrate turned down the application, and ordered the first F applicant to give his defence outline.

The fourth, fifth and sixth applicants also applied for a postponement, on the grounds that their legal practitioner was not in attendance and that they were staying in a cell without sufficient light and had not been able for that reason to prepare their defence outlines. They also alleged that G prison officers had taken their court documents and only returned some of them. Their applications for a postponement were again not granted. The magistrate ordered the applicants, who were all now not represented, to give their defence outlines.

Mr *Warara* who was then representing the first, fourth, fifth, and sixth applicants arrived when the first applicant was giving his defence outline. H

2010 (1) ZLR p325

Uchena J

A He applied for the recusal of the magistrate, because he had presided in the cases of *S* v *Gwekwerere* and *S* v *Chikwanda*, who were participants in the applicants' alleged attempted escape from prison. They pleaded guilty and were convicted by the magistrate, who sentenced them to terms of imprisonment. He submitted that the applicants reasonably believed that the magistrate's knowledge of their case gained from his presiding over the *Gwekwerere* and B *Chikwanda* cases would make it impossible for him to impartially assess their evidence in view of the fact that Gwekwerere and Chikwanda woul testify for the State in the applicants' trial.

The magistrate dismissed the applicants' application for recusal and ordered that the trial should proceed.

C The applicants then filed this urgent application, seeking an order staying the proceedings before the magistrate pending their review by this court. Generally this court does not encourage the bringing of unterminated proceedings for review. There are, however, circumstances which may justify the reviewing of unterminated proceedings. This means this court will not lightly stay proceedings pending review. An application of this nature can D only succeed if the application for review has prospects of success. In the case of *Masedza & Ors* v *Magistrate*, *Rusape & Anor* 1998 (1) ZLR 36 (H) Devittie J at p 47 said:

> "If an allegation of bias has been proved, the proceedings are a nullity. Therefore it would be unjust to require that the accused go through the motions, if he is E convicted, of the sentencing process, followed by an appeal or review in respect of proceedings proved to be abortive at the stage of the application for recusal. Thus, in *S* v *Herbst* 1980 (3) SA 1026 (C), where the facts showed that the magistrate's conduct of the proceedings might have created the impression 'in the mind of the right-minded layman that he was unfavourably disposed towards the applicant', the court intervened in unterminated proceedings by setting aside the proceedings and referring the matter for hearing *de novo* before another F magistrate. It was not necessary, the court stated, to show that the magistrate was in fact biased."

The probability of the proceedings being a nullity justifies the stopping of the proceedings pending a determination of their validity by the reviewing court. It would be prejudicial to the accused, and a

waste of time and resources, for the trial court to carry on with a trial which is likely to be declared a nullity

G The success of the application for review depends on whether or not the application for recusal was one which the magistrate should have granted. Judicial officers generally recuse themselves on their own motion (*sua sponte*), or on application by a party, on realizing the presence of facts disqualifying them from presiding over a case. If the judicial officer does not recuse H himself in such circumstances, a party who applies for the judicial officer's

Uchena J

recusal and whose application is turned down, is most likely to succeed if A he applies for the stay of the proceedings pending review. The present case does not fall into that class of cases where the reason for recusal is easily identified. It falls in the class of cases were the reasons for recusal are not actual bias i.e. bias against a party, personal knowledge about the case, personal interest or a close relative's interest in the case, etc. The intended B review in this case involves an appearance of bias, which is the applicants' perception of how the magistrate is conducting their case, based on how he handled preliminary applications in their case, his exposure to information about their case and his refusal to recuse himself.

Appearance of bias from the dismissal of the applicants' applications C

Mr *Warara* for the applicants submitted that the magistrate's dismissal of the applicants' applications for postponement when their counsel failed to appear in time at 11.30 a.m., and his requiring them to immediately give their defence outlines in spite of their having been represented, and that they had not had time to prepare defence outlines as prison officers had confisticated their State papers and returned them with some statements missing, reflects D an extraordinary eagerness on his and the second respondent's part to fast-track the trial. He submitted that this raises a reasonable apprehension of bias in the applicants.

Mr *Zvekare* for the second respondent submitted that the prosecutor who represented the second respondent at the trial before the magistrate had opposed the applicants' applications for postponement. He therefore submitted that E the magistrate exercised his judicial function in determining an interlocutory issue placed before him by the parties

It is true that the applicants may perceive the handling of their applications as an indication of the magistrate's bias against them. That, however, is not enough to indicate prospects of success on review. An application for F recusal must be based on a reasonable litigant's apprehension of bias and the apprehension must itself be reasonable. In *Silwana* & *Anor* v *Magistrate, District of Piketberg*, & *Anor* 2003 (5) SA 597 (C) at 603 to 604 Foxcroft J said:

> "In decisions in recent years judges have been reminded that one should not be G unduly sensitive about applications for recusal. As Howie JA (as he then was) said in *S* v *Roberts* 1999 (4) SA 915 (SCA) (1999 (2) SACR 243) para [26] at 923B-C :
>
> > 'It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the further "proceeding" H

Uchena J

> A a nullity'"
>
> *Council of Review, South African Defence Force*, & *Ors* v *Mönnig* & *Ors* 1992 (3) SA 482 (A) is referred to, and also the remarks in *S* v *Malindi* & *Ors* 1990 (1) SA 962 (A) at 969 G where Corbett CJ said that:
>
> > 'The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of *S* v *Radebe* 1973 (1) SA 796 (A) B and *South African Motor Acceptance Corporation (Edms) Bpk* v *Oberholzer* 1974 (4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that C in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.'"

In *South African Commercial Catering* & *Allied Workers Union* & *Ors* v *Irvin & Johnson Ltd (Seafoods Division Fish Processing*) 2000 (3) SA 705 (CC), at D p 714F to 715D the South African Constitutional Court *per* Cameron AJ, dealing with the concept of apprehension of bias, said:

> "The court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S* v E *Roberts* 1999 (4) SA 915 (SCA) decided shortly after *Sarfu*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.
>
> It is no doubt possible to compact the 'double' aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. F As Cory J stated in a related context on behalf of the Supreme Court of Canada:
>
> > 'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasise that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity': *R* v *S (RD)* (1977) 118 CCC (3d) 353 at para 113.
>
> G The 'double' unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased – even a strongly and honestly felt anxiety – is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby H decides whether it is such that it should be countenanced in law."

2010 (1) ZLR p328

Uchena J

The magistrate's handling of the applications for postponement must be A tested against the reasonableness of the applicants and the reasonableness of their apprehension of bias. The magistrate was aware that the applicants' case was coming before him for trial. He knew their legal practitioner had been in court in the early part of that morning. The rescheduled time for the trial of the applicants' case had arrived. The legal practitioner was B no longer in attendance without having been excused. The State wanted to proceed with the trial. The fact that the trial was scheduled to take off means the applicants' legal practitioner must have prepared their defence outlines. He would have done so with instructions from the applicants. There was therefore no impropriety in the magistrate's order that the applicants should give their defence outlines. They were expected to be ready with C their defence outlines as they knew that the trial date was approaching. They could simply give their defence outlines as per the instructions they had given to their legal practitioner. Though the second and third applicants were not represented, they too knew of the trial date, and should have been prepared to give their defence outlines on the trial date. The first, fourth, fifth and sixth applicants' allegations about the disabling prison conditions D could not justify a postponement as their legal practitioner was free to prepare the defence outlines, and could easily have asked the State for the alleged confisticated papers. The magistrate was entitled to make a value judgment on the applications for postponement as they were marred by appearances of delaying tactics. The applicants' apprehension of bias on this aspect is not reasonable and therefore cannot be countenanced in law. E

A judicial officer is expected to manage his court in the interest of justice and the efficient administration of justice The circumstances in which the applications for postponement were dismissed must therefore be carefully considered. A judicial officer can in a proper case insist that a scheduled trial must take off. That would not in the absence of other apparent motives be F an indication of a reasonable appearance of bias to a reasonable litigant. In *Take & Save Trading CC* & *Ors v Standard Bank of South Africa Ltd* 2004 (4) SA 1 (SCA) at 4-5, Harms JA, commenting on a situation similar to the one arising in this application, said:

> "[2] Everyone is entitled to a fair trial and that includes the right to a hearing G before an impartial adjudicator. This common-law right is now constitutionally entrenched. Present a reasonable apprehension of bias, the judicial officer is duty bound to recuse him or herself. The law in this regard is clear, having been the subject of recent judgments of both this court and the Constitutional Court, and does not require any restatement. It is nevertheless convenient for present purposes to quote the following extracts from a Constitutional Court judgment [*President of the Republic od SA & Ors* v *S A Football Union & Ors* H 1994 (4) SA

Uchena J

147 (CC)] A for purposes of emphasis and because they are particularly germane to this case.

> 'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.'
>
> B 'At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

[3] That is one side of the coin. The other is this [*R v Hepworth* 1928 AD 265 C at 277]:

> 'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that D justice is done.'

The same applies to civil proceedings: a judge is not simply a 'silent umpire'. A judge is not a mere umpire to answer the question "How's that?'" Lord Denning once said [*Jones* v .*National Coal Board* [1953] 2 All ER 155 (CA) at 159B] Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure E that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of F the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right.

G [4] A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal, taking into account the degree of the trial court's aberration".

I entirely agree with Harms JA's comments on the judicial officers' H responsibilities in the management of cases that come before them for

Uchena J

trial or in preparation for trial. I would only add that this equally applies to A magistrates who in fact preside over more cases than judges. The need for firm control of proceedings is called for, as a supine approach will result in avoidable backlogs. The need for efficient court management by judicial officers must, however, give in to the delivery of quality justice, which must be seen to be done. In short, a judicial officer must be firm and fair, allowing B genuine applications for postponement, and turning down those made for dilatory purposes.

I am in this case satisfied that the magistrate was merely exercising firm control of the proceedings in circumstances where he was justified in suspecting delaying tactics on the part of the applicants and their legal practitioner. The applicants' suspicion of bias is not justified as they had come to court for C trial, and must have by then prepared their defence outlines through their legal practitioner who could only do so on their instructions.

I therefore cannot stay the proceedings on the alleged appearance of bias due to the magistrate's refusal to grant the applicants a postponement because their legal practitioner had not come to court at the agreed time. D

Appearance of bias due to the magistrate's prior exposure to information on the applicants' case

The applicants' stronger ground for believing that they may not have a fair trial before the magistrate is based on his having presided over and convicted their alleged accomplices in the

attempted escape from prison. E

Mr *Warara,* for the applicants, submitted that the magistrate presided over the applicants' accomplices' trial. Those accomplices were convicted on their own pleas for their participation in the applicants' alleged attempt to escape from prison. They were sentenced, and are now going to be called as State witnesses against the applicants. He submitted that this creates a reasonable appearance of bias, as the magistrate is most likely to believe the accomplices when they testify that an attempt to escape from prison occurred, than to believe the F applicants if they were to say it did not.

Mr *Zvekare,* for the second respondent, submitted that the magistrate is a trained judicial officer who can not be influenced by his being exposed to the facts of this case by his having previously handled the applicants' accomplices' G trials which resulted in his convicting them on their own pleas. He submitted that the magistrate will be guided by rules of evidence.

It is common cause that the magistrate presided over the cases of *S* v *Gwekwerere* and *S* v *Chikwanda*, It is also common cause that the evidence of these convicted accomplices will be led at the applicants' trial. The magistrate convicted them after believing that their pleas of guilty confirmed H

Uchena J

A their participation in the attempted escape from prison. The case of the applicants will depend on whether or not the magistrate will believe the convicted accomplices when they say they were acting in common purpose with the applicants when they executed their part in the attempted escape for which he has already convicted them.

B The applicants perceive that the fact of the alleged attempted escape is established in the magistrate's mind by the information he obtained from presiding over Gwekwerere and Chikwanda's trials. They are apprehensive that he is unlikely to disbelieve Gwekwere and Chikwanda if they, in their testimonies, say there was an attempted escape, as he has already convicted them for their participation in it. That, if their apprehension is reasonable, C will restrict them to denying having participated in the attempt to escape from prison. This, in my view, demonstrates how the information on their case the magistrate already has will prejudice them if their trial is to be before the same magistrate.

The applicants' situation is different from the one in *Dancarl Diamonds* D (*Pty) Ltd* v *Wilmans NO (Vize Toetredend*) 2001 (4) SA 1123 (NC) at 1125E where van der Walt J held. that:

> "Accordingly, where a judge during liquidation proceedings finds that the respondent has committed breach of contract, and the question arises in separate proceedings, between the same parties and in respect of the same facts, whether that breach was such that it constituted a repudiation of the contract in question, E the determination of the judge in connection with the breach of contract *per se* is *res judicata*, and he is not obliged, by reason of possible bias, to recuse himself from the later proceedings, in which the only further question that arises is whether the breach amounted to repudiation."

In *Dancarl Diamonds (Pty) Ltd supra* it was held that the fact that a judicial officer previously "made a decision about substantially the same dispute F between the same parties and that he must therefore be biased, when he presides over the same parties' dispute for the determination of a further issue arising from the one already decided is answered by the principle of *res judicata* putting that judicial officer in the same position as any other judicial officer. In such a case there would be no reason for the judicial officer to recuse himself, because once a matter is *res judicata* it cannot be G decided again on the same issue. The decision made will stand whether or not the same judicial officer presides to determine an issue arising from its off shoot Therefore the same judicial officer or any other judicial officer of competent jurisdiction can preside.

In that the dispute which had been decided was between the same parties as H those who were in the dispute to be decided. In this case the dispute decided

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Uchena J

by the magistrate is between the State and Gwekwerere and Chikwanda, while A the one to be decided in the trial before the magistrate is the one between the State and the applicants. The two disputes are therefore not between the same parties. The applicants' apprehension of bias cannot

therefore be defeated by the principle of *res judicata*. In this case, the issue of there having been an attempt to escape from prison is not *res judicata* between the applicants B and the State. It has never been decided between them, but will be one of the issues to be proved either way for the applicants' conviction or acquittal. It is, however, a decided issue between the accomplice witnesses, the State and the magistrate. That is why it is inconceivable how the magistrate can be expected to properly assess Gwekwerere and Chikwanda's evidence in the applicants' trial when their participation in the attempted escape from C prison has already been decided in their own trial. The fear that he will be biased towards believing them is therefore real and must lead to his recusal.

There is no doubt in my mind that justice will not be seen to be done when a magistrate who has convicted the accomplice has to determine whether that accomplice is telling the truth when he comes before him as a witness D to tell the same story, but now for the purpose of securing the unconvicted accomplices' conviction. It is accepted that the magistrate is a trained judicial officer, and that there is a presumption of judicial impartiality in his favour. The presumption arises from his judicial oath of office that he will deliver justice without fear or favour. That cannot however convince the applicants to believe that he will dispassionately assess the evidence of witnesses he E previously believed and convicted, having accepted that they correctly confessed their part in the crime the applicants are facing.

In *Silwana & Anor* v *Magistrate, District of Piketberg*, *& Anor supra*, a magistrate who issued a search warrant for the accused and thereby got prior information on the commission of the offence could not be allowed to preside F over the accused's trial. Foxcroft J commenting on the undesirability of a magistrate who issued the search warrant to preside over the same accused's trial at p 605 said:

> "An accused person in the position of the applicants would certainly have reason to fear that a magistrate might well remember what was said in the affidavit, when the witness who testified in advance of the search warrant does not testify G at the trial.
>
> Dealing with the practical difficulties raised by the magistrate, it is, in my view, necessary for a magistrate in a different town to sign search warrants in situations like the present one. Alternatively, if a local magistrate has signed a search warrant after seeing an affidavit of this kind, he or she should not sit in a case, and a magistrate should be brought from a neighbouring jurisdiction. H

2010 (1) ZLR p333

Uchena J

> A In my view, there is merit in the review brought to this court and there will be an order in terms of para 1 of the notice of motion."

What is of paramount importance in this case is the applicants' apprehension of bias, based on their knowledge that the magistrate presided over the facts of the case they are facing, with the only difference being that he presided over their alleged accomplices' case. Can the applicants' apprehension be B said to be unreasonable? I do not think so, especially when consideration is given to the convicted accomplices' coming to testify before the magistrate who convicted them in their own trials. The river of justice must be allowed to flow clear and clean. It should not be turned muddy by reasonable perceptions of bias, emanating from a judicial officer's insistence to preside over cases C where his presiding does not help in ensuring that justice is seen to be done. The appearance of justice must not be blurred by appearances of what may to the applicants and the general public reasonably seem to be an unfair trial. This should be avoided, especially at a court where other judicial officers can preside over the case without raising perceptions of bias.

The words of advice quoted by Harms JA in *Take & Save Trading CC &* D *Ors* v *Standard Bank of SA Ltd supra* at p 4 must constantly remind us that:

> "It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.".

E As already said, the test is on the reasonable litigant's reasonable fear that he will not have a fair trial. In this case the applicants are at their trial going to face their alleged convicted accomplices. They are to do so before the magistrate to whom the accomplices have already confessed their participation in the alleged attempted escape. The magistrate has already convicted the accomplices on their confessed participation. Can he be expected to preside F with a mind open to persuasion by evidence or submissions by counsel as to whether or not there was an attempt to escape from

prison when he has already convicted the accomplices for that offence? This means all the applicants can say is that they were not involved. It will be difficult for them to say there was no attempt to escape from prison. In their minds, they G must be finding it difficult to believe that the magistrate who has already convicted Gwekwerere and Chikwanda for that offence would believe them if they were to proffer a defence that there was no attempt to escape from prison. The applicants' further apprehension is on the magistrate not believing them, and instead believing those he has already convicted. Their apprehension is therefore based on facts. It is reasonable. They must, if the H record of proceedings to be reviewed supports their allegations, be given a

chance of a fair trial before a magistrate who has not already dealt with the A facts of the allegations they are facing.

I must conclude by echoing Cameron AJ's words of guidance in *South African Commercial Catering & Allied Workers Union*, *& Ors* v *Irvin & Johnson Ltd (Seafoods Division Fish Processing) supra* at p 715 where he said:

> "Courts considering recusal applications asserting a reasonable apprehension of B bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a Bench be discouraged. On the other, the courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is 'as wrong to yield to a tenuous or frivolous objection' as it is 'to ignore an objection of substance'". C

I am therefore satisfied that the applicants' application for the review of the magistrate's refusal to recuse himself has prospects of success.

The applicants' application for interim relief is granted.

Pending determination of this matter the applicants are granted the following relief-: D

> That pending the hearing of this matter on review the applicants be and are hereby granted stay of the criminal proceedings before the first respondent.

Warara & Associates, first, fourth, fifth and sixth, applicants' legal practitioners E

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

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Document 46 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/JAKAZI & ANOR v CHURCH OF PROVINCE OF CENTRAL AFRICA & ORS 2010 (1) ZLR 335 (H)

JAKAZI & ANOR v CHURCH OF PROVINCE OF CENTRAL AFRICA & ORS 2010 (1) ZLR 335 (H)
2010 (1) ZLR p335

Citation	2010 (1) ZLR 335 (H)
Case No	Judgment No. HH-80-10
Court	High Court, Harare
Judge	Bhunu J
Heard	25 November 2009
Judgment	19 May 2010

Counsel *R Moyo*, for the applicants
G C Chikumbirike, for the respondents

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Church – *bishop – resignation of – effect – person ceasing to have any rights or privileges arising from status as a bishop*

D **Employment** – *contract – termination – resignation – a unilateral voluntary act – when resignation takes effect*

Headnote

The first applicant was the Anglican Bishop of Manicaland. He wrote a letter to the Church of the Province of Central Africa, of which the Diocese of Manicaland was a part, purportedly withdrawing the Diocese from the E Province. The Bishops of the Province responded by issuing a statement rejecting the withdrawal of the Diocese of Manicaland but accepting the resignation of the first applicant as an individual. The applicant then attempted to recant and retract his withdrawal. The Bishops rejected his application and appointed a vicar general, pending the election of a new bishop. The applicant sought an order declaring that he remained F the Bishop of Manicaland.

Held, that resignation is a unilateral voluntary act which takes effect as soon as the resignation has been communicated to the correct person or authority. The first applicant was not dismissed. He resigned voluntarily. Once his resignation letter was received, he automatically ceased to be an G employee or member of the church without any further formalities. Having ceased to be an employee or member of the church, he automatically stripped himself of any rights and privileges arising from the contract of employment, membership or his status as a bishop of the church. He had no residual rights to meddle in the affairs of the church by barring the appointment of replacement staff. Any appeal or review which he H might launch would mean that he was appealing or seeking a review

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2010 (1) ZLR p336

Bhunu J

of his own conduct. This was wholly untenable and so illogical that it A must be incompetent at law.

Case referred to

Muzengi v Standard Chartered Bank & Anor 2000 (2) ZLR 137 (H) B

Case information

R Moyo, for the applicants

G C Chikumbirike, for the respondents

Judgment

BHUNU J: The applicant in his founding affidavit states that he is the duly consecrated and enthroned Bishop currently heading the Anglican Diocese of Manicaland. C

The second applicant is the Anglican Board of Trustees for the Diocese of Manicaland and the first respondent is the Church of the Province of Central Africa.

On 23 September 2007 the applicant addressed a letter to the Archbishop of the Church of the Province of Central Africa and the Bishop of Upper D Shire notifying them of the diocese's withdrawal from the Church of the Province of Central Africa.

The withdrawal was prompted by disagreements on issues of homosexuality.

The letter reads:

> "Your Grace, E
>
> RE: NOTIFICATION OF WITHDRAWAL OF THE ANGLICAN DIOCESE OF MANICALAND FROM THE CHURCH OF THE PROVINCE OF CENTRAL AFRICA
>
> The above subject refers.
>
> To put to rest speculation from your office, the church of the Province of Central Africa and the rest of the Anglican community, this letter comes to you as F confirmation that the Anglican Diocese of Manicaland has withdrawn from the church of the Province of Central Africa with effect from 21 September 2007.
>
> The resolution by the Diocesan committee which is attached and my submission to the Provincial Synod when I moved a motion on the need for the dissolution of the Province also attached and the minutes of the standing committee is a statement of emphasis on this matter by the standing committee. G
>
> This your Grace is the kind of seriousness that we take this matter.
>
> Yours faithfully
>
> Signed
>
> The Rt Rev Elton Jakazi.
>
> cc All Bishops of the Church of The Province of Central Africa" H

Bhunu J

A The Bishops of the Province of Central Africa responded by issuing a statement rejecting the withdrawal of the Diocese of Manicaland but accepted the withdrawal of the first applicant as an individual. The statement reads in part:

> "BISHOPS OF THE PROVINCE OF CENTRAL AFRICA STATEMENT ON THE DIOCESE OF MANICALAND ISSUE.
>
> We, the undersigned Bishops of the church of the Province of Central Africa, B at the extraordinary Episcopal Synod held on 24 December 2007 at the Lusaka Hotel, Zambia, state that we were consulted by the dean of the Province of Central Africa, the Rt Rev Chama, in connection with the contents of the letter of 23 September 2007 addressed to the Archbishop of the Church of the Province of Central Africa (CPOA) concerning the withdrawal by Bishop Jakazi of the Diocese of Manicaland from the CPOA.
>
> C We unanimously concur that:
>
> 1. The fundamental declarations, articles of the constitution, canons and laws of the CPOA do not permit the unilateral withdrawal of a diocese from the Province even if, as alleged by Bishop Jakazi but challenged by many, the Diocesan standing committee of the Diocese unanimously expresses a desire no longer to be associated with the province.
> D 2. Bishop Jakazi was *inter alia* expressing his personal attitude and intention to severe all ties with the Province and was himself withdrawing from the Province.
> 3. *In the circumstances we accept his personal resignation and withdrawal from the body of the CPOA"* (my emphasis).

The applicant, in a letter written by his Diocesan Registrar dated 31 October E and subsequently followed up by his own letter, attempted to recant and retract his withdrawal from the Central Province of the Church of Central Africa.

The retraction met with outright rejection. On 20 December 2007 Bishop Albert Chama advised him of the same in the following terms:

> "We write to advise you that, following the letter of 31 October 2007 written on F your instructions by the Diocesan Registrar of Manicaland, Mr Peter Makombe retracting your withdrawal from the Church of the Province of Central Africa as per your letter of 23 September 2007, addressed to the former Archbishop of Central Africa, Dr Bernard Amos Malango, and copied to all bishops of the Province, the extraordinary Episcopal Synod held at the hotel on 20 December 2007 considered your letter of retraction and decided to uphold the earlier G decision taken and communicated to you that you are no longer a Bishop of the Church of the Province of Central Africa,
>
> Consequently we as Dean of the Province of Central Africa immediately appoint a Vicar General for the Diocese of Manicaland pending the election of the next Bishop."

The first respondent followed up by appointing the second and third H respondents in terms of the above letter.

Bhunu J

Aggrieved by the first respondent's refusal to reinstate him and the appointment A of the second and third respondents, the applicants launched this urgent chamber application seeking a declarator setting aside the appointments on the basis of unlawfulness. It also seeks to have the first applicant declared the reigning Bishop for the Diocese of Manicaland until such time his appeal has been determined in terms of the first respondent's constitution and canons. B It is an established rule that resignation is a unilateral voluntary act which takes effect as soon as the resignation has been communicated to the correct person or authority. In *Muzengi* v *Standard Chartered Bank & Anor* 2000 (2) ZLR 137 (H) this court held that a letter of resignation constitutes a final act of termination by an employee.

What this means is that once the first applicant's resignation letter was C received by the Archbishop of the Central African Province of Central Africa, he automatically ceased to be an employee or member of that church organization without any further formalities.

Having ceased to be an employee or member of the church organization, he automatically stripped himself of any rights and privileges arising from the D contract of employment, membership or his status as bishop of that church organization. The first applicant was not dismissed. His was a voluntary act to resign from that church organization. That being the case, he can hardly be heard to complain or cry foul. Any appeal or review which he may launch means that he is appealing or seeking a review of his own conduct. This is wholly untenable and illogical such that it must be incompetent at law. E

The applicant, having voluntarily divested himself of all rights and privileges accruing to a member, employee or Bishop of the Anglican Church Province of Central Africa, has no residual rights to meddle in the affairs of that organization by barring the appointment of replacement staff.

For that reason the application cannot succeed. It is accordingly ordered that F the application be and is hereby dismissed with costs.

Chikumbirike & Associates, applicants' legal practitioners

Gill, Godlonton & Gerrans, respondents' legal practitioners

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Document 47 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/CHILUFYA v COMMISSIONER-GENERAL OF POLICE & ORS 2010 (1) ZLR 339 (H)

CHILUFYA v COMMISSIONER-GENERAL OF POLICE & ORS 2010 (1) ZLR 339 (H)

Citation	2010 (1) ZLR 339 (H)
Case No	Judgment No. HH-89-10
Court	High Court, Harare
Judge	Uchena J
Heard	17 May 2010; 18 May 2010
Judgment	21 May 2010
Counsel	*E Koworera*, for the applicant Miss *K L Murefu,* for the respondents
Case Type	Urgent chamber application

Annotations No case annotations to date

Flynote

Police – discipline – *trial for offences under Police Act [Chapter 11:10] – trial by single officer – proceedings not subject to automatic review by High Court – when proceedings may be reviewed by High Court – court's* D *power to interfere with proceedings – need for court to have record of proceedings – effect of conviction by single officer on subsequent proceedings in magistrates court*

Headnote

The applicant, a non-commissioned officer in the police, was tried by a E single officer on a charge relating to corruption and sentenced to 12 days' imprisonment. He appealed to the Commissioner-General of Police in terms of s 34(7) of the Police Act [*Chapter 11:10*]. His appeal was dismissed. He brought an application to the High Court for review of the proceedings. He alleged that the officer who tried him did not warn himself of the dangers of convicting on the evidence of accomplices F or warn the accomplices before they testified. He also complained of "double jeopardy", as he was facing charges in the magistrates court arising out of the same conduct.

Held, that in terms of s 35(1) of the Police Act, the trial officer must, as nearly as is possible, comply with the rules of evidence and procedure as is done in the criminal courts. Where the officer significantly departs from those G rules the proceedings may be set aside on review. The test applied in review proceedings is whether or not the proceedings are in accordance with real and substantial justice. A stay of sentence may only be granted if the record shows prospects of success, which can only be properly assessed from the totality of the proceedings. In this case, the applicant H had not placed the record of proceedings before the court. This made it

Uchena J

impossible for the court to assess the applicant's prospects of success on A review, as the standard of assessment on review must comply with the proviso to s 34(3) of the Police Act, which provides that no conviction or sentence shall be quashed or set aside by reason of any irregularity or defect in the record or proceedings unless the Commissioner-General, or the court on review, considers that a miscarriage of justice has actually occurred. B

Held, further, that the applicant had no right of automatic review by the High Court as, in terms of s 31(1) of the Police Act, automatic review only applies to sentences imposed by a board of officers which exceed level three or imprisonment or more than one month. The case could therefore only be reviewed by the court if an application for review was filed, or C if the matter was reviewable in terms of s 29(4) of the High Court Act [*Chapter 7:06*]. The procedure under s 29(4) was, however, not applicable *in casu* because the applicant claimed to have filed an application for review. His legal practitioners must be allowed to represent him and seek justice for him. The courts should not be seen to be championing the cause of a legally represented applicant. D

Held, further, that the applicant could raise his conviction and sentence as a mitigating factor if convicted in the magistrate's court. A trial and conviction in terms of s 34(1) of the Police Act is, in terms of s 34(9), not regarded as a conviction in terms of any other law. It is regarded as a disciplinary action. E

Legislation considered

High Court Act [*Chapter 7:06*], s 29(4)

Police Act [*Chapter 11:10*], ss 31(1), 34(1), 34(9) & 35(1)

Case information

E Koworera, for the applicant F

Miss *K L Murefu,* for the respondents

Judgment

UCHENA J: The applicant is a Detective Assistant Inspector in the Zimbabwe Republic Police (ZRP). He was charged with bringing disrepute to the ZRP in contravention of s 35 of the Police Act [*Chapter 11*:*10*] (hereinafter called G "the Police Act"). He was convicted and sentenced to 12 days' imprisonment.

The first respondent is the Commissioner-General of the ZRP, who is being sued in his official capacity as the Head of the ZRP. The second respondents are the Co-Ministers of Home Affairs, being sued in their capacity as the Ministers responsible for the ZRP. The third respondent is the officer-in-charge of Chikurubi Detention Barracks, where the applicant will be lodged for 12 H

Uchena J

A days if he is to serve the sentence imposed on him by the fourth respondent. The fourth respondent is the officer who tried and convicted the applicant and sentenced him to 12 days' imprisonment.

The applicant was convicted on allegations that he had sought and obtained a bribe of US$500 and stolen a plasma television from a suspect he had arrested and B was about to lodge in police cells. He was charged under para 35 of the schedule to the Police Act, which provides that an act of misconduct is:

> "Acting in an unbecoming or disorderly manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the Police Force."

The suspect and another witness gave evidence at the trial leading to the C conviction of the applicant.

In this application, the applicant alleges that the fourth respondent did not warn himself about the dangers of convicting on the evidence of accomplice witnesses nor did hewarn the accomplices before they testified. He further alleges that he is being exposed to double jeopardy, as he is also being charged for the same acts in the magistrate's court. He further complains D that the sentence imposed by the fourth respondent induces a sense of shock.

Mr *Koworera,* for the applicant, submitted that s 35(1) of the Police Act requires that a trial under that Act must closely comply with the procedure followed in the courts of Zimbabwe. It reads as follows:

> "(1) The proceedings before or at any trial by a board of officers or an officer E in terms of this Act shall, as near as may be, be the same as those prescribed for criminal cases in the courts of Zimbabwe."

The intention of the legislature is clear. The tribunal or trial officer must, as nearly as is possible, comply with the rules of evidence and procedure as is done in the courts of Zimbabwe. Where the tribunal or trial officer significantly departs from the procedure set for criminal proceedings in F the courts of Zimbabwe, the proceedings may be set aside on review. The test applicable in review proceedings is whether or not the proceedings are in accordance with real and substantial justice. That may be satisfied if a record reveals statements made by the accused admitting having done what is alleged or other things tending to support the conviction. In other words, G errors on the part of the prosecuting authority may, if they do not go to the root of the proceedings, affect its being held to be in accordance with real and substantial justice. A stay of sentence may therefore only be granted if the record shows prospects of success, which can only be properly assessed from the totality of the proceedings. In this case, the applicant has not placed the record of proceedings before the court. In fact the applicant said nothing H about it in his founding affidavit. Mr *Koworera* tried to explain from the bar,

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Uchena J

but an application must stand or fall on the papers filed. A

The applicant's failure to place the record before this court makes it impossible for this court to assess his prospects of success on review, as the standard of assessment on review must comply with the proviso to s 34 (3) of the Police Act, which provides as follows:

> "Provided that no conviction or sentence shall be quashed or set aside by reason of B any irregularity or defect in the record or proceedings unless the Commissioner-General considers that a miscarriage of justice has actually occurred".

The alleged irregularities can not, therefore, in the absence of information from the record showing that a miscarriage of justice actually occurred, persuade the court to stay the execution of sentence. The standard of review set by the legislature for the Commissioner-General must be applicable to C the review of those proceedings by this court.

The applicant filed this urgent application seeking an order staying his imprisonment for 12 days as ordered by the fourth respondent. He seeks the stay of his imprisonment pending the review of his case. He says that he is taking the proceedings on review before the High Court, and seeks the stay D of the sentence pending review. He does not state that he has already filed a review, nor does he state the review case number. There is nothing on the record to show that the application for review has been filed. Mr *Koworera* complains that he is facing difficulties in obtaining the judgment and record of proceedings. If that is true, he can initiate other forms of review.

The applicant can not, however, rely on an automatic review to this court, E because s 31 of the Police Act does not apply to the sentence imposed on him. Section 31 provides for the review of the tribunal's proceedings by this court as follows.

> "(1) Where a board of officers imposes on a member a sentence of a fine in excess of level three or a period of imprisonment in excess of one month, the F record of the proceedings shall forthwith be forwarded to the registrar of the High Court together with –
>
> (*a*) any statement that the president of the board may wish to make; and
>
> (*b*) any statement relating to the sentence that the member may wish to make.
>
> (2) On receipt of the record and statements referred to in subsection (1), the registrar of the High Court shall forthwith place such record and statements G before a judge of the High Court in chambers for review.
>
> (3) A judge before whom a record and statements are placed in terms of subsection (2) may –
>
> (*a*) if the proceedings appear to him to be in accordance with substantial justice, confirm the proceedings and endorse the record to that effect; or
>
> (*b*) exercise the powers conferred upon a judge of the High Court by subsection H

Uchena J

> A (5) of section 29 of the High Court Act [*Chapter 7*:*06*] as if the proceedings were the proceedings of a magistrate's court".

In terms of s 31(1) of the Police Act, the proceedings in which the applicant was convicted and sentenced are not subject to an automatic review. Automatic review only applies to sentences imposed by a board which exceed level three or imprisonment exceeding one month. The applicant was tried by B one officer in terms of s 34(1) of the Police Act. Section 34 (3) of the Act provides for a review of such proceedings by the Commissioner-General. The section provides as follows:

> "(3) Every officer who convicts and sentences a member under this section shall forthwith transmit the proceedings for review by the Commissioner-General, who may – C
>
> (*a*) confirm the conviction and sentence;
>
> (*b*) alter or quash the conviction or reduce the sentence or substitute a different but not more severe sentence;
>
> (*c*) quash the conviction and sentence and remit the matter for trial afresh before a different officer; D
>
> (*d*) remit the matter to the officer with instructions relative to the further proceedings to be held in the case as the Commissioner-General thinks fit:
>
> Provided that no conviction or sentence shall be quashed or set aside by reason of any irregularity or defect in the record or proceedings unless the Commissioner-General considers that a miscarriage of justice has actually occurred."

Section 34(3) of the Police Act therefore establishes that the Commissioner- E General is the reviewing authority. The case can therefore only be reviewed by this court if an application for review is filed in terms of s 29(4) of the High Court Act [*Chapter 7:06*], which provides as follows:

> "(4) Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal F are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review."

Section 29(4) of the High Court Act gives this court or a judge of this court wide review powers. It allows a judge to call for and review any proceedings G of an inferior court or tribunal it becomes aware of and forms the view that they are not in accordance with real and substantial justice. The judge is empowered to call for and review any proceedings, even those he may hear about through the press or a letter or any other source of complaint or information. This procedure can, however, not be used to review these proceedings because the applicant claims to have filed an application for H review. His legal practitioners must be allowed to represent him and seek

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justice for him. The courts should not be seen to be championing the cause of A a legally represented applicant. That is why trials in the magistrate's courts, in which the accused is represented by a legal practitioner, are not subject to an automatic review.

The applicant's case has actually been heard by the Commissioner-General as an appeal in terms of s 34(7) of the Police Act. See the Commissioner B -General's affidavit in which he said he has dismissed the appeal. The applicant did not respond to the Commissioner-General's opposing affidavit. This means that the applicant is not being candid with the court. He clearly did not initially consider the review of the proceedings necessary until his appeal was dismissed. This tends to show that the review is an afterthought, and an act of desperation aimed at avoiding imprisonment That must be why he C does not even state that he has already applied for the review nor state the review case's number. The record of proceedings has not been placed before the court. The sentence cannot be stayed without assessing the applicant's prospects of success on review. There is no proof that the applicant is seriously pursuing a review of the proceedings. What would happen if the sentence is D stayed but the application for review is not filed. I cannot, therefore, grant a stay of the execution of a sentence when there is no proof that an application for the review of the proceedings has been filed.

Mr *Koworera* raised the issue of the appropriateness of the sentence of 12 days' imprisonment. The charge under para 35 of the Schedule of the Police Act is intended to protect the reputation of the ZRP from being damaged by E the conduct of its officers. There is no doubt that asking for bribes by police officers is like a cancerous disease which not only seriously damages the image of the police, but poses a danger which can destroy the foundations on which the ZRP is founded. Therefore, the sentence imposed cannot on its own be a basis for staying the execution as it does not, in my view, induce a sense of shock. The ZRP must act decisively against corrupt officers. F

On the question of the applicant being exposed to double jeopardy as he is being tried in the magistrate's court for the same offence, I am satisfied that he can raise his conviction and sentence as a mitigating factor if he is convicted in the magistrate's court. A trial and conviction in terms G of s 34(1) of the Police Act is, in terms of s 34(9), not regarded as a conviction in terms of any other law It is regarded as a disciplinary action. Section 34(9) of the Police Act provides as follows:

> "A member who is found guilty of a contravention of this Act by an officer shall not be regarded as having been convicted of an offence for the purpose of any other law."

That means that the applicant is not exposed to double jeopardy as alleged. H

A The trial in the magistrate's court does not therefore justify the staying of a sentence imposed for disciplinary purposes. In the circumstances the applicant's application is dismissed.

The applicant shall pay the respondents' costs.

B *Nyikadzino*, *Koworera & Associates*, applicant's legal practitioners

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

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Document 48 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/CHURCH OF THE PROVINCE OF CENTRAL AFRICA v DIOCESAN TRUSTEES, DIOCESE OF HARARE 2010 (1) ZLR 346 (H)

CHURCH OF THE PROVINCE OF CENTRAL AFRICA v DIOCESAN TRUSTEES, DIOCESE OF HARARE 2010 (1) ZLR 346 (H)

Citation	2010 (1) ZLR 346 (H)
Case No	Judgment No. HH-105-10
Court	High Court, Harare
Judge	Mavangira J
Heard	20 May 2010;21 May 2010
Judgment	31 May 2010
Counsel	*H Zhou*, with him *R Moyo*, for the applicant *G Chikumbirike*, with him *S Mufara,* for the respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Court – judicial officer – *functus officio – when becomes functus officio – court making prima facie determination on assessment of urgency without hearing parties – court not precluded from hearing argument* D *from parties subsequently*

Practice and procedure — *application – urgent chamber application — refusal of application as on the papers matter not considered to be urgent by judge — subsequent oral argument as to whether the matter was urgent — court not functus officio* E

Headnote

Upon perusal of the papers in respect of an urgent chamber application, the judge was of the view that no urgency was disclosed and endorsed the papers accordingly. Thereafter, the applicant sought leave to present oral argument before her on the point. This was granted. During subsequent argument, the respondent submitted that the judge was *functus officio* F on the urgency point as the applicant had failed to establish any urgency outside what was already contained therein.

Held, that the endorsement that the matter was not urgent reflected the *prima facie* view of the court on the papers, without hearing oral argument from the parties. In these circumstances, the court cannot be *functus officio*. Had the matter been fully argued orally and a determination G made thereafter, the court would have been *functus officio.*

Cases cited

Chirambasukwa v Min of Justice 1998 (2) ZLR 567 (S)

Stumbles and Rowe v Mattinson; *Mattinson* v *Stevens & Ors* 1989 (1) ZLR 172 (H) H

Mavangira J

Case information

A *H Zhou*, with him *R Moyo*, for the applicant

G Chikumbirike, with him *S Mufara,* for the respondent

Judgment

MAVANGIRA J: This urgent chamber application was referred to me on 10 May 2010. On the same date after perusing the papers I endorsed on it that B the matter was not urgent. On 11 May 2010 the applicant's legal practitioners wrote to the Registrar seeking an opportunity to argue the urgency of the matter before the judge. Their letter was received by the Registrar on 12 May and brought to my attention on 13 May. I therefore directed that the matter be set down for 17 May at 10.00am.

On 17 May 2010 the matter was postponed to 20 May at the instance of C the applicant's legal practitioners who had been served with the opposing papers just before the time set for the hearing. They indicated that they had only managed to have a cursory perusal of the papers and were of the view that they needed to file an answering affidavit.

On 20 May the respondent's legal practitioners raised preliminary points, the D first of which was that this court is *functus officio* and cannot hear the matter as it had already made a final determination that the matter is not urgent and the determination had been communicated to the parties. Reference was made to *Chirambasukwa v Minister of Justice* 1998 (2) ZLR 567 (S) in support of this proposition. It was submitted that, as the applicant had failed to establish urgency on the papers filed, it could not now seek to establish E urgency outside what is contained in its papers.

The applicant's legal practitioners, on the other hand, urged the court to find that it, the court, is not *functus officio* on the issue of urgency as the determination referred to is only a procedural directive as to how the matter should proceed and is not an order of court. It was submitted that F the determination is analogous to a referral to trial of a matter brought to court by way of application procedure. It was also submitted that, even if the determination was to be taken as an order of court, it is an interlocutory order which relates to a procedural matter and the court thus cannot be *functus officio.* Reliance was placed on *Stumbles and Rowe* v *Mattinson; Mattinson* v *Stevens & Others* 1989 (1) ZLR 172 (H) in support of this submission. It G was held in that case that, while normally a court does not have jurisdiction to tamper or interfere with its own judgments because, in relation thereto, it is *functus officio,* it does have such jurisdiction over orders made in interlocutory and procedural matters.

I dismissed this preliminary point at the hearing for the following reasons. H The endorsement that the matter is not urgent was made on a consideration

Mavangira J

of the papers without hearing any oral arguments by the parties. It was the A court's *prima facie* view of the matter as regards the issue of urgency. The parties were not heard by the court on the merits of the issue of urgency. It is my considered view that this court cannot be *functus officio* in such circumstances. Had the parties been heard orally and a determination made thereafter, such determination would be consequent upon full ventilation by B the parties on the pertinent issue. In my view. the court would then become *functus officio.*

After my ruling on this preliminary point the respondent's legal practitioner raised three other preliminary points. But before I lay these out, it would be appropriate for the court to give a brief background to the filing of this urgent chamber application. C

In cases Nos HC 4327/08 and 2792/09, the respondent herein filed a court application and an urgent chamber application respectively. The two matters were consolidated and heard together culminating in judgment HH-166-09. The applicant herein noted an appeal against the judgment in the Supreme Court in case No. SC180/09. The respondent herein then filed in the Supreme D Court

an application in terms of r 36(1) of the Supreme Court Rules for the dismissal of the appeal. The ground on which the dismissal was sought is recorded in judgment S-9-10 as:

> "that the respondent (applicant herein) failed to enter into good and sufficient security for the applicant's (respondent herein) costs of appeal failing agreement to have the amount or nature of the security to be provided, determined by the E registrar as required by subrule (2) of r 46 and furnish such security within a period of one month from the date of the filing of the notice of appeal as required by subrule (5) of the same rule."

In that judgment, S-9-10 dated 3 May 2010, the Supreme Court ordered as follows:

> "It is ordered that the appeal noted in case SC 180/09 be and is hereby dismissed F in terms of r 36 (3) of the Supreme Court Rules with costs on a legal practitioner and client scale."

On 7 May 2010 the applicant filed in the Supreme Court a court application in which it seeks relief in the following terms:

> "1. The applicant's failure to comply with the provisions of rule 46(5) of the G Rules of this Honourable Court in respect of Case Number SC 180/09 be and is hereby condoned.
>
> 2. The appeal in Case Number SC 180/09 be and is hereby reinstated.
>
> 3. The applicant shall provide security for costs as required by rule 46 of the Rules of this Honourable Court within five days after the date of this order."

As already stated above the instant urgent chamber application was referred H

Mavangira J

A to me on 10 May 2010. The applicant seeks before this court relief in the following terms:

> "A TERMS OF FINAL ORDER SOUGHT.
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. Pending determination of the Supreme Court application made by the B applicant for the reinstatement of its appeal in Case No. SC 180/09, the operation of the orders granted in Cases Nos HC 4327/08 and HC 2792/09 be and is hereby suspended.
> 2. This order shall remain in operation notwithstanding the noting of an appeal against it. C
> 3. In the event that the application is opposed, the respondent shall pay the costs of suit.
>
> B INTERIM RELIEF GRANTED.
>
> Pending the confirmation or discharge of this provisional order, the following relief is granted:
>
> 1. The applicant and all the persons who worship under it are entitled to access D all the assets and facilities, including church buildings and to which they had access immediately prior to the handing down by the Supreme Court of the judgment in Case No. SC 180/09 (judgment Number SC 9/10). (*sic*)
> 2. The status quo as at the time of and prior to the handing down of the Supreme Court in Case No. SC 180/09 shall prevail."

The first of the next three preliminary points raised after my ruling on the E first point was that the deponent to the applicant's founding affidavit has no *locus standi* to depose to the affidavit, as the deponent was not appointed to the position of Diocesan Registrar by the Bishop of the Diocese of Harare. Furthermore, that even if he were the Diocesan Registrar, as such he would still not have the *locus standi* to bring to court an issue that concerns the F Diocese as it is only the trustees who have the power to institute legal action for and on behalf of the diocese. Furthermore, and in any event, even if the deponent was acting properly acting in the capacity of Registrar, the proceedings should be in the name of the Diocesan Trustees. The issues raised in the application relate to the diocese and the Registrar has no competence to depose to an affidavit or purport to act on behalf of a party on such G issues because in terms of Act 8.6 of the respondent's governing Act, only the Registrar's advice is sought. He is not conferred with the competence to do what he has purported to do *in casu.* It was submitted that the urgent chamber application was thus not properly before the court.

It was also submitted that, 2009 (2) ZLR 132 (H) as presently there is no H appeal pending in the Supreme Court against Hlatshwayo J's judgment,

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Mavangira J

the said judgment stands. Furthermore, that it is only the parties that were A before Hlatshwayo J who may appeal against it. It was also submitted that the applicant cannot seek an interdict before this court when the alleged right to the interdict is premised on a contingent right and dependent on an uncertainty. There is no certainty that the application for condonation and for reinstatement of the applicant's appeal in the Supreme Court will B be granted. *Airfield Investment (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 520 was cited in support of the submission that one cannot seek relief in the form of an interdict if it is dependent on a decision which may or may not be granted.

The next preliminary point raised was that the matter before the court is *res judicata* because it is predicated on an issue which has already been determined C by the Supreme Court in the judgment of 3 May 2010 in S-9-10 in which the applicant's appeal was dismissed. It was submitted that the dismissal of the applicant's appeal was a dismissal on the merits and that the applicant thus has no basis to seek to appeal to the same court which will certainly not change its views about contingent rights not being the proper basis for the D granting of relief in the form of an interdict. It was submitted that it is not competent to approach an inferior court to seek relief predicated on issues that may happen in the Supreme Court.

The final preliminary point raised was that the matter is not urgent as it is made very clear in the judgment in S-9-10 that the applicant was put on notice several times from 24 July 2009 on the need to furnish security for E costs. After failing to timeously furnish security for costs, the applicant was also advised of the need to seek condonation for such failure and for leave to furnish the security out of time. As the applicant made a deliberate decision not to seek condonation until after its appeal was dismissed, the present application cannot be viewed in isolation from the application before the Supreme Court. The inordinate delay by the applicant in making an F application for condonation must therefore be imputed upon the urgency of the present application. There can therefore be no urgency on the facts and in the circumstances of this matter. *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) was cited in support of such a finding being made by this court. It was submitted that an issue that has been going on since July G 2009 cannot now assume urgency.

In response to the issue of *locus standi* it was submitted that if any issue as to *locus standi* should arise it should be in relation to the parties and not to witnesses. The deponent to the applicant's founding affidavit being merely a witness the point raised is untenable. The proceedings were instituted in the name of and by the Church of the Province of Central Africa, not by the H

Mavangira J

A Diocesan Trustees for the Diocese of Harare. In any event, in terms of r 227 (4)(a) of the rules of this court, a person who has knowledge of the facts can depose to an affidavit. Furthermore, as the proceedings are brought in the name of the Church of the Province of Central Africa, reference to the Diocesan Acts is of no application.

B Regarding the *res judicata* issue, it was submitted that the respondent had to show that the same parties had appeared before a competent court and that the court dealt with that cause of action. *In casu,* the Supreme Court did not deal with the application which is before this court. What was before the Supreme Court was an application at the instance of the respondent for the dismissal of the appeal noted by the applicant against Hlatshwayo J's C judgment on the basis that it had not tendered security in accordance with the Rules. That is not the matter now before this court. The requirements for the application before this court to succeed are different in every respect from the requirements which applied before the Supreme Court. It was submitted that if any issue of *res judicata* is to be raised it can only be in relation to the matter now before this court. However, to the extent that *res judicata* was D meant to apply to the application before the Supreme Court, the application for condonation that is pending before the Supreme Court differs in its requirements from the application for dismissal that was instituted by the respondents. It thus cannot be said that the application for condonation raises matters which are *res judicata.* In any event, those are matters which would be better dealt with by the Supreme Court when it deals with the application. E It was submitted that this court cannot, as sought by the respondent, make a pronouncement on an application which is pending before a different court and the preliminary point must therefore be dismissed.

It was further submitted that the respondent's stance had been based on an incorrect premise that the application before this court is for an interdict. F It was submitted that the order that is being sought is an order to stop the operation of an order which in effect is an application to stay execution. The court thus has no need to examine whether the requirements for the granting of an interdict have been met as these are irrelevant.

Regarding the issue of urgency the response was that this application would G not have been necessary if there was now a valid appeal before the Supreme Court. The appeal would have suspended the orders made by Hlatshwayo J. This application is necessitated by the fact that the appeal that was noted in the Supreme Court was dismissed. It was also submitted that the applicant has, as it is entitled to, made an application in the Supreme Court for condonation of its non-compliance with the Rules and for the reinstatement of its appeal. H In the meantime, the respondent has already moved to give effect to or to

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enforce Hlatshwayo J's orders. Thus, if the order sought herein is not granted A and the application in the Supreme Court ultimately succeeds, there would have been irreparable damage caused. It was also submitted that the remarks in the *Kuvarega* case are of no application *in casu* as the delay that the respondent's legal practitioner was referring to is delay that arose consequent upon the respondent filing an application for the dismissal of the appeal in B the Supreme Court. Once that application was filed by the respondent, the applicant was placed in a position in which all it could do was defend that application and in the course of that defence invite the court to exercise its discretion as given it by the Rules to make an order other than an order for dismissal. The applicant could not in the face of the application for dismissal insist on tendering costs as that would have bordered on contempt of the C court before which the application was. However, the Supreme Court did not then deal with an application for condonation. That is the application now pending before it.

It was further submitted that the newspaper article placed by Dr Kunonga and referred to by respondent's legal practitioner goes to show that the respondent is seeking to give effect to Hlatshwayo J's orders, the first of D which is a declaratory order, while part of the order in HC 4327/08 in the third paragraph is, in fact, an interdict. He also submitted that the respondent's suggestion that the applicant should have applied for the urgent hearing of its application now pending before the Supreme Court does not take the matter any further as that would not have provided the applicant with the protection E that it now seeks before this court. He submitted that all the preliminary points must therefore fail.

It is not in dispute that the applicant has filed an application in the Supreme Court seeking condonation of its failure to comply with the rules regarding payment of security and for the reinstatement of its appeal. The application is still pending before that court. The relief sought by the applicant is in F effect to allow the applicant access to assets and facilities to which it had access immediately prior to the handing down by the Supreme Court of the judgment S-9-10 pending the determination of the Supreme Court application for condonation and the reinstatement of its appeal.

Whilst, generally, a legal point can be raised at any point in legal proceedings, G I found it striking that the respondent decided to raise the issue of *locus standi* at this stage in their saga. These same parties have been litigating for quite some time now and have litigated up to the Supreme Court often under the very same citations by which they now appear before this court. The application pending before the Supreme Court involves the very same parties and the application also arises from litigation between those same H

A parties in the High Court. As regards the *res judicata* issue, it is my view that a determination by this court on these issues may entail this court making findings that purport to impact on the application now pending before the Supreme Court. It appears to me that it is only proper for this court to defer to the higher court and not to purport to pre-empt the higher court's determination of the matter before it. In any event, the relief sought by the B applicant *in casu* is for the interim only while the parties await the Supreme Court's determination of the applicant's application for condonation and for the reinstatement of its appeal.

It is for the above reasons that I granted the amended provisional order on 31 May 2010.

C *Gill, Godlonton & Gerrans*, applicant's legal practitioners

Chikumbirike & Associates, respondent's legal practitioners

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Document 49 of 62

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S v PRANDINI 2010 (1) ZLR 354 (H)

Citation	2010 (1) ZLR 354 (H)
Case No	Judgment No. HH-94-10
Court	High Court, Harare
Judge	Kudya J
Heard	2 June 2010
Judgment	2 June 2010
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure – *review – review of criminal case coming to attention* C *of High Court – case being brought to attention of High Court by complainant dissatisfied with acquittal – court's powers on review – may not alter verdict*

Headnote

An unhappy complainant may seek a review of an acquittal, notwithstanding that the Attorney-General may appeal against the acquittal in terms of D s 61 of the Magistrates Court Act [*Chapter 7*:*10*] or s 38A of the High Court Act [*Chapter 7:06*]. In terms of s 29(4) of the High Court Act, the review powers conferred by s 29(1) and 29(2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal E are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review. Such proceedings may be initiated by a complainant who asks the court to declare that an acquittal was not in accordance with real and substantial justice. On review of an acquittal, the High Court has F two options. The first is to confirm the proceedings if they meet the procedural and substantive legal requirements. The second is to decline to confirm the proceedings if they fall short of the requisite standards of justice. However, s 29 does not authorize the High Court to convict an accused person on review where the trial magistrate intended to acquit. G

Legislation considered

High Court Act [*Chapter 7:06*] s 29(1)(c) & (2)(b)

Judgment

KUDYA J: The question raised in the present review is whether an acquittal after a full criminal trial is subject to review at the instance of the complainant. H

2010 (1) ZLR p355

Kudya J

A The record of proceedings was forwarded by the Provincial Magistrate, Harare, at the request of a firm of legal practitioners, which was instructed by the complainant, who was dissatisfied with the acquittal of the accused person after a full trial. The letter is couched in these terms:

> "We refer to the above matter in which judgment was handed down by a magistrate on 5 March 2010 acquitting the accused person. The complainant, whom we B represent, has reason to believe that the ends of justice were subverted in that the accused prior to the handing down of the judgment was boasting that he had already been acquitted. There is therefore likelihood of interference with the manner in which the magistrate handled the matter. As you might be aware, that (*sic*) the matter was reported to the police. We therefore request that the record of proceedings in the matter be submitted for review to ascertain whether real C and substantial justice was done."

The accused was charged with the assault of the complainant in terms of s 89 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The State called the evidence of three witnesses who indicated how the accused first pushed and head butted the complainant before slapping him twice on the face at around 9 pm on 22 January 2010. The accused person testified D and called two witnesses who confirmed his version that he did not in any way or manner assault the complainant. At the conclusion of the trial, the trial magistrate returned a verdict of not guilty. He highlighted the material discrepancies in the State evidence and held that the State had failed to discharge the onus of proof beyond a reasonable doubt. It is this decision E for which the complainant has sought a review.

The High Court, being a court of inherent jurisdiction has wide reviewing powers conferred upon it by both common law and statute. The law applicable in criminal matters has been conveniently set out by the legislature in s 29 of the High Court Act [*Chapter 7:06*], which reads thus:

> **29 Powers on review of criminal proceedings**
>
> F (1) For the purpose of reviewing any criminal proceedings of an inferior court or tribunal, the High Court may exercise any one or more of the following powers –
>
> (a) … (not relevant)
>
> (b) … (not relevant) G
>
> (c) where the proceedings are not being reviewed at the instance of the convicted person, direct that any question of law or fact arising from the proceedings be argued before the High Court by the Attorney-General or his deputy and a legal practitioner appointed by the High Court.
>
> (2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings – H
>
> (a) are in accordance with real and substantial justice, it shall confirm the

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2010 (1) ZLR p356

Kudya J

> proceedings; A
>
> (b) are not in accordance with real and substantial justice, it may, subject to this section –
>
> (i) alter or quash the conviction; or
>
> (ii) reduce or set aside the sentence or any order of the inferior court or tribunal or substitute a different sentence from that imposed by the inferior court or tribunal: B
>
> Provided that –
>
> (i) a sentence of imprisonment shall not be substituted for a fine unless the enactment under which the convicted person was convicted does not permit the imposition of a fine;
>
> (ii) the substituted sentence shall not be more severe than that imposed C by the inferior court or tribunal unless the convicted person –

(a) is a company; or

(b) was represented by a legal practitioner at the proceedings in the inferior court or tribunal concerned;

and requested that the proceedings be forwarded on review or otherwise instituted the review; or

(iii) set aside or correct the proceedings of the inferior court or tribunal D or any part thereof or 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 on any matter which was before it in the proceedings in question; or

(iv) if the convicted person was convicted on one of two or more alternative E counts, when quashing that conviction remit the case to the inferior court or tribunal with instructions that he be retried on one or more of the alternative counts before a presiding officer other than the presiding officer who recorded the previous conviction; or

(v) remit the case to the inferior court or tribunal with such instructions relative to the further proceedings to be had in the case as the High F Court thinks fit; or

(vi) make such order relative to the suspension of the execution of any sentence against the convicted person or the admission of such person to bail or generally any matter or thing connected with such person or the proceedings in regard to him as the High Court thinks calculated to promote the ends of real and substantial justice; or

(vii) if the convicted person was convicted on one or more counts and G acquitted on one or more counts and it appears to the High Court that the inferior court or tribunal intended to –

A. acquit him on one or more of the counts on which he was convicted; and

B. convict him on one or more of the counts on which he was acquitted; H

2010 (1) ZLR p357

Kudya J

A correct the proceedings in accordance with such intention;

(viii) If the convicted person has been convicted of an offence and the inferior court or tribunal could on the indictment, summons or charge have found him guilty of some other offence, whether because it was, according to law, a competent verdict or because that other offence had been alleged as an alternative count, and on the findings of the B inferior court or tribunal it appears to the High Court that the inferior court or tribunal must have been satisfied of facts which proved him guilty of that other offence, the High Court may, when quashing the conviction, substitute for the judgment of the inferior court or tribunal a judgment of guilty of that other offence, whether or not the convicted person had been acquitted of that offence at the trial, and may –

A. subject to the provisos to subparagraph (ii), substitute a different C sentence for that imposed at the trial; or

B. remit the case to the court or tribunal concerned for the passing of such sentence in substitution for the sentence passed at the trial, whether more or less severe, as may be warranted in law for that other offence.

(3) No conviction or sentence shall be quashed or set aside in terms of D subsection (2) by reason of any irregularity or defect in the record or proceedings unless the High Court or a judge thereof, as the case may be, considers that a substantial miscarriage of justice has actually occurred.

(4) Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal E are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review.

(5) A judge of the High Court before whom the record of criminal proceedings in a magistrates court has been laid in terms of section 55, 57 or 58 of the Magistrates Court Act [*Chapter 7:10*] – F

(a) may lay the proceedings before the High Court for its consideration in terms of this section; or

(b) may himself exercise the powers conferred by subsection (1), other than paragraph (b) thereof, or subsection (2):

Provided that a judge of the High Court shall not exercise any of the powers conferred by subparagraph (i), (ii) or (iii) of paragraph (b) of subsection (2) unless another judge of the High Court has agreed with the exercise of G the power in that particular case;

(c) shall, if he confirms the proceedings, cause the record to be endorsed with a certificate to that effect and returned to the court concerned."

The provisions of s 29, *supra*, may be divided into two parts. There are those matters which are brought for review by magistrates in terms of s 55, H 57 and 58 of the Magistrates Court Act [*Chapter 7:10*] and those which

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come to the notice of the High Court by some other means as provided in A subs (4). The present proceedings fall into the latter category. Ordinarily criminal reviews seek to alter or quash a conviction; or reduce or set aside a sentence. The present matter is rare, in that a complainant seeks the court to declare that an acquittal was not in accordance with real and substantial justice. In my view, this is permitted by s 29(1)(c), which gives the High B Court a discretion to direct the Attorney-General and a legal practitioner appointed by it to argue on any question of law or fact emanating from the proceedings. Section 29(2) empowers the High Court to determine whether the proceedings are in accordance with real and substantial justice. If it finds that they conform to accepted norms of both adjectival and substantive law it approves of the proceedings. If the proceedings run foul of either the C procedural or substantive legal requirements the court has a wide choice to draw from to correct the proceedings. The choices set out in s 29(2)(b) are predicated on a conviction and not on an acquittal. This is because both sub paras (i) and (ii) of subs (2) of s 29 revolve around a conviction and sentence. An acquittal does not fit into this mould. The eight provisos to s 29(2)(b) are triggered by either a conviction or sentence. D

Proviso (vii) to s 29(2)(b) permits the High Court to convict an accused person who has been acquitted on one or more counts which are co-joined with one or more counts for which he has been convicted, but only in circumstances where the inferior court has made the error of acquitting when it actually wanted to convict. This proviso does not therefore authorize the High Court E to convict an accused person on review where the trial magistrate, as in the present matter, intended to acquit.

The letter written on behalf of the complainant did not set out the basis for the review. It did not attack any of the findings of the trial magistrate. It obliquely suggested bias on the part of the trial magistrate but did not link that perception to the conduct or outcome of the trial. The fact that an accused F person boasts of his acquittal before the event may very well arise from his appreciation of the evidence led during his trial. That his opinion comes to pass would not objectively be reason to suspect bias or other untoward practice on the part of the trial magistrate.

I hold that s 29(2) of the High Court Act is couched in language which is wide G enough to permit a complainant to seek a review of an acquittal. On review of an acquittal the High Court has two options. The first is to confirm the proceedings if they meet the procedural and substantive legal requirements. The second is to decline to confirm the proceedings if they fall short of the requisite standard of justice. An unhappy complainant may seek a review of an acquittal notwithstanding that the Attorney-General may appeal against H

A the acquittal in terms of s 61 of the Magistrates Court Act [*Chapter 7*:*10*] or s 38A of the High Court Act.

The letter written by the complainant's legal practitioners, though framed in bald language, meets the minimum requirement that is sufficient to trigger a criminal review of the proceedings which resulted in the acquittal of the B accused person.

The evidence of the complainant, a 70-year-old man and the two security guards, Kudakwashe Mavhinga and Austin Hove, who supported his version, was as follows: He arrived at the back of his building at Avondale shopping centre in Harare, which was being rented out to the accused, soon after the lawful eviction of the accused, at between 8 and 9 p.m. The accused, who C was in a foul temper, verbally abused him. He then proceeded to push him and head butt him. The complainant drove to the front of the shop where the accused followed him and slapped him twice in the face. The State witnesses alleged that the place was well lit by electrical lighting emanating from a nearby shop.

D There were discrepancies in the evidence of the three State witnesses. The complainant said that the accused used his stomach to push him on his stomach while Kudakwashe stated that the accused used his hands to push the complainant. The complainant stated that the accused struck him on his

thigh with his head while Kudakwashe said the head butt was directed on the upper part of the complainant's body, above the waist. Austin was at the E front of the shop and did not see what happened behind it. The complainant did not sustain any injuries. He did not scream in pain or call out that he was under attack. The accused denied pushing or head butting the complainant. The two witnesses he called were at a distance of between two and four metres from where the two protagonists were. Both confirmed the accused's F version that the two exchanged verbal insults which did not degenerate into physical assaults.

The trial magistrate correctly found that the complainant and Kudakwashe, who alleged that he was two metres away from the protagonists at the back of the shop, were not credible witnesses in regards to the pushing and head butting. His finding cannot be faulted if regard is had to the absence of any G physical injuries on, or cries of pain from the complainant.

As regards the assault at the front of the shop, the complainant and his witness averred that he was slapped twice as he sat in the car. The complainant only revealed during cross-examination that he was wearing spectacles which fell to the floor as a result of the slaps. The complainant stated that he managed H to pick his unbroken spectacles after the accused had been restrained by his

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Kudya J

relatives. Kudakwashe and Austin averred that they restrained the accused A after he had slapped the complainant. There was a discrepancy on the part of the State witnesses as to who restrained the accused person, which the trial magistrate noted. None of the State witnesses averred that the slaps made any sound; they averred that they saw the accused slap the complainant yet they were behind him. The strangest part of the State's story was that the complainant stopped these security guards from apprehending the accused B and only reported the incident some four days later after the accused appeared on national television accusing him of racism. He confessed under cross-examination that he was irked by the accusation and he decided to report the assault which he had decided to consign to memory.

The two defence witnesses stated that they took the accused to the front of C the shop after restraining him from a verbal mudslinging match with the complainant. When the complainant drove to the front, the accused advanced towards him but they restrained him. The two witnesses called by the accused disputed the version given by the State. Their evidence coupled with the probabilities satisfied the trial magistrate that the State had failed to prove its case beyond a reasonable doubt. That finding is unassailable. D

Accordingly, I confirm that the proceedings in the present trial were in accordance with both procedural and substantive law.

CHITAKUNYE J agreed. E

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Document 50 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/DONGO v REGISTRAR-GENERAL & ANOR 2010 (1) ZLR 361 (S)

DONGO v REGISTRAR-GENERAL & ANOR 2010 (1) ZLR 361 (S)

Citation 2010 (1) ZLR 361 (S)

Case No Judgment No. S-6-10

Court Supreme Court, Harare

Judge Chidyausiku CJ, Ziyambi JA, Garwe JA, Makarau AJA & Gowora AJA

Heard 31 March 2009

Judgment 3 June 2010

Counsel Ms *S Njerere*, for the applicant
D P Drury, for the first respondent
No appearance for the second respondent

Case Type Constitutional referral

Annotations No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 22 – freedom of movement – citizen's right to hold a passport in order to enjoy right to travel freely in and out of the country – minor child – D has same right of freedom of movement as adult – issue of passport to child – not a juristic act requiring assistance of guardian*

Family law – *child – guardianship – need for guardian to assist child in juristic acts – passport – right of child to a freedom of movement and thus to a passport – issue of passport not a juristic act requiring E assistance of guardian*

Headnote

The applicant, a woman, was married under the Customary Marriages Act [*Chapter 5:07*]. When one of her minor children required a passport, the applicant approached the offices of the Registrar-General, the first respondent. She was turned away on the basis that she could not assist F the minor child to obtain a passport as she was not the natural guardian of the minor child and that only her husband, as the natural guardian of the minor child, could assist the child. The first respondent was of the view that the obtaining of a passport for a minor child is an act of guardianship and therefore a juristic act and the applicant, not being the G minor child's guardian, could not approach his office.

The applicant brought an application to the Supreme Court under s 24(2) of the Constitution, alleging that the Declaration of Rights, particularly s 23(1) (a) and (b), had been violated in relation to her, in that she was being discriminated against on the basis of her gender and her marital status. In argument, the applicant accepted as correct the legal position H advanced by the first respondent that in applying for a passport a minor

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Makarau AJA

child requires the assistance of his guardian. A

Held, that it is correct to say that in all juristic acts a minor child must be assisted by his or her guardian. While most of the debate between the rights of the guardian parent and the custodian parent has arisen in instances where the parents of the minor child have separated or divorced, even during the subsistence of a marriage a minor child still requires B the assistance of a guardian to perform all juristic acts.

Held, further, that a Zimbabwean passport is a document that enables holders to travel outside the borders of the country. It is issued to citizens only, to enable them to travel beyond the borders of the country. It also acts as a document of identity identifying the possessor as a Zimbabwean national, but it is not the issuance or denial of the document that confers C on or withdraws nationality or citizenship from Zimbabweans. The document simply confirms or affirms that the holder is a Zimbabwean citizen and identifies him or her as such. Holding a passport is simply a recognition by the State that the holder is a citizen and is entitled to enjoy his constitutional right to travel freely in and out of the country. While the possession of a passport is not guaranteed by the Constitution, the D right to freedom of movement, which is constitutionally guaranteed, can only be fully enjoyed by citizens who are in possession of a passport. A passport is issued to

enable the citizen to enjoy a constitutional right of freedom of movement but does not confer that right itself.

Held, further, that the right to freedom of movement inheres in all human E beings and is enshrined in the Constitution. Minor children are guaranteed that right by virtue of being human beings. Any abrogation to that right has to be found in the Constitution and cannot be by an administrative act of the first respondent or by the provisions of another statute that is not consistent with the Bill of Rights. To deny a minor child a passport because he has not been assisted by his natural guardian may amount to an F unlawful abrogation of the minor child's right to freedom of movement. The issuance of a passport does not confer any new or additional right that the citizen of Zimbabwe did not enjoy before the document was issued. It does not change the holder's legal status after its issuance. Accordingly, the issuance of a passport to a citizen is thus not a juristic G act and the exclusive assistance of the minor child's guardian is not a legal requirement. Both parents of a minor child can assist a child to obtain a passport.

Case referred to

M v A & Anor 1981 ZLR 306 (H) H

Makarau AJA

Legislation considered A

Guardianship of Minors Act [*Chapter 5:08*], s 3

Case information

Ms *S Njerere*, for the applicant

D P Drury, for the first respondent

B No appearance for the second respondent

Judgment

MAKARAU AJA: This matter was referred to this court from the High Court in terms of s 24(2) of the Constitution of Zimbabwe ("the Constitution"), which reads:

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

The referral was by consent.

Three issues were referred for determination. These are – D

(a) Whether s 3 of the Guardianship of Minors Act [*Chapter 5:08*] in its effect and implementation concerning the rights of guardianship of a minor is discriminatory against women such as the applicant and offends against the provisions of s 23(1)(a) and/or s 23(1)(b) of the Constitution;

(b) Whether the common law relating to the guardianship of children born E in wedlock is discriminatory against women and offends against the provisions of s 23(1)(a) and/or s 23(1)(b) of the Constitution; and

(c) Whether African customary law relating to the guardianship of children born in a customary law union is discriminatory against women and offends against the provisions of s 23(1)(a) and/or s 23(1)(b) of the Constitution.

F The facts giving rise to this application are common cause. I summarise them as follows.

The applicant is married to one Tonderai Caspa Dongo under the Customary Marriages Act [*Chapter 5:07*]. The applicant and her husband have a number of children, one of whom, namely Kudakwashe Norman, was a minor in G 2006, the time when the events giving rise to this application occurred. Kudakwashe Norman (hereinafter referred to as "the minor child") was born on 28 October 1989.

In January 2006 the applicant approached the offices of the first respondent, seeking to obtain a passport for the minor child. She was turned away on H the basis that she could not assist the minor

child to obtain a passport as she

Makarau AJA

was not the natural guardian of the minor child. Her husband, as the natural A guardian of the minor child, was the only one who could assist the minor child in this regard.

Aggrieved by the refusal to allow her to assist the minor child, the applicant approached the High Court, alleging that the Declaration of Rights in the Constitution had been violated in relation to her, in that she was being B discriminated against on the basis of her gender and her marital status. In particular, she alleged firstly that, as between herself and her husband, she was being discriminated against mainly on account of her gender, as the law automatically recognised her husband, a man, as the natural guardian of their joint children to her exclusion. Secondly, she alleged that, as between her (as a married woman) and unmarried and widowed women, she was being C discriminated against, as again the law acknowledged all unmarried and widowed women as natural guardians of their minor children.

At the hearing of the matter in the High Court, the first respondent denied the contentions by the applicant. In the main, he argued that the natural guardianship of children born to a married couple vests in the father of the D children, hence his request that the father (or the mother duly authorised by the father) sign a section on the application form that is issued by his office signifying his consent to the minor child obtaining a passport. He also argued that, in his view, the law of guardianship does not discriminate on the basis of gender or marital status as alleged by the applicant. He, however, consented to the three issues detailed above being referred to this court for E determination.

In her submissions before us, Ms *Njerere*, for the applicant, argued that the Declaration of Rights, particularly ss 23(1)(a) and (b) of the Constitution, had been violated in relation to the applicant. She premised her argument on the facts of the matter and accepted as legally correct the position adopted by F the first respondent that when applying for a passport, a minor child requires to be assisted by his or her guardian. Arguing against the provisions of the common law, Ms *Njerere* submitted that the applicant faced discrimination as a married woman, as the common law recognises unmarried women and widowed women as the natural guardians of their minor children but does G not so equally recognise the applicant, a married woman. She also attacked as discriminatory against the applicant the provisions of s 3 of the Guardianship of Minors Act, which provides that:

> "Where the parents of a minor –
>
> (a) are living together lawfully as husband and wife; or
>
> (b) are divorced or are living apart and the sole guardianship of the minor has H

Makarau AJA

> A not been granted to either of them by order of the High Court or a judge;
>
> the rights of guardianship of the father shall be exercised in consultation with the mother, and if a decision of the father on any matter relating to guardianship is contrary to her wishes and in her opinion likely to affect the life, health or morals of the minor to his detriment, the mother may apply to a judge in chambers, who may make such order in the matter as he thinks proper."

B As correctly submitted by Ms *Njerere*, the import of the above section is to restate the common law position that recognises a father's right of guardianship in the absence of an order granting sole guardianship to the mother of the minor child. The section then proceeds to introduce a limited right on the part of the mother of the minor child to be consulted by the father and, if she is not happy with the decision of the father, and, in her opinion C the father's decision is likely to affect the life, health or morals of the minor child, she can then approach a judge in chambers for a suitable order to be made overriding that of the father.

The third question raised for this court to answer is whether the African customary law relating to the guardianship of children born in a customary D law union is discriminatory of women and offends against the provisions of s 23(1)(a) and/or s 23(1)(b) of the Constitution. Ms *Njerere* did not, however, make any detailed submissions regarding the position of the applicant as guardian to her minor children under customary law. In my view, this omission on her part is neither here nor

there, as s 3 of the Guardianship of Minors Act applies with equal force to women married under the Customary E Marriages Act, thus making it also the applicable position that the rights of guardianship of the father married at customary law shall be exercised in consultation with the mother.

In her submissions, Ms *Njerere* proceeded to observe that the applicant and women in her position suffer from discrimination on two counts in F violation of the constitutional provision against discrimination. She suffers discrimination on account of her marital status, in that other women, who are not married or are widowed, have rights of natural guardianship over their minor children, which she does not have. As regards her husband, she suffers discrimination on the basis of her gender. He is automatically imbued with rights of guardianship over their joint children on account of being the G father, while she, an equal parent to the minor children, has none at common law, and can only be content with the limited right granted her by statute to be consulted by the father and thereafter to approach the courts if she is unhappy with any decision taken by the father. She is thus discriminated against as against other women who are either not married or are widowed H and against her husband or former husband on account of her gender.

2010 (1) ZLR p366

Makarau AJA

As stated above, the applicant brought this constitutional application, having A accepted as correct the legal position advanced by the first respondent that in applying for a passport a minor child requires the assistance of his or her guardian. It is common cause that the first respondent refused the applicant the capacity to assist the minor child to obtain a passport on the basis that the obtaining of a passport for a minor child is an act of guardianship and B therefore a juristic act and the applicant, not being the minor child's guardian, could not approach his office in this regard. The issue that has exercised my mind in this matter is whether this submission as to the law is correct.

In developing her argument further, that the issuance of a passport is a juristic act for which a minor child requires the assistance of a guardian, the applicant, in my view correctly, made submissions on the differences C between acts of guardianship and those acts that the custodian of the child, who is not the guardian, can assist the minor child in, where custody and guardianship do not vest in the same person.

H R Hahlo *South African Law of Husband and Wife* 5 ed at p 389 takes the narrow approach and distinguishes between acts of guardianship and acts D of custodianship in the following terms:

> "Where custody and guardianship are separated, the custodian parent has the care and control of the minor's person, the guardian parent the administration of his property and business affairs."

I say that the approach taken by this author is narrow, borrowing from the observations and remarks made by Gubbay J (as he then was) in *M* v *A and* E *Anor* 1981 ZLR 306 (H) at 310H when he rejected the submission made by Mr Horn to the effect that the award of custody to the mother circumscribed the rights and duties of the father to the administration and management of the minor child's property. In rejecting the suggested circumscription of the guardian's functions, the learned judge had this to say at 310H-311A: F

> "I am unable to accept that the rights and duties of a non-custodian father are limited to the exercise of control over the property of the child. That indeed is an extremely important adjunct, but I consider his function must be more broadly stated. It is to represent or assist the child in the performance of a juristic act, such an act being one expressing the actor's will to achieve a desired legal consequence." G

It is from this authority that the applicant, again correctly in my view, submitted that in all juristic acts a minor child must be assisted by his or her guardian. It would appear to me that, while most of the debate between the rights of the guardian parent and the custodian parent has arisen in instances where the parents of the minor child have separated or divorced, even during the subsistence of a marriage a minor child still requires the assistance of a H

2010 (1) ZLR p367

Makarau AJA

A guardian to perform all juristic acts.

I now turn to consider whether the obtaining of a passport in Zimbabwe is a juristic act.

In Zimbabwe there is no written law that specifically governs the application for and issuance of passports. To interpret the rights of citizens, particularly B of minor children, to passports, one then has to look to the common law.

A Zimbabwean passport is a document that enables holders to travel outside the borders of the country. It is issued to citizens only, to enable them to travel beyond the borders of the country. It also acts as a document of identity, identifying the possessor as a Zimbabwean national. While a Zimbabwean passport denotes the nationality of the holder as Zimbabwean, C it is not the issuance or denial of the document that confers on or withdraws nationality or citizenship from Zimbabweans. It simply confirms or affirms that the holder is a Zimbabwean citizen and identifies him or her as such. Zimbabwean citizenship is acquired or lost through the various methods set out in Chapter II of the Constitution.

D The relationship between passports, citizenship and the right of freedom of movement in Zimbabwe has, in my view, to be contrasted with that obtaining in Britain. According to Laurie Fransman *Fransman's British Nationality Law*, the issue of a British passport is governed by the Royal Prerogative and is issued not only to citizens but to a number of groups of people enjoying the protection of the Crown whilst abroad, arising from E the political relationships between Britain and its former colonies. Thus, while holding a British passport is at the discretion of the Government and confirms that one is protected by the might of Britain whilst abroad, holding a Zimbabwean passport is simply a recognition by the State that the holder is a citizen and is entitled to enjoy his or her constitutional right to travel F freely in and out of the country. The position in Zimbabwe is similar, in my view, to that in India where, relying on the Magna Carta, the courts in that country held that there is a right to passport facilities in India. In America, the right to a passport is reportedly a constitutional right. See *Fransman's British National Law* p 1098.

In Zimbabwe, while the possession of a passport is not guaranteed by the G Constitution, the right to freedom of movement, which is constitutionally guaranteed, can only be fully enjoyed by citizens who are in possession of a passport.

In Zimbabwe it is necessary to be the holder of a valid passport to travel outside the borders of the country. There are countries with special bilateral H relationships that obviate the need for their mutual citizens to hold passports

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Makarau AJA

to cross their borders. A passport, while obtained to facilitate travel outside A the borders of the country, is issued to all regardless of whether the holder travels or not. It is not withdrawn on the basis that the holder did not travel. It is issued to enable the citizen to enjoy a constitutional right of freedom of movement but does not confer that right itself.

The right to freedom of movement inheres in all human beings and is enshrined B in the Constitution. Minor children, too, are guaranteed that right by virtue of being human beings. Any abrogation to that right has to be found in the Constitution and cannot be by an administrative act of the first respondent or by provisions of another statute that is not consistent with the Bill of Rights. In my view, to deny a minor child a passport because he or she has not been assisted by his or her natural guardian may amount to an unlawful C abrogation of the minor child's right to freedom of movement.

In my view, the issuance of a passport does not confer any new or additional right that the citizen of Zimbabwe did not enjoy before the document was issued. It does not change the holder's legal status after its issuance. The conclusion I reach is that the issuance of a passport to a citizen is thus not D a juristic act.

In my further view, the position has to be contrasted with the possession of a British passport issued under the Royal Prerogative and in exchange for allegiance from the holder. The possession of a British passport would thus, in the wide sense, denote nationality and afford the possessor the right E of protection whilst abroad. It is in this spirit that passports issued to non-British people but to the so-called naturalised person were issued for limited periods and upon the expiry of the passport the protection of the Crown would automatically cease. See Clive Perry *Nationality and Citizenship Laws of the Commonwealth and Ireland*. It may be from the nature of the British passport that the common law practice developed of requiring minor children to be F assisted by their guardians to apply for passports, as the issuance of such passports would have the effect of changing the minor child's legal status in that the minor child would now be recognised as a British citizen or subject.

As correctly observed by the applicant in her heads of argument, the three questions referred to this court will only fall for determination if it is legally correct that the act of applying for a passport is a juristic act for which a G minor child requires the assistance of a guardian.

I have come to the conclusion that the issuance of a passport does not alter the holder's legal position after its issuance and is therefore not a juristic act.

It may be pertinent to note at this stage that the first respondent did not either in his heads of argument or during the hearing of the matter avert to H

2010 (1) ZLR p369

Makarau AJA

A this issue at all. Mr *Drury* submitted that, in his view, the act of applying for a passport is clearly a juristic act for which a minor child requires the assistance of his or her guardian.

I have come to the conclusion that an application for a passport is not a juristic act and that the exclusive assistance of the minor child's guardian is not a legal requirement. On that basis, the first respondent erred in disallowing the B applicant from assisting the minor child to apply for a passport and insisting that only the child's guardian could assist. Both parents of a minor child can assist a child to obtain a passport.

The questions referred to this court by the court *a quo* were premised on the proposition that an application for a passport was a juristic act in respect C of which a minor child required the assistance of the guardian. As I have already stated, such an application is not a juristic act and accordingly the questions raised are based on an erroneous legal premise.

In the result, the questions referred for determination by this court fall away.

As regards costs, this matter was determined on a basis raised by neither D party. Accordingly, it is only fair that each party bears its own costs.

CHIDYAUSIKU CJ, ZIYAMBI JA, GARWE JA and GOWORA AJA concurred.

E *Honey & Blanckenberg*, applicant's legal practitioners

Gollop & Blank, first respondent's legal practitioners

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

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Document 51 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/S v SABAU 2010 (1) ZLR 370 (H)

S v SABAU 2010 (1) ZLR 370 (H)

2010 (1) ZLR p370

Citation	2010 (1) ZLR 370 (H)
Case No	Judgment No. HH-110-10
Court	High Court, Harare
Judge	Patel J and Kudya J
Heard	3 June 2010
Judgment	3 June 2010

Counsel Details not supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

Criminal procedure *(sentence) – statutory offence – negligent driving –* C *prohibition from driving – classes of vehicle to which such prohibition extends – when court may order that prohibition shall not extend to class of vehicle other than that driven at time of offence*

Road traffic *– offences – negligent driving – prohibition from driving following* D *conviction – classes of vehicle to which such prohibition extends – when court may order that prohibition shall not extend to class of vehicle other than that driven at time of offence*

Headnote

The accused was convicted of negligent driving arising out of an accident he caused when driving a commuter bus, a class 2 vehicle. The magistrate E sentenced him to a fine. The accused was, in addition, prohibited from driving motor vehicles in classes 1 and 2 for a period of two years. His driver's licence in respect of class 2 vehicles was also cancelled. The magistrate's rationale for this course was that the prohibition was extended to class 1 vehicles because, if not so prohibited, the accused could have proceeded to obtain a class 1 driver's licence, which would F enable him to drive vehicles in all of the other classes, including class 2, thereby defeating the object of the prohibition in respect of that class. As regards classes 4 and 5, he did not extend the prohibition to those classes because the accused was convicted of an offence involving a class 2 vehicle and there was no need to prohibit him from driving motor G vehicles in classes 4 and 5.

Held, that s 52(4) of the Road Traffic Act [*Chapter 13:11*] provides for prohibition from driving upon conviction for negligent driving. In the case of an offence involving the driving of a commuter omnibus or a heavy vehicle, the court *shall* prohibit the person from driving for a period of not H

Patel J

A less than two years, but may decline to impose the mandatory prohibition if it considers that there are special circumstances which justify it so declining. Such special circumstances must be endorsed on the record of the case when passing sentence. Section 65 of that Act stipulates general provisions relating to prohibition. Subsection (1) thereof provides that a prohibition from driving shall extend to all classes of motor vehicle. B However, subs (3) of s 65 gives the court a discretion, if it thinks fit, to order that the prohibition shall not extend to a class of motor vehicle other than the class to which the motor vehicle driven by the accused at the time of the commission of the offence belongs. In terms of subs (5) of s 65, where the accused is prohibited from driving for a period of twelve months or more or for consecutive periods which together amount C to twelve months, the court *shall* cancel his driver's licence in respect of all classes of motor vehicle to which such prohibition extends. What the magistrate should have done was to impose the prohibition, in general, and then indicate the classes of motor vehicle to which the prohibition would not extend. Before so doing, he should have considered whether D or not there were any special circumstances surrounding the commission of the offence which justified such non-extension and endorsed such special circumstances on the record, as prescribed in subs (4) of 52 of the Act. As regards cancellation of the accused's driver's licence, subs (5) of s 65 requires that such cancellation be imposed in respect of all classes of motor vehicle to which the prohibition from driving extends. E In other words, the coverage of cancellation must be co-extensive with the classes of motor vehicle to which the prohibition extends.

Legislation considered

Road Traffic Act [*Chapter 13:11*], ss 52(4) & 65(1), (3) & (5)

Judgment

F **PATEL J:** The accused was found guilty on his plea of guilty to a charge of negligent driving in contravention of s 52(2) of the Road Traffic Act [*Chapter 13:11*] ("the Act"). The conviction is in order and is accordingly hereby confirmed.

The accused committed the offence whilst driving a commuter omnibus G with five passengers on board. He collided with seven stationary vehicles, probably because of over-speeding combined with defective brakes. All of the vehicles involved were damaged but nobody was injured. The accused is a 46-year-old first offender and is married with four children. He is self-employed as a driver earning US$40 per week. He has no savings but owns H 5 bovines. He holds a driver's licence in respect of motor vehicles in classes

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Patel J

2, 4 and 5. A

The trial magistrate sentenced the accused to a fine of US$200 or 1 month imprisonment in default of payment of the fine. The accused was further prohibited from driving motor vehicles in classes 1 and 2 for a period of 2 years. His driver's licence in respect of class 2 motor vehicles was also cancelled. B

The regional magistrate who scrutinised this case is of the view that the accused should not have been prohibited from driving class 1 motor vehicles, as his driver's licence does not include that class, but that he should have been prohibited from driving motor vehicles in classes 4 and 5 in addition to class 2. In his response to the queries raised, the trial magistrate explained C that he extended the prohibition to class 1 motor vehicles because, if not so prohibited, the accused could have proceeded to obtain a class 1 driver's licence, which would enable him to drive vehicles in all of the other classes, including class 2, thereby defeating the object of the prohibition in respect of that class. As regards classes 4 and 5, he did not extend the prohibition to those classes because the accused was convicted of an offence involving D a class 2 motor vehicle and there was no need to prohibit him from driving motor vehicles in classes 4 and 5.

Section 52(4) of the Act provides for prohibition from driving upon conviction for negligent driving. In the case of a first driving offence, the court *may* prohibit the convicted person from driving for such period as it thinks fit. For E a repeat driving offence, the court *shall* prohibit the convicted person from driving for such period as it thinks fit *and* cancel his licence in respect of motor vehicles of the class to which such prohibition from driving extends. In the case of an offence involving the driving of a commuter omnibus or a heavy vehicle, the court *shall* prohibit the person from driving for a period of not less than two years. However, the court may decline to impose the F mandatory prohibition if it considers that there are special circumstances which justify so declining, in which event it must endorse such special circumstances on the record of the case when passing sentence. Section 52(1) of the Act defines the term "special circumstances" to mean "special circumstances surrounding the commission of the offence concerned, but G does not include special circumstances peculiar to the offender".

The provisions of s 52(4) are subject to Part IX of the Act, including s 65 which stipulates general provisions relating to prohibition. Section 65(1) provides that a prohibition from driving shall extend to all classes of motor vehicle. However, s 65(3) allows the court a discretion to order that the prohibition shall not extend to such class of motor vehicle, other than the H

Patel J

A class to which the motor vehicle driven by the accused at the time of the commission of the offence belongs, as it thinks fit. In terms of s 65(5), where the accused is prohibited from driving for a period of twelve months or more or for consecutive periods which together amount to twelve months, the court *shall* cancel his driver's licence in respect of all classes of motor vehicle to which such prohibition extends.

B Turning to the instant case, the trial magistrate found (without conducting any specific inquiry into the question) that there were no special circumstances justifying the non-imposition of a prohibition from driving and then proceeded to impose such prohibition for a period of 2 years. In so doing, however, he limited the prohibition to classes 1 and 2. In my view, that approach is C erroneous and misdirected in that it is the converse of what is contemplated by s 65(1), as read with s 65(3), of

the Act. What the magistrate should have done is to impose the prohibition, in general, and then indicate the classes of motor vehicle to which the prohibition would not extend. Before so doing, he should have considered whether or not there were any special circumstances surrounding the commission of the offence which justified D such non-extension and endorsed such special circumstances on the record, as prescribed in s 52(4) of the Act.

As regards cancellation of the accused's driver's licence, s 65(5) of the Act requires that such cancellation be imposed in respect of all classes of motor vehicle to which the prohibition from driving extends. In other words, the E coverage of cancellation must be co-extensive with the classes of motor vehicle to which the prohibition extends. Again, the magistrate appears to have misdirected himself by departing from this requirement.

In the circumstances of this case, it is necessary that corrective action be taken at the earliest opportunity. This is specifically envisaged in s 65(6) F of the Act, where prohibition from driving or cancellation of a licence is required to be imposed in terms of the Act, and the court for any reason does not prohibit the convicted person from driving or does not cancel his licence in respect of all or any of the classes of motor vehicles in respect of which it is required to be cancelled. In any such case, the court *shall* cause notice to be served on the convicted person directing him to appear before G the court at the time and place specified in the notice to show cause why the prohibition or cancellation should not be imposed or the order should not be corrected, as the case may be. However, this procedure is subject to s 65(8) of the Act which precludes the service of such notice more than six months after the date of the conviction. (The accused *in casu* was convicted H and sentenced on 3 January and 3 February 2010 respectively.).

Patel J

In the premises, it is directed that this matter be remitted to the trial magistrate A forthwith for him to institute the procedure enjoined by s 65(6) of the Act and to correct the sentence imposed in this case, in conformity with the guidelines set out in this review.

KUDYA J concurred.

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Document 52 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/JIRIRA v ZIMCOR TRUSTEES LTD & ANOR 2010 (1) ZLR 375 (H)

JIRIRA v ZIMCOR TRUSTEES LTD & ANOR 2010 (1) ZLR 375 (H)

Citation	2010 (1) ZLR 375 (H)
Case No	Judgment No. HH-98-10
Court	High Court, Harare
Judge	Makarau JP
Heard	14 May 2010
Judgment	9 June 2010
Counsel	*T Mpofu,* for the applicant *F Mutamangira*, for the first respondent
Case Type	Civil application

Annotations No case annotations to date

Flynote

Legal practitioner – *conduct and ethics – drafting of pleadings and affidavits – need for precision – clients' case to be set out so that the legal issues are clearly revealed – failure to do so may amount to incompetence on the part of the legal practitioner*

D **Practice and procedure** – *application – when competent – disputed facts – discretion of court where wrong procedure is adopted – may be inappropriate to refer such matter to trial simply in order to save costs*

Headnote

Where an applicant is relying on a disputed fact whose proof lies in the E memories of witnesses to the fact, it is utterly incompetent for such an applicant to proceed by way of a court application. Depending on the circumstances it may be wrong for a court to use its discretion, condone the wrong procedure and to refer the matter to oral evidence with the papers standing as summons and appearance to defend respectively, simply in order to save costs and to proceed with the matter.

F Litigants, unless they have been legally trained, do not frame their instructions to legal practitioners in legal terms. They are not expected to. They do not instruct their legal practitioners using terms that have any legal import. They invariably tell their stories using language that they are familiar with and language which they use every day. Some are good G story tellers, some are not. It is the duty of legal practitioners to screen, from the story told them by their clients, the legal issues arising and then to plead such with precision and in accordance with the law. Simply to repeat the entire story as told by the client and using the imprecise language that lay people use may amount to incompetence on the part H of the legal practitioner.

2010 (1) ZLR p376

Makarau JP

Cases cited A

Masukusa v National Foods 1983 (1) ZLR 232 (H)

Case information

T Mpofu, for the applicant

F Mutamangira, for the first respondent

Judgment

MAKARAU JP: Whether to bring proceedings by way of application or by B way of summons is an issue that must be uppermost in the mind of each and every legal practitioner who is given instructions to approach the court for relief. While application procedure is the more expedient manner of resolving disputes, it is not always suitable. Rules and practices of this court have been set up to guide legal practitioners on when application procedure is C not suitable. Numerous judgments of this court and the Supreme Court have explained these rules and practices in detail and have in some instances gone to great lengths to explain the rationale behind the rules and the practices. Such authorities appear to have gone unheeded in the above matter.

On 16 October 2009, the applicant filed this application, seeking an order D cancelling the agreement of sale entered into between herself and the first respondent and instead, confirming an agreement of loan between the parties. The applicant also sought an order compelling the first respondent to return to her the deed of transfer in respect of certain immovable property.

In her founding affidavit, the applicant narrates the following story. Sometime in March 2009, she borrowed the sum of US$15 000 from the first respondent. E It was a condition of the loan

agreement that she would surrender the deed of transfer in respect of her property in Hatfield, Harare to the first respondent, which she duly did. She was, however, made to sign an agreement of sale in terms of which she was selling her property for the sum of US$10 000. She was made to sign this agreement by means of deceit. Again through deceit, F she was made to sign a power of attorney to pass transfer of the property and a stamp duty declaration form, presumably declaring that she had sold the property to the first respondent.

She also completed a loan agreement form, copies of which were all retained by the first respondent.

When she heard rumours that the first respondent was in the habit of transferring G properties whose deed had been given to him as security for loans, she had a caveat placed against the title to the property, to safeguard her interests. She then approached this court for the relief that I have outlined above.

The above is a summary of the applicant's entire story.

The application was opposed. The first respondent vehemently denied the H

Makarau JP

A agreement of loan and averred that the parties concluded an agreement of sale in respect of property described in the agreement. It also denied that the applicant was deceived at any stage into signing the agreement of sale and the various other documents that she signed in preparation of transfer of the property to the first respondent.

B At the hearing of the application it was apparent that there is a material dispute of fact arising from the application that cannot be resolved on the basis of the papers filed of record. The applicant alleges that the parties concluded an agreement of loan and not an agreement of sale. However, she does not explain in detail why she signed the agreement of sale and all the other documents she has listed in her founding affidavit. She simply deposes to C the fact that she was deceived into signing these documents and does not give the details of the deceit.

It must have been apparent to the applicant and her legal practitioners when she approached court for relief that she would have to explain why the agreement of sale had to be set aside, as it is the transaction for which D contemporaneously made documents can be produced. She knew that the respondent was insisting on upholding the agreement of sale and would allege that this was the only binding agreement between the parties.

Being aware of the nature of the dispute between the parties and that it would necessarily call for the leading of evidence to prove the correct nature of the transaction that unfolded between the parties, it was, in my view, an abuse of E process on the part of the applicant to choose to approach the court by way of application procedure. The choice of application procedure was clearly inappropriate in view of the story that the applicant herself was relying on for relief. It was clear at the filing of the application that the applicant was not in a position to prove by a document made contemporaneously with the F transaction, the loan agreement as she did not keep a copy of that agreement and efforts to obtain a copy from the first respondent were fruitless, to use her own words. In such a case, it was apparent that it would be the applicant's word against that of the first respondent on the existence or otherwise of the loan agreement, as there was no other evidence of the transaction.

In my view, where an applicant is relying on a disputed fact whose proof G lies in the memories of witnesses to the fact, it is utterly incompetent for such an applicant to proceed by way of application.

When the materiality of the dispute of fact was brought to his attention, Mr *Mpofu* submitted that the court should use its discretion to refer the matter to oral evidence, with the papers filed of record standing as summons and H appearance to defend respectively.

Makarau JP

As correctly submitted by *Mr Mutamngira*, this is a difficult case for the A court to use its discretion in favour of the applicant. Such discretion will fly in the face of the remarks made by McNally J (as

he then was) in *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) at 236E-F, where, when faced with an apparent dispute of fact, he asked himself the question:

> "Should I, nevertheless, in the interests of saving costs and generally getting on B with the matter condone the wrong procedural approach?"

The learned judge was of the view that it would be wrong to do so.

I am also of the view that it would be wrong for me in the application before me to condone the wrong procedure adopted by the applicant and keep the ball in the court, as it were in, an effort to save costs. The reasons that present themselves to me are not dissimilar to the reasons that McNally J advanced C for taking a similar approach in the *Masukusa* matter.

Firstly, the dispute of fact in this matter did not arise from the nature of the defence proffered by the respondent in the opposing affidavit. It is part of the applicant's case. The applicant deposed to facts in her affidavit that were neither common cause nor capable of proving by way of affidavits. Her D allegations needed *viva voce* evidence to explain and she proceeded by way of application notwithstanding, but at her own peril. Secondly, the nature of the case that the applicant sought to portray is one that clearly cannot be proved on paper and by way of affidavits. It requires the parties to give oral evidence and to be examined on their evidence to find out where the truth lies. It is a case, in my view, that will ultimately turn on the credibility of E the witnesses and affidavits have no colour save the colour of the paper on which they are typed. There is no proven way of ranking affidavits in terms of veracity. One simply cannot find one affidavit more credible than the other.

Before I dispose of this matter, it is pertinent in my view that I advert to one other issue of general concern. F

Litigants, unless they have been legally trained, do not frame their instructions to legal practitioners in legal terms. They are not expected to. Thus, they do not instruct their legal practitioners using terms that have any legal import. They invariably tell their stories using language that they are familiar with and language which they use every day. Some are good story tellers, some G are not. It should not matter how the story is told, for it is the duty of the legal practitioner to then reduce such instructions or stories into questions that demand legal answers and to draft their clients' pleading or applications and affidavits accordingly.

I have been constrained to make these remarks by the manner in which the applicant's legal practitioner (not Mr *Mpofu*) drafted the applicant's founding H

Makarau JP

A affidavit in this matter. It would appear to me that the legal practitioner simply reproduced the instructions from his or her client as they were given to him or her and thus ended up with a founding affidavit where the applicant alleges that she was "deceived" into signing an agreement of sale after she had obtained a loan from the applicant. While the term "deceit" may have an every-day meaning, it is not a cause of action and has no special meaning B at law. One can think of a number of legal situations that may loosely be termed as deceitful by lay persons. All frauds are deceits. Some negligent misrepresentations may amount to deceit. Some innocent misrepresentations may amount to deceit. Unilateral mistakes leading to a contract may in some cases be loosely described as being deceits by the party who knew the correct position but did not disclose because they had no duty to do so. C The list is endless.

The point I am making is that it is the duty of the legal practitioner to screen, from the story told them by their client, the legal issues arising and then to plead such with precision and in accordance with the law. To simply repeat the entire story as told by the client and using the imprecise language that lay D people use may amount to incompetence on the part of the legal practitioner.

In view of the vague cause of action that the applicant is relying on, it is my view that it will serve no purpose for me to refer the matter to trial with the papers standing as summons and appearance to defend respectively. There is, in my view, no cause of action disclosed in the papers at this stage.

E In the result, I make the following order:

1. The application is dismissed.
2. The applicant will bear the respondent's costs.

Muchandibaya & Associates, applicant's legal practitioners

F *Mutamangira & Associates*, respondent's legal practitioners

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Document 53 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/S v STANLEY 2010 (1) ZLR 380 (H)

S v STANLEY 2010 (1) ZLR 380 (H)

Citation	2010 (1) ZLR 380 (H)
Case No	Judgment No. HH-97-10
Court	High Court, Harare
Judge	Omerjee J & Mavangira J
Heard	1 June 2010
Judgment	9 June 2010
Counsel	*A A Debwe,* for the appellant *C M Dube,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law – *inchoate offences – conspiracy – what is – withdrawal from conspiracy – what is required to end conspirator's liability for commission of substantive crime*

Headnote

"Conspiracy" may be defined as the act of conspiring; combination for unlawful D purpose; plot. A conspirator is one engaged in a conspiracy. In general a conspirator is liable for the crime perpetrated by his co-conspirators. But where he has effectively withdrawn from the conspiracy, he does not remain liable for the commission of any subsequent criminal acts. The terms "withdrawal" and "dissociation", which are often used in this E context of the law, refer to a voluntary action by a conspirator which is legally effective to terminate his relationship to the conspiracy. The reason for allowing such a defence is to encourage the conspirator to abandon the conspiracy prior to the attainment of its specific object A and, by encouraging his withdrawal, to weaken the group which he has entered. The actual role of the conspirator will determine the kind of withdrawal F necessary to effectively terminate his liability for the commission of the substantive crime. Where a person has merely conspired with others to commit a crime but has not commenced an overt act toward the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision G to abandon the common unlawful purpose. Where, however, there has been participation in a more substantial manner, something further than a communication to the co-conspirators of the

intention to dissociate is necessary. A reasonable effort to nullify or frustrate the effect of his contribution is required. H

Mavangira J

Cases cited A

S v Beahan 1991 (2) ZLR 98 (S)

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 273

Case information

B *A A Debwe,* for the appellant

C M Dube, for the respondent

Judgment

MAVANGIRA J: The appellant was charged, firstly, with contravening s 45(1)(a) as read with s 128(a) of the Parks and Wildlife Act [*Chapter 20:14*] C and, secondly, contravening s 28(1) (a) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*]. He pleaded not guilty to both counts but was convicted of both after a trial. He was sentenced on the first count to US$2000 or eight months'imprisonment with labour. On the second count he was sentenced to US$40 or six days'imprisonment. In addition, he was sentenced to two years'imprisonment which was wholly suspended for five D years on condition that during that period he does not hunt for specially protected animals for which upon conviction he is sentenced to imprisonment without the option of a fine.

The facts as outlined by the State before the trial court are as follows. On 9 May 2009 the appellant and four accomplices, three of whom are now E deceased, entered Malilangwe Trust Estate in Chiredzi to hunt rhinoceros. The appellant, who was driving a Toyota Hilux registration number ABE 2449, dropped off his accomplices about 3 km into Malilangwe Trust Estate. The accomplices were to pursue the spoor of rhinoceros which they intended to shoot and kill for their horns.

F A team of police detectives and game scouts who had observed the appellant dropping off his accomplices then kept the accomplices under surveillance. The appellant's accomplices and the detectives and game scouts then met in the bush. As the detectives and the game scouts tried to arrest the poachers the poachers shot at them and a heavy exchange of gunfire ensued. Three poachers were shot dead and one escaped. The police detectives recovered G two rifles, a .303 rifle serial number CA2416 and a .306 rifle serial number 7D 3888 fitted with a telescope, a .303 gun bag, 52 live rounds of ammunition and an axe.

The appellant was arrested by the police detectives at about 18.30 hours whilst parked within the Malilangwe Trust area. They carried out a search H and recovered two live rounds of ammunition behind the seat. The deceased

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Mavangira J

poachers' jackets were also found in the appellant's truck. A

In his defence outline the appellant stated as follows: He said that he denied the allegations. On Saturday 9 May 2009 in the morning, one Albert Svuure approached him and asked that he escort him to Mvuma for the purpose of collecting his colleagues so that they could proceed to Malilangwe Trust in order to poach. Svuure said that he and his friends wanted to hunt rhinoceros B and that they would pay him the sum of US$500 for providing them with transport. He agreed. Albert then took two guns and an axe which he said they were to use during the poaching. Albert placed these at the back of the front seat. They then proceeded to Mvuma where they collected one Mhofu who was himself in the company of a friend. They then proceeded to Chiredzi via Masvingo. In Chiredzi they went to Croco Motors where Albert and Mhofu C went away for about ten to fifteen minutes. When they returned they were in the company of a man clad in blue overalls. The man in the blue

overalls sat in the front passenger seat and gave directions to the appellant as he drove them all to Chiredzi. From Chiredzi turn-off they traveled for about 30 km along the Chiredzi-Mutare road. The man in the blue overalls then advised him to turn left and follow a secluded path into a bushy area. After D driving for about one to one and half kilometers into the bush the appellant was instructed to stop. The three men took their guns and advised him to go back to Chiredzi and to return to collect them at around 19.00 hours in the evening. They then went into the bush. When the appellant returned to the same place in the evening to collect them he was arrested by the police. E

The appellant stated that he knew nothing, had not participated in the criminal activity in any way and that the ammunition found in his motor vehicle was left there by Albert Svuure.

The prosecutor then applied to the court to seek formal admissions from the appellant. He indicated to the court the admissions that he was seeking from F the appellant. The trial magistrate then explained the provisions of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to the appellant and advised him that he was not obliged to make any admission and that if he did the substance of the admission would be taken as proven fact(s). The following are the admissions which were sought from and made by the appellant: firstly, that he was hired by Albert Svuure and his friends to G drive them to Malilangwe Trust Estate in Chiredzi on the day in question. Secondly, that he drove them to Malilangwe Trust Estate, knowing that they were going to hunt rhinoceros. Thirdly, that upon arrival he drove them deep into Malilangwe Trust Estate. Fourthly, that later in the day at around 19.00 hours he then proceeded to collect or pick them up. Fifthly, that he had been promised a payment of US$500 for his services from the proceeds of H

Mavangira J

A the hunting expedition. Sixthly, that when he went with Albert Svuure and company to Malilangwe Trust Estate he knew that they were going to hunt for rhinoceros and that he knew that it was unlawful. The seventh admission sought and made was that, when he took them from Mvuma to Malilangwe Trust Estate, Albert and his friends had guns and ammunition. The eighth admission sought by the State and made by the appellant was that two rounds B of ammunition were subsequently recovered from his motor vehicle Toyota Hilux registration number ABE 2449. The ninth and last admission sought and made was that when he was subsequently arrested along the Chiredzi-Mutare road he was still in the premises of Malilangwe Trust Estate.

After the accused had made the admissions the prosecutor closed the State C case. In his evidence-in-chief the appellant stood by his defence outline and stated further that he was only hired by Albert Svuure to take him to Chiredzi where he and his colleagues would hunt for rhinoceros. In return for transporting them he would subsequently be paid a fee of US$500. He reiterated his denial of hunting rhinoceros, emphasizing that it was Svuure and his friends who had hunted and not himself. He said that the rounds of D ammunition found in his motor vehicle were left in there by Svuure and his friends and not by him.

During cross-examination by the prosecutor the appellant, among other things, admitted that when he left Mvuma for Chiredzi he knew that the business for which he had been hired was unlawful. He was told the full nature of the E transaction whose purpose was to hunt rhinoceros. He said that he knew at the time that hunting of rhinoceros is illegal but that he proceeded to assist or abet them only because he wanted the money. When it was put to him that he had facilitated the transaction and that he was therefore criminally liable, his response was that he was not involved and was only after money. F The appellant then closed his case.

The appellant has appealed against his conviction on the grounds, firstly, that the lower court misdirected itself by convicting him solely on the basis of admissions that had been improperly and unprocedurally led and initiated by the prosecution. Secondly, that the lower court erred at law in not assisting the unrepresented appellant on the effect "legally and procedurally of the G forced admissions". Thirdly, that the appellant, having only admitted to providing transport to the perpetrators, the lower court "erred in relying on admissions to lable (label) appellant an accomplice". The final ground of appeal is that the lower court misdirected itself in convicting the appellant on the second count of possessing ammunition when the court was aware H that the appellant did not know of the bullets left behind the seat.

Mavangira J

In his oral submissions Mr *Debwe,* for the appellant, conceded that from a A perusal of the record it is clear the appellant was properly advised by the court of the legal effect of his making the admissions that the State was seeking. He also submitted that as no hunting took place because of the exchange of fire that then ensued and resulted in the unfortunate death of three members of the gang, the appellant was rather a conspirator and not B an accomplice to hunting.

There is no evidence that any hunting took place. The would-be hunters met their demise before they could carry out their planned mission. The basis for the appellant's prosecution appears to be a contention that he was part and parcel of the planned scheme to hunt rhinoceros in Malilangwe Trust Estate. That he was a willing participant is clear even on his own version of C events. He was advised in no uncertain terms what the planned expedition entailed and he was clearly told what his role in the whole scheme was. He agreed to perform his own part of the scheme well knowing that the whole intended operation was illegal. We therefore agree with Mr *Debwe* that the appellant was a conspirator in the intended scheme or expedition. D

Section 273 of the Criminal Law (Codification and Reform) Act provides as follows:

> "A person charged with any crime may be found guilty of –
>
> (a) threatening, incitement, *conspiracy* or attempting *to commit that crime* or any other crime of which the person might be convicted on the charge; or
>
> (b) assisting a perpetrator of that crime or of any other crime of which the E person might be convicted on the charge" (emphasis added).

In casu, there was no hunting but there certainly was a conspiracy to hunt. The appellant, with the full knowledge of the proposed operation and with the full knowledge that the planned operation was illegal, willingly agreed to be part of and to perform a crucial part in the unlawful affair. The Concise F Oxford Dictionary defines the word "conspiracy" in the following terms: "act of conspiring; combination for unlawful purpose, plot" and a "conspirator" as "one engaged in a conspiracy".

In *S* v *Beahan* 1991 (2) ZLR 98 (S) at 118B –E Gubbay CJ stated:

> "*In general a conspirator is liable for the crime perpetrated by his co-conspirators.* G But where he has effectively withdrawn from the conspiracy, he does not remain liable for the commission of any subsequent criminal acts. The terms 'withdrawal' and 'dissociation, which are often used in this context of the law, refer to voluntary action by a conspirator which is legally effective to terminate his relationship to the conspiracy [emphasis added].
>
> The dominant policy of the law in allowing such a defence is to encourage the conspirator to abandon the conspiracy prior to the attainment of its specific object H

Mavangira J

> A and, by encouraging his withdrawal, to weaken the group which he has entered. In *R* v *Chinyerere* 1980 ZLR 3 (A) at 8E; 1980 (2) SA 576 (RA) at 579G Lewis JP said that:
>
> > '… a conspirator can withdraw from the enterprise even at the last moment, and in the event of his withdrawal he is entitled to his acquittal on the main charge, and is liable to be convicted only of the offence of conspiring to B commit the crime in question.'"

And at 121D-F Gubbay CJ continued:

> "I respectfully associate myself with what I perceive to be a shared approach, namely, that it is the actual role of the conspirator which should determine the kind of withdrawal necessary to effectively terminate his liability for the commission of the substantive crime. I would venture to state the rule this way: where a person C has merely conspired with others to commit a crime but has not commenced an overt act toward the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose. Where, however, there has been participation in a more substantial manner something further than a communication to the co-conspirators of the intention to dissociate is necessary. D A reasonable effort to nullify or frustrate the effect of his contribution is required. To the extent, therefore, that the principle enunciated in *R* v *Chinyerere supra* at 8E is at variance, I would with all deference depart from it."

I am aware that there is no debate in the instant matter as to whether or not the appellant withdrew or dissociated himself from the enterprise. He in fact played a prominent, though complementary role, that was meant to ensure E the successful completion of the illegal mission. As fate would have it, his intended role of providing essential and necessary transport out of the trust area was overtaken by events. But that is of no immediate relevance to his criminal liability. The above *dicta* are cited merely for their assistance in exposing or clarifying how the law views a conspirator.

Indeed, when the F provisions of s 273 of the Criminal Law (Codification and Reform) Act were brought to Mr *Debwe*'s attention he indicated that he had not had regard to it earlier but that, on his reading of it, it was clear that the appellant's conduct and participation placed the appellant squarely within its ambit. We agree with him.

Although, in written submissions, Ms *Dube* for the State did not support G either the conviction or the sentence, in her oral submissions she revised her stance and indicated that she had adopted a very narrow view of the facts but was now of the view that both the conviction and sentence were in order and there was no justification for any interference with either.

Although submissions were made regarding the order of forfeiture, there was H no appeal against sentence. In any event, no valid justification was placed

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Mavangira J

before us why we should interfere with it. Neither was any misdirection on A the part of the trial court in this regard placed before us. The only pertinent observation that we made was that the appellant was fortunate in that he got off with a more lenient sentence than the case otherwise warranted.

In the result and for the above reasons the appellant's appeal is dismissed. B

OMERJEE J concurred.

Muzenda & Partners, appellant's legal practitioners C

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Document 54 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/S v HUNDA & ANOR 2010 (1) ZLR 387 (H)

S v HUNDA & ANOR 2010 (1) ZLR 387 (H)

Citation	2010 (1) ZLR 387 (H)
Case No	Judgment No. HH-124-10
Court	High Court, Harare
Judge	Uchena J
Heard	14 June 2010
Judgment	14 June 2010
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C **Criminal procedure** – *review – automatic review – requirement to submit record for review within a week – unacceptability of delays*

Criminal procedure *(sentence) – general principles – seriousness of particular offence – level of sentence should reflect seriousness of offence – maximum sentences should be reserved for most serious examples of offence –* D *youthful offenders – desirability of avoiding long prison sentences*

Criminal procedure *(sentence) – offences under Criminal Law Code – theft – theft of motor vehicle – opportunistic theft by youthful offenders – appropriate sentence*

Headnote

E The two accused pleaded guilty to and were convicted of contravening ss 113 and 131 of the Criminal Law Code [*Chapter 9:23*] (theft and unlawful entry into premises, respectively) and were sentenced to 15 years' imprisonment, of which six years were conditionally suspended. They had entered the complainant's house and stolen various items. Finding the complainant's car keys in the pocket of a jacket, they stole the car F too. Most of the property was recovered. At the time the accused were convicted and sentenced, they were aged 17 and 18 years respectively. The record was sent for automatic review some two and a half years after the accused were sentenced.

Held, that the delay in submitting the record for review was unlawful and G unacceptable. Such delays compromise the quality of justice and are potentially prejudicial to the accused.

Held, further, that the sentences were inappropriate. The theft of the car was opportunistic; they had not gone with the object of stealing the car. Their pleas of guilty should have been given serious consideration. The rigours of imprisonment on young offenders should have had the effect H of reducing the sentence to be imposed and the total effective sentence.

2010 (1) ZLR p388

Uchena J

Youthfulness and the attendant lack of serious consideration of the A consequences of their actions should also have been considered. The 17-year-old accused could have been sentenced to corporal punishment, plus a wholly suspended prison term. He was now above the age of 18, and must be treated as an adult, in the sense that corporal punishment was no longer applicable. The offence was a serious one. He must now be B sentenced to a term of imprisonment, as he could no longer be subjected to corporal punishment. Other forms of punishment, like community service or a fine, would trivialize the serious offences he committed.

Held, further, that the ranges of sentences that may be imposed for theft are fairly wide. This gives judicial officers a very wide discretion in imposing any appropriate sentence. Judicial officers should avoid C imposing sentences around the maximum for cases which are far from being the worst under that crime. The lowest sentence should be for the least offence above the level of triviality and the maximum for the worst example of the crime.

Cases referred to D

S v Butau (1) 1994 (1) ZLR 240 (H)

S v Chirinda & Ors 2009 (2) ZLR 82 (H)

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

S v Katsura 1997 (2) ZLR 102 (H)

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

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

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

Legislation considered

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

Magistrates Court Act [*Chapter 7:10*], s 57(1) F

Judgment

UCHENA J: The accused persons were convicted by a regional magistrate of contravening ss 131 and 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (hereinafter called "the Code"). They unlawfully entered the complainant's premises and stole property from his house and a motor G vehicle from his premises. They pleaded guilty to the charges, and were convicted. They were each sentenced to 15 years'imprisonment, of which 6 years were suspended on conditions of good behaviour. Both counts were treated as one for sentence.

The accused persons unlawfully entered the complainant's house and stole seven long sleeved shirts, four pairs of trousers, a two plate stove, and a H

A jacket which contained car keys. On searching the complainant's jacket looking for money, they found the complainant's motor vehicles keys. On leaving the house with their loot, the accused persons stole the complainant's motor vehicle. The motor vehicle was recovered intact except for a missing car radio and CD player. The complainant's other property which was stolen during the unlawful entry was valued at $2 billion dollars and of that B property valued at $1.86 billion dollars was recovered. Most of the stolen property for both the aggravated unlawful entry and theft of motor vehicle was recovered. The accused persons did not therefore substantially benefit from the crimes they committed.

The accused persons were, at the time they were convicted and sentenced , C aged 17 and 18 years respectively. They are young first offenders, who pleaded guilty. They were sentenced on 1 August 2007. The record of proceedings was submitted for review in January 2010. I raised issues on the appropriateness of the charge in count one and of the sentence in view of the accused persons' ages.

D The regional magistrate in response commented as follows:

> " In assessing sentence the court was heavily influenced by the daring and determination of the accused persons.
>
> However in retrospect I am of the opinion that perhaps the sentence was a trifle too harsh in view of their youthfulness.
>
> I agree that the charge in count 1 is not properly framed"

E The charge on which the accused persons were convicted in count one reads as follows:

> "In that on the night between the 16 and 17 of July 2007 and at No 17 Arkden Road, Sunridge, Mabelreign, both Edwin Dino Hunda and Abison George Kariwo unlawfully, intentionally and without permission from Martin Dangeni, the lawful occupier of the premises concerned, or without lawful authority, entered F Martin Dangeni's premises at No 17 Arkden Road, Sunridge, Mabelreign, and stole 7 long sleeved shirts, 4 pairs of trousers, 2 plate stove and car keys of a Peugeot 306 XN, knowing that Martin Dangeni was entitled to possess or own or control the property and intending to deprive Martin Dangeni permanently of his ownership, possession or control of the property."

The charge was framed as if it was for what used to be the crime of G housebreaking and theft. That offence no longer exists. It was replaced by two separate offences, one of contravening s 131(1) of the Code, for unlawful entry, and the second of contravening s 113(1)(a) of the Code, for theft. There will, however, be no prejudice to the accused persons if the charge is amended on review. They admitted unlawfully entering the complainant's H premises. That constitutes a contravention of s 131(1). By admitting that

they stole the property already referred to, they admitted committing an A offence within the complainant's house. The unlawful entry was therefore aggravated and they should therefore in count one have been charged with contravening s 131(1)(a) of the Code. The correct framing of charges for the contravention of s 131(1)(a) was dealt with in *S* v *S Chirinda & Ors* 2009 (2) ZLR 82 (H) at 87-88. The charge in count one is therefore amended to read as follows: 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*] as read with s 131(2) (e):
>
> In that on the night between the 16 and 17 July 2007 and at No 17 Arkden Road, Sunridge, Mabelreign, both Edwin Dino Hunda and Abison George Kariwo, C unlawfully, intentionally and without permission or

authority from Martin Dangeni, the lawful occupier of the premises concerned, or without other lawful authority, entered Martin Dangeni's premises by opening a broken window and gained entry into those premises through the window".

The offences were committed on the night of 16 to 17 July 2007. The accused persons were sentenced on 1 August 2007, but their record of proceedings D was submitted for review in January 2010, about two and half years later. The trial regional magistrate merely signed the review cover and forwarded the record of proceedings for review. He should have explained the delay. I raised the issues referred to above by letter dated 25 January 2010. The regional magistrate's reply is dated 9 April 2010, but was referred to my office in May 2010. The trial regional magistrate did not again explain the E delay in respondent to the issues I raised.

Delays in submitting records of proceedings for review, and responding to issues raised by the reviewing judge are unlawful and unacceptable. They compromise the quality of justice, and are potentially prejudicial to accused persons. F

In terms of s 57(1) of the Magistrates Court Act [*Chapter 7:10*] (hereinafter called the Magistrates Court Act), the record of proceedings must be submitted for review "not later than one week next after the determination of the case". In this case the case was submitted for review two and half years after the period stipulated by the legislature. The clerk of court did not comply with G the law. The magistrate, who have ensured that the clerk did comply, did not take any notice. He too did not treat the case with the urgency it deserved. He took three months to respond to the issues I raised. Section 57(1) of the Magistrates Court Act provides as follows:

"(1) When any court sentences any person –

(a) to be imprisoned for any period exceeding twelve months; or H

A (b) to pay a fine exceeding level six;

the clerk of the court shall forward to the registrar, not later than one week next after the determination of the case, the record of the proceedings in the case, together with such remarks, if any, as the magistrate may desire to append"

The magistrate's remarks in terms of s 57(1) can be in relation to the proceedings. He can also remark on delays in sending the record of proceeds B for review. The remarks are simply those, in relation to the case, which the magistrate may desire to append. To simply submit a record for review two and half years after the determination of the case, without comment, is unacceptable.

The issue of greater concern is the severity of the sentences imposed on the C accused persons. They were each sentenced to 15 years'imprisonment, both counts being treated as one for sentence. The regional magistrate correctly treated the two counts as one for sentence, as they were closely related in terms of time, place of occurrence, and sequence of events. The commission of count one led to the commission of count two. The accused persons were, at the time they committed these offences, aged 17 and 18 years respectively. D They set out to unlawfully enter the complainant's house. They obviously planned and resolved to commit that offence. They, however, fortuitously found the complainant's motor vehicle's keys in the jacket they stole from the complainant's house during the unlawful entry. They had not come to steal the motor vehicle. The circumstances enticed them to steal it. They E are therefore circumstantial offenders in respect of the theft of the motor vehicle. They should not have been sentenced as if they had gone out with the intention of stealing the motor vehicle.

The sentences on their own are not appropriate for young first offenders aged 17 and 18 years respectively. Their pleas of guilty should have been given serious consideration. The rigours of imprisonment on young offenders F should have, had the effect of reducing the sentence to be imposed and the total effective sentence. Youthfulness and the attendant lack of serious consideration of the consequences of their actions should also have been considered.

In *S* v *Tendai and Anor (Juveniles)* 1998 (2) ZLR 423 (H) at 428- 429 Gillespie G J, commenting of the sentencing of juveniles of about the accused's age, said:

"In *S* v *Zaranyika & Ors*, this court, through Bartlett J, attempted to bring some rationality to the difficult area of sentencing offenders aged 17-19 years. Such persons were not normally beaten – corporal punishment cannot be imposed upon persons 18 years and above. After a careful review of authorities on the principle of imprisonment for young offenders and of precedents in sentencing, H the learned judge concluded at 278C:

Uchena J

> 'While Zimbabwe would not want to be a nation where rapists of the accused's A age are not dealt with appropriate severity, it would also not, to my mind, want to be a nation where 17- and 18-year-olds are treated as fully grown mature adults and sent to prison for many years for offences such as rape. As I have previously indicated, a balance needs to be drawn.'

The learned judge drew the balance in the four cases before him by recommending sentences of 5 to 6 years 'imprisonment, with 11/2 to 21/2 years suspended – in the B case of rapes of girl children by 17- and 18 year-olds, and a sentence of 5 years, all of which was suspended, in the case of a similar offence by a 15-year-old, where institutionalization would have been appropriate but could not be put in place. These sentences replaced punishments of 6 to 10 years, which had been imposed by the magistrates concerned.

That judgment has been successful in ensuring that a necessary distinction C is drawn in sentencing older juveniles and young adults, as opposed to more mature offenders".

In this case, the 17-year-old could have been sentenced to corporal punishment, plus a wholly suspended prison term. He is now above the age of 18, and must on the consideration of the appropriate sentence on review be treated, as an adult, in the sense that corporal punishment is no longer applicable. D

In *S* v *Zhou* 1995 (1) ZLR 329 (H) at 332-333 Chatikobo J, dealing with the sentencing of a juvenile who committed an offence before attaining the age of majority, but was sentenced after attaining the age of majority, said:

> "If the accused was a juvenile at the time of commission of the offence but was an adult at the time of conviction should he have been sentenced as a juvenile? E
>
> Section 329(1) (formerly s 330(1)) of the Criminal Procedure and Evidence Act [*Chapter 59*] (the Act) provides that –
>
> > 'Where a male person under the age of eighteen years is convicted of any offence, the court which imposes sentence upon him may –
> >
> > (a) in lieu of any other punishment; or
> >
> > (b) ... F
> >
> > sentence him to receive moderate corporal punishment, not exceeding six strokes.'
>
> The precursor to s 329(1), namely s 330(1) of the Act, was dealt with in *S* v *Chitiki* 1986 (1) ZLR 60 (H) where Gibson J, with the concurrence of Reynolds J, held that the effect of the provision is to make the operative date the date of conviction and not the date of commission of the offence. In other words, if G the accused who commits an offence while he is a juvenile is convicted after the attainment of majority status he should be sentenced as an adult. I perceive this to mean that while the sentencing court is entitled to take into account the 'frailty and deficiencies of youth at the time of commission of the offence' (*S* v *Pledger* 1975 (2) SA 244 (E) at 246H), it is not hidebound by the accused's bygone youth in settling upon an appropriate punishment. One of the reasons for distinguishing between juveniles and adults in sentencing is to ensure that H

Uchena J

> A young and immature offenders are not exposed to the harsh conditions which are attendant upon the fact of imprisonment. Where the offender has attained majority and is able to withstand the rigours of incarceration, the fact that he was a juvenile at the time of commission of the offence should be no bar to his incarceration if the circumstances so dictate. In any event, s 329(1) of the Act does not prohibit the incarceration of juveniles. It merely gives the court a choice. It is a choice which, like any other form of discretion, should be exercised judicially.
>
> B In my view, it would not be an improper exercise of discretion for a court to send to jail an adult who committed a brutal rape on an infant of four years while he was a juvenile. This is one of those cases where the accused should have been sentenced in the normal way. The proper approach to sentence is dealt with by Bartlett J in a thorough review judgment in the case of *S* v *Zaranyika & Ors* 1995 (1) ZLR 270 (H). I would commend it to all magistrates. It is rewarding C to read it and commit to memory the exhortations contained therein."

In this case I will extend the reasoning of Chatikobo J to the sentencing of a former juvenile on review. The then 17-year-old was a juvenile when he was sentenced by the trial court but has now attained the age of majority. Even though I am of the view that he should have been sentenced to corporal D punishment plus a wholly suspended term of imprisonment, if the record of proceedings had been timeously submitted for review, it is now not possible to impose such a sentence on him

because he is now an adult. I am compelled to send him to prison for the portion in lieu of which he should have been sentenced to corporal punishment. The offence he committed is a serious one. He must now be sentenced to a term of imprisonment, as he can no E longer be subjected to corporal punishment. Other forms of punishment, like community service or a fine, would trivialize the serious offences he committed.

The trial court did not give serious consideration to the accused persons' moral blameworthiness. I have already said that they are circumstantial F offenders in respect of the theft of the complainant's motor vehicle. The motor vehicle was recovered intact. Only a radio and CD player were stolen from it. Therefore their stealing a motor vehicle, after unlawfully entering the complainant's premises, should have been considered in its proper perspective. The ages of the accused persons should also have been given serious consideration. It is counter productive to send 17- to 18-year-olds G to prison for 15 years. The length of the sentences imposed by the regional magistrate induces a sense of shock.

In *S* v *Zaranyika & Ors* 1995 (1) ZLR 270 (H) the headnote (which correctly summarises the reasoning of Bartlett J) reads:

> "Normally a juvenile should never be sent to prison unless the offence is so serious H that only a prison sentence can be justified. In prison he is bound to mix with the

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Uchena J

> worst elements of society. It is a sad reflection on Zimbabwean society that the A level of serious offences committed by persons in the 17-to 18-year age group is markedly increasing. Factors such as the high percentage of the population under the age of 18 and the dismal employment prospects are undoubtedly large causative factors.
>
> Rapes committed by young offenders are regrettably becoming more and more commonplace. *The prevalence and need for deterrence of such offences are* B *relevant considerations but have their limitations. It is not possible to justify imposing more and more severe sentences on the grounds of prevalence; the intrinsic moral blameworthiness of the offence is the best guide as to the appropriate sentence. Indignation and passion must not be allowed to sway fairness and reason*. There is reason to believe that the deterrent effect of sentence is not necessarily proportionate to its length; in this field it is likely C that there operates a law of diminishing returns. Nor should it be assumed that retribution, and recognition of the indignation and fears of the community at large, will always demand a more severe sentence. *The court should have regard not only to the nature of the crime committed and the interests of society, but also to the personality, age and circumstances of the offender. In the case of a juvenile offender, it is above all necessary for the court to consider whether the punishment would serve the interests of society as well as those of the* D *offender. The interests of society cannot be served by disregarding the interests of the juvenile, because a mistaken form of punishment might easily result in a distorted (or more distorted) personality being returned to society*. While Zimbabwe would not want to be a nation where young rapists are not treated with appropriate severity, it would also not want to be a nation where 17-and 18-year-olds are treated as fully mature adults and sent to prison for many years E for offences such as rape" (emphasis added).

I agree with these comments. Rape is, in my view, a more serious offence than unlawful entry, and of equal seriousness with theft of a motor vehicle. I am therefore persuaded that, in the absence of corporal punishment, imprisonment is unavoidable, but its length must be carefully considered. The accused are in their formative years. They need more guidance than F punishment. As the accused in this case overstepped the line punishable by non-custodial rehabilitative sentences, they should be imprisoned, but for a period which will let them taste the sting of imprisonment to scare them off the life of crime. The sting should not be for too long, so that they will come out adjusted to it. The sentence must seek to cause them to avoid G it in future. If they are imprisoned for periods which brings them out as hardened criminals, society and the offenders will both lose the benefit of a rehabilitative prison sentence. Society will be the greater loser as it will at the end of such a sentence receive into it a schooled and hardened criminal no longer scared of the prospects of being sent back to prison.

In *S* v *Katsaura* 1997 (2) ZLR 102 (H) at 108-109 Bartlett J, commenting H

Uchena J

A on this issue, said:

"The blameworthiness of the appellant in defrauding his employer of some $44 000 was such that only an effective term of imprisonment was appropriate but as Reynolds J stated in *S* v *Ngombe* HH-504-87 at p 2:

> 'It has been repeatedly stressed that a sentence of imprisonment is a rigorous and severe form of punishment, often bearing drastic and destructive B consequences for the accused and the members of his immediate family. This form of penalty should be resorted to only if absolutely essential in the circumstances of the case, and only if no other available form of punishment would be preferable and appropriate.'

A corollary of this approach is that where imprisonment is imposed the minimum effective period necessary should be imposed. Greenland J in *S* v *Teburo* HH- C 517-87 (at p 2) explained the rationale behind this approach as follows:

> 'Given the limited avenues available to a judicial officer, he can attempt to achieve this by tempering the sentence with mercy and compassion, especially here when the accused is a contrite first offender. Such an approach is more likely to induce a positive response from the accused than a sentence which will simply brutalise him and lead ultimately to the man redefining himself D as a criminal and behaving accordingly.
>
> Moreover, overlong incarceration is counter-productive. It destroys and contaminates. See *S* v *Khumalo & Anor* 1984 (3) SA 327 (A) at 331. The court therefore ends up contributing to the criminalisation of society.
>
> For the above reasons, it is a better approach for a judicial officer to appeal to the good sense of responsibility residual in the contrite first offender and impose the least punishment which will still achieve the objectives E of punishment.'

A further salutary explanation was made by Blackie J in *S v Hope* HB-18-93 at p 3-4, quoting the words of Macdonald JP (as he then was) in *S* v *Wood* 1973 (2) RLR (A) 11 at 13H-14C:

> *'In imposing a prison sentence on a first offender, sight should never be lost* F *of the fact that, for the greater part, the form of punishment itself, much more than the length of the sentence, is likely to reform him and act as a deterrent to others*. This is particularly true where the offender belongs to a class, the members of which, whatever their race, feel deeply the shame and stigma of a prison sentence. The publicity of the trial, the exposure as a criminal, the far reaching and often devastating effect of imprisonment on his social, family and economic life are, in the case of a first offender, aspects G of punishment which should never be overlooked or underestimated. *It is these consequences attendant on serious criminal conduct, much more than the length of the prison sentence, which are likely to deter other persons and to reform the first offender. If they do not, it is unlikely that the length of the prison sentence will, in the majority of cases, have a significant effect on bringing about the desired results. In this connection I should make the point that it should not be thought* H *that to deprive a first offender of his liberty*,

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Uchena J

> *even for a short period of six months, is not to impose a substantial term* A *of imprisonment. To the first offender, accustomed to liberty and deprived of it for the first time, even such a period would, I would think, seem to be interminable. It is of course, of the utmost importance that a person should not be kept in prison for longer than is necessary in the interests of the offender, of society, or both*. The reasons for this need hardly be stressed, nor is it necessary to stress that in a civilised society, the retributive effect of punishment should not receive great weight.' B

These salutary explanations are, however, it seems seldom given meaningful effect by magistrates. Like the inability to give proper weight to a plea of guilty, the need to impose only the minimum appropriate term of imprisonment, is a custom more noted in the breach than in the observance" (emphasis added).

Sections 131(1)(a) and 113(1)(a) of the Code provide for sentences ranging C from a fine not exceeding level thirteen to imprisonment for a period not exceeding 15 years, and a fine not exceeding level fourteen to imprisonment for a period not exceeding twenty-five years respectively. The regional magistrate, treating both counts as one for sentence, imposed the maximum sentence imposable for contravening s 131(1)(a) of the Code The ranges provided by ss 131 and 113 of the Code are fairly wide. This gives judicial officers a very D wide discretion in assessing the appropriate sentence. A judicial officer must thus avoid the temptation of imposing ever-increasing sentences for these offences. He or she must avoid imposing sentences around the maximum level of the range for cases which are far from being the worst under that crime. He or she must carefully consider the appropriate sentence for each case, E bearing in mind that the least sentence is for the least offence above the trivial level referred to in s 270 of the Code under that crime, and the maximum sentence for the worst offence under that crime. Each case must be assessed and be

punished according to the offender's moral blameworthiness, which pegs the level of punishment deserved by the accused. The sentence must suit the offence and the offender. F

In *S* v *Butau* 1994 (1) ZLR 240 (H) at 242 to 243 Garwe J (as he then was) said:

> "The principle is now established that the maximum penalty should be reserved for the most serious offences or persistent offenders.
>
> In *S* v *Mutusva* HH-156-86, the accused was charged with wrongfully and unlawfully carrying on the business of an ivory dealer without being in possession G of the necessary licence, contrary to the provisions of the Parks and Wild Life Regulations 1981. On conviction, he was sentenced to pay the maximum possible fine. In reducing the sentence, Reynolds J remarked that –
>
> > '… the maximum sentences prescribed should be reserved for the worst or most persistent of offenders ... Once again ... the magistrate attempts to justify the most severe sentence allowed by the Legislature on the basis H

2010 (1) ZLR p397

Uchena J

> A of prevalence. I can only repeat that this approach is improper. It is to be hoped that the magistrate will now bear this well-recognized principle in mind in future cases.'
>
> In *S* v *Mathe* HB-104-83 the accused, who was 18 and a first offender, killed a heifer on a commercial farm and took away the meat. He was subsequently convicted, on his plea of guilty, of theft of stock and sentenced to receive 10 B cuts with a light cane and in addition to a wholly suspended prison term of 18 months' imprisonment with labour. Having considered that ten strokes was the maximum number of strokes imposable under the Criminal Procedure and Evidence Act, Gubbay J (as he then was) remarked:
>
> > 'I do not question the propriety of ordering the accused to receive a moderate correction co-joined with a period of conditional imprisonment. After all he committed a serious offence and one which is particularly prevalent in C the Gwanda area. But the number of cuts inflicted was grossly excessive. Ten cuts is the maximum that may be imposed on a juvenile in terms of s 330 (1) of the Criminal Procedure & Evidence Act [*Chapter 59*]. I venture to think that very few crimes would demand a juvenile being visited with such a degree of judicial barbarism. Perhaps offences of unprovoked and extreme violence or of bestial or wanton cruelty to the person of another might qualify. The present offence certainly does not'.
>
> D The same sentiments were expressed by Reynolds J in *S* v *Bote* HH-340-87 and by Sansole J in *S* v *Maposa & Ors* HH-395-85".

Applying the above principles to this case, I am persuaded that, though theft of a motor vehicle would normally attract sentences ranging between 7 to 10 years, such sentences are not appropriate in this case. I have already pointed E out that the accused persons did not set out to go and steal the motor vehicle. They stole it when they fortuitously found its key in the complainant's jacket. They can therefore not be classified as dealers in stolen motor vehicles. The principles enunciated in S *v Dube & Anor* 1995 (2) ZLR 321 (S) do not apply in this case. Although theft of motor vehicles has become rampant, in this case the theft was induced by the accused finding the motor vehicle's keys in F the jacket they had stolen. There is no evidence of international connections in the accuseds' conduct. There is no evidence that they deal with stolen motor vehicles, nor that the motor vehicle was found intact because, as dealers, they had an interest in its preservation. A much shorter sentence is therefore called for when this case is compared to *S* v *Dube (supra*) and the G cases there cited. The sentence to be imposed on the accused should also take into account their youthfulness. The sentence for unlawful entry should, because of the value stolen, and the recovery of most of the stolen property, be closer to the lower level suggested in s 131(1)(a) of the Code. As the offence in this case is aggravated by subs (2)(e), the sentence should range from a fine not exceeding level thirteen or double the value of the stolen H property. This means consideration should start from a fine moving upwards

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2010 (1) ZLR p398

Uchena J

to the maximum of 15 years'imprisonment. The maximum, as already said, A should be reserved for the worst contravention of s 131(1)(a) of the Code. The present case is far from being the worst. It is merely above the lower level, but below the middle level. That, coupled with the accused persons' ages, must result in a sentence not exceeding two years. The theft of the complainant's motor vehicle, in the circumstances described above, must B on its own not attract a sentence exceeding five years. When both counts are treated as one, their cumulative effect and interrelationship must tone down the global sentence to a total of six years.

After considering the above I am satisfied that the accused persons have already felt the sting of imprisonment. They were sentenced on 1 August 2007. They have spent close to three years in prison. They are, however, still C young, and need deterrence against committing crimes. A reasonably long portion of the total term of imprisonment to be imposed should be suspended to deter them from committing similar crimes.

The sentence imposed by the regional magistrate is set aside and is replaced by the following: D

> Each accused, both counts being treated as one for sentence: 6 years' imprisonment of which 3 years are suspended for five years on condition the accused does not during that period commit any offence of which dishonesty is an element and for which he will be sentenced to imprisonment without the option of a fine. E

BHUNU J agrees.

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Document 55 of 62

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/EX PARTE NDORO 2010 (1) ZLR 399 (H)

EX PARTE NDORO 2010 (1) ZLR 399 (H)

Citation	2010 (1) ZLR 399 (H)
Case No	Judgment No. HH-119-10
Court	High Court, Harare
Judge	Uchena J
Heard	17 June 2010
Judgment	17 June 2010
Counsel	Details not supplied
Case Type	Civil review
Annotations	No case annotations to date

Flynote

C **Court** – *children's court – jurisdiction – application to for guardianship of child – when court has jurisdiction to hear such application*

Family law – *child – guardianship – application – mother applying for guardianship – father still alive – need to give notice of application to father – children's court – application to for guardianship of child –* D *when court has jurisdiction to hear such application*

Headnote

The applicant, who was separated from her husband, applied to the children's court for the guardianship of the minor child of the marriage. The father of the child was not notified of the application. The court granted the E application. On the review by the High Court:

Held, that under s 3 of the Guardianship of Minors Act [*Chapter 5:08*], during the subsistence of the marriage, and after divorce or separation but before the High Court or a judge has granted the sole guardianship to either of them, the father remained the minor's guardian. The applicant's application sought to take that guardianship from him. Doing so without F notifying him offended against the *audi alteram partem* rule.

Held, further, that the children's court in any event had no jurisdiction to grant guardianship to the child's mother. In terms of s 9 of the Act, that court can hear applications for guardianship by relatives, other persons having care and custody of the minor, or a probation officer, but only if the minor has no natural guardian or tutor testamentary. Where one G of the minor's natural parents is alive, only the High Court can hear an application for guardianship.

Legislation considered

Guardianship of Minors Act [*Chapter 5:08*], ss 3 & 9

Uchena J

Judgment

UCHENA J: The applicant, Sekai Ndoro, is the natural mother of Samatha A Ruhukwa. She applied to the Mutare juvenile court for an order granting her guardianship and custody of Samatha. The application cites her as the applicant. No respondent was cited, though Samatha's father's identity is revealed in the applicant's founding affidavit. In her affidavit the applicant says she stays with Samatha, because her father has remarried. There is B therefore a respondent who should have been given notice of the application. The application was heard, in spite of the applicant's failure to give notice to Samatha's father. According to Chipo Ndoro's supporting affidavit, Samatha's father has left the country. However, that does not justify his not being given notice of an application which affects his guardianship of Samatha.

The juvenile court granted the application. The record of proceedings C was forwarded to this court for automatic review in terms of s 9(6) of the Guardianship of Minors Act [*Chapter 5:08*] (hereinafter referred to as the Act). Section 9(6) of the Act provides as follows:

> "(6) Whenever the children's court appoints a person as guardian in terms of subsection (4), the clerk of the children's court shall, within seven days thereof, D submit the record of the proceedings in the matter to the registrar of the High Court, who shall lay the record before a judge in chambers."

The record landed on my desk. I asked the magistrate to comment on why Samatha's father was not given notice of the application. The magistrate conceded the error. Samatha's father was entitled to notice because, in terms of s 3 of the Act, after his separation from the applicant he retained E guardianship of Samatha. Section 3 of the Act provides as follows;

> "Where the parents of a minor –
>
> (*a*) are living together lawfully as husband and wife; or
>
> (*b*) are divorced or are living apart and the sole guardianship of the minor has not been granted to either of them by order of the High Court or a judge; F
>
> the rights of guardianship of the father shall be exercised in consultation with the mother, and if a decision of the father on any matter relating to guardianship is contrary to her wishes and in her opinion likely to affect the life, health or morals of the minor to his detriment, the mother may apply to a judge in chambers, who may make such order in the matter as he thinks proper."

This means that during the subsistence of the marriage, and after divorce G or separation but before the High Court or a judge has granted the sole guardianship to either of them, the father remains the minor's guardian. The applicant's application sought to take that guardianship from him. Doing so without notifying him offends against the *audi alteram partem* rule.

The juvenile court made a more serious error when it heard the applicant's application because it had no jurisdiction to hear such an application. In terms H

Uchena J

A of s 9(1) and (2) of the Act, a juvenile court can only hear an application for guardianship by a relative, by another person having care and custody of the minor or by a probation officer. It can

only hear such an application if the minor has no natural guardian or tutor testamentary. Subsections (1) and (2) of s 9 of the Act provide as follows:

> B "(1) Without prejudice to the rights, powers and privileges of the High Court as upper guardian of minor children, and the Master in terms of section 74 of the Administration of Estates Act [*Chapter 6:01*], the children's court may, on application in terms of this section, appoint a fit and proper person to be the guardian of a minor who has no natural guardian or tutor testamentary.
>
> (2) Where a minor has no natural guardian or tutor testamentary – C
>
> (*a*) a relative or person having the care and custody of the minor; or
>
> (*b*) a probation officer;
>
> may apply to the children's court by way of an application lodged with the clerk of that court for the appointment of a person as guardian of the minor, and such application may propose the appointment of a specified person as the guardian."

This means that the juvenile court can only exercise jurisdiction and appoint D a guardian for a minor child if that child has no natural guardian. In this case the applicant is the minor child's natural mother and therefore the child's natural guardian. An application to the juvenile court, in terms of s 9(2)(a) and (b) of the Act, can only be made by a relative or person having the care and custody of the minor, or by a probation officer. It cannot be made by the minor's natural guardian, because what qualifies such an application is E the absence of a natural guardian or tutor testamentary. This is confirmed by s 3 of the Act which provides that:

> "Where the parents of a minor –
>
> (*a*) are living together lawfully as husband and wife; or
>
> (*b*) are divorced or are living apart and the sole guardianship of the minor has F not been granted to either of them *by order of the High Court or a judge* ..." (emphasis added)

This means that guardianship disputes between the minor's natural parents are determined by the High Court or a judge of the High Court. The juvenile court did not therefore have jurisdiction to hear the applicant's application. G The applicant should have applied to the High Court in terms of s 4(1) of the Act for guardianship. Section 4(1) provides as follows:

> "(1) The High Court or a judge thereof may –
>
> (*a*) on the application of either parent of a minor in proceedings for divorce or judicial separation in which an order for divorce or judicial separation is granted; or
>
> H (*b*) on the application of either parent of a minor whose parents are divorced

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Uchena J

> or are living apart; A
>
> if it is proved that it would be in the interests of the minor to do so, grant to either parent the sole guardianship, which shall include the power to consent to a marriage, or sole custody of the minor, or order that on the predecease of the parent named in the order, a person other than the survivor shall be the guardian of the minor, to the exclusion of the survivor or otherwise."

This means that no other court has jurisdiction to determine the issue of B guardianship where one of the minor's natural parents is alive. The juvenile court's jurisdiction is limited to circumstances where the minor has no natural guardian or tutor testamentary.

The juvenile court's decision is therefore null and void. It is set aside.

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Document 56 of 62

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/S v CHORUMA & ANOR 2010 (1) ZLR 403 (H)

S v CHORUMA & ANOR 2010 (1) ZLR 403 (H)

Citation	2010 (1) ZLR 403 (H)
Case No	Judgment No. HH-103-10
Court	High Court, Harare
Judge	Uchena J
Heard	3 March 2010;4 March 2010; 15 March 2010; 16 March 2010; 17 March 2010;18 March 2010; 29 March 2010
Judgment	18 June 2010
Counsel	*F Nyahunzvi*, for the State *C Mutandwa*, with him Mrs *R Matsika*, for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal law – *inchoate offences – being an accessory after the fact to a crime – elements – not necessary that accused knows precisely what crime has been committed – circumstances where liability will attach to an accessory after the fact – accessory can be liable even if actual* D *perpetrator raises a defence which entitles him to an acquittal*

Headnote

The elements of the crime of being an accessory after the fact, for the purposes of s 206 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] are: E

1. The knowledge that the actual perpetrator has committed a crime or the realization that there is a real risk or possibility that the actual perpetrator has committed a crime; and
2. The rendering to the actual perpetrator, or his accomplice, assistance which enables him to conceal the crime or to evade justice; and
3. The assistance must be rendered after the crime has been committed.

F The legislature, in s 207(1)(a) to (d) of the Act, intended to attach liability to an accessory after fact even if:

1. He lacked the capacity to commit the offence committed by the actual perpetrator; or
2. He did not know what offence the actual perpetrator had committed but was only aware that the actual perpetrator's conduct was unlawful; G or
3. The actual perpetrator was not aware that the accessory had rendered him assistance; or
4. The assistance rendered did not conceal the actual perpetrator's crime or help him to evade justice.

H Thus, in an appropriate case the accused can be convicted as an accessory

Uchena J

after the fact of the crime which had been committed at the time he A rendered assistance, even if at the time of rendering assistance he did not know what crime had been committed. He must, however, believe that a crime has been committed, and with that knowledge render assistance to conceal it, or help the actual perpetrator to evade justice. Giving false information to a police officer or other person in authority concerning B the circumstances of a crime renders the giver of false information an accessory to the crime. In s 207(2) of the Act, the legislature goes further to

provide that the accessory will be guilty even if the actual perpetrator raises a defence which entitles him to an acquittal. This means that an accessory after the fact can remain in jeopardy even when the actual perpetrator escapes liability. C

Cases cited

S v Mungati & Anor 1999 (2) ZLR 1 (H)

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 3, 47, D 206, 207(1) and (2), 253, 255 and 273

Case information

F Nyahunzvi, for the State

C Mutandwa, with him Mrs *R Matsika*, for the accused

Judgment

UCHENA J: The first and second accused pleaded not guilty to a charge of E murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The State alleged that they murdered the deceased on 18 November 2008. The deceased was their paternal grandfather. They were staying with him in Mhondoro. Their father had died, and their mother stays in Epworth in Harare. F

The accused persons were charged with murder. The State alleged that they planned to eliminate the deceased. Accused one armed himself with a knobkerrie and went to where the deceased was sleeping on the verandah. While accused two stood guard, he struck the deceased twice on the head.

Accused one's defence is that he acted in self defence when the deceased G had cornered him in a corridor. He said the deceased was armed with a raised spear. He struck the spear from the deceased's hand. The deceased remained standing in the corridor, blocking his escape route. He then struck the deceased once on the head to create an escape route, and escaped. He thereafter sent accused two to go and see the injury he had caused. Accused two made a report to him and they together went to see the deceased's H

Uchena J

A injuries, after which they devised a plan to allege that thieves had invaded the homestead and injured the deceased.

Accused two's defence is that he did not participate in the struggle between accused one and the deceased. He said the deceased came to their room before 4 a.m., looking for accused one. He was armed with a spear. Accused B one was not in the room, having gone to attend a traditional ceremony in the village. He reported this to accused one when he came back at 4 a.m. Accused one then said that maybe the deceased had come because they had delayed in going to plough the fields. Accused one went to collect cattle harnessing equipment. He there met the deceased, and came back and told him that he had struck the deceased with a stick. He asked him to go and C observe the deceased's condition. He did so and brought a report to accused one. He later went back to the deceased with accused one, after which they connived to allege that thieves had invaded the home, so they could blame the deceased's injury on the thieves.

Evidence was led by the State and by the accused persons. There were no independent eye witnesses to the murder. The State relied on the evidence D of Elizabeth Chanengeta, and the accused person's confirmed warned and cautioned statements. Elizabeth was the deceased's wife, and is the accused's grandmother. She was asleep when the incident took place. She was woken up by the accused persons after the deceased had already sustained the injury which caused his death. Her evidence is therefore merely what she E witnessed after the fatal blow had been delivered. The post mortem report does not support the delivery of two blows as alleged in the State outline. It confirms accused one's evidence that he struck the deceased once on the head, to create an escape route. The deceased had cornered him in a corridor. Accused one's warned and cautioned statement

refers to his delivering two blows. Accused one, however, explained it by saying the first blow was to F the spear and the second to the deceased's head. We accept that explanation as it is supported by medical evidence. The probabilities favour the accused persons' explanation. If the accused persons had planned the murder, as alleged by the State, they would have killed the deceased who lay helpless in the corridor, before calling out that thieves had invaded the homestead. Why would they risk his surviving to narrate what had happened? We are G convinced the deceased was injured in the circumstances narrated by the accused persons.

After the determination of the above, the following facts became common cause. The accused persons are the deceased's grand children. They stayed with him and his wife in Mhondoro. They are the deceased's late son's children. H Their father died leaving them in the custody of their paternal grandparents.

2010 (1) ZLR p406

Uchena J

Their mother stayed in Epworth with their two siblings. A

The accused persons were not happy with their living conditions. Their grandfather, the deceased, used to wake them up before dawn to go and plough fields. That, according to their mother, was his way of life even during the period she stayed with him as a daughter in law.

On the fateful night, accused one attended a traditional ceremony, and came B back home at 4 a.m. He received a report from accused two that the deceased had been looking for him and that he was carrying a spear. He assumed that the deceased wanted them to harness cattle and go to the fields to plough. He went to get cattle harnessing tools from where they are kept. He carried a T-shaped curved stick he said they used whenever they go to the fields to C plough. He entered a corridor from which he was to access the room where the harnessing tools were kept.

While he was in that corridor, he saw the deceased coming from behind, armed with a raised spear. The first accused struck the spear with the stick he was carrying, and it fell down. The deceased then stood in the passage unarmed. The first accused struck him on the head with the stick. The deceased fell D to the ground. The first accused went back to their room and told accused two what he had done. He sent accused two to go and see the deceased's condition. Accused two came back and reported that the deceased's condition was serious. They went back to the scene, saw the deceased's condition and agreed to report to their grandmother that thieves had invaded the homestead so that they would blame the deceased's injuries on the alleged thieves. E

They gave chase to the imaginary thieves until their grandmother called them back, fearing that they would be injured. They came back and took their grandmother to where the deceased was. They saw that his condition was critical. The news of the incident started spreading in the village. As people gathered at the homestead, the accused persons agreed to hide the F stick accused one had used. Accused two threw it into a Blair toilet.

Arrangements were made to take the deceased to a clinic. The clinic could not attend to him due to the seriousness of the injuries. They later attempted to take him to the district hospital but he died on the way.

The police came while accused one and others were taking the deceased to G hospital. Accused two, who was at home, told them that the deceased had been attacked by thieves. They went back to their station and came back after the deceased had died and his body had been brought back home. Accused two again told them that deceased had been attacked by thieves. They took him to the police station where, after further questioning, he owned up and told them the truth that the deceased had been struck on the head by accused one. H

2010 (1) ZLR p407

Uchena J

A Accused one was arrested. The accused persons recorded warned and cautioned statements in which they told the police that accused one had struck the deceased in the circumstances explained in accused one's statement.

At the time of the deceased's death, accused one was no longer going to school. The parties are not agreed as to whether or not accused two was still B going to school. It is, however, common cause that he had previously been taken by his mother to Harare, where he attended a school she had

secured for him. He however ran away from that school and walked from Harare to Mhondoro on foot. He chose not to go back to his mother's house in Epworth. This demonstrates the second accused's preference as to where he wanted to stay, despite the deceased's demand of hard work from the accused persons.

C There are minor differences between the State's and defence evidence. These are on peripheral issues and do not contribute to the determination of the question whether or not the accused persons are guilty of the offence charged.

Accused one

It is apparent from the common cause evidence that accused one is raising the D defence of defence of the person as provided in s 253 of the Code. Section 253 of the Code provides as follows:

> "(1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if – E
>
> (a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent; and
>
> (b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she believed on reasonable grounds that his or her conduct was necessary to avert the F unlawful attack and that he or she could not otherwise escape from or avert the attack; and
>
> (c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and
>
> (d) any harm or injury caused by his or her conduct –
>
> (i) was caused to the attacker and not to any innocent third party; and G
>
> (ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.
>
> (2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may have been H operating on his or her mind."

Uchena J

Self-defence, or defence of the person, can be a complete defence if all the A requirements set out in subsections (1)(a) to (d) are satisfied. The first accused's uncontroverted evidence established that on the fateful night he came from a traditional ceremony at 4 a.m. He received a report that the deceased was looking for him and was armed with a spear. He believed that the deceased wanted him and his young brother, accused two, to go and plough as was B the norm at the deceased's home. He took a stick he said they normally use when they go to the fields to plough. He proceeded to the room where cattle harnessing tools were kept. While he was in a corridor leading to that room he saw the deceased behind him armed with a spear. The spear was raised up ready to attack. He struck the spear with his stick. It fell to the floor, but the deceased remained standing in the corridor blocking his escape route. C He struck the deceased once on the head. The deceased fell down and the first accused escaped. He went to their room where he instructed accused two to go and check on the deceased's condition. The second accused told him that the deceased had been seriously injured. They went to the scene together and later devised a plan to divert attention from accused one by alleging that thieves had invaded the homestead. D

When these facts are applied to s 253 of the Code, it becomes clear that:

(a) The first accused reacted to an unlawful attack, which was imminent. The deceased held a raised spear in his hand.

(b) The first accused's conduct in striking the spear was necessary to disarm the deceased. He had no other means of escaping from the raised spear. E He then struck the deceased once on the head. He said the deceased was blocking his escape route. He had received a report that the deceased was looking for him armed with a spear. Mr *Nyahunzvi,* for the State, argued that once the spear was on the floor the first accused should have simply run past the deceased or pushed him aside as he was a 79-year-old man. F Mr *Mutandwa,* for the accused, submitted that the first accused was acting under stressful conditions. He feared that the deceased would pick up the spear and use it to stab him. The question which arises is whether the first accused believed on reasonable grounds that his conduct was necessary to avert the unlawful

attack and that he could not otherwise escape from, or avert the attack. The history of the deceased and accused's G relationship comes into play. The first accused in his evidence said the deceased was a violent man who did not hesitate to use any weapon at hand. The accused's grandmother indirectly confirmed this when she confirmed an incident in which the deceased chased away the accused person's mother with a spear when she come to pay her condolences to her in-laws on the death of her husband. The accused persons' mother H

Uchena J

A confirmed the incident. There was also the issue of the birth certificate the first accused had asked the deceased about, resulting in his being threatened with being stabbed with a spear. In my view, the first accused must have reasonably believed that striking the deceased was a necessary means of escaping from the deceased's imminent attack. He said he feared the deceased would pick up the spear and use it on him. The B accused's reasoning is supported by the fact that he struck the deceased once, and ran away. The postmortem report confirms that only one blow was delivered. If his intention was to kill the deceased he would have delivered further blows. The fact that he did not confirms that he merely wanted to clear his escape route. He thereafter sent accused two to check C on the deceased, and subsequently came back to the scene with him. He did not use these opportunities to inflict further injuries on the deceased. This proves the first accused merely wanted to escape from the corridor where he believed the deceased had cornered him.

(c) The fact that the first accused struck the deceased once and escaped from the corridor confirms that the means he used to avert the unlawful D attack was reasonable in all the circumstances. The fact that he merely wanted to escape is demonstrated by his not inflicting further harm when he had the opportunity to do so.

(d) The deceased was armed with a spear. The first accused was armed with a stick. It is obvious that the deceased's weapon was more dangerous E than the first accused's. When he struck the spear down he did not decide to pick it up and use it, though he feared the deceased would pick it and use it on him. His striking the deceased with the stick is, in the circumstances, not grossly disproportionate to the harm that could have been caused by the deceased's unlawful attack with a spear.

In determining whether or not the requirements specified in subs (1) have F been satisfied, I have considered the relationship between the deceased and the first accused. They did not enjoy a good relationship, as explained above. The deceased used to display aggression towards the accused. The accused found himself having to go and harness cattle at 4. a.m., because the deceased was looking for him with a spear. As he went to collect the G harnessing tools, the deceased followed him from behind with a raised spear. That must have caused the first accused to fear extremely for his life. He was, as a result of the history already narrated, a child living under stressful circumstances. He feared the deceased and must have been spurred by his knowledge of the deceased to act in the manner he did. It would be taking an arm-chair approach to expect him to have reacted other than he did. He acted H in the spur of the moment. He did not have time to rationalize things, as one

Uchena J

would in the comfort of a courtroom or a judge's chambers. I would in the A circumstances find that the first accused acted in circumstances where self defence should be accepted as a complete defence to the charge he is facing.

My view that the first accused is entitled to a complete defence is strengthened by the provisions of s 255 of the Code, which provides as follows:

> "If a person genuinely and on reasonable grounds, but mistakenly, believes that B he or she is defending himself or herself or another person against an unlawful attack, he or she shall be entitled to a complete or partial defence in terms of this Part to any criminal charge in all respects as if his or her belief were in fact correct".

This means that even if the first accused genuinely, on the reasonable grounds explained above, but mistakenly, believed that the deceased would pick up C the spear and stab him, he would still be entitled to a complete defence. The mistake would be genuine, in view of it being made by a juvenile, in a moment of fear, in the absence of time within which he could nicely weigh the pros

and cons of the action he was to take. Section 255 applies to any criminal charge, and therefore includes a charge of murder. D

The first accused is therefore found not guilty and is acquitted.

Accused two

Accused two did not, as alleged by the State, participate in the delivering of the blow which caused the deceased's death. He should not have been charged as an actual perpetrator but as an accessory after the fact. He therefore E cannot be convicted on the charge of murder as he only took part after the fatal blow had been delivered. Mr *Mutandwa,* for the accused, submitted that the accused cannot be convicted of murder, as he only assisted after the fatal blow had been delivered and before the deceased had died. He submitted that accused two's case must be treated as that of an accessory after the fact. He relied on *S* v *Mungati & Anor* 1999 (2) ZLR 1 (H) at 3A- F B, where Chinhengo J said:

> "An accessory after the fact is one who, after the crime has been completed, aids or abets the principal perpetrator by conduct which deprives the owner of his rights. An accessory after the fact cannot be convicted of the principal offence on a charge of murder. See *R* v *Mlooi & Ors* 1925 AD 131."

Mr *Nyahunzvi,* for the State, conceded that accused two cannot be convicted G of murder, as he assisted accused one after the fatal blow had been delivered. He submitted, however, that he should be convicted as an accessory after the fact to the crime of murder as he gave false information to the Police after the deceased had died.

The determination of criminal trials after the codification of our criminal H

Uchena J

A law must be based on the provisions of the Code. The former common law positions, as pronounced through case law, must yield to the provisions of the Code, if there is a difference between, the precedents created by case law and the clear provisions of the Code. Where the Code modifies Roman-Dutch law, its provisions must be followed. Case law based on Roman-Dutch law, before its modification by the Code, can only be followed to the extent B relevant to the provisions of the Code. In other circumstances, it can only be used as a guide in interpreting the provisions of the Code. Section 3 of the Code provides as follows;

> **"**(1) The non-statutory Roman-Dutch criminal law in force in the Colony of the Cape of Good Hope on 10 June, 1891, as subsequently modified in Zimbabwe, C shall no longer apply within Zimbabwe to the extent that this Code expressly or impliedly enacts, re-enacts, amends, modifies or repeals that law.
>
> (2) Subsection (1) shall not prevent a court, when interpreting any provision of this Code, from obtaining guidance from judicial decisions and legal writings on relevant aspects of –
>
> (a) the criminal law referred to in subsection (1); or D
>
> (b) the criminal law that is or was in force in any country other than Zimbabwe".

In this case, I will analyse the two situations from which the liability of accused two can be determined. These are, what he did, after the first accused had struck the fatal blow, but before the deceased died, and what he did after the deceased had died.

E Accused two's acts before the deceased died

Accused two assisted the first accused after the fatal blow had been delivered. He can, if the facts of this case proves it, be convicted of assisting the first accused as provided in s 273(b) of the Code, which provides as follows:

> "A person charged with any crime may be found guilty of – F
>
> (a) …; or
>
> (b) assisting a perpetrator of that crime or of any other crime of which the person might be convicted on the charge; if such are the facts proved."

An accused person who assists the actual perpetrator after the commission of the offence is, in terms of s 206 of the Code, an accessory after the fact. G In this case, accused two rendered assistance after accused one had delivered the fatal blow but before the deceased had died. When the deceased was still alive he lied to their grandmother and the Police that the deceased had been attacked by thieves. When the deceased was still alive, he hid in a toilet the stick accused one had

used to attack the deceased. For one to be an accessory after the fact to any crime, one must have acted in a manner that conceals the H crime committed by the actual perpetrator or helped the actual perpetrator to

Uchena J

evade justice. When the second accused acted as described above there was A no murder to be concealed. Section 206 of the Code provides as follows:

> "Any person, other than an actual perpetrator of a crime, who –
>
> (a) knowing that an actual perpetrator has committed a crime; or
>
> (b) realising that there is a real risk or possibility that an actual perpetrator has committed a crime; B
>
> renders to the actual perpetrator or to any accomplice of the actual perpetrator any assistance which enables the actual perpetrator or accomplice to conceal the crime or to evade justice or which in any other way associates the person rendering the assistance with the crime after it has been committed, shall be guilty of being an accessory to the crime concerned."

The elements of the crime of being an accessory after the fact are therefore: C

1. knowledge that the actual perpetrator has committed a crime, or the realization that there is a real risk or possibility that the actual perpetrator has committed a crime, and
2. rendering the actual perpetrator or his accomplice assistance which enables him to conceal the crime or to evade justice, and D
3. that the assistance must be rendered after the crime has been committed.

In this case, the second accused rendered the abovementioned assistance to the first accused before the deceased died. He cannot therefore be found guilty of being an accessory after the fact to the crime of murder, which had not been committed when he rendered the abovementioned assistance. E

It is, however, obvious that when he rendered assistance to accused one, he was aware, and had realized, that accused one had committed a crime. He might not have known exactly what crime had been committed, but that does not matter. In terms of s 207(1)(b) of the Code:

> "(1) A person may be found guilty as an accessory to a crime even if –
>
> (a) … F
>
> (b) the person is only aware of the fact that the conduct of the actual perpetrator is unlawful but unaware of the nature of the crime committed by the actual perpetrator or the manner in which it was committed; …"

This means that in an appropriate case the accused can be convicted as an accessory after the fact of the crime which had been committed at the time G he rendered assistance even if, at the time of rendering assistance, he did not know what crime had been committed. He must, however, believe that a crime has been committed, and with that knowledge render assistance to conceal it, or help the actual perpetrator to evade justice. In this case, accused one had delivered the fatal blow when accused two rendered assistance. He was sent to observe the deceased's injuries. He went back to accused one H

Uchena J

A and reported the seriousness of the injuries he saw. He then went back to the scene with accused one and again saw the injuries accused one had inflicted on the deceased. It was after this that they agreed to allege that thieves had invaded the homestead to divert attention from accused one. Accused two later hid the stick accused one had used in a toilet. An offence had been committed, and accused two should be convicted as an accessory after the B fact of it, if that offence is a competent verdict to the crime of murder.

In terms of s 47 of the Fourth Schedule to the Code, infanticide, culpable homicide, or any crime of which a person might be convicted if he or she were charged with a crime of infanticide or culpable homicide, are permissible verdicts to a charge of murder. Infanticide is obviously not relevant in this C case. It is only culpable homicide and its competent verdicts which call for consideration. Accused two cannot be convicted of culpable homicide as death had not occurred when he rendered the abovementioned assistance to accused one. In terms of s 49(e) of the Fourth Schedule to the

Code, assault is a competent verdict to a charge of culpable homicide. An assault had clearly taken place when the second accused rendered assistance to accused one. D The second accused could therefore have been found guilty of assault if he had not done anything after the deceased's death.

Accused two's acts after deceased's death

In this case, accused two gave false information to the police about what had E caused the deceased's death. He told them that the deceased's death was a result of injuries inflicted on him by thieves who had invaded their homestead This was after the deceased had died on the way to hospital and his body had been brought back to the homestead. While still at the homestead he told the police that the deceased had been attacked by thieves who invaded the homestead. He was taken to the police station where he continued to give F the police false information. He only owned up after further questioning. In his own words, he said he told the police the truth after they quizzed him. He was then clearly concealing the "murder" which, he believed, had been committed by accused one. In terms of s 208(d) of the Code, giving false information to a police officer, or other person in authority, concerning the circumstances of a crime, renders the giver of false information an accessory G to the crime. Section 208(d) provides as follows:

> "Without limiting the expression, any of the following forms of assistance, when given to an actual perpetrator of a crime, shall render a person liable as an accessory to the crime in terms of this Part –
>
> (a) … H
>
> (b) …

Uchena J

> (c) … A
>
> (d) giving false information to a police officer or other person in authority concerning the circumstances of the crime or the whereabouts of the actual perpetrator".

The second accused gave false information to police officers whom he knew were investigating the cause of the deceased's death. He deliberately gave B them false information to conceal the true circumstances of the crime. He must therefore be found guilty of being an accessory after the fact to the crime of murder.

Effect of Accused One's Acquittal on Accused Two's case

It sounds illogical that accused two, who merely assisted accused one whose C acts caused the deceased's death, should remain in the lurch. This is, however, not accidental. The Legislature foresaw it and intended it. Section 207(1) and (2) of the Code provides for such a situation as follows:

> "(1) A person may be found guilty as an accessory to a crime even if –
>
> (a) the person lacks capacity to commit the crime committed by the actual perpetrator; or D
>
> (b) the person is only aware of the fact that the conduct of the actual perpetrator is unlawful but unaware of the nature of the crime committed by the actual perpetrator or the manner in which it was committed; or"
>
> (c) the actual perpetrator is unaware of any assistance rendered by the person; or
>
> (d) the assistance the person renders does not in fact enable the actual perpetrator E to conceal the crime or to evade justice.
>
> (2) Where a person renders assistance to another person in circumstances which would make him or her guilty as an accessory to a crime, but for the fact that the person to whom he or she renders assistance is entitled to rely upon a defence which excuses that other person from liability or reduces that other person's liability for the crime concerned – F
>
> (*a*) the first-mentioned person shall be guilty as an accessory to a crime as if the person to whom he or she renders assistance were an actual perpetrator; and
>
> (*b*) the first-mentioned person shall not be entitled to rely upon that defence unless he or she would be entitled to rely upon it if he himself or she herself were charged as an actual perpetrator of the crime concerned". G

The Legislature in s 207(1)(a) to (d) intended to attach liability to an accessory after the fact even if

1. he or she lacked capacity to commit the offence committed by the actual perpetrator, or

2. he or she does not know what offence the actual perpetrator had committed, H

Uchena J

A but is only aware that the actual perpetrator's conduct is unlawful, or

3. the actual perpetrator is not aware that the accessory rendered him or her assistance, or
4. the assistance rendered does not conceal the actual perpetrator's crime or help him or her to evade justice.

B It is clear that the Legislature intended to punish any conduct that helps actual perpetrators to conceal their crimes, or to evade justice. In short, liability should attach to even an unsuccessful attempt .

In s 207(2), the Legislature goes further, to provide that the accessory will be guilty even if the actual perpetrator raises a defence which entitles him C to an acquittal. That means that an accessory after the fact will remain in the lurch when the actual perpetrator escapes liability. The accessory's ability to escape through the same defence is restricted by s 207(2)(b), which provides that the accessory can only rely on the same defence, "if he would be entitled to rely on it if he himself were charged as an actual perpetrator of the crime concerned".

D In this case the second accused could only rely on the defence of self-defence, or defence of accused one, if he himself had been under attack, or accused one had been under attack in his presence. Accused two was not at the scene where accused one was under the deceased's unlawful attack. He cannot therefore rely on the defence which entitled accused one to be acquitted. E The requirements of that defence do not apply to his case. He was personally never under an imminent unlawful attack from the deceased. Accused one, in whose defence he could have acted, was on his own when he fell under the deceased's unlawful attack. Accused two only heard of the deceased's unlawful attack from accused one long after it had ceased. He could therefore not have acted against the deceased and claimed the defence of defence of F person. If, for example, accused two had, on being sent by accused one to check on the deceased's injuries, had attacked the deceased because he had had a scuffle with his brother accused one, that would not have been an act in defence of person but one of revenge. The defence of defence of person can not be applied in retrospect. It is therefore not available to accused two. The defence of defence of person can in fact not be raised against his giving G false information to the police.

Accused two's liability for assisting accused one to conceal the cause of the deceased's death and to evade justice can therefore not be avoided. The evasion of justice occurs even in a case where the actual perpetrator would, if charged, be able to raise a defence which entitles him to an acquittal. Justice H involves the investigation, trial and determination of a case. Preventing any

Uchena J

of these by giving false information to the police or person in authority to A conceal the act, or prevent its investigation, trial and determination is an act aimed at evading justice. The second accused persistently gave false information to police officers who were investigating the deceased's death.

He is therefore found guilty as an accessory to the crime of murder. B

Criminal Division of the Attorney-General's Office, legal practitioners for the State

Justice for Children Legal Practitioners, for the accused

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Document 57 of 62

Source:

S v MAFUSIRE 2010 (1) ZLR 417 (H)

Citation	2010 (1) ZLR 417 (H)
Case No	Judgment No. HH-130-10
Court	High Court, Harare
Judge	Musakwa J and assessors
Heard	7 June 2010; 8 June 2010; 9 June 2010
Judgment	18 June 2010
Counsel	18 June 2010
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Flynote

Criminal law – *defences – provocation – when may be a defence – when may reduce murder to culpable homicide – need to show that accused lost his self-control and that a reasonable person would also have done so*

Headnote

D By virtue of s 238 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], provocation is not a complete defence. In respect of any crime other than murder, provocation is not a defence but the court may regard it as mitigatory when assessing the sentence to be imposed for the crime. In murder cases there is a two-stage approach. The first E stage is to decide whether the accused had the intention to kill when he reacted to the provocation. If he did not have an intention to kill, he will not be convicted of murder but only of culpable homicide. If he had an intention to kill, then the court will proceed to the second stage, which is to decide whether the accused himself lost his self-control and killed intentionally in circumstances where even the reasonable person, F faced with this extent of provocation, would also have lost self-control. If the accused did lose his self-control and the reasonable person would have done likewise, the accused will have a partial defence and will be found guilty of culpable homicide and not murder. In South Africa, on the other hand, if the accused killed intentionally, he will be found guilty of murder and the provocation will only act in mitigation of sentence. It G is not enough to show merely that in the circumstances a reasonable man would have lost his self-control. There would have to be some evidence (leaving aside the question of onus) that the accused himself lost his self-control. What is meant by loss of self-control, and how that may differ from a lack of intention, is another matter. A loss of self-control H is not absolute but is a matter of degree: there are many intermediate

Musakwa J

stages between icy detachment and going berserk. A

Cases cited

S v Evans 1985 (1) ZLR 95 (S)

S v Nangani 1982 (1) ZLR 150 (S)

R v Tazwinga 1968 RLR 121 (A) B

R v Tenganyika 1958 R&N 228 (FS)

Legislation considered

Criminal Law (Codification and Reform Act) [*Chapter 9:23*], ss 238 and 239 C

Case information

T G Nyasha, for the State

S R Ratisai, for the accused

Judgment

MUSAKWA J: The accused stands charged with contravening s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The correct D citation should be s 47(1)(a) or (b). The offence arose in Mashambanhaka village in Uzumba Maramba Pfungwe.

The brief facts as summarized in the outline of the State case are that the deceased was one of the accused's two wives in a polygamous setting. On 4 July 2009 the deceased and the accused quarrelled, wherein the accused E made accusations of infidelity against the deceased. The accused lost his temper, armed himself with an axe and tied up the deceased's hands and legs. He then axed the deceased indiscriminately all over the body. The deceased died shortly thereafter.

The accused's defence was that on the day in question he had an altercation with the deceased around 9 p.m. concerning her infidelity. The deceased had F previously been found with cigarettes she could not satisfactorily account for. The deceased then confessed that their child was not sired by the accused. This incensed the accused as the deceased further told him that she had falsely accused him of having bewitched her. This accusation had previously led the accused to take the deceased for treatment. The deceased in the process G further told him that she had in fact had a Depo-Provera injection and was in addition taking some family planning tablets.

As a result of this provocation the accused took a stick from behind the door with which he assaulted the deceased. The deceased managed to fight back as she was bigger than the accused. The deceased by then was armed with an axe which the accused tried to wrest from her. As they grappled the H

A accused turned the axe on the deceased and he has no recollection of how she got injured. He only recalls seeing the deceased sprawled on the floor in their bedroom. In a state of shock the accused tied the deceased's limbs with a rope in a bid to straighten them as they had been broken.

Afterwards the accused reported the incident to his brother's wife. From B there he followed a footpath that led to his late parents' home and discarded the axe. He then went to his in-laws' home where he attempted to commit suicide by ingesting poison.

Maud Date, the accused's first wife, testified to hearing the altercation and later hearing the deceased crying out that the accused was axing her. She then rushed to alert a brother-in-law as well as the village head. She did not C find the brother-in-law but the headman told her they would attend. When she went back she found the deceased seated on the floor with injuries to her hands and legs. There was a lot of blood. A rope was close by on the floor. The deceased asked for water which the witness provided. Having noted that there was a delay by the headman she went back to seek further help.

D Maud Date was not a very forthcoming witness. She gave the impression that she did not know what was going on between the accused and the deceased. The little she did know was to confirm that the two's relationship was rocky. For example, she told the court that she once heard from the accused that he had found the deceased with some cigarettes. However, in her own view she considered the issue trivial.

E This witness did not abide by her intended testimony as summarized in the outline of the State case. In the summary of her evidence, it is stated that she heard the accused and the deceased quarrelling. She eavesdropped and heard the deceased pleading with the accused not to axe her. She also pleaded with the accused not to axe the deceased. She then heard sounds of an axe F chopping several times and the deceased crying for help.

She departed from this summary during her evidence-in-chief. She only stated that she heard the deceased crying that she was being axed and she ran to inform a brother-in-law as well as the village head.

The other witnesses to testify for the State were Zvinairo Mafusire, who is G the accused's younger brother, Assistant Inspector Dzvetero, the investigating officer, as well as Kerina Kanenungo who is an in-law of the accused. This last witness was supposed to testify on the accused's attempt to commit suicide at their home. However, it turned out that she did not witness the incident. Her statement, though purporting to give the impression that she was a direct witness, turned out to be based on what she heard from her H father. It is not clear how such potentially grave mistakes are made in the

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recording of statements from witnesses. A

Owen Mafusire, the accused's thirteen-year-old son, testified to hearing the deceased crying out for help. He and other children had retired to bed in the kitchen hut. He heard the deceased crying and saying sorry. He also heard sounds of something being struck. According to him, this happened thirteen times. He later went to the deceased's bedroom hut where he found her seated B on the floor with her hands and legs bound with a rope. There was no light in the room. The deceased requested him to untie her. He noted injuries to the leg, hands and on the side of the head. He also provided the deceased with water to drink upon her request. Later he returned to the kitchen hut.

The accused's evidence was framed along the lines of the defence outline. C However, there were other material additions to his defence in the form of the background to this tragedy. He stated that, having entertained doubts about the deceased's fidelity, he had taken his case before the local court. As we understood it, the accused wanted the public to hear about his accusations against the deceased. He then divorced the deceased. The deceased took her belongings and went to her parents' home. The accused was later summoned D to the local court where his in-laws reside and his father-in-law levelled charges of having cast a spell on the deceased. The divorce was reversed. He was ordered to seek treatment for the deceased. This meant that the deceased would only be accepted back by her parents after she had been healed. A chief's aide was to accompany the accused and the deceased wherever they sought treatment. He consulted a faith healer who diagnosed that the deceased E had been bewitched by those who were jealous of her marriage. Although the healer removed some spells, the deceased was not healed.

He also explained the incident of the cigarettes. He had found the deceased with two packets of Madison cigarettes. Her explanation was that she had done some work for the accused's nephew at his shop. When he failed to pay F her she then snatched the cigarettes from him. The accused was not satisfied with the explanation. The issue was discussed and settled within the family.

Following their divorce the deceased had been staying at his home for a month. They had previously consulted a medical doctor who detected no abnormality with the deceased but nonetheless prescribed some medication. G On the fateful day the accused had purchased the prescribed medicine in Murehwa. After supper he went to the deceased's bedroom where he intended to give her the medication. That is when the deceased told him she was not ill and was on a Depo-Provera injection. She also told him that the issue of him having bewitched her was a ploy by her and her parents to extract compensation from him. As he sought further explanation from the H

A deceased he addressed her by their daughter's name, Varaidzo. That is when the deceased told him that the child was not his daughter. She further told him that is why she preferred to call the daughter Ethel.

At this stage the accused says he lost his temper. He first took a one metre long stick with which they used to secure the door from inside and started B to beat the deceased. He said he just beat the deceased randomly as he was angry. The next thing was that he saw the deceased with an axe with which she attempted to strike him. He then grabbed the axe and they struggled. The next thing he saw the deceased had been injured. He does not recall how the deceased was injured as he blacked out momentarily because of extreme anger.

C After noting the injuries he took a rope and tied the deceased's hands and wound the rope around her body. He did this because the hands were badly injured as the bones were sticking out. He then told the deceased that he was going to her parents' home where he would kill himself. Having retrieved some rat poison from his bedroom he first proceeded to his brother's home D but he did not find him there. Under cross-examination he said the aim was to get a cart and oxen with which to convey the deceased to hospital. However, this contradicts the earlier decision to go and commit suicide at the deceased's parents' home. In any event, he managed to find transport and went to his in-laws' home in Chitsungo, some fifty kilometers away where he attempted to take his life. It appears that his in-laws were not moved by his threats to E commit suicide as they let him attempt to take his life in their presence. He asked for water and ingested the poison but he was later taken to hospital.

The State submitted that self-defence cannot be sustained as the deceased was not armed when she was injured. Mr *Nyasha* initially submitted that this was a premeditated act and thus the accused should be found guilty F of murder with actual intent. However Mr *Nyasha*, having at some stage submitted that the attack by the accused was indiscriminate and reckless in the circumstances, relented and urged the court to return a verdict of guilty of murder with constructive intent. Regarding what is required to prove constructive intent Mr *Nyasha* cited *S* v *Tazwinga* 1968 RLR 121 (A).

On the other hand, Ms *Ratisai* submitted that the evidence led must show G beyond a reasonable doubt that the accused had the requisite intent to commit the offence. In this case, she submitted that the accused was severely provoked as a result of which he lost control of himself as he blacked out. She submitted that the accused must be found guilty of culpable homicide instead.

Concerning the defence of blackout, Ms *Ratisai* referred to *S* v *Evans* 1985 (1) ZLR 95 (S). H I must point out that the accused never raised a defence of

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blackout in his defence outline. He only referred to coming out of a trance A at the time he realized that the deceased had been injured.

The post-mortem report compiled by Dr Mugwagwa describes the deceased's injuries as "fractures on the legs and left hand. Several cuts all over the body and head". The cause of death is given as resulting from multiple injuries as described. B

Although there was no issue regarding the production of the post-mortem report it is not sufficiently detailed in some material respects. The investigating officer stated that he noted the deceased's body had eleven cuts. The photographs he produced depict some wounds to the legs, hands, chest and head. However, the severity of the injuries is not known. Doctors who conduct post-mortem examinations are normally expected to give details like the depth of cuts C and the amount of force used. In the absence of such details the State should routinely call the doctor to elaborate on his report.

We agree that the defence of self-defence cannot be sustained. The accused, by his own admission, was the aggressor as he started to assault the deceased with a stick. That act constitutes an unlawful attack on his part. If the deceased D tried to use an axe against him, self-defence could only have been raised by her in the circumstances. In any event, in relation to the accused, if there had been any attack against him he was no longer under such attack the moment he disarmed the deceased. In addition, the means used would certainly be immoderately excessive to import intention on his part.

The defence of blackout does not appear to have a sufficient foundation. In E *S* v *Evans supra* the appellant was convicted of culpable homicide arising from the collision of the train he was driving with another. It was established that the brakes in the train that was driven by the appellant had been applied accidentally. The appellant's defence was that he had a blackout as he did not recall

what happened prior to the accident. Commenting on this defence F on appeal, Dumbutshena CJ had this to say at 99-100:

> "The appellant's defence, as already mentioned, is that he had a black-out. He testified to not remembering what happened after he had seen the distant warning signal. He denied having fallen asleep or having applied the air brakes. The appellant was persistent in his defence of a black-out. In reply to the warn and caution he said: 'From the time of seeing the amber until after the accident I G had a black-out'. In his evidence in court he asserted that he had a black-out and could not remember what happened before the accident.
>
> Is this sufficient evidence to establish this type of defence? In *Bratty* v *Attorney-General for Northern Ireland* [1963] AC 386 (HL) (NI), a case in which the appellant had told the police that when he was with the girl he had a 'terrible feeling' and that a 'sort of blackness' came over him, at his trial three separate defences were left open to the jury, namely, (1) automatism by reason of suffering H

Musakwa J

A from psychomotor epilepsy; (2) that he was guilty of only manslaughter because he was incapable of forming an intent to murder on the ground that 'his mental condition was so impaired and confused and he was so deficient in reason that he was not capable of forming' such intent; (3) that he was guilty but insane in consequence of suffering from a disease of the mind within the McNaughton Rules. The case is of interest to us because of what was said by Lord Denning B about the defence of a black-out at 413-14:

> 'It is not sufficient for a man to say 'I had a black-out': for 'black-out' as Stable J said in *Cooper* v *McKenna,* Ex parte *Cooper* 'is one of the first refuges of a guilty conscience and a popular excuse'.
>
> In *R* v *Dervish* [1968] Crim LR 37 *Bratty's* case was considered with approval by the Court of Appeal (Criminal Division). The commentary on that case explained the above words as follows:
>
> C 'Of course a jury might, as a fact, be left in real doubt where they have nothing to go on but the bare, unsupported word of the accused person, if he appeared to be a witness of truth; and it would be an artificial rule which debarred them from considering the defence in those circumstances. The requirement of some supporting evidence is based on obvious considerations of policy - otherwise it might be all too easy for guilty persons to procure D an opportunity of acquittal on fabricated evidence.'
>
> In his book *Textbook of Criminal Law* 2 ed at 663 the learned author Glanville Williams says of this defence:
>
> 'Although the "black-out" defence is legally recognised, it is a defence too easily feigned to be accepted without severe scrutiny. So the courts have laid down that the evidential burden in respect of the issue of non-insane automatism rests upon the defendant, and, moreover, that medical evidence E must (where appropriate) be given in its support before the judge is bound to leave this issue to the jury. If there is sufficient evidence (whether coming from the defendant or from the Crown) to pass this "initial hurdle" – to "lay a foundation" for the defence, as the judges sometimes say – the jury will be directed that the persuasive burden of proving the mental element rests on the prosecution.'
>
> F See also Smith & Hogan *Criminal Law* 4 ed at 40.
>
> There is in the requirement for an accused person to lay a foundation for the defence of black-out some similarity between that defence and the defence of compulsion. In the defence of compulsion the accused should adduce some evidence to show that his mind was overborne by compulsion at the time of committing the offence. Baron ACJ, when considering the defence of compulsion in *S* v *Mapfumo & Ors* 1983 (1) ZLR 250 (S), said at 253F-G what I consider G appropriate to the appreciation of the foundation to be laid in the defence of black-out. The learned Acting Chief Justice said:
>
> 'There is … no onus on an accused person; all that is required is that there emerge from the evidence, whether adduced by the prosecution or the defence, material sufficient to raise the issue in question as a realistic issue, and to speak of this as an onus resting upon an accused, quite apart from H its extent, can be misleading'."

Musakwa J

In that case, the court concluded that the accused had laid sufficient foundation A for a defence of blackout. It took into account that evidence was led from a doctor who was called by the State. Among other things, he was asked what happens to a person when he experiences a blackout, to which he responded that he physically collapses and passes out. It was also put to the doctor the life of a trial driver which he agreed was unusual on account of the irregular B shifts, the early

hours, irregular meals and lack of adequate sleep. In finding merit in such defence, the learned Acting Chief Justice went further to say at p 102:

> "In my judgment the appellant, through Dr Gwisayi, a prosecution witness, laid a proper foundation for the defence by introducing evidence from which it may reasonably be inferred that the appellant suffered a blackout. His evidence alone C would not have been sufficient. It seems to me that on this evidence alone the foundation for the defence of a black-out has been laid albeit on a balance of probabilities. On this evidence alone the persuasive burden of proving that the appellant was negligent now rests on the prosecution."

In the present case we are not persuaded that the accused laid a foundation for such a defence. Apart from his mere say-so, there is no other evidence D from which one may infer that he experienced a black-out. It is incredible that he could recall how he assaulted the deceased with a stick but could not recall how he assaulted her with an axe. There is no evidence that there was a lull between the assault with a stick and the assault with the axe. In addition, the accused's son who responded to the deceased's cry did not find the accused present. We also note that the accused was able to recall what E he did after injuring the deceased.

Coming to the defence of provocation, the first thing to note is that by virtue of s 238 of the Code, provocation is not a complete defence. The provision on the question states that:

> "Except as provided in section *two hundred and thirty-nine* and subject to any F other enactment, provocation shall not be a defence to a crime but the court may regard it as mitigatory when assessing the sentence to be imposed for the crime."

On the other hand, s 239 provides that:

> "(1) If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder G if done or omitted, as the case may be, with the intention or realisation referred to in section *forty-seven*, the person shall be guilty of culpable homicide if, as a result of the provocation –
>
> (*a*) he or she does not have the intention or realisation referred to in section *forty-seven*; or
>
> (*b*) he or she has the intention or realisation referred to in section *forty-seven* but H

Musakwa J

> A has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.
>
> (2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that –
>
> (*a*) he or she did have the intention or realisation referred to in section *forty-* B *seven*; or
>
> (*b*) the provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control;
>
> the accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided in section *two hundred and thirty-eight*."

C In his *Commentary on the Criminal Law (Codification and Reform) Act* Professor G Feltoe has this to say at pp 221-222:

> "Provocation can be partial defence to a charge of murder but it is not a defence to any other crime, although it can be a mitigatory factor. (Previously provocation could also have been a partial defence to assault with intent to do grievous bodily harm. This no longer applies because the Code has merged together what used to D be the separate crimes of common assault and assault with intent to do grievous bodily harm.)
>
> In cases other than murder the defence of provocation operates merely to mitigate sentence.
>
> In murder cases there is a two-stage approach.
>
> E The first stage is to decide whether X had intention to kill when he or she reacted to the provocation. If X did not have intention to kill, X will not be convicted of murder but only of culpable homicide.
>
> If X had intention to kill, then the court will proceed to the second stage, which is to decide whether X lost his or her self-control and killed intentionally in circumstances where even the reasonable person, faced with this extent of provocation, would also have lost self-control. If X did lose his or her self- F control and the reasonable person would have done likewise, X will have a partial defence and will be found guilty of culpable homicide and not murder. (In South Africa on the other hand if X killed intentionally X will be found guilty of murder and the provocation will only act in mitigation of sentence.)"

This is the approach that was adopted in *R* v *Tenganyika* 1958 R&N 228 (FS) G and *S* v *Nangani* 1982 (1) ZLR 150 (S). In *Nangani's* case, which has a closer bearing on the present case, the appellant and the deceased had lived together for two years and a child had been born from the union. They subsequently separated. When the appellant went to look for the deceased he found her sharing a blanket with a man outside the hut. When the appellant asked who the man was, the deceased whispered something to the man who then ran H away. The appellant pursued the man and returned to where he had left the

deceased. On his way back he met the deceased who started to run away. A The appellant, who was armed with a rifle, then shot and killed the deceased. The appellant was convicted of murder with no extenuating circumstances. The conviction was set aside on appeal and substituted with a conviction of culpable homicide. This is what Fieldsend CJ had to say with regard to the defence of provocation at pp 158-160: B

> "In *Tenganyika* v *R (supra*) the Federal Supreme Court, albeit to some extent *obiter*, considered a different approach to the problem, perhaps best summarized at p 245 of Burchell and Hunt as follows:
>
> > 'Where the charge is one of murder and there is evidence of provocation, it was held that two separate inquiries must be made. First, was intention to kill present? In making this inquiry account must be taken of all the C facts – provocation, intoxication and any other eccentricity or abnormality the accused may have had. And since the test for intention is subjective, at this stage provocation will be considered subjectively. If the court is left in doubt as to whether the intention to kill was present the accused could, at most, be convicted of culpable homicide. On the other hand, if the court is satisfied that the intent to kill was proved, the Federal Supreme Court took the view that a second inquiry must be made, namely, whether the D provocation which the accused received was sufficient to warrant a verdict of culpable homicide despite the fact that the killing was intentional. On this point Tredgold CJ, held the test to be objective "whether the accused was so provoked that, in the circumstances, a reasonable man would have float his self-control."
>
> The learned Chief Justice did not, of course, say that where an intention to kill E has been established, an accused can escape conviction for murder by showing merely that in the circumstances a reasonable man would have lost his self-control. Clearly there would have to be some evidence (leaving aside the question of onus) that the accused himself lost his self-control. As he said at p 237:
>
> > '... to suggest that provocation is only a defence when it excludes the intention to kill is to narrow its limits unwarrantable ... it is not difficult to envisage F circumstances in which it might properly be held that he had been provoked beyond endurance *and* to a point when any ordinary person would have been deprived of his self-control and acted in the same manner' (emphasis added).
>
> The question what is meant by loss of self-control, and how that may differ from a lack of intention are separate matters. As Lord Diplock indicated in *Phillips* G v *R* (1969) 53 Cr App R 132 at p 135, loss of self-control is not absolute but is a matter of degree: there are many intermediate stages between icy detachment and going berserk. And as Schreiner JA said in *Krull's* case (*supra*) at pp 398-99:
>
> > 'That acts done after a man has lost control of himself may still in a sense be said to be intended is no doubt true. But also it may fairly be, and is, said that such acts are not really intended ... Whether one says that a provoked man loses the power of self-control or becomes unable to form the intention H

> > A to kill seems to me to be substantially a question of the choice of words. Either form is probably only a roughly approximate description of the actual mental processes. Legal systems can only attempt by one approach or another to give effect to the basic idea, which is that the provoked person may have been so upset that the mental element requisite for murder may not have been present.'
>
> B *Tenganyika's* case (*supra*) has been followed in this country, despite the criticism of it in *Krull's* case (*supra*). See for example *R* v *Bureke* 1959 (2) R & N 353 (FS); *R* v *Majhaye* 1965 RLR 106. We are not bound by these decisions – see s 24 (2) of the Supreme Court Act, No. 28 of 1981 – but unless there is good reason for departing from them we would not want to give a new direction to the law at this stage: *Practice Direction (Precedent)* 1981 ZLR 417; 1981 (4) SA 1981.
>
> There are arguments both of principle and expediency in favour of each of the C two approaches. The South African approach follows the logical and systematic application of the strict law that an intentional killing of another person is murder unless there is a legitimate excuse, such as justifiable homicide (*R* v

Koning, 1953 (3) SA 220 (T) or self defence (*R* v *Mathlau,* 1958 (1) SA 350 (A)). To act under provocation, it is said, is not to act with any justification. As Schreiner JA put it in *Krull's* case (*supra*) at p 399C:

> D 'In self-defence the motive is fear, which from the law's viewpoint is a better motive than anger, which operates in provocation.'

Provocation may be an extenuating circumstance and a mitigating factor, but once it is established that a person acted with intent to kill then he is guilty of murder. In my view there are two answers to this view.

First, if the law recognizes that provocation is an extenuating circumstance then E there is no question of principle involved in recognizing it as a circumstance which may reduce murder to culpable homicide. It is only a question of the effect to be given to it. Both self-defence and duress – see *S* v *Goliath*, 1972 (3) SA 1 (A) – are now recognized as defences to murder. Either may be a complete defence or may operate to reduce murder to culpable homicide, depending on the facts. But in each case it is accepted that what is excused or reduced is an F intentional killing. There is therefore no anomaly in recognizing that provocation may have a similar effect, or at least may reduce murder to culpable homicide even where the killing is intentional."

The accused in the present matter was provoked by words uttered by the deceased that he was not the father of their child and that the deceased was not ill. This is what prompted him to assault the deceased with a stick. G Thereafter he draws a blank as regards how he attacked the deceased with an axe. However, as previously noted, the accused recalls what he did after axing the deceased. In our view we do not accept that he suffered a blackout before he struck the deceased.

It is also clear that the accused was not in any danger when he struck the H deceased with the axe. The nature of weapon used can only mean that

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Musakwa J

the accused had some intent to murder the deceased notwithstanding the A provocation. The nature of the attack on the deceased in light of the injuries sustained can only mean that the accused must have lost control of himself but not the intention to kill. However, in our view, the accused did not mean to kill the deceased in the sense of desiring to bring about her death. This is because of the nature of the attack itself which was indiscriminate. It can B only have been perpetrated by someone who was enraged. We do not accept that he had lost so self-control as not to appreciate what he was doing. He must have realised that there was a real risk or possibility that his conduct might cause death, but continued to engage in that conduct despite the risk or possibility. He is accordingly found guilty of contravening s 47(1)(b) of the Code which is equivalent to murder with constructive intent. C

Ratisai Law Practice, accused's legal practitioners

Criminal Division, Attorney-General's Office, legal practitioners for the State

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Document 58 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/JOHN STRONG (PVT) LTD v WACHENUKA & ANOR (2) 2010 (1) ZLR 429 (H)

JOHN STRONG (PVT) LTD v WACHENUKA & ANOR (2) 2010 (1) ZLR 429 (H)

Citation 2010 (1) ZLR 429 (H)

Case No Judgment No. HH-118-10

Court High Court, Harare

Judge Gowora J

Heard	16 July 2009
Judgment	23 June 2010
Counsel	Mrs *J B Wood*, for the applicants No appearance for the first respondent *K Gutu*, for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Court – contempt – *disobedience to order of court – arrest for – may only be ordered after finding by court that person has flouted court order – not competent to authorize police to effect arrest without such a finding*

Headnote

D The applicants were the owner and lessee, respectively, of a farm which had been expropriated by the State. The first defendant had been given a letter of offer in respect of part of the farm and began to interfere with the applicants' operations on the rest of the farm. The applicants sought a spoliation order. In addition, they sought an order that, should E the first respondent breach the spoliation order, the police be authorized to arrest him.

Held, that the spoliation order would be granted, but the order for the arrest of the first respondent in the event that he was in breach of the spoliation order could not be granted. Firstly, the first respondent was not before the court and had made no submissions on that subject. Secondly, the court F could not order the police to arrest a person for an alleged breach of a court order before finding that such person was in fact in breach of the court order. What the applicants were seeking was an order protecting them from an anticipated breach of the spoliation order. This was not the correct manner to approach a court for an order of contempt of court. G Before an arrest can be ordered by the court on allegations of a party being in breach of a court order, it is necessary for the respondent to be arraigned before the court for a finding that he had deliberately flouted a court order served on him personally. This is done by the institution of proceedings for contempt of court proceedings against such party. Time and time again legal practitioners insert in their draft orders a paragraph H for the arrest of a party in the event of breach of paragraphs in the order.

2010 (1) ZLR p430

Gowora J

This is irregular and contrary to any person's right to be heard before an A order is granted against such person. Legal practitioners should therefore desist from drafting orders in this fashion.

Cases referred to

Chisveto v Min of Local Govt 1984 (1) ZLR 248 (H) B

Nino Bonino v de Lange 1906 TS 120

Case information

Mrs *J B Wood*, for the applicants

No appearance for the first respondent

K Gutu, for the second respondent C

Judgment

GOWORA J: This application was argued before me on 16 July which was the return day of a provisional order granted on 4 May 2009. Although the first respondent was at the initial hearing he did not appear on the return day. He had filed opposing papers as well as heads of argument even though he was not legally represented. Mr *Gutu,* who appeared for the second respondent, the Minister, insisted on the matter being heard on the merits and seemed D not to be alive to the absence of the first respondent and the prejudice that would ensue to the latter if the matter was heard on the merits. After hearing counsel, I granted a final order as prayed by the applicants. Subsequent to the order being granted the first respondent has addressed several letters to the Registrar demanding a judgment. I have acceded to the request and I give E my reasons hereunder. I have, however, endeavoured as much as possible not to touch on the case of the first respondent in order to allow him a window to put his case forward should he be so inclined.

The applicant, applied to this court for a provisional order under a certificate of urgency and on 4 May 2009 this court issued a provisional order in their favour in the following terms: F

"PROVISIONAL ORDER

TERMS OF FINAL ORDER SOUGHT

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

1. The first respondent and all those claiming occupation through him be and G are hereby ordered to forthwith restore to applicants and their employees full possession, use and access to the tobacco barns, grading sheds, storage sheds, workshop, office and irrigation pump station on Plot 7 and all farming implements owned by the applicants and located thereon.
2. The first respondent and all those claiming occupation through him permit the applicants and their employees to grade their tobacco and remove it for sale thereafter. H

Gowora J

3. The first A respondent desists from threatening any of the applicants' workers or management in carrying out their normal duties.
4. Should the first respondent breach 1 and 2 or 3 that the Zimbabwe Republic Police Guruve be authorized to arrest the first respondent.
5. The first respondent shall pay the costs of this application on the legal practitioner and client scale.

B INTERIM RELIEF GRANTED

Pending the determination of the above Final Order, the applicant is granted the following relief:

1. The first respondent and all those claiming occupation through him be and are hereby ordered to forthwith restore to applicants and their employees full possession, use and access to the tobacco barns, grading sheds, storage sheds, workshop, office and irrigation pump station on Plot 7 and all farming C implements owned by the applicants and located thereon so as to restore the *status quo* prevailing on Plot 7 as at 15 April 2009.
2. The first respondent and all those claiming occupation through him permit the applicants and their employees to grade their tobacco and remove it for sale thereafter.
3. The first respondent desists from threatening any of the applicants workers or management in carrying out their normal duties. D
4. The first respondent shall be entitled to the full use and occupation of Plot 7, other than the structures equipment referred to in paragraph 1 and the applicants shall refrain from interfering with the first respondent's farming activities, equipment and employees on Plot 7.
5. Should the applicants or the first respondent breach any provision of this Order the Zimbabwe Republic Police Guruve is hereby authorized to enforce E the terms of this order.

INTERIM ORDER-RETURN DAY

1. The respondents shall file and serve their opposing papers in this matter by 7 May 2009.
2. The applicants shall file and serve their answering affidavit by 11 May 2009. F
3. The applicants shall file and serve their heads of argument by 15 May 2009.
4. The respondents shall file and serve their heads of argument by 18 May 2009.
5. The respondents shall index and paginate the papers filed herein by 20 May 2009.
6. The Registrar is hereby directed to set this matter down for hearing in the opposed roll forthwith upon compliance with the foregoing paragraphs.

G SERVICE OF PROVISIONAL ORDER

Service of this order may be effected by the applicants' legal practitioners on the respondents or their legal practitioners. "

The two applicants are companies that are duly registered as such in accordance with the laws of this country. The second respondent is the minister responsible H for agriculture and land resettlement. The first applicant is the former owner

Gowora J

of Disi Farm which is situate in Mvurwi. The second applicant leased Disi A Farm from the first applicant and was in terms of the agreement of lease carrying out farming activities on the said farm. Disi Farm has been acquired by the government under the land reform programme.

In a founding affidavit sworn to by one Robert Strong, it is averred that the second applicant produces approximately 500 000 kg of tobacco every year, B and 30 hectares of horticulture which is all targeted at export markets, 50 hectares of commercial maize and 30 hectares of sugar beans. The second applicant also has fifteen pedigree breeding cows with followers. The second applicant also operates a wheat meal and a bakery and supplies the surrounding areas with bread.

It is averred further that both the first and second applicants have been actively C involved with the local community since the early 1990s and support a number of local projects. The first applicant is alleged to have paid a substantial sum towards the extension of Chifumbo School in Mudindo, Guruve and both have fully supported rural electrification of all schools in the area. Both applicants are said to finance local school stationary requirements. D

In total, both applicants have had four farms acquired by the government for purposes of land reform and have been assisting both A1 and A2 farmers on the acquired farms. There has been no interference with their farming activities on Disi Farm since the inception of the land reform program. However, since May 2008 the first respondent has stated to the applicants that he had an E offer farm for a section of Disi Farm. Through the existence of the alleged offer letter, the first respondent then moved onto plot 7 on the said farm.

Due to the alleged illegal occupation of this portion of the farm by the first respondent, the applicants sought and obtained an order for spoliation against him under case number HC 4110/2008 which was granted on 18 August 2008. Possession of that portion of the farm was restored in pursuance of F the order granted. This enabled the second applicant to reap its tobacco. On 4 December 2008 it, the second applicant, then commenced the process of loading the tobacco in the barns for purposes of having the tobacco cured. On 6 December 2008 the first respondent came to the farm and had a discussion with Robert Strong. He said that if the applicants wished to continue using G the barns they had to pay for them. He said that he himself had no use for the barns as he had not grown any tobacco. The first respondent had then left but returned a short while later to threaten the applicants' workers from returning to work the following day. On 7 December 2008 the first respondent turned up armed with a pistol and locked all the gates. A report was made to the police, and subsequently an urgent application filed with the court on 11 H

Gowora J

A December 2008 resulted in the court issuing a *mandament van spolie* against the first respondent. The order sought by the applicants was granted with the consent of the respondent and resulted in the applicants being restored to possession of the disputed items and in addition a temporary interdict was granted against the first respondent preventing him from interfering with the applicants and their employees. That order was to be effective up B until 15 April 2009. The acquiring authority had also consented to the order.

It was averred by the applicants that it had been agreed with the second respondent's legal practitioners that the order be for a limited period and that after its expiry the applicants should seek and obtain a formal lease for the tobacco barns and facilities from the second respondents. The applicants C were assured that this was a mere formality. The applicants have, as stated above, sought a lease over the tobacco barn where their tobacco is currently stored. The lease has not yet been granted to them.

On 17 April the first respondent returned to the area known as Plot 7 armed with a pistol and pointed it at a clerk and forced him to hand over the keys to D the storerooms, offices, workshop and tobacco grading sheds. He then placed locks on all the access gates. On 18 April 2009 the district administrator instructed that the locks that the first respondent placed be removed but after this was done he, the first respondent, came and threatened the workers and chased them off Plot 7. He was armed with a pistol. On 19 April the first respondent instructed his workers to switch off all the pumps and lock all E the sheds. Again on 21 April the applicants' workers attempted to access the tobacco grading sheds. The first respondent came and switched off the pumps supplying water to the granadillas. There was a standoff between the respondent's workers and those of the applicants. The situation was only alleviated by the arrival of the police. The first respondent had indicated to the F applicant's workers that he would only restore possession of the tobacco barns after he and the applicants would have negotiated a partnership agreement. Based on these allegations this court had issued a provisional order.

The insistence by the second respondent, who was represented by Mr *Gutu,* that the matter be should be argued on the merits despite the absence of the first respondent, who is the party against him, the substantive relief G that was being sought has placed this court in something of a quandary as the first respondent was in default. I will therefore only deal with issues as they relate to the second respondent and the applicants. It may, however, be unavoidable to make reference to the first respondent as it his alleged illegal conduct being complained against by the applicants and in fact the order H being sought is mainly against him and not the Minister.

2010 (1) ZLR p434

Gowora J

There is no dispute that the applicants have been in possession of Disi Farm A and, in particular, the barns, equipment and structures situate at Plot 7. When the entire farm was acquired by the acquiring authority the applicants were left *in situ* and they have remained on the premises throughout. The barns, storerooms and curing facilities have been in their possession all along. The acquiring authority has, however, not seen it fit to evict the applicants from the same. B

Mr *Gutu* was correct to state that an applicant for an order for spoliation must prove that he was in peaceful and undisturbed possession of the thing dispossessed. It was his contention that the applicants were not in peaceful and undisturbed possession. This contention is not supported by the facts on the papers. The applicants have attached to their papers a handwritten C letter from the District Lands Officer dated 20 April 2009 and addressed to the first respondent in which the writer is imploring the respondent to allow Mr Strong to have access to the tobacco curing facilities in order to facilitate the finalization of the curing process. This letter was attached to the founding papers and the interim relief was granted based on those papers. The paragraph in respect of which the contents of the letter are alluded to D was not challenged by the second respondent. An allegation or averment which is not denied is taken to have been admitted. It is therefore difficult to understand the submission that the applicants never had possession.

The background to this application in fact goes back to 18 August 2008 when the first order for a *mandament van spolie* was granted against the first E respondent. That particular order did not refer to the barns but merely sought to restore possession to the applicant of the portions of the farm not allocated to the first respondent. The second order granted on 16 December 2008 with the consent of the first and second respondent was to the following effect:

"BY CONSENT IT IS ORDERED

1. The first respondent and all those claiming occupation through him be and F are hereby ordered to restore full possession and use of tobacco barns on Plot 7 to the applicants forthwith.
2. The first respondent is interdicted from banning access to the applicants employees to the tobacco barn on Plot 7
3. The first respondent is interdicted from preventing the applicants and their G employees from carrying out their duties in curing the applicants' tobacco.
4. The first respondent is interdicted from threatening the applicants' employees.
5. This Order will be effective up to 15 April 2009."

The parties do not appear to have to anticipated the recurrence of problems between them subsequent to 15 April 2009. It may well be that the applicants anticipated that by then a lease would have been offered to them for the barns, H

Gowora J

A but it has not. The second respondent has argued that the first respondent took occupation of Plot 7 in 2007. The first respondent is not before me so I cannot comment on the manner in which he took occupation. The second respondent should, however, have ensured that the first respondent got vacant possession by evicting the applicants from the disputed barns and sheds. This was not done, leaving the applicants in possession of the same.

B The contention by the second respondent is to the effect that the farm was acquired by the Government and as a result all infrastructure on the land belongs to the State. The second respondent further contends that, as the applicants are not the holders of an offer letter, they are therefore in illegal possession of the barns and storerooms on Plot 7 which has been allocated C to the first respondent. The contention is, therefore, that the applicants do not have *locus standi* to institute and defend any proceedings in respect of that portion of Disi Farm and the buildings situate thereon.

In the final analysis, the protection of possession is part and parcel of the protection of the peace in a community, which could not be maintained if every person who asserts that he has a real right to a particular thing which D is in another person's possession would be entitled to resort to self-help. [1] Thus the *mandament van spolie* is aimed at preserving peace and order in a community and to discourage self help. Consequently the question of ownership or the lawfulness of the possessor is not an issue for consideration by the court as long as the applicant can show that he was in peaceful and E undisturbed possession and that he was dispossessed unlawfully, whether through violence, stealth or fraud. The aim is therefore to achieve a restoration of the status *quo ante*. In *Chisveto* v *Minister of Local Government & Town Planning*[2] Reynolds J stated thus:

> "Lawfulness of possession does not enter into it. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking F the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party. Thus it is my view that the lawfulness of the applicant's possession of the property in question does not fall for consideration at all. In fact, the classic generalization is sometimes made in respect of spoliation actions that even a robber or thief is entitled to be restored to possession of the stolen property."

G *In casu* the second respondent has argued that the first respondent is the holder of an offer letter in respect of Plot 7 and that the applicants did not oppose the occupation of Plot 7 by the first respondent. It is argued that the

Gowora J

dispute arose when the applicants sought to continue to use the facilities on A the first respondent's portion, the tobacco barns, grading sheds, workshop and office. The second respondent has contended further that the applicants were through an order of this court allowed to use the tobacco barns up to 15 April 2009 and that they did not approach the court for an extension of the continued use. B

The second respondent is overlooking the fact that even after the first respondent moved onto Plot 7, the applicants remained in possession of the infrastructure that is central to this dispute and that in order to give effect to the offer letter the second respondent had to take legal steps to ensure that the possession by the applicants of the infrastructure was terminated properly and that thereafter the first respondent could assume possession. *In casu* the C possession by the applicants of the disputed infrastructure is not due to an order of court. The court merely restored possession to them after an act of spoliation. The expiry of the period agreed to by the parties did not have any material consequence as to the possession. It did not affect the legal position of their possession, which remains the same unless and until the acquiring D authority takes some positive action for its determination. This was not done and the courts have held on numerous occasions that an applicant will be given possession of the property where it is shown that he was despoiled.

> "It is a fundamental principle that no man is allowed to take the law into his own hands; no-one is permitted to dispossess another forcefully or wrongfully and against his consent of the possession of property, whether movable or E immovable. If he does so, the court will summarily restore the status *quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principal so clear." [3]

In my view, it matters not that the first respondent was granted an offer letter in respect of Plot 7, as the merits of the dispute are not in issue. It may well be F that, in the absence of an offer letter for the property, the applicants' occupation of the same is illegal. That, however, is not the point. In order to enable the first respondent to occupy the plot legally, the second respondent is obliged to evict the applicants from the plot and thus grant the first respondent vacant possession. Any occupation by the first respondent without an order of court G evicting the applicants from the same will be an act of spoliation and will open the respondents to challenge regarding the said occupation. It is for these reasons that I confirmed the provisional order granted on 4 May 2009.

I did not grant an order for the arrest of the first respondent in the event that

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A he was in breach of paras 1, 2 and 3 of the draft order as, firstly, the first respondent was not before me and his submissions on that aspect of the order had not been placed before me. In addition, this court cannot order the police to arrest a person on alleged breach of a court order before the court has made a finding that such person is in fact in breach of the court order. What the applicants seek is an order protecting them from an anticipated breach of this order. B This, in my view, is not the correct manner to approach a court for an order of contempt of court. The requirements of contempt of court proceedings are known to legal practitioners and an application where an order is sought in anticipation of breach is irregular. Every legal practitioner knows, or should be aware, that before an arrest can be ordered by this court C on allegations of a party being in breach of a court order, it is necessary for the respondent to be arraigned before the court for a finding that the person had deliberately flouted a court order served on him or her personally. This is done by the institution of proceedings for contempt of court proceedings against such party. Time and time again legal practitioners insert in their draft orders a paragraph for the arrest of a party in the event of breach of D paragraphs in the order. This is irregular and contrary to any person's right to be heard before an order is granted against such person. I am not able to find a person in contempt of a court in anticipation of that person being in contempt by disobeying the court order in the absence of a hearing with regard to the refusal to obey the court order. Legal practitioners should E therefore desist from drafting orders in this fashion. It is for these reasons I refused to confirm the paragraph requiring his arrest in the event of breach.

It is therefore ordered as follows:

The provisional order granted by this court on 4 May is hereby confirmed and an order is issued in the following terms: F

1. The first respondent and all those claiming occupation through him be and are hereby ordered to forthwith restore to the applicants and their employees full possession, use and access to the tobacco barns, grading sheds, storage sheds, workshop, office and irrigation pump station on Plot 7 and all farming implements owned by the applicants and located thereon so as to restore the status *quo ante* prevailing on Plot 7 as at 15 G April 2009.
2. The first respondent and all those claiming occupation through him be and are hereby ordered to permit the applicants and their employees to grade their tobacco and remove it for sale thereafter.
3. The first respondent be and is hereby ordered to desist from threatening H any of the applicants' workers or management in carrying out their

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normal duties. A

4. The first respondent shall pay the costs of this application.

Venturas & Samukange, applicants' legal practitioners

Civil Division of the Attorney-General's Office, second respondent's legal practitioners B

1 Silberberg *The Law of Property* 2 ed p 135
2 1984 (1) ZLR 248 (H) at 250C-E
3 *Per* Innes CJ in *Nino Bonino* v *de Lange* 1906 TS 120 at 122

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Document 59 of 62

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 1/OLD MUTUAL LIFE ASSURANCE CO (PVT) LTD v RAFTOPOULOS 2010 (1) ZLR 439 (H)

OLD MUTUAL LIFE ASSURANCE CO (PVT) LTD v RAFTOPOULOS 2010 (1) ZLR 439 (H)

Citation	2010 (1) ZLR 439 (H)
Case No	Judgment No. HH-102-10
Court	High Court, Harare
Judge	Mtshiya J
Heard	22 February 2010; 19 March 2010
Judgment	23 June 2010
Counsel	*T Nleya,* for the plaintiff *J Samkange*, for the defendant
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Landlord and tenant – *tenant – statutory tenant – grounds for ejectment – allegation that lessor requires premises for own use – lessor requiring premises for use by a wholly-owned subsidiary company – not for "own* D *use" of lessor*

Headnote

The plaintiff sought the eviction of the defendant from premises that the defendant was leasing from the plaintiff. The plaintiff claimed that it wanted the premises for use by one of its wholly-owned subsidiary E companies. The defendant disputed this, arguing that the real reason why the plaintiff was seeking his eviction was that he had refused to pay rent in foreign currency, that being illegal at the time.

Held, that the lessor was the plaintiff. Irrespective of any relationship, the subsidiary company could not, in these proceedings, be defined as the lessor. The Commercial Premises (Rent) Regulations 1983 (SI 676 of F 1983) are meant to define the relationship between the lessor and the lessee. Accordingly, when the lessor declares that it needs the leased premises for its "own use", it is logical that the lessee would understand that to mean "own use" by the lessor to whom rent is payable. The lessor cannot repossess the premises for the purpose of "leasing the premises G to some other person". The plaintiff having conceded that the subsidiary company was a separate legal entity that would also be required to pay rent for the premises as a lessee, it was clearly established that the plaintiff wanted to lease the premises to another person – a third party.

Cases cited

H *Film & Video Trust v Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191 (H)

Mtshiya J

Mobil Oil Zimbabwe (Pvt) Ltd v Chispite Service Station (Pvt) Ltd 1991 (2) ZLR 82 (S) A

Legislation considered

Commercial Premises (Rent) Regulation, 1983 (SI 676 of 1983), s 22(2) B

Case information

T Nleya, for the plaintiff

J Samkange, for the defendant

Judgment

MTSHIYA J: On 23 January 2009, the plaintiff issued summons against the defendant seeking relief in the following terms:-

"(a) An order for the ejectment forthwith of the defendant together with its C subtenants, assignees, invitees and all those claiming through defendant from the plaintiff's premises known as Shop No. 2 Stand No. 12A Avondale Township located at Avondale Shopping Centre, Avondale, Harare.

(b) Plaintiff's claims arises from a lease agreement concluded between the parties. The lease agreement having expired on 31 March 2008, the defendant became a statutory tenant. Plaintiff now reasonably requires the premises for D own use and despite being given three months notice to vacate the premises, the defendant has failed and/or has neglected to vacate the premises.

(c) Plaintiff further claims payment of holding over damages at a rate that is equivalent to the market value of the occupation of the premises in question from 1 October 2008 to the date of the defendant's ejectment.

(d) Payment of costs of suit at legal practitioner and client scale". E

The defendant objected to the relief sought and the matter was then referred to trial for the determination of the following two issues:

"1.1. whether or not the plaintiff requires the premises for its own use?

2.2. whether or not the plaintiff is entitled to holding our damages. If yes, the quantum?" F

It is common cause that under a lease agreement which commenced on 1 April 2005, the defendant occupied the plaintiff's premises known as Shop No. 2, located at Avondale Shopping Centre, Avondale, Harare. In terms of the lease agreement, the expiry date was 31 March 2008. In terms of clause 6 of the lease agreement, the lease was subject to renewal on agreed terms between the parties. There is dispute as to whether or not the lease G agreement was renewed after 31 March 2008. The defendant asserts that the lease agreement was renewed but the plaintiff denies that and states that the defendant is now occupying the premises as a statutory tenant. On 30 May 2008 the plaintiff gave the defendant three months notice in writing. The notice was for the defendant to vacate the premises because the plaintiff wanted the premises for its own use. The said notice expired on 30 August H

Mtshiya J

A 2008 but the defendant still remains in occupation. Indeed the said notice which was produced in court as exhibit number 2 reads as follows:-

"We write to advise that your lease agreement will be terminated in three months from the date of this letter, i.e. 30 August 2008. Please be advised that the Landlord will require the premises for owner-occupation effective 1 September 2008.

B This development is however strictly without prejudice to the other terms and provisions of the lease. Thus rentals proposed and agreed with your Mr M Raftopolous for the period May to July 2008 would remain payable.

Our maintenance department will come to carry out a pre-vacation inspection, and we would afterwards advise of the necessary premises reinstatements"

C In refusing to vacate the premises, the defendant argued that a "renewed lease agreement" was never signed because the plaintiff was demanding rentals in foreign currency when that was not permissible in law at the time. The defendant goes on to say it was not true that the plaintiff required the premises for its own use. The defendant pointed out that the plaintiff wanted to lease the premises (for rental) to another tenant, namely Central Africa D Building Society (CABS).

The plaintiff called three witnesses. The first witness, Mr Moyo, now an Investment Analyst with the plaintiff, said that at the material time he was in the employ of the plaintiff as a Property Manager assigned to manage the plaintiff's Avondale properties. He was responsible for negotiating lease E agreements and rentals attaching to such leases. He said that the parties had indeed entered into a lease agreement which he produced. The said lease agreement, which was renewable, commenced on 1 April 2005. Mr Moyo said he had dealt with the defendant from April 2008 to May 2009. Rental negotiations with the defendant were conducted in a cordial manner. He also confirmed the issuance by him of the notice of 30 May 2008. Mr Moyo said F the plaintiff wanted to occupy the premises for its own use through CABS, one of its subsidiaries. This, he said, was so because CABS were being evicted from the premises of Avondale Holdings (Private) Limited which they were leasing.

In order to prove the relationship between CABS and the plaintiff, Mr Moyo G produced the following exhibits:

(a) Certificate of Registration showing that on 21 October 1961 Old Mutual Building Society of Central Africa changed its name to Central Africa Building Society.

(b) Certificate of Registration showing that on 8 September 1954 Old Mutual H Building Society of Central Africa was registered as a Building Society'

Mtshiya J

(c) An organogram lining up the plaintiff's subsidiaries in Zimbabwe." A

The production of the three exhibits was strongly opposed by Mr *Samkange*. He argued that proof of the relationship between the plaintiff and CABS was not an issue for determination before the court. The issues for determination, he pointed out, were only those two referred to on the first page of this judgment. I took the view that the production of the exhibits was anchored B on the need to prove the point that 'the premises were genuinely required for own use' so I therefore allowed the production of the exhibits. I believe that a party should not be hindered or restricted in the manner it may seek to prove the aspect of 'own use' in matters of this nature. To the extent that some evidence is requested, this view enjoys the support of the case authorities relied upon by the parties, namely *Mobil Oil Zimbabwe (Pvt) Ltd* C v *Chisipite Service Station (Pvt) Ltd* 1991 (2) ZLR 82 (S) and *Film & Video Trust v Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191 (H).

Mr Moyo said the request from CABS was made on 19 May 2008 i.e. before the plaintiff's notice of 30 May 2008. Through CABS, a Mr Chikanda had then inspected the premises on 22 May 2008 upon notice of that inspection D having been given to all tenants on 20 May 2008. On 23 May 2008 Mr Chikanda had then advised the plaintiff that CABS had identified shops No. 1 and 2 for their banking needs, Shop No.2 being the one leased to the defendant. He confirmed that to-date the plaintiff was still pursuing the eviction of the defendant.

Under cross-examination Mr Moyo said there had never been any intention E to renew the lease agreement. The negotiations were aimed at getting a return for the months of May 2008 to July 2008. He did not know the exchange rate when the lease was due to expire. The negotiation were in terms of the Zimbabwe dollar and not foreign currency. He agreed that as at 27 May 2008 when the parties had failed to agree on new rentals, the plaintiff had not yet F advised the defendant about CABS.

Mr Moyo said he had never spoken to Mr Terry, the Managing Director of CABS. He had only dealt with Mr Chikanda and was not aware of any discussions between the defendant and Mr Terry. He maintained that the plaintiff needed the premises for its own use through its subsidiary. He could G not comment on the fact that the defendant had since been given a new lease as from February 2010 to December 2010.

The second witness called by the plaintiff was Mr Finnigan of CABS. He said he was the General Manager responsible for Retail Banking since the 1990's and was in charge of CABS branch

operations, including Avondale Branch, which fell under the supervision of Mr Chikanda who reported H

Mtshiya J

A directly to him. He said Avondale Holdings had given CABS notice to vacate the premises where the CABS Avondale Branch operated from. To that end he produced two exhibits.

The first exhibit was a letter from Avondale Holdings directed to CABS dated 6 May 2008, which reads as follows:

> B "We hereby give you three months notice to vacate the premises you occupy in Avondale Shopping Centre, effective from 1 June 2008 to 31 August 2008.
>
> Your lease expires at the end of this month and we will not be renewing it as the premises are required for owner own use".

The exhibit was received by CABS on 8 May 2007 and on it are the following handwritten endorsements: "SM, OK, OM C

- Target Stanley House
- Relocation of Avondale
- CABS requirements"

The above endorsements were made on 20 May 2008 and from the endorsements it appears that as at that date CABS were targeting Stanley D House for their requirements.

The second exhibit was also a letter from Avondale Holdings, which is dated 11 June 2008 and directed to CABS. It reads as follows:

> "We refer to our letter of 6 May 2008 in which we gave you notice to vacate the premises by 31 August 2008, and which was delivered to CABS Avondale and E to Old Mutual via their Mutual Centre collection point.
>
> We have had no response to this letter from CABS or from Old Mutual and we now confirm the notice to vacate the premises at Sammar Galleries in the Avondale Shopping Centre, reiterating that the reason for the cancellation of the lease is that the owner wishes to have it for her own use."

Mr Finnigan said it was because of the above communications that CABS, F as part of the plaintiff's group of companies, had approached the plaintiff for rental premises in Avondale. After visiting Shop No. 2 occupied by the defendant in the company of Chitanda, he had then instructed Chitanda to proceed with negotiations with the plaintiff for the conclusion of a lease agreement over Shop No. 2. Correspondence had then ensued between the parties as indicated in a collection of e-mails exchanged between officials G of CABS and the plaintiff. Mr Finnigan said CABS was 100 per cent owned by the plaintiff, who had the final say in matters relating to CABS. He also said CABS still wanted to operate in Avondale and hence the need for the premises occupied by the defendant.

Under cross-examination, Mr Finnigan said negotiations with the plaintiff H had started early in May 2008. He agreed that CABS was an independent

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Mtshiya J

legal entity, like the plaintiff, and if offered the premises they would pay rent. A

The last witness called by the plaintiff was Miss Maulana, the plaintiff's Senior Portfolio Manager. She said she was aware of the dispute between the parties. Her department was responsible for rent reviews and was therefore responsible for drawing up the letter which was signed by the defendant on 29 January 2010. She, however, said the letter had been dispatched to the B defendant by mistake and she only realised the mistake when payment had been effected. The letter, which is addressed to the defendant and dated 20 May 2010 reads as follows:

> "The year 2009 was challenging for the property sector as the market lacked comparative evidence after the dollarization since all rentals had to be reviewed at the same time. I am glad however that as the year progressed and the rent C levels began to take shape and this year we were in a position to set rentals based on market evidence. We are hereby proposing a rent increase with effect from 1 February 2010 to 31 December 2010 as you have probably noticed we have maintained the January 2010 rent at 2009 levels.

After our market research we have determined the fair rent for your premises to be US $674.71 per month, which translates to US7 421.81 for 11 months that D is 1 February 2010 to 31 December 2010. Our rent proposal comes with the following options for you to select from in line with your business operations.

Option 1: 11 months rent in advance

This option allows you a 20% discount on the proposed rent, resulting in a rental of US $5 937.45 payable by the 15th of February 2010.

Option 2: half yearly advance payments E

This option allows you a 15% discount on the proposed rent, resulting in a rent of US $2 867.52 for the remaining 5 months to June, payable by the 10th of February 2010. The second half payment will be due by the 30th of June 2010 and it will be US $3 441.02.

Option 3: Quarterly advance payments

This option allows you a 12% discount on the proposed rent, resulting in a rent F of US $1 781.23 for each quarter, however for the balance of Q1 the total due will be US $1 187.49 for the remaining two months. The due dates for each quarter are as set below

Quarter 1 - 7 February 2010

Quarter 2 – 31 March 2010

Quarter 3 – 30 June 2010 G

Quarter 4 – 30 September 2010

Option 4: monthly rent

This option allows you to pay the proposed rent as set out above on or before the first of each month in question.

Please select your desired option and return a copy of this letter clearly stating H

2010 (1) ZLR p445

Mtshiya J

A your selected option in the space provided. We require your responses to be submitted by no later than the 31st of January 2010. Please take note to adhere to the stipulated deadlines for each option as failure to do so will nullify the choice and we will renege to option 4, monthly payments at proposed levels. Should you require clarification please do not hesitate to conduct your respective Property Manager, who is your usual contact person."

B The exhibit reveals that on 29 January 2010, the defendant selected option 1 and endorsed same on the exhibit as had been requested by the plaintiff. The exhibit was sent back to the plaintiff indicating the defendant's option.

Miss Maulana maintained, under cross-examination, that the letter was sent to the defendant in error. She, however, admitted that the letter was specifically C directed to the defendant.

Mr Raftopolous was the only witness called to give evidence on behalf of the defendant. He said he is the managing director of the defendant and had directly negotiated rentals with Mr Moyo. Mr Moyo had clearly stated that the plaintiff wanted rentals in United States dollars – a currency that Mr Moyo said was being used by everybody. The witness said he had told Mr Moyo D that as a small business he could not afford to pay in US dollars – based on the parallel market rates i.e. Zimbabwe dollar to US dollar. He had also told Mr Moyo that such a transaction would be illegal. Mr Moyo, according to the witness, had stated that he would find someone else who would be able to pay rent in US dollars. The witness said when he maintained his refusal to E pay rent in foreign currency Mr Moyo had then revealed that CABS would be able to pay rentals in US dollars.

Mr Raftopolous said he had told Mr Moyo that it would be unfair to evict him for the sake of bringing in someone else who had the capacity to pay rent in US dollars. However, Mr Moyo had refused to indicate the rentals in foreign currency in the draft agreement that the parties were negotiating. F He said during the negotiations Mr Moyo had turned abusive and vowed that he would ensure that the defendant was moved out of the premises. Following their exchanges he had then, on 30 May 2008, been served with a notice to vacate the premises. He had immediately proceeded to see Mr Terry of CABS who said he knew nothing about the proposed arrangements G for CABS to take over the premises Shop No. 2. Mr Terry had eventually visited Avondale and had expressed interest in two vacant shops situated in Avondale and belonging to the plaintiff. The witness said that all along he was not aware of the relationship between the plaintiff and CABS. He was of the view that if he had succumbed to Mr Moyo's demands to pay rent in foreign currency there would have been no court case at all. Mr H Raftopolous said his family had operated at the premises for thirty years

Mtshiya J

without any problems and therefore he believed Mr Moyo was victimising A him for refusing to pay rent in foreign currency. He did not believe that the plaintiff wanted the premises for its own use. The premises were not suitable for banking purposes.

Under cross-examination, Mr Raftopolous maintained that rental negotiations had commenced in April 2008. He said Mr Moyo had never sent him any B documentation incorporating the rental that he was demanding in foreign currency. The only document Mr Moyo had sent to him was the notice to vacate the premises. CABS, through Mr Terry, were told that those were the only shops available – there was no question of choice. He said all along he had hoped the matter would be settled out of court.

In dealing with this matter it is important start by capturing the relevant C provision of our statute law that regulates the relationship between parties such as the ones *in casu* involved in a dispute requiring the intervention of this court. Section 22(2) of the Commercial Premises (Rent) Regulations (the Regulations) provides as follows:

> "No order for the recovery of possession of commercial premises or for the D ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee –
>
> (a) continues to pay the rent due, within seven (7) 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 E requiring such order other than that –
>
> (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."

Relying on the *Mobil Oil* case *supra* and the *Film & Video Trust* case *supra*, Mr *Nleya,* for the plaintiff, submitted that where an owner or lessor wishes F to use rented premises for its own use, the court should make an enquiry only as to its *bona fides*. The two case authorities decided that the lessor was required "to assert its good faith and bring some small measure of evidence to demonstrate the genuineness of its desire to use the premises". He went on to state that the defendant had been aware since May 2008 that CABS, a company wholly owned by the plaintiff, would occupy the premises. The G plaintiff, it was submitted, was not motivated by a wish to lease the premises to a third party with the objective of obtaining a higher rental. CABS, it was argued, had been thrown into a serious predicament after being moved out of the premises it was renting in Avondale Shopping Centre. The premises rented by the defendant had therefore been identified as suitable for CABS' banking business. This, therefore, was a genuine need on the part of the H

Mtshiya J

A plaintiff as it required the premises for use by its wholly owned subsidiary. He further submitted that if the plaintiff had been motivated by malice, then it could not have allowed the defendant to continue renting one of its premises in the same location.

On the issue of holding over damages, Mr *Nleya* submitted that although the B defendant continued to make rental payments, the plaintiff was entitled to retain them as the tenant was still unlawfully holding over to the premises after having been given notice to vacate the premises as far back as 30 May 2008. He noted that the defendant had since made an advance payment up to December 2010. That advance payment, he submitted, was a fair return for the occupation of its premises by the defendant. In the main, the plaintiff's C argument was that it had made a genuine case in proving to the court that it intended to occupy the premises for its own use. There was, therefore, a valid reason for requiring the defendant to vacate the premises. Adequate notice had been given.

In his submissions Mr *Samkange,* for the defendant, noted that in its declaration D the plaintiff had given the main reason for requiring the defendant to vacate the premises in the following terms:

> "Plaintiff now reasonably requires the said premises for its own use and on the 30 May 2008, the plaintiff gave the defendant three months notice in writing to vacate the said premises on that ground".

He said the respondent had responded to the above in the following terms:

E "This is denied. Plaintiff does not need the premises the defendant occupies for its own use. The area occupied by the defendant is so small that it's not possible for the plaintiff to occupy it. Plaintiff's claim that it requires the premises for its own use is simply a ploy to punish the defendant for refusing to pay rentals in foreign currency last year"

The plaintiff, it was submitted, had repeated its assertion in its summary of F evidence and had denied that the move was a result of a rent dispute between the parties. That being the case, Mr *Samkange* submitted, both parties had agreed at the pre-trial conference that the issues for trial would be:

(a) whether or not the plaintiff required the premises for its own use?

(b) whether or not the plaintiff is entitled to holding over damages, if yes G the quantum.

Mr *Samkange* further argued that, given the above two issues, the evidence by Messrs Moyo and Finnigan on the relationship between the plaintiff and CABS was of no consequence. That issue was not before the court. He said to that end, the defendant had objected to the production of evidence H relating to the relationship and indeed to the introduction of that issue at

the hearing. (i.e. the issue of whether or not CABS was a company wholly A owned by the plaintiff).

It was the defendant's view that, notwithstanding any relationship, CABS, as conceded to by Mr Finnigan in court, was a separate legal entity. That entity, as again admitted by Mr Finnigan, would take the premises as a lessee and would also negotiate rentals with the plaintiff. Such evidence or B concession, it was argued, clearly corroborated the defendant's defence that the plaintiff simply wanted to evict it because, contrary to the provisions of the law, it wanted to bring in a new tenant that would pay higher rentals. That new tenant, a third party, it was pointed out, was CABS. It was further submitted that the evidence of Miss Maulana did not overrule the fact that a one year lease, expiring on 31 December 2010, is currently in place and C rentals were paid in advance. That is not a disputed fact.

Mr *Samukange* went on to submit that, as per the defendant's evidence, Mr Moyo had maintained during the rental negotiations which commenced in April 2008, that rentals were to be paid in foreign currency. The defendant's refusal or failure to do so had angered Mr Moyo, who now sought to evict D the defendant at any cost. The fact that the defendant had been allowed to continue occupying one of the plaintiff's premises in the same location was meant to make it appear there was no personal vendetta between Mr Moyo and the defendant. The plaintiff had not, as stated in *Film & Video Trust supra*, produced architectural building plans or an application to the City Council for change of use. The plaintiff had only introduced the issue of CABS as E a potential tenant at the eleventh hour and, in any case, the plaintiff had not admitted to the issue of CABS when raised by the defendant at the pre-trial conference. In the premises, it was argued, the plaintiff had failed to satisfy the requirements of s 22(2) of the Regulations. As to the issue of holding over damages, Mr *Samkange* submitted that the defendant had already paid up to December 2010 what the plaintiff accepted as fair rentals. This was not F disputed by the plaintiff. The issue of holding over damages did not therefore arise. He therefore called for the dismissal of the plaintiff's claim with costs.

Elsewhere in this judgment I recorded that I allowed the plaintiff to produce evidence relating to its relationship with CABS. To the extent that a lessor is required to prove its *bona fides* in requiring leased or rented premises for G its own use, I did not see anything wrong in the plaintiff endeavouring to prove its genuineness by proceeding to prove that it and CABS were one entity. I note, however, that in law the two entities enjoy separate legal status. However, the plaintiff can only prove its case by the introduction of some relevant evidence – see *Film & Video Trust*, *supra*. I believe a lessor in the circumstances of the plaintiff *in casu* should not be curtailed in its efforts H

A to prove its *bona fides*. It should, however, remain the sole duty of the court to determine whether or not such evidence entitles the plaintiff to an order in terms of the Regulations.

In casu, the lessor is the plaintiff. Irrespective of any relationship, CABS cannot, in these proceedings, be defined as the lessor. The Regulations, in my B view, are meant to define the relationship between the lessor and the lessee. Accordingly, when the lessor declares the need for

own use of the leased premises, it is logical that the lessee should understand that to mean "own use" by the lessor to whom rent is payable. As per the Regulations, the lessor cannot repossess the premises for the reason of "leasing the premises to some other person". That would certainly be against the spirit of the law. It was C conceded that CABS is a separate legal entity that would also be required to pay rent for the premises as a lessee. That concession to me disposes of this matter because it clearly establishes that the plaintiff wanted to lease the premises to another person – a third party. At the time Mr Moyo engaged the defendant for revised rentals, it knew of CABS's predicament. CABS had been given notice on 6 May 2008 and, as already said, it appears they D were targetting Stanley House for their requirements. I am, therefore, on a balance of probabilities, satisfied that Mr Moyo was, just before giving notice, still negotiating the renewal of the lease agreement with the defendant. The negotiations were frustrated by the defendant's refusal to pay rent in foreign currency, an act, which, as the defendant correctly observed, would have E been against the law prior to February 2009.

It should also be noted that on 21 October 1961, Old Mutual Building Society of Central Africa changed its name to Central Africa Building Society. The legal entity (i.e. the plaintiff) that seeks relief *in casu* is Old Mutual Life Assurance Company Zimbabwe Ltd and not the holding company Old Mutual Zimbabwe Ltd. There was never any explanation of the differences. F The court cannot therefore substitute the plaintiff with Old Mutual Building Society of Central Africa or Old Mutual Zimbabwe Ltd without a valid explanation. The absence of any explanation therefore throws away any value to be gained from the evidence proferred to demonstrate a relationship between the plaintiff and CABS.

G The plaintiff, *in casu,* remains as cited in the summons, namely Old Mutual Life Assurance Company Zimbabwe Limited. It is that plaintiff who, as far back as 6 May 2008, must have been aware of the predicament of CABS. The most that could therefore have happened, was for the plaintiff's notice requiring the defendant to vacate the premises to disclose its full intentions by making reference to CABS and explaining who CABS was (i.e. the alleged H relationship). That was never the case until the eleventh hour.

2010 (1) ZLR p450

Mtshiya J

Given the circumstances of this case, I am unable to dismiss the defendant's A defence which, in the main, is that the reason for the rift between the parties was the refusal by the defendant to pay rentals in foreign exchange, contrary to the laws of the country. The extended relationship – now expiring in December 2010 – would tend to prove that, whilst Mr Moyo thought otherwise, the plaintiff *per se* did not share his views. The regularisation B of the defendant's occupation of the premises up to December 2010 cannot be ignored in considering the defendant's evidence in court. That being the case, I am unable to place value on Miss Maulana's evidence.

In view of the foregoing I am therefore, on a balance of probabilities, not satisfied that the plaintiff wanted the premises for its own use. In the circumstances, I cannot, in terms of s 22(2) of the Regulations and indeed C in terms of the authorities relied upon by both parties, grant the plaintiff the order it seeks.

With regard to the issue of holding over damages, I am guided by the subsequent conduct of the parties after the issuance of the notice to vacate. The plaintiff has not claimed any unpaid rentals and has proceeded to allow D the defendant to remain in occupation on the basis of fully paid fair rentals up to December 2010. The issue of holding over damages therefore falls away.

I therefore order as follows:

That the plaintiff's claim be and is hereby dismissed with costs. E

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Venturas & Samukange, defendant's legal practitioners

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Document 60 of 62

Source:
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VENETIAN BLINDS SPECIALISTS LTD v APEX HOLDINGS (PVT) LTD 2010 (1) ZLR 451 (H)

Citation	2010 (1) ZLR 451 (H)
Case No	Judgment HH-87-10
Court	High Court, Harare
Judge	Patel J
Heard	9 March 2009
Judgment	24 June 2010
Counsel	*J R Tsivama*, for the plaintiff *A B Chinake*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Evidence – *foreign law – enforcement of a foreign judgment – failure of party seeking enforcement to lead evidence as to the foreign law – effect* D *of such failure.*

International law – *foreign judgment – enforcement of – principles – effect to such judgments should be given in the absence of a violation of some fundamental principle of justice – modification of judgment by local court – expert evidence as to the foreign law required – whether enforcement of judgment would contravene public policy – foreign court alleged* E *to have failed to calculate special damages correctly – judgment not totally flawed and not an affront to justice – foreign judgment expressed in foreign currencies – tender of payment in local currency – not a sufficient discharge of judgment debt – failure to comply with express terms of foreign judgment – judgment of foreign court of first instance* F *complied with by full payment of judgment debt – such payment in turn satisfying the order of foreign court of appeal – claim to enforce foreign judgment dismissed*

Practice and procedure – *judgment – foreign judgment – recognition and enforcement of – limited circumstances in which correctness of foreign judgment may be reviewed – modification of foreign judgment* G *– modification in accordance with provisions of foreign statute – need to properly prove provisions of foreign law*

Headnote

"The courts are not free to enforce a foreign right at the pleasure of the judges to suit the individual notion of expediency or fairness. They do not close H their door unless help would violate some fundament principle of justice,

Patel J

some prevalent conception of good morals, some deep rooted tradition A of the common weal" (*dicta per* Cardozo J *in Loucks* v *Standard OiI Company of New York* (1918) 224 NY 99 at 111, followed).

The defendant, a Zimbabwean company sold plaintiff, a Malawian company a quantity of PVC. A subsequent dispute between parties led to proceedings in the Malawi High Court, brought by the defendant. The B plaintiff, however, counter claimed, alleging that the PVC which it had purchased from the defendant was defective. The court awarded it general damages but did not make any

award for special damages. Dissatisfied with its failure to obtain any special damages, the plaintiff appealed successfully to the Supreme Court of Appeal of Malawi, which awarded it general and special damages in the amounts of USD848 662.50 and C MWK241 957. By this time, however, the defendant, having accepted the award of the Malawi High Court, had paid the plaintiff all that was due in terms thereof. The plaintiff conceded that full payment had been made in terms of the judgment of the lower court, but it wished to be paid in terms of the judgment of the superior court. Accordingly, it sought an D order recognizing the latter judgment as binding and enforceable against the defendant, who opposed the grant of such an order. The defendant submitted, firstly, that the recognition of the judgment of the Supreme Court of Appeal of Malawi would be contrary to public policy, being fundamentally erroneous in several respects, as its award of special damages was wrongly based and, therefore, arbitrary and contrary E to justice. Secondly, it urged that the award of the Supreme Court of interest did not apply to its award of special damages which sounded in American dollars, that is USD848 662.50. While the relevant Malawian legislation did provide for an interest rate of 5 per cent in civil cases, that legislation was silent as to whether that percentage figure referred to claims sounding in F foreign currency as well as to claims sounding in its domestic currency.

The plaintiff had not led any evidence on the point nor was any help to be gained *ex facie* the judgment of the court, as duly certified by an authorized court official. Finally, the question arose as to whether the defendant's indebtedness to the plaintiff, consequent upon the judgment G of the Malawi Supreme Court, had been satisfied. With the permission of the Reserve Bank of Zimbabwe and in accordance with the official rates of exchange, the defendant had tendered the sum of ZWD50.9 billion. The plaintiff argued that this sum was not made in the currencies expressed by the Supreme Court and that the defendant's tender to it in local currency was useless. It was a peregrine company with no business H

Patel J

A interests in Zimbabwe. The plaintiff submitted that tender at official rate was grossly inadequate as, at the market rate, ZWD50.9 billion was only worth about USD500. Thus, it submitted, the tender in local currency did not constitute sufficient discharge of an obligation sounding in foreign currency. Argument then took place concerning the applicable exchange rates so as to determine whether the Supreme Court judgment had been B satisfied in the light of the payment made by the defendant in settling the judgment of the Malawi High Court.

Held, that the argument based upon public policy could not assist the defendant. While the Malawian Supreme Court may have erred in calculating the quantum of special damages awarded to the plaintiff, it could not be said C that its decision was so fundamentally flawed as to entail an affront to our notion of justice or some irreparable harm to the economic or social well-being of the community as a whole.

Held, further, that as the plaintiff had failed to lead expert evidence as to whether Malawian law allowed a 5 per cent rate of interest in respect of claims sounding in foreign currency as well as its own local currency, D it must be accepted that it applied only to the latter.

Held, further, that if the court were to accept the plaintiff's argument on the question of interest, it would have to modify the expressly stated terms of the Malawi Supreme Court on the basis of a point of a foreign law not properly proven in terms of s 25 of the Civil Evidence Act [*Chapter* E *8:01*]. This it could not do.

Held, further, that the defendant's tender in local currency did not constitute a sufficient discharge of the judgment debt of the Malawi Supreme Court. It did not comply with the express terms of that judgment nor did it adequately compensate the plaintiff as contemplated therein.

Held, further, that on the evidence before the court concerning the applicable F exchange rates, both the awards of the Supreme Court of Appeal of Malawi, of USD848 662.50 and MWK241 957, had been satisfied in full because of the previous payment which the defendant had made to the plaintiff as a result of the judgment of the Malawi High Court. For that reason, the plaintiff's claim must be dismissed with costs.

Cases cited G

Echodelta Ltd v Kerr and Downey Safaris (Pvt) Ltd 2002 (1) ZLR 632 (H)

Fender v St John-Mildmay [1938] AC 1

Hadley v Baxendale (1854) 9 Ex 341; 156 ER 145

Hilton v Guyot 159 US 133 (1895)

H *Jones v Krok* 1995 (1) SA 677 (A)

Patel J

Loucks v Standard OiI Company of New York 224 NY 99 (1918) A

Lowveld Leather Products (Pvt) Ltd v Intl Finance Corp Ltd & Anor 2003 (1) ZLR 78 (S)

Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe 1988 (2) ZLR 482 (SC)

Tobacco Finance (Pvt) Ltd v Zimnat Ins Co Ltd 1982 (1) ZLR 47 (H); 1982 (3) SA 55 (ZH) B

Zimbabwe Development Bank v Zambezi Safari Lodges (Pvt) Ltd & Ors 2006 (2) ZLR 118 (H)

Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd 1985 (1) ZLR 358 (S); 1985 (4) SA 553 (ZS)

Legislation considered C

Civil Evidence Act [*Chapter8:01*], s 25

Case information

J R Tsivama, for the plaintiff

A B Chinake, for the defendant

Judgment

PATEL J: The plaintiff herein seeks an order recognising as binding and D enforceable as against the defendant a judgment granted by the Supreme Court of Appeal of Malawi on 11September 2007. Pursuant to that judgment, the plaintiff claims from the defendant the sums of US$848 662.50 (with interest) and MK241 957 as well as costs of suit on a legal practitioner and client scale. The defendant resists the claim on the ground that it has discharged its E obligations under the judgment. In the alternative, the defendant avers that the Malawi Supreme Court misdirected itself to the extent that it would be contrary to public policy to recognise and enforce its judgment in this country.

The issues for determination *in casu*, as reconsidered and confirmed at the commencement of trial, are as follows: F

1. Whether the recognition of the judgment of the Malawi Supreme Court would be contrary to public policy under the law of Zimbabwe.
2. Whether that judgment has been wholly satisfied under the law of Zimbabwe.
3. What order of costs should be made by this court in the circumstances G of this case?

Evidence for the Plaintiff

Mario de Angelis is the Managing Director of the plaintiff company and his evidence was as follows.

On 11 February 2003, the plaintiff succeeded in a counterclaim for breach H

Patel J

A of contract against the defendant in the High Court of Malawi. However, the plaintiff was aggrieved by the fact that only general damages were awarded by the High Court and immediately lodged an appeal against that determination. On appeal to the Supreme Court of Appeal, the plaintiff was awarded general as well as special damages, equating to the amounts claimed on the Summons *in casu*. The award of US$848 662.50 was by B way of special damages for loss of profits from 1994 to 1999, stemming from the drastic reduction of the plaintiff's share of the market occasioned by the

defendant's breach of contract. According to the plaintiff's attorneys, the rate of 5 per cent interest claimed on that amount arises by operation of law, *viz.* the Malawi Courts Act [Exh 1]. The sum of MK241 957 represents C damages for loss of profit on the specific contract between the parties. This sum incorporates the interest component specifically awarded but doubled up to the maximum claimable under the *in duplum* rule.

The decision of the Supreme Court of Malawi was handed down on 11 September 2007. There is no appeal against that decision and it is a final judgment which the defendant has not satisfied. The defendant paid a sum of D ZW$50 billion through this court on 13 April 2008. The plaintiff rejected this payment as being valueless. The contract between the parties was initially invoiced in UAPTAs but after that currency lapsed the parties agreed to deal in United States Dollars. The Zimbabwe dollar was never mentioned as part of the agreement and the plaintiff had no need to use that currency as E it is a wholly Malawian company with no business interests in Zimbabwe.

Under cross-examination, the witness conceded that on 16 February 2004 the defendant transferred a sum of MWK4 817 862.25 to its own attorneys in Malawi [Exh 2]. The bulk of this money, though he could not state exactly how much, was received by the plaintiff and retained by it thereafter. He F also accepted the contents of a letter from the defendant's bank dated 27 October 2003 [Exh 3] confirming exchange control approval to remit that amount to satisfy the 2003 judgment of the Malawi High Court. The witness could not confirm with any certainty whether the Supreme Court of Malawi had taken that payment into account in calculating its award of special and general damages. He further conceded that the plaintiff's claim for special G damages before the Malawian courts was based on a profit mark-up of 30 per cent on gross annual turnover. It did not take into account the plaintiff's net profit, after deduction of taxes and other contingencies.

Evidence for the Defendant

Icy Chasara is the Chief Executive Officer of William, Smith & Gourock H (WS&G), which at the relevant time was the trading division of the defendant.

Patel J

He testified as follows. A

WS&G was contracted to sell 34 000 metres (30 tonnes) of PVC to the plaintiff. This material was found to be defective by the Malawi courts and the principal question before those courts was that of damages. The defendant accepted the Malawi High Court judgment ordering the payment of MK1.5 million as general damages together with interest on that amount and costs. B Applying the exchange rate adopted by the High Court, the award of MK1.5 million converted to approximately US$330 000.

Consequently, a payment of MWK4.8 million (equating to circa US$1 050 000), inclusive of interest and costs, was made through the defendant's attorneys on 16 February 2004. The plaintiff accepted this C payment but still proceeded with its appeal against the High Court award of damages as being inadequate. The defendant only became aware of the appeal in 2006, after it had already effected payment, when its Malawi attorneys forwarded a copy of the notice of hearing before the Supreme Court [Exh 5]. The plaintiff did not refund the payment of MWK4.8 million, despite the appeal, and the PVC supplied was never returned to the defendant. D

The Supreme Court allowed the appeal and awarded general as well as special damages. Its award of special damages was based on a gross profit margin of 30 per cent and was not related to net profit. Moreover, in making its award, the Supreme Court did not take into account the earlier payment of MWK4.8 million made in satisfaction of the High Court award. E

Due to the very lengthy and difficult process of approval involved in sourcing foreign currency at that time, the defendant did not attempt to access any convertible currency through the Reserve Bank in order to satisfy the Supreme Court judgment. Instead, on 16 April 2008, the defendant wrote to its legal practitioners enclosing a bank cheque for ZW$50.9 billion, representing the capital sum due plus *in duplum* interest. This amount was calculated by F applying the rates of exchange confirmed by the ZB Bank. On 30 April 2008, the payment was transmitted to the Registrar of the High Court of Zimbabwe. It was intended as payment into court, in satisfaction of the Malawi Supreme Court judgment, and was duly receipted as such. [See Exhibits 4A-4E]. In effect, the

defendant paid the plaintiff twice, once on the High Court award G and for the second time on the Supreme Court award.

Under cross-examination, the witness was unable to indicate what the plaintiff could have done with the payment of ZW$50.9 billion. He assumed that the plaintiff might have been able to apply to the Reserve Bank for approval to convert and remit that sum to Malawi. In any event, his testimony as to the plaintiff having been paid and having retained MWK4.8 million, and H

Patel J

A the relative value of that sum in United States dollars, was not challenged in cross-examination.

Whether Malawi Judgment Contrary to Public Policy

The defendant avers that it would be contrary to public policy for the Malawi Supreme Court judgment to be recognised in Zimbabwe because B it is fundamentally erroneous in several respects. In essence, it is averred that the court's award of special damages was based on the plaintiff's gross profit margin rather than its net profit, contrary to established rules on the calculation of damages. It is therefore arbitrary, erroneous and inimical to the notion of justice and consequently contrary to public policy. In this regard, reference is made to *Tobacco Finance (Pvt) Ltd* v *Zimnat Insurance Company* C *Ltd* 1982 (1) ZLR 47 (H); 1982 (3) SA 55 (ZH) at 61, where a policy based enquiry into the concept of negligence was adopted and articulated as one that:

> "is really governed by broader considerations such as the ordinary notion of justice, the interests of the claimant or the defendant as balanced against the community as a whole, and the economic or even social effects of the claim, all of which compendiously may be said to broadly reflect the policy of law."

D Reliance is also placed on the principles to be applied in determining damages for breach of contract as enunciated in *Zimbabwe Banking Corporation Ltd* v *Pyramid Motor Corporation (Pvt) Ltd* 1985 (1) ZLR 358 (S) at 374; 1985 (4) SA 553 (ZS) at 564, where Gubbay JA (as he then was) observed as follows:

> "Each case must be assessed pragmatically on its own facts and merits, with E primary weight being laid upon the policy of the law. The court must ask itself whether, paying due and proper regard to the notion of justice and the interests of litigants balanced against the community as a whole, it is socially desirable to impose liability in the particular circumstances."

The plaintiff's case is that the law of Malawi is essentially the same as English law and that the Malawi Supreme Court properly relied upon the F leading case of *Hadley* v *Baxendale* (1854) 9 Ex 341; 156 ER 145 in assessing special damages for consequential loss that was within the contemplation of the parties. This approach in distinguishing general or intrinsic damages from special or extrinsic damages recoverable in special circumstances also forms an established part of our law. See Christie *Business Law in Zimbabwe* at p 128.

G As regards the non-recognition of foreign judgments on the ground of public policy, the uniform approach in common law jurisdictions is to be extremely chary about delving into questions of legal or factual correctness. It is generally inappropriate to review a judgment of a foreign court of competent jurisdiction and to deny or withhold recognition, even if there is shown to H be a clear misapprehension by that court of the law or facts founding its

Patel J

judgment. In the United States, for instance, it was stated as follows in *Hilton* A v *Guyot* 159 US 113 (1895):

> "Where there has been an opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings … and there is nothing to show either prejudice in the court or in the system of law under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, B the merits of this case should not, in an action brought in this country upon the judgment, be tried afresh, as on a trial or on appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendant cannot be permitted upon that general ground to contest the validity of the effect of the judgment sued on."

In similar vein, Cardozo J in *Loucks* v *Standard Oil Company of New York* C 224 NY 99 (1918) at 111, took the view that:

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges to suit the individual notion of expediency or fairness. They do not close their door unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal." D

In England, this view was echoed in *Fender* v *St John-Mildmay* [1938] AC 1 at 12, where Lord Atkin declared that:

> "[public policy] should only be invoked in clear cases in which harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds." E

The approach in South Africa is no different. Thus, in *Jones* v *Krok* 1995 (1) SA 677 (A) the Appellate Division overturned a decision of the court *a quo* which declined to recognise a foreign award because of the apparently arbitrary and unacceptable approach of the foreign court in awarding damages for breach of contract. As was stated by Corbett CJ at 696:

> "In my view there was no valid basis on the papers for these findings by the F court *a quo*; and, in any event, they seem to involve entering into the merits of the case adjudicated upon by the US Court, which, as I have pointed out, is not permissible. Accordingly, public policy afforded no ground for denying the appellant relief …"

In the instant case, it is common cause that the defendant voluntarily G participated in the trial and appeal before the Malawian courts. Moreover, there is no doubt that the Malawi Supreme Court is a court of competent jurisdiction, nor is there any claim that its proceedings on appeal were anything other than procedurally correct. Ultimately, there is no evidence or averment of illegality, partiality or other fundamental irregularity vitiating the propriety of those proceedings. H

Patel J

A In the event, I am unable to perceive any persuasive justification for deviating from the circumspect approach expounded by the eminent jurists that I have cited above. While it might be accepted that the Malawi Supreme Court may have erred in calculating the quantum of special damages awarded to the plaintiff, it cannot be said that its decision was so fundamentally flawed as to entail an affront to our notion of justice or some irreparable harm to the B economic or social well-being of the community as a whole. In short, the public policy argument cannot avail the defendant. I accordingly find that the recognition of the judgment of the Malawi Supreme Court would not be contrary to public policy under the law of Zimbabwe.

Interest Claims

C The summons (as amended) incorporates two separate claims for interest. The first is in respect of the Malawi kwacha award and is equivalent to the *in duplum* interest on the capital sum awarded. The second relates to the award of special damages denominated in United States dollars, in respect of which the plaintiff seeks interest at the rate of 5% per annum from 12 D September 2007, being the day after the judgment of the Malawi Supreme Court was handed down.

The relevant portion of the judgment of the court reads as follows:

> "In the result the appellant is awarded special damages in the sum of US$848 662.50. The appellant is further awarded the sum of MK120 928.50 with interest at 1 per cent above the bank base lending rate with effect from 24th May 1994 to E the date of payment."

The parties are not in dispute as to the interest claimed by the plaintiff on the Malawi kwacha award. As regards the United States dollar award, the judgment itself is silent on the question of interest. The plaintiff's position is that the 5 per cent interest component is automatically claimable, without F having to be specifically stipulated, by virtue of the Courts Act [*Chapter 3:02*] of the Laws of Malawi. Section 65 of that Act provides as follows:

> "Every judgment in civil proceedings shall carry interest at the rate of five per centum per annum or such other rate as may be prescribed."

It seems to me that there are several compelling reasons for not allowing the interest claimed by the plaintiff on the sum of US$848 662.50. Firstly, G in the absence of specific evidence to the contrary, it must be assumed that the above provision is confined to claims sounding in the official currency of Malawi, to wit, the Malawi kwacha. There is nothing in s 65 or in any other provision of

the Act to suggest that s 65 extends equally to claims sounding in all foreign currencies, in respect of which the permissible rate H of interest applicable to civil claims will inevitably vary according to the

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Patel J

currency concerned. A

Secondly, and more importantly, what is sought *in casu* is the recognition of a foreign judgment. If this court is to accord such recognition, it must do so on the judgment *ex facie*, as duly certified by an authorised official of the foreign court. Accepting the plaintiff's argument involves having to materially modify the expressly stated terms of the foreign judgment on the B basis of a point of foreign law that has not been properly proven in terms of s 25 of the Civil Evidence Act [*Chapter 8:01*].

In my view, the interpretation that the plaintiff seeks to place on the meaning of s 65 of the Malawi Courts Act is not entirely incontestable. Apart from the statutory provision itself, nothing else has been adduced to support the C plaintiff's construction of that provision, either by way of expert evidence or a reported judgment from Malawi or this country, as is explicitly envisaged by s 25 of our Civil Evidence Act.

In the premises, I am of the considered view that the plaintiff's claim for interest on the sum of US$848 662.50 cannot be allowed upon the recognition of the judgment of the Malawi Supreme Court. D

Whether Malawi Judgment Satisfied

It is common cause that the defendant effected two separate payments to the plaintiff, one in Malawi kwachas in satisfaction of the High Court judgment and the other in Zimbabwe dollars pursuant to the Supreme Court judgment. E

As regards the tender of ZW$50.9 billion, Mr *Chinake's* argument runs as follows. This was a payment into court, in terms of r 144 of the High Court Rules 1971, made with Reserve Bank approval at the prevailing exchange rate. The defendant, as a locally registered company, was bound to comply with Zimbabwean exchange control laws in settling the Malawi Supreme Court judgment. F

As against this, Mr. *Tsivama* submits that the payment was not made in the currencies expressed by the court. Moreover, the plaintiff is a peregrine company with no business interests in Zimbabwe and it could not have utilised the Zimbabwe dollars tendered by the defendant. As for the real value of the sum tendered, the evidence shows that it would have translated G to *circa* US$500 on the "parallel" market and that it would have been practically impossible to convert it through official channels into anything approximating the judgment debt.

In recent years, our courts have taken judicial notice of the existence of the parallel currency market and its glaring disparity with the official exchange rate. See *Echodelta Ltd* v *Kerr & Downey Safaris (Pvt) Ltd* 2002 (1) ZLR 632 H

Patel J

A (H); *Lowveld Leather Products (Pvt) Ltd* v *International Finance Corporation Ltd & Another* 2003 (1) ZLR 78 (S). Our courts have also acknowledged that currencies are bound to fluctuate in value and that it is necessary to protect creditors from being prejudiced by currency devaluations. See *Makwindi Oil Procurement (Pvt) Ltd* v *National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC) at 492. The overall objective is to achieve *restitutio in integrum*, B so as to ensure full and proper compensation, coupled with performance *in forma specifica*, in accordance with the intention of the parties. In the absence of contractual agreement between the parties or acquiescence by the creditor, a tender in local currency does not constitute sufficient discharge of an obligation sounding in foreign currency. See *Zimbabwe Development* C *Bank* v *Zambezi Safari Lodges (Pvt) Ltd & Others* HH-95-06 at pp 10-11.

In the instant case, the parties agreed to transact their contract initially in UAPTAs and subsequently in United States dollars, without reference to any valuation or payment in Zimbabwe dollars. In any

event, the defendant's tender of ZW$50.9 billion does not accord with the express terms of the Supreme Court judgment. Moreover, it did not and could not adequately compensate D the plaintiff as contemplated by that judgment. In these circumstances, I am amply satisfied that the defendant's tender in local currency did not constitute sufficient discharge of the judgment debt under consideration.

Turning to the payment of MWK4.8 million effected by the defendant in February 2004, it is clear that this payment was made after the plaintiff E had filed its notice of appeal against the High Court judgment. It appears that the defendant only became aware of the appeal in 2006. In any event, whatever may have transpired in that regard, what is relevant for present purposes is that the payment was accepted and retained by the plaintiff in satisfaction of the High Court judgment. In this regard, Mr *Tsivama* admits that the payment made by the defendant must be taken into account and set- F off in executing the Supreme Court judgment in the event of its recognition and enforcement in this country. Furthermore, the evidence also shows that the 34 000 metres of PVC, valued at US$26 656.78, that was supplied to the plaintiff under the original contract was kept by the plaintiff and never returned to the defendant.

G As regards the rate of exchange to be applied to the payment of MWK4.8 million, Mr *Tsivama* submits that this figure should be converted at the rate prevailing in 2004 when the payment was received by the plaintiff. While this approach may be generally correct, as per the M*akwindi Oil Procurement* case, *supra*, there is nothing in either of the Malawi judgments to indicate that the awards denominated in Malawi kwachas have devalued since the H contract was entered into. In any event, it must be borne in mind that the

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Patel J

defendant's payment to the plaintiff included interest on the original award, A exceeding MWK3 million, covering the period from 1993 to 2003. Equally significantly, the plaintiff did not lead any evidence whatsoever at the trial before this court as to the rate of exchange to be applied to the Malawi kwacha awards. Moreover, as I have indicated earlier, the testimony of the defendant's witness as to the United States dollar value of the payment B of MWK4.8 million was entirely unchallenged and untested under cross-examination. The court cannot reject that evidence and must place reliance upon it in the absence of any other evidence to controvert it having been adduced at the trial.

According to the exchange rate applied by the High Court in relation to the contract price agreed between the parties, US$1 converted to MK4.4788 C when the contract was concluded. The total amount paid by the defendant in satisfaction of the High Court judgment was MWK4 819 512, comprising general damages, 30 per cent of the contract price, interest up to February 2003 and legal costs. Excluding the latter amount of MWK150 000 renders the sum of MWK4 669 512 which, at the exchange rate of 4.4788, converts D to USD1 042 581.00. This figure equates to the total amount that was paid to and retained by the plaintiff, as damages and interest from 1993 to 2003, pursuant to the judgment of the High Court.

In terms of the Supreme Court judgment, the plaintiff is entitled to payment of USD848 662.50 and MWK120 928.50 with *in duplum* interest, *i.e.* MK241 857.00. Applying the exchange rate of 4.4788 to the latter amount, E the sums payable to the plaintiff are USD848 662.50 plus USD54 000.40 – adding up to a total of USD902 662.90.

If the above calculations and resultant figures are correct, and there is nothing in the papers to evince the contrary, the defendant's judgment debt in terms of the Supreme Court award has been fully discharged by virtue of its payment F to the plaintiff pursuant to the High Court judgment. This would be so even if one were to add the interest component of 5% per annum on the United States dollar award of USD848 662.50 (which I have already disallowed), *i.e.* USD42 433.125 x 2.75 years = USD116 691.09 + USD902 662.90 = USD1 019 353.99.

Disposition G

As I have found earlier, the defendant has failed to demonstrate any public policy consideration *in casu* precluding the recognition of the Malawi judgment in Zimbabwe. However, as the evidence shows, the monetary award rendered by the Supreme Court has been fully satisfied by dint of the payment previously effected by the defendant in settling the High Court H

Patel J

A judgment. Although the latter judgment has been overtaken by the former, the payment already made by the defendant to the plaintiff clearly cannot be disregarded in determining the question of discharge. For that reason, the plaintiff's claim for recognition of the Malawi judgment as binding and enforceable in Zimbabwe must fail. It is accordingly dismissed with costs.

B *Sawyer & Mkushi*, plaintiff's legal practitioners

Kantor & Immerman, defendant's legal practitioners

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Document 61 of 62

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CENTRAL AFRICAN BUILDING CONSTRUCTION CO (PVT) LTD v CONSTRUCTION RESOURCES AFRICA (PVT) LTD 2010 (1) ZLR 464 (H)

Citation	2010 (1) ZLR 464 (H)
Case No	Judgment No. HH-112-10
Court	High Court, Harare
Judge	Gowora J
Heard	14 June 2010
Judgment	30 June 2010
Counsel	*P C Paul*, for the plaintiff *L Uriri*, for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Legal practitioner – *conduct and ethics – duty to court – legal practitioner having done acts which would buttress his clients case – likelihood* D *of practitioner being called as witness to explain such actions – such partisan conduct inconsistent with duty to court – practitioner should not act for party in litigation*

Headnote

One of the issues raised by the defendant's legal practitioner was that of just who were the directors and shareholders of the plaintiff company and E whether the person who purported to represent the plaintiff had transferred his shares and directorship to the defendant or its representatives. The plaintiff's legal practitioner had, before the trial, been issued a proxy by

that person, and on the basis thereof called a meeting of shareholders attended only by himself and at which a resolution was issued by F himself appointing himself as director of the plaintiff. Following that appointment the legal practitioner, in the capacity of chairman of the directors' meeting, then issued a resolution which sought to ratify the institution of the proceedings before the court.

Held, that a legal practitioner's duty is to protect the interests of his client and to give legal advice. It is not his function to step into the shoes of G the client and perform, on behalf of his client, acts that are materially related to the dispute before the court in an endeavour to buttress his client's case. To do so is especially reprehensible when the question of the plaintiff's authority to institute the current proceedings had been raised with him and he was aware that this alone could damage the success of the plaintiff's claim. Notwithstanding this fact and his legal H

Gowora J

A knowledge and, more importantly, his duty to the court, he had held a meeting attended only by himself as director of the company, at which he issued a resolution in terms of which his actions as a legal practitioner in instituting the proceedings were ratified by himself. In addition to this, a resolution passed by him under the guise of director of the plaintiff sought to nullify the appointment of defendant's nominees as directors. Even B if the appointment had been irregular, it would be serious misconduct for a legal practitioner to then don his client's mantle and rectify the irregularity by nullifying the appointment.

Held, further, that in circumstances where the actions of a legal practitioner may be such that he may be called as a witness, as might happen *in* C *casu*, it would be undesirable and indeed not in the interests of justice, if that legal practitioner were allowed to act for a party to the dispute. A legal practitioner should at all times retain his independence in relation to his client and the litigation which is being conducted. If he is to give important evidence in circumstances where his credibility may be called into question, his independence as a professional adviser to D his client in the matter may be affected. If he is to testify as a witness, he acquires an interest in the matter which may make it difficult for him to discharge his professional duty to his client, and to this must be added the fact that his impartiality may be suspect due to his being a legal practitioner for one of the parties to the dispute. In assuming the E mantle of his clients and accepting the proxies by which he then held meetings and passed resolutions that had a direct bearing on matters in hand, the practitioner clearly showed a partisanship with the plaintiff's case in a manner that was incompatible with his duty to the court. If he were called to give evidence this would be irregular indeed, as a legal practitioner is instructed to advise his client, and he cannot be a legal F adviser and a witness. He can only assume one role, not both.

Held, accordingly, that the plaintiff's legal practitioner should not act for the plaintiff in the trial.

Cases referred to

G *Bozimo Trade & Development Co (Pvt) Ltd v First Merchant Bank & Ors* 2000 (1) ZLR 1 (H)

Central African Building Construction Co (Pvt) Ltd v Construction Resources Africa (Pvt) Ltd & Ors HH-37-09

Chafadza v Edgars Stores Ltd & Anor 2005 (1) ZLR 299 (H)

Robinson v van Hulsteyn & Ors 1925 AD 12

Gowora J

Case information

P C Paul, for the plaintiff A

L Uriri, for the defendant

Judgment

GOWORA J: On 9 January 2007 the plaintiff herein instituted proceedings against the defendant by way of summons for an order for its ejectment from three immovable properties. The defendants

filed papers in defence of B the claim and in due course the matter was referred to a judge in chambers for the holding of a pre-trial conference. Issues for trial were agreed by the parties at the pre-trial conference and thereafter the matter was referred to trial. When the matter was called for trial Mr *Uriri,* on behalf of the defendant, indicated to the court that the defendant had a preliminary issue to be dealt with before the trial could proceed. The submission by Mr *Uriri* C was that the court should find that it was improper for Mr *Paul* to represent the plaintiff in the suit.

The first point raised on this aspect was that after the defendant had entered appearance to defend it had, in its plea, taken issue with the authority of those persons seeking to represent the company in the suit and that the issues at D the pre-trial conference had captured this is a point of contention between the parties to be resolved at trial. An amended plea filed by the defendant has the following allegations in relation to the alleged lack of authority:

1. That a Mr Viera who has purported to institute these proceedings has not been authorized by plaintiff to bring the current proceedings
2. That in any event, no resolution has been passed by the plaintiff's current E directors to bring a claim against the defendant, because the defendant is not in occupation of the premises in question.
3. That the premises in question are lawfully occupied by the current directors and shareholders of the plaintiff and that plaintiff can not seek its own eviction as there is no cause for such action. F

At the pre-trial conference one of the issues for trial was recorded as follows:

Has Mr Viera transferred his shares and directorship to defendant or its representatives?

The contention by Mr *Uriri* is that the question of who the directors and shareholders of the plaintiff are is of the moment in the resolution of the G dispute between the parties as the actions of the company are directed by the shareholders through its directors. He contends further that as of 14 June 2007 the defendant's nominees had been appointed as directors of the plaintiff and were making decisions on behalf of the plaintiff. According to counsel, this court had already made a factual finding on this in a judgment by Chatukuta J in *Central African Building Construction Co (Pvt) Ltd* v H

2010 (1) ZLR p467

Gowora J

A *Construction Resources Africa (Pvt) Ltd & Ors* HH-37-09. At p 4 of her judgment the learned judge stated as follows:

> "… As from the time the agreement of sale was concluded, the respondents were running the affairs of the applicant. The applicant was aware that the second and third respondents were holding themselves out as its directors. In Case No. HC 109/07 the second and third respondents pleaded that they were the applicant's B directors."

It is clear that the court did not, in that case, conclude that the respondents therein were directors of the applicant but that they were holding themselves out as directors. It is obvious, therefore, that the issue of the directorship of the plaintiff herein is central to the resolution of the dispute in the main claim. The actions of Mr Paul for and on behalf of the company therefore C assume importance.

The complaint against Mr *Paul* is linked to the following events. After the pre-trial conference, Mr Viera issued a proxy to Mr *Paul*, who on the basis thereof called a meeting of shareholders attended only by himself and at which a resolution was issued by himself appointing himself as director of D the plaintiff. Consequent upon that appointment, Mr *Paul,* in the capacity of chairman of the directors' meeting, then issued a resolution which sought to ratify the institution of the proceedings before me. The meeting also sought to declare the appointment of the defendant's nominees as directors as being null and void. The contention, therefore, is that Mr *Paul* was a participant E in further happenings that purported to have a bearing on the issues before the court and that the defendant has considered issuing a subpoena *duces tecum* for the production of minute books and to testify on the circumstances surrounding the various acts supposedly done on behalf of the plaintiff by him. The further contention by the defendant is that it would wish to adduce evidence that the unauthorized conduct of Wintertons in instituting proceedings F on behalf of the plaintiff was ratified through a resolution passed by Mr *Paul.*

Mr *Paul* has contended that he would not call himself as a witness and that it would be improper for the defendant to subpoena him as such. He argued that the summary of evidence clearly revealed

the evidence that is sought to be led on the part of the plaintiff and he is not one of the witnesses. He G accepted the contention by Mr *Uriri* that the issue of who the shareholders and directors are is for determination by the trial court and contended that the shareholders nominate the directors. He submitted that at the pre-trial conference the defendant had belatedly raised for the first time the issue that the plaintiff's representatives, namely Viera Senior and Viera Junior, were no longer directors. He confirms that after the pre-trial conference there was an H annual general meeting held to ratify the actions of Wintertons in instituting

the action. Mr *Paul* is of the view that that meeting, contrary to the assertions A of Mr *Uriri,* is not vital to the issues before this court.

Lewis *Legal Ethics* p 156 para 68 says:

> "In Supreme Court actions the entry of an attorney in the into the witness-box is by no means uncommon, either because the evidence he has to give, though expected *ab initio*, was of a formal nature only (i.e. not a grave part of the B main contention rendering withdrawal essential), or because events from the initiation of proceedings up to trial were not so patterned as to avoid the need for his evidence. In such circumstances, it may become the duty of the attorney to give evidence; and if counsel finds it necessary to call him he certainly must not seek to avoid testifying; even to hint to the client that he would rather not give evidence would be reprehensible. The suggestion is made earlier in this paragraph that evidence of the attorney which is a grave part of the main C contention might render it essential that he did not act. The reason for this and the picture presented will be plain to any practitioner experienced in the handling of Supreme Court litigation …
>
> In those circumstances that attorney should certainly not act as attorney for the defendant in the action brought by the corporation. He is far too near the matter to exercise the necessary judgment in advising a client respecting the conduct D of the suit let alone its possible settlement."

In *Bozimo Trade & and Development Co (Pvt) Ltd* v *First Merchant Bank of Zimbabwe & Ors*2000 (1) ZLR 1 (H) Chatikobo J, in considering an objection to the appearance as counsel in the matter before him by a chairman of the applicant, opined that due to the relationship of the legal practitioner E of the applicant with the myriad affairs of the companies of which he was chairman and with whose legal brief the legal practitioner was seized, he would not permit him to appear for the same as counsel but would allow him to appear as an agent of the applicants.

In our jurisdiction, a legal practitioner is an officer of the court and as such the court has jurisdiction over the said legal practitioner and, in the event F that it is established that the legal practitioner has performed acts or actions that are inconsistent with the legal practitioner's duty to the court, then it is within the power of the court to sanction such legal practitioner. In the case before me, there can be no talk of a conflict of interest on the part of Mr *Paul*. There is, however, clear evidence on his part of a breach of his duty to the court. G

He has always acted as the legal practitioner for the plaintiff in relation to its dispute with the defendant's representative. At the pre-trial conference in June 2007, he was aware that the most burning issues for determination in the trial related to the shareholding and to the directors of the company. A legal practitioner's duty is to protect the interests of his client and to give H

A legal advice. It is not the function of the legal practitioner to then step into the shoes of the client and perform, on behalf of his client, acts that are materially related to the dispute before the court in an endeavour to buttress the case of his client. This is especially reprehensible when one takes into account the fact that the question of the plaintiff's authority to institute the current proceedings had been raised with Mr *Paul* and he was aware that this alone B could damage the success of the plaintiff's claim. Notwithstanding this fact and his legal knowledge, and, more importantly, his duty to the court, Mr *Paul* had the temerity to hold a meeting attended only by himself as director of the company, at which meeting he issued a resolution in terms of which his actions as a legal practitioner in instituting the proceedings were ratified by C himself. In addition to this, a resolution passed by Mr *Paul* under the guise of director of the plaintiff sought to nullify the appointment of defendant's nominees as directors. Whether their supposed appointment was irregular or not was not an issue that he was empowered, as a legal practitioner, to deal with legally. This particular action, if true, would cast a very serious light on the conduct of Mr *Paul* as a legal practitioner,

especially in light D of the surrounding circumstances of the case, taking into account that that was one of the issues for determination at trial. Even if it had transpired that the appointment had been irregular, for a legal practitioner to then don his client's mantle and rectify the irregularity by nullifying the appointments amounts to serous misconduct. As was said by Wessels JA in *Robinson* v E *van Hulsteyn & Ors* 1925 AD 12 at 21 :

> "According to our law, a solicitor is an officer of the court, the court exercises jurisdiction over him and will see that in the conduct of his professional work he displays towards the court and towards his clients a very high standard of conduct"

The conduct of Mr *Paul* towards the court cannot in the instant case be F described as being of a very high standard. He has aligned himself so closely with his client's case that this court can be forgiven for stating that he has displayed an interest in the case going beyond that of a legal practitioner. In HH-37-09 an application brought by the plaintiff against the defendant for an interdict, the founding affidavit was deposed to by Mr *Paul* in his capacity as a director of the plaintiff. I wish to associate myself with the G views of Cheda J in *Chafadza* v *Edgars Stores Ltd & Anor* 2005 (1) ZLR 299 (H) at 300G to the following effect:

> "To my mind, it is highly undesirable to either attest to an affidavit or sign an urgent certificate for and on behalf of a client who is being represented by his firm, as such lawyer clearly has an interest in the matter at hand."

H It seems to me that the contention of the defendant that the conduct of Mr

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Gowora J

Paul after the pre-trial conference was such that it has contemplated serving A him with a subpoena has merit. The court has wide powers in regulating the conduct of the legal practitioners over whom it has jurisdiction. The power reposed in the judge is not just to control and direct the proceedings but also to ensure, at the end of the day, that justice is done to all parties to the dispute. Where therefore, in circumstances where the actions of a legal B practitioner may be such that he may be called as a witness as may happen in this case, it would be undesirable and indeed not in the interests of justice, if a legal practitioner who should be an important witness in the matter in hand is allowed to act for a party to the dispute. It is important that the legal practitioner should at all time retain his independence in relation to his client and the litigation which is being conducted. If he is to give important evidence C in the circumstances where his credibility may be called into question, his independence as a professional adviser to his client in the matter may be affected. If he is to testify as a witness, he acquires an interest in the matter which may make it difficult for him to discharge his professional duty to his client, and to this must be added the fact that his impartiality may be suspect D due to his being a legal practitioner for one of the parties to the dispute. Hoffmann & Zeffertt *South African Law of Evidence* 4 ed state at p 378:

> "The attorney or counsel acting for a party is also not an incompetent witness, but it is similarly undesirable that he should give evidence on anything which is a matter of controversy since this might indicate a degree of partisanship incompatible with his duty to the court." E

In assuming the mantle of his clients and accepting the proxies by which he then held meetings and passed resolutions that had a direct bearing on matters in hand, Mr *Paul* clearly showed a partisanship with the case of the plaintiff in manner that is incompatible with his duty to the court. If he is called to give evidence this would be irregular indeed, as a legal practitioner F is instructed to advise his client, and he cannot be a legal adviser and a witness. He can only assume one role, not both.

In the premises, in view of the involvement by Mr *Paul* in matters of the plaintiff which have a direct bearing on this trial, it would in my view be irregular for him to continue acting for the plaintiff. It would also, I believe, not be in the interests of justice. I therefore accede to the application by the G defendant and I direct that Mr *Paul* stop acting for the plaintiff in this trial.

The application is therefore granted as prayed.

Wintertons, legal practitioners for the plaintiff

Kantor & Immerman, legal practitioners for the defendant H

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Document 62 of 62

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GRAY & ANOR v REGISTRAR OF DEEDS 2010 (1) ZLR 471 (H)

Citation	2010 (1) ZLR 471 (H)
Case No	Judgment No. HH-114-10
Court	High Court, Harare
Judge	Gowora J
Heard	5 November 2009
Judgment	30 June 2010
Counsel	*P C Paul*, for the applicants Mrs *P Philips-Dube*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Companies – *pre-incorporation contract – company not yet formed – contract entered into on behalf of such company – ratification of – requirements of s 47 of Companies Act [Chapter 24:03] – effect of – company entitled to ratify contract if it is a stipulatio alteri*

D **Contract** – *benefit of third party – company not yet in existence – ratification of contract by company after formation – when permissible*

Headnote

The first applicant, acting as trustee for the second, purchased an immoveable property for the second applicant. The second applicant was a company E to be formed and was incorporated two months after the sale. Early in the following year, the respondent was requested to register the transfer of the property, but refused to do so, on the grounds that s 47 of the Companies Act [*Chapter 24:03*] had not been complied with. This provides that any contract made in writing by a person professing to act as agent or trustee for a company not yet formed shall be capable of being ratified F or adopted by or otherwise made binding upon and enforceable by the company after it has been registered as if it had been duly formed, incorporated and registered at the time when the contract was made, provided that (a) the memorandum of association contains as one of the objects of the company the adoption or ratification or the acquisition of G rights and obligations in respect of such contract; and (b) the contract or a certified copy of it is delivered to the Registrar simultaneously with the delivery of the memorandum. In view of the manner in which the memorandum and articles of association were prepared the applicants would not be able to comply with the requirements of the Act.

The question for decision was whether the second applicant was obliged to H comply with the provisions of the Act in order for the transfer of the

Gowora J

immovable property to be effected in its name or whether under the A common law the applicant could have the property registered in its name despite avoiding the requirements set by statute. The applicants argued that notwithstanding non-compliance with the provisions of s 47, the company was under common law entitled to ratify the contract as it was entered into on behalf of the company by a trustee and that the contract constitutes a *stipulatio alteri*. B

Held, that at common law the promoters of a company prior to incorporation can individually enter into a contract for the benefit of such company. The contract negotiated by the first applicant was a *stipulatio alteri*. Where a company has not complied with provisions of the Act, the alternative is to invoke the common law. A company can under the concept of a C *stipulatio alteri* ratify the contract, or it may refuse to be bound by it. This was not the situation here as the company was the prime mover for the acceptance and ratification of the contract concluded on its behalf.

Cases referred to

Graphics Africa (Zimbabwe) (Pvt) Ltd v Rank Xerox Ltd 1989 (2) ZLR 292 (H) D

Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunmisverspreiders (Edms) Bpk 1970 (3) SA 367 (A)

Watson v Gilson Entprs & Ors 1997 (2) ZLR 318 (H)

Legislation considered E

Companies Act [*Chapter 24:03*], s 47

Deeds Registries Act [*Chapter 20:05*], s 11

Case information

P C Paul, for the applicants

Mrs *P Philips-Dube*, for the respondent F

Judgment

GOWORA J: On 2 September 2007 the first applicant, acting as a trustee for a company about to be formed, entered into an agreement with one Marie Louise Morris in respect of the sale of an immovable property belonging to the latter. The sale was successfully concluded by the parties thereto. The G purchaser of the property was not specifically identified and was referred to as Ian Spence Gray, acting as trustee for a company about to be formed. It is common cause that the second applicant was incorporated as a company under the laws of this country on 8 November 2007. The first applicant is a director in the second applicant.

On 19 March 2008, legal practitioners acting on behalf of the second H

A applicant then lodged with the respondent documents to effect transfer of the immovable property from the said Morris to the second applicant. The documents were returned with an instruction that the applicant comply with s 47 of the Companies Act [*Chapter 24:03*] ("the Act"). The applicant was not satisfied with the reaction from the respondent and the result was that a letter was addressed by its legal practitioners to the respondent, in which it B was indicated that the applicant did not need to comply with s 47 of the Act, in that the first applicant, when he entered into the agreement of sale for the purchase of the immovable property central to the dispute, had acted as a trustee for a company not yet formed when the agreement was concluded, and not as an agent. Correspondence was exchanged between the parties C which did not yield any result. The applicants therefore have brought this action for an order from this court directing the respondent to transfer the property from Morris to the second applicant. The respondent opposes the relief being sought.

When the matter was initially called, it appeared that counsel had not furnished the court with any authority on the issues to be determined. I therefore directed D that each of them draft and file supplementary heads of argument, citing for my benefit the authorities being relied upon by the respective parties and I am grateful for their assistance in this regard.

The crisp issue before me is whether or not the second applicant is obliged to comply with any provisions in the Act in order for the transfer of the E immovable property to be effected in its name or whether, under the common law, the applicant can have the property registered in its name despite avoiding the requirements set by statute.

It is appropriate at this juncture to set out the provisions of the Act that the respondent insists must be complied with before the property can be registered F in the applicant's name. Section 47 is to the following effect:

> "Any contract made in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly registered as if it had been duly formed, incorporated and registered at the time when the contract was made if – G
>
> (a) the memorandum on its registration contains as one of the objects of such company the adoption or ratification or the acquisition of rights and obligations in respect of such contract; and
>
> (b) the contract or a certified copy thereof is delivered to the Registrar simultaneously with the delivery of the memorandum in terms of section twenty-one."

H Mr *Paul* argued on behalf of the applicants that the second applicant does not

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have any obligation to comply with the requirements of the Act, as in terms A of common law a contract concluded for a third party, a *stipulatio alteri*, was capable of being enforced by the intended beneficiary even where that beneficiary was a company which had not yet been formed at the time the contract was concluded, as long as the person who represented the company did so as a trustee and not an agent. According to Mr *Paul,* the law of South B Africa, which is the same as our own, is to the effect that under the common law a company can ratify a contract merely by adopting a resolution to that effect and there is no need for compliance with the provisions of the Act as long as the contract was made for the company before its incorporation by a person acting as a trustee for the such company. It was his further submission that the provisions of the Act, which the respondent insists must be complied C with, are only relevant if the person who negotiated the pre-incorporation contract acted as an agent and not as a trustee. Mr *Paul* has sought reliance on a South African authority on the issue before me.

Mrs *Philips-Dube* submitted that South African authorities are merely persuasive on our courts, but they are not binding. She argued further that the D applicants were seeking to avoid compliance with the provisions of the Act on the pretext that the first applicant had acted as trustee in the pre-incorporation contract and that, as a consequence, strict compliance with the provisions of s 47 was unnecessary. Her contention was that statutory provisions took precedence over the common law and that the non-compliance on the part of the applicants with those provisions was fatal to the applicants' cause. E The contention by the respondent is that every company in Zimbabwe must comply with the provisions of the Act.

The authority which Mr *Paul* has placed reliance on is in Afrikaans and, despite request from me, he has refused to furnish the court with a translation of the judgment, his view being that the court can read the minority judgment by Trollip JA. In view of the fact that his whole argument was based on this F authority, I found his attitude not only puzzling, but rather unhelpful, and even an indication from the court that the majority judgment in Afrikaans would be more of more assistance met with no success. The only saving grace is that the minority judgment of Trollip JA is instructive and was quoted with approval by Gillespie J in one of the few Zimbabwean authorities on G the issue in question. I think a discussion of that judgment is necessary.

In *Watson* v *Gilson Enterprises & Ors* 1997 (2) ZLR 318 (H) Gillespie J had to consider the rights of a person who contracts a contract on behalf of a company not yet incorporated. Whilst the facts in that case are not similar to the present, nevertheless the learned judge, as was his wont, also discusses the position of the company as regards the company both at common law H

A and under the Act. At 325F-326D he stated the following:

"Thus where a person purports to contract as agent for a company which is not as yet formed, the company upon its incorporation cannot at common law (leaving aside for the moment the relevant provisions of the Companies Act) purport to ratify that contract. It could only enjoy the benefits of that contract were it to enter into a new contract itself with the other party.

B On the other hand, the Roman Dutch law recognizes the concept of the *stipulatio alteri* by which –

'where the persons have entered into a contract for the benefit of a third, the latter may, before the promise has been revoked, accept it and thus acquire a right of action ...'

The third party may accept the benefit even if it did not exist when the promise C was made. Where such a third party, particularly a company not incorporated at the time of the agreement, purports to ratify or adopt the contract made for its benefit, it was therefore formerly most important to determine whether the person purporting to act in the non-existent third part's interest acted as agent or as a principal contracting party.

I say 'formerly' because much of the importance of the distinction as far as D companies are concerned has been removed by the provisions of s 47 of the Companies Act. This provides that, subject to certain formal requirements:

'Any contract made in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly registered as if it had been duly formed, incorporated and registered at the time when the E contract was made ...'"

The issue has received attention from Nkala and Nyapadi*Company Law in Zimbabwe* (1995). The view of the learned authors is that a company can adopt contracts made on its behalf before incorporation provided that it (the company) meets the following five conditions *viz*: that the contract is in F writing; the person making the contract on behalf of the company to be formed, irrespective of how he describes himself, must at least profess to act as agent for the company; the memorandum and articles of association must contain at the time of incorporation the contract as one of its objects; the contract must be delivered to the registrar simultaneously with the memorandum and articles of association and the contract must be legally enforceable. G This view expressed on pp 55-59 is in accord with the provisions of the Act.

The applicants have not complied with the requirements of s 47. That much is not in dispute and, given the manner in which the memorandum and articles of association were prepared, they will not be able to comply with the requirements of the Act. They accept that the Act has prescribed the steps H required of a company under the Act to benefit from a pre-incorporation

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contract concluded for its benefit before it came into being. However, they A argue that, notwithstanding non-compliance with the provisions of s 47, the company is under common law entitled to ratify the contract as it was entered into on behalf of the company by a trustee and that the contract constitutes a *stipulatio alteri*.

It is not the case for the applicants that the Act does not provide for specific B requirements for the ratification of a pre-incorporation contract, but that, over and above those requirements, the applicant company is not precluded from benefitting from the contract without reference to the provisions of the Act as the remedy is available at common law. The respondent has contended that the provisions of s 47 are peremptory and, as a result, the applicant company can only have the pre-incorporation contract ratified if it has abided by the C requirements of s 47.

I do not believe that it is necessary for me to decide whether or not the provisions of s 47 are peremptory as argued by Mrs *Philips-Dube*. In my view, the import of s 47 has been interpreted by the South African courts as well as Zimbabwean ones. It appears that neither counsel was prepared to research D on the issue. Our courts have accepted that at common law the promoters of a company prior to incorporation could individually enter into a contract for the benefit of such company. In *Graphics Africa (Zimbabwe) (Pvt) Ltd* v *Rank Xerox Ltd* 1989 (2) ZLR 292 (H) at 301F Adam J unequivocally stated:

"At common law, it is clear that the promoters of a company prior to incorporation could individually enter into a contract for the benefit of such company to be E formed and on its incorporation the newly formed company could adopt the contract: *Sentrale Kunssmis Korporasie (Edms) Bpk* v *NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 384G."

In *The Law of Contract in South Africa* 3 ed, the eminent author R H Christie states at p 293:

"There is ample authority for thus falling back on the common law, and it may F well be correct to say that s 35 is not intended to apply to pre-incorporation contracts which qualify as contracts for the benefit of a third party, but it does not seem to matter which view is taken because as Trollip JA observed in *Sentrale Kunsmis Korp (Edms) Bpk* v *NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) 367 (A) at 398, s 35 is usually invoked and complied with for safety's sake even if it is not necessary, and if the attempt to comply with it fails no harm is G done, provided the contract qualifies under the common law. In the days before what is now s 35 the courts very properly applied the maxim *ut res magis valeat quam pereat* to interpret the promissee's position as that of a principal rather than an agent in a doubtful case, but in *Peak Lode Gold Mining Co Ltd* v *Union Government* 1932 TPD 48 at 51 Greenberg J thought the section made it no longer necessary to lean away from agency. There is no doubt so if the section has not been complied with, but if it has not the position remains unchanged." H

Gowora J

A It is also recognized by Nyapadi and Nkala *op cit* at 59-63 that where the company has not complied with provisions of the Act, the alternative is to invoke the common law rules, which they refer to as being very complicated. They accept that the company can do so, under the concept of a *stipulatio alteri,* but point out that the newly formed company may refuse to be bound by the contract. This is not the situation in this case, as the company is the B prime mover for the acceptance and ratification of the contract concluded on its behalf.

In casu the requirements of s 47 have not been complied and it falls for this court to decide if the contract is a *stipulatio alteri* and, if so, whether or not it can be adopted and ratified by the company. I did not understand the respondent C to dispute the contention by the applicants that the contract negotiated by the first applicant was a *stipulatio alteri*. I take the view, therefore, that the nature of the contract has been accepted. In the premises, I cannot find a reason why the first applicant cannot enforce the contract. This, in my view, includes the registration of title in the cause of the contract itself.

One more issue remains for determination, which is whether or not the D applicants should have instead proceeded in terms of s 11 of the Deeds Registries Act [*Chapter 20:05*] and had the property registered in the names of the first applicant and the second applicant in sequence. This submission deserves a short answer. The intent behind a *stipulatio alteri* is that the contract is made for the benefit of a third party. There are only two E parties to the contract and the party acting on behalf of the third party only comes into the picture if the promissee fails to accept the benefit under the *stipulatio alteri*. In the circumstances, therefore, s 11 of the Act would not be applicable. I find therefore that the contract concluded in respect of the agreement of sale is a *stipulatio alteri* and in terms of the common law the company for whose benefit it was concluded has the right to ratify the same F under the common law. The applicants are therefore entitled to an order as prayed and in the premises an order will ensue as follows:

IT IS HEREBY ORDERED:

(a) That the respondent be and is hereby directed to register the transfer of certain piece of land situate in the district of Salisbury being Stand 459 G Northwood Township 3 of Sunben to the second applicant.

(b) That the respondent shall pay the costs of this application.

Wintertons, legal practitioners for the applicants

Civil Division of the Attorney-General's Office, legal practitioner for the H respondent

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