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TOTAL ZIMBABWE (PVT) LTD v POWER COACH EXPRESS (PVT) LTD 2010 (2) ZLR 1 (H)

Citation	2010 (2) ZLR 1 (H)
Case No	Judgment No. HH-64-09
Court	High Court, Harare
Judge	Gowora J
Heard	4 February 2009
Judgment	4 February 2009
Counsel	*J James*, for the applicant *P Dube*, for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Company - *legal proceedings - authorization for - what must be shown - not always necessary for proof of resolution by company's board*

Contract-*compromise - agreement between parties to litigation – judgment ordering respondent to deliver items to applicant - agreement by applicant* D *not to execute upon judgment against delivery of alternative items by*

Respondent - *effect of agreement - not an abandonment by applicant of judgment in its favour - no unequivocal abandonment by applicant of its right to enforce judgment - onus upon respondent to establish its case by facts set out in its papers*

E **Practice and procedure** - *abandonment - of claim or judgment – what constitutes abandonment*

Practice and procedure - *affidavit -founding affidavit - affidavit filed on behalf of a company - what deponent must aver - not always necessary to prove resolution by company to authorize litigation*

F **Practice and procedure** - *joinder - of parties to litigation - interest of third party - no contractual bond between applicant and the third party - joinder of third party not necessary*

Practice and procedure – *party – company - litigation by - board authorization to institute such litigation - challenge by other party as to the existence of such authorization - not necessary in every case to produce such* G *board resolution to establish authorization - circumstances where such production to a court is not necessary*

Words and phrases - *"abandonment" - of a right - meaning – connotes relinquishment of right to the control or in favour of another*

Headnote

H Where a company litigates, it is not necessary to produce, in every case, a

board resolution to prove that the company has authorized such litigation. A Where a minimum of evidence has been adduced establishing that the company has set litigation in process, in the absence of some evidence from the respondent pointing to a lack of authority for the litigation, the court should not require the production of a resolution.

The word "abandon" connotes a relinquishment by a party of a right or B an item to the control of or in favour of another party and that such relinquishment would have to amount to an absolute surrender and the party so surrendering the right or item shall not reclaim the item or seek to enforce the right. The abandonment must be absolute in its effect and the person so abandoning must make his intention to abandon unequivocal. There can be no abandonment where a party alleged to C have abandoned something still seeks a benefit from the thing he is alleged to have abandoned.

In 2006, the applicant had obtained a judgment in the High Court ordering the respondent to hand over certain diesel and petrol tanks. The respondent thereupon noted an appeal, which led to correspondence between the parties in which the applicant tried to persuade the respondent as to the D lack of merit in its appeal. In the result, however, the applicant agreed to a compromise in terms of which the respondent undertook to engage a third party to manufacture, within a specified period, tanks of the same specifications and material as the ones it claimed from the respondent. The tanks were, however, not manufactured by the third party within E the specified period and a dispute then arose as to whether they were manufactured according to the required specifications. This led to the respondent bringing a separate action seeking relief against the third party. Ultimately there was no delivery of the tanks in terms of the judgment of 2006 and the applicant brought the respondent to court once again for an order enabling it to obtain delivery thereof. The applicant sought F a declaratory order as to its rights to enforce the 2006 judgment. In resisting this claim, the respondent submitted that the compromise agreed upon by the parties amounted, on applicant's part, to an abandonment of its right to enforce the judgment. In so doing, it relied not upon any correspondence between the parties nor anything else in the papers but upon a paragraph in the applicant's heads of argument which read: G

"Applicant submits that it entered into an agreement with the respondent in terms of which it agreed to abandon the judgment... against delivery of alternative tanks with the same specifications as the tanks it was entitled to recover in (that) judgment..."

This, the respondent submitted, was evidence of abandonment of the earlier judgment by the applicant. The respondent also took the technical point H

A that as the applicant had failed to join the third party as a party to these proceedings, its action should be dismissed.

Held, that there was no merit in the technical point. In the absence of a contract between applicant and the third party, the joiner of the latter to the present dispute would not have assisted either party in the resolution of this dispute.

B *Held,* further, that the paragraph in the applicant's heads of argument, upon which the respondent relied, did not mean that the judgment of 2006 had been abandoned by the applicant. Any abandonment of that judgment was subject to the delivery by the respondent of the tanks with the same specifications as that ordered in that earlier judgment. There C was no unequivocal abandonment by the applicant of its rights to have the judgment enforced. In any event, the abandonment, if it was made, should have appeared in the respondent's papers filed in relation to the relief being sought.

Held, further, granting judgment with costs in favour of the applicant, that although the question of whether or not there had been abandonment by D the applicant was a legal issue, it could only be answered when reference was had to the facts pertaining to the particular aspect determined. *In casu,* the respondent had not placed before the court any facts that would justify such a conclusion.

Cases referred to E

Direct Response Marketing (Pvt) Ltd v Shepherd 1993 (2) ZLR 218 (H)

Dold v Joowalay 1959 (2) R & N 180; 1960 (1) SA 222 (SR)

Freeman v Cooke (1848) 2 Ex 654

Gull & Kimpton Ltd v Maver & Co Ltd (1) 1935 SR 27

Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C)

F *Palmer v Moore* [1900] AC 293

Thelma Court Flats (Pty) Ltd v McSwigin 1954 (3) SA 457 (C)

Case information

R Moyo, for the applicant.

B Chidziva, for the respondent

Judgment

G **Gowora J**: On 4 February 2009 after hearing counsel, I granted an order in favour of the applicant herein. I am advised that an appeal against my decision has since been noted and a request for reasons for the judgment has been communicated to the Registrar. These are my reasons.

When the matter was first called, I queried with applicant's counsel the H appropriateness of the relief being sought. I queried why there was need to

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Gowora J

even approach the court for relief when there was in existence a judgment A which had not been satisfied, and I further enquired whether or not the approach to court indicated that the earlier judgment had been abandoned. *Mr Moyo,* for the applicant, submitted that the judgment had not been abandoned and that in order to dispose of my queries he would file an amendment to the draft order. An amendment was duly filed and on the date of hearing the B amendment was granted by consent. I will deal with the draft order when I consider the relief being sought. I also requested that I be furnished with additional authorities on the relief being sought and I am indebted to counsel for the supplementary heads of argument which both of them filed. The basis of the application is as follows.

On 24 March 2006 Musakwa J granted a judgment in favour of the applicant, C with the operative part of the order being to the following effect:

(a) Defendant is to hand over to the plaintiff the following property:
  (i) 2 x 35 0001 diesel tanks
  (ii) 1 x 25 000 1 diesel tank
  (iii) 1 x 15 0001 petrol tank D
  (iv) 3 x Gilbarco 616 fuel pumps.

(b) In the event that the defendant fails to avail the equipment described in paragraph (a) above the Deputy Sheriff is authorized to recover the property from the defendant and hand it over to the plaintiff.

(c) Defendant is to pay costs of suit. E

On 27 April 2006, the applicant, in pursuant of its claim under the judgment described above, caused a writ of execution to be issued by the Registrar of this court. The writ was not executed because the applicant ascertained that the respondent had on 1 May 2006 noted an appeal against the judgment of Musakwa J. The applicant did not consider that the appeal had prospects of success and therefore instructed its legal practitioners to write a letter to F the respondent to highlight the lack of merit in the appeal and the apparent (according to the applicant) lack of prospects of success of the appeal. The parties' legal practitioners then exchanged correspondence which culminated in a compromise on both sides. The result of this was that it was agreed that a firm of engineers, Martin Millers Engineers be engaged to manufacture G tanks of the same specification and same material as the ones being claimed by the applicant. The tanks were to be fabricated within a period of weeks, certainly not more than three. The tanks were not manufactured within the stipulated period and, in addition, a dispute then arose as to whether they had been manufactured according to specification. Ultimately, there was no delivery of the tanks to the applicant in terms of the judgment and the H

Gowora J

A applicant has again brought the respondent to court for an order enabling it to obtain delivery.

The founding affidavit was deposed to by Teclah Mucheche. In the second paragraph of the affidavit, she states that she is the credit control and litigation manager of the applicant and that she is authorized to depose to the affidavit. B She also avers that the facts that she deposed to were within her personal knowledge. In the opposing affidavit, her authority to depose to the affidavit on behalf of the applicant was put in issue. In his opposing affidavit, George Chauruka, the respondent's operations manager, stated that the respondent had always dealt with Total but at no time did it interact with Teclah Mucheche and that, in his view, she had no knowledge of the proceedings, save for such C facts as she might have been told by her predecessor. He stated further that the persons who had knowledge were Messrs Mabhiza and Muzvondiwa and therefore the evidence that Teclah sought to adduce in her affidavit could not be within her personal knowledge. Lastly, he stated that no board resolution had been produced authorizing Teclah Mucheche to depose to an affidavit on behalf of the company.

D It is correct, as submitted on behalf of the respondent, that where a company institutes proceedings by way of an application, as in the instant case, it must be evident on the papers that the person who deposes to the affidavit not only has authority to depose to the affidavit but that the proceedings themselves were authorized by the company. It is trite that where a company authorizes E anything to be done for and on its behalf, a board resolution is issued to that effect. The contention by the respondent is that there was no board resolution produced *in casu,* and therefore its absence points to the lack of authorization of Teclah Mucheche not only to institute these proceedings but to depose to the affidavit. An instructive passage on the issue is to be F found in *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C), a judgment by Watermeyer J. At 351-352 this is what he had to say:

> "There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorized to do so ... This seems to me to be a salutary rule and one which should also apply to notice of motion proceedings where the applicant is an artificial person. In G such cases some evidence should be placed before the court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorized would be to H provide by an affidavit made by an official by the company annexing a copy

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> of the resolution but I do not consider that that form of proof is necessary in A every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the court, then I consider that a minimum of evidence will be required from the applicant (cf *Parsons* v B *Barkly East Municipality* 1952 (3) SA 595 (E); *Thelma Court Flats (Pty) Ltd v McSwigin* 1954 (3) SA 457 (C)."

In *Direct Response Marketing (Pvt) Ltd v Shepherd* 1993 (2) ZLR 218 (H) Adam J was content to agree with the *dicta* by Watermeyer J in *Thelma Court Flats (Pty) Ltd v McSwigin (supra)* to the effect that, where there were allegations and factors in the affidavits, it would be carrying formality too C far to uphold the point *in limine* in relation to lack of authority on the part of the deponent to the founding affidavit.

I consider then that the question I must determine on the papers is whether there are sufficient facts placed before me to warrant a conclusion on my part that it is the applicant that is litigating in this instance. It is not in dispute D that the judgment obtained by the applicant has not yet been satisfied. Correspondence in the record and to which reference is made by both parties is mute testimony to the determination of the applicant to recover its tanks or payment for the same. On 2 October 2006, following upon correspondences which had yielded no result, the applicant's legal practitioners threatened to return to the High Court for resolution if the parties failed to reach agreement E on a date to meet during the following week. Again, on 9 October 2006 the applicant's legal practitioners wrote to the respondent's legal practitioners expressing dissatisfaction with the lack of progress. Yet again, another threat to take the matter to court if there is no quick resolution during the final week was made. The last letter on the papers is dated 19 October 2007 and a

demand is made for payment in the sum of Z$60 billion, being the assessed F value of the tanks by 25 October 2007, failing which the legal practitioners had instructions to litigate on the matter.

The import of these letters clearly indicates that the applicant required to have its tanks replaced or to be paid for the same. It had in its possession an order of this court which was still to be fully satisfied. I have no evidence G from the respondent suggesting that the applicant, notwithstanding the lack of resolution, was content for the legal practitioners to carry on exchanging correspondence which was taking the matter no further. It cannot be gainsaid that the only conclusion from the letters written by the applicant's legal practitioners is that their client wanted to have the judgment complied with and, in the absence of such compliance, then it would go to court to have H

A the same satisfied. It must be borne in mind that the need for the applicant's authorization of the proceedings is premised on the realization that, in the event that the company has not authorized the institution of the proceedings in question, a successful respondent to the application would find itself unable to recover its costs or give effect to the judgment. It is clear, therefore, that the need for proof of proper authority to be established for the proceedings B is to ensure that other litigants, dragged to court by a person purportedly acting on behalf of an artificial person, do not suffer any prejudice as a result of the litigation. My reading of the authorities does not therefore lead me to conclude that in every case where a company litigates it is necessary to produce a resolution to prove such. Where a minimum of evidence has been C adduced, as is the case here, establishing that the company has set litigation in process, in the absence of some evidence from the respondent pointing to a lack of authority for the litigation, then, in those circumstances, the court should not require the production of a resolution.

It is common cause that the parties agreed that Martin Millers (Pvt) Ltd should be engaged to manufacture tanks to replace those being retained by D the respondent. Payment for the manufacture of the tanks was made by the respondent, and communication with Martin Millers was by the respondent, apart from the issues relating to the specifications on the manufacture of the tanks. The tanks have since been disposed of, prompting the respondent to institute proceedings against Martin Millers for relief, the details of which E have not been communicated to the court. The respondent did not in that legal process find it necessary to join the applicant as a party to the dispute. As that particular litigation was concerned with the issue of tanks commissioned by the respondent for purposes of meeting its obligation under case No. HC 3695/05, I find it mischievous on the part of the respondent of the respondent to suggest that the application *in casu* ought to be dismissed on the basis F of non-joinder of Martin Millers as a party. In the issue of the fabrication of the tanks by the latter, the applicant was not a party to the contract, even if the tanks were to be delivered to it. Parties to a contract have rights as well as obligations flowing from the same. Under the contract concluded between the respondent and Martin Millers the applicant neither had rights nor obligations, nor did Martin Millers have any obligations to the applicant. G There was no contract between the two. I conclude therefore that the joinder of Martin Millers to this dispute would not have assisted any of the parties in the resolution of this dispute, especially taking into account that the tanks are no longer available.

The respondent exchanged correspondence with Martin Millers and its legal H practitioners, which correspondence points to the indisputable fact that the

tanks, which were in fact not made according to specification, have since been A disposed of and are no longer available. This is the reason why the respondent has instituted proceedings against Martin Millers. In spite of this, the respondent seeks to urge this court to find that there are material disputes of fact in relation to whether or not there was an alteration of the specifications on the materials used to fabricate the tanks by Martin Millers. B Which tanks the respondent is referring to is a mystery when, to the knowledge of everyone concerned, there are no tanks to speak of as the fabricator has sold them. The disposal of the tanks also disposes of the issue as to whether or not they were fabricated according to specifications.

In the supplementary heads of argument filed as a result of concerns raised by me at the initial hearing, the applicant has submitted that this court is C in a position to grant a *declaratur* to the

effect that the judgment granted to the applicant under case No. HC 3659/05 is still in effect. The applicant contends that it obtained a judgment in its favour against the respondent, which judgment still remains unsatisfied and that, despite the compromise reached with the respondent for the fabrication of new tanks to replace the D ones which are in the possession of the respondent, it has the right to enforce the judgment in question as it never abandoned the same and to that end it seeks a *declaratur* confirming its entitlement to the same. The respondent has taken the view that the applicant is not entitled to a *declaratur* because, according to its heads of argument, it had abandoned the judgment given under case No. HC 3659/05. For this contention, the respondent has referred E me to para 6 of the applicant's supplementary heads of argument. The paragraph reads as follows:

> "Applicant submits that it entered into an agreement with the respondent in terms of which it agreed to abandon the judgment in matter HC 3659/05 against the delivery of alternative tanks with the same specifications as the tanks it was entitled to recover in the judgment HC 3659/05". F

I do not understand that paragraph to mean that the judgment had been abandoned. To my understanding, the abandonment of the judgment would be subject to the delivery by the respondent of tanks with the same specifications as had been ordered by the court in the judgment being referred to. There was no unequivocal abandonment of the applicant's rights to have the judgment G enforced. In any event, the abandonment, if it was to be made, should have appeared in the papers filed in relation to the relief being sought, and it is surprising that the respondent has not alluded to any action on the part of the applicant which points to such abandonment except for the paragraph in the heads of argument. Neither legal practitioner pointed me to an authority on what would constitute abandonment of a judgment. My own endeavours H

A have not been very successful in that I have found only two very old English cases and two in this jurisdiction.

The first of the English cases is *Palmer v Moore* [1900] AC 293. In that case the respondent and one Maguire and one Lamrock had in July 1893 been granted a lease by the Crown, specifically the Department of Mines B and Agriculture, to mine gold. By November of the same year they had not complied with the conditions and they were put on terms to show cause why the lease should not be terminated. The respondent responded to the notice and was able to stop the cancellation of the lease. Lamrock did not attend, nor did Maguire. The respondent then sourced funds to run the mine and, so successful was he in doing so, that in 1895 he was able to sell it for a C considerable sum. Lamrock did not contribute anything. It happened that Lamrock had fallen on hard times and had assigned his estate. His trustee then made a claim for a share of the purchase price in respect of the mine.The defence by the respondent to the claim was that he had sent a notice to Lamrock prior to the show cause notice and Lamrock had written back that he was unable to contribute towards the expenses of the mine and that the D respondent and Maguire could do what they wanted as he "was out of it". Therefore, according to the respondent, Lamrock had abandoned his interest in the mine in favour of his partners. The lower court gave judgment for the respondent and the trustee appealed.

Their Lordships concluded that on the evidence adduced in the court *a quo* E it was clear that the presiding judge had reached a correct conclusion. At p 298 their Lordships made the following observation:

> "Did Lamrock abandon all his beneficial interest in the lease and license Moore and Maguire to continue the adventure, if they thought fit to do so, at their own risk and for their own profit? In *Clarke v Hart* (1) Lord Chelmsford, commenting on the cases of *Pickard v Sears* (2) and *Freeman v Cooke* (3) says: 'So that I F apprehend, where there is a vested right or interest in any party, the principle of law as now firmly established is, that he cannot waive or abandon that right except by acts which are equivalent to an agreement or a licence. 'Their Lordships think there was sufficient evidence of such an agreement or licence in the present case".

I have perused the judgment *of Freeman v Cooke* (1848) 2 Ex 654 and I find G that it is more concerned with the principles of estoppel and not abandonment.

In *Gull and Kimpton Ltd v Maver & Co Ltd* 1935 SR 27, a case from this jurisdiction, Hudson J had to consider the word "abandon" as it related to pleadings. At p 29 this is what he had to say:

"... Now the word used in regard to an objection, which is the pleading to be dealt with in this case, is 'abandoned'. It is provided that any party may, by delivery H of notice abandon any objection pleaded by him. The actual word used by the

Gowora J

attorney for the defendant in the notice he gave in this case was 'withdraw', A but it is obvious that the word 'withdraw' must be taken as 'abandon' and that I think is conceded by Mr *Beadle.*

It seems to me that having abandoned a defence, an objection which has been taken, a party is precluded thereafter from raising it. We must give the word its proper significance as it is usually understood, and particularly in regard to legal proceedings. An abandonment of a point of law, I must hold, means that B the party who abandons the point gives it up for good and all and on that point alone it seems to me this appeal must fail."

In *Dold v Joowalay* 1959 (2) R & N 180; 1960 (1) SA 222 (SR), yet another case decided in this jurisdiction, the court had to consider the import of the word "abandon" under Architects Regulations SRGN 279 of 1930. At p 225A-B Young J opined: C

"The next issue is whether this project was at any time abandoned in whole. The word 'abandon' in this context is one in ordinary and common use, and means 'to give up' or 'to renounce".

I have also had recourse to the *Shorter Oxford Dictionary* in an attempt to arrive at a definition of the word. The definition contained therein is as follows: D

"To reduce under control, subdue, to give up to the control of another, surrender to another, to surrender oneself, to relinquish a claim to underwriters, to cease to hold, use, or practice, to give up, renounce, to desert, leave without help, to let oneself loose, rush headlong, to put to the ban, banish."

My understanding of the definition according to the authorities referred to above is that the word "abandon" connotes a relinquishment by a party of E a right or an item to the control of or in favour of another party and that such relinquishment would have to amount to an absolute surrender and the party so surrendering the right or item shall not reclaim the item or seek to enforce the right. Abandonment must be absolute in its effect and the person so abandoning must make his intention to abandon unequivocal. I do not believe that there can be abandonment where a party alleged to have F abandoned something still seeks a benefit from the thing he is alleged to have abandoned.

Although the question of whether or not there has been abandonment by the applicant is a legal issue, the question can only be answered when reference is had to the facts pertaining to the particular aspect being determined. The G respondent has not placed before the court any facts that would justify such a conclusion. In order for the contention by the respondent to find favour, the papers would have to show that the applicant had relinquished its claim for delivery of the tanks and further that it had no intention of pursuing the matter to recover the tanks in satisfaction of the judgment in its favour. In other words, the applicant must have renounced its claim to the tanks. It H

Gowora J

A has not done so. It has not even acted in a manner that could lead anyone to conclude that it has given up its claim aforesaid and, as a result, its right to execute in terms of the judgment granted in its favour. Instead, the papers produced by both parties bear mute testimony to the applicant's desire to have its judgment, obtained in 2006, executed. It is obvious that a reading of the papers will show that the respondent is doing all in its power to frustrate B the execution of the said judgment, even to the extent of having noted an appeal against the initial judgment and subsequently withdrawing the same on the basis of an offer of compromise which the respondent failed to deliver on. The compromise entered into by the parties, which saw the respondent opting to keep the applicant's tanks and commissioning Martin Millers to fabricate alternative tanks to give to the applicant, was at the respondent's C behest and obviously, on the part of the applicant, an attempt to have the matter settled without acrimony. I did not get the sense that this compromise constituted an abandonment of the judgment.

In the premises, it is my firm view that the applicant's right to delivery of its tanks has been established and therefore that the applicant is entitled to D an order, in the alternative, as prayed. I will therefore issue an order in the following terms;

It is hereby declared that:

1. (a) The judgment of this Honourable Court granted in favour of the applicant under case No. HC 3659/09 is still in effect. E

   (b) The applicant is entitled to recover its assets in terms of the said judgment save for such assets as may have already been delivered by the respondent.

2. The respondent is ordered to pay the applicant's costs.

F *Gill Godlonton & Gerrans,* applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/S v WESTGATE INVESTMENTS (PVT) LTD 2010 (2) ZLR 12 (H)

S v WESTGATE INVESTMENTS (PVT) LTD 2010 (2) ZLR 12 (H)

2010 (2) ZLR p12

Citation	2002 (1) ZLR 12 (H)
Case No	Judgment No. HH-26-09
Court	High Court, Harare
Judge	Patel J & Assessors
Heard	19 February 2007; 23 February 2007; 29 May 2007; 27 January 2009; 29 January 2009
Judgment	5 March 2009
Counsel	Ms *C Parirehwa* and *R K Tokwe,* for the State *A Makoni* and *T Gunje,* for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal law - *offences under Criminal Law Code - theft (s 113) – trust money - what is - using trust money without having equivalent value to cover any deficiency*

Criminal procedure - *charge - accused committed for trial on particular* D *charge - amendment to such charge and inclusion of alternative charge -permissible provided accused not prejudiced in his defence* E

Criminal procedure - *committal for trial - committal by magistrate for trial in High Court - purpose of committal - amendment or revision of charge on which accused is committed - permissible provided accused not prejudiced in his defence*

Headnote

The accused, a company and its managing director, were originally committed by the magistrates court to appear for trial by the High Court on a charge of theft by false pretences. Due to the

death of a principal State witness the matter was postponed. Five days before the date set for the trial, F the State filed a fresh indictment, charging theft by false pretences, alternatively, theft by conversion, as well as a revised summary of evidence. The alternative charge alleged that the accused received into their possession from the Reserve Bank of Zimbabwe a sum of money, the property of the Reserve Bank, for the purpose of buying on behalf of Chegutu Municipality two tractors and a grader, it having been agreed G that the money would be held in trust by the accused and used solely for the purpose of purchasing the t tractors and grader, but that the accused did not use the money for that purpose and instead converted the money to their own use. The accused had won a tender for the supply of the equipment to the municipality.

Before the trial started, defence counsel objected to the revised indictment H

A as being irregular. The court ruled that since the accused had not as yet pleaded they would not suffer any prejudice by reason of the inclusion of the alternative charge in the indictment. They were then afforded the opportunity to prepare and file a fresh defence outline. This was duly done and the matter proceeded to trial on the revised indictment. At the close of the State case, the main charge was withdrawn, leaving only B the alternative charge to be addressed. At the end of the trial, defence counsel again raised the procedural regularity of the revised indictment and argued that the alternative charge for theft by conversion was defective, because the accused had not been originally committed to trial on that charge by the magistrates court. He relied on s 103 of the C Criminal Procedure and Evidence Act [*Chapter 9:07*].

The evidence was that the payment to the accused was an advance payment in terms of the contract of supply between the accused and the Municipality. The accused were required as a precondition to obtain and furnish an advance payment bond for an equivalent sum. The accused did not have in their possession or under their control sufficient money either D to meet the purpose for which the money was advanced to them or to repay the equivalent amount. The accused then used most of what was paid for purposes other than the purchase of the machinery. At some later stage the accused did try to procure two tractors through separate contracts and they did in fact attempt to partially fulfil their contract with the Municipality. The main question then was whether the money E paid to the accused was trust money or simply a pre-payment between debtor and creditor. Put differently, were the accused entitled to use the money once they had received it for whatever purpose they deemed fit?

Held, that the purposes of committal by a magistrate, as required by s 103, are, firstly, to ensure that the accused is fully apprised of the charge F or charges against him before he is tried and, secondly, to enable the magistrate to scrutinise the charges so as to determine, as is enjoined by s 89(1) of the Act, that there appears sufficient reason for putting on trial for any offence any accused person brought before him. Nothing in s 103 precludes the amendment or revision of a charge after committal by a magistrate and before commencement of trial by the High Court, G so long as the accused is not materially prejudiced in the conduct of his defence.

Held, further, that when trust money is handed to a person, it is the duty of the person to keep it in its possession and to use it for no other purpose than that of the trust. The person fulfils his duty if he accounts for or H returns an equivalent amount. It is inherent in such a trust that the

person should at all times have available liquid funds in an equivalent A amount. The very essence of a trust is the absence of risk. If it is proved that the money was "trust money" i.e. money given to an agent with instructions to devote it to a specific purpose, then the use of that money for some other purpose without the retention of an equivalent liquid fund may well constitute theft. An advance payment is not necessarily and B invariably indicative of an ordinary commercial pre-payment between debtor and creditor. In most cases, the probability is that that is what was contemplated by the parties; but it may still be necessary and relevant in each case to have regard to the intention and conduct of the parties in order to ascertain the true purpose of an advance payment. *In casu,* it was clear that all the parties, including the accused, unequivocally C intended that the advance payment was to be used for the specific and clearly defined purpose of purchasing two tractors and one grader, and for no other purpose. The money was thus "trust money" and not merely "debtor-creditor money". The argument that the accused could not be convicted of theft as they lacked the requisite *mens rea* or intention to permanently deprive the Reserve Bank or the Municipality of their money D ignored that fact that theft of trust

money by conversion is a peculiar species of offence. Generally speaking, it is necessary for common law theft to establish an intention to effect a permanent deprivation. Ordinarily, therefore, *furtum usus* or unauthorised borrowing does not constitute theft at common law. In the case of money and other fungibles E which are consumed by their use, the fact that the accused may at some later stage attempt to procure or restore the equivalent thing or amount to the complainant does not negative his intention to deprive at the time of conversion. Such conduct may serve to mitigate the wrong doing but does not exculpate the wrongdoer. By using the advanced trust money without having retained an equivalent liquid fund to replenish or cover F the deficiency, the accused intentionally deprived the Reserve Bank of that money at the time that they converted it to their own use.

Editor's note: s 103 of the Criminal Procedure and Evidence Act was repealed by Act 9 of 2006 and re-enacted in substantially similar terms as s 65, with effect from 19 January 2007. The original committal in this case took place before the amendment came into effect. G

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 103 (since repealed) & 202(1) Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 113 H

Cases referred to A

Incorporated Law Society, Transvaal v Visse and Others 1958 (4) SA 115 (T)

S v Mabhena 1996 (1) ZLR 134 (H)

S v Malume 1998 (2) ZLR 508 (H)

S v Vambe 1986 (1) ZLR 168 (S)

S v Zindoga 1988 (2) ZLR 86 (S)

Case information

B Ms *C Parirehwa* and

R K Tokwe, for the State

A Makoni and *T Gunje,* for the accused

Judgment

Patel J:The first accused is a private company duly incorporated in C Zimbabwe. The second accused is the managing director of the first accused.

Both accuseds were initially charged with theft by false pretences and, alternatively, theft by conversion. At the close of the State case, the main charge was withdrawn, leaving only the alternative charge to be addressed. Also at that stage, the accuseds' application for discharge in respect of the alternative charge was dismissed for the reasons stated on record.

D The charge for theft by conversion is that:

> "On 29 July 2005 and at National Merchant Bank, Msasa Branch, Harare, [the accused persons] or one or more of them received and took into their possession from the Reserve Bank of Zimbabwe the sum of $1 556 000 000, the property of Reserve Bank for the purpose of buying on behalf of Chegutu Municipality two Massey Ferguson tractors and one CAT Grader, it having been agreed that E the money would be held in trust by the accused and used solely for the purpose of purchasing the two tractors and one CAT grader. Thereafter the accused did not buy the two tractors and a grader but instead on a date to the prosecutor unknown at Harare the accused unlawfully and with intent to steal converted the money to their own use."

[*The court examined the State and defence evidence, and continued:*]

F **Whether Alternative Charge Procedurally Defective**

The accuseds were originally committed by the magistrates court on 24 August 2003 to appear for trial by the High Court on 29 January 2007 on a charge of theft by false pretences. Due to the death

of a principal State witness the matter was then postponed to 19 February 2007. On 14 February 2007, the G State filed a fresh indictment charging theft by false pretences or theft by conversion, as well as a revised summary of evidence.

Before the commencement of trial, defence counsel objected to the revised indictment as being irregular. After hearing both counsel, the court ruled that since the accuseds had not as yet pleaded they would not suffer any H prejudice by reason of the inclusion of the alternative charge in the indictment.

2010 (2) ZLR p16

Patel J

They were then afforded the opportunity to prepare and file a fresh defence A outline and this was duly done. Thereafter, the matter proceeded to trial on the revised indictment. At a much later stage, at the end of the defence case, the accuseds were given an additional month to produce certain documentary evidence in support of their case.

At the close of the trial, defence counsel again raised the procedural irregularity B of the revised indictment and argued that the alternative charge for theft by conversion was defective, inasmuch as the accuseds had not been originally committed to trial on that charge by the magistrates court. He relied for his argument on s 103 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which in its relevant portions provides as follows:

> "No person shall be tried in the High Court for any offence unless he has been C previously committed for trial by a magistrate, whether or not the committal was on the direction of the Attorney-General in terms of section *eighty-eight* or *one hundred and ten,* for or in respect of the offence charged in the indictment:
>
> Provided that -
>
> (i) ...; D
>
> (ii) ...;
>
> (iii) ...;
>
> (iv) ...;
>
> (v) no irregularity or defect in -
>
> (a) ...; or
>
> (b) ...;or E
>
> (c) any other matter relating to the bringing of an accused person before the High Court;
>
> shall affect the validity of the trial, but the court may, on the application of the prosecutor or the accused, adjourn the trial to some future day."

In my opinion, defence counsel's argument in this respect is entirely F misconceived and untenable for a number of compelling reasons. It is trite that the High Court is a court of unlimited criminal jurisdiction. The purpose of committal by a magistrate, as required by s 103 of the Act, is twofold: firstly, to ensure that the accused is fully apprised of the charge or charges against him before he is tried and, secondly, to enable the magistrate to scrutinise G the charges so as to determine, as is enjoined by s 89(1) of the Act, that:

> "... there appears ... sufficient reason for putting on trial for any offence any accused person brought before him ..."

In my view, there is nothing in s 103 to preclude the amendment or revision of a charge after committal by a magistrate and before commencement of trial by the High Court - *so long as the accused is not materially prejudiced* H

2010 (2) ZLR p17

Patel J

A *in the conduct of his defence.* My view in this respect is fortified by proviso (v) to s 103. It is further emboldened by the provisions of s 202(1) of the Act which empowers the trial court to allow the amendment of any indictment, summons or charge:

> "... at any time before judgment, if it considers that the making of the necessary amendment in the summons, indictment or charge will not prejudice the accused B in his defence ..."

In the present case, I am more than satisfied that the accused persons, having been given sufficient notice of the amended charges and ample opportunity to revise and prepare their case, did not incur any prejudice by reason of the amended indictment. It follows that the alternative charge of theft by

C conversion is not defective by dint of s 103 of the Act. Accordingly, the procedural objection put forward by defence counsel in that regard cannot be upheld and must be dismissed.

Citation of Complainant

It is common cause that the contract *in casu* was one between the Chegutu D Municipality and the accuseds. The Reserve Bank was not a party to the contract but, through an on-lending arrangement between the parties, it provided to the accuseds the money required to purchase the equipment to be supplied under the contract.

In this respect, it is argued by defence counsel that the charge against the accuseds is defective and incompetent because it cites the Reserve Bank and E not the Municipality as the complainant. I must confess to being unable to comprehend the thrust of this argument. At the relevant time, the money that was paid into the first accused's account by the Reserve Bank did belong to the Reserve Bank and it was received as such by the accuseds for the purpose of buying two tractors and a grader on behalf of the Municipality. F This is precisely what is stated in the indictment and the evidence adduced in court does not deviate from that position. The fact that the contract of supply was between the Municipality and the accuseds or that the money was paid under an on-lending arrangement between the Reserve Bank and the Municipality does not detract from the gravamen of the charge, *viz.* that the accuseds took into their possession and converted to their own use the G money paid by the Reserve Bank to enable them to purchase the equipment for the Municipality. I therefore take the view that defence counsel's argument on this point cannot be sustained.

Trust Money

In the South African case of *Incorporated Law Society, Transvaal v Visse* H *& Others* 1958 (4) SA 115 (T) at 118, it was observed by Boshoff J that:

Patel J

> "When trust money is handed to a firm it is the duty of the firm to keep it in its A possession and to use it for no other purpose than that of the trust. The position is, however, not the same in a case where a specific article is handed over which must subsequently be returned or accounted for. The firm fulfils its duty if it accounts for or returns an equivalent amount. It is inherent in such a trust that that the firm should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk." B

In the same vein, it was held by Dumbutshena CJ in *S v Vambe* 1986 (1) ZLR 168 (S) at 171-172 that:

> "The money which was paid by the complainants was received by the appellant for his own use. If a person receives money for buying goods for someone and does not buy them but converts the money to his own use he does not necessarily commit theft. See S v *Matlare* 1965 (3) SA 326 (C) at 327G; *R v Gebhard* 1947 (2)SA 1210 ... C
>
> It must be noted that this case is concerned specifically with theft by conversion. It appears to be settled law that where one is dealing with what Hunt calls 'prepaid contracts' a charge of theft by conversion will usually fail. Of course, if the State can prove a fraudulent misrepresentation as to the accused's state of mind which induced the complainant to part with his money, then the accused D might be guilty of fraud or theft by false pretences. See *South African Criminal Law and Procedure* vol II 2 ed at 631 and especially at 637-8; *S v John* 1971 (2) PH 125; *R v Harlen* 1964 RLR 178; 1964 (4) SA 44 (SR); *R v Takumira* 1958 R & N 187.
>
> Similarly, if the State can prove that the money was 'trust money' i.e. money given to an agent with instructions to devote it to a specific purpose, then the use of that money for some other purpose without the retention of an equivalent E liquid fund may well constitute theft. See Hunt *op cit* at 639 and the cases there cited at n 355."

As explained by Hunt *South African Criminal Law and Procedure* Vol II (2 ed) at p 636:

> "The basic question which has to be asked is: did the person entitled (Y) visualise F and expressly or impliedly authorise that X should use the money without retaining an equivalent liquid fund? If the answer is yes, it is debtor-creditor money; if no, it is 'trust' money. It is impossible to lay down absolute rules. All depends on the terms, express and implied, of the parties' agreement."

The principal question of fact to be determined in this case is whether the money paid to the accuseds was trust money or simply a pre-payment between G debtor and creditor. To put it

differently, were the accuseds entitled to use the money once they had received it for whatever purpose they deemed fit?

It is not disputed that the payment of $1.5 billion to the accuseds was an advance payment in terms of the contract of supply between the accuseds and the Municipality. Nor is it in dispute that the accuseds were required as a precondition to obtain and furnish an advance payment bond for an H

Patel J

A equivalent sum. All of these factors appear to point to the conclusion that the amount of $1.5 billion was nothing more than a contractual pre-payment in the ordinary course of business.

However, the question that still remains is this: was there some clear and specific purpose attached to the advance payment? The authorities that I B have cited, as I understand them, do not declare that an advance payment is necessarily and invariably indicative of an ordinary commercial pre-payment between debtor and creditor. In most cases, the probability is that the latter is what was contemplated by the parties. Nevertheless, it may still be necessary and relevant in each case to have regard to the intention and conduct of the parties in order to ascertain the true purpose of an advance payment.

C In the present case, the evidence of Misheck Kaendeza was that the purpose of the advance payment of $1.5 billion was to enable the accuseds to procure the grader and tractors and that the high percentage of the advance payment, i.e. 70%, was specifically designed to account for inflation and avoid price escalations. To similar effect, Damascus Shem Mhute testified that the amount D of $1.5 billion was paid to enable the accuseds to supply the equipment and represented 70% of the purchase price for two tractors and one grader and that the remaining 30% was to be disbursed by the Reserve Bank upon delivery. None of this evidence was challenged under cross-examination. Equally significantly, the second accused himself conceded that an advance payment under a contract should be used for the goods to be supplied under E the contract but could be used for other purposes as long money from other sources was available to meet the contractual obligation.

Having regard to the foregoing evidence, it is apparent that all of the relevant parties, including the accuseds themselves, unequivocally intended that the advance payment of $1.5 billion was to be utilised for the specific and clearly F defined purpose of purchasing two tractors and one grader and for no other purpose. I am therefore satisfied that the sum of $1.5 billion was advanced to the accuseds as "trust money" and not merely as "debtor-creditor money". I am further satisfied that on 29 July 2005 the accuseds converted well over half of that money to their own use. In the following weeks they continued to convert more of that money for their own purposes. The fact that not G all of the money advanced was so expended is of little consequence. As is observed by Hunt *op cit* at p 634:

> "All the trust money need not be spent. The slightest deficiency, without equivalent liquid fund reserves, is enough."

Equivalent Liquid Fund

H It is common cause that the sum of $1.5 billion was paid into the first accused's

Patel J

account with NMB Bank on 29 July 2005. Before that deposit, this account A had a negative balance and was overdrawn by the sum of $41 million. On the same day the second accused made nine withdrawals from this account by way of cash, bank transfers and payments to various third parties, all of which amounted to almost $900 million, in respect of transactions that had nothing to do with the Municipality contract. After these withdrawals, the B credit balance remaining in the account was $617 million. On the same date, the credit balance in the first accused's Barclays Bank account stood at $51 million. Taking all of these figures together, it takes very little mathematical acuity to conclude that the accuseds did not have in their possession or under their control moneys sufficient either to meet the purpose for which the $ 1.5 billion was advanced to them or to repay the equivalent amount. In this C respect, the second accused was quite unable to explain where or how the accuseds would source the funds required to fulfil the Municipal contract.

Turning to the advance payment bond for $ 1.5 billion issued by Champions, was this available to the accuseds as a liquid fund to meet its contractual obligations at that time? The evidence of Kim Muvimbi in this respect was D that, quite apart from the accuseds' failure to pay the security deposit of $300 million, the amount guaranteed under the bond exceeded the statutorily prescribed limit of $150 million. Nevertheless, he believed that the bond was still valid and enforceable by the Municipality as it had never been formally cancelled. Muvimbi's testimony on this point was conflicting and did not accord with his earlier statement to the police, made on 24 February 2006, E to the effect that the bond was invalid as it had been fraudulently obtained. In my view, the bond was probably invalid, not because of the circumstances surrounding its acquisition but because it was issued in clear contravention of statute. Be that as it may, it is not necessary to delve into this aspect because the validity or otherwise of the bond is immaterial for present purposes. Even if the bond were to be treated as having been validly issued F and as being enforceable at the relevant time, it was only redeemable by the Municipality and not by the accuseds. Thus, even if and when the bond had been redeemed by the Municipality, the money accruing therefrom would not have been available to the accuseds themselves to use for the specific purpose for which they had received the advance payment, viz. to purchase G the equipment for the Municipality.

In the premises, I conclude that at the time that the accuseds received the advance of $1.5 billion and immediately expended well over half of that amount for their own purposes, they did not retain or have access to any equivalent liquid fund, either in their bank accounts or through any other means, in order to meet their specific contractual obligation to supply the H

A equipment or to refund the amount advanced.

Intention to Deprive

The evidence presented by the second accused shows that at some later stage, in August and September 2005, the accuseds probably did endeavour to procure two tractors through separate contracts with MTS in Bulawayo and B AWSI in South Africa. It appears, therefore, that they did in fact attempt to partially fulfil their contract with the Municipality. On this basis, it is argued by defence counsel that they cannot be convicted of theft as they lacked the requisite *mens rea* or intention to permanently deprive the Reserve Bank or the Municipality of their money.

C What this argument ignores is that the crime of theft of trust money by conversion is a peculiar species of offence. Generally speaking, it is necessary for common law theft to establish an intention to effect a permanent deprivation. Ordinarily, therefore, *furtum usus* or unauthorised borrowing does not constitute theft at common law. See Hunt *op cit* at p 617. However, as is pointed out by the learned author at pp 617-618:

> D "... even at common law the unauthorised borrower commits theft if... the thing is such as is consumed by its use, the 'borrower' intending to return other than the identical thing to the owner. Subject to what is said below, however, this rule is restricted to money and fungibles such as might have formed the subject- matter of a Roman law contract *of mutuum,* for instance, wood, coal or bread."

Thus, in the case of money and other fungibles which are consumed by their E use, the fact that the accused may at some later stage attempt to procure or restore the equivalent thing or amount to the complainant does not negative his intention to deprive at the time of conversion. Such conduct may serve to mitigate the wrongdoing but does not exculpate the wrongdoer.

In the present case, it is abundantly clear that on 29 July 2005 and in the F weeks that followed the accuseds converted to their own use almost all of the money that was advanced to them by the Reserve Bank for the purpose of procuring the equipment for the Municipality. At that time and by his own admission, the second accused clearly knew the purpose for which the money had been advanced and that he was in fact converting that money to the accuseds' own use. Moreover, he was fully aware that there was no G equivalent liquid fund from which the accuseds could source sufficient moneys either to procure the equipment or repay the amount advanced. Thus, by using the advanced trust money without having retained an equivalent liquid fund to replenish or cover the deficiency, the accuseds intentionally deprived the Reserve Bank of that money at the time that they converted it H to their own use. In other words, when they consumed the money paid into

Patel J

their account they had the requisite intention to deprive the Reserve Bank A of that money. They thereby committed the offence of theft by conversion on 29 July 2005 as well as during the weeks that followed. In this regard, their subsequent transactions with MTS and AWSI are irrelevant for the purposes of conviction.

Verdict B

Having regard to all of the foregoing, I am satisfied beyond any reasonable doubt that the State has established the requisite *actus reus* and *mens rea* on the alternative charge in the indictment. By virtue of s 385(2) of the Criminal Procedure and Evidence Act [*Chapter* 9:07], the culpable conduct and state of mind of a company director is imputed to the corporation itself. There can C be therefore be no dispute as to the first accused's guilt by dint of the second accused's conduct and intent *qua* Managing Director of the first accused. I accordingly find both accused persons guilty of theft by conversion as charged.

Mitigation

The first accused is a commodity broking company. Due to the economic circumstances prevailing in the country, it now only has one branch and D its staff complement has dwindled from 60 to 8 employees. Moreover, its operating capacity has been reduced to 15% of its usual capacity.

The second accused is aged 45 and is married with four children, two of whom are still minors while the other two attend universities in South Africa and are therefore still dependants. The second accused is also responsible E for his widowed mother. He himself suffers from diabetes and hypertension. The second accused is a director and 90 per cent shareholder in the first accused. His wife is the remaining 10 per cent shareholder. The second accused earns approximately US$1 000 per month by way of drawings and profits from the first accused.

Both the first accused and the second accused are first offenders. As was F argued by Mr *Gunje* for the accuseds, there are several other mitigatory features arising from the personal circumstances of the second accused and the facts of this case. Firstly, the accuseds were prepared to offer restitution of the capital amount at its meeting with the Reserve Bank on 17 October 2005. However, the latter rejected the offer, having previously indicated its G willingness to accept a refund of the full capital sum together with interest at the bank rate. Secondly, to some extent, the Reserve Bank itself contributed to the non-performance of the tender contract by the accuseds inasmuch as it failed to timeously provide the ital sum promised to the accuseds. Thirdly, the second accused was obligated by his bail conditions to surrender his travel documents and to report to the police once every week. In the ordinary H

Patel J

A course of events, it was not always possible for him to seek a variation of his bail conditions in order to travel outside the country for business purposes. This resulted in the loss of business opportunities for the first accused and consequent loss of income for the second accused. Lastly, the court was urged to take into account the second accused's commendable conduct since judgment was reserved in May 2007. In particular, he has religiously B complied with his bail conditions and made himself available to appear in court at very short notice.

Sentence

The accuseds *in casu* have been convicted of a very serious offence. They deliberately diverted trust funds that had been made available to them for a C specific public purpose. Moreover, their conduct, which displays a cavalier disregard for the public interest, has occasioned substantial prejudice to the *fiscus.*

Nevertheless, it is trite that first offenders should be spared the rigours and devastating impact of imprisonment. See *S v Malume* 1998 (2) ZLR 508 (H) D and *S v Mabhena* 1996 (1) ZLR 134 (H). Additionally, having regard to the personal and factual circumstances adverted to above, particularly the familial responsibilities of the second accused, I am satisfied that he should be given a non-custodial sentence.

However, my inclination towards leniency must be balanced by the condition that the accuseds make good the loss that has been suffered by E the complainants. See *Malume's* case, *supra,* and *S v Zindoga* 1988 (2) ZLR 86 (S). The difficulty that confronts me in this regard is that of quantifying the prejudice *in casu.* In purely nominal terms, taking into account the two revaluations that the local currency has endured, the amount of $ 1.5 billion in August 2005 presently equates to the paltry and risible sum of one and a F half thousandth of one cent.

In my view, given the hyperinflationary absurdities of our economy, it is incumbent upon the court to take a novel but pragmatic approach to the question of restitution in criminal matters. On the facts of this case, meaningful restitution entails a fair computation of the purchasing power of the sum involved at the relevant time, viz. when the money was stolen G by the accuseds, expressed in a specific convertible currency amount and payable in convertible currency, together with interest from the time when the offence was committed up to the time of restitution.

In the course of their submissions on sentence, both counsel have expressed their general acceptance of this approach. Defence counsel has also indicated H that the accuseds would be in a position to repay the appropriate amount

Patel J

within a period of six months from the date of sentence. A

According to the statements furnished by the Reserve Bank at the court's request (Exhibits 14A & 14B), the amount of ZW$1.5 billion in August 2005, applying the so-called auction exchange rate of 17 694.15, equated to US$84 773.78. As for the relevant US$ interest rate, this varied between 2 per cent and 5 per cent over the relevant period. Factoring in the lowest B applicable interest rate of 2 per cent per annum, compounded annually from August 2005 onwards, the amount due and payable in August 2009 is the sum of US$91761.86.

Turning to the question of the appropriate fines to be imposed, I am of the view that the first accused should be fined an amount equating to US$5 000, while the second accused should be subjected to a lower fine equating to C US$2 500, inasmuch as he will be held personally liable to restitute the amount by which the *fiscus* has been prejudiced. Applying the prevailing inter-bank exchange rate of ZW$180 to US$1, these amounts translate to ZW$900 000 and ZW$450 000 respectively.

In the result, the accused persons are sentenced as follows: D

First accused is sentenced to a fine of ZW$900 000, payable on or before 9 March 2009.

Second accused is sentenced to a fine of ZW$450 000, payable on or before 9 March 2009, or 3 months' imprisonment in default of payment of the fine. In addition, he is sentenced to imprisonment for a term of five years, E of which 18 months are suspended for five years on condition that he does not during that period commit any offence involving dishonesty for which he is convicted and sentenced to a term of imprisonment without the option of a fine, while the remaining 18 months are suspended on condition that he restitutes the sum of US$91 761.86 to the Reserve Bank of Zimbabwe through the Registrar of the High Court on or before 31 August 2009. F

Gunje and Chasakara, acccused's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/DHLAMINI & ANOR v CO-MINISTERS OF HOME AFFAIRS & ORS 2010 (2) ZLR 25 (H)

DHLAMINI & ANOR v CO-MINISTERS OF HOME AFFAIRS & ORS 2010 (2) ZLR 25 (H)

Citation	2010 (2) ZLR 25 (H)
Case No	Judgment No. HH-51-09
Court	High Court, Harare
Judge	Patel J
Heard	27 April 2009
Judgment	30 April 2009
Counsel	*H Zhou*, for the applicants *C B Mutangadura*, for the respondents
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Criminal procedure - *bail - appeal - by Attorney-General against grant of- appeal from High Court - seven day period within which to note appeal - does not include Saturdays, Sundays and public holidays*

Headnote

D The applicants were granted bail by the High Court; the Attorney-General immediately announced his intention of appealing against the grant of bail, and in terms of s 121(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (CP&EA), the release of the applicants was precluded for E a period of seven days. Shortly afterwards, the Easter weekend intervened. As enjoined by s 121(1) of the Act, as read with s 44(5) of the High Court Act [*Chapter 7:06*], the Attorney-General filed an application for leave to appeal. This application was granted by the High Court 3 days later, and the appeal against the grant of bail was then filed with the Supreme Court on the same day. The issue then arose as to whether, in reckoning F the seven day period referred to in s 121, weekends and public holidays were to be included or excluded.

Held, that s 44(5) of the High Court Act provides that, where a judge has made an interlocutory order or given an interlocutory judgment in relation to any criminal proceedings, the accused person or the Attorney-General may appeal to the Supreme Court against that interlocutory order or G judgment. However, any such appeal is "subject to rules of court" and requires "the leave of a judge of the High Court". While it is very doubtful that the admission of a person to bail can properly be perceived as an interlocutory order or judgment, the refusal or grant of bail must be regarded as an interlocutory order or judgment "for the purposes H of' s 121 of the CP&EA as read with s 44(5) of the High Court Act,

and the practical effect of these provisions is that where the Attorney A - General wishes to appeal against an admission to bail he has to obtain the leave of a judge. The "rules of court" referred to in s 44(5) of the High Court Act must be construed as being the rules governing appeals against interlocutory orders and judgments in criminal proceedings as distinguished from the rules governing bail applications and bail appeals. B In other words, the reference to "rules of court" in s 44(5) of the High Court Act has no direct bearing on the interpretation and application of s 121 of the CP&EA.

Held, further, that neither the CP&EA nor the Interpretation Act [*Chapter 1:01*] contain express guidance or assistance on how to compute the seven day period. Rule 6 of the Supreme Court of Zimbabwe (Bail) C Rules 1991 (SI 290 of 1991) restates the stipulation that an appeal from the High Court against the grant of bail must be filed within seven days and then prescribes the specific procedure to be followed in noting such an appeal. Rule 3, in dealing with the reckoning

of time, provides that a Saturday, Sunday or public holiday shall not be reckoned as part of such period. By contrast, r 3 of the High Court of Zimbabwe (Bail) Rules D 1991 (SI 109 of 1991) explicitly includes Saturdays, Sundays and public holidays as part of the seven day period for filing an appeal to the High Court. The Supreme Court (Bail) Rules were lawfully and procedurally enacted in terms of s 34 of the Supreme Court Act [*Chapter 7:13*]. To the extent that they are *intra vires* and consistent with that Act, they must E be duly applied "for regulating all matters in relation to the proceedings of the Supreme Court" and "in relation to criminal cases, for carrying the criminal law, practice and procedure into effect". Rule 3 does not conflict with anything contained in s 121 of the CP&EA. Accordingly, the seven day period stipulated in s 121 must be reckoned as excluding F Saturdays, Sundays and public holidays.

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*]*,* ss 121(1) and (3)

High Court Act [*Chapter 7:06*]*,* s 44(5)

High Court (Bail) Rules 1991 (SI 109 of 1991), r 3 G

Interpretation Act [*Chapter 1:01*]*,* s 3(1)

Supreme Court Act [*Chapter 7:13*]*,* s 34

Supreme Court (Bail) Rules 1991 (SI 290 of 1991), rr 3 and 6

Case referred to

Attorney-General v Mpofu & Anor 2002 (1) ZLR 670 (S) H

Patel J

Case information

A *H Zhou,* for the applicants

C B Mutangadura, for the respondents

Judgment

Patel J: The applicants in this matter were granted bail by this court on 9 April 2009. Immediately thereafter, the Attorney-General invoked s 121(3) B of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (CP&EA) giving notice of his intention to appeal against the decision and thereby precluding the release of the applicants from custody for a period of 7 days. The Easter weekend intervened and, as enjoined by s 121(1) of the CP&EA as read with s 44(5) of the High Court Act [*Chapter 7:06*]*,* the Attorney-General filed an application for leave to appeal on 14 April 2009. This application was C granted by this court on 17 April 2009 and the appeal against the grant of bail was then filed with the Supreme Court on the same day.

Again on the same day, in circumstances that are not entirely clear but which are not relevant for present purposes, the applicants paid the prescribed bail amount and were released from custody. They were then admitted to D the Avenues Clinic for medical treatment. At the hospital they were placed under guard, initially by prison officers and then later by police officers. They now seek an order removing the police guard and declaring unlawful any form of guard imposed upon them.

For the applicants, it is submitted that the notice of appeal by the Attorney- General was filed out of time and, since there is no appeal presently pending E before the Supreme Court, there is no legal basis for the police guard. On behalf of the respondents, it is contended that the appeal was filed within the prescribed period, taking into account the intervening weekend and public holidays, and that the liberation of the applicants was premature and therefore unlawful.

F Section 121(1) of the CP&EA stipulates that the Attorney-General must appeal against the admission of any person to bail "within seven days of the decision" appealed against, failing which such person must be released from custody in terms of s 121(3) after "the expiry of seven days". The crisp and critical question for determination *in casu* is this: in reckoning the seven day period referred to in s 121, does the law require that weekends and public G holidays be included or that they be excluded?

As I have already indicated, s 121(1)of the CP&EA allows an appeal against the admission of a person to bail by a judge, subject to s 44(5) of the High Court Act [*Chapter 7:06*]. This subsection provides that where a judge has made an interlocutory order or given an interlocutory judgment in relation to H any criminal proceedings, the accused person or the Attorney-General may

Patel J

appeal to the Supreme Court against that interlocutory order or judgment. A However, any such appeal is "subject to rules of court" and requires "the leave of a judge of the High Court" in the first instance.

In my view, it is very doubtful that the admission of a person to bail can properly be perceived as an interlocutory order or judgment. The same doubt was clearly shared by Chidyausiku CJ in *Attorney-General v Mpofu* B *& Anor* 2002 (1) ZLR 670 (S) at 675. In any event, as was aptly observed by the learned Chief Justice, the refusal or grant of bail is to be regarded as an interlocutory order or judgment "for the purposes of' s 121 of the CP&EA as read with s 44(5) of the High Court Act, and "the practical effect" of these provisions is that where the Attorney-General wishes to appeal against an admission to bail he has to obtain the leave of a judge. C

What also appears to follow from the foregoing is that the "rules of court" referred to in s 44(5) of the High Court Act must be construed as being the rules governing appeals against interlocutory orders and judgments in criminal proceedings, as distinguished from the rules governing bail applications and bail appeals. In other words, the reference to "rules of court" in s 44(5) of the D High Court Act has no direct bearing on the interpretation and application of s 121 of the CP&EA.

Turning to the central question at hand, the CP&EA itself contains no express guidance on the computation of the period of seven days prescribed for the filing of an appeal against the refusal or grant of bail. Again, I am unable to find any assistance on the point in the Interpretation Act [*Chapter 1:01*]. For E the applicants, it is argued that the period in question must be calculated as seven days, inclusive of weekends and public holidays, and that this is so notwithstanding anything contained in the relevant rules of court, inasmuch as such rules cannot modify the clear words of an Act of Parliament. As against this, it is submitted for the respondents that the prescribed period must be F construed in conformity with the governing rules of court.

Section 34 of the Supreme Court Act [*Chapter 7:13*] provides for the enactment of rules of court as follows:

> "(1) Subject to subsection (4), the Chief Justice, after consultation with a committee appointed by him, may make rules of court for *regulating all matters in relation to the proceedings of the Supreme Court,* including any matter in respect of G which rules of court may in terms of this Act be made.
>
> (2) Rules of court made in terms of subsection (1) may provide for the following matters—
>
> …
>
> (s) the time within which any requirement of the rules is to be complied with and the extension of such time; H

Patel J

> (x) generally, any A …matter in respect of which, in the opinion of the Chief Justice, it is necessary or desirable to make provision in order to ensure or facilitate the proper dispatch and conduct of the business of the Supreme Court and, *in relation to criminal cases, for carrying the criminal law, practice and procedure into effect"* (my emphasis).

B Rule 6 of the Supreme Court of Zimbabwe (Bail) Rules 1991 restates the stipulation that an appeal from the High Court against the grant of bail must be filed within 7 days and then prescribes the specific procedure to be followed in noting such an appeal. Rule 3 deals with the reckoning of time as follows:

> "Where anything is required by these rules to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as C part of such period."

In marked contrast, r 3 of the High Court of Zimbabwe (Bail) Rules 1991 explicitly includes Saturdays, Sundays and public holidays as part of the seven day period for filing an appeal to the High Court, in terms of r 7, against the grant of bail by a magistrate. I presume that the reason for

this distinction D is that an appeal from the decision of a magistrate is not conditioned by the need to seek and obtain leave to appeal and can therefore be processed more expeditiously.

It is trite that in the interpretation of an Act of Parliament any subsidiary legislation made under that Act *(viz.* regulations, notices, rules, by-laws, etc.) must be construed and applied in conformity with the Act. In the event E of any conflict or inconsistency, the provisions of the Act must prevail and the subsidiary legislation must either be struck down or be applied, *mutatis mutandis,* so as to conform with the Act.

The rules of statutory interpretation also require that all subsidiary legislation that is lawfully and procedurally made under an Act of Parliament must F be construed as an integral part of that Act. In this regard, s 3(1) of the Interpretation Act [*Chapter 1:01*] specifically states that:

> "In every Act...; 'this Act' includes any statutory instrument made and in force under the Act."

For present purposes, it is not in issue that the Supreme Court (Bail) Rules were lawfully and procedurally enacted in terms of s 34 of the Supreme Court G Act. Moreover, to the extent that they are *intra vires* and consistent with that Act, they must be duly applied "for regulating all matters in relation to the proceedings of the Supreme Court" and "in relation to criminal cases, for carrying the criminal law, practice and procedure into effect".

In my view, r 3 of the Supreme Court (Bail) Rules is clearly *intra vires* H the enabling Act and consistent with the provisions of that Act. I also take

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Patel J

the view that r 3 does not conflict with anything contained in s 121 of the A CP&EA. As I have already stated, there is nothing in s 121 or in any other provision of the CP&EA to provide direction or guidance as to the reckoning of the prescribed period of 7 days. In this respect, r 3 does not purport to alter or deviate from what s 121 explicitly stipulates. On the contrary, it is specifically designed to carry into effect the criminal law, practice and B procedure, including s 121 of the CP&EA, in accordance with s 34 of the Supreme Court Act.

Adopting this holistic approach, by having regard to all of the relevant statutory provisions cited above, I conclude that the seven day period stipulated in s 121 of the CP&EA must be reckoned as excluding Saturdays, Sundays and public holidays. It follows that the appeal noted by the Attorney-General C against the grant of bail to the applicants was timeously filed within the prescribed period of seven days. It also follows that the applicants have failed to establish that the police guard imposed upon the applicants is in any way unlawful. They are therefore not entitled to the relief that they seek *in casu.*

As regards costs, I take the view that the principal question raised in this D matter is of significant public importance in relation to a point of law that has not previously been canvassed. Accordingly, I am inclined not to penalise the applicants with any award of costs against them.

In the result, this application is dismissed with no order as to costs.

Mbidzo, Muchadehama & Makoni, applicants' legal practitioners E

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/MASUKU v CHINYEMBA & ORS 2010 (2) ZLR 31 (H)

MASUKU v CHINYEMBA & ORS 2010 (2) ZLR 31 (H)

Citation	2010 (2) ZLR 31 (H)
Case No	Judgment No. HH-63-09
Court	High Court, Harare
Judge	Bere J
Heard	20 May 2009
Judgment	21 May 2009
Counsel	*S Tsaurayi*, for the applicant Mrs *W O M Simango-Kaneta*, for the first respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Court- *small claims court - execution of judgment of - procedures applicable - procedures applicable to magistrates court to be followed - such procedures including interpleader proceedings*

D **Practice and procedure** - *interpleader proceedings - property attached in execution - requirement for messenger of court to institute interpleader proceedings when property claimed by a third party - such requirement applicable to execution in respect of judgment in small claims court*

Headnote

Where the messenger of court has attached goods in execution of a judgment E debt and such goods are claimed by a party who is not the judgment debtor, then by operation of law it becomes incumbent upon the messenger of court to initiate interpleader proceedings in order to have the status of the attached property determined before execution can continue. It is only when such property has been determined to belong to the judgment debtor that such property can be sold in execution of the judgment in issue.

F In terms of s 29(2) of the Small Claims Courts Act [*Chapter 7:12*], procedures in respect of execution of judgments in those courts follow the procedures laid down for the magistrates courts. The messenger would be wrong to blindly proceed with execution in the face of an applicant's claim in respect of the attached property. The Act does not oust the jurisdiction G of the High Court in such a case. Unlike the small claims courts, whose operations are governed by statute, the High Court has full original civil jurisdiction over all persons and matters within Zimbabwe. Certainly, the creation of the small claims courts did not exclude the jurisdiction of the High Court in entertaining a case emanating from such courts H where execution is being improperly carried out.

Legislation considered A

Small Claims Courts Act [*Chapter 7:12*], ss 29(2) & 33

Case referred to

Maravanyika v Hove 1997 (2) ZLR 88 (H)

Case information

S Tsaurayi, for the applicant B

Mrs *W O M Simango-Kaneta,* for the first respondent

Judgment

Bere J: Having obtained a judgment in her favour from the small claims court, the judgment creditor (the first respondent) duly instructed the third respondent (the messenger of court) to proceed with execution in order to C satisfy that judgment. In pursuit thereof, the third respondent attached a motor vehicle, believing it to be the property of the judgment debtor.

The applicant, who has nothing to do with the debt in question, claimed ownership of the attached motor vehicle. Despite the applicant's claim, the messenger of court, apparently with the encouragement of the first respondent, made it clear that the attached motor vehicle would be sold in execution of D the judgment. Two possible dates for the sale were actually given.

It is this conduct of the third respondent which has prompted the applicant to institute the instant urgent chamber application in an effort to halt the sale and ultimately safeguard his attached property.

It is not in dispute that at one stage a similar application was brought to the E magistrates court which felt it did not have jurisdiction to entertain the matter.

Counsel for the first respondent passionately argued that the application by the applicant was not urgent because, as she perceived it, it was brought to the wrong forum - it ought to have been brought to the small claims court where it all started and not to bring the matter to this court. F

It was also contended by counsel for the first respondent that there was no irreparable harm that would visit the applicant in the event of the attached vehicle being sold as applicant could always have recourse against those who sold him the vehicle, the argument being that he would institute an action for damages against such other party.

According to the first respondent, there was an unreasonable delay on the part G of the applicant in bringing this action and that such delay was inconsistent with bringing the instant application on the basis of urgency.

Counsel for the applicant contended that the point raised *in limine* by the applicant be dismissed on the grounds that this matter was urgent and had been rightly brought to the High Court which enjoys inherent jurisdiction. It H

Bere J

A was further argued that the time lapse in instituting the instant action could not by any stretch of imagination be deemed to be so unreasonable as to defeat the justification of bringing this application on urgent basis.

The view which the court takes is that where the messenger of court has attached goods in execution of a judgment debt and such goods are claimed B by a party who is not the judgment debtor, then by operation of law it becomes incumbent upon the messenger of court to initiate interpleader proceedings in order to have the status of the attached property determined before execution can continue. It is only when such property has been determined to belong to the judgment debtor that such property can be sold in execution of the judgment in issue.

C The instant application by the applicant was a desperate response to the intransigence demonstrated by the third respondent in his determination to sell the property whose status had not been properly ascertained.

Interpleader proceedings in the small claims court are modelled along the guidelines laid down in the magistrates courts and the third respondent was D obliged to initiate such an action. It was certainly improper for the third respondent to blindly proceed with execution in the face of the applicant's protestations and claim of the attached property. In this regard, and for clarity's sake, s 29(2) of the Small Claims Courts Act [*Chapter 7:12*] reads as follows:

> "(2) The judgment creditor may, on payment of the prescribed messenger's fees, E require the messenger of a small claims court to serve and enforce a writ of execution issued in terms of paragraph (a) of subsection (1), and *in such event the procedure for attachment and sale in execution which applies in magistrates courts, including the provisions relating to the exemption of property from execution,* shall apply, *mutandis mutandis,* in relation to the attachment and sale of property in execution of the writ of execution" (my emphasis).

F Property which upon enquiry is determined not to belong to a judgment debtor cannot be sold to satisfy a judgment debt._ In the instant case, dates for the sale of the property in execution were given and it became necessary for the applicant to institute the instant urgent chamber application.

In my view, it is not a correct appreciation of the Small Claims Court Act G that it ousts the jurisdiction of the High Court in a case like the instant one as speculated by the first respondent's counsel. Unlike the small claims court whose operations are governed by statute, the High Court has full original civil jurisdiction over all persons and matters within Zimbabwe. Certainly, the creation of the small claims courts did not exclude the jurisdiction of H the High Court in entertaining a case emanating from such court where

Bere J

execution is being improperly carried out. See *Maravanyika v Hove* 1997 (2) ZLR 88 (H). A

In any event s 33 of the Act states as follows:

> "Nothing in this Act shall be construed as depriving any other court of its jurisdiction to hear and determine any matter which by this Act, is declared to be within the jurisdiction of a small claims court".

Given the determination of both the first and third respondent in wanting to B proceed with execution despite the applicant's claim of the attached property, it was within the applicant's rights to bring this action to this court on an urgent basis.

For this reason I make a finding that the preliminary point is not sustainable. C The urgency of this matter cannot be doubted.

Accordingly the provisional order prayed for by applicant is hereby granted as amended.

A R Chizikani, applicant's legal practitioners

OMSimango & Co, respondent's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/S v K (A JUVENILE) 2010 (2) ZLR 35 (H)

S v K (A JUVENILE) 2010 (2) ZLR 35 (H)

Citation	2010 (2) ZLR 35 (H)
Case No	Judgment No. HH-66-09
Court	High Court, Harare
Judge	Uchena J
Heard	13 June 2009
Judgment	4 June 2009
Counsel	*T Mpofit,* for the applicant *R Chikosha,* for the respondent
Case Type	Bail application
Annotations	No case annotations to date

Flynote

Criminal procedure - *bail - application - refusal of - grounds - applicant a danger to the safety of public or a particular person - applicant a child or young person - where should such person be detained - undesirability of keeping young person in a remand prison if a remand home available*

Headnote

D The applicant, a 17-year-old juvenile, was indicated for trial before the High Court on two counts of murder. It was alleged, and not in dispute, that he had shot and killed both of his parents. Before he was asked to plead to the charges, he applied for bail pending the trial. The grounds E for the application were that the applicant needed to be examined by a psychiatrist before the trial. The applicant alleged that he was suffering from a mental disability at the time he killed his parents. The issue for trial was whether or not he had the necessary *mens rea* at the time he fired the fatal shots. The State produced a report by a doctor who had examined the applicant and found that he was suicidal and a danger to F himself and others.

Held, that this ordinarily would not have been the best time for a bail application, as whatever bail the applicant might have been granted at that stage, it would have been affected by his plea of not guilty; a plea which was unavoidable in terms of s 271 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In terms of s 169 of that Act, any bail G granted before the applicant had tendered his plea would have lapsed when he pleaded to the indictment and a fresh application would have had to have been made. *In casu,* however, there had been a need for the applicant to have applied for bail before pleading to the two charges but the application should have been preceded by an application for H postponement.

Held, further, that the facts that the shooting was not in dispute and that the A applicant's state of mind was an issue called for a careful consideration of whether or not the applicant was a danger to those with whom he had been staying. There was good reason for fearing that the applicant was not only been a danger to himself but also to members of his family and to the public. In terms of s 117(2)(a)(i) of the Act, a reason for refusing B bail included the fact that the applicant was a danger to the safety of the public or a particular person. It was too risky to release the applicant into society before he had been properly examined and/or treated for the condition which had triggered the events of the fateful day.

Held, further, however, that it was not only undesirable for a juvenile to be kept in a remand prison but such a course was contrary to the provisions C of s 84(1) of the Children's Act [*Chapter 5:06*], which stipulated that a young person should not, before conviction, be detained in a prison or police cell or lock-up unless detention was necessary and no suitable remand home had been conveniently available for his detention. As there was such a home suitably available, the court ordered that the D applicant be detained there

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 117, 169 & 271

Children's Act [*Chapter 5:06*], ss 84(1) & 86

Deceased Persons Family Maintenance Act [*Chapter 6:03*], ss 10, 11 & 12 E

Case information

T Mpofu, for the applicant

R Chikosha, for the respondent

Judgment

Uchena J: The applicant, a 17-year-old juvenile, was indicted for trial before this court on two counts of murder. It is alleged that he shot his father F at the back of the head before going upstairs

to his parents' bedroom where he shot his mother on the bridge of the nose. Both parents died from gun shot wounds.

The applicant applied for bail pending trial, before he was asked to plead to the charges. This, in my view, was not the best time for a bail application, G as whatever bail the accused may be granted at this stage may be affected by his plea of not guilty, which is unavoidable in terms of s 271 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which I will refer to as the CP&E Act. In terms of s 271 (1) of the CP&E Act the court cannot enter a plea of guilty on a murder charge, as evidence must be lead before an accused person can be convicted of murder. The bail application at this H

A stage, is ill advised because in terms of s 169 of the CP&E Act, any bail granted before the accused tenders his plea will lapse when he pleads not guilty to the indictment. Section 169 of the CP&E Act provides as follows:

> "If the accused is indicted in the High Court after having been admitted to bail, his plea to the indictment shall, unless the court otherwise directs, have the effect of terminating his bail, and he shall thereupon be detained in custody until the B conclusion of the trial in the same manner in every respect as if he had not been admitted to bail."

This means the court will have to again consider the question of bail after the accused's plea. The defence may have good reasons for making the application at this stage. This would, in most cases, be due to the parties not being ready for trial. In this case, the applicant's counsel explained the need C for an application at this stage by pointing out the need for the applicant to be examined by a psychiatrist before the trial. See p 6 of the applicant's application where he said:

> "The applicant has only recently secured the services of counsel who is working flat out on the preparation of his defence. The preparation has not as yet been D completed. There is need for investigations to be carried out, in particular for the applicant to receive proper and meaningful psychiatric evaluation".

The need for psychiatric evaluation is confirmed by the applicant's seemingly purposeless shooting of his own parents. I am therefore satisfied that there was need for the applicant to apply for bail before pleading to the two counts of murder, but the application should have been preceded by an application E for postponement..

Mr Mpofu, for the applicant, submitted that the accused should in terms of s 117 (1) of the CP&E Act be granted bail as he has been previously granted bail thus proving that he is a good candidate for bail. He submitted that he was thereafter brought back into custody in circumstances under which he F was to lead oral evidence, but he thereafter shied away from leading such evidence. Mr *Chikosha* for the respondent submitted that the applicant should not be granted bail because he is a danger to himself the family and society. He was, however, not opposed to the applicant being remanded into the custody of Northcott Children's Remand Home. He led evidence from Vimbai Mvundura, the applicant's elder sister. She is the executrix of their G parent's estate, which Mr *Mpofu* had said has a duty to accommodate the applicant at one of the estate's properties different from where Vimbai stays.

It is trite that a parent's estate has a duty to support the deceased's minor children. The estate's duty includes the provision of food, accommodation and other necessities of life. Sections 10(1), 11 and 12 of the Deceased H Persons Family Maintenance Act [*Chapter 6:03*] provide for the deceased's

children's rights, when they terminate, and the consequences of a parent's A attempt to terminate those rights before his death. Section 10(2) and (3), provides for the prosecution of any one who interferes with those rights The fact that interference with the maintenance of the deceased's family leads to prosecution, and the prevention of the squandering of the estate by the deceased to avoid the maintenance of his family by his estate, means the B applicant as the deceased's child has a very strong and unavoidable right to support from his parents' estate.

Vimbai told the court that, as the applicant's sister and executrix of their parents's estate, she initiated the bail application which resulted in the applicant being released on bail. She had to convince other family members that the applicant had to be assisted. On his release on bail, she stayed with him at C the Ruwa home where the applicant had shot and killed their parents. She

arranged for his medical and psychiatric examinations. He refused to take the later examination, but was medically examined after initially refusing to undergo that examination. He thereafter refused to go to school, opting to be involved in the family business. He participated in the family business D for one week and started leaving home on the pretext of going to work but never arriving. He started coming home at midnight or after midnight. He took keys to all rooms, resulting in anyone wanting anything from rooms like the pantry having to go through him. He became moody and started avoiding Vimbai in the way he had been avoiding his father before the fateful day. He had previously told her that he could not stand their father. E He demanded use of family cars, even though he was not a licensed driver. She said the licence the applicant presented to the police was a fake one. He demanded US$ 100 per day. Vimbai, on the advice of elder members of the family, gave in to these demands, fearing that a refusal would trigger the applicant into the state he was in before he gunned down his parents. Vimbai, fearing for her life, the lives of family members and the public at large, decided to renounce her guardianship of the applicant. She deposed an affidavit in which she details her fears, leading to the applicant being remanded in custody.

The issues before the court are:

1. whether or not the applicant is a good candidate for bail, and G
2. whether or not the estate is able to accommodate and provide for the applicant if he is released on bail.

The answer to the second issue is obvious. The applicant's parents' estate is able to look after and accommodate him. It did so when he was in remand prison for nine months before he was released on bail in January 2009. Vimbai H

Uchena J

A used to bring him food every day. It provided for the bail application which led to his being granted bail in January 2009. When he was released on bail, the estate accommodated him and made available to him the necessities of life plus the luxuries of family cars and an allowance of US$100 per day.

The estate has four immovable properties: the family home [in] Ruwa, the B business premises from which the family business is conducted, a vacant stand in Seke, and a house in Zimre Park. These properties are in Harare and three of them can, if the applicant is a suitable candidate for bail, be used to accommodate him. Vimbai said there are tenants at the Zimre Park house. From the impression given of the means of the estate it can even afford rented accommodation for the applicant. I am therefore satisfied that C the estate of the applicant's parents can accommodate him if he is a good candidate for bail.

The evidence placed before the court confirms that the applicant indeed gunned down his parents on 19 April 2008. The *actus reas* is not in dispute. The applicant alleges mental disability at the time he gunned down his parents. The issue for trial will therefore be whether or not he had the necessary D *mens rea* at the time he fired the fatal shots. The fact that the shooting is not in dispute and that the applicant's mental state is in issue calls for a careful consideration of whether or not the applicant is not a danger to those he will stay with if he is released on bail. The applicant's entitlement to bail is subject to certain conditions stipulated in s 117(2)(a)(i) to (iv) of the CP&E E Act, which provides as follows:

> **"117 Entitlement to bail**
>
> (1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained F in custody.
>
> (2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established —
>
> (a) where there is a likelihood that the accused, if he or she were released on bail, will — G
>
> (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
>
> (ii) not stand his or her trial or appear to receive sentence; or
>
> (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or H

(iv) undermine or jeopardise the objectives or proper functioning of the

Uchena J

criminal justice system, including the bail system; A

or

(b) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security."

The relevant provision in this case is s 117(2)(a)(i), which deals with the B applicant for bail being a danger to the safety of the public or a particular person. In this case, the respondent produced a report by a doctor who examined the applicant and found that he is suicidal and a danger to himself and others. Vimbai's sister, who initiated the previous bail application, testified that the applicant while on bail exhibited traits similar to those he exhibited before he gunned down his parents. The combination of the doctor's comments and C Vimbai's observations establish a good reason for fearing that the applicant is not only a danger to himself but also to Vimbai, members of his family and the public. While on bail, he took all the keys to the house. This can, if his condition is triggered, lead to his being able to endanger anyone who will be in the house. He exhibited signs that he resents the presence of Vimbai. He D walked out of any room he would be in whenever Vimbai entered that room. That is the behaviour he exhibited before he shot his father. The resentment may have been intensified by the fact that he now is aware of the fact that Vimbai renounced his guardianship leading to his being remanded in custody. He heard her testimony against his bail application. He is also now aware of the people who will testify against him. Some of them stayed with him E when he was released on bail, but he then did not know that they were going to testify against him. However, he became aware when he was served with the State's summary of the evidence to be led at his trial.

In considering whether or not an applicant for bail is a danger to society the court should, in terms of s 117 (2)(a)(i), take into account the following factors: F

(i) the degree of violence towards others implicit in the charge against the accused;

(ii) any threat of violence which the accused may have made to any person;

(iii) the resentment the accused is alleged to harbour against any person;

(iv) any disposition of the accused to commit offences referred to in the G First Schedule, as evident from his or her past conduct;

(v) any evidence that the accused previously committed an offence referred to in the First Schedule while released on bail;

(vi) any other factor which in the opinion of the court should be taken into account. H

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A The charge the applicant is facing establishes that he shot his father for no apparent reason, before going up to his parents' bedroom to shoot his mother, again for no apparent reason. This conduct exhibits a condition within the applicant which if triggered can cause him to react violently towards others. This proves him to be a danger to others if released on bail. The court can, in terms of s 117(3)(vi), consider any other factor which in B its opinion should be taken into account. The applicant has not yet received a meaningful psychiatric examination. According to Vimbai's evidence, he refused to be subjected to such an examination. In my view, such an examination and possible treatment could ensure his safe re-integration into society. It is in my view risky to release the applicant into society when he C has not been properly examined, and or treated, for the condition which triggered the events of the fateful day. The cumulative effect of the doctor's finding that he was suicidal and a danger to others, the possibility of his having within him a condition which makes him resort to violence and the resentment he harbours towards Vimbai makes him an unsuitable candidate for bail. His application for bail must therefore be dismissed.

D The respondent's counsel conceded that the applicant should not be kept in remand prison but be transferred to Northcott Juvenile Remand Home. The applicant's counsel said he would be comfortable with the applicant being remanded into the custody of Northcott Remand Home, if his bid for bail fails. I agree that it is undesirable for a juvenile to be kept in a remand prison. That is

contrary to the provisions of s 84 (1) of the Children's Act [*Chapter 5:06*], which provides as follows:

> "(1) A child or young person who is charged with an offence shall not before conviction be detained in a E prison or police cell or lock-up unless his detention is necessary and no suitable remand home is conveniently available for his detention."

F Mr *Chikosha* for the respondent advised the court that the applicant was previously remanded in remand prison because Northcott Juvenile Remand Home could not receive him due to lack of food. While s 84 (1) allows a remand in prison in such circumstances, I consider it unfortunate that the applicant was kept in remand prison for such a long time, when options in G terms of s 86(1)(b) and (2) of the Children's Act and the applicant's family, could have provided a relief for the non-availability of food at Northcott Remand Home and insured an earlier transfer of the applicant from remand prison to Northcott Remand Home. Section 86(1) and (2) provides for government and local authorities grants to certified institutions like Northcott. It was therefore desirable for the State to constantly review the availability H of food at Northcott Remand Home. Alternatively, the applicant's family,

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which according to Vimbai's evidence, gave him food daily at remand prison A could have been asked to do so at Northcott Juvenile Remand Home. The inability to provide food by Northcott should have been met by inquiries on the possibility of that institution being assisted or the applicant being fed by his family while at that institution.

In view of my finding that the applicant is not a suitable candidate for bail, B and that he should not be remanded in the custody of a remand prison, I will order that he should be transferred to Northcott Juvenile Remand Home. C

In the result, the applicant's application for bail is dismissed. The applicant shall be removed from Harare Remand Prison, and be placed into the custody of Northcott Juvenile Remand Home.

Mawere & Sibanda Legal Practitioners, applicant's legal practitioners

Criminal Division of the Attorney-General's Office, respondent's legal practitioners D

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CHINANZVAVANA & ORS v ATTORNEY-GENERAL 2010 (2) ZLR 43 (H)

Citation	2010 (2) ZLR 43 (H)
Case No	Judgment No. HH-73-09
Court	High Court, Harare
Judge	Uchena J
Heard	8 June 2009;9 June 2009;10 June 2009
Judgment	22 June 2009
Counsel	*A Muchadehama,* for the applicants *M Mugabe,* for the respondent

Case Type Details not supplied

Annotations No case annotations to date

Flynote

C **Constitutional law** - *Constitution of Zimbabwe 1980-Declaration of Rights - s 24(2) - application to refer alleged contravention of Declaration of Rights to the Supreme Court - whether such application frivolous and vexatious - meaning of "frivolous and vexatious" - availability of other means of redress - not a reason not to refer matter - decision as to whether other means are adequate vests in Supreme Court*

D **Criminal procedure** – *jurisdiction - accused person brought before court after illegal arrest and detention - whether court should decline jurisdiction*

Headnote

The applicants had all been indicted for trial before the High Court and a trial date had been set. On the trial date, they gave notice of their intention to E apply for the referral of their case to the Supreme Court in terms of s 24(2) of the Constitution and applied for an order referring those questions to the Supreme Court. The questions all arose out of the manner in which the applicants had been arrested and detained. The applicants alleged

(1) unlawful deprivation of liberty, having been held for more than 1½ months without being brought to court; F

(2) inhuman and degrading treatment while so detained

(3) denial of protection of the law, on the basis that they had been kidnapped by state security agents, which kidnapping had been condoned by the police

(4) denial of access to their legal practitioners.

G They raised the question of whether their trial in such circumstances was permissible. The State opposed the application on the grounds that it was frivolous and vexatious. They also argued that the applicants had other remedies, such as an action for wrongful imprisonment.

Held, that a "frivolous and vexatious" application is an application of no merit, mounted only for the purpose of harassing the respondent. In H the context of s 24(2), the word "frivolous" connotes the raising of a

question marked by a lack of seriousness; one inconsistent with logic A and good sense, and clearly so groundless and devoid of merit, that a prudent person could not possibly expect to obtain relief from it. The word "vexatious", in contra-distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party, in the full appreciation that it cannot succeed; it is not B raised *bona fide,* and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless. Unless the court finds the application is frivolous and vexatious, it must refer the matter to the Supreme Court. This determination is made after examining the questions the applicant seeks to refer to the Supreme Court and the applicable law. The examination is at this stage not aimed at determining the constitutional issues, but to test whether or not the questions raised are of a serious nature, or make the application frivolous and vexatious. In this assessment, the constitutional questions raised by the applicants must be assessed in light of the facts from which they are alleged to arise. If the facts establish that the questions are worthy of the attention D of the Supreme Court, then the court must refer the case; otherwise the application should be dismissed.

Held, further, that the mere availability of other means of redress is not a bar to a referral of a case to the Supreme Court. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is insular and unacceptable. Having taken cognizance E of the lawlessness, it would be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the applicant. In terms of the proviso to s 24(4), the Supreme Court decides and has to be satisfied of the adequacy of the other means of redress available to the applicant for referral. If the application for referral is not frivolous and

vexatious, and it is alleged by the respondent that F other remedies are available to the applicant, the Supreme Court must decide the issue. The court to which an application for referral is made cannot itself make that decision. To do so would usurp the functions of the Supreme Court.

Held, further, that the circumstances under which the applicants were deprived G of their liberty were not covered by any of the exceptions provided in s 13(2) of the Constitution. The referral on this point was thus not frivolous and vexatious.

Held, further, that on the allegation of inhuman or degrading treatment, the applicants' evidence was not challenged. An unchallenged allegation of physical abuse by state officials cannot be held to be frivolous and H

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A vexatious.

Held, further, that in terms of s 18(1) of the Constitution, every person is entitled to the protection of the law. "Every person" means every person, without exception. Even persons who are alleged or believed to have committed serious offences must be afforded the protection of the law. Their arrest must conform with the procedures specified by the B Constitution and other laws of the country. Failure to afford protection to any such person entitles him or her to raise a constitutional issue. Denial of access to a legal practitioner is a contravention of s 13(3).

Held, further, that on the issue of the applicants being tried in spite of their being brought to court illegally, there is an increasing acceptance by the C courts of many countries that they cannot try accused persons abducted or kidnapped from outside their borders with the connivance of the state. The decided cases, though not dealing with local abduction or kidnapping, throw a shadow on the effect of illegalities in the bringing of accused persons to court. The court can use these cases as a guide to how the courts view illegality in general. The question was therefore D reasonable and worthy of the attention of the Supreme Court.

Legislation considered

Constitution of Zimbabwe 1980, ss 13, 15(1), 18(1), 24(2) & 24(4)

Cases referred to E

A-G v Slatter & Ors 1984 (1) ZLR 306 (S)

Bennett v Horseferry Road Magistrates Court & Anor [1993] 3 All ER 138 (HL)

Chiramba & Ors v Min of Home Affairs & Ors 2008 (2) ZLR 269 (H)

Dhlamini & Ors v A-G & Anor HH-42-09

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

S v Beahan 1991 (2) ZLR 98 (S)

S v Ebrahim 1991 (2) SA 553 (A)

Regina v O'Connor (1964) 48 DLR 110

S v Makwakwa 1997 (2) ZLR 298 (H)

Case information

G *A Muchadehama,* for the applicants

MMugabe, for the respondent

Judgment

Uchena J. The applicants are members of the Movement for Democratic Change (Tsvangirai) (MDC (T)) party. They were indicted for trial before this H court on charges of contravening s 24 (a) of the Criminal Law (Codification

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& Reform Act [*Chapter 9:23*], alternatively contravening s 187(1)(a) or A (b) as read with s 24(a) of the Act. In the main charge, the applicants are being charged with recruiting Tapera Mupfuranhewe and other MDC (T) party youths, to undergo military training in Botswana for the purpose of committing acts of insurgency, banditry, sabotage or terrorism in Zimbabwe. The recruitment is alleged to have taken place between 1 July and 30 October B 2008, in and around the Banket area. The alternative is based on an allegation that during the same period as in the main charge, they persuaded or induced Tapera Mupfuranhewe to undergo military training in Botswana for the purpose of committing acts of insurgency, banditry, sabotage or terrorism in Zimbabwe. The respondent, the Attorney-General, is the prosecuting authority in Zimbabwe. C

The applicants' trial was scheduled for 8 June 2009. They pre-empted it by giving notice of their intention to apply for the referral of their case to the Supreme Court in terms of s 24(2) of the Constitution of Zimbabwe. On 8 June, they applied for an order, referring the constitutional questions arising in their case to the Supreme Court. The respondent opposed the application, arguing that the application was frivolous and vexatious. The respondent D also raised a point *in limine* arguing that the issue of referral was previously dealt with by the magistrates court, therefore the application was improperly before this court.

The respondent, however, abandoned the point *in limine* when Mr *Mugabe* for the respondent conceded that the applicants had not made such an E application in the magistrates court. He had mistaken this case for that of Kisimisi Dhlamini and others in which such an application was made. The point *in limine* is therefore dismissed. I will therefore proceed to consider whether or not the applicants' application should be granted.

The applicants seek the following order:

"1. The following questions be and are hereby referred to the Supreme Court F for determination;

(a) Whether or not the applicants' arrest and detention (abduction and kidnapping) constituted unlawful deprivation of liberty in violation of s 13(1) of the Constitution.

(b) Whether or not the applicants' physical treatment constitutes inhuman G and degrading treatment in violation of s 15 (1) of the Constitution of Zimbabwe.

(c) Whether or not the applicants' right to the protection of the law in terms of s 18(1) of the Constitution has been violated through their arrest, detention and physical treatment. H

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(d) Whether or not A the applicants as victims of enforced disappearances can lawfully be prosecuted. Whether the applicants can be compelled to go to trial in circumstances where their appearance at court was facilitated by a criminal act of kidnapping or abduction authorised or sanctioned by the State or officials of the State. B

(e) Whether the denial of access to the applicants' legal practitioners violated our [*sic*] rights to [the] protection of the law.

(f) Whether or not the Supreme Court should not direct the respondent to act in terms of s 76(4a) of the Constitution of Zimbabwe, by ordering the Commissioner General of the Police to forthwith institute and/or carry forward to completion a comprehensive and C diligent investigation of the offences alleged to have been committed against... each of the applicants as detailed in the affidavits sworn by them on 29 December 2008, with a view to the prosecution of all persons against whom there is a reasonable suspicion of complicity in the perpetration of such offences, before the applicants' possible prosecution. D

2. Pending the determination of these issues in the constitutional court, the prosecution of the applicants in this matter be and is hereby stayed."

Section 24(2) of the Constitution provides as follows:

"(2) "If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of E 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."

In terms of s 24(2) the court may on its own initiative refer a constitutional issue to the Supreme Court. When a party to the proceedings applies for F referral the court must refer the issues to the Supreme Court unless it finds that the application for referral is frivolous and vexatious.

A frivolous and vexatious application is an application of no merit mounted only for the purpose of harassing the respondent. In *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) at 157C-D Gubbay CJ, commenting on the meaning G of the words "frivolous" and "vexatious", said:

> "In the context of s 24(2), the word 'frivolous' connotes, in its ordinary and natural meaning, the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit, that a prudent person could not possibly expect to obtain relief from it. The word 'vexatious', in contra-distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party, H in the full appreciation that it cannot succeed; it is not raised *bona fide,* and

> a referral would be to permit the opponent to be vexed under a form of legal A process that was baseless ..."

When an application for referral to the Supreme Court is made, the court before which, it is made, has a very limited role to play. It has to refer the case to the Supreme Court if it cannot find that the application is frivolous and vexatious. That determination is made after examining the questions B the applicant seeks to refer to the Supreme Court and the applicable law. The examination is at this stage not aimed at determining C the constitutional issues, but to test whether or not the questions raised are of a serious nature, or make the application frivolous and vexatious. In this assessment the constitutional questions raised by the applicants must be assessed in light of the facts from which they are alleged to arise. If the facts establish that the C questions are worthy of the attention of the Supreme Court, then this court must refer the case to that court. If the facts establish that the questions are not worthy the attention of the Supreme Court then they can be held to be frivolous and vexatious and the application should be dismissed.

I will therefore proceed to consider the questions raised, and determine D whether or not they are worthy the attention of the Supreme Court.

Unlawful deprivation of liberty

The applicants alleged that they were arrested (abducted and kidnapped) between 30 October and 3 November 2008. They further alleged that they were thereafter kept by their abductors and their associates until 22 December E 2008. The first and fourth applicants alleged that they were arrested on 3 November 2008 by officers who were being driven in five motor vehicles along Chitungwiza road near St Mary's police station. They were coming from the MDC (T) head office where they wanted to report their fear of being abducted and the abductions of other MDC officials in Banket. They said Detective Inspector Maria Phiri of the Law and Order Section participated F in their arrest. She and others took them to Harare Central Police Station where she handed them over to Chief Superintendent Magwenzi. Chief Superintendent Magwenzi drove them to the Police Golf Club in a Toyota Virgo motor vehicle. The applicants further alleged that at the Police Golf Club they were moved from one motor vehicle to another, and were finally G blindfolded and driven in circles until the motor vehicle stopped. They were taken into a house while still in blindfolds. They were immediately separated and taken each to his or her own room. Interrogations started that night.

The first applicant said she was assaulted with blunt objects under her feet which had been put on top of a table. On 4 November 2008 she was again interrogated and one of her interrogators threatened to kill her. She alleged H

A that she was interrogated by the officers she mentioned on p 3 of her affidavit. On 22 December she was handed over to Chief Superintendent Magwenzi, in blindfolds. When these were removed she realized that she was in Chief Superintendent Magwenzi's office.

The second applicant in his affidavit alleges that he was, on the night of 31 October 2008, arrested by heavily armed man. They arrested him at B his house in Banket. They took him to Rhodesville Police station where the police allowed him to call his son who brought him food. He was later transferred to Borrowdale Police Station where he was interrogated by three CID officers. They recorded a warned and cautioned statement from him in which he denied the allegation that he had recruited youth for training as C soldiers. He was later taken to Marlborough police station for

detention. On 1 November he was taken to Highlands police station. The following day he was moved to Avondale police station. On 3 November he was taken to Hatfield police station. On 4 November he was moved from Hatfield police station to Avondale police station where officers told him that he was innocent and was to be taken back to his home. He was briefly taken to CID Law and D Order where a warned and cautioned statement was recorded. The police then drove him towards Westgate and turned into Lomagundi road. As they neared Mount Hampden another motor vehicle came and signaled the one he was in to stop. He was dragged out of the motor vehicle which was supposed to be taking him to Banket and thrown into the motor vehicle had signaled E them to stop. He was immediately blindfolded. He lost his shoes in the process. He was driven back to Harare and kept in a carpeted house which had no furniture. He was put in a room with no furniture. He discovered that other MDC members from Banket, i.e the first and fourth applicants, were in that house. He was assaulted all over his body. The next day he was put into a deep freezer, where he felt close to death. A few minutes after being F removed from the freezer he was ordered to remove all his clothes, and hot water was poured onto his genitals, causing him excruciating pain. He was asked to walk stark naked in front of women who were also in captivity. His abductors looked on laughing and mocking his bodily make-up. He was subjected to further assaults until he was moved from that base on 11 November 2008, and taken to another base where he was handed to another G team of officers who also subjected him to the assaults and inhuman and degrading treatment he narrates in his affidavit.

The third applicant said she was on 31 October 2008 taken from her home in Banket by men who said they were police officers from Chinhoyi. They produced their police identification cards. They walked her to the lifts. They H agreed that her 2-year-old son who was crying for her could go with her.

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They were taking her to CID Chinhoyi. As they walked they were joined by A two men who were wearing dark glasses. At about 1600 hours a Mitsubishi pick up came and took them to Chinhoyi. At Chinhoyi police station she was kept in cells until about 1900 hours. The officer in charge came and asked her about the whereabouts of her husband, to which she said she did not know. At 2100 hours she was taken to Banket, where she was asked about where B her husband was. She told them that she did not know where he was. She was transferred into another motor vehicle and ordered to lie down behind the back seat. She was taken to and detained at Malbereign police station. She heard the men who brought her telling the police officers on duty not to record her details in the detention book. They gave instructions that she was not to be fed, and no one was allowed to talk to her, and no relative was C supposed to see her, or know about her presence there. The next day they took her to Borrowdale. She said a dreadlocked female police officer called Phiri drove her there. At Borrowdale she was interrogated by six huge men. She was taken back to Banket where she was asked to show her interrogators houses of other MDC members. She, while lying at the back seat, showed D them the houses of Mai Gahadzikwa and Mai Katandika. She was taken back to Harare lying on the floor of the motor vehicle. She slept in cells at Mabelreign police station. On 2 November she was taken to Harare Central police station's CID Law and Order Section for the recording of her profile. She said Detective Phiri pressurized her to implicate the first applicant. After interrogation she was taken to Malbrough police station where she spent the E night in cells. On 3 November 2008, she was taken back to Harare Central for interrogation by a different team. The following day she was told she was going to be released and was driven to a place near Mount Hampden were she and others who had been arrested were dragged from police motor vehicles into other motor vehicles. They were told to bend over so they could F not see where they were going. They were taken to a house guarded by five young man armed with guns. They were put into a room which looked like a garage as it contained car parts. They were ordered to lie down on their stomachs. She was ordered to ensure that her two-year-old son also complied. She was given the following rules regarding her child:

1. the child was only going to be allowed to go to the toilet, and G
2. he was not to cry for food.

When the child cried of hunger an officer would beat him up. On the third day of their arrival at this house she was ordered into a tub of very hot water for failing to participate in a quiz. She was burnt on the buttocks, and for a few days she had blisters on her back. H

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A One day she and another, not a participant in this application, were accused of spoiling the toilet, and they spent the whole day having icy cold water poured into their pants. She was eventually taken to Mabelreign Police Station where Detective Superintendent Ncube recorded her statement. Thereafter she was taken to court together with other applicants.

The fourth applicant was arrested in the circumstances already described by B the first applicant. He was about to be assaulted when one of his interrogator remarked that he looked sickly. He was thus not assaulted but spent up to 23 December 2008 at the house they were taken to from the Police Golf Club. On 23 December he was taken to Avondale Police Station, and later to police General Headquarters where his statement and finger prints were recorded.

C These allegations were not denied by the respondent, whose response was simply that the applicants were from 31 October to 22 December 2008 in the custody of state security agents. That response attempts to distance the police from the alleged wrong doing, but does not succeed, because the police are alleged to have been involved from the time the applicants were abducted. The second and third applicants were kept in police custody for a long time D before they were taken to a house where they were kept until 22 December 2008. The response does not absolve all the state law enforcements agents. It is therefore not a complete answer to the applicants' application. Annexure A, the police investigation, does not absolve the police as it gives the impression that they dealt with the applicants from 22 December 2008 onwards, without E specifically denying earlier involvement as alleged by the applicants. Even Chief Superintendent Magwenzi's own affidavit does not respond to what is alleged to have happened before 22 December 2008. The respondent's responses leave the allegation of detention beyond 96 hours unchallenged. Section 32 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]*,* which I will in this judgment call the CP&E Act, provides for the detention F of an accused person in police custody for not more than 48 hours without a warrant of further detention and for not more than 96 hours if a warrant for further detention has been granted. In this case there is no allegation that a warrant of further detention was issued. Even if one had been issued, the applicants' detention far exceeds the period permissible under our law.

Section 13(1) of the Constitution provides for a citizen's rights against G the deprivation of liberty. Section 13(2) provides for the exceptions were deprivation of liberty is authorised by law. The relevant part of the section provides as follows;

> "(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the cases specified in subsection (2). H
>
> (2) The cases referred to in subsection (1) are where a person is deprived of

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> his personal liberty as may be authorized by law — A
>
> (a) in consequence of his unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether in Zimbabwe or elsewhere, in respect of a criminal offence of which he has been convicted;
>
> (b) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal or in execution of the order of the Senate or B the House of Assembly punishing him for a contempt;
>
> [Paragraph amended by s 26 of Act No. 31 of 1989 (Amendment 9) and by s23 of Act No. 5 of 2005 (Amendment No. 17)]
>
> (c) in execution of the order of a court made in order to secure the fulfilment of an obligation imposed on him by law;
>
> [Paragraph amended by s 4 of Act No. 30 of 1990 (Amendment No. 11)] C
>
> (d) for the purpose of bringing him before a court in execution of the order of a court or an officer of a court or before the Senate or the House of Assembly in execution of the order of the Senate or the House of Assembly;
>
> [Paragraph amended by s 26 of Act No. 31 of 1989 (Amendment No. 9), s 9 of Act No. 15 of 1990 (Amendment No. 10) and s 23 of Act No. 5 of 2005 (Amendment No. 17)] D
>
> (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;
>
> (f) in execution of the order of a court or with the consent of his parent or guardian, for the purposes of his education or welfare during a period beginning before he attains the age of twenty-one years and

ending not later than the date when he attains the age of twenty-three years; E

(g) for the purpose of preventing the spread of an infectious or contagious disease;

(h) if he is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care, treatment or rehabilitation or the protection of the community; or

(i) for the purpose of preventing his unlawful entry into Zimbabwe or for the F purpose of effecting his expulsion, extradition or other lawful removal from Zimbabwe or the taking of proceedings relating thereto."

An examination of the provisions of s 13(2) of the Constitution establishes that the circumstances under which the applicants were allegedly deprived of their liberty is not covered by any of the exceptions. They were held for G more than one and half months without being taken to court. That, if proved, would be in contravention of s 13(1) of the Constitution. It cannot therefore be held that the applicants' application for referral is frivolous and vexatious.

Mr *Mugabe* for the respondent submitted that s 13(5) provides the applicants with other remedies for their alleged deprivation of liberty. He submitted that they can sue for the deprivation of their liberty. He submitted that they have H

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A already given notice of their intention to sue. Mr *Muchadehama* in response submitted that the provisions of s 13(5) are not a bar to an application for referral to the Supreme Court. He relied on *Bennett v Horseferry Road Magistrates Court & Anor* [1993] 3 All ER138 (HL) in which Lord Bridge at p 155F-I, commenting on the adequacy of civil proceedings as a remedy, said:

> "To hold that the court may turn a blind eye to executive lawlessness beyond B the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognizance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution C could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted."

Mr *Muchadehama,* on the authority of the *Bennett* case *supra,* submitted that the mere availability of other means of redress is not a bar to a referral of the case to the Supreme Court. The case is not a binding authority which this court has to follow. I however find the reasoning of Lord Bridge persuasive, D and would be inclined to follow it. That persuasive authority is confirmed by the proviso to s 24(4) of the Constitution. Section 24(4) provides as follows:"

> (4) The Supreme Court shall have original jurisdiction—
>
> *(a)* to hear and determine any application made by any person pursuant to subsection (1) or to determine without a hearing any such application which, E in its opinion, is merely frivolous or vexatious; and
>
> *(b)* to determine any question arising in the case of any person which is referred to it pursuant to subsection (2);
>
> and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights:
>
> F *Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other' provisions of this Constitution or under any other law"* (emphasis added).

In terms of the proviso to s 24(4), it is the Supreme Court which decides and has to be satisfied of the adequacy of the other means of redress available G to the applicant for referral. This, in my view, means if the application for referral is not frivolous and vexatious, and it is alleged by the respondent that other remedies are available to the applicant, the question raised must be referred for the consideration of the Supreme Court. The court to which an application for referral is made cannot itself make that decision as it would H in making that decision usurp the functions of the Supreme Court.

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The law further provides that if any person other than the police arrests A an accused person that person must bring the accused person to a police station as soon as possible. The reasonableness of

the delay depends on the circumstances of each case. In *S v Makwakwa* 1997 (2) ZLR 298 (H) the court held that an accused person who escaped from police custody after 60 hours, in circumstances which could have enabled the police to take him to B court within 48 hours, but they had instead subjected him to inhuman and degrading treatment, had not escaped from lawful custody. The applicants in this case were, according to their unchallenged accounts, held in detention, at police stations and other secret places, and subjected to inhuman and degrading treatment for more than one and half months. Even if they were in the custody of state security agents, the lawfulness of their detention must C be considered by the Supreme Court.

The applicants' unchallenged allegations merit the attention of the Supreme Court. They cannot be held to be frivolous and vexatious. I would in the circumstances refer this question to the Supreme Court.

Physical treatment D

The applicants alleged that while they were in the custody of their abductors, they were assaulted, and treated in an inhuman and degrading manner. They were most of the time blindfolded. They were kept incommunicado. Again the respondent simply distanced the police from such physical abuse of the applicants. It said the applicants were handed over to the police by state E security agents on 22 December 2008 and that no abuse took place while the applicants were in police custody. The applicant's complaint covers the period 30 October to 22 December 2008. They attached to their application doctors' reports confirming their allegations. They alleged other inhuman and degrading treatment to which the respondent's response was they could not investigate what happened between 30 October 2008 and 22 December F 2008 because of the certificate issued by the Minister of State Security. This again leaves the applicants' allegations unchallenged. An unchallenged allegation of physical abuse by state officials cannot be held to be frivolous and vexatious.

Section 15(1) of the Constitution provides against inhuman and degrading G treatment as follows:

> "(1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

The provisions of subsections (2) to (6) provides for the exceptions to the provisions of s 15(1). None have been alleged by the respondent to apply to the applicants' allegations. I therefore cannot hold that the application for H

Uchena J

A the referral of this question is frivolous and vexatious. I will therefore refer the applicant's second question to the Supreme Court.

Protection of the law, denial of access to legal practioners and the applicants' prosecution in view of their having been brought to court illegally

B The applicants also sought the referral of their being denied the protection of the law and access to their legal practitioners to the Supreme Court. They also want the Supreme Court to consider whether or not they should be prosecuted in spite of their being brought to court illegally. They claim that they were initially kidnapped by known police officers, and subsequently handed over to state security agents. They allege that the police knew they were missing, C and that Justices Hungwe and Omerjee had ordered that they be released. In spite of that knowledge, the police received them from the state security agents in blindfolds. The police did not arrest their abductors, but instead arrested the applicants. It was contented on their behalf that kidnapping is a crime from which the applicants should have been protected by the police.

D It was also contended on their behalf that they were, for the period they were in the custody of the police and state security agents, denied access to their legal practitioners.

In terms of s 18(1) of the Constitution, every person is entitled to the protection of the law. That is however subject to the provisions of the Constitution. E Section 18(1) provides as follows:

> "Subject to the provisions of this Constitution, every person is entitled to the protection of the law."

The use of the words "every person" means every person, without exception. This means even persons who are alleged or believed to have committed serious offences must be afforded the

protection of the law. Their arrest must F conform with the procedures specified by the Constitution and other laws of this country. Failure to afford protection to any such person entitles him or her to raise a constitutional issue.

In this case, it is not in dispute that the applicants' enforced disappearance was known to the police. The police were party to the proceedings before G Hungwe J where the issue was the disappearance of the applicants and others. They at first denied knowledge, but conceded after the applicant's legal practitioners had proved that some of the applicants had been detained at various police stations. They then consented to the granting of the order granted by Hungwe J. That order was not complied with, leading to an order by Omerjee J that that order should be complied with. That did not H yield any positive results. The applicants were thereafter brought to various

police stations as per the respondent's Annexure A. They were brought in A blindfolds. They were left while still in blindfolds. It must be assumed that those who received them removed the blindfolds, and started dealing with them according to law.

The issues which arise are, were the applicants afforded protection of the law and access to their legal practitioners and, if not, should they be compelled B to go to trial when they were illegally brought to court?

Section 13(3) of the Constitution provides for an accused person's right to be afforded access to a legal practitioner at his own expense. It provides as follows:

> "(3) Any person who is arrested or detained shall be informed as soon as reasonably C practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and hold communication with him."

The applicants' access to legal practitioners is a constitutional right which ensures the protection of an accused person's right at the time of his or her D arrest and thereafter. *See A-G v Slatter & Ors* 1984 (1) ZLR 306 (S). Section 13 (3) of the Constitution provides that an accused person must be permitted to obtain and instruct a legal representative of his choice without delay. In this case the applicants allege that they were not allowed access to a legal practitioner for more than one and half months. This is a serious allegation which calls for a determination by the Supreme Court. E

On the issue of the applicants being tried in spite of their being brought to court illegally, Mr *Muchadehama* for the applicants referred the court to John Dugard's *Cs International Law: A South African Perspective* in which the learned author discusses the courts' attitude to the illegal bringing of accused persons for trial from outside their countries' borders. A reading of the learned F author's work from pp 231 to 234 reveals an increasing acceptance by the courts of many countries that they cannot try accused persons abducted or kidnapped from outside their borders with the connivance of the State.

Mr *Muchadehama* also referred the court to the South African case of *S v Ebrahim* 1991 (2) SA 553 (A) at 556 and 583-4 and the Canadian case of G *Regina v O'Connor* (1964) 48 DLR 110 at 115, which confirm the courts' abhorrence of the practice of kidnapping accused persons from outside their countries' borders and bringing them before them for trial.

In *S v Beahan* 1991 (2) ZLR 98 (S) at 111B-C Gubbay CJ, commenting on the approach of Zimbabwean courts, said:

> "In my opinion it is essential that in order to promote confidence in and respect for H

> A the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting state. There is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations. For abduction is illegal under international B law, provided the abductor was not acting on his own initiative and without the authority or connivance of his government. A contrary view would amount to a declaration that the end

> justifies the means, thereby encouraging states to become law-breakers in order to secure the conviction of a private individual."

These cases confirm that our courts and those of other jurisdictions frown upon the bringing of accused persons to trial through illegal means. These cases, C though not dealing with local abduction or kidnapping, throw a shadow on the effect of illegalities in the bringing of accused persons to court. The court can use these cases as a guide to how the courts view illegality in general.

Mr *Muchadehama* also referred to the local cases of *Chiramba & Ors v Min of Home Affairs & Ors* 2008 (2) ZLR 269 (H), and *Dhlamini & Ors* v D *A-G & Anor* HH-42-09. In the *Chiramba* case, in which the applicants were involved, Hungwe J commented strongly on the police's failure to protect the applicants. At 277B he said:

> "The respondents have denied the applicants the protection of the law. The respondents have permitted the applicants to be detained incommunicado. People are at risk of torture or other forms of ill-treatment if they are detained E incommunicado. The risk increases the longer they are held as this allows for a longer period for injuries to be inflicted and visible marks of these injuries to fade. Further, detainees have a right of access to legal advice without delay. They should be able to consult with a lawyer in private while in custody, to have a lawyer present during interrogations and to represent them when they appear in court."

F All the applicants in this case allege that they were detained incommunicado. They were denied access to their legal practitioners. The first to the third applicants were assaulted. They were humiliated in one way or the other. The females were at one stage denied sanitary pads. The second applicant was put in a freezer and later forced to walk naked in front of female detainees. The female detainees were exposed to a naked male. Some were kept in blindfolds. G The second and third applicants were promised release by the police, and driven towards their homes only to be handed over to state security agents for further detention. These are the dangers of illegal detention of suspects Hungwe J warned about.

Mr *Mugabe* for the respondent argued that the police could not comply with H Hungwe J's order because they were not the correct respondents in that case

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as the applicants were not in their custody. That argument is contrary to the A specific findings of Hungwe J who allowed the parties a postponement so that they could establish the whereabouts of the applicants. The applicant's legal practitioners in that case came back with detailed findings proving that most of the applicants had been held at various police stations by the aforementioned senior police officers. See pp 274-5 of the judgment, which was produced as B annexure E1 to the applicants' application. After the postponement the third and fourth respondents did not report back to the judge their findings. They also did not make themselves available to their legal practitioner who was left with no option but to consent to the final order sought being granted. In respect of the applicants in this case, Hungwe J found that some of them had been in police custody. The applicants persist with their allegation that C the police were involved in their arrest and detention. It would therefore be difficult for the police to argue that they could not release the applicants as they were wrongly cited as respondents in *Chiramba's* case. They also cannot say they did not know where the applicants where as the applicants' unchallenged allegations are that it was the police who arrested them and handed them to state security agents. D

The question of the applicants being denied the protection of the law has therefore already been commented on by this court in *Chiramba* where Hungwe J held that they had been denied the protection of the law. My task is limited to deciding whether or not their request for referral for that reason is frivolous and vexatious. I am satisfied that it is a request worthy of the E attention of the Supreme Court.

The question of the applicants being denied access to their legal practioners was also commented on in *Chiramba.* My task is therefore again limited to whether or not their request for referral for that reason is not a serious request. In my view, it is a request which must be granted.

The question whether or not the applicants should be tried in spite of F their claim that they were brought before the courts through illegal means has received judicial consideration within this jurisdiction and in other jurisdictions. The consensus of local and external judicial pronouncements is that courts frown upon the trial of persons who are illegally brought for trial before them. In

Dhlamini & Ors supra Hlatshwayo J, commenting on G *S v Ebrahim supra* and the effect of illegally bringing accused persons to court said at p 6 of the judgment:

> "Once the proper appreciation of the reasoning in *S v Ebrahim* has been made, as has been done above, one may then proceed to examine whether the sentiments expressed therein are not applicable with greater force, to situations of internal abductions, torture and forced disappearances. If the courts frown upon situations H

Uchena J

> A where the state has resorted to cross-border abductions, presumably because of non-existence or difficulties in the implementation of extradition agreements or because of the exigencies of apprehending criminals operating from across borders, the courts should be even more wary of the state resorting to such extreme measures of bringing accused persons before the courts within its own jurisdiction where it holds sway and has limitless and perfectly legal and humane ways in which it can secure their attendance at court. It may thus be argued that B if it is proved that internal abduction, torture or forced disappearance carried out or authorised by or connived in by the state or its officials has preceded the handing over to the police and the courts of an accused person, then, as in the case of foreign abductions the judiciary should not condone such delinquent acts. Whether the proper way of exercising judicial censure of such conduct is through the courts declining to exercise their jurisdiction as in the foreign C abduction cases, I hesitate to hazard an opinion and so leave the issue completely open as I have not been addressed on the matter."

The comments by Hlatshwayo J are consistent with the courts frowning upon any illegal means being used to bring accused persons before them. The applicants' case is similar to that of *Dhlamini & Ors.* The respondent ordered the police to investigate the applicants' and Dhlamini and others' D complaints under the same correspondence because of the similarities. The police investigated the cases together under Annexure A. *If Dhlamini's* case could attract the comments it did from Hlatshwayo J, that means that the applicants' request for referral cannot be held to be frivolous and vexatious. It confirms the reasonableness of the applicants' request for referral on this E aspect. The question of the applicants' trial in view of the means through which they were brought to court is therefore reasonable and worthy the attention of the Supreme Court.

Investigation

The applicants want the respondent to be ordered to order the Commissioner- F General Of Police to carry forward to completion a comprehensive and diligent investigation of the offences alleged to have been committed against them by each of the applicants as detailed in the affidavits sworn by them on 29 December 2008, with a view to the prosecution of all persons against whom there is a reasonable suspicion of complicity in the perpetration of such offences, before the applicants' possible prosecution.

G This request is premised on Annexure A, the police's investigation, which the applicants say is inadequate. It is not in dispute that aspects of the applicant's allegations were not investigated because of the Ministerial certificate. This means the applicants' allegations of assaults, being placed in a freezer, being burnt with hot water, etc will never be investigated if the application is not H granted. The allegations made against the law enforcement agency are very

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serious. It would be unacceptable for such serious allegations to be swept A under the carpet. The request for an order for investigation is, in my view, not frivolous and vexatious. Its seriousness is demonstrated by the respondent and the police having considered it necessary when they investigated the allegations as per their Annexure A. It is conceded that the investigation did not cover the crucial period because of the Ministerial certificate. If the B Ministerial certificate had not been issued there is no doubt that the police would have carried out a full investigation as had been ordered. It is therefore necessary that the issue be considered by the highest court of the land. The referral of this question is therefore granted.

Stay of prosecution

The applicants sought the staying of the prosecution of their case pending C the determination of their issues by the Supreme Court. This is a natural consequence of a referral to the Supreme Court. That request cannot be refused once the referral of the questions to the Supreme Court has been granted. The order sought under para 2 will therefore be granted.

In the result the applicants' application is granted, and it is ordered as follows, D

"1. The following questions be and are hereby referred to the Supreme Court for determination:

2. (a) Whether or not the applicants' arrest and detention (abduction and kidnapping) constituted unlawful deprivation of liberty in violation of s 13(1)of the Constitution.

(b) Whether or not the applicants' physical treatment constitutes inhuman E and degrading treatment in violation of s 15(1) of the Constitution of Zimbabwe.

(c) Whether or not the applicants' right to the protection of the law in terms of s 18(1) of the Constitution has been violated through their arrest, detention and physical treatment.

(d) Whether or not the applicants as victims of enforced disappearances can F lawfully be prosecuted and whether the applicants can be compelled to go to trial in circumstances where their appearance at court was facilitated by a criminal act of kidnapping or abduction authorised or sanctioned by the State or officials of the State.

(e) Whether the denial of access to the applicants' legal practitioners G violated their rights to protection of the law.

(f) Whether or not the Supreme Court should not direct the respondent to act in terms of s 76(4a) of the Constitution of Zimbabwe, by ordering the Commissioner General of the Police to forthwith institute and/or carry forward to completion a comprehensive and diligent investigation of the offences alleged to have been committed against them by each of the applicants as detailed in the affidavits sworn by them on 29 H

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A December 2008, with a view to the prosecution of all persons against whom there is a reasonable suspicion of complicity in the perpetration of such offences, before the applicants' possible prosecution.

3. Pending the determination of these issues in the constitutional court, the prosecution of the applicants in this matter be and is hereby stayed."

B *Mbidzo, Muchadehama & Makoni*, applicants' legal practitioners

Attorney-General's Criminal Division, respondent's legal practitioners

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DUMBURA v MUHWEHWESA & ANOR 2010 (2) ZLR 62 (H)

2010 (2) ZLR p62

Citation	2010 (2) ZLR 62 (H)
Case No	Judgment No. HH-80-09
Court	High Court, Harare
Judge	Kudya J
Heard	3 July 2009

Judgment 15 July 2009

Counsel *M E Motsi*, for the plaintiff
R M Mubata, for the defendants

Case Type Civil trial

Annotations No case annotations to date

Flynote

Contract - *pactum commissorium - void and unenforceable -permission of court necessary in order to perfect the security*

Contract - *validity - contract induced by undue pressure and extortion - no* D *part of the contract severable - contract void and unenforceable*

Practice and procedure - *onus of proof - allegation of fraud in civil proceedings - criminal connotation thereof—need for proof of such allegation beyond reasonable doubt required* E

Headnote

A pactum commissorium is a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full property in the thing will irrevocably pass to the creditors in payment of the debt. Such an agreement is void and unenforceable. To perfect the security F the court's imprimatur is required.

In contravention of s 3 (1)(a) of the Precious Stones Trade Act [*Chapter 21:06*], as read with s 189(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], the parties, not being licensed to do so, attempted to deal in diamonds. In the course of these dealings, the defendants alleged G that, in circumstances amounting to fraud, they had given the plaintiff the sum of US$230 000 for the purchase of a hundred carat diamond from one T. This the plaintiff denied. It was his case that he had acted as no more than a facilitator in the dealings between the defendants and T and that the former had handed the money directly to the latter. At the defendant's instigation, the plaintiff was arrested by the police on a H

A charge of fraud and remanded in custody. In the order to facilitate his release from custody on bail, the plaintiff agreed to sign a memorandum of agreement and an addendum thereto, in the course of which, and while under undue pressure, he admitted criminal liability for fraud and civil liability to the defendants in respect of the monies by which they alleged that they had been defrauded. The plaintiff undertook to surrender to B them certain immoveable and moveable assets, including a house and five motor vehicles, in return for the defendants undertaking to withdraw the charge against him. Upon delivery of the last of the motor vehicles to the defendants, their legal practitioner advised the prosecutor handling the case that he was agreeable to the granting of bail.

C The plaintiff sought the nullification of the memorandum of agreement and the addendum and the return of the five motor vehicles. He argued that the agreement was not freely executed, alternatively that it was illegal because it was based on extortion. The defendant opposed the relief sought and counterclaimed, seeking the plaintiff's eviction from the house.

Held, that the fraud which the defendants alleged had criminal connotations D and, as such, they needed to prove it beyond a reasonable doubt so as to discharge the onus which lay upon them. They failed to do so. On the facts, therefore, they had failed to prove that the plaintiff had received the sum of $230 000 from them.

Held, further, that while the plaintiff had been legitimately remanded in E custody, he had been subjected to undue pressure. The memorandum of agreement was, therefore, grounded on extortion and, lacking severable clauses, was void and unenforceable.

Held, further, that in any event, there agreement was void and unenforceable because it was a *pactum commissorium.*

Held, further, that the plaintiff was entitled to the relief he sought. The F memorandum of agreement and its addendum were void and the five vehicles should be returned to him. The defendants' counterclaim, being based on the void and unenforceable memorandum of agreement and addendum, must be dismissed.

Legislation considered G

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 134(1) & 189(1)

Cases referred to

Bock & Ors v Duburoro Invstms (Ptv) Ltd 2004 (2) SA 242 (SCA); [2003] 4 All SA 103 (SCA) H

Kudya J

Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor 1994 (1) ZLR 310 (H) A

DPP Cape of Good Hope v Bathgate 2000 (2) SA 535 (C)

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

Evans v Snapper 2004 (2) ZLR 121 (S)

Hattingh & Ors v van Kleek 1997 (2) ZLR 240 (S)

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

Jajbhay v Cassim 1939 AD 537 *Logan v Sibiya* 2002 (1) ZLR 531 (H)

Mapenduka v Ashington 1919 AD 343

Mugabe & Anor v Law Soc of Zimbabwe 1994 (2) ZLR 356 (S) C

Oceaner (Pvt) Ltd & Anor v Upperclass Enterprises (Pvt) Ltd 2001 (2) ZLR 130 (H)

Pitluk v Law Soc of Rhodesia 1974 (2) RLR245 (A); 1975 (2) SA 21 (RA)

Rootes (Central Africa) (Pvt) Ltd v Mundawarara & Anor 1973 (1) RLR 57 (G)

Upper Class Enterprises (Pvt) Ltd v Oceaner (Pvt) Ltd & Ors 2002 (2) ZLR 603 (S) D

van Rensburg v Weiblen 1916 OPD 247

Zuvaradoka v Franck 1980 ZLR 402 (S)

Case information

M E Motsi, for the plaintiff E

R M Mubata, for the defendants

Judgment

Kudya J: On 1 September 2008 the plaintiff issued summons out of this court seeking the nullification of a memorandum of agreement of 20 May 2008 and its addendum of 30 May 2008 (the agreement), the return of five F motor vehicles and their respective registration books and costs of suit. On 26 September 2008 the defendants entered their plea and filed a counterclaim, based on the agreement, for the cession of rights in house No. 241 Tsvingwe Township Penhalonga, the eviction of the plaintiff therefrom and the payment of US$89 000.

The agreement of 20 May 2008 and the undated addendum which was G executed on 30 May 2008 read as follows:

"MEMORANDUM OF AN AGREEMENT OR SETTLEMENT Made and entered into by and between

SHELLINGTON DUMBURA

ID No. 75-155396 P 50

ADDRESS: 241 TSVINGWE TOWNSHIP H

Kudya J

A PENHALONGA

AND

MISHECK MUHWEHWESA

ID No. 07-055049 F 07

AND

SIMBARASHE SIGXOZA

B ID No. 63-976714 F 24

ADDRESS: C/O GONESE AND NDLOVU

3RD FLOOR FIDELITY LIFE CENTRE

MUTARE

WHEREAS the said Shellington Dumbura by means of false pretences, C criminal misrepresentation and fraud stole US$220 000 from the said Misheck Muhwehwesa and Simbarashe Sigxoza

AND WHEREAS THE SAID Shellington Dumbura was arrested and is appearing at Mutare Magistrates Court under CRB No. 1726/08 and is currently detained at Mutare Prison.

AND WHEREAS the said Shellington Dumbura is admitting to his civil liability D and wants to compensate the said Misheck Muhwehwesa and Simbarashe Sigxoza.

AND WHEREAS the parties have discussed the matter with professional help and assistance of their respective legal counsels and have reached an agreement and understanding.

AND WHEREAS the parties wish to have their agreement recorded and reduced into writing

E NOW THESE PRESENT WITNESSTH THAT

1.

Shellington Dumbura pay a deposit of US$21 000 to Misheck Muhwehwesa and Simbarashe Sigxoza upon signature of this agreement.

2.

Shellington Dumbura shall surrender, deliver and cede his rights, title, interests F and ownership of-

(A) Stand No. 241 Tsvingwe Township valued at US$30 000

(B) Hino ranger ABC Reg. No. ABC 4307 valued at US$20 000

(C) Hyundai Santafe Reg. No. AAV 7895 presently registered in Ntambwe Kaninda's name valued at US$15 000

G (D) Mitsubishi Canter registration No. AAX 8709 presently registered in Charles Muwamba's name valued at US$14 000

to Misheck Muhwehwesa and Simbarashe Sigxoza.

3.

Transfer of ownership and legal title shall be effected or ceded upon signature of this agreement. Shellington Dumbura shall vacate the immovable property H by 31 /08/08. Provided that ownership and title of these items shall be reversed

Kudya J

back to Shellington Dumbura if he pays their value to Misheck Muhwehwesa A and Simbarashe Sigxoza by 31 /08/08.

4.

The balance of US$120 000 shall be paid off or liquidated by and in monthly instalments of US$10 000 or its equivalent at the prevailing interbank rate with the first instalment payable on or before 30 June 2008.

5.

The said Shellington Dumbura renounces all benefits from the legal exceptions B "non causa debiti", "non numerata pecuniae", "de errore calculi", "revision accounts", "no value received".

6.

Misheck Muhwehwesa and Simbarashe Sigxoza undertake to withdraw the criminal charges against Shellington Dumbura upon full settlement of the civil C debt or liability.

THUS DONE AND SIGNED AT MUTARE THIS 20 DAY OF MAY 2008 IN THE PRESENCE OF THE UNDERSIGNED WITNESSES

AS WITNESSES 1

SHELLINGTON DUMBURA

2

THUS DONE AND SIGNED AT MUTARE THIS 20 DAY OF MAY 2008 IN THE PRESENCE OF THE UNDERSIGNED WITNESSES AS WITNESSES

1

MISHECK MUHWEHWESA E

2

AS WITNESSES

1

SIMBARASHE SIGXOZA

2

ADDENDUM F

WHEREAS the parties entered into, recorded and executed an Agreement on 20 May 2008.

WHEREAS the parties wish to modify, add and incorporate further agreements.

Now therefore witnessth that:

(1) In recognizing accepting and admitting his criminal and civil liability G Shellington Dumbura shall deliver, surrender and cede his rights, title, interest and ownership of-

(a) Mazda 626 Cronos Registration No. AAL 8267 valued at US$5 000 presently registered in Lizzy Mandikonza's name.

(b) Toyota Hilux (Virgo) Registration No.AAU6184 valued at US$30000 presently registered in Crosby Mashiri's name. H

Kudya J

A (2) The provisions of paragraphs 3, 4, 5 and 6 of the Principal Agreement shall apply mutatis mutandis.

THUS DONE AND SIGNED AT MUTARE THIS.....DAY OF MAY2008

IN THE PRESENCE OF THE UNDERSIGNED WITNESSES.

THUS DONE AND SIGNED AT MUTARE THIS 20 DAY OF MAY 2008 IN THE PRESENCE OF THE UNDERSIGNED WITNESSES

B AS WITNESSES

1

SHELLINGTON DUMBURA

2

THUS DONE AND SIGNED AT MUTARE THIS 20 DAY OF MAY 2008 IN C THE PRESENCE OF THE UNDERSIGNED WITNESSES

AS WITNESSES

1

MISHECK MUHWEHWESA

2

D AS WITNESSES

1

SIMBARASHE SIGXOZA

2"

The facts which gave rise to these claims and counterclaims were hotly disputed. All the parties are businessmen based in Mutare. The plaintiff gave E evidence and called his wife Bongani Kusinabadza to support his story, while both defendants testified on their own behalf and called the evidence of their friend and legal practitioner of record, Christopher Ndlovu.

The sole issue that was referred to trial at the pre-trial conference held on 25 March 2009 was whether or not the agreements signed between the plaintiff F and the defendants are enforceable. In argument, both counsel were agreed that the issue could only be determined after the resolution of the factual disputes that gave birth to the agreement.

A diamond craze hit Mutare in the wake of the discovery of diamonds in the Chiadzwa area of Marange in Manicaland. Taiziri Mahommed, a Lebanese diamond dealer traveling on a Democratic Republic of the Congo passport G set up a base at the Eastgate Hotel in Mutare. It was common cause that he was a business associate of the plaintiff. It was also agreed that before the attempted diamond transaction took place in October 2007, Ndlovu had acted as the legal practitioner of the plaintiff in a murder case that had by then been withdrawn. Thereafter Ndlovu became the legal practitioner of H record for Taiziri and the defendants.

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Kudya J

The first factual dispute between the parties involves the sum of US$230 000, A consisting of US$155 000 and US$75 000 raised by the first and second defendants, respectively, for the purchase of a 100 carat diamond from Taiziri. The issue that I have to resolve first is whether the defendants paid the money to Taiziri or to the plaintiff. It was Ndlovu's testimony, which the parties with the benefit of hindsight agreed with, that the diamond in B question did not exist. The defendants averred that on 21 October 2007 the plaintiff persuaded them to contribute towards the purchase of the diamond from Taiziri, who was selling it for US$300 000. They were assured by other diamond dealers, whom they named as Hlahla, Francis and Lazarus, of the existence of the diamond. They handed the sum of US$230 000 to the plaintiff on 30 October 2007. The plaintiff intimated to them that he had a ready C buyer who was willing to pay US$1 million for the diamond and promised to return their capital and immediately distribute the profits amongst them after the sale. The first defendant stated that he promised each defendant a profit of US$100 000, while the second defendant stated that they did not discuss the profit sharing formula. Ndlovu, however, stated that the two defendants had told him that they would each receive profits of US$50 000. D

The plaintiff, on the other hand, averred that the two defendants, in the knowledge that he was a close business associate of Taiziri, requested him to facilitate a meeting with Taiziri. They wanted to purchase the diamond, which they would sell for US$1.5 million to an unidentified Lebanese national whom he saw who lived in Morningside in Mutare. He was motivated by the E promise of a commission of US$100 000. He accompanied the defendants to Taiziri, who refused to part with the diamond before payment. He was aware that the defendants had, in his absence, eventually paid US$230 000 to Taiziri for the purchase of the diamond. At the time all of them were aware that dealing in diamonds without a licence was illegal.

Mr *Motsi,* for the plaintiff, on the one hand, urged me to find that the defendants F handed the money directly to Taiziri. Mr. *Mubata,* for the defendants, on the other, urged me to find that the defendants gave the money to the plaintiff for his own account. Taiziri was deported from Zimbabwe over his dealings at the Chiadzwa diamond fields soon after the plaintiff was released on bail. He did not testify in the present trial.

In his testimony the plaintiff stated that in October 2007 he acted as a conduit G pipe between Taiziri and the second defendant in the exchange between them of 31 pieces of diamonds paid in lieu of the US$230 000. He also stated that he guaranteed a US$10 000 loan that Taiziri advanced to the second defendant when the second defendant returned the 31 pieces to Taiziri. He also testified that in early November 2007 the defendants unleashed some H

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A mobsters on him at the Wise Owl Hotel who robbed him of US$500. The money was repaid by the first defendant after the intervention of one Binale, a fellow businessman based in Mutare. Thereafter he withdrew from the dealings that went on between the defendants and Taiziri and concentrated his energies in campaigning for the Mutare South constituency parliamentary elections. He only saw the defendants after the harmonized elections. On 6 B May 2008 he was arrested for defrauding the defendants of US$230 000.

The two defendants gave similar evidence on what transpired soon after they gave the plaintiff the money on 30 October 2007. He did not return with the diamond as he had promised. They failed to reach him on his cellphone. They alleged that he had gone to Mozambique, purportedly to meet the courier C in whose custody the 100 carat diamond was and who was coming from Maputo. On the following day they caught up with the plaintiff at Chimoio police station where he alleged that the money and some diamonds that were in his possession had been stolen when his vehicle, a Hyundai

Santafe station wagon, was broken into at the Manhica Executive Hotel in Chimoio. The quarter window of the vehicle was damaged but the boot was full of D groceries and toys. He was enjoying himself with a Mutare based woman whom they named. While he told them that US$250 000 had been stolen, he reported to the Chimoio police that US$50 000 had actually been stolen.

On arrival in Mutare, he agreed to refund them their money and repaid US$10 000. Two days later he brought diamonds he alleged were worth E US$100 000. They declined to accept them and requested him to sell them and bring the money to them. He did not pay up. Two weeks later he bought six cars. They approached Ndlovu, who referred them to the police, who refused to entertain their complaint. They came to the Attorney-General's Office in Harare five times in the company of Ndlovu to explain what had happened. F They saw the Director of Public Prosecutions and the Deputy Attorney- General in charge of crime, who in February 2008 directed the Serious Fraud Squad in Harare to investigate the matter. The police indicated that they would arrest the plaintiff after the harmonized presidential, parliamentary and local government elections, so that they would not derail his campaign.

The onus lies on the defendants to show, on a balance of probabilities, that G the plaintiff received the money. In order to prove fraud, they would need to discharge the onus beyond a reasonable doubt. That the bar on the onus is raised where criminal connotations arise was set out *in Pitluk v Law Society of Rhodesia* 1975 (2) SA 21 (RA); *Mugabe and Mutezo v Law Society of* Zimbabwe 1994 (2) ZLR 356 (S) at 363-365 B and *Hove v Gumbo (Mberengwa* H *West Election Petition Appeal)* 2005 (2) ZLR 85 (S) at 90 and 92.

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Mr *Mubata,* in argument, properly conceded that I should disregard the A testimony adduced by the defendants on the events that they alleged happened from the time they gave the money to the plaintiff until their return from Mozambique because he had not cross-examined him on it.

When the defendants were cross-examined, they indicated that the plaintiff was not a diamond dealer. This was at variance with their opposing affidavit B in case No. HC 3902/08, the urgent application brought by the plaintiff for the vehicles to be retained in the Deputy Sheriff's custody, in which they described the plaintiff as "a well known and well celebrated diamond dealer". In addition, while they expressed surprise in their evidence in chief that the plaintiff had not brought the diamond within half an hour after they gave him the money, in their opposing affidavit, referred to above, they stated C that the plaintiff had gone to Mozambique to purchase the diamond. The two defendants differed between themselves and with Ndlovu on the profits that would accrue to them from the US$230 000 investments. These examples show that the defendants did not give credible evidence. They fabricated some of their evidence and were evasive under cross-examination. They did D not call Taiziri to dispute the plaintiff's story that he was the recipient of the money and explain why he paid US$31 000 to Ndlovu in reduction of the US$230 000. They neither disputed the Wise Owl Motel incident nor denied refunding the plaintiff the US$500 that was forcibly taken from him during that incident. It seemed to me that they used the criminal justice system to force the plaintiff to admit to liability because they realized that they did not E have adequate evidence to prove their allegation against him.

I am satisfied that they failed to show on a balance of probabilities that they paid US$230 000 to the plaintiff. Further, the evidence that they gave also failed to show beyond a reasonable doubt that the plaintiff defrauded them of this amount. F

The second factual dispute arises from the manner in which the agreement was made. The plaintiff alleged that he did not enter into the agreement freely and voluntarily but was unduly influenced by his arrest, incarceration in prison while on remand and the subsequent failure of his bail application both in the magistrates court in Mutare and on appeal to this court. The defendants averred that at the time the agreement was initiated, negotiated G and executed, the plaintiff was ably represented by a legal practitioner of his choice and the agreement was therefore voluntarily and freely made.

Most of the facts of how the plaintiff was arrested and arraigned before a magistrate for fraud were common cause. He was represented by a legal practitioner, Mr Mugadza. On7 May 2008 he was denied bail, notwithstanding H

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A that the prosecutor was initially amenable to the grant of bail. It transpired that Ndlovu actively influenced the prosecution against consenting to bail. He supplied the State with the police profile of the plaintiff and influenced the Director of Public Prosecutions to direct the local public prosecutor to oppose bail. The appeal against the refusal of bail was dismissed by this court on 15 May 2008. He was subsequently remanded in custody to 21 May B and thereafter to 18 June 2008.

Mugadza and Ndlovu visited the plaintiff in remand prison and conferred with him in the officer in charge's office. The first defendant and Taiziri attended one of the meetings. The outcome of the meetings was the drawing up of the agreement. Taiziri paid US$21 000 to Ndlovu which went towards the C reduction of the indebtedness of US$220 000. Ndlovu stood as creditor to the plaintiff in a bid to disguise Taiziri as the source of the money. Five motor vehicles, that is a Hino Ranger, a Hyundai Santafe, a Mitsubishi Canter, a Mazda Cronos and a Toyota Hilux, valued at US$84 000, were surrendered to the defendants. On 31 May 2008, with the encouragement of Ndlovu, the State acceded to the application for bail that was made by Mugadza who D used the agreement as demonstrative of changed circumstances warranting the admission of the plaintiff to bail.

The plaintiff averred that the defendants pressurized him to surrender assets in exchange of or as a guarantee for the indebtedness. He signed the agreements when he was in remand prison. Mr Ndlovu assisted the State to E oppose bail and, after the agreement had been executed, assisted the plaintiff obtain bail. Mr *Motsi* submitted that Ndlovu acted in an overbearing and intimidating manner against both the plaintiff and his wife which resulted in the execution of the oppressive agreement. Mr Mugadza was not called by the plaintiff. In the absence of his testimony, it is difficult to accept the plaintiff's and his wife's testimony on the accusations that they made against F Ndlovu on the intimidatory tactics that he allegedly made against both of them, including the robbery of US$300 from the wife for the bribery of court officials. I am satisfied that the wording of the agreement in its first preamble amounts to a confession of fraud and false misrepresentation, which, had it been obtained freely and voluntarily, one would thereafter have expected the plaintiff to plead guilty to the charge he was facing. Indeed, that he was G forced to sign is apparent from the last promise therein to the effect that the defendants would withdraw charges once full settlement was made. Further, the fact that he agreed to cede the Tsvingwe property valued at US$30 000, which did not belong to him, confirms the absence of free consent in the execution of the agreement. As soon as he obtained his liberty, on 25 July H 2008 he brought an urgent chamber application, which was dismissed, to

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retain the vehicles that had been surrendered to the custody of the Deputy A Sheriff. Notwithstanding the defendants' awareness that the plaintiff was challenging the validity of the agreement, they alleged that they sold four of the vehicles and surrendered the Hyundai Santafe to Ndlovu in lieu of his fees. Ndlovu confirmed the fate of the Hyundai Santafe. The defendants were not able to supply the names of the purchasers or the dates of the alleged sales. B If indeed they sold the vehicles, their conduct was perverse, as on 29 July 2008 they averred in their opposing affidavit in case No. 3902/08 that they had the vehicles in their possession. Even though the initial application for the return of the vehicles was withdrawn on 29 August and the summons in this trial served on 11 September, by 2 October 2008 they were aware that the plaintiff desired his vehicles back. Their failure to supply the dates on C which they sold the vehicles and the names of the purchasers and the fact that when the trial commenced the defendants came to court in the Toyota Vigo, cast doubt on their version that they disposed of the vehicles. The defendants averred that they assumed ownership of the vehicles, by virtue of the agreement, on 31 August 2008.

Ndlovu stated that the plaintiff was desperate to gain his liberty. The plaintiff D denied that he paid US$10 000 in person after his release on bail as stated by Ndlovu and believed it was paid by Taiziri. Ndlovu assisted his clients and friends to the best of his ability. He used his professional skills to their advantage. At the time he acted for the defendants, he did not have a legal practitioner and client relationship with the plaintiff. He did not use any E privileged information that he gained while representing the plaintiff to the latter's disadvantage. The only blight on his conduct was in allowing the false information that the plaintiff was facing a charge of murder to stand, when he very well knew that it had been withdrawn before plea. He, it seems to me, acted improperly in accepting a motor vehicle and for that matter one he knew to be the subject of dispute as payment for his fees. Notwithstanding F the duty he had to his clients and the court, it was clear that he deliberately initiated the arrest and the opposition to the grant of bail of the plaintiff in a calculated

bid designed to draw him to the negotiating table. After he had partially succeeded he influenced the plaintiff's lawyer to seek bail. The State took a cue from the defendants to agree to the consensual admission G to bail of the plaintiff.

While the plaintiff did not call Mugadza to testify, I am satisfied that the probabilities favour his version that he signed the agreement against the advice of his legal practitioner in order to gain his liberty. I accept his averment that he would have sold his soul to escape from the terrible condition of Mutare remand prison. I take judicial notice of the fact that at the time Mutare Prison G

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A was in a parlous and dire state. His version is supported by his continued denial of the criminal allegations, notwithstanding that the agreement represented a confession to that very charge. I am therefore satisfied that the plaintiff has discharged the onus on him to show on a balance of probabilities that he did not freely and voluntarily enter into the agreement in question.

B It seems to me that the conduct of Ndlovu in this case requires investigation by the Law Society. I will direct the Registrar in terms of s 25 (a) of the Legal Practitioners Act [*Chapter 27:07*] to refer this judgment to the Secretary of the Law Society for him to investigate whether or not the conduct of Ndlovu amounted to unprofessional, dishonourable and unworthy conduct.

The finding that the agreement was not freely executed would ordinarily C result in the conclusion of both the claim and counter claim. Mr *Motsi,* however, argued in the alternative that the illegality of the agreement was based on extortion.

Extortion is defined in s 134 (1) the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as follows:

> " D **134 Extortion**
>
> (1) Any person who -
>
> *(a)* intentionally exerts illegitimate pressure on another person with the purpose of extracting an advantage, whether for himself or herself or for some other person, and whether or not it is due to him or her, from that other person, or causing that other person loss; and E
>
> *(b)* by means of the illegitimate pressure, obtains the advantage, or causes the loss;
>
> shall be guilty of extortion."

Mr *Motsi* contended that Ndlovu applied illegitimate pressure on the plaintiff by influencing the decision to arrest, oppose bail and, when bail was denied, F by demanding compensation and declaring that the plaintiff would rot in prison unless he surrendered property and agreed to repayment terms that were to the satisfaction of the defendants. Ndlovu stated that the plaintiff was desperate to obtain his liberty from remand prison. The plaintiff stated that he would have sold his soul to gain his liberty. He went against his legal practitioner's advice and signed the agreement on 20 May 2008. The G defendants exerted more pressure on him to include two other vehicles and he signed the addendum to the agreement on 30 May 2008. His wife testified that when she refused to release the motor vehicles, she was warned by Ndlovu that her husband would rot in prison.

Mr *Mubata* submitted that Ndlovu worked in liaison and agreement with H the plaintiff's legal practitioner, who protected the interests of the plaintiff.

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The preamble to the agreement is worded in strong language which is A inconsistent with a denial of the criminal charges that the plaintiff still faces. A legal practitioner worth his salt would not advise his client to sign such an agreement when such client was denying criminal liability. I am satisfied, from the language therein, that the plaintiff signed the agreement under pressure. The defendants were not able to show how the values attached to B each motor vehicle and the immovable property were calculated.

Thus, while the plaintiff was legitimately in remand prison, the pressure exerted by the defendants' legal practitioner on the plaintiff was untoward and unwarranted. That he illegitimately influenced the process of bail is demonstrated by his admission that when the last two motor vehicles were delivered, he advised the prosecutor handling the case that he was agreeable C to the grant of bail. Ndlovu appeared to have worn the prosecutorial robe in this matter, which he used to extract an

advantage not only on behalf of the defendants but in his own behalf. After all, he ended up driving and owning one of the motor vehicles that had been extracted from the plaintiff. It seems to me that his conduct in taking a motor vehicle, the subject of litigation, D was designed to intimidate the plaintiff by painting a veneer of legality to the agreement and his conduct. It is not surprising that he could boldly state in evidence that he had a direct and substantial interest in the case. One would have thought that legal practitioners act as agents and not as co-principals of their clients.

I am satisfied that the agreement was based on extortion. Further, and in any E event, both counsel submitted, on the authority of *van Rensberg v Weiblen* 1916 OPD 247 at 252; *Mapenduka v Ashington* 1919 AD 343; *Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor* 1994 (1) ZLR 310 (H) and *Oceaner (Pvt) Ltd & Anor v Upperclass Enterprises (Pvt) Ltd* 2001 (2) ZLR 130 (H) and its sequel on appeal *Upper Class Enterprises (Pvt) Ltd v Oceaner (Pvt) Ltd & Ors 2002* (2) ZLR 603 (S), F that the agreement is *a pactum commissorium.* It is "a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full property in the thing will irrevocably pass to the creditor in payment of the debt". In *Chimutanda's* case, *supra,* it was held that the portion that is *a pactum commissorium* is the only one G which is unenforceable. This view finds support in *Bock & Ors v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA); [2003] 4 All SA 103) para [7] where Harms JA stated that:

> "A clause in a mortgage bond permitting the bond holder to execute without recourse to the mortgagor or the court by taking possession of the property and selling it is void. It does not matter whether the goods are immovable or H

> A movable: in the latter instance, to perfect the security, the court's imprimatur is required."

Thus, were the plaintiff truly indebted to the defendants and had the other portions of the agreement in the present case been found to have been freely and voluntarily made, I would have enforced them.

B Clearly, the agreement, being grounded on extortion, lacks severable clauses and additionally being *a pactum commissorium,* is void and unenforceable.

An attempt to deal in diamonds by persons who are not licensed to do so is a criminal offence in terms of s 3(1)(a) of the Precious Stones Trade Act [*Chapter 21:06*] as read with s 189(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is illegal.

C The plaintiff and the defendants in both the claim in convention and reconvention correctly admitted that they attempted to deal in diamonds in the full knowledge that it was illegal. They were aware that it was prohibited and penalized by the law.

In *Dube v Khumalo* 1986 (2) ZLR 103 (S) at 109D-F Gubbay JA, as he D then was, stated that:

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

In *Hattingh & Ors v van Kleek* 1997 (2) ZLR 240 (S) Korsah JA cited the above statement with approval at 245F-G. At p 245H-246B he proceeded G to say:

> "The learned Judge of Appeal then cited a passage from the judgment of Stratford CJ in *Jajbhay v Cassim* 1939 AD 537 at 544-545 to underscore the point that 'in cases where public policy is not foreseeably affected by a grant or refusal of the relief claimed a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment.'
>
> H The cases clearly show that where a contract is on the face of it legal but, by

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> reason of a circumstance known to one party only, is forbidden by statute, it A may not be declared illegal so as to bar the innocent party from relief; for to deprive the innocent person of his rights would be to injure the innocent, benefit the guilty and put a premium on deceit."

In *Jajbhay v Cassim, supra, at* 542 Stratford CJ did not define the maxim *ex turpi causa non oritur actio* but was content to hold that it was self explanatory and required no elucidation. In the same case, at p 548 Watermeyer JA stated that it B "referred to an illegal or immoral purpose not yet carried out." In *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) at para [89] van Zyl J translated the maxim as "no action arises from an immoral cause".

Both counsel submitted that the *ex turpi causa* maxim had no application in the present case. They argued that the court should apply the *par delictum* maxim. I agree that neither the plaintiff nor the defendant is seeking the C enforcement of the alleged diamond deal. In fact the plaintiff denied being either an agent or principal in the diamond deal. The defendants averred that he was the principal with whom they contracted and that they performed their obligations under the illegal contract. They are not seeking the supply of the diamond or their profits. Rather they desire that they be refunded D the money that they paid out to the plaintiff. In the circumstances outlined by the defendants, it is clear that the *par delictum* rule would have applied had the circumstances outlined by the defendants been vindicated by the evidence. It means that where the parties to an illegal or immoral contract are equally in the wrong, the loss should lie where it falls; however, the court will intervene and do justice between the wrongdoers where one of them E has been unjustly enriched.

The *par delictum* rule has been discussed and applied in many cases in this jurisdiction. I refer to *Zuvaradoka v Franck* 1980 ZLR 402 (S); *Dube v Khumalo, supra; Rootes (Central Africa) (Pvt) Ltd v Mundawarara & Anor* 1973 (1) RLR 57 (G); *Hattingh & Ors v van Kleek, supra; Logan* v F *Sibiya* 2002 (1) ZLR 531 (H) and *Evans v Snapper* 2004 (2) ZLR 121 (S). The plaintiff did not obtain any money from the defendants. He did not benefit from any of the defendants' money. In these circumstances the *par delictum* rule has no application. The agreement was not voluntarily made. It was based on extortion and was illegal. There was no cause for the alleged indebtedness. The confiscation of the motor vehicles clause was *a pactum* G *commissorium.* All these findings favour the plaintiff's claim and militate against the defendants' counterclaim.

Accordingly, it is ordered that:

1. The memorandum of agreement dated 20 May 2008 and the undated addendum thereto is declared null and void. H

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2. The defendants A and all those claiming through them surrender the following vehicles and registration books to the plaintiff:
   a. Hino Ranger Registration No. ABC 4307,
   b. Hyundai Santafe Registration No. AAV 7895
   c. Mitsubishi Canter Registration No. AAX 8709 B
   d. Mazda 626 Cronos Registration No. AAL 8267
   e. Toyota Hilux Vigo Registration No. AAU 6184.
3. The defendants' counter claim is dismissed.
4. The defendants shall pay the plaintiff's costs of suit jointly and severally, the one paying the other to be absolved. C
5. The Registrar shall transmit a copy of this judgment to the Secretary of the Law Society for him to investigate whether or not the conduct of Mr. Christopher Ndlovu of Gonese and Ndlovu Legal Practitioners in this matter amounted to unprofessional, dishonourable and unworthy conduct.

D *Mabulala & Motsi,* plaintiff's legal practitioners

Gonese & Ndlovu, defendants' legal practitioners

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PASIPANODYA NO v RUWIZHI NO & ANOR 2010 (2) ZLR 78 (H)

Citation	2010 (2) ZLR 78 (H)
Case No	Judgment No. HH-82-09
Court	High Court, Harare
Judge	Bhunu J
Heard	30 March 2009
Judgment	22 July 2009
Counsel	Mrs *J B Wood,* for the plaintiff *F Katsande,* for the first defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Practice and procedure *-plea - res judicata -previous litigation between parties - matter in magistrates court dismissed because of failure by plaintiff to appear - rules of court specifically providing that such a dismissal not a defence in any subsequent action* D

Headnote

Under the common law, the defence *of res judicata* is unavailable where the matter has not been previously determined on the merits. In respect of cases in the magistrates court, this common law rule has been restated in rr 4 and 5 of Order 33 of the the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980). These rules make it clear that a default judgment in E the magistrates court does not amount to a final judgment giving rise to the special plea of *res judicata* in subsequent proceedings involving the same parties for the same or a substantially similar cause of action. Rule 5 is couched in peremptory terms, as it provides that "the withdrawal or dismissal of an action or a decree of absolution from the instance shall F not be a defence to any subsequent action".

Legislation considered

Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), Order 33 rr 4 & 5

Cases referred to

Maparura v Maparura 1988 (1) ZLR 234 (H) G

Muchakata v Netherburn Mine 1996 (1) ZLR 153 (S)

Munemo v Maswera 1987 (1) ZLR 20 (S)

Case information

Mrs *J B Wood,* for the plaintiff

F Katsande, for the first defendant H

Judgment

A **Bhunu J**: During their lifetimes both parties, who are now deceased, were engaged in vicious litigation over the occupation and sale of a certain piece of immovable property known as 11192 Rusununguko, Zengeza 4 Chitungwiza.

The late Edna Pasipanodya sued the late John Ruwizhi in the Harare magistrates court under case No. 8113/086. The issues for determination B in that case were:

1. Whether the plaintiff entered into a lease agreement or sale agreement as alleged by the defendant;
2. What were the terms of the agreement;
3. If the agreement was one of sale, C
   (i) whether the plaintiff has refused to receive the balance of the purchase price;
   (ii) what amount has been paid to date;
4. If the agreement was one of lease,
   (i) what was the quantum of rentals; D
   (ii) whether the defendant has failed to pay such rentals; and
5. Whether the plaintiff gave the defendant notice to vacate the premises.

The plaintiff's case was dismissed at the Harare magistrates court in default of appearance.

Thereafter the plaintiff instituted an ex parte application against the defendant E at Chitungwiza magistrates court on 18 November 2003 under case No. 291/99, seeking a rule nisi for the defendant's eviction from the said premises.

At that hearing both parties were represented by counsel. The defendant raised the special plea of *res judicata,* arguing that the matter had already been determined by the magistrates court at Harare.

F The hearing magistrate upheld the defendant's special plea and dismissed the plaintiff's application on 10 September 1999 after hearing full argument from both counsel.

Undaunted by this initial setback, the plaintiff issued summons against Betty Ruwizhi on 13 November 2003 in her capacity as the duly appointed executrix in the estate of the late Edna Ruwizhi, seeking session of rights G and title in the disputed property.

The defendant has at this late juncture in the course of trial in this court, applied to amend its plea so as to incorporate the special plea of *res judicata,* relying heavily on *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S). Counsel for the defendant has submitted that what he is proposing to raise H is a point of law which can be raised at any time. I have no problem in

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accepting that submission as the correct proposition of law. A

The application has, however, been strenuously opposed on the grounds that there are no reasonable prospects of the special plea succeeding at the trial. The applicant complained bitterly that the application is a time wasting gimmick because the defendant continues to occupy the premises without paying any rentals. So the longer it takes to finalise these proceedings the B better it suits the defendant to the loss and prejudice of the plaintiff.

I take the view that the decision of the magistrate at Chitungwiza did not in any way alter the Harare magistrate's decision. In essence, the Chitungwiza magistrate was simply saying that he had no jurisdiction to hear and determine the matter as it had already been determined by his

colleague. That, in effect, leaves us with the Harare magistrate's determination as the single active and C binding decision between the parties in the magistrates court.

The plaintiff's counsel has, however, convincingly argued that default judgments in the magistrates court do not give rise to the special plea of *res judicata.* For that proposition of law she pointed to order 33 rr 4 and 5 of the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980) which provide that: D

> **"4. Failure by party to appear**
>
> (1) If a plaintiff or applicant does not appear at the time appointed for the trial of the action or the hearing of the application, the action or application may be dismissed with costs.
>
> (2) If a defendant or respondent does not appear a judgment against him, not E exceeding the relief claimed, may be given with costs.
>
> **5. Effect of withdrawal or dismissal of action or decree of absolution**
>
> (1) *The withdrawal or dismissal of an action or a decree of absolution from the instance shall not be a defence to any subsequent action.-*
>
> (2) *If a subsequent action is brought for the same or substantially the same cause of action before payment of the costs awarded on such withdrawal, dismissal or decree of absolution, the court may on application, if it thinks fit and if the* F *costs have been taxed and payment thereof has been demanded, order -*
>
> (a) a stay of such subsequent action until such costs are paid; and
>
> (b) that the plaintiff shall pay the costs of such application to stay the proceedings" (emphasis added).

Order 33 r 4 as read with r 5 makes it clear that a default judgment in the G magistrates court does not amount to a final judgment giving rise to the special plea of *res judicata* in subsequent proceedings involving the same parties for the same or substantially similar cause of action. Rule 5 is couched in peremptory terms in so far as it provides that *"the withdrawal or dismissal of an action or a decree of absolution from the instance shall not be a defence to any subsequent action.* " H

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A The rule accords with common law in so far as its provisions are to the effect that the defence of *res judicata* is unavailable where the matter has not been previously determined on the merits. See Hoffmann and Zeffertt *South African Law of Evidence* 3 ed p 344 and a host of decided cases including *Munemo v Maswera* 1987 (1) ZLR 20 (S) *and Maparura v Maparura* 1988 (1) ZLR 234 (H).

B In this case, although the Chitungwiza magistrate dismissed the *ex parte* application after hearing argument, his judgment was not the operative judgment. As I have already pointed out, the operative judgment was the Harare magistrate's default judgment. That judgment having been issued in default of appearance, that is to say, on account of the plaintiff's failure to C appear at that hearing, the defendant is specifically prohibited by operation of law from raising the special defence of *res judicata.*

Even if I was to assume that the Chitungwiza judgment was the operative judgment, the special plea of *res judicata* will still not be available to the defendant, for the simple reason that the Chitungwiza magistrate did not determine the cause of action on the merits. He simply declined to hear the D matter and dismissed the application on the basis that the matter had already been determined by the same court.

That being the case, the defendant is striving to amend her plea in such a way as to incorporate an incompetent and prohibited defence at law. That can only amount to a sheer waste of time which is prejudicial to the plaintiff E as the intended plea is incurably bad at law.

In the result it is ordered that the application for amendment of plea to incorporate the defence of *res judicata* be and is hereby dismissed with costs being costs in the cause.

F *Byron Venturas & Partners,* plaintiff's legal practitioners

F M Katsande & Partners, first defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/KATSANDE v KATSANDE & ORS 2010 (2) ZLR 82 (H)

KATSANDE v KATSANDE & ORS 2010 (2) ZLR 82 (H)

Citation	2010 (2) ZLR 82 (H)
Case No	Judgment No. HH-113-10
Court	High Court, Harare
Judge	Chitakunye J
Heard	13 October 2009
Judgment	1 July 2010
Counsel	*H Mucheche,* for the applicant *T Hangazha,* for the second respondent No appearance for the first third and fourth respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Administration of estates - *administrator or trustee - inherent power of court to remove administrator or trustee in appropriate circumstances*

Administration of estates - *executor - duties - duty to act in good faith an in accordance with provisions of will - selling property contrary to* D *provisions of will - sale a nullity - removal of executor - grounds - failure to perform duties according to mandate*

Administration of estates - *Master - duties and responsibilities - consent to sale of estate property - inquiry before granting such consent -need to take positive steps to verify application for consent to sale*

Succession - *will -purported sale of a house by executor not in accordance* E *with provisions of will - fraudulence of executor - wrongful consent thereto by Master - rights of minors with interest in will -failure of Master to seek court's authority for sale of house –purported sale a nullity*

Succession - *will - trustee or executor appointed under a will - inherent power of court to remove such person - failure of testamentary executor* F *to perform his duties - court entitled to remove him*

Headnote

In dealing with an application from an executor of a deceased estate, the Master of the High Court needs to be aware of the serious duties and responsibilities bestowed on him. Section 120 of the Administration of G Estates Act [*Chapter 6:01*] enjoins the Master to institute an inquiry in order to be satisfied that the request being made would be to the advantage of the persons interested in the estate to sell the property. Due inquiry connotes that the Master takes active or positive steps to verify the contents of the application before granting the consent. In cases where minors are the beneficiaries, it may necessitate the appointment of a H

A *curator ad litem* to ensure that the interests of the minors are protected. Wherever a minor is involved as a beneficiary or an interested party, the Master must take extra caution and ensure

that the provisions of the law are adhered to.

"It has been held that under Roman-Dutch law, the court possesses inherent B power to remove a trustee or administrator (even one appointed under a will) on the ground that his continuance in office will prejudicially affect the future welfare of the estate entrusted to him" (*dicta per* Makarau JP *in Karitawu v Karitawu & Ors* 2007 (2) ZLR 64 (H) followed).

The applicant was one of two surviving children of the late NK and a beneficiary to his estate. The first respondent, who was the brother of the deceased, C had been appointed as the testamentary executor of the estate. In terms of the deceased's will, a house in Chitungwiza was bequeathed to the applicant. Notwithstanding this bequest, the first respondent entered into an agreement of sale with the second respondent, in terms of which the latter purchased the house and subsequently assumed occupation thereof. At the time of the sale the applicant and the other surviving child of the D late NK, who also had an interest in the will, were minors. Three months after the sale of the house and consequent upon the dishonesty of the first respondent, the Master of the High Court (the third respondent) purported to grant his consent to the sale. In so doing, he appeared to have ignored the provisions of s 122 of the Administration of Estates E Act which required him to apply to a judge, through the chamber book, for authority for such a sale where minor heirs have an interest in the property. On these facts, the applicant sought an order from the High Court setting aside the consent of the Master to the sale of the house as well as to the appointment of the first respondent as the testamentary executor.

F He also sought to set aside the sale of the Chitungwiza house to the second respondent and an order prohibiting the Chitungwiza Municipality, the fourth respondent, from ceding the rights and title to the house to anyone other than the applicant. He submitted that the sale of the house was wrongful as the first respondent was not empowered, in terms of the will, to sell it and had thus acted contrary to the provisions of s 52(1) of the G Act. No appearance to defend was entered by the first, third or fourth respondents but the second respondent opposed the application on the grounds that he was a bona fide and innocent purchaser of the house.

Held, that the purported consent of the Master was of no consequence as the H will did not provide for the sale of the house.

Held, further, that notwithstanding that the second respondent was an innocent A purchaser of the house, its sale must be set aside. The failure of the Master to comply with s 122 meant that the sale was in specific violation of the Administration of Estates Act. At the same time, the first respondent did not have the right or authority, in terms of the will, to sell the house and had dishonestly and fraudulently obtained the consent of the Master. B

Held, further, that the appointment of the first respondent as the testamentary executor must also be set aside. Where an executor lamentably fails to perform his duties according to the mandate given, there can be no good reason why he should remain in office.

Held, further, that in all the circumstances the applicant was entitled to the relief he sought, including the eviction of the second respondent from C the house. Costs should be awarded against the first respondent on the scale of legal practitioner and client.

Legislation considered

Administration of Estates Act [*Chapter 6:01*], ss 52(1), 120 & 122 D

Cases referred to

Fey NO and Whiteford NO v Serfontein and Another 1993 (2) SA 605 (A)

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

Nemuseso v Mashita & Ors 2009 (2) ZLR 298 (H)

Case information

H Mucheche, for the applicant E

T Hangazha, for the second respondent

No appearance for the first third and fourth respondents

Judgment

Chitakunye J: The applicant is one of the two surviving children of the late Norman Katsande and a beneficiary to his estate. He also purported to F be acting on behalf of the other surviving child of the late Norman Katsande, namely, Milenda Tinashe Katsande who is still a minor.

The first respondent is a brother to the late Norman Katsande and he is the executor testamentary of the estate late Norman Katsande. The second respondent is a male adult who purportedly bought house no. 18806, Unit L, G Seke, Chitungwiza from the first respondent. The third and fourth respondents are cited in their official capacities.

The brief facts of the case are that the applicant and Milenda Tinashe Katsande are the only surviving children of the late Norman Katsande and the late Hilda Gamanya. Hilda Gamanya died in August 1996. Norman Katsande died on 26 March 2001. H

Chitakunye J

A Before his demise, Norman Katsande executed a will and testament on 17 January 2001. In terms of clause 1 of the aforesaid will, Norman Katsande appointed his brother Razmond Katsande as the executor. In clause 3 of the will Norman Katsande bequeathed to applicant House No. 18806, Unit L, Seke, Chitungwiza and Stand No. 2310, Lower Paradise, Marondera, in B these terms:

> "I direct that:
>
> a. House No. 18806 Unit L, Seke, Chitungwiza, for which was acquired during my first marriage shall devolve upon my son KUDZANAYI FRANK KATSANDE, presently residing at 18806 Unit L, Seke, Chitungwiza who shall exercise such responsibility and execute such paternal duties as I C would have done over my daughter MILENDA TINASHE KATSANDE.
>
> b. Stand Number 2310 Lower Paradise in Marondera shall only be disposed as and when my estate failed to meet claims and demands, otherwise it shall devolve upon my son KUDZANAYI FRANK KATSANDE.
>
> c. Ensure that the two of them share equally any cash or liquid assets of this Estate."

D On 26 September 2007, the third respondent issued the first respondent with a letter of administration as the executor testamentary in terms of the aforesaid will.

In the same year 2007 the first respondent sold House No. 18806 Unit L, Seke, Chitungwiza to the second respondent. The agreement of sale was E entered into on 11 October 2007 apparently without a consent to sale from the Master of the High Court. In his report the Master indicated that the consent to sale was only obtained three months after the sale. The purported consent to sale document is not dated. If it was dated at all, such date is not legible from the copy filed with court.

On 25 March 2009, the applicant applied to this court by way of a court F application seeking an order that:

1. the consent to sell House No. 18806 Unit L, Seke, Chitungwiza given by the Master of the High Court sometime in 2007 be and is hereby set aside
2. the appointment of Razmond Katsande as the executor testamentary in G the estate late Norman Katsande be and is hereby set aside
3. The purported sale of House No. 18806 Unit L, Seke, Chitungwiza to second respondent be and is hereby set aside and the second respondent and all who claim right of occupation through him of House No. 18806 Unit L, Seke, Chitungwiza be and are hereby ordered to vacate the H premises within forty-eight hours of being served with this order.

Chitakunye J

4. In the event that the second respondent and all who claim right of A occupation through him fail to comply with para 3 above, the Deputy Sheriff be and is hereby authorised to evict them from House No. 18806 Unit L, Seke, Chitungwiza.
5. the fourth respondent be and is hereby ordered not to cede rights and title in House No. 18806 Unit L, Seke, Chitungwiza from the name of B the late Norman Katsande into any other name except the applicant's and in the event that such cession had been effected it is hereby set aside.
6. The first respondent shall pay the costs of this suit on a legal practitioner and client scale.

All the respondents were duly served with the court application in terms of C the rules. The first respondent did not file any opposing papers. The second respondent filed opposing papers contending that he is an innocent purchaser. The third respondent filed the requisite Master's report in terms of the rules expressing his views on the issues at hand. The fourth respondent did not file any papers in response to the application.

The applicant's argument was to the effect that the sale to the second D respondent was wrongful as the first respondent was not empowered by the will to sell the house in question. If there was need to sell any immovable property the first respondent was authorized to sell Stand no. 2310 Lower Paradise Marondera and not the house in question. The sale has left applicant and his sister destitute and with no accommodation.

The applicant also argued that the purported consent to sale by the Master E was contrary to the provisions of his late father's will and so ineffective.

On his part, the second respondent contended that the applicant's case must be dismissed because he is an innocent purchaser. The second respondent contended that the property was advertised in the *Herald* by an estate agent. He went and viewed the house after which he offered to buy it. The first F respondent told him that the property was from a deceased estate. The first respondent showed him all documents pertaining to the house except the Master's consent to sale. They agreed on the purchase price but he indicated that he would only pay after the first respondent had obtained the consent to sale and shown him same. Later on the first respondent advised him that G he had now obtained the consent to sale. Upon being shown the consent to sale document he duly paid the purchase price. He is therefore an innocent purchaser whose rights can no longer be taken away. The applicant's recourse is to sue the first respondent.

The third respondent's response to the application was to the effect that the first respondent misrepresented the facts when seeking consent to sale. The H

Chitakunye J

A first respondent had indicated that he wished to buy two smaller houses for the minors, but up to now nothing had been done. The third respondent went on to say that, in any case, the sale took place on 11 October 2007, some three months before the granting of the Master's consent in terms of s 120 of the Administration of Estates Act [*Chapter 6:01*]

B The issues as identified by the parties included:

(1) Whether the first respondent Razmond Katsande being the duly appointed executor testamentary failed to execute his duties by fraudulently obtaining the consent to sell the house.

(2) Whether the second respondent is a bona fide or innocent third party.

(3) Whether the relief sought is the only relief available to the applicant.

C I am of the view that this matter can be resolved on the first issue and answers to the other issues will fall into place.

(1) Whether the first respondent Razmond Katsande being the duly appointed executor testamentary failed to execute his duties by fraudulently obtaining the consent to sell the house

D Section 52(1) of the Administration of Estates Act [*Chapter 6:01*] states:

> "Every executor shall administer and distribute the estate in respect of which he is appointed according to law and the provisions of any will relating to that estate."

In the administration of the estate an executor is required to act with utmost E good faith and everything is done for the benefit of the beneficiaries.

In casu the first respondent was appointed in terms of a valid will. He was thus bound to act in terms of the law and provisions of that will. The question that arises is, what did the will provide regarding the immovable properties and did the first respondent comply with those provisions?

F Clause 3 of the will on the immovable property stated that:

> "I direct that:

a. House number 18806 Unit L Seke Chitungwiza for which was acquired during my first marriage shall devolve upon my son KUDZANAYI FRANK KATSANDE presently residing at 18806 Unit L Seke Chitungwiza who shall exercise such responsibility and execute such paternal duties as I G would have done over my daughter MILENDA TINASHE KATSANDE."

Clearly, the late Norman Katsande intended this particular immovable property to devolve to his son, the applicant. This is how the first respondent was to execute his mandate. The executor was duty bound to comply with that provision. There is no ambiguity in that clause at all.

H The late Norman Katsande, being mindful that there may be debts to be

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Chitakunye J

paid which may necessitate the sale of some property, went on to provide A in clause 3(b) that:

"b. Stand Number 2310 Lower Paradise in Marondera shall only be disposed of as and when my estate failed to meet claims and demands, otherwise it shall devolve upon my son KUDZANAYI FRANK KATSANDE."

Clause 3(b) is not ambiguous at all. The stand was only to be sold if, and B only if, the estate failed to meet claims and demands from his creditors; otherwise it was to devolve to the applicant, as was the case with House no. 18806 Unit L, Seke, Chitungwiza. The first respondent was expected to comply with this provision as well.

The condition that was set for the Marondera property to be sold had to be satisfied first. The property could thus not be sold for any other reason, save C to meet claims and demands that the estate failed to meet.

The clear intention of the testator, as evident from the will, was that both immovable properties were to devolve to applicant. House No. 18806 in Unit L Seke Chitungwiza was not to be sold at all whilst the stand in Marondera was to be sold only for purposes of meeting outstanding debts if any. The D first respondent's duty was to act in terms of the clear intentions of the late Norman Katsande.

The executor, if acting in good faith, needed to show that a need had arisen to dispose of the Marondera stand in terms of the condition set by the testator. He could not devise his own conditions or reasons to sell the property. As for the house in Unit L, Seke, the executor had no authority to sell it at all. E

In his report, the Master stated that the first respondent represented that he wanted to sell the Seke House so that he could buy two smaller houses for the minor children. That was clearly not in terms of the law and was contrary to the provisions of the will.

Master's report F

It is trite law that, where estate property is to be sold, it must be done in accordance with the Act.

Section 120 of the Administration of Estates Act, *supra,* states that:

"If, after due inquiry, the Master is of the opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate G otherwise than by public auction he may, if the will of the deceased contains no provision to the contrary, grant the necessary authority to the executor so to act."

In this case, the Master's consent was of no consequence, as the will did not provide for the sale of this particular property; if anything, it provided to the contrary. H

Chitakunye J

A In any case, s 122 of the Administration of Estates Act states that:

"In cases where minor heirs are interested in property inherited from the estate of any deceased person the Master may apply through the chamber book to a judge in chambers for authority for the lease, mortgage, sale or other disposition of such property, and the judge may make such order as in the circumstances he considers advisable."

B *In casu,* it is common cause that the applicant and his sister Milenda Tinashe Katsande were minors and were heirs to the property in question. If the property was to be disposed of in any way, including the Marondera property, the Master should have complied with s 122 of the Act. In his report, the Master did not state that he had complied with this section at all. It is clear from all C the submissions that the sale was in violation of the specific provisions of the law. See *Nemuseso v Mashita & others* 2009 (2) ZLR 298 (H).

I am of the firm view that the net effect of the anomalies pointed above as regards both the executor and the Master is that the purported sale of house no. 18806 Unit L, Seke, Chitungwiza by the first respondent to the second D respondent is a nullity. Not only did the first respondent not have the right or authority to do so from the will itself, he also acted dishonestly and fraudulently in obtaining the Master's consent to sell. As already shown, the consent itself was not proper in the light of the clear provisions of the will and the law applicable in such cases.

Consequences of a nullity

E Where an act is a nullity the innocence or otherwise of the other party to the act is of no assistance at all. This is so because nothing can be built on nothing. In *Karitawu v Karitawu & Ors* 2007 (2) ZLR 64 (H) the second respondent had claimed to be an innocent purchaser of rights and interests in a property where the purported executor was found to have acted fraudulently in F obtaining the letters of administration. After holding that the sale was a non-sale, Makarau JP went on at p 70 to say that:

> "In conclusion, the rights that the second respondent believes to have purchased and acquired from the first respondent are tainted by the same illegality and amount to nought by token of the same reasoning. It is as if there was never a sale between her and the first respondent and consequently, no rights can flow G from a non-sale in her favor. The sale and the consequent cession of rights in her favor amount to nothing at law for nothing legal can flow from a fraud."

In casu the purported sale was contrary to the provisions of the will and was done without following the law as pointed to above. The first respondent went clearly against the intention of the testator. One can say he acted dishonestly H and clearly contrary to the provisions of the will he was supposed to execute.

Chitakunye J

In my view, whatever he did was a non-sale. He purported to sell something A he had no power and was in fact prohibited from selling.

The issue of an innocent purchaser would thus not turn a non-sale into a valid sale. There was nothing for the first respondent to sell and for the second respondent to purchase as the law and provisions of the will did not allow the sale. The first respondent's purported sale was an act of illegality. B

It is pertinent to note that the Master's office needs to awaken to the serious duties and responsibilities bestowed on that office in deceased estates. As already alluded to, s 120 of the Administration of Estates Act enjoins the Master to make an inquiry in order to be satisfied that the request being made to sell the property would be to the advantage of the persons interested in the estate. Due inquiry connotes that the Master takes active or positive steps to C verify the contents of the application before granting the consent. In cases where minors are the beneficiaries, it may necessitate the appointment of a *curator ad litem* to ensure that the interests of the minors are protected. Had such an inquiry been made, the Master would easily have realised that the request was contrary to the provisions of the will, as the house in D question was unconditionally bequeathed to applicant. Through the inquiry, the Master would have been further alerted to the fact that, as the heirs and beneficiaries were minors, s 122 of the Administration of Estates Act needed to be complied with if ever such a request was to be granted.

I would implore the Master's office to take such requests from executors E seriously as failure to do so may bring that office into disrepute. I raise this issue because, of late, applications in which the Master's office had granted consent to sale well after the properties had been sold , or where minors are the beneficiaries or interested persons without complying with s 122 of the Administration of Estates Act, have become common.

Whenever a minor is involved as beneficiary or interested party the Master's F office must in my view take extra caution and ensure that the provisions of the law are adhered to as there is ever the temptation on the part of executors and others to prejudice the minors who will in many cases not be consulted or represented by a *curator ad litem.*

The applicant also prayed for the removal of the first respondent as executor. G The first respondent, despite being properly served with the application, did not deem it fit to file any opposing papers. This is despite the fact that serious allegations were made against him regarding the manner he administered the estate. As the applicant's allegations were unchallenged I take that is the truth. The first respondent has lamentably failed to administer the estate for the benefit of beneficiaries. He instead did what ever he did, including H

Chitakunye J

A the purported sale of the house in question, for his own benefit, completely contrary to the law and provisions of the will.

Where an executor lamentably fails to perform his duties according to the mandate given, can there be any good reason why he should remain in the office? In my view, there is no good reason why first respondent should B remain in the office. Any minute he remains in that office may be used for self aggrandizement or enrichment at the expense of the beneficiaries. It is only proper that he be removed from that office forthwith. I find support for this from the words of Makarau JP in *Karitawu v Karitawu & Ors supra* at 68F where, after discussing a number of cases on the grounds for removal of an executor, she said:

> C "Tt has been held that under Roman-Dutch Law, the court possesses inherent power to remove a trustee or administrator (even one appointed under a will), on the ground that his continuance in office will prejudicially affect the future welfare of the estate entrusted to him." to sell the property

See also *Fey NO and Whiteford NO v Serfontein and Another* 1993 (2) SA 605 (A). D

After considering whether the court can do so at the instance of a beneficiary or only if such application for removal is brought by the Master, Makarau JP went on to say at 69D that:

> "While s 117(1) empowers the Master to approach the court for the removal of an executor for the listed grounds, in my view, such a power granted to the E Master was not intended to take away the right of all those having an interest in the estate from approaching the court at common law to have the executor removed if they can establish to the satisfaction of court that the continuance in office of the executor does not augur well for the future welfare of the estate and beneficiaries. The power granted to the Master by s 117 is, in my view, complementary to the inherent power of the court at common law. In any event, F if it was the intention of the legislature to revoke the common law power of the court in this regard, it would have done so in express language for the jurisdiction of the court is not ousted other than in clear language.

Applying the above law to the facts before me, it is my finding that the applicant as a beneficiary in the estate has the capacity to approach this court at common law to move the court for the removal of the first respondent as an executor."

G In the case before me, the applicant, as the beneficiary, has the capacity to move this court for the removal of first respondent as executor. His grounds are clearly under common law. He has alleged fraudulent conduct on the part of first respondent in the manner in which he obtained the Master's consent to sell. The Master also alluded to the same acts of dishonesty on the part H of the first respondent. There is no denial that the first respondent's conduct

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Chitakunye J

has been to the prejudice of beneficiaries of the estate and clearly justice A demands that he be removed from that office.

Eviction and costs

The eviction of anyone in occupation of the property is a natural consequence of the finding that the purported sale was a nullity. The second respondent and all those claiming right of occupation through him must vacate the B premises within an appropriate period. The applicant's request was

for the second respondent to vacate within 48 hours. There is need to give the occupants reasonable time within which to vacate the premises. In this regard, a period of seven days should be adequate taking into account the circumstances of the case.

On the issue of costs, the applicant's prayer was to the effect that the first C respondent be ordered to pay costs of suit on a legal practitioner and client scale. The first respondent did not file any papers in opposition to that. In his heads of argument and submissions in court, the applicant's counsel maintained that same stance: that costs be paid by the first respondent as per the draft order. D

Accordingly it is hereby ordered that:

1. The consent to sell house No. 18806 Unit L, Seke, Chitungwiza given by the Master of the High Court sometime in 2007 be and is hereby set aside.
2. The appointment of Razmond Katsande as the executor testamentary in E the estate late Norman Katsande be and is hereby set aside.
3. The purported sale of House No. 18806 Unit L, Seke, Chitungwiza to second respondent be and is hereby set aside.
4. The second respondent and all those who claim right of occupation through him of House No. 18806 Unit L, Seke, Chitungwiza be and F are hereby ordered to vacate the premises within seven days of being served with this order.
5. In the event that the second respondent and all those who claim right of occupation through him fail to comply with para 4 above, the Deputy Sheriff be and is hereby authorized to evict them from House No. 18806 G Unit L, Seke, Chitungwiza.
6. The fourth respondent be and is hereby ordered not to cede rights and title in House No. 18806 Unit L, Seke, Chitungwiza from the name of the late Norman Katsande into any other name except that of the applicant and in the event that such cession had been effected it is hereby set aside and the house must be ceded to the applicant. H

Chitakunye J

7. The first respondent A shall pay the costs of suit on a legal practitioner and client scale.

The Registrar is hereby directed to serve a copy of this judgment on the Master of the High Court.

B *Matsikidze & Mucheche,* applicant's legal practitioners

Hangazha & Partners, second respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/SHAH v AIR ZIMBABWE CORPORATION 2010 (2) ZLR 94 (H)

SHAH v AIR ZIMBABWE CORPORATION 2010 (2) ZLR 94 (H)

Citation	2010 (2) ZLR 94 (H)
Case No	Judgment No. HH-133-10
Court	High Court, Harare
Judge	Kudya J
Heard	29 June 2010

Judgment 1 July 2010

Counsel The plaintiff in person
L Uriri, for the defendant

Case Type Exception to summons

Annotations Link to case annotations

Flynote

Practice and procedure *-parties - substitution of - plaintiff bringing action against statutory corporation - corporation's business wholly taken over by a successor company - not permissible to amend summons to add or substitute the company* D

Headnote

The plaintiff issued summons against Air Zimbabwe Corporation following a flight on an Air Zimbabwe aircraft. The defendant excepted to the summons, on the grounds that the defendant had ceased to exist, both at the time the cause of action arose and at the institution of proceedings, by virtue of the Air Zimbabwe Corporation (Repeal) Act 1998, under E which Air Zimbabwe (Pvt) Ltd was established. The company took over all the functions, assets, liabilities and staff of the Corporation. The plaintiff through his erstwhile legal practitioners filed a notice of amendment. He indicated his intention to apply at the commencement of trial to amend his summons and declaration by the addition of "'and/ or Air Zimbabwe (Pvt) Ltd' after Air Zimbabwe Corporation wherever F it appears".

Held, that the legal position that existed after 23 March 2000 was that the excipient existed in form only. The application to amend the summons and declaration in the manner proposed by the plaintiff was a disguised application, firstly for joinder and secondly for substitution. The G amendment sought was a novelty in this jurisdiction as it combined the conjunctive "and" and the disjunctive "or". Such an amendment was vague and embarrassing and would have to be struck out. It did not fulfill the requirements for a joinder contemplated by r 85 of the High Court Rules. The plaintiff had failed to demonstrate both some common question of law or fact and some entitlement to the relief H

A claimed that arose from transactions performed by both the defendant and Air Zimbabwe (Pvt) Ltd.

Cases cited

Dawson (Bradford) Ltd & Ors v Dove & Anor [1971] 1 All ER554 (QB)

Fosa v Commercial Properties (Pty) Ltd & Anor [1996] 2 All SA 611 (D)

B *Gariya Safaris (Pvt) Ltd v van Wyk* 1996 (2) ZLR 246 (H)

Lazard Bros & Co v Midrand Bank Ltd [1933] AC 289 (HL)

Stewart Scott Kennedy v Mazongororo Syringes (Pvt) Ltd 1996 (2) ZLR 565 (S)

van Heerden v du Plessis 1969 (3) SA 298 (O)

Legislation considered C

Air Zimbabwe Corporation (Repeal) Act 1998 (No 4 of 1998), ss 5 & 11

General Notice 120A of 2000

High Court Rules 1971(RGN 1074 of 1981), rr 85 & 132

Case information

D The plaintiff in person

L Uriri, for the defendant

Judgment

Kudya J: On 23 June 2008 the plaintiff issued summons out of this court against the defendant. After the plaintiff furnished it with the further E particulars it requested, the defendant, *inter alia,* excepted to the summons and declaration on 3 October 2008. The basis of the exception was that the defendant had ceased to exist both at the time the cause of action arose and at the institution of proceedings.

The cause of action arose on 2 September 2007 when the plaintiff was a fare-paying passenger in an Air Zimbabwe aircraft en route from Singapore F to Harare. The summons commencing action was served at the head office of Air Zimbabwe (Pvt) Ltd. In his replication filed by his erstwhile legal practitioners, Scanlen and Holderness, the plaintiff averred that the exception was frivolous and ill conceived and persisted with his assertion that the defendant was in existence.

G It was directed at the pre-trial conference held on 29 May 2009 that the parties were to file heads of argument on the exception, which was to be argued and disposed of at the commencement of trial. However, on 26 May 2009 the plaintiff had filed a notice of amendment in which he of his own accord amended some aspects of his declaration. This document was not dealt with at the pre-trial conference. On 7 July 2009 the plaintiff, through H his erstwhile legal practitioners, filed a notice of amendment. He indicated

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his intention to apply at the commencement of trial to amend his summons A and declaration by the addition of "'and/or Air Zimbabwe (Private) Limited' after Air Zimbabwe Corporation wherever it appears". On 24 July 2009 the excipient filed heads of argument and the plaintiff did so on 12 August 2009. It is noteworthy that Messrs Scanlen and Holderness renounced agency on 17 December 2009; and Messrs Muringi Kamdefwere who took over from B them also renounced agency on 24 June 2010. In argument before me, the plaintiff relied on the heads of argument filed on his behalf by his initial legal practitioners.

The issue raised by the exception is whether or not at the time the cause of action arose and, at the time that summons was issued, the defendant was in existence. Mr *Uriri,* for the excipient, contended that the defendant ceased to C exist on 23 March 2000. The plaintiff, on the other hand, contended that the excipient still exists. It is necessary that I provide a historical overview of the Air Zimbabwe Corporation in order to place the issue in its proper context.

There was, during the Federation of Rhodesia and Nyasaland, a statutory body called the Central African Airways Corporation, which had the powers to sue D and be sued. On 1 September 1967 the Minister of Transport and Power, acting in terms of s 9(1) of the Transport Services (Railways and Airways) (Transition) Act, No. 15 of 1967, in the Transport Services (Airways) (Establishment of New Corporation) Notice, RGN 439 of 1967, dissolved and replaced it by a corporation of the same name. The name of the corporation was changed to the Air Rhodesia Corporation on 11 October 1968 by the Air Rhodesia E Corporation Act No. 32 of 1968. During the Zimbabwe-Rhodesia era it was renamed the Air Zimbabwe Rhodesia Corporation. After independence, it was renamed the Air Zimbabwe Corporation by the Amendment of Laws Order, SI 236 of 1980.

On 8 May 1998 the Air Zimbabwe Corporation (Repeal) Act No. 4 of 1998 F (the Repeal Act) was brought into operation by General Notice No 195 of 1998 which was published in the *Government Gazette* of that day. The purpose of the Repeal Act, as set out in the preamble, was "to provide for the dissolution of Air Zimbabwe Corporation and the transfer of its functions, assets, liabilities and staff to a company formed for the purpose; to provide G for the repeal of the Air Zimbabwe Corporation Act [*Chapter 13:02*]*;* and to provide for matters connected with or incidental to the foregoing."

Section 3 of the Repeal Act mandated the Minister of Transport and Energy to secure the formation of a company limited by shares in terms of the Companies Act [*Chapter 24:03*] to succeed the

Corporation. If such a company was in existence before the commencement of the Act, the Minster was empowered H

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Kudya J

A to notify the Corporation and direct the company to become the successor to the Corporation. The company he nominated as the successor company, Air Zimbabwe (Pvt) Ltd, was already in existence by the time the Repeal Act was published. It had been incorporated on 20 November 1997.

Section 5(1) of the Repeal Act directed the Minister to fix a date for the transfer B of all assets and liabilities of the Corporation to the successor company. He duly transferred the assets and liabilities of the Corporation on 23 March 2000 through General Notice No. 120A of 2000. The Corporation staff, bonds, hypothecations, deeds, contracts, licences, permits, causes of action and proceedings were in terms of subss (2) to (8) of s 5 deemed to have been transferred to the successor company on the transfer date.

C Mr *Uriri* contended that the excipient was not in existence in fact and in law both at the time the cause of action allegedly arose and at the time the proceedings were launched. The plaintiff grounded his contention that the excipient was in existence on the failure by the President to repeal the Air Zimbabwe Corporation Act in terms of s11 of the Repeal Act. Section 11 reads:

> D "When the President is satisfied that the assets and liabilities of the Corporation have been transferred to the successor company and that nothing remains to be done under this Act, he shall, by statutory instrument, repeal the Air Zimbabwe Corporation Act [*Chapter 13:02*].

The factual position is that in terms of s 5 of the Repeal Act as read with General Notice 120A of 2000, the excipient was divested of all substance. E In my view, it ceased to operate on 23 March 2000. The legal position that existed after 23 March 2000 was that the excipient existed in form only, or, as was aptly stated by the plaintiff in his written heads, "Air Zimbabwe Corporation does exist, albeit as a shell".

On 23 March 2000, Air Zimbabwe Corporation ceased to hold any utility F value. It could not transact any business. It did not have a board. It did not have employees. It did not have assets. It could not commit acts of commission or omission. It could not execute contracts or commit delicts. It did not have offices to operate from. When the alleged cause of action arose on 2 September 2007 and when the summons was issued on 18 June 2008, the excipient was neither dead nor alive. It was in a comatose state. G The obvious issue that presents itself is whether in that state it could sue or be sued. The answer, in my view is found in s 5(6) of the Repeal Act. It reads:

> "Any cause of action or proceeding which existed or was pending by or against the Corporation immediately before the transfer date may be enforced or continued, as the case may be, by or against the successor company on or after the date of transfer in the same way that it might have been enforced or continued by or H against the Corporation had this Act not been passed."

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Kudya J

In my view, this subsection irrevocably divested the excipient of any power A to sue or to be sued after the transfer date. Thus the shell that remained by virtue of s 11 of the Repeal Act could not possibly be seized with the power to sue or be sued. That right was lost forever on 23 March 2000.

It seems to me that the averment in the exception that the plaintiff sued the wrong party was properly taken. B

The plaintiff sought to cure the dangers posed by the exception by making an application to amend his summons commencing action and declaration by adding the words after the defendant's name "and/or Air Zimbabwe (Pvt) Ltd". He relied on the provisions of Order 20 r 132, which is predicated on the absence of prejudice to the party against whom the amendment is sought. Mr C *Uriri* contended that the application to amend the summons and declaration in the manner proposed by the plaintiff was a disguised application, firstly for joinder, and secondly for substitution. He submitted on the authority of *Gariya Safaris (Pvt) Ltd v Van Wyk* 1996 (2) ZLR 246 (H) at 252G-255F that the summons in the present case was a nullity and as such it could not be rectified by either substitution or joinder. D

In my view, the amendment sought is a novelty in this jurisdiction as it combines the conjunctive "and" and the disjunctive "or". Such an amendment is vague and embarrassing and would have to

be struck out. It does not fulfill the requirements for a joinder which are contemplated by Order 13 r 85 of the rules of court. The plaintiff failed to demonstrate both some common E question of law or fact and some entitlement to the relief claimed that arises from transactions performed by both the defendant and Air Zimbabwe (Pvt) Ltd. I agree with Mr *Uriri* that the plaintiff sought the substitution of Air Zimbabwe (Pvt) Ltd for the defendant under the guise of an application to amend his summons and declaration. The cases cited in the *Gariya* case, *supra,* of *van Heerden v du Plessis* 1969 (3) SA 298 (O); F *Fosa v Commercial Properties (Pty) Ltd & Anor* [1996] 2 All SA 611 (D); *Dawson (Bradford) Ltd & Ors v Dove & Anor* [1971] 1 All ER 554 (QB) and *Lazard Brothers & Co v Midrand Bank Ltd* [1933] AC 289 make the point that a summons which is invalid cannot be rectified by an amendment. See also *Stewart Scott Kennedy v Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S).

The application for amendment must fail on the basis that the summons G issued against the defendant was invalid. In view of the conclusions that I have reached in regards to the exception and the application to amend the summons and declaration, it is not necessary for me to determine the validity of the amendment made *mero motu* by the plaintiff on 26 May 2009.

It is accordingly ordered that: H

Kudya J

1. The defendant's A exception be and is hereby upheld.
2. The application to amend the plaintiff's summons be and is hereby dismissed.
3. The plaintiff's claim against the defendant be and is hereby dismissed with costs

B *Mutumbwa, Mugabe & Associates,* defendant's legal practitioners

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TIISO HOLDINGS (PTY) LTD v ZISCO 2010 (2) ZLR 100 (H)

Citation	2010 (2) ZLR 100 (H)
Case No	Judgment No. HH-95-10
Court	High Court, Harare
Judge	Patel J
Heard	4 May 2010
Judgment	6 July 2010
Counsel	*E W W Morris*, for the plaintiff *J Muchada*, for the defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Jurisdiction — *principles — effectiveness — when foreign court has jurisdiction — submission to jurisdiction — sufficiency of*

Practice and procedure — *judgment — foreign judgment — recognition and enforcement of — principles — jurisdiction of foreign court — defendant submitting to jurisdiction — sufficiency of — finality of foreign judgment* D *— need for plaintiff to show that foreign judgment final — provisional judgment not enforceable*

Prescription — *running of — foreign judgment — prescription of claim based on such judgment — issue of prescription determined by lex causae — need to show that claim was prescribed in terms of foreign law* E

Headnote

The applicant issued summons for payment of the sum of some 6 million euros together with interest and costs of suit. The summons was issued more than three years after a default judgment had been entered against the defendant in Frankfurt, Germany, the rights in which judgment had F been ceded to the applicant. The defendant raised a plea in abatement regarding the enforceability of the foreign judgment. The main issues for determination were (a) whether the foreign judgment was contrary to natural justice because of the failure to serve court process properly or at all; (b) whether part of the amount claimed by the plaintiff before the Frankfurt court had prescribed at the time that the claim was instituted; (c) G whether the Frankfurt award was unenforceable *ab initio* in the absence of any executable assets belonging to the defendant in Germany; and (d) whether or not the Frankfurt judgment was final and conclusive for the purposes of its recognition and enforcement in Zimbabwe.

Held, that the general requirements for the recognition and enforcement of foreign judgments are: (i) the foreign court in question had the requisite H

A international jurisdiction or competence according to our law; (ii) the judgment concerned was final and had the effect of *res judicata* according to the law of the forum in which it was pronounced; (iii) the judgment must not have been obtained by fraudulent means; (iv) it must not entail the enforcement of a penal or revenue law of the foreign State; (v) it must not be contrary to public policy in Zimbabwe; and (vi) the foreign B court must have observed the minimum procedural standards of justice in arriving at the judgment.

Held, further, that although a mere procedural irregularity will not debar recognition, there must have been reasonable notice of the proceedings to the persons affected and adherence to the *audi alteram partem* principle. C The evidence was that the respondent was issued a summons and failed to respond to it.

Held, further, that prescription is a substantive matter and, as such, falls to be determined by the *lex causae* and not the *lex fori.* The law of Germany was the *lex causae* and it was that law that determined the question of prescription. In this regard, the defendant did not adduce any D evidence as to the German law of prescription. In any event, it would not be competent for a court in Zimbabwe to review the correctness or otherwise of the Frankfurt court's determination, if any, as to whether or not the claim had prescribed under the law of Germany. In proceedings for the recognition of a foreign judgment, it would be quite improper to pronounce upon the merits of any issue of fact or law tried by the E foreign court and to review or set aside its findings. The effect of the Frankfurt judgment was a *novatio necessaria* of the original debt sued upon. While such *novatio* did not necessarily entail the creation of a new obligation, the clear effect of the judgment was to provide a new right of action enforceable as such. Under s 15(a)(ii) of the Prescription Act F [*Chapter 8:11*]*,* a judgment debt only prescribes after 30 years.

Held, further, that the principle of effectiveness that underlies the law of jurisdiction, in its absolute sense, is that the court will only have jurisdiction if it controls the person or property of the defendant, as the mere consent or submission of the defendant to the jurisdiction of the court affords no absolute guarantee that the court's judgment will G be effective. Nowadays, however, submission is widely recognised in legal systems across the world as a ground of international competence justifying the enforcement of the judgment of a foreign court to which the defendant has submitted. A defendant's express submission to the jurisdiction of a foreign court suffices,

ipso facto, and without any further H jurisdictional ground, to endow that court with the requisite international

competence, enabling and allowing the recognition and enforcement of A its judgments under the common law, regardless of whether the defendant may or may not have had any executable assets in the foreign country.

Held, further, that a foreign judgment will not be enforced unless it is a final judgment and has the effect of *res judicata* according to the law of the forum that pronounced the judgment. The fact that it is subject to appeal B does not affect its finality for the purposes of recognition, but if an appeal is actually pending our courts would probably exercise their discretion not to recognise the judgment. Finality must be alleged and proved by the party seeking to enforce the judgment. A provisional judgment of an internationally competent foreign court will not be enforced or recognised. The finality and conclusiveness of the judgment should appear *ex facie* C the record. There should, if necessary, be a due and proper translation. Here, the translation of the document from the court in Frankfurt stated that the judgment was provisional or preliminary and only provisionally enforceable. Without anything explaining the relevant law of Germany, by way of written law or judicial decisions, as would conform with the requirements of s 25 of the Civil Evidence Act [*Chapter 8:01*], it must D be held that the judgment *in casu* was not final and conclusive for the purposes of its recognition and enforcement in this jurisdiction.

Legislation considered

Civil Evidence Act [*Chapter 8:01*], s 25 E

Prescription Act [*Chapter 8:11*], s 15(a)(ii)

Cases referred to

CBZ v MM Builders & Suppliers (Pvt) Ltd & Ors 1996 (2) ZLR 420 (H)

Corona v ZISCO 1985 (2) SA 423 (TkA)

Gramara (Pvt) Ltd & Anor v Govt of Zimbabwe 2010 (1) ZLR 59 (H) F

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

Laurens NO v von Hohne 1993 (2) SA 104 (W)

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

Reiss Engineering Co Ltd v Insamcor (Pty) Ltd 1983 (1) SA 1033 (W)

Richman v Ben-Tovim 2007 (2) SA 283 (SCA) G

Case information

E W W Morris, for the plaintiff

J Muchada, for the defendant

Judgment

Patel J: The plaintiff in this matter has issued summons for payment of the sum of EUR 6 640 295.94, together with interest and costs of suit. The H

Patel J

A claim arises pursuant to a default judgment of the Regional Court of Frankfurt entered in favour of Kreditanstalt für Wiederaufbau (KfW) as against the defendant on 25 July 2006.

On 20 May 2008, KfW assigned its rights in the judgment to the plaintiff. The latter then obtained judgment on the Frankfurt award for an equivalent sum in the High Court of Botswana on 5 June 2009. The defendant has not B satisfied either the Frankfurt or the Botswana judgment.

The plaintiff's claim in this court is founded on the Frankfurt judgment. The defendant has filed a plea in abatement challenging the enforceability of that judgment on various grounds. At the hearing

of this matter, counsel for the defendant abandoned several of these grounds relating to, *inter alia,* the C impact of the *in duplum* rule on the interest claim, the non-payment of security for costs by the plaintiff as a peregrine suitor, and the non-enforceability of the Botswana judgment. The last aspect was not pursued in light of the concession by counsel for the plaintiff that its claim was premised solely on the Frankfurt award and not on the Botswana judgment.

D Following these concessions, the issues for determination *in casu* are as follows:

(a) Whether the deed of assignment between KfW and the plaintiff is a mere sham depriving plaintiff of any *locus standi* to sue on the deed.

(b) Whether the plaintiff has *locus standi* to claim any interest beyond the assigned capital amount. E

(c) Whether the Frankfurt judgment is contrary to natural justice because of the failure to serve court process properly or at all.

(d) Whether part of the amount claimed by the plaintiff before the Frankfurt Regional Court had prescribed at the time that the claim was instituted. F

(e) Whether the Frankfurt award was unenforceable *ab initio* in the absence of any executable assets belonging to the defendant in Germany.

(f) Whether or not the Frankfurt judgment is final and conclusive for the purposes of its recognition and enforcement in this country.

Recognition and enforcement of foreign judgments

G Under the common law, the general requirements for the recognition and enforcement of foreign judgments may be summarised as follows: (i) the foreign court in question had the requisite international jurisdiction or competence according to our law; (ii) the judgment concerned was final and has the effect of *res judicata* according to the law of the forum in which it was pronounced; (iii) the judgment must not have been obtained by fraudulent H means; (iv) it must not entail the enforcement of a penal or revenue law of

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the foreign State; (v) it must not be contrary to public policy in this country; A and (vi) the foreign court must have observed the minimum procedural standards of justice in arriving at the judgment.

See Joubert (ed) *The Law of South Africa* (First Reissue, 1993) Vol 2 at para 477. See also *Jones v Krok* 1995 (1) SA 677 (A) at 685B-E; *Purser v Sales* 2001 (3) SA 445 (SCA) at 450D-G; *Gramara (Pvt) Ltd & Another* v B *Government of Zimbabwe & Others* 2010 (1) ZLR 59 (H) at 66-68.

Validity of deed of assignment

On 21 July 2009, KfW instituted proceedings against the Government of Zimbabwe in the High Court of South Africa to enforce an arbitral award rendered on 5 December 2006 by the International Court of Arbitration. This C award relates to repayments due under two loan agreements (Nos. F 2971 and F 3040), including the amount assigned to the plaintiff. In this regard, the defendant contends that, if the assignment were valid and genuine, KfW *qua* assignor would have divested itself of any right or interest in the debt assigned. Therefore, inasmuch as the assignor is claiming the amount assigned in other litigation, it must be inferred that the deed of assignment D between KfW and the plaintiff is a mere sham.

In my view, the defendant's position is clearly misconceived for the following reasons. In the deed of assignment between KfW and the plaintiff, the former has assigned to the latter its rights to the debt claimed as against the defendant. This assignment does not embrace KfW's rights as against the Government of E Zimbabwe in its capacity as guarantor under the loan agreements in question. These are separate rights founding a separate cause of action and KfW is undoubtedly entitled to proceed against the Government on its guarantees through separate litigation. This should not entail any double jeopardy to the defendant or unjust enrichment of the plaintiff, as anything recovered on either claim must obviously be set-off against the amount recovered through F the other. It follows that there is nothing untoward in the assignment between KfW and the plaintiff and that the latter is duly vested with the requisite *locus standi in judicio* to claim the debt assigned.

Claim for interest

In terms of clause 1.1 of the deed of assignment, KfW transferred to the G plaintiff by way of assignment "the claim for payment of the Assignor under the loan agreements Nos. F 2971 and F 3040 ... up to an amount not exceeding EUR 6 640 295.94 against Zimbabwe Iron & Steel Company,

... as awarded by the judgment of the District Court in Frankfurt am Main dated July 25, 2006". In the instant case, the plaintiff claims the entirety of the Frankfurt award, *i.e.* the capital sum of EUR 6 640 295.94 as well as H

Patel J

A interest at varying rates on diverse amounts from 30 December 1999.

It is axiomatic that a litigant is only entitled to claim that in which he has a legal right or interest. The plaintiff herein clearly has no *locus standi* whatsoever to claim anything more than the assigned amount of EUR 6 640 295.94. Mr *Morris* quite correctly conceded this point and abandoned the plaintiff's claim for interest as set out in the summons and declaration. B However, he then sought to substitute a claim for interest at the prescribed rate of five per cent per annum, calculated from 25 July 2006, being the date of the Frankfurt ruling. Mr *Muchada* did not appear to raise any objection to the proposed amendment.

Despite this apparent consensus between counsel, I perceive one particular C difficulty with the revised claim for interest. What is essentially sought *in casu* is the recognition and enforcement of a foreign judgment as embodied in a private treaty in the form of a deed of assignment. Any such recognition and enforcement may only be granted on the face of the judgment as translated into the deed of assignment. Accepting the original unamended claim for interest, as I have already stated, involves granting to the plaintiff more than D what it owns. Acceding to the amended claim for interest entails having to modify the express terms of the foreign judgment sought to be recognised and enforced. In my view, neither of these avenues is available to the plaintiff. It must be confined to the amount awarded by the Frankfurt court as recast and transferred to it through the deed of assignment.

E For the sake of completeness, I should add that I might have been prepared to accede to a revised claim for interest at the prescribed rate, either from the date of issuance of the summons or from the date of judgment *in casu.* However, that is not what was specifically sought before me and I am not at liberty to entertain any such claim *mero motu.*

F **Service of court process**

As I have indicated earlier, a foreign judgment will not be recognised or enforced where it is shown on a balance of probabilities that it was obtained contrary to the rules of natural justice. See van Winsen, Cilliers & Loots: *The Civil Practice of the Supreme Court of South Africa* (4 ed 1997) at p 999; *Corona v Zimbabwe Iron & Steel Co Ltd* 1985 (2) SA 423 (TkA) at G 425-426. In particular, although a mere procedural irregularity will not debar recognition, there must have been reasonable notice of the proceedings to the persons affected and adherence to the *audi alteram partem* principle. See Joubert *op cit* at para 477.

The defendant herein avers that it was not properly served with legal process H instituting KfW's claim in the Frankfurt court. However, this averment is

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Patel J

clearly belied by the certified translation of the Frankfurt court's ruling A (at p 5), wherein it is explicitly stated that the defendant was served with the complaint on 10 April 2005 and, having been required to answer the complaint within seven weeks, did not give any indication of its willingness to defend within that time limit. There is nothing in the papers to counter this position. It follows that the defendant has failed to establish on a balance of B probabilities any fundamental violation of the rules of natural justice such as to warrant the non-recognition of the Frankfurt judgment.

Prescription of claim

According to the defendant, part of the loans founding KfW's claim had prescribed under the law of Zimbabwe by the time that KfW instituted C proceedings in the Frankfurt court. In this regard, the defendant refers the court to the loan repayment schedules set out in the two loan agreements (Nos. F 2971 and F 3040) and contends that all the amounts due for repayment on or before 31 September2001 had prescribed at the relevant time. The defendant further contends that the judgment of the Frankfurt court itself, delivered on 25 July 2006, had prescribed within three years and that the plaintiff's D action in this court, filed on 15 October 2009, was instituted out of time.

I must confess that I find it somewhat difficult to comprehend the defendant's contentions on prescription. First and foremost, the defendant is unable to state with any certainty when the proceedings in the Frankfurt court were instituted and, E therefore, what the cut-off date should be for the purposes of prescription before that court. Secondly, even if the cut-off date argued for by the defendant is accepted, I note that the repayments due on or before that date constitute only about 20 per cent of all the repayments owing to KfW. Thirdly, the schedules referred to deal only with capital repayments and there is no indication as to the quantum of interest payable on the loans and the due dates for payment of such interest. Finally, the ruling of the F Frankfurt court (at p 4 of the certified translation) refers to a letter of demand for all amounts owed by the defendant exceeding 50 million euros, while the amount actually claimed by KfW in the Frankfurt court is no more than 6.6 million euros (together with interest). On these facts, it seems to me virtually impossible to ascertain precisely what amounts were owed under the loan G agreements and when such amounts became due and payable. Therefore, without further documentary and oral evidence being lead, any attempt at this stage to determine what has prescribed would be an exercise in utter futility.

In any event, quite apart from the aforementioned evidential difficulties, there is considerable merit in the plaintiff's submission that prescription is a substantive matter and, as such, falls to be determined by the *lex causae* H

Patel J

A and not the *lex fori.* See *Laurens NO v von Hohne* 1993 (2) SA 104 (W) at 121. Under the loan agreements *in casu* (Article 10.2 of Loan No. F 2971 and Article 9.2 of Loan No. F 3040) the loans are governed by the law of the Federal Republic of Germany. It is that law that is the *lex causae* and it is that law that determines the question of prescription. In this regard, the defendant has not adduced any evidence as to the German law of prescription. B In any event, it is not competent for this court to review the correctness or otherwise of the Frankfurt court's determination, if any, as to whether or not KfW's claim had prescribed under the law of Germany. In proceedings for the recognition of a foreign judgment, it would be quite improper to pronounce upon the merits of any issue of fact or law tried by the foreign C court and to review or set aside its findings. See Joubert *op cit* at para 476.

As regards the prescription of the Frankfurt judgment itself, I concur with counsel for the plaintiff that the effect of that judgment was a *novatio necessaria* of the original debt sued upon. However, contrary to counsel's submission, such *novatio* does not necessarily entail the creation of a new obligation. Nevertheless, the clear effect of the judgment is to provide a D new right of action enforceable as such. See *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H) at 436-437. If one applies the prescription law of Zimbabwe to this new right, i.e. s 15(a)(ii) of the Prescription Act [*Chapter 8:11*], it is evident that a judgment debt only prescribes after 30 years. In this context, given the all - E embracing definition of "debt" in s 2, there is nothing in the Act to suggest that the prescription period of 30 years applies only to local judgments and does not extend to foreign judgments. Thus, even as regards the Frankfurt judgment, it is abundantly clear that the plea of prescription does not avail the defendant.

F **Enforceability without executable assets**

Under the loan agreements in question (Article 10.3 of Loan No. F 2971 and Article 9.3 of Loan No. F 3040) the parties expressly agreed that the place of jurisdiction for all litigation in connection with the loans would be Frankfurt am Main in the Federal Republic of Germany. It is therefore perfectly clear that the defendant specifically submitted to the jurisdiction G of the Frankfurt court.

The defendant avers that the Frankfurt judgment could not have been enforced by execution in Germany as the defendant had no executable assets in that country at that time to satisfy the

judgment in whole or in part. In this regard, Mr *Muchada* contends that the mere submission of the defendant to H the jurisdiction of the Frankfurt court is not enough to render its judgment

Patel J

effective. Mr *Morris* counters that submission to the Frankfurt court is A sufficient and that the defendant should have raised the effectiveness of its ruling before that court and not in the present proceedings.

The principle of effectiveness that underlies the law of jurisdiction, in its absolute sense, is that the court will only have jurisdiction if it controls the person or property of the defendant, as the mere consent or submission of B the defendant to the jurisdiction of the court affords no absolute guarantee that the court's judgment will be effective. See *Forsyth Private International Law* (4 ed) at p 215. However, as is further explained by the learned author, at pp 215-216:

> "Today the doctrine of effectiveness is artificial and conceptual rather than realistic. And indeed even those cases that would most severely restrict submission do C not reject it altogether. Moreover, submission is widely recognised in legal systems across the world as a ground of international competence justifying the enforcement of the judgment of a foreign court to which the defendant has submitted. Thus, on the whole, a judgment based on submission will be effective. It is submitted that effectiveness in this slightly attenuated sense should suffice to justify the exercise of jurisdiction on the grounds of submission. The fact is that most other legal systems ... give wide recognition to and encourage submission D as a ground of jurisdiction. ... It is to the benefit of international commerce that this should be so. ... As economic development in Southern and Central Africa proceeds, there is no reason, other than archaic restrictions on the exercise of jurisdiction, why the local courts should not develop an international role akin to that of the Commercial Court in London."

Similar sentiments predicated on policy grounds were expressed *in Richman* E v *Ben-Tovim* 2007 (2) SA 283 (SCA) at289, where Zulman JA observed that:

> "there are compelling reasons why ... in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen. In addition, it is now well established that the exigencies of international trade and commerce require 'that final foreign judgments be recognised as far as is reasonably possible in our courts, and that F effect be given thereto'."

As I have stated earlier, the enforcement of a foreign judgment requires that the foreign court had jurisdiction in the international sense according to the principles of our law on the jurisdiction of foreign courts. See Joubert *op cit* at para 477; Schulze "International Jurisdiction in Claims Sounding in Money" G 2008 (20) *SA Merc LJ* at pp 61-62. Thus, the mere fact that the foreign court may have had jurisdiction under its own laws is not conclusive. See *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983 (1) SA 1033 (W) at 1037.

The rules for assessing the international jurisdiction of a foreign court are expounded by Pollak *The South African Law of Jurisdiction* (1937)at p206 ff. The overall position is summarised, at p 219, as follows. A foreign court H

Patel J

A has jurisdiction to entertain an action for a judgment sounding in money against a natural person if, at the time of the commencement of the action, the defendant is physically present in the state to which the court belongs or is domiciled or resident within that State or has submitted to the jurisdiction of that court. According to Pollak, there are no other grounds for jurisdiction. This summation was cited with approval in the *Reiss Engineering* case *supra* B at 1037-1038, and followed in *Richman's* case *supra* at 289.

With specific reference to submission as a basis of jurisdiction, the position is reiterated by Pistorius *Pollak on Jurisdiction* (2 ed 1993) at pp 162-163:

> "Submission has been accepted in our law as an acceptable basis for international competence. As in the case of local jurisdiction submission may be by way of C agreement or by a defendant acquiescing by his conduct in such jurisdiction after litigation against him has commenced. In the case of agreement, this may be pursuant to a contract between the parties which specifically provides for submission in the event of disputes or by an express or tacit submission after litigation. Submission by conduct may be difficult to prove and ... the conduct must be of such a nature that it is consistent only with acquiescence."

D Again, in relation to claims sounding in money, Forsyth *op cit* at p 395, encapsulates the modern law as follows:

> "It is widely recognised, by both writers and the decided cases, that submission by the defendant to the jurisdiction of the foreign court grants to that court international competence even if it would not otherwise enjoy that competence."

As regards submission by agreement, the learned author, at pp 399-400, E states that:

> "In accordance with the general principles of the law of contract, parties may, either expressly or impliedly, enter into binding agreements to submit their dispute to a particular court which might otherwise lack jurisdiction...
>
> ... express submission where the parties agree to submit in the *ipsissma verba* of their contract. Provided such submission is valid under its proper law, such an agreement is undoubtedly effective F ."

Having regard to the foregoing cases and commentaries, I conclude that a defendant's express submission to the jurisdiction of a foreign court suffices, *ipso facto,* and without any further jurisdictional ground, to endow that court with the requisite international competence, enabling and allowing G the recognition and enforcement of its judgments under the common law. I am fortified in that conclusion by the policy considerations that I have cited earlier, which are obviously germane to any analysis of international competence according to the principles of our law governing the jurisdiction of foreign courts. In that context, the tenets of international comity, informed by the inexorable trans-nationalisation of trade and commerce, dictate that H our courts should be astute to extend rather than constrict the scope of

---

international jurisdiction and competence as regards claims sounding in A money. On that basis, there can be no objection to a more liberal approach that recognises the enforceability of a foreign judgment founded on the submission of the defendant, whether it be a natural person or an artificial entity, to the jurisdiction of the foreign court in question.

I accordingly take the view, in keeping with principle as well as policy, that B the explicit contractual submission of the defendant *in casu* to the jurisdiction of the Frankfurt court suffices for the purpose of recognising its judgment. This is so regardless of the fact that the defendant may or may not have had any executable assets in Germany at the time of the commencement of the plaintiff's action in Frankfurt.

Finality and conclusiveness of frankfurt judgment C

The defendant avers that the judgment that the plaintiff seeks to enforce is *ex facie* not one that is final and conclusive and, as such, it cannot be enforced *in casu.* In this respect, it is specifically pleaded by the plaintiff, in para 4 of its declaration, that the Frankfurt judgment "is final in its terms and remains valid and effective". Consequently, it is submitted by counsel D for the plaintiff that the defendant cannot challenge the validity and finality of the judgment by way of special plea and can only raise that issue on the merits. It is further argued by Mr *Morris* that the finality or otherwise of the judgment under German law is a matter for the defendant to establish. This contention is disputed by Mr *Muchada* who submits that the burden in this E regard falls squarely on the plaintiff.

The requirement of finality and the burden of proof in that regard are lucidly adumbrated by Joubert *op cit* at para 477:

> "A foreign judgment will not be enforced unless it is a final judgment and has the effect of *res judicata* according to the law of the forum that pronounced the judgment. The fact that it is subject to appeal does not affect its finality for the F purposes of recognition, but if an appeal is actually pending the South African court will probably exercise its discretion not to recognise the judgment. Finality must be alleged and proved by the party seeking to enforce the judgment."

According to Forsyth *op cit* at pp 427-428:

> "A provisional judgment of an internationally competent foreign court will not be enforced or recognised. After all, it would be undesirable if the foreign court's G judgment were enforced and thereafter the foreign judgment was set aside or altered by the court which made it in the first place. Consequently, any foreign judgment must be final and conclusive before it will be recognised or enforced.
>
> Our courts have largely accepted the English principles in this regard; thus what is required is that the judgment was unalterable by the court which pronounced it. But it need not be absolutely unalterable.

Indeed, the fact that a particular H

2010 (2) ZLR p111

Patel J

A Judgment is appealable or has been appealed against in the legal system from which it comes does not affect the finality of the judgment. Although the original judgment may be upset on appeal it is not then altered by the court, which made it. It appears further, however, that where the rendering court has suspended its judgment pending an appeal, such a judgment will not be enforced locally, and, moreover, where an appeal is pending although the effect of the judgment B has not been suspended the court has a discretion not to enforce the judgment

... The onus of establishing that a foreign judgment is final rests, naturally, on the party seeking to enforce it; but once this is shown the 'defendant must place before the court the facts relating to the impending appeal and such other relevant facts as may persuade the court to exercise its discretion in granting a stay of proceedings.' [*per Jones v Kroge* 1995 (1) SA 677 (A) at 692]."

C With reference to default judgments, the learned author opines as follows, at pp 428-430:

"The position in regard to default judgments - which may or may not be rescinded by the court which rendered them - is less clear. Under German law, for example, a defendant against whom a default judgment has been given has the privilege of *Einspruch* available (if exercised within two weeks of the judgment being D served on him) in terms of which the case against him is automatically reopened without the defendant needing to excuse the default. Such a judgment is certainly not final while the defendant can exercise this privilege; but thereafter it must be considered final. Other legal systems, however, do not build time limits into their rules. In our own law, for example, it appears that, notwithstanding certain cases to the contrary, a High Court judgment can be rescinded at any time on E grounds that would normally entitle defendant to *restitutio in integrum* or' some other just cause'. Such judgments are in theory not final for they may still be altered by the court which made them.

... there is a strong case for creating an exception to the 'final and conclusive' rule in the case of default judgments. If this is not done default judgments, even when granted by an internationally competent court, will often be worthless outside the territory of that court. Moreover, in the absence of a time limit after F which the default judgment cannot be set aside by the court which pronounced it, only an application by the defendant to have the judgment set aside can, when dismissed, transmute the judgment into an internationally enforceable one ... The courts in several jurisdictions have been creating such an exception (subject to safeguards) and the local courts should do so too."

G As regards proof of the finality of a foreign judgment, van Winsen, Cilliers & Loots *op cit* at pp 998-999, enunciate the position concisely:

"The foreign judgment must, however, be a final and conclusive one, and the finality and conclusiveness of the judgment should appear *ex facie* the record. It should be alleged in the summons that the judgment is a final one, and the law and facts which make it final should be stated if on the face of it the judgment H appears to be provisional."

2010 (2) ZLR p112

Patel J

With reference to the requisite formalities, the learned authors continue, at A pp 1000-1001:

"It is essential that all the papers should be in order before a foreign judgment will be enforced. The plaintiff must therefore have before the court a properly authenticated copy of the judgment upon which provisional sentence is sought, and if it does not appear from that that the judgment is a final one, the plaintiff should annex a certificate from the competent authority in the foreign tribunal B to show that the judgment is or has become final. If the judgment is in a foreign language, a due and proper translation of it must be annexed to the summons. The documents must show that the translation was made either by a sworn translator of the court or by a person otherwise qualified to translate the judgment."

In the instant matter, the plaintiff has annexed to its declaration certified copies of the original judgment and what purports to be a certified translation of that C judgment. However, it is not clear that the copy of the original judgment has been properly authenticated. Moreover, there is no indication on the papers that that the translation was made by a sworn translator of the Frankfurt court or by a person otherwise qualified to translate the judgment. Be that as it may, these are technical issues that may well be addressed and rectified D should the matter proceed to trial.

What is more significant at the present stage of the proceedings is the content of the record as it stands and what appears on the face of the Frankfurt judgment itself. It is not in dispute that the judgment was granted by default and that the defendant has neither applied for its rescission nor appealed against it. In that regard, nothing has been placed before this court as to whether or not E

the period for appealing against the judgment or for seeking its rescission has expired (*cf.* Forsyth *op cit* at p 428) and, without such clarification, I am not at liberty to assume the correct position under German law at the present time.

In any event, quite apart from the possibility that the judgment may be susceptible to appeal or rescission (which seems unlikely given the passage F of time since it was delivered in July 2006) what is more crucial for present purposes are the actual words employed in the judgment itself. At p 2 of the certified translation, it is decreed that "The judgment is provisionally enforceable" and, at p 6 of the judgment, it is declared that "The decision about preliminary enforceability is based on §§ 708 No. 2 ZPO (*)".

What then emerges *ex facie* the Frankfurt judgment is that it is provisional G or preliminary and only provisionally enforceable. The word "preliminary" normally denotes something that is initial, first, opening or introductory; the term "provisional" in ordinary parlance means temporary, interim, conditional or impermanent. In legal jargon "provisional" is similarly defined in *Black's Law Dictionary* (6 ed) as: H

Patel J

A "temporary, preliminary, acceptable in the existing situation but subject to change or nullification".

Having regard to all of these connotations, it seems unequivocally clear from the record that the Frankfurt judgment is purely provisional in nature and, therefore, subject to change or nullification. In this regard, the plaintiff has failed to discharge the onus upon it to demonstrate that the ruling is final B and conclusive or to explain the esoteric reference to "§§ 708 No. 2 ZPO (*)" upon which it appears to have been based. The plaintiff has merely proffered the bald assertion in its declaration to the effect that the judgment is final. It has not furnished any certificate from a competent authority in the Frankfurt court to show that the judgment is or has become final. Nor C has it adduced anything to counter the defendant's special plea, explaining the relevant law of Germany, by way of written law or judicial decisions, as would conform with the requirements of s 25 of the Civil Evidence Act [*Chapter 8:01*]. In the premises, it must be held that the judgment *in casu* is not final and conclusive for the purposes of its recognition and enforcement in this jurisdiction and that, for that reason, this court must decline to recognise D and enforce the judgment.

Disposition

In the final analysis, many of the issues for determination *in casu* must be answered in favour of the plaintiff, save for the second question, pertaining to its claim for interest, and the last question, relating to the finality and E conclusiveness of the judgment that it seeks to enforce. This last issue is critical to the plaintiff's case and it is one that the plaintiff has clearly failed to establish on the record.

Accordingly, the defendant's plea in abatement challenging the enforceability of the Frankfurt judgment succeeds on that single ground and must therefore F be upheld. In the result, the plaintiff's claim is dismissed with costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

G *Dube, Manikai & Hwacha,* defendant's legal practitioners

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HARRISON & HUGHSON (PVT) LTD v ALSTOM ZIMBABWE (PVT) LTD & ANOR 2010 (2) ZLR 114 (H)

Citation	2010 (2) ZLR 114 (H)
Case No	Judgment No. HH-152-10
Court	High Court, Harare
Judge	Mutema J
Heard	8 July 2010
Judgment	8 July 2010
Counsel	*E M Warhurst,* for the applicant Mrs *J B Wood,* for the first respondent No appearance for the 2nd respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Appeal - *right of- interlocutory order - magistrates court - order granting leave to execute pending appeal on main issue - not subject to appeal*

Headnote

The respondent obtained an eviction from the magistrates court against D the applicant. The applicant noted an appeal against the order, but the respondent applied for and was granted an application for leave to execute the eviction order pending the determination of the appeal. The applicant noted an appeal against the order granted to the first respondent to execute pending appeal and thereafter filed a chamber application for a provisional order staying the ejectment, alternatively, restoring it to E possession of the premises.

Held, that the granting of the relief to stay execution would amount to overruling the magistrate's decision and also to determining the appeal when the court was not sitting as an appellate court.

Held, further, that appeals from the magistrates court are by choice of the appellant, but limited to judgments, rules, orders or decisions covered F by paras (a), (b) and (c) of s 40(2) of the Magistrates Court Act [*Chapter 7:10*]. The common thread running through those provisions is that the judgment, rule, order or decision being appealed against must have the effect of a final and definitive judgment. It follows, therefore, that those orders or judgments which are of a purely interlocutory nature G are not appealable. An order granting leave to execute pending appeal, such as that granted in the instant case, is purely interlocutory and thus does not have the effect of a final judgment on the main suit, despite the inconvenience to the applicant. It is, to all intents and purposes, not subject to appeal H

Legislation considered A

Magistrates Court Act [*Chapter 7:10*], s 40

Cases referred to

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

Faye Trust v Zhanje & Anor 2002 (1) ZLR 373 (H) C

Gillespies Monumental Works (Pvt) Ltd v Zimbabwe Granite Quarries (Pvt) Ltd 1997 (2) ZLR 436 (H)

Case information

EM Warhurst, for the applicant

Mrs *J B Wood,* for the first respondent

C No appearance for the 2nd respondent

Judgment

Mutema J: This is an urgent chamber application for a provisional order in which the interim relief sought was couched in these terms:

> "1. That the second respondent be and is hereby ordered to stay ejectment of applicant from the premises known as 93 Coventry Road, Harare pending D the hearing of this urgent application for stay of execution.
>
> 2. In the event of the second respondent having ejected applicant from the premises known as 93 Coventry Road Harare, he is hereby directed temporarily to return possession of the premises to applicant pending the outcome of the application for stay of execution."

E The terms of the final order sought include, *inter alia:*

> "That second respondent be and is hereby ordered to stay execution permanently against applicant pending the outcome of the Civil Appeal 251/10."

The background of the matter is briefly as follows. The applicant and the first respondent entered into a lease agreement in respect of 93 Coventry Road wherein the applicant was the lessee. On 9 September 2009 the first F respondent's estate agent, Guest and Tanner, invited the applicant to come and discuss an increase in fair rent from $ 1 200 per month. The first respondent's representatives went for the discussion but the estate agent's representative missed the appointment and consequently no discussion about the issue was ever held. Subsequently the applicant offered to increase the rent to $2 400 per month, which was accepted by the first respondent. The estate agent G communicated acceptance of the offer by a letter dated 21 October 2009 wherein it also gave the applicant a six month notice to vacate the premises on the grounds that the first respondent required the premises for its own use. The notice period endured up to 30 April 2010.

Come 30 April 2010, the applicant did not vacate the premises. On 17 May H 2010 the first respondent filed an application for eviction of the applicant

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in the magistrates court. On 7 June 2010 the magistrates court granted the A application. On 8 June 2010, the applicant noted an appeal in this court against the order for its eviction. Since the noting of the appeal had the effect of suspending the judgment appealed against, the first respondent filed an application for leave to execute pending the appeal. That application was granted. The applicant again noted an appeal against the order granted B to the first respondent to execute pending appeal. Thereafter the applicant filed this urgent chamber application for the provisional order. The chamber application was accompanied by a certificate of urgency. At the hearing Mrs *Wood* raised the following points *in limine:*

(1) the application lacks urgency, in that six months notice to vacate was given. The applicant sat back and it was only on 28 April 2010 (two days C before expiry of the notice to vacate) that the applicant in vain attempted to cajole the first respondent into signing an agreement it had drafted to have the notice period extended.

(2) if relief to stay the execution is granted, this would be tantamount to this court overruling the magistrate's decision to execute pending appeal. D Effectively the applicant was asking this court to determine the appeal when it is not sitting as the appeal court.

(3) the court should determine whether there is a valid appeal against the magistrate's decision to grant leave to execute pending appeal. There is no appeal in this respect because that order to execute pending appeal is E not a final or definitive one. It is merely an interlocutory order and such an order is not appeallable. Over and above that, the notice of appeal pertaining to that order is fatally defective in that it falls foul of r 7 of the Supreme Court (Miscellaneous Appeals and References) Rules 1975 by not stating all the aspects required in a notice of appeal.

In the event, so the argument went, there is no appeal that was noted and F the applicant has no basis to come before this court.

Mr *Warhurst,* in response, contended that the matter was urgent in that the applicant believed that, instead of the matter being brought by way of application, it should have been brought by way of summons since there existed a dispute of fact, *viz* whether the first respondent required the premises G for its own use. Further, the urgency arises because of the first respondent's insistence on eviction before applicant's appeal is heard.

Regarding the point that if relief to stay execution is granted, this would amount to overruling the magistrate's decision, he said it is interwoven with the one whether the judgment being appealed against is final or not. He submitted that the judgment is final in that once the applicant is evicted, H

A the purpose of its appeal is frustrated.

On whether the notice of appeal is fatally defective, he denied that the same rules are applicable. Even if they are, the notice is sufficiently clear on the papers regarding which judgment is being appealed against, the second one granting leave to execute pending appeal. He submitted that the prayer that B the judgment of the court *a quo* be reversed is the standard practice in this regard.

Let me now advert to the points *in limine* that were raised.

1. *Is the application urgent?*

Mr *Warhurst* contended that the urgency itself only arises because of first respondent's insistence on evicting applicant before the latter's appeal has C been heard. I am unable to subscribe to this submission. The basis for so holding hinges on the validity or otherwise of the applicant's appeal which issue I shall deal with when unraveling the third point *in limine,* viz whether the appeal against the magistrate's decision to grant leave to execute pending appeal is valid.

D At this stage, it behoves me to look at the issue of urgency vis-à-vis the facts of this matter. A party whose ejectment from rented premises is imminent maybe excused in entertaining the belief that his/her matter is urgent for he/ she has an understandable apprehension of fear of the threatened eviction. However, this should not be accepted at face value. There is need to follow the spoor, in a manner of speaking, leading up to the threatened eviction on E the facts. In the instant case the applicant was given six months' notice to vacate the premises. It was content to sit back, blissfully hoping that the first respondent was bluffing. It was only two days before the notice period was up that the applicant attempted to engage the first respondent in an endeavour to have the notice period extended by a month. The applicant, in the draft F agreement which the first respondent refused to sign, agreed to vacate at the end of the extra month but set certain conditions for its vacation from the premises. If, therefore, the applicant was willing to vacate the premises on or before 31 May 2010, one can safely conclude that the applicant had alternative premises to go to. That date has passed and the applicant is still *in situ* fighting to remain there. In view of the foregoing the urgency of the G matter has been grossly eroded. I would hold that the application is not urgent.

2. *Would granting of the relief to stay execution amount to overruling the magistrate's decision and also amount to determining the appeal when this court is not sitting as an appellate court?*

I think it would and this would set a bad precedent. If granted, the relief H sought would reinstate the effect of the noting of the appeal. There is no

way this court can upset the magistrate's decision without delving into the A merits of the appeal, yet the court will not be sitting as an appellate court. In any event, and more importantly, the so called appeal's validity is being impugned and no legal basis for its validity has been established, the very issue I will advert to next.

3. *The validity of the appeal against the magistrate's decision to grant leave* B *to execute pending appeal*

The issue for resolution here is whether an order granting leave pending appeal to execute a judgment is interlocutory or final. It is settled law that if it is final it is subject to appeal and if merely interlocutory then it is not appeallable.

Let me turn with profit to B *Gillespies Monumental Works (Pvt) Ltd v Zimbabwe Granite Quarries (Pvt) Ltd* 1997 (2) ZLR 436 (H). C In that case, the parties had a dispute regarding mining rights over a certain piece of land. The dispute resulted in an order that Gillespies vacate the area. Gillespies noted an appeal against the order granted. Zimbabwe Granite filed an urgent chamber application seeking an order that leave to execute the order be D granted notwithstanding the filing of the notice of appeal. The order applied for was granted. Gillespies then filed an appeal against the order and applied for an order that Zimbabwe Granite vacate the area concerned pending the outcome of the two appeals. The application was dismissed with costs.

Smith J, after considering a series of decisions of the Appellate Division of E South Africa and Jones and Buckle *The Civil Practice of the Magistrates Courts in South Africa* Vol. 1 (8 ed) at p 330 regarding the meaning of the terms "interlocutory order" and "interlocutory judgment", concluded that his order granting leave to execute pending appeal did not have a final or definitive effect on the main suit. In other words, it was an interlocutory order and could only be appealable with leave of the court. He held that, in F the absence of such leave, the noting of the appeal was invalid and hence there was no basis for the application by Gillespies. See also *Econet v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H); and *Faye Trust v Zhanje and Anor* 2002 (1) ZLR 373 (H).

It is pertinent to point out the distinction that, while leave of the High G Court is required before making an appeal to the Supreme Court against an interlocutory order or judgment, in the magistrate's court the situation is different. Subsection (2) of s 40 of the Magistrates Court Act [*Chapter 7:10*] does not provide for the court's leave to appeal. Appeals are by choice of the appellant but limited to judgments, rules, orders or decisions covered by paras (a), (b) and (c) of the subsection. The common thread running through H

Mutema J

A those provisions is that the judgment, rule, order or decision being appealed against must have "the effect of a final and definitive judgment". It follows, therefore, that those orders or judgments which are of a purely interlocutory nature are not appealable.

It having been established that an order granting leave to execute pending appeal, such as the one extant in the instant case, is purely interlocutory B and thus not having the effect of a final judgment on the main suit. Despite causing inconvenience to the applicant, it is to all intents and purposes not subject to appeal.

In the result, the noting of the appeal by the applicant against the magistrate's order granting leave to execute pending appeal was invalid and there was no C basis for this application. The bringing of the application could be described as analogous to the shutting of the stable door after the horse has bolted. Accordingly, the urgent chamber application is hereby dismissed with costs.

Matizanadzo & Warhurst, applicant's legal practitioners

D *Venturas & Samukange,* respondent's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/S v MATAPO & ORS 2010 (2) ZLR 120 (H)

S v MATAPO & ORS 2010 (2) ZLR 120 (H)

Citation 2010 (2) ZLR 120 (H)

Case No	Judgment No. HH-142-10
Court	High Court, Harare
Judge	Malaba J
Heard	21 June 2010; 29 June 2010
Judgment	9 July 2010
Counsel	*C Warara,* for the applicants *C Mutangadura,* for the State
Case Type	Criminal application
Annotations	No case annotations to date

Flynote

Criminal procedure - *committal for trial -failure to bring accused to trial within six months of date of committal - six month period between committal and date of trial - interruption of such period - aggregate period exceeding six months - accused entitled to dismissal - calculation of time period - interruption of six month period - may be interrupted when* D *accused not available to stand trial for reasons beyond the control of the Attorney-General - "not available for trial" - meaning - circumstances when an accused is deemed to be "not available for trial"*

Interpretation of statutes - *time - computation of time - calendar month - period from date in any particular month to corresponding date in* E *next month*

Headnote

For the purposes of computing a month, in s 33(6)(c) of the Interpretation Act [*Chapter 1:01*], a court will take the date in any particular month to a corresponding date in any other month.

The six month period referred to in s 160(2) of the Criminal Procedure and F Evidence Act [*Chapter 9:07*] does not mean that the period must run uninterrupted and that any period preceding such interruption must be discounted. What it does mean is that if the aggregate period between an accused's committal for trial before the High Court and the date of trial exceeds six months, even though interrupted by some other G circumstance which is beyond the control of the Attorney-General, an accused is entitled to a dismissal.

Where an accused is committed for trial before the High Court, for the purpose of the proviso to s 160(2) of the Criminal Procedure and Evidence Act he automatically becomes "available" for trial. The only time he is "not available to stand trial" for the purposes of the proviso would be, for H

A example, if the accused is too ill to stand trial or when the trial process is interrupted by some other process like an application for referral of a constitutional issue to the Supreme Court. Even when the State contends that at some stage investigations had to be conducted in relation to a suspect who attempted to facilitate the accused's escape from custody or when the High Court was on vacation, it could not be said that the B accused "was not available to stand trial".

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 65, 66, 160(1) & 160(2)

C Interpretation Act [*Chapter 1:01*], *s* 33(6)(c)

Cases referred to

Mukuze & Anor v A-G 2005 (1) ZLR 6 (H)

S v Mukuze & Anor 2005 (1) ZLR 79 (H)

Case information

D *C Warara,* for the applicants

C Mutangadura, for the State

Judgment

Musakwa J: The applicants are seeking the dismissal of the charge for which they were committed for trial on 4 June 2008 on the basis that they were not brought to trial within six months of such committal.

E The facts as set out in Mr *Warara's* founding affidavit are that the applicants were arrested on charges of contravening s 20 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They have been in custody since 30 May 2007. On 4 June 2008 they were served with indictment papers for trial before the High Court on 7 July 2008.

F Subsequent to the committal for trial the defence wrote to the prosecution on 5 June, 12 June and 2 July 2008. In the first two letters they sought to be furnished with documentation and witnesses' statements. In the last letter they were reminding the prosecution of the delay in being furnished with witnesses' statements and the difficulties defence counsel experienced in accessing the applicants in order to prepare their defence outline. There G were no replies to those letters.

On the date of trial the matter could not be heard as the defence persisted with its complaints. The defence outline was later filed on 11 July 2008. On the other hand, the State was notified of the defence's intention to raise a constitutional challenge against the charge that was preferred against the H applicants.

Musakwa J

On 5 August 2008 the constitutional issue was argued before Hlatshwayo J A who reserved judgment. Judgment was handed down on 18 November 2008 whereupon the matter was referred to the Supreme Court. The Supreme Court handed down its decision in which it dismissed the application on 7 December 2009.

Following the Supreme Court decision, the applicants' counsel personally B attended at the offices of the Attorney-General where he requested that the matter be set down during the first term of 2010. He was advised that it was not possible to set the matter down during that term.

In March 2010 the defence was notified of the setting down of the matter for 21 June 2010. During the course of the applicants' incarceration, several C applications for bail have been made. There was also an attempt to re-indict the applicants at the magistrates court a week before 21 June 2010. This was successfully resisted by the defence.

In his heads of argument, Mr *Warara* submitted that in terms of s 66 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] the Attorney-General is *dominus litis* in respect of cases he decides to prosecute. In this respect a D matter may be set down for trial even a year in advance.

He further submitted that in terms of s 160(2) an accused who has been committed for trial but not tried within six months is entitled to have his case dismissed. He also submitted that the provision in question is meant to protect an accused person from lengthy incarceration before he is brought E to trial. The period in question should be six calendar months, calculated in terms of the Interpretation Act [*Chapter 1:01*].

Mr *Warara* further submitted that the reckoning of time is between the time the accused persons were indicted and the trial date. That period should exclude the time the constitutional application was awaiting determination by the F Supreme Court. That is the only time the applicants were not available for trial, as the trial could not be set down whilst the constitutional application was still pending.

The State did not file an opposing affidavit. I must also point out that, despite the State having been directed to file a response to the application by 28 June G 2010, all that was filed were the State's submissions on the day of hearing. The court was made to understand that the officer who previously attended to this matter was indisposed. However, that does not absolve the State from

its obligations. At the end of the day one cannot say the matter was opposed in the manner expected of a contested application, because effectively all the averments that were made against the State in the applicants' founding H

2010 (2) ZLR p123

Musakwa J

A affidavit went unanswered, save for issues of law that were addressed in the submissions.

In its written response, the State in essence raised two aspects regarding the delay in the matter. Firstly, it is contended that the calculation of the period within which the accused persons should have been brought to trial should take into account the times the High Court was on vacation. In this respect, B it was submitted that the High Court was on vacation between 29 November 2009 and 12 January 2010, as well as between 1 April and 10 May 2010. The two vacations are taken as a period that was beyond the control of the Attorney-General, as no trial could be heard during those periods. Allied to this submission is the contention that the six months that entitle a dismissal C of the case must run uninterrupted. In this respect, counsel for the State cited *Mukuze & Anor v A-G* whose correct citation is 2005 (1) ZLR 6 (H).

The other contention is that State witnesses had to be secured first before the case was set down for trial. It was also submitted that between 29 March and 3 April 2010 a suspect was arrested on allegations of abetting the applicants in their attempt to escape from custody. This necessitated a D delay as the matter had to be investigated. In this respect the suspect was tried and convicted on 8 April 2010.

Section 160 of the Criminal Procedure and Evidence Act provides that:

> "(1) Except as is otherwise expressly provided in this Act as to the postponement or adjournment of a trial, every person committed for trial or sentence whom E the Attorney-General has decided to prosecute before the High Court shall be brought to trial on such date as may be determined by the Attorney-General:
>
> Provided that the High Court may, on application by the accused and on good cause shown by him, order that the trial shall take place on an earlier date than that determined by the Attorney-General.
>
> (2) If a person referred to in subsection (1) is not brought to trial after the expiry F of six months from the date of his committal for trial, his case shall be dismissed:
>
> Provided that any period during which such person is, through circumstances beyond the control of the Attorney-General, not available to stand trial shall not be included as part of the period of six months referred to in this subsection."

It is clear from a reading of the above provision that the prerogative of setting down a criminal matter for trial is that of the Attorney-General. The only G time an accused person may be granted an earlier date is upon application before the court.

Subsection (2) does not provide for the reckoning of the six months period. Under such circumstances one has to have recourse to the Interpretation Act [*Chapter 1:01*]. In this respect s 33(6) of the Act provides that:

> H "In an enactment—

2010 (2) ZLR p124

Musakwa J

> (*a*) ... A
>
> (*b*) ...
>
> (*c*) a reference to a month shall be construed as a reference to a calendar month;
>
> (*d*) ..."

The Act does not define a calendar month; the *Shorter Oxford English Dictionary* defines it as:

> "One of the twelve months into which the year is divided according to the B calendar; also the space of time from any date (e.g. the 17th) of any month to the corresponding date (the 17th) of the next, as opposed to a lunar month of 4 weeks."

Taking the above definition in computing time in the present matter, the court will take the date in any particular month to a corresponding date to any other C month. Mr *Mutangadura* submitted that a calendar month is the beginning of the month to the end of that month. If one were to use that method it would present problems with any dates that fall between the beginning and the end of a

particular month. It would leave such periods unaccounted for, which in my view was not the intention of the legislature when s 33 (6) was enacted.

The committal of an accused person for trial before the High Court occurs D when the Attorney-General serves a written notice on a magistrate in terms of s 66(1) of the Criminal Procedure and Evidence Act. This is because, in terms of s 65, no accused person shall be tried in the High Court unless he or she has been committed for trial by a magistrate for the offence charged in the indictment. On committal it is a requirement that the accused person E be served with a list of witnesses the State intends to call, plus a summary of the evidence of each witness sufficient to inform accused of all the material facts upon which the State relies. However, in practice, the State invariably furnishes the accused with copies of the witnesses' statements and any other relevant documents recovered, recorded or compiled during the course of investigations. The effect of committal is that an accused person is detained F in prison in terms of s 66(2).

Mr *Mutangadura* argued that the period of six months must be uninterrupted and, in his written submissions, he referred to *Mukuze & Anor v A-G supra,* in which he quoted the remarks of Uchena J when he commented on s 160. This case was a precursor to another decision of this court reported in 2005 (1) ZLR 79 (H) G *(sub nomine S v Mukuze & Anor)* which involved the same accused persons. In the first matter, the accused persons had filed a court application in which they sought the dismissal of the case against them in terms of s 160(2). Although they had been committed for trial, their matter had subsequently been set down for trial in the Magistrates Court. Although Uchena J did not order a dismissal on the basis that a proper inquiry needed H

Musakwa J

A to be conducted regarding the delay in prosecuting the matter, this is what the learned judge had to say in respect of the proviso to s 160 at p 11:

> "The proviso to s 160(2) and s 160(3) provides for circumstances which interrupt the lapse of the six months period. If the six months period lapses without interruption, then the accused is entitled to a dismissal of his case. It must, however, be noted that this can only be done when the court is satisfied there B is no such interruption. This should be after hearing the reasons why the case did not get to trial within the stipulated period. In my view, dismissal cannot be ordered after a cursory inquiry based on the applicant's affidavits without affidavits from the investigating officer and the prosecutor who handled the case, or an admission by the State that there are valid reasons why the accused's case should be dismissed ..."

C When the same matter had been reinstated before the High Court and an application was made before the criminal court the facts were that accused persons had been remanded in custody in 2002. They were subsequently indicted for trial, the date of which was set for 31 May 2004. Initially the trial failed to commence on account of the absence of State witnesses and *pro Deo* counsel for one of the accused. Later, the trial failed to proceed D because one *pro Deo* counsel had been excused from the case and the trial prosecutor was not in attendance. The matter failed to proceed on another date in October 2004.

Although Mavangira J accepted that the absence of defence counsel was a factor beyond the control of the Attorney-General, she also held that the E unexplained absence of the trial prosecutor would be visited on the Attorney- General. Commenting on s 160, she had this to say at p 86:

> "I thus find that s 160(2) is meant to protect accused persons from being unreasonably kept under committal for trial for longer than six months when the trial has failed to take place during that period. It is also, in my view, meant to ensure that the Attorney-General ensures that trials of accused persons committed F for trial are expeditiously conducted. There must be a balancing of the interests of society vis-à-vis the interests of the accused person. Indeed, our constitution recognizes the right of an accused person to be afforded a fair hearing within a reasonable time. In my view, s 160(2) was enacted in that spirit and against such backdrop. But s 160(2) does not entitle the applicants to a discharge or acquittal nor does it relate to the running of prescription. It merely relates to the release from committal."

G In the present matter I hold that from the time the applicants were committed for trial on 4 June 2008, the six months within which they should have been brought to trial immediately commenced to run. Between that date and when the constitutional application was heard, the matter could not be tried because the defence had not been furnished with certain documents which H were listed or described in correspondence addressed to the prosecution.

Musakwa J

The prosecution did not reply to the correspondence, save that the requested A witnesses' statements were made available a few days before the date of trial. In my view, the period between committal and the hearing of the constitutional application should be counted as part of the six months within which the applicants should have been tried. This is because the Attorney-General cannot be heard to argue that those were circumstances beyond his control. B The two cases I have referred to did not deal with the issue of reckoning of six months or the effect of interruption of that period. In my view, the remarks by Uchena J do not mean the six months must run uninterrupted and that any period preceding such interruption must be discounted. I say so because there would not have been the need for the proviso to subs (2). What it means then is that, if the aggregate period between an accused's C committal and date of trial exceeds six months, even though interrupted by some other circumstances which are beyond the control of the Attorney- General, he is entitled to a dismissal.

I am fortified in my view by a phrase in the proviso, *viz.* "not available to stand trial". When an accused person is committed for trial he automatically becomes available for trial. The only time he is not available for trial would D be, for example, if he is too ill or when the trial process is interrupted by some other process, like an application for referral of a constitutional issue to the Supreme Court. Even when the State contends that at some stage investigations had to be conducted in relation to a suspect who attempted E to facilitate the applicants' escape from custody, it cannot be said they were not available to stand trial. In any event, the interruption amounted to only a few days and would thus be inconsequential.

In the same vein, I am not persuaded that the fact that the High Court was on vacation on two occasions cited by the State constitutes a circumstance beyond the control of the Attorney-General. This is because it cannot be said the applicants were not available to stand trial. Whichever way you F consider it, the argument that the court vacation interrupts the reckoning of time is dissipated when one takes into account the definition of a calendar month. I did not hear the State attempt to explain why the case could not be set down for trial during the First Term of 2010. It would not have required the High Court not being on vacation to set down a matter within the six G months that are required by s 160.

In light of the foregoing it is ordered that the case against the applicants be and is hereby dismissed.

Warara & Associates, the applicants' legal practitioners

Attorney-General's Office, respondent's legal practitioners H

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HARRIS v HARRIS 2010 (2) ZLR 127 (S)

Citation	2010 (2) ZLR 127 (S)
Case No	Judgment No. S-11-10
Court	Supreme Court, Harare
Judge	Malaba DCJ, Ziyambi JA & Cheda AJA
Heard	9 November 2009

Judgment 13 July 2010

Counsel Mrs *J B Wood,* for the appellant
P C Paul, for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Family law - *child- abduction - country of child's habitual residence - meaning - when change of residence can be said to have taken place - interests of child - relevance of*

Headnote

D The appellant and respondent were husband and wife. They had married in the United Kingdom, where their child was born. The parties separated and the husband came to Zimbabwe, where his parents lived. By agreement with the wife, he brought the child to Zimbabwe. The agreement was detailed and in writing. It provided that the child would E stay in Zimbabwe for approximately three months, then, provided certain conditions about the wife's accommodation and employment had been fulfilled, he would return to live with his mother in England. After the three month period was over, the mother demanded that the child be sent back. The appellant refused, claiming that the conditions had not been fulfilled. The respondent obtained an order from the High Court F in terms of the Child Abduction Act [*Chapter 5:05*] for the return of the child. On appeal against the grant of the order, the appellant argued

(a) that the retention of the child was not unlawful and that he had not breached the provision of the Hague Convention on Child Abduction;

(b) that the child was not habitually resident in England immediately before the alleged wrongful retention; (c) that the High Court erred in G making findings as to the current law of England by reference to a South African case decided in 2003 and that relevant English legislation was not proved in accordance with art 12 of the Convention; and finally (d) that it was not in the child's best interests to be returned to England, having been in Zimbabwe a long time.

H *Held,* that under art 3 of the Convention, the removal or retention of a child

is unlawful if it breaches the rights of custody attributed to a person A under the law of the State in which the child was habitually resident immediately before removal or retention and at the time of removal or retention those rights were actually exercised or would have been so exercised but for the removal or retention. The rights of custody may arise by operation of law or by reason of a judicial or administrative decision, B or by reason of an agreement having legal effect under the law of the State in which the child was habitually resident immediately before the removal or retention. Here, there was an agreement which authorised the removal of the child from the custody of the mother in England.

Held, further, that whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all C the circumstances of the case. It is one thing to cease to be habitually resident in country A and another to become habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he leaves it with a settled intention not to return to it but to take up long- term residence elsewhere. However, he cannot become habitually resident in another country in a single day: an appreciable period of D time and a settled intention to remain will be necessary to enable him to become so. Here, the child was born in England and lived there up to the time of his removal to Zimbabwe. He must therefore be regarded as having been habitually resident in England until his removal and retention. He was not moved to Zimbabwe with the intention to make E Zimbabwe his home

for an indefinite period. He was going to be here with his father temporarily while his mother made the arrangements referred to in the agreement.

Held, further, that the agreement did not grant exclusive custody to the father.

Held, further, that the interests of the child cannot be used to resist the child's return where the issue of such interest arises because the father F wrongfully retained him. Under art 12 of the Convention, where, at the date of the commencement of the proceedings before a judicial authority, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. In this case, the respondent made the application G within the required time limit, so the question of delay in claiming the return of the child does not arise.

Held, further, that under art 12, proof of the foreign law is not subject to the normal evidential requirements. H

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Legislation considered A

Child Abduction Act [*Chapter 5:05*]

International instruments considered

Convention on the Civil Aspects of International Child Abduction, arts 1, 3, 4, 5, 12, 13(a) & 14

Cases referred to B

Re *A & Ors* [1996] 1 All ER 24

C v C (minor: abduction of: rights of custody abroad) [1989] 2 All ER 465 (CA)

C *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961 (HL)

Chidoda v Mhangaki 1996 (2) ZLR 111 (S)

Croll v Croll 229 F.3d 133 (2nd Cir 2000)

Lewis v Lewis [1956] 1 All ER 375 (PDA)

Macrae v Macrae [1949] 2 All ER 34 (CA).

Case information

D Mrs *J B Wood,* for the appellant

P C Paul, for the respondent

Judgment

Cheda AJA: This is an appeal against the decision of the High Court granting an order in favour of the respondent who claimed the return of a minor child to her from the appellant in terms of the Child Abduction Act E [*Chapter 5:05*] ("the Act") incorporating the Hague Convention on the Civil Aspects of International Child Abduction. The order of the High Court reads as follows:

1. The continued retention of the minor child, B by the respondent be and is hereby declared unlawful. F
2. The respondent be and is hereby directed to return the minor child to the applicant's custody within seven (7) days of the date of this order.
3. The respondent shall pay costs of suit.

The appellant and the respondent were married in the United Kingdom on 21 February 2004. The marriage still subsists but the parties are now living G in separation. There is one minor child of the marriage, a boy named B ("the child").

While the parties were living in separation in England, they arranged that the child would stay with the appellant on week-days and with the respondent on week-ends. This was because the mother was employed whilst the H appellant was not.

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On 24 June 2007, the parties entered into an agreement to provide for A the removal of the child from the United Kingdom to Zimbabwe and his subsequent care and return to the mother.

The agreement provided as follows:

> **"AGREEMENT**
>
> UPON it being recorded that the Father and Mother were married on 21st B February 2004 and there is one child, namely, B and both parties have parental responsibility for B
>
> AND UPON the parties wishing to effect an agreement which will make provision for the future welfare and support of B
>
> AND UPON the Mother and Father agreeing that they will at all times encourage B in relation to the time spent in the care of the other, and to only speak of each C other and each other's respective partners and family in a positive manner to B
>
> AND UPON the Mother and Father agreeing to abide by the terms of this Agreement and not to seek or alter any of the terms of the same save by agreement with one another in writing or a specific Order being obtained from the Court ordering a variation
>
> AND UPON the Mother and Father agreeing that B shall only reside with his D Mother as set out below once the Mother has provided documentary evidence to the Father that she has obtained tax credits for B, found a nursery place for B, found a two bedroom property to live in and found employment in the local area and until this happens and at least until 1 September 2007 in any event B will continue to reside with the Father
>
> AND UPON the Mother and Father agreeing that from the date of this Agreement the Father will be permitted to return to Harare, Zimbabwe with B to reside E with the Father's parents or any other alternative accommodation he secures until the Mother is able to provide a secure home for B as detailed above upon which the Father will return B to reside with his Mother
>
> AND UPON the Mother undertaking that she will from September 2008 provide to the Father details of B's school holidays as soon as they are available AND UPON the Father agreeing to pay for the travel costs involved in exercising F his contact with B
>
> AND UPON the Mother and Father agreeing that subject to their mutual agreement family members may accompany B on such travel until B is old enough to travel alone
>
> AND UPON the Mother and Father agreeing that they will both install audio and visual web cam facilities in their homes G
>
> AND UPON the Mother and Father agreeing that they will inform the other when a new partner has their first contact with B
>
> AND UPON the Father agreeing that he will allow B to spend some time with the Mother's family when B is in Zimbabwe
>
> IT IS HEREBY AGREED THAT:
>
> 1. Subject to the provisions above, B will reside with his Mother. H

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> 2. For Christmas A 2007 B will stay with his Father for a period of three weeks from approximately 15 December 2007 to 5 January 2008. The precise dates, times and locations of contact to be agreed between the Mother and Father at least two weeks in advance.
> 3. Until B starts school he shall stay with his Father for the entire duration of the normal end of term school holiday periods in Christmas, Easter and Summer (not including half term holidays). The dates, times and locations of contact to be agreed between the Mother and Father at least two weeks in advance.
> 4. Once B has started school, B shall stay with his Father for the entire duration of B's end of term school holidays in Christmas, Easter and B Summer (not including half term holidays). The dates, times and locations of contact to be agreed between the Mother and Father at least two weeks in advance. C
> 5. The Mother shall make B available for the following indirect contact with his Father:
>   a. Webcam and/or telephone contact on not less than 2 occasions per week.
>   b. Webcam and/or telephone contact on B's D birthdays, the Father's birthday, Father's Day, Christmas Day and on other special occasions.
> 6. The mother shall

a. Notify the father of any emergency concerning B and of any health issue that results in him being absent from school.

b. Notify the Father of any special events in B's life (such as Sports Day) in sufficient time for the father to attend such event if he so wishes. E

7. The Father shall

a. Notify the Mother of any emergency or hospital admission concerning B or of any health issue necessitating treatment by a GP whilst B is in his care.

b. Make B available for contact with his Mother by webcam and/or F telephone on no less than 2 occasions per week and on any special occasions when B is in his care.

8. The Father will have such further direct or indirect contact with B as may be agreed between the parties."

On 17 July 2007, the appellant brought the child to Zimbabwe. On22 October 2007, about three months and five days later, the respondent demanded G that the child be returned to her in the United Kingdom as she had met the conditions agreed to in their agreement. The appellant refused to return the child. Thereafter, there was an exchange of correspondence between the legal practitioners of the parties.

The appellant's reasons for refusing to return the child to the respondent can H be summarized as follows:

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(a) she had not satisfied all the conditions set in the agreement, in particular A she had not furnished documentary evidence to show that she had obtained tax credits in respect of the child; the document in regard to the nursery school into which the child may be enrolled was patently insufficient and uninformative; the document purportedly substantiating that she had secured a two bed-roomed property to live in was incomplete as some B pages were missing; the lease did not reflect the respondent as the tenant and so there was no security of tenure in respect of the respondent; the employment she allegedly secured was not anywhere near where she lives; she would find it absolutely impossible to provide properly and fairly for her son vis-à-vis his legitimate expectations of secure and permanent accommodation, food and clothing, transport, medical and C dental provisions etc.

(b) at all material times he had custody of the child and had exercised full custodial rights in that capacity.

(c) the Hague Convention was not applicable to the matter.

(d) she was unlikely to be able to afford the rent of the flat to which she and her partner were joint tenants. D

(e) it was not in the best interests of the child to be returned to England.

The respondent was compelled to approach the High Court to seek an order for the return of the child. On 18 June 2008 the respondent made an application to the High Court for an order for the return of the child in terms of the Act.

The above issues were argued at the High Court after which a decision E including the order referred to earlier was made.

The appellant now appeals against that decision on the following grounds:

1. The court *a quo* erred in finding that the Convention on Civil Aspects of Child Abduction was applicable *in casu* and erred more particularly:

(a) in finding that the child was not habitually resident in Zimbabwe F at the time of his alleged unlawful retention.

(b) In finding that the respondent had rights of custody in respect of the child for purposes of the Convention notwithstanding the fact that she did not have the care of his person.

2. Alternatively to para 1, *supra,* the court *a quo* erred in finding that the applicant had breached rights of custody attributable to the respondent G under the law of England and erred more particularly:

(a) in making findings as to the current law of England by reference to a South African case decided in 2003;

(b) in relying on an agreement between the parties that had not been shown to have legal effect under English law; H

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(c) in finding that A the agreement between the parties clearly stated that they had joint custody of the child;

(d) in finding that the respondent had complied with the terms of the agreement between the parties and, in so doing, failing to take cognizance of the fact that the lease gave the respondent no security of tenure after the expiry of a six-month term. B

(e) In any event, the court *a quo* erred in finding that the appellant had not invoked Article 13 of the said Convention, alternatively, having regard to the current circumstances of the child and the parties, misdirected itself in failing to exercise the discretion vested in it in terms of Article 13(a) by reason of the fact that the respondent was C not exercising rights of custody at the time of the alleged unlawful retention of the child.

The appellant's argument at the High Court, and on appeal, was that the respondent did not satisfy all the conditions of the agreement. However, the respondent furnished the appellant with documentary proof of a lease D agreement for her accommodation, a letter from a nursery school where she had secured a place for the child, confirmation of employment as a credit control manager and a copy of her pay slip. The respondent could not produce proof of tax credits for the child because that would only be possible once the respondent started living with the child. The appellant appreciates this position and he cannot insist that the tax credits be provided as a condition E precedent to returning the child to the respondent. The argument that the respondent has no security of tenure is unfounded because contrary to his claim that the lease is in the name of another person, the respondent's name is on the lease agreement. The fact that it is referred to as a short hold lease is irrelevant because it is common knowledge that most leases start with F a short term then get extended. In this case the lease agreement shows in Clause 16 that it would continue until it is ended by either party.

There is nothing to suggest that the departure of one partner from the property terminates the rights of the other because clause 1:1:4 of the lease agreement recognizes that the property can be leased by one or more persons jointly and severally. The rental for the property is less than half of G the respondent's income, and if it is shared, the respondent will only pay a much smaller amount. There is therefore no basis for the fear that she will not afford the rental.

The appellant claimed that the removal of the child was not unlawful and that he had not breached the provision of the Convention on which the case was H based. The Convention on the Civil Aspects of International Child Abduction

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was concluded on 25 October 1980. Zimbabwe is one of the countries that A signed the Convention and incorporated its provisions into domestic law by enacting the Child Abduction Act [*Chapter. 5:05*]. It is therefore a Contracting State in terms of art 4 of the Convention.

Article 1 of the Convention gives the objectives as being:

"(a) to secure the prompt return of children wrongfully removed to or retained B in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States."

Article 3 of the Convention deals with different situations in which the removal or retention of a child is to be considered wrongful. It states that the C removal or retention of a child is to be considered wrongful where:

"(a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, D either jointly or alone, or would have been so exercised but for the removal or retention."

Article 4 defines the child to whom the Convention applies as a child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention ceases to apply when the child attains the age of 16 years. E

It is not disputed that England is a Contracting State. Many cases have been dealt with by the courts of England concerning the abduction, removal or retention of minor children. See Re A *& Ors* [1996] 1AllER24, *C v S* [*1990*] *2* All ER 961, and *C v C* [1989] 2 All ER 465.

Article 3 states that the rights of custody may arise, in particular by operation F of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the State in which the child was habitually resident immediately before removal or retention. In this case, there is an agreement by the parties which authorised the removal of the child from the custody of the mother in England. The question is whether G there was wrongful retention of the child when the conditions agreed upon by the parties for its return to the mother were satisfied.

The appellant argued that the child was not habitually resident in England immediately before the alleged wrongful retention. The issue of habitual residence was discussed in Re *A & Ors supra.* In that case it was held that "habitual residence" required a physical presence in the place or country in H

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A question immediately prior to the wrongful removal which is both voluntary and for settled purposes.

In *C v S supra,* Lord Brandon said at p 965:

> "... it seems to me to be helpful to deal first with a number of preliminary points. The first point is that the expression 'habitual residence' as used in Article 3 of the Convention is nowhere defined. It follows, I think, that the expression B is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question of whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually C resident in country A and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and *settled intention* will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be D habitually resident in country A, but not yet have become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers." (my emphasis)

See also *Macrae v Macrae* [1949] 2 All ER 34 at 36 and *Lewis v Lewis* [1956] 1 All ER 375 at 377.

E In *Croll v Croll* 229 F 3d 133 (2nd Cir) (2000) the United States Court of Appeal, 2nd Circuit Court, dealing with the case of the return of a child under the Convention, agreed with the parties that the child who lived in Hong Kong from her birth until arriving in New York in 1999, was habitually resident in Hong Kong within the meaning of Article 3 of the Convention. F The child in this case was born in England and lived there up to the time of his removal to Zimbabwe. He must therefore be regarded as having been habitually resident in England prior to his removal and retention.

I agree with the appellant that in *Chidoda v Mhangaki* 1996 (2) ZLR 105 (S) "habitual residence" was correctly interpreted to mean a place where G a person moves with the intention of making it his home for an indefinite period. However, that is not relevant to this case. The child was not moved to Zimbabwe with the intention to make Zimbabwe his home for an indefinite period. He was going to be here with his father temporarily while his mother made certain arrangements referred to in the agreement of the parties. This is very clear from the agreement. The arrangement is similar to that of a H parent taking a child for a holiday or visit to another country. The fact that

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both parents agree to such removal does not confer on that parent custodial A rights to the exclusion of the other parent who remains behind.

The appellant argued that he alone had custody of the child. This argument is not supported by the facts of the case. The facts show that custody was shared between the parties. The agreement also confirms that position as it states that both parties had parental responsibility for the child consistent with the B provisions of s 2 of the Children Act 1989 (c. 41) of the United Kingdom.

Article 5 of the Convention provides as follows:

(a) ""rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. C

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

There is nothing to suggest that a mother of a child, by arranging that the father assists in looking after the child of the marriage while she is at work, loses her right of custody. The agreement shows that the right to determine D the place of residence of the child was exercised by both parties when they provided where the child would live while the mother was making arrangements for him, and that once the arrangements were made the child would live with the mother. There was no arrangement granting exclusive custody to the father.

The argument that the coming into operation of the agreement had to be E determined by the English courts is irrelevant. The appellant has not shown why the English courts would not uphold an agreement that was entered into in that country.

The appellant argued that the respondent was seeking to alter the *status quo* by the order she was seeking because his home is no longer in England and F it is not in the best interests of the child to be returned to England. The fact that the father's home is no longer in England does not affect the child. The arrangement under the agreement shows that England was intended to be the child's home where he would live with his mother and even start going to a nursery school there. No similar arrangement was made for him in Zimbabwe. G

The interests of the child cannot be used to resist his return where the issue of such interest arises because the father wrongfully retained him. In *C v C* [1989] 2 All ER 465 (CA) at 471 Butler-Sloss LJ, dealing with the allegation that the returning of the child would expose it to physical or psychological harm quoted from Re.4 [1988] 1 FLR 365 at 372 as follows:

> "The intendment of Article 13(b) cannot be that the judicial or administrative H

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> A authority of the requested State is to be blinkered against a sight of the practical consequences of the child's return."

Later at p 471 (b) her Ladyship said:

> "Is a parent to create the psychological situation, and then rely on it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied on by every mother of a young B child who removed him out of the jurisdiction and refused to return."

She went on to say at p 471 (d), quoting from Re E [1989] 1FLR135 at 142:

> "... the whole purpose of this Convention is ... to ensure that parties do not gain adventitious advantage by either removing a child wrongfully from the country of its usual residence, or, having taken the child, with the agreement of any other party who has custodial rights, to another jurisdiction, then wrongfully to retain C that child."

I am of the view that the above observation applies to this case.

Defences that can be raised against a civil action for the return of a child are those provided under Articles 12 and 13 of the Convention. If they are not successfully raised then an order for the return of the child must be made. It D is not enough to simply argue that it is not in the interests of the child to be returned to England without any evidence. There is no evidence that such a young child's welfare would be better served in Zimbabwe, where he lives with relatives, than in England, where he will live with his natural mother.

The appellant did not attempt to leave England with the child before signing the agreement. If he had done so, he would have committed a criminal E offence. He entered into the agreement in order to make his removal of the child legal. In his own affidavit he admits that the removal of the child was in accordance with the agreement of the parties. His attempt to dispute the legality of the agreement is unacceptable. He cannot say that the agreement is not binding, while at the same time

arguing that the respondent did not F comply with the conditions stated in the agreement. He suggested that he thought the respondent would have complied with the conditions of the agreement by the end of August 2007. This was not part of the conditions. The agreement simply says:

> "Until this happens and at least until 1 September 2007 in any event B will continue to reside with the father."

G I understand this to mean that even if all the conditions were met before 1 September 2007, B would continue to live with his father up to that date. In other words, it was not intended that the child would be returned to his mother before that date. It was not a time limit within which the respondent had to satisfy the conditions.

H The appellant argued that it was not in the best interests of the child to be

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returned to England after being in Zimbabwe for a long time. The appellant A overlooked the fact that Article 12 of the Convention provides that where, at the date of the commencement of the proceedings before a judicial or administrative authority, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. In the circumstances, the question B of delay in claiming the return of the child does not arise. In this case the respondent made the application within the required time limit.

The appellant suggested that the Court erred in making findings as to the current law of England by reference to a South African case decided in 2003 and that the Children Act 1989 (c.41) of England was not proved in accordance with Article 12. C

Article 14 of the Convention answers this issue by providing for judicial notice to be taken of the law of the State where the child habitually resides as follows:

> "In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested D State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable."

The appellant said the court *a quo* failed to exercise the discretion vested in it by Article 13(a). This article provides grounds for refusal to return of E child as follows:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -
>
> (a) the person, institution or other body having the care of the child was not F exercising the custody rights at the time of removal or retention or had consented to or subsequently acquiesced in the removal or ..."

The above provision does not assist the appellant as the respondent's exercise of custody was never relinquished when the parties entered into the agreement.

Once it is found that the respondent was exercising her right of custody and G would have been exercising it had it not been for the wrongful retention, Article 13(a) would not apply.

The appellant said the respondent first based her case on the alleged right of custody then changed and claimed sole custody. This is not correct. She said custody was shared. The wrongful retention deprives her of that custody.

The argument by the appellant that the agreement is not valid would mean H

A that the child's removal was a criminal offence in which case it would still be necessary to order his return to England.

I agree with Mr *Paul* that the court *a quo* was correct in its decision that the retention of the child is wrongful within the meaning of the Convention. It is, however, necessary to amend para 2 of the court *a quo's* order to read:

B "The respondent be and is hereby ordered to permit the return of the child to the United Kingdom within seven days of the date of this order."

Accordingly, the appeal is dismissed with costs.

Malaba DCJ and Ziyambi JA concurred.

C *Atherstone & Cook,* appellant's legal practitioners

Wintertons, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/TACHIONA & ANOR v RAILWAYS OF ZIMBABWE 2010 (2) ZLR 140 (H)

TACHIONA & ANOR v RAILWAYS OF ZIMBABWE 2010 (2) ZLR 140 (H)

Citation	2010 (2) ZLR 140 (H)
Case No	Judgment No. HB-61-10
Court	High Court, Bulawayo
Judge	Ndou J
Heard	2 June 2008
Judgment	15 July 2010
Counsel	*B Ndove,* for the plaintiffs *T Sibanda,* for the defendant
Case Type	Stated case
Annotations	No case annotations to date

Flynote

Carrier - *liability - carriage by land - goods lost through gross negligence of carrier or through theft by its employees - carrier's liability - extent to which carrier may exempt itself from liability* D

Contract - *carriage - clause limiting carrier's liability - need to bring such clause to other party's attention - effect of failure to do so adequately*

Contract - *carriage - when a consumer contract - unfair contract - carrier limiting amount of compensation to a sum based on weight of item carried - contact expressed in language not readily understood by other* E *party - contract referring to another document - information being conveyed in vague and uninformative fashion*

Headnote

The plaintiffs entered into a contract of carriage with the defendant in terms of which the defendant was to transport two pieces of furniture on behalf of the plaintiffs from Harare to Bulawayo. One only piece was delivered; F the other was probably stolen from the defendant in transit by the defendant's employees. The plaintiffs claimed the current market value for the lost item, as compensation; alternatively, they claimed specific performance. The consignment note that was

issued to and signed by the first plaintiff for the transportation of the goods in question had a G provision to the effect that the consignment was in accordance with the bye-laws, regulations and conditions published in the current edition of the Official Railway Tariff Book. This book was not shown to the plaintiff at the time. The defendant claimed that the amount of compensation due was based on the item's weight, and tendered an amount which was below the item's market value. The plaintiffs argued that, while they H

A voluntarily signed the consignment note, the consignment note did not contain enough details concerning the issue of compensation and, in any event, the contractual terms were unfair, unreasonable and oppressive and thus unenforceable against them.

Held, that while carriers of goods may contract out of the strict liability imposed on them by the common law or by contract limit their liability, B the clause exempting the carrier from liability must do so in clear terms, with express reference to negligence. In the absence of such clear terms, the clause is to be construed as relating to a different kind of liability and not to liability based on negligence. The excluding or limiting term must be brought to the attention of the party against whom its protection C is sought or otherwise be within his knowledge. Whether or not the plaintiffs could be taken to be aware of the term, the defendant could not exempt itself from liability for theft by its employees. Theft or loss of a large item like that in question could only be attributed to "gross negligence or wilful malfeasance" as defined in the Tariff Book, and the defendant could not, therefore, be exempted from liability.

D *Held,* further, that this contract of carriage was a consumer contract as defined in s 2 of the Consumer Contracts Act [*Chapter 8:03*]. Section 5(1) of the Act allows a court to find a consumer contract to be unfair if it excludes or limits the liabilities of a party to an extent that it is not reasonably necessary to protect its interest, if it is contrary to commonly accepted standards E of fair dealing or if it is expressed in a language not readily understood by the other party. The current contract was unreasonably oppressive, in that it contained a provision that sought to deny the plaintiffs adequate compensation for their goods. The Tariff Book sought to quantify the value of compensation to be paid in respect of goods lost or damaged by F means of mass. This method was unreasonably oppressive, as mass alone is not a suitable standard used in evaluating assets. Further, the contract limited the defendant's liability more than was reasonably necessary, as it resulted in the owners of goods being transported not getting real compensation in the event of loss or damage. Finally, the terms of the agreement as contained in the Tariff Book were conveyed to the other G party in a bad, vague and less than informative fashion.

Legislation considered

H Consumer Contracts Act [*Chapter 8:03*], ss 2 & 5(1)

Ndou J

Cases referred to A

Canada Steamship Lines Ltd v Regem [1952] 1 All ER 18 (HL)

Cotton Mktg Bd v NRZ 1988 (1) ZLR 304 (S)

Jiawu Manufacturers v Mitchell Cotts Freight Zimbabwe (Pvt) Ltd 2003 (2) ZLR 369 (H)

Lewis v Rhodesia Rlys 1921 SR 80

Micor Shipping (Pty) Ltd v Treger Golf & Sports Ltd 1977 (2) SA 709 (W) B

Radar Holdings Ltd & Anor v Eagle Insurance Co Ltd 1998 (1) ZLR 479 (H)

Strydom v Strydom 2003 (1) ZLR 379 (H)

Tubb (Pvt) Ltd v Mwamuka 1996 (2) ZLR 27 (S)

Case information

B Ndove, for the plaintiffs C

T Sibanda, for the defendant

Judgment

Ndou J: The parties have agreed that their dispute be resolved in terms of a stated special case pursuant to the provisions of Order 29 r 199 of the High Court Rules 1971. The parties concurred in a special case for the opinion of this court. The plaintiffs entered into a carriage contract with the defendant D in terms of which the defendant was, for a fee, to transport on behalf of the plaintiffs from Harare to Bulawayo one teak wardrobe and one three-piece teak room divider. The defendant only managed to deliver the wardrobe but has failed to deliver or account for the room divider which appears to have been lost by or stolen from the defendant in transit. The plaintiffs are E claiming the current market value for the lost room divider as compensation. Alternatively, the plaintiffs claim for an order that the defendant specifically performs by delivering to them, the room divider tendered for transportation. The consignment note that was issued to and signed by the first plaintiff for the transportation of the goods in question had a provision to the following effect. F

> "Received and forwarded by ...
>
> The under-mentioned goods to the said destination in accordance with the Bye- Laws, Regulations and Conditions published in the current edition of the Official Railway Tariff Books (or any amendment thereof or supplement thereto) of the administration specified above or regulations of any other Railway Administration over whose lines the goods may travel to reach their destination, and it is agreed G that the said conditions and regulations shall be applicable to this contract in the same manner as though they were fully sent out herein.
>
> Signed by the Sender"

It is beyond dispute that neither the Bye-Laws, nor the Regulations nor the Official Railway Tariff Books referred to above, were shown to the first H

A plaintiff at the time of the signing of the consignment note. The first plaintiff, however, had the option of requesting such documents from the defendant. It is common cause that the defendant's insurance tariff for lost goods is based on the mass/weight of the lost goods for ordinary consignments and also, on the amount paid for insured consignments. *In casu,* the quantified amount for compensation for the plaintiffs' room divider is $3 282 363, an B amount which is below the current value of the lost room divider, even at the time of the loss.

The defendant accepts liability only to a limited amount in the sum of $3 282 363, which is the amount calculated in terms of its official insurance tariff.

C **The dispute**

On the one hand, the amount tendered as compensation for the lost room divider is below the market value of the piece of furniture, but the defendant maintains that such an amount is contractually fair and binding against the plaintiffs who freely and voluntarily signed the consignment note.

D On the other hand, whilst the plaintiffs accept that they freely and voluntarily signed the consignment note, they maintain that the consignment note did not contain enough details concerning the issue of compensation and, in any event, the contractual terms are unfair, unreasonable and oppressive and hence unenforceable against them.

E It is trite law that while carriers of goods may contract out of the strict liability imposed on them by the common law or by contract limit their liability, the clause exempting the carrier from liability must do so in clear terms, with express reference to negligence. In the absence of such clear terms, the clause is to be construed as relating to a different kind of liability and not to liability based on negligence: *Cotton Marketing Board v NRZ* 1988 (1) ZLR 304 (S) at 324-325; F *Canada Steamship Lines Ltd v Regem* [1952] 1 All ER 18 (HL) and *Lewis v Rhodesia Railways* 1921 SR 80. The defendant's original Tariff Book and Regulations fell foul of the above principle. The defendant has since changed its Tariff Book and Regulations to specifically include negligence. In clause (5)(e) of the current Tariff Book it is provided:

> "The phrase 'at the risk of the other', 'at the sole risk of the owner', 'at owners' G risk' and any other phrases in this Tariff Book, the purport of which is that the risk of damage to or loss of goods in transit being carried by the Railways or in storage or being kept by the Railways for any reason and whether or not for a fee or charge levied by or paid to the Railways, is to be a risk by the owner, consignor or consignee of

such goods, shall be so construed as to absolve the Railways of any and all responsibility for loss of damage to or any detriment H to such goods whilst they are in Railways custody unless such damage, loss

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2010 (2) ZLR p144

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or detriment is due to gross negligence or willful malfeasance on the part of the A Railways or their agents and servants whilst such agents and servants are acting within the course and scope of their duties as such agents and servants. For the avoidance of doubt, no claim against the Railways shall be capable, in circumstances where goods are carried or kept subject to such conditions as aforesaid, of being founded upon ordinary negligence on the part of the Railways or their agents or servants."

It is evident that the above-mentioned clauses are clear on the kind of B negligence that the defendant is exempted from. It is trite that the excluding or limiting term must be brought to the attention of the party against whom its protection is sought or otherwise be within his knowledge: *Micor Shipping (Pty) Ltd v Treger Golf and Sports Ltd* 1977 (2) SA 709 (W) at 713H-714; *Tubb (Pvt) Ltd v Mwamuka* 1996 (2) ZLR 27 (S) at 31F-32A-G and *Jiawu* C *Manufacturers v Mitchell Cotts Freight Zimbabwe (Pvt) Ltd* 2003 (2) ZLR 369 (H) at 376F to 377F. Where, however, an "owner's risk" notice is displayed so conspicuously that a normal person could hardly have failed to see it, an inference that it was seen will be drawn. *In casu,* as alluded to above, the plaintiffs were not shown the excluding or limiting term in the D Tariff Book. The consignment note that the first plaintiff signed alluded to the existence of some limiting or excluding terms in the Tariff Book. Neither the Tariff Book nor the terms thereof were annexed to the consignment note. The defendant's position is that it was available for the other party to see on request. It is common cause that the plaintiffs did not request for it. From the size of the three piece teak room divider, theft by the defendant's employees E is the only probable explanation for its disappearance. The defendant cannot exempt itself from liability for theft by its employees: *Jiawu Manufacturers v Mitchell Cotts Freight supra.* Theft or loss of a big item like a room divider can only be attributed to "gross negligence or willful malfeasance" as defined in clause 5(e) of Tariff Book, *supra,* and the defendant cannot therefore, be exempted from liability. On this finding alone I will rule in favour of the F plaintiffs. If, however, I am wrong in this finding, I find in the alternative that this contract of carriage (by land) is a consumer contract as defined in s 2 of the Consumer Contracts Act [*Chapter 8:03*]. I say so on the basis that the explanation or limiting clause in the Tariff Book is a product of subordinate legislation which cannot limit, alter or amend statutory provisions of the G Consumer Contracts Act: *Strydom v Strydom* 2003 (1) ZLR 379 (H).

In terms of s 2 *supra,* a consumer contract means a contract for sale or supply of goods or services or both in which the seller or supplier is dealing in the course of business. There is little doubt that the defendant is in the business of provision of transport services. This fact is, in any event, admitted in the defendant's plea. It is not disputed that when the defendant so ferried their H

2010 (2) ZLR p145

Ndou J

A goods they were doing so in the course of such business. In the premises the contract between the parties is a consumer contract as defined in s 2. Further, to the extent that the defendant's Tariff Book makes provision for insurance of goods transported in the event of loss or damage, the contract also qualifies to be treated as a contract of insurance. Such a contract has been held to be a consumer contract by this court in B *Radar Holdings Ltd & Anor v Eagle Insurance Ltd* 1998 (1) ZLR 479 (H) at 492E-F.

Section 5(1) gives a court discretion to find a consumer contract to be unfair if it excludes or limits the liabilities of a party to an extent that it is not reasonably necessary to protect its interest, it is contrary to commonly accepted standards of fair dealing or if it is expressed in a language not C readily understood by the other party.

The current contract is unreasonably oppressive, in that it contains a provision that seeks to deny plaintiffs adequate compensation for their goods. The Tariff Book arbitrarily, unreasonably and without just cause seeks to quantify the value or quantum of compensation to be paid in respect of all goods lost or damaged by means of mass or weight. This method is unreasonably oppressive D if one has regard to the fact that weight alone is not a suitable standard used in evaluating assets. Further, the contract limits the defendant's liability more than is reasonably necessary. It results in owners of goods being transported not getting real compensation in the event of loss or damage. In any event, the terms of the agreement as contained in the Tariff Book are conveyed to E the other

party in a bad, vague and less informative fashion as alluded to above. This is not readily understood by the other party: *Cotton Marketing Board of Zimbabwe v NRZ* and *Lewis v Rhodesia Railways supra.* As the contract is unfair in terms of the Act, the plaintiffs are entitled to relief as defined in s 4.

F Accordingly, it is ordered that:

(a) The defendant delivers to the plaintiffs a three piece teak room divider;

(b) Alternatively the defendant pays the plaintiff the current market value of the three piece teak room divider.

(c) The defendants shall pay costs of suit on the ordinary scale.

G *Marondedze, Mukuku & Ndove,* plaintiffs' legal practitioners

James, Moyo-Majwabu & Nyoni, defendant's legal practitioners

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Source:
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MAPLANKA v B A NCUBE HOLDINGS 2010 (2) ZLR 146 (H)

Citation	2010 (2) ZLR 146 (H)
Case No	Judgment No. HB-63-10
Court	High Court, Bulawayo
Judge	Ndou J
Heard	13 July 2009
Judgment	15 July 2010
Counsel	*J Tshuma*, for the plaintiff *S S Mazibisa*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract - *interpretation - time - computation of - clause requiring rent to be paid "within 7 days of the due date" - meaning of - period of computation beginning on first day of period stated*

Headnote

A lease agreement for a piece of land on which there was a filling station D provided that the rent "shall be payable monthly in advance ... on or before the first day of each month." The subsequent clause provided that "In the event of the rent... being unpaid within seven days of the due date ... the owner shall be entitled at his option to cancel the lease forthwith". The lessee

paid the rent for one month on the 8th of the E following month, and the lessor sought to have the contract cancelled and the lessee evicted. The issue was whether the lessor was entitled to this remedy.

Held, that if the language used in the lease agreement is sufficiently clear in fixing the last day of payment, the court will give effect to the clear intention of the parties. On the other hand, if the language used in the F lease is not sufficiently clear or explicit in fixing the last day of payment, the civil method of computation of time must be used, in which case the first day is included in, and the last day excluded from, the computation. "Within seven days of the due date" clearly means that payment is due within the first seven days of each month. The due date being the first G day of the month, it follows that "within seven days" of that date must mean within a period of no more than seven days from due date, including the due date itself. In this respect the phrase "within seven days of due date" is clearly distinguishable and different from the phrase "within 15 days after the same should have become due". The phrase "within seven days of due date" suggests that counting starts from the due date H

Ndou J

A itself. Accordingly, the meaning of "within seven days of due date" is reasonably clear and it refers to the first seven days of the month, that is to say, up to midnight of the 7th day of each month. Consequently, payment of rent on the 8th day of the month would be a breach of the contract of lease, entitling the landlord to cancel the contract. The fact that the delay was merely one day would be wholly irrelevant to the B plaintiff's entitlement to cancel the contract. As soon as the rent is not paid by midnight on the 7th of the month, the landlord acquires the right of cancellation. Whether rent is then subsequently paid does not affect this legal position, except where the acceptance of the rent amounts to a waiver of the right of cancellation.

Cases referred to C

Beck v du Toit 1975 (1) SA 366 (O)

Human v Rieseberg 1922 TPD 157

Joubert v Enslin 1910 AD 6

Middelburgse Stadsraad v Trans-Natal Steenkool Korporasie Bpk 1987 (2) SA 244 (T) D

National Bank v Levson Studios Ltd 1913 AD 213

Phone-a-Worldwide Copy Ltd v Orkinand & Anor 1986 (1) SA 729 (A)

Swart v Vosloo 1965 (1) SA 100 (A)

Tomson v Ross 1947 (2) SA 1233 (W)

Case information

E *J Tshuma,* for the plaintiff

S SMazibisa, for the defendant

Judgment

Ndou J: This matter was commenced by way of summons. At the pre-trial conference the parties agreed to proceed by way of a stated case in terms of F Order 29 Rule 199 of the High Court Rules, 1971. The stated case agreed upon is the following:

> **"1. Outline of agreed facts**
>
> 1.1 Plaintiff is Sally Maplanka, a private individual who resides and does business in Bulawayo. G
>
> 1.2 Defendant is B A Ncube Holdings (Pvt) Ltd, a company which is duly registered in accordance with the laws of Zimbabwe.
>
> 1.3 Plaintiff is the registered owner of a piece of land known as Lot A Old Breweries, Bulawayo Township, Bulawayo, on which there is constructed, *inter alia,* a filling station commonly known as Airport Road Service Station ("the filling station"). H
>
> 1.4 Sometime in or about October 2001 the plaintiff and defendant entered

Ndou J

into a lease agreement in terms of which the plaintiff agreed to let to the A defendant the filling station.

1.5 On or about 1 October 2001 the defendant took occupation of the filling station. Occupation was taken on the strength of an oral agreement between the parties.

1.6 Sometime in or about March 2002 the parties reduced the terms of their agreement to writing. Before signing the agreement the defendant deleted B clause 20 of the draft written agreement and inscribed on the margin "Needs verification".

1.7 The deleted clause 20 was an option clause in terms of which the lease could be renewed for a further period of 3 years at the instance of the defendant provided the defendant notified the plaintiff, in writing, of its desire to exercise such an option by no later than 30 June 2004, otherwise C the option would lapse.

1.8 When presented with the written lease agreement the plaintiff refused to sign it because of the deletion of clause 20.

1.9 Notwithstanding her non-signing of the agreement, the plaintiff allowed the defendant to continue in occupation of the leased premises and continued to receive rent for the property. D

1.10 In terms of the written lease agreement the lease was for a period of 36 months "commencing on 10 October, 2001 and expiring on 30 September 2004**".**

1.11 The parties are agreed that the written lease agreement, even though not signed by the plaintiff, reflects the terms of their agreement serve [*sic*] for clause 20 which was deleted by the defendant. E

1.12 In terms of clause 3.2 of the lease agreement the defendant is bound to pay rent for the premises monthly in advance on the first day of each month. More specifically, clause 3.2(a) and (b) provide as follows:

"(a) The rent shall be payable monthly in advance, without deduction, free of exchange and bank or other charges on or before the first day of each month, at the offices of the agent. F

(b) Should the tenant fail to pay the rent in full by the seventh day of the month for which it is due he [it] agrees that he [it] will be liable to pay on demand 'a late payer's administration charge' levied by the agent."

1.13 Clause 17.1 of the lease agreement states that:

"In the event of the rent of the premises being unpaid within 7 days of G due date or in the event of the tenant committing a breach or disregarding any of the other terms ... then the owner shall be entitled at his [her] option to cancel this lease agreement...."

1.14 By letter dated 2 December 2005, the plaintiff's legal practitioners advised the defendant that the rent for the month of October 2005 had not been paid and that as a result they had been instructed by the plaintiff "to issue summons cancelling ... [the lease agreement]". This was followed up by H

Ndou J

A a letter dated 6 December 2005 in which the plaintiff's legal practitioners advised that "the lease agreement between ... [the defendant and plaintiff] is hereby cancelled."

The letter further demanded that the defendant vacate the premises forthwith and also threatened that, if the defendant did not vacate the premises within 48 hours, summons for eviction would be issued. B

1.15 On21 December 2005, the plaintiff caused to be issued out of this honourable court summons for the eviction of the defendant from the filling station.

1.16 The summons set out the cause of action in para 7 as being the failure of the defendant to pay the rents for the month of October 2005 and to pay timeously the rent for the month of November 2005. C

1.17 In para 8 of the declaration the plaintiff pleaded that the lease agreement had been cancelled by the letters of 2 and 6 December 2005.

1.18 Contrary to the letter of 2 December 2005 and para 7 of the declaration, rent for the month of October was paid timeously. Consequently, it is conceded by the plaintiff that the alleged non-payment of the October rent is not correct and hence the same cannot found a cause of action. D

1.19 The rent for the month of November 2005 was paid on 8 November 2005.

2. Issues for determination

2.1 Whether the payment of the rent for the month of November 2005 on 8 November 2005 entitled the plaintiff to cancel the agreement of lease and if so whether on the facts and the applicable law

the plaintiff validly and effectively cancelled the lease agreement. E

2.2 More specifically, the defendant will contend that this honourable court has no jurisdiction to determine this matter in the light of the provisions of Statutory Instrument No. 678 of 1983.

2.3 Who would pay the costs of this action and, if it is the defendant, whether such costs should be on an attorney-client scale."

At the commencement of this hearing the issue 2.2, *supra,* was withdrawn F by consent.

In its supplementary heads of argument, the defendant raised a further issue which is not part of the above stated case. I propose to deal with the latter last if it is still necessary for me to do so.

The starting point in this matter is clause 3.2(a) of the lease agreement G which provides that:

"The rent shall be payable monthly in advance, ... on or before the first day of each month ..."

The meaning of this clause is plain. It is that the rent is due and payable on or before the first day of each month. However, clause 3 (2)(a) must be read H with clause 17.1 which provides that:

Ndou J

"In the event of the rent.... being unpaid within seven days of the due date A ... the owner shall be entitled at his option to cancel the lease forthwith ..."

The essence of this clause is that the right to cancel the lease agreement for non or late payment of the rent accrues only if the rent due on the first day of each month remains unpaid after the seventh day of its due date. On the agreed facts, it is common cause that the rent for the month of B November 2005 was only paid on 8 November 2005. The legal question to be determined is therefore whether the payment of rent on 8 November 2005 was "within seven days of due date." As alluded to above, the due date of the rent payment is fixed by clause 3.2(a) of the lease agreement as the first day of each month. Thus it is plain that the due date for the rent of November 2005 was 1 November 2005. The defendant paid the November C 2005 rent on 8 November 2005.

It is sometimes unclear which is the last day for payment in cases such as this one, where the lease agreement, instead of fixing an exact date for payment, merely provides that the rent must be paid within a certain number of days of or from or after, a fixed date or day. My understanding of the law in this D regard is the following.

If, on the one hand, the language used in the lease agreement is sufficiently clear in fixing the last day of payment, the court will give effect to the clear intention of the parties. On the other hand, if the language used in the lease is not sufficiently clear or explicit in fixing the last day of payment, in that event the civil method of computation of time is or must be used or followed, E in which case the first day is included in, and the last day excluded from the computation - *National Bank v Levson Studios Ltd* 1913 AD 213 and *Joubert v Enslin* 1910 AD 6 at 25. *In casu,* the question is what exactly is the meaning of the phrase "within seven days of the first day of each month?" Does it mean defendant has seven days "after the first day of the month" or F does it mean "within the first seven days of the month"?

If it means seven days after the first day of the month, then the last day for payment is midnight on the eighth day of each month. On the other hand, if it means within the first seven days of the month, then the last day of payment is midnight of the seventh day of each month. If, on the other hand, the phrase is unclear, the civil method of computation applies and the last G day of payment would be midnight on the seventh day of each month. I hold the view that "within seven days of the due date" clearly means payment is due within the first seven days of each month. The due date being the first of the month, surely it follows that within seven days of that day must mean *within* a period of no more than seven days from due date, including the due date itself. In this respect, the phrase "within seven days of due date" is H

Ndou J

A clearly distinguishable and different from the phrase "within 15 days *after* the same should have become due" which the court had to interpret in the *National Bank* case *supra.* The use of the word *"after"* in the latter clause suggests that you start counting days *after* the due date. But the phrase "within seven days of due date" suggests that you start counting from the due date itself. In the

premises, the meaning of "within seven days of due date" is B reasonably clear and it refers to the first seven days of the month, that is to say, up to midnight of the seventh day of each month. This conclusion is fortified by the fact that it is clear from reading the written lease agreement as a whole that the parties understood and intended the phrase to mean up to midnight on the seventh day of the month. This is borne out by clause C 3.2(b) which provides that

> "should the tenant fail to pay rent by the seventh day of the month for which it is due, he agrees that he will be liable to pay on demand a late payer's administrative charge levied by the agent."

This makes it clear that the parties intended and understood the phrase "within seven days of due date" to mean up to midnight on the seventh D day of the month. Alternatively, even if I am wrong that the meaning of "within seven days of due date" is clear within the context of the lease as a whole, and a reasonably good and thorough argument can be made that it means seven days after the first day of the month, it is my view that, in that event, the meaning of the phrase is not sufficiently clear and therefore the E civil method of computation of time must apply. If that be the case, then, in accordance with the civil method of computation of time, the last payment date was midnight of 7 November 2005. It is significant that in its plea, the defendant concedes that the last date for timeous payment in terms of the lease agreement is the seventh day of the month and hence the plea that the delay of one day is not negligible as to be noticeable.

F All in all, when clause 17.1 is read together with clause 3.2(b), it is clear that its true meaning is that the last date of payment of rent is the seventh day of each month. Consequently, payment of rent on 8 November 2005 is a breach of the contract of lease entitling the landlord to cancel the agreement of lease under the terms of the forfeiture clause, *viz.* clause 17.1. The fact that the G delay was merely one day is wholly irrelevant to the plaintiff's entitlement to cancel the contract. As soon as the rent is not paid by midnight on the seventh day of the month, the landlord acquires the right of cancellation. Whether rent is then paid on the eighth, ninth or tenth day of the month does not affect this legal position, except in those circumstances where the acceptance of the rent amounts to a waiver of the right of cancellation. In the H absence of waiver the right to cancel is unassailable: *Middelburgse Stadsraad*

Ndou J

v Trans-Natal Steenkool Korporasie Bpk 1987 (2) SA 244 (T); *Human v* A *Rieseberg* 1922 TPD 157 at 163 and *Tomson v Ross* 1947 (2) SA 1233 (W).

The next question for consideration is whether or not plaintiff validly cancelled the lease agreement. The written lease agreement does not contain any clause stating the method of cancellation or notification of the cancellation. As a general rule, cancellation must be communicated to the other party: *Swart* B *v Vosloo* 1965 (1) SA 100 (A) at 105G and *Phone-a-Worldwide Copy Ltd v Orkinand & Anor* 1986 (1) SA 729 (A) at 751A-G. It is also a principle of our law that, if cancellation has not been previously communicated, it takes effect from service of summons or notice of motion/application: *Middelburgse Stadsraad* case *supra* at 249A-G. In other words, the institution of proceedings is adequate notification of cancellation. It therefore follows that even if C the cancellation letters of 2 and 6 December 2005 were ineffectual for the reasons stated in the defendant's supplementary heads, or for whatever other reason, the service of summons on 6 January 2006 was, at law, valid and effective notice of cancellation. The fact that the true or correct reason for cancellation was not contained in the letters of 2 and 6 December 2005 D does not affect the matter. What is crucial is that true and valid and correct ground for cancellation was failure to pay timeously the November 2005 rental. That reason or ground is included in the summons and declaration. Admittedly, an additional incorrect ground was added as alluded to above. In *Beck v du Toit* 1975 (1) SA 366 (O) at 368F-G it was stated that:

> "I do not, however, understand the law to be that a party who alleges facts which E disclose more than one breach of contract justifying cancellation must, in addition to stating that he claims cancellation, specifically state that he is cancelling on each ground available to him on pain of being precluded from relying on a particular ground, not expressly stated, to be a ground of cancellation."

It is further stated at 369:

> "I am accordingly of the view that where the applicant has on 28 March 1974 F consistently manifested the attitude that the deed of sale has been cancelled by her, and where she had a valid and undisputed ground for cancellation at the time she instituted motion proceedings for cancellation, she is entitled to rely on such ground even though she has not stated in her affidavit in so many words that she is claiming cancellation on that ground."

Having regard to the above principles, the service of summons on the G defendant, to which summons was attached a declaration which stated a valid and undisputed ground of cancellation, namely non-timeous payment of November 2005 rent, constitutes sufficient and legally valid notification of cancellation of the lease agreement. The fact that the letter of purported cancellation did not include the only valid ground of cancellation, *viz.* non- H

Ndou J

A timeous payment of November 2005 rent, is irrelevant since the summons contained a valid ground of cancellation.

Accordingly, the plaintiff has made out an unanswerable case and is thus entitled to judgment in her favour.

Accordingly, it is hereby ordered that: B

(a) The cancellation of the agreement of lease between the parties be and is hereby confirmed.

(b) The defendant be and is hereby ejected from premises known as Lot A, Old Breweries, Bulwayo Township, also known as Airport Road Filling Station. C

(c) The defendant shall pay costs of suit on the ordinary scale.

Webb, Low & Barry, plaintiff's legal practitioners

Cheda & Partners, defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/HUNGWE & ANOR v MAWEREZA 2010 (2) ZLR 154 (H)

HUNGWE & ANOR v MAWEREZA 2010 (2) ZLR 154 (H)

Citation	2010 (2) ZLR 154 (H)
Case No	Judgment No. HB-49-10
Court	High Court, Bulawayo
Judge	Cheda J
Heard	16 June 2010
Judgment	15 July 2010
Counsel	*L Musika* for the applicants Respondent in person
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Police - *Commissioner of Police - suit against in official capacity - service of process - claims otherwise than in money - personal service on Commissioner not required*

Practice and procedure - *process-service of - claim against the State - claim D against police - when process must be served on Commissioner and when may be served at a police station - claims against Commissioner of Police in his official capacity - claims otherwise than in money - personal service on Commissioner not required*

Headnote

The respondent, a junior police officer, had been convicted of a disciplinary E offence by a police board. An appeal to the Commissioner, the second applicant, failed. The respondent brought the matter on review. The process was served on the first applicant, the president of the disciplinary board, at his office in Bulawayo. There being no appearance for the applicants, the review application was granted. The applicants sought to F have the order set aside, on the grounds that they had not been properly served with the process, as required by r 43B of the High Court Rules 1971. They argued that service should have been on the Commissioner, at his office.

Held, that Order 5 A, under which r 43B falls, applies only to claims against the State where the claim is sounding in money. Any other court process G should be served at any police station for onward transmission to the Commissioner. Indeed, the Commissioner was aware of this, as he had instructed all police stations to forward court papers relating to either review or appeal matters to the force's legal services in Harare. H

2010 (2) ZLR p155

Cheda J

Legislation considered A

High Court Rules 1971 (RGN 1047 of 1971), rr 43A& 43B; Seventh Schedule

Case information

L Musika for the applicants

B Respondent in person

Judgment

Cheda J: This is an application for setting aside a provisional order granted by this court on 13 May 2010 on the basis that the said order was erroneously granted in the absence of the affected party.

The background of this matter is that respondent, a police officer, was C charged with contravention of paragraph 35 of the Schedule to the Police Act [*Chapter 11:10*] as read with s 34 of the said Act. This relates to an allegation that he acted in an unbecoming manner. The full facts are not relevant for these proceedings. He pleaded not guilty but was, however, convicted and sentenced to six day s' imprisonment. He appealed to the second applicant. He however lost the appeal and served his six days' imprisonment. Dissatisfied D with that decision, he applied for review under case No. HC 667/10 wherein he sought to quash the conviction referred to *supra.*

The said application was served on 11 June 2010 on the first and second applicants at Ross Camp, Bulawayo. On the hearing day, there was no appearance and the application was granted.

In the present application, it is the applicants' contention that the E review application was not properly served on them as required by the rules of this court, in particular r 43B, which reads:

> **"43B. Persons upon whom notice and process to be served**
>
> Where a person mentioned in the first column of the Seventh Schedule is the F defendant or respondent in any proceedings to which this Order applies -
>
> (a) the notice of intention to bring the proceedings required by section 5 of the State Liabilities Act [*Chapter 54*] [1]; and
>
> (b) all process by which the proceedings are instituted or by which effect is given to any judgment arising out of the proceedings;
>
> shall be served upon the person specified in relation to the defendant or respondent G in the second column of the Seventh Schedule, and copies of the notice and process shall be served, for information, upon the person or persons specified in relation to the defendant or respondent in the third column of that Schedule".

The Seventh Schedule relates to service of court process upon state officers of which para 4(a) reads:

Cheda J

"Seventh Schedule (Rule 43B) A

Service of Process upon State Officers

Defendant or Respondent Process to be served on Copies to be served,

for information on

1-3 [not relevant]

4. *Minister of Home Affairs* B

(a) in respect of any act or omission by a member of the Police force	Commissioner of Police, or his private secretary, at the Commissioner's office	(a) Director of the Civil Division of the Attorney-General's Office, at the Director's office; C (b) Deputy Secretary (Finance and Administration) of the Ministry of Home Affairs, D at the Deputy Secretary's Office

The question then is, were the first and second applicant properly served in terms of the rules of this court? The first applicant was personally served E at his offices at Ross Camp. That admits of no doubt and accordingly, there was proper service. The respondent argued that r 43B as read with r 43A applies to claims for money only and not any other claims. It was further his argument that the second applicant is aware of this procedure and practice. It is for that reason that he authored a directive through a radio communication F signal which reads:

"FROM COMPOL LEGAL SERVICES.

TO ALL STATIONS CLASS H ZIMBABWE.

RDO BTM 15/09 DATED 30 JULY 2009

SUBJECT: POLICE DISCIPLINARY TRIALS: DENIAL OF APPEALS G

... should the affected party take the matter on review or appeal comma the decision will stand up to judicial scrutiny stop further *comma where the president of a board has been served with court process challenging the convening of a board or an officer has filed his or her appeal with the High Court comma it is directed that the court papers be forwarded to legal services by the most expeditious means possible* stop once a matter is before the High Court comma H

Cheda J

A it is prudent to stay the board proceedings until the finalization of the High Court matter or appeal stop"(my emphasis).

In my view, r 43B, which falls under Order 5 A, should not be read in isolation but with r 43A which reads:

"43A. Application of Order

B This Order shall apply to claims for -

(a) money, whether arising out of contract, delict or otherwise; or

(b) the delivery or release of any goods;

whether or not joined with or made as an alternative to any other claim, where the claims are instituted against -

(i) the State; or C

(ii) the President, a Vice-President or any Minister or Deputy Minister in his official capacity; or

(iii) any officer or employee of the State in his official capacity."

This order is unambiguous; it is as clear as daylight to an extent that he who runs can read. My interpretation of it is that personal service on the D Commissioner is required only where the claim

is sounding in money. Any other court process should be served at any police station for onward transmission to second applicant. This makes sense, as all police stations throughout the country are directly linked to the Police General Headquarters. The second applicant and all other police stations are aware of this practice, hence the radio communication signal of 30 July 2009 directing all police E stations to forward court papers relating to either review or appeal matters to the legal services in Harare.

On issuing these instructions, the second applicant specifically directed his subordinates to expeditiously forward court process to him so that his officers can comply with all the legal requirements. The fact that they probably did F not act timeously is their own shortcoming which cannot be visited upon the respondent.

I therefore find that there was proper service upon both applicants and accordingly there was indeed wilful default on their part. The application is accordingly dismissed.

G *Civil Division, Attorney General's Office,* applicants' legal practitioners

1 Now s 6 of the State Liabilities Act [*Chapter 8:14*]. *-Editor.*

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/CEDOR PARK FARM (PVT) LTD v MINISTER OF STATE FOR NATIONAL SECURITY & ORS 2010 (2) ZLR 158 (H)

CEDOR PARK FARM (PVT) LTD v MINISTER OF STATE FOR NATIONAL SECURITY & ORS 2010 (2) ZLR 158 (H)

Citation	2010 (2) ZLR 158 (H)
Case No	Judgment No. HB-65-10
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	12 January 2010
Judgment	15 July 2010
Counsel	*TA Cherry,* for the applicants Mrs *Samowah,* for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Land - *acquisition - preliminary notice of acquisition - application for confirmation of acquisition withdrawn by Minister - land nonetheless listed in Schedule 7 of Constitution - ownership of land vesting in State D*

Headnote

The applicants were farmers whose farms had been gazetted for compulsory acquisition in terms of s 5(1) of the Land Acquisition Act [*Chapter 20:10*]. Thereafter they reached an agreement with the responsible Minister, whereby the applicants each surrendered part of their agricultural holdings and the Minister agreed to withdraw his application to the E Administrative Court (which at that time had jurisdiction in such disputes) for confirmation of the acquisition. The agreement in each case was then taken to the Administrative Court for it to be made into a court order. The effect was that the particular pieces of land were "delisted" and that ownership of the respective pieces of land reverted to the original owners, F the applicants. In spite of this agreement, the farms were itemized in Schedule 7 of the Constitution as pieces of land which constituted land referred to in s 16B (2)(a)(i) of the Constitution.

The applicants argued that their pieces of land had been returned to them by orders by consent which were made into court orders by the Administrative Court. They contended that s 16B(2)(a)(i) and (ii) did not vest their G ownership of their pieces of land in the acquiring authority. Since the court orders returned their pieces of land to them, they had acquired real rights in the properties. The Minister had withdrawn the applications to confirm. No legislation can act retrospectively to take away acquired rights. They had worked on and improved the farms on the understanding that the pieces of land were theirs to do as they wished. H

A *Held,* that their pieces of land had been identified in GN 144A of 2002 gazetted on 5 April 2002 and appeared as item 44 in Schedule 7 of the Constitution. There could be no doubt that the legislature took a deliberate effort to acquire the two farms and vested the rights in them to the State. The provisions of s 16B(2)(a)(i) expressly stipulated that the particular farms were acquired and vested in the State with full title. B It is a correct statement of the law that where the legislature wishes an enactment to have a retrospective effect it must expressly say so. Section 16B expressly states that despite the protection enshrined in the Declaration of Rights all agricultural land that was identified prior to 8 July 2005 would be compulsorily acquired for resettlement purposes. C The provisions of s 16B(2)(a)(i) were deliberately intended to take away the prior existing rights of all the owners of agricultural land itemized in Schedule 7. The suggestion by the applicants, that the legislature should have specifically stated the provisions were also meant to overrule orders of court made by consent, was untenable. In terms of s 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*], they were now D occupying, holding or using gazetted land without lawful authority. This did not mean that the respondents could interfere with their possession without due process of law.

Cases referred to

Agere v Nyambuya 1985 (2) ZLR 336 (S)

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

Airport Game Park (Pvt) Ltd & Anor v Kambidza & Ors 2004 (1) ZLR 391 (S)

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

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

Principal Immigration Officer v Parshotam 1928 AD 435

F *Route Toute BV& Ors v Min of National Security & Ors* 2009 (2) ZLR 351 (H)

Spencer & Anor v Min of Lands & Ors 2010 (1) ZLR 144 (H)

Vice-Chancellor, University of Zimbabwe & Anor v Mutasah & Anor 1993 (1) ZLR 162 (S)

Legislation considered G

Constitution of Zimbabwe 1980, ss 16B(2)(a)(I) & 52; Schedule 7

Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*], s 3(5)

Case information

T A Cherry, for the applicants

H Mrs *Samowah,* for the respondents

Kamocha J

Note: compare the decision of Makoni J in *Matanda (Pvt) Ltd v Min of National* A *Security & Ors* 2009 (2) ZLR 340 (H), where it was held that ownership of a piece of land which had been erroneously listed in Schedule 7, notice of acquisition having been withdrawn, remained with the original owner. - *Editor.*

Judgment

Kamocha J: The parties in these two farming matters agreed to have them consolidated and argued at the same time as the facts of both matters are B identical. Both were gazetted for compulsory acquisition in terms of s 5(1) of the Land Acquisition Act [*Chapter 20:10*].

Thereafter they reached an agreement with the Minister of State for National Security, Land, Land Reform and Resettlement in the President's Office - hereinafter referred to as "the Minister"- whereby the respective farmers C surrendered part of their agricultural holdings and the Minister agreed to withdraw his application to the Administrative Court (which at that time had jurisdiction in such disputes) for confirmation of the acquisition. The agreement in each case was then taken to the Administrative Court for it to be made into a court order which was accordingly done. The effect of that was that the particular pieces of land were delisted and that ownership of the D respective pieces of land reverted to the original owners i.e. the respective applicants.

After the respective agreements had been made into consent orders of the Administrative Court, the farms were gazetted and both appear in the 7th Schedule of Constitutional Amendment No. 17 which came into effect on 14 E September 2005. Constitutional Amendment Number 17 introduced s 16B in terms of which the two farms were acquired. The relevant provisions recite as follows:

> **"16B Agricultural land acquired for resettlement and other purposes**
>
> (2) Notwithstanding anything contained in this chapter –
>
> (a) all agricultural land - F
>
> (i) that was identified on or before the 8th July 2005, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], and which is itemized in Schedule 7, being agricultural land required for resettlement purposes; or
>
> (ii) that is identified after the 8th July 2005, but before the appointed day, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land G Acquisition Act [*Chapter 20:10*], being agricultural land required for resettlement purposes; or
>
> (iii) ...
>
> is acquired by and vested in the State with full title therein with effect from the appointed day or in the case of land referred to in paragraph (iii) with effect from the date it is identified in the manner specified in that paragraph." H

Kamocha J

A Both farms were itemized in Schedule 7 as pieces of land which constituted land referred to in s 16B (2)(a)(i) above. They were acquired through General Notice 144 A of 2002 and were itemized as 44.

It accordingly admits of no doubt that the two farms were identified before 8 July 2005, and itemized in schedule 7 and were acquired by and vested B in the State with full title therein with effect from 14 September 2005 - the appointed day.

The law is now settled that, once a farm has been acquired, then the rights over it vest in the State. That being the case, the former owner and title holder has no *locus standi* to approach the court for an interdict because he or she cannot establish a clear right. The lack of *locus standi* prevails even C if a matter is pending before the Administrative Court, because the right would merely be speculative. See *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S) *and Airport Game Park (Pvt) Ltd & Anor v Kambidza & Ors* 2004 (1) ZLR 391 (S).

In casu, the orders by consent were issued by the Administrative Court in2003. D The one relating to Felton Farm, for instance, was issued on 5 August 2003. The orders therefore preceded the

appointed day *id est* 14 September 2005.

However, it was strenuously argued by the applicants that their case was completely different, because their pieces of land had been returned to them by orders by consent which were made into court orders by the Administrative E Court. It was then contended that the constitutional amendments set out in s 16B(2)(a)(i) and (ii) above did not vest their pieces of land in the acquiring authority. They reasoned that, since the court orders returned their pieces of land to them, they had acquired real rights in the properties. The Minister had in fact withdrawn the applications to confirm. The properties were restored to them in terms of the law. No legislation can act retrospectively to take away F acquired rights that have vested in the right holders. They went on to submit that they had worked on and improved the farms on the understanding that the pieces of land were theirs to do as they wished.

It was their belief that, contrary to popular belief, the recent amendment to the Constitution did not make all farming land State land. Their belief is indeed true. Not all farming land was made State land. However, the applicants G were ignoring the fact that the Constitutional Amendment, especially s 16B thereof, provides that agricultural land identified in the *Gazettes* itemized in Schedule 7 of the Constitution, had been acquired. Their pieces of land were identified in General Notice 144 A of 2002 gazetted on 5 April 2002 and appear as item 44 in Schedule 7 of the Constitution. It therefore admits H of no doubt that the legislature took a deliberate effort to acquire the two

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Kamocha J

farms and vested rights in them to the State. The provisions of s 16B(2)(a) A

(i) expressly stipulate that the particular farms were acquired and vested in the State with full title.

The applicants still persisted that their rights over the farms were not retrospectively affected by the provisions of s 16B(2)(a)(i) of the Constitution and cited *Nkomo & Anor v A-G & Ors* 1993 (2) ZLR 422 (S) at 429A-C and B 433 C. At 429A-C Gubbay CJ had this to say -

> "It is a cardinal rule in our law, dating probably from *Codex 1:14:7,* that there is a strong presumption against a retrospective construction. *See Agere v Nyambuya* 1985 (2) ZLR 336 (S) at 338G-339G. Even where a statutory provision is expressly stated to be retrospective in its operation, it is not to be treated as in any way affecting acts and transactions which have already been completed, or C which stand to be completed shortly, or in respect of which action is pending or has been instituted but not yet decided, *unless such a construction appears clearly from the language used or arises by necessary implication-...* Care must always be taken to ensure that the retrospectively is confined to the exact extent which the section of the Act provides ..."(emphasis added).

The learned Chief Justice continued at 433C as follows:

> "This conclusion is underscored when account is taken of the well established D rule that a statute should be interpreted, where possible, so as not to impair or extinguish substantive rights actually vested at the time of its promulgation. Courts will only find that such an inequitable result *was intended when compelled to do so by language so clear as to admit of no other inference. ...* The supposition is that the legislature intends to deal with future events and circumstances and E not with those pertaining to the past."(Emphasis added)

When discussing the fundamental rule of construction in our law in *Agere v Nyambuya* 1985 (2) ZLR 336 (S), Gubbay JA (as he then was) stated that retrospective operation may only be given to an enactment so as to remove or in any way impair existing rights where the enactment is expressly retrospective. At 339A-C he quoted with approval the remarks by Stratford F JA in *Principal Immigration Officer v Purshotam* 1928 AD 435 at 450.

> "Stratford JA succinctly set out this general rule as follows:
>
> > 'The rule of interpretation is well established; *it is that where in express terms or by necessary implication* (which is much the same thing) *the enactment is to have a retrospective effect, that effect must be given to it whatever the consequences may be*. If, on the other hand, the clear intention G to have retrospective effect cannot be extracted from the words used in their context, then the enactment must not be taken to effect pre-existing rights' (emphasis added).
>
> These words echo what Innes CJ said many years earlier in *Curtis'* case, *supra* at 311 namely:
>
> > 'The general rule is that, in the *absence of express provision to the contrary,* H

Kamocha J

A statutes should be considered as affecting future matters only; and more especially that they should if possible be interpreted as not to take away rights actually vested at the time of promulgation. The legislature is virtually omnipotent, but the courts will not find that it intended so inequitable a result as the destruction of existing rights unless forced to do so *by language so clear as to admit no other conclusion'"* (emphasis added).

B The applicants also cited the recent case of *Route Toute BV & Ors v Min of National Security & Ors* 2009 (2) ZLR 351 (H) in which it was stated that a later statute will only be construed as affecting or taking away rights accrued in a previous statute *if the later enactment expressly intends to take away the prior existing rights.* It was indeed held to the effect in, *Vice-Chancellor, University of Zimbabwe & Anor v Mutasah & Anor* 1993 (1) ZLR 162 (S), C that the removal of an existing right *has to be done expressly and not indirectly.*

The Constitution of Zimbabwe recites to the same effect in s 52, thus:

"(52) Alteration of the Constitution

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

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

What is conspicuous in all the case authorities and the Constitution of Zimbabwe is a common thread running through all of them. Where the E legislature wishes an enactment to have a retrospective effect it must expressly say so.

In casu, s 16B(2)(a)(i), quoted above, expressly states that "Notwithstanding anything contained in this Chapter all agricultural land that was identified on or before the 8th July, 2005 in the *Gazette* or *Gazette Extraordinary* under F s 5(1) of the Land Acquisition Act [*Chapter 20:10*] and which is itemized in Schedule 7, being agricultural land required for resettlement purposes, is acquired by and vested in the State with full title therein from the appointed day." Chapter III of the Constitution is the Declaration of Rights and s 16 protects property from any deprivation. But the provisions of s 16B are expressly instructing all citizens of Zimbabwe that despite the protection G enshrined in the Declaration of Rights all agricultural land that was identified prior to 8 July would be compulsorily acquired for resettlement purposes. Schedule 7 contains 107 items of pieces of land that constitute the land referred to in s 16B(2)(a)(i). As has already been mentioned elsewhere in this judgment, the two farms that are under consideration herein are reflected H as item 44.

Kamocha J

It therefore admits of no doubt that the provisions of 16B(2)(a)(i) were A deliberately intended to take away the prior existing rights of all the owners of agricultural land itemized in Schedule 7. The suggestion by the applicants, that the legislature should have specifically stated the provisions were also meant to overrule orders of court made by consent, is clearly untenable. The applicants were just being pedantic. Their rights in those pieces of B land were extinguished with effect from the appointed day, which was 14 September 2005.

The effect of that was that from that date they had no rights over the said pieces of land as the rights were vested in the State. They, in the result, had no *locus standi* to approach this court for an interdict because they cannot establish clear rights. C

In terms of s 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]*,* they are now occupying, holding or using gazetted land without lawful authority. They have now held, occupied or used those pieces of land more than 45 days after the fixed date. They have also remained in occupation of the living quarters for a period in excess of 90 days after their pieces of D land had been identified.

However, although they are occupying gazetted land illegally, they may not be ejected therefrom without due process of law. In order to evict them the State needs to take them before the courts for prosecution. If convicted, the courts would issue eviction orders in addition to sentences to be imposed in E terms of s 3(5) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. In my view, evicting them without following the procedure laid down in s 3 (5) of the Act would be improper. In *Spencer & Anor v Min of Lands & Ors* 2010 (1) ZLR 144 (H) at 148E-149FI had this to say,

"Evicting them without following the procedure laid down in s 3(5) of the Act would, in my view, be improper as the law protects even unlawful possessors. F The legislature was alive to this; that 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 v Commissioner of Police & Anor* 1993 (2) ZLR 329 (H) at 333B to H had this to say about the general principle as stated by G Innes CJ in *Nino Bonino v de Lange* 1906 TS 120 at 122 as follows:

> ' 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 as a preliminary to any inquiry or investigation into the merits of the dispute. H

2010 (2) ZLR p165

Kamocha J

A 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 of property, *however, unlawful his possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his* B *possession 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 respondent's conduct that the occupation* C *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, they had committed acts of spoliation and they were therefore interdicted from further demolishing those premises.

D 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 there from but that does not mean that the respondents can interfere with their possession without due process of law. 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 E mean 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 *Mutsotso & Ors v Commissioner of Police & Ors supra* at 33H to 334A continued thus:

> ' As stated by Diemont J in *Fredericks & Anor v Stellenbosh Divisional* F *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 its own hands ... Such conduct cannot be countenanced or condoned."'

As far as the costs are concerned I hold a view that this is a proper case for each party to bear its own costs for the following reasons. Firstly, the G applicants ought to have realized that the provisions of s 16B(2)(a)(i) were couched in a language so clear as to admit no other conclusion but failed to do so because they chose to be pedantic. Secondly, the respondents ought to have proceeded in terms of s 3(5) as soon as the applicants became illegal occupiers, holder or users of gazetted land. In the result, I would issue the H following order.

2010 (2) ZLR p166

Kamocha J

It is ordered that: A

1. the applicants shall be entitled to remain on their respective pieces of land until they are lawfully evicted pursuant to an order of a court of competent jurisdiction in terms of s 3(5) of the Gazetted Land (Consequential *Provisions)* Act [*Chapter 20:28*]*;*
2. unless the applicants are ejected from the respective farms in terms of B s 3(5) of the Act, no new settlers shall be settled on the said farms.
3. in the event that new settlers have already been settled thereon they shall be evicted forthwith until the applicants are lawfully removed there from in terms of s 3(5) of the Act; and

4. each party shall bear its own costs. C

Webb, Low & Barry, applicants' legal practitioners

Civil Division, Attorney-General's Office, respondent's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/ZIMASCO (PVT) LTD v MARIKANO 2010 (2) ZLR 167 (H)

ZIMASCO (PVT) LTD v MARIKANO 2010 (2) ZLR 167 (H)

Citation	2010 (2) ZLR 167 (H)
Case No	Judgment No. HH-148-10
Court	High Court, Harare
Judge	Mtshiya J
Heard	11 March 2010
Judgment	21 July 2010
Counsel	*K Ncube,* for the applicant Respondent in person
Case Type	Opposed civil application
Annotations	No case annotations to date

Flynote

Employment - *Labour Court - jurisdiction - unresolved dispute between employer and employee about lawfulness of termination of contract of employment - employee holding employer's property - property forming benefits under contract of employment - employer seeking return of* D *property - High Court having no jurisdiction to determine issue*

Practice and procedure -*plea - lis alibi pendens - need for action to be already pending and in respect of same subject matter - action brought subsequently - plea not sustainable*

Headnote

E The respondent was employed by the applicant. As part of his conditions of service, he had the use of a company vehicle and other items of value. The applicant terminated the respondent's employment, purportedly in terms of s 14(4) of the Labour Act [*Chapter 28:01*] and demanded the return of the various items. When the respondent failed to return them, the applicant brought a vindicatory action in the High Court. The F following day, the respondent filed an application in the Labour Court, claiming that he had been unfairly dismissed. At the hearing in the High Court, the respondent pleaded *lis alibi pendens* and argued that the application should be dismissed. In addition, it was argued that the High Court did not have jurisdiction, as the property, having come into the respondent's possession through his employment by the applicant, G could not be

separated from a dispute that relates to his employment. The property formed part of his conditions of service in terms of the contract of employment.

Held, that for the special plea to succeed the respondent had to prove that (a) the action was *already* pending between the parties; (b) the plaintiff H had brought another action against the same defendant; and (c) the

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action was based on the same cause of action and in respect of the same A subject matter. The subject matter in the subsequent application in the Labour Court was unfair dismissal or unfair labour practice, whereas the application in the High Court was for vindication. There was, therefore, no pending matter and therefore the special plea could not stand.

Held, further, that in terms of s 89(6) of the Act, the power to hear and resolve B the labour dispute between the parties *in casu* resided in the Labour Court. The respondent's position was that once that labour dispute was resolved, he would surrender the applicant's assets, if need be. However, if the Labour Court were to rule in his favour, the withdrawal of the assets from him at this stage would lead to serious prejudice on his part, which the applicant could not easily compensate him for. The total cost C to the employer of retaining an employee includes the employee's salary and *all* benefits. It would be untenable, *in casu,* to remove the assets in question from the respondent's disputed contract of employment. The employer's obligation to meet total costs of retaining an employee only vanishes when employment is finally terminated. The labour dispute now before the Labour Court was based a contract of employment. D The assets *in casu* clearly formed part of the respondent's conditions of service. The respondent's disputed contract of employment gave him the right to hold onto the assets until the Labour Court declared that he does not enjoy such a right.

Legislation considered E

Labour Act [*Chapter 28:01*]*,* ss 89(6) & 124

Cases referred to

Nyandoro v CIMAS Case No HH 6652/08

Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd 1999 (2) SA 986 (T) F

Zimtrade v Makaya 2005 (1) ZLR 447 (H)

Case information

K Ncube, for the applicant

Respondent in person G

Judgment

Mtshiya J: This is an opposed application wherein the applicant seeks the following relief:

"1 Respondent shall within two hours of the service of this order on him restore the following property to the applicant;

(a) Mitsubishi Pajero 3.0 Registration Number AAV5956; H

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(b) laptop A HP Compaq 6720;

(c) cellphone Samsung D880

2. The cost of this application shall be borne by the respondent".

The relief sought arises from the fact that upon termination of employment the respondent retained the applicant's property which is being claimed in B the relief quoted above.

It is common cause that, before 18 September 2009, the respondent was employed by the applicant as its Health Services Manager. The respondent's employment was terminated on grounds of ill-

health through an internal memorandum dated 18 September2009. The memorandum reads as follows:

> "I acknowledge receipt of your memo dated l5 September 2009 including medical C reports from your doctor (Mr Macheka) and some clinical psychologist (Mr Broomberg).
>
> The letter from Mr Macheka is very clear in stating that your ill-health is such that you will not be able to resume your job after the legally stipulated one hundred and eighty days. Mr Macheka states clearly, in reference to yourself that:
>
> > 'he needs more time off work for a full resolution of his injuries though at D this point one cannot state a definite time-frame and will depend on future reviews and assessment in 2 months time' You have now exceeded your maximum sick leave in one year period of service (that is, from 11 March 2009 to 14 September 2009). It leaves the company with very little option, therefore, than to terminate your contract of employment forthwith (that is, with effect from 18 September 2009) in accordance with s E 14(4) of the Labour Act [*Chapter 28:01*].
>
> Please note that due to your failure to obtain your doctor's certificate by 17 July 2009 as had been instructed and as reiterated in previous communication to you, you have forfeited your chance of being terminated through the company's medical boarding process.
>
> Your are thus instructed to surrender all company assets in your possession to the F General Manager Shurugwi not later than close of day on Monday 21 September 2009. For avoidance of doubt the said assets include the company PAV, laptop, cellphone and line. Failure to surrender the said company assets will result in the company instituting any legal process necessary to recover any such assets.
>
> Your terminal benefits, which include any outstanding salary and leave days up to 18/09/09 will be deposited into your account provided an exit form has been duly completed clearing you of any outstanding liabilities to the company. G Your pension benefits from both the Zimasco Pension Fund and NSSA will be processed in the normal manner".

Paragraph 6 of the above memorandum refers to the property that the applicant wants the respondent to return to it. The respondent admits that the property belongs to the applicant but refuses to release the property on H the ground of unfair dismissal.

2010 (2) ZLR p170

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In his opposing affidavit the respondent states as follows: A

> "1. I wish to raise a point *in limine.* It is common cause that on 9 October 2009, I instituted proceedings in the Labour Court challenging applicant's decision to terminate my employment contract summarily, see copy of proof of service and copy of the application of review and appeal attached hereto marked annexures (A), (B) and (C).
>
> 2. It is common cause that those proceedings are still pending and have not B been disposed of.
>
> 3. There is, accordingly, litigation pending between the parties on the same cause of action and in respect of the same subject matter in the Labour Court and this honourable court should decline to exercise its jurisdiction as this is purely a labour matter which should be dealt with and has been properly placed before the Labour Court". C

The respondent further declares:

> "I will state that I am in possession of the items pending the settlement of the matter as stated in above Ad Para 3".

The respondent therefore urged the court to dismiss the application.

In his submissions, Mr *Ncube,* for the applicant, stated that the applicant D had satisfied the requirements for an action for vindication. This, he said, was largely so because the respondent himself admitted that the assets he was in possession of belonged to the applicant.

It was submitted that, notwithstanding the provision of s 89(6) of the Labour Act [*Chapter 28:08*] ("the Act"), there was no pending matter in the Labour E Court relating to an employment dispute between the applicant and the respondent. That being the case, it was argued, the respondent's plea of *lis alibi pendens* was misplaced. The undisputed fact was that the applicant's application was filed on 8 October 2009, while the respondent's review application/appeal in the Labour Court was filed on 9 October 2009.

It was therefore the applicant's contention that for the special plea to apply F there must have been an appeal/application already pending in the Labour Court. It was further stated that, even if such an appeal/application were pending, the court had a discretion to order or refuse a stay of

proceedings on the grounds of *lis alibi pendens.* In the exercise of that discretion, the court would have regard to the equities and the balance of convenience in G the matter. *In casu* the applicant's argument was that, with the respondent's contract of employment having terminated on 18 September2009, it wanted its assets restored for the advancement of its business activities. The respondent had no right to hold onto the assets.

It was further submitted that the subsequent action placed before the Labour Court by the respondent was based on an allegation of an unfair labour H

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A practice on the part of the applicant. However, *in casu* the applicant was seeking relief based on the *actio rei vindicatio.* The matters before the courts, according to the applicant, were therefore not based on the same subject matter. That being the case, and based on its "full original civil jurisdiction over all persons and over all matters within Zimbabwe", it was argued, this court had jurisdiction to entertain the application unless that jurisdiction is B clearly ousted in terms of legislation. The Labour Court, it was argued, as a special court, only dealt with matters provided for in the Act. There was no provision for an application for vindication in the Act. This court therefore had the jurisdiction to deal with such an application, it was submitted.

In his supplementary heads of argument filed on his behalf by Chikumbirike C and Associates the respondent argued as follows:

> "1.1. The applicant, through this application, seeks the restoration of certain property that is in the respondent's possession consequent upon the employment relationship that subsists between the parties.
>
> 1.2. It is common cause that there is an ongoing labour dispute between the parties herein, in which the respondent has made an application, to the Labour Court, for a determination of his dismissal as having been unfair. D
>
> 1.3. It is also common cause that the application made by the respondent in the Labour Court, falls within the ambit of the provisions of s 89(1) of the Labour Act, more particularly s 89(1)(a).
>
> 1.4. It also follows therefore, that the provisions of s 89 (6), quoted above, apply to this matter. While the application made herein is one for the restoration of the assets in the respondent's possession as a consequence of E his employment, that issue cannot be related to in isolation from the main application made by the respondent in the Labour Court, which application has the potential of disposing of the whole issue once and for all."

Relying on *Zimtrade v Makaya* 2005 (1) ZLR 447 (H), the respondent submitted that the restoration of the applicant's property could not be separated from the determination of the labour dispute. The matter, it was argued, F fell within the provisions of s 89 of the Act which gives the Labour Court powers to hear and determine issues in labour disputes in the first instance. In support of his case, the respondent quoted from *Zimtrade (supra)* where Makarau J, as she then was, said:

> "Notwithstanding the arguments advanced by *Mr Dondo,* I am of the opinion that G matters relating to suspension from employment, with or without salary, and matters relating to dismissals are specifically within the purview of the Labour Court as these are matters that are provided for in the Act and the regulations made thereunder. There is adequate provision under the Act for setting up machinery to resolve such disputes. *Thus, following my reasoning in the* Sibanda *matter, the jurisdiction of this court is specifically ousted in respect of matters of dismissals and suspensions as these are specifically provided for the Act"* H (emphasis added).

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The respondent went further to state that the same principles alluded to in the A *Zimtrade* case *supra* had been given the same force in *Nyandoro v CIMAS* HC 6652/08 where Makarau JP, as she then was, again said:

> "1.6. I have had occasion to comment on the jurisdiction of this and the Labour Court in *Sibanda & Anor v Chinemhute & Anor* HH-134-04. *In that matter, I came to the conclusion that s 89(6) of the Act takes away the jurisdiction of this and other courts in the first instance in all matters where the Labour* B *Court has been specifically granted jurisdiction*. The meaning that I gave to the section in that judgment was that whatever the Labour Court was specifically empowered to do, it would do exclusively. I remain of the same opinion"(emphasis added).

I now shall deal first with the issue of *lis alibi pendens* (the special plea). Section 124 of the Act provides as follows: C

> "(1) Where any proceedings in respect of any matter have been instituted, completed or determined in terms of this Act, no person who is aware thereof shall institute or cause to be instituted, or shall continue any other proceedings, in respect of the same or any related matter, without first advising the authority, court or tribunal which is responsible for or concerned with the second-mentioned proceedings of the fact of the earlier proceedings." D

The above provision of the law does not apply to the applicant because the proceedings were not in terms of the Act (i.e. *actio rei vindicatio).* This is so also mainly because at the time of instituting these proceedings the applicant was not aware of any proceedings anywhere "in respect of the same or any related matter". Even if the applicant might have been aware, the above E law did not place an obligation on him as indicated in the relevant section because this action was not brought in terms of the Act. In the main, however, what comes out clearly is that there was no pending action/application in the Labour Court relating to the same matter at the time this application was filed on 8 October 2009. The alleged pending matter was only filed on 9 October 2009, presumably as a reaction to this application. F

I fully agree with the applicant that for the special plea to succeed the respondent must prove the following:

> "4.1. That the action is already pending between the parties,
>
> 4.2 That the plaintiff has brought another action against the same defendant.
>
> 4.3 The action is based on the same cause of action and in respect of the same G subject matter."

The subject matter in the subsequent action/application in the Labour Court is unfair dismissal or labour practice, whereas *in casu* the application is for vindication. There was therefore no pending matter as submitted and therefore the special plea cannot stand.

I now come to the issue of jurisdiction. *In casu,* the argument to deny this H

2010 (2) ZLR p173

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A court jurisdiction is largely based on the provision of s 89(6) of the Act which provides as follows:

> "(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)."

It is not in dispute that this application is for vindication and is therefore B not in terms of the Act. However, the respondent argues that the property in question, having come into his possession through his employment by the applicant, that property cannot be separated from a dispute that relates to his employment. The property formed party of his conditions of service as per the contract of employment.

C Indeed in his points *in limine,* the respondent states as follows:

> "1. Respondent will argue that the determination of this has a direct and substantial effect on the outcome of the matter pending in the Labour Court in that the outcome of the matter in the Labour Court will resole the validity of the termination of the employment contract in terms of which the respondent acquired permission of the assets concerned. D Put differently, if the High Court were to rule in favour of the applicant it would have in essence accepted as fact that the respondent's contract of employment was validly terminated by the applicant, yet *that* issue is not before the High Court. Significantly, the High Court will have usurped the powers of the Labour Court to determine the validity of the respondent's employment contract".

E The respondent goes on to state as follows:

> "Respondent admits that applicant is the owner of the assets and that respondent is in possession of the assets.
>
> Respondent will argue that he is in possession of the assets in terms of an employment contract entered into between the parties.
>
> F A copy of the contract is attached.
>
> Respondent will further argue that the said contract of employment was unlawfully and summarily terminated by applicant by letter dated 18 September 2009. A copy of the letter is attached".

A reading of the offer letter of employment will show that clause 20 thereof provides as follows:

G "You will be entitled to purchase a company vehicle of your choice up to a certain value limit. Should you wish to procure a vehicle with a cost price in excess of this limit, this will be approved, provided that the extra sum is paid in cash by yourself at the time of purchase.

All fuel and maintenance costs will be for your account, and your basic salary does include an allowance for fuel for business travel in and around Shurugwi/Gweru.

H You will be entitled to claim for any other prior approved business travel at AA

2010 (2) ZLR p174

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rate, less the portion of the rate for insurance and licensing. A

Full details of the scheme will be available after acceptance of this employment opportunity."

The foregoing clearly shows that the vehicle belonged to the applicant and in his heads of argument the respondent states as follows:

"Respondent admits that the applicant is the owner of the assets and that the B respondent is in possession of the assets".

In para 4.2. of his opposing affidavit the respondent also states that:

"I will state that I am in possession of the items pending the settlement or the matter as stated in above ad Para 3". (Ad Para 3 refers to the settlement of the labour dispute in the Labour Court.)

Furthermore, in item 13 of Annexure J of his opposing affidavit the respondent C states as follows:

"1. Under the contract I was employed, I have first option to purchase my PAV at book value. The policy was revised downwards and therefore should not affect me but new employees.

2. The vehicle which I am holding now, namely a Mitsubishi Pajero AAV D 5956, is subject to that condition."

The above is also alluded to in item 10 of the same annexure where the respondent says:

"Re-imbursement for use of own car after amortizing my last vls (An Isuzu KB 320) E

Basis of Claim

1. Some years ago the vehicle policy was changed from a loan scheme to a company vehicle scheme because of increased maintenance costs
2. One of the clauses was that "*employee on the current loan scheme may at anytime amortise their loan and get onto he new company car scheme* ".
3. I amortised my loan in terms of that policy and procedure. F
4. The policy and procedure was immediately that afternoon changed to read that you needed approval of your general manager to amortize. This was AFTER I had amortized.
5. Despite this I was penalized and *went for 18 months without a company vehicle as required by my contract of employment. I also did not receive any compensation from the company for the use of my own vehicle for the* G *period.*
6. I calculated the financial loss for the period to be USD14790 at prevailing exchange rates."

The same issue of the vehicle is captured in his affidavit to the police, which affidavit is annexure B to the applicant's founding affidavit. In paras 3-13 the respondent states as follows: H

2010 (2) ZLR p175

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"1. ... A

2. ...

3. I am in possession of a Mitsubishi Pajero Reg. Number AAV 5956 registered in the name of Zimasco. I am in possession of a laptop computer belonging to Zimasco.

4. I have a cellphone line 0912286646 issued to me by Zimasco B

5. ...

6. Zimasco officically allocated the vehicle to me.

7. The above goods are subject of a labour dispute, which is still in process

8. Zimasco in turn owes me a lot of money, which is subject of determination in the same labour dispute. C

9. IT IS CATEGORICALLY NOT TRUE THAT THERE IS ANY THEFT INVOLVED.

10. I HAVE NOT STOLEN THE VEHICLE FROM ZIMASCO ANY MORE THAN ZIMASCO STOLE THE MONEY THEY OWE ME FROM ME.
11. I HAVE NO INTENTION OF KEEPING THE VEHICLE ANY LONGER THAN BEYOND THE LEGAL DETERMINATION OF THE MATTER.
12. I AM MERELY KEEPING THE ITEMS IN SAFE CUSTODY AS ZIMASCO IS ALSO KEEPING IN SAFE CUSTODY WHAT I BELIEVE OWE ME.
13. THIS IS A PURELY CIVIL DISPUTE MATTER SUBJECT TO DETERMINATION BY THE JUDICIARY PROCESS OF THE REPUBLIC OF ZIMBABWE."

From the foregoing I am informed that there is indeed a labour dispute still raging in the Labour Court. That fact is not disputed by the applicant. The respondent's position is that, once that labour dispute is resolved, he will surrender the applicant's assets, if need be. I say "if need be" because the Labour Court's decision is not yet known. However, if the Labour Court were to rule in his favour, the withdrawal of the assets from him at this stage would lead to serious prejudice on his part, which prejudice the applicant cannot easily compensate him for *i.e* loss of use of motor vehicle for the period prior to the Labour Court's determination.

I hold the view that the total cost to the employer of retaining an employee includes the employee's salary and *all* benefits. I would, therefore, on that basis, find it untenable, *in casu,* to remove the assets in question from the respondent's disputed contract of employment. The employer's obligation to meet the total costs of retaining an employee only vanishes when employment is finally terminated. The labour dispute now before the Labour Court is based a contract of employment. The assets *in casu* clearly form part of the respondent's conditions of service (in particular the vehicle). In any case,

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the respondent is at liberty to apply to the Labour Court for the continued enjoyment of his full employment benefits until that court makes a final determination on the issue of his dismissal. It would therefore be premature to remove from him the assets that are linked to the labour dispute that he has placed before the Labour Court. To that end, I am unable to distinguish this matter from the *Zimtrade* case *supra* where Makarau J ruled that in certain circumstances "an employee can always raise the defence of a claim of right to possess the property of an employer until he or she is effectively and lawfully disentitled to the property".

We have *in casu* a situation where the respondent is saying: "I was unlawfully dismissed and before the unlawful dismissal I was entitled to the use of the assets which are the subject matter of this application. My case is now before the Labour Court where I am demanding my employment back together with all benefits attaching to my employment".

The applicant has drawn my attention to *Unimark Distributors (Pvt) Ltd v ERF 94, Silvertondale (Pvt) Ltd* 1999 (2) SA 986 (T) at 996 where the following appears:

> "But there can be little doubt that on of its incidents *(dominium)* is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found from whosoever holding it. It is inherent in the nature of ownership that possession of the *res* should be normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some rights enforceable against the owner, e.g. right of retention or a contractual right".*

I agree with the above.

I am, *in casu,* of the view that the respondent's disputed contract of employment gives him the right to hold onto the assets until the Labour Court declares that he does not enjoy such a right. The respondent is not merely saying "I am holding onto the assets because you owe me money". A reading of his affidavit to the police might paint that picture. However, the issue goes beyond that. He is actually saying: "I have a contractual interest in these assets as they form part of my conditions of employment. I shall only release the assets when the Labour Court confirms my dismissal".

I further believe that it is the Labour Court that shall determine whether or not the changed policy relating to vehicles applied to the respondent as alleged by him in his papers. That being the respondent's argument, the issue of a lien does not arise.

My view is that s 89(6), as quoted in this judgment, clearly gives exclusive

Mtshiya J

A jurisdiction to the Labour Court in all labour disputes. Given the wording of that section, I do not see how any other court can seek to place itself as a court of first instance in any labour dispute. Admittedly parties retain the right to follow the arbitration route. Notwithstanding its inherent jurisdiction, I think this court should go a long way to give effect to the legislature's intentions in creating a special court to deal with all labour disputes in the country.

B Clearly, in terms of s 89(6) of the Act, the power to hear and resolve the labour dispute between the parties *in casu* resides in the Labour Court. Indeed, as I have already said, an attempt by any other court, at this stage, to deal with any aspect of the dispute, would certainly amount to interference with the special functions bestowed on the Labour Court by the legislature. C That is the reason why the legislature was quite specific as to clearly state that "No court other than the Labour Court" would have jurisdiction in the first instance to hear and determine matters of this nature. This is a case of dismissal from employment and therefore a labour dispute. I therefore believe that once any other court is satisfied, in a matter placed before it, that the issues for determination therein are entirely anchored on a labour D dispute, then such court should immediately refer the matter to the special court, namely, the Labour Court. Such a move, would, in my view, be in line with the intentions of the legislature as spelt out in the Act. I therefore find merit in the respondent's opposition to this application. The application cannot therefore succeed.

E I accordingly order as follows:

1. The application be and is hereby dismissed.
2. The applicant shall pay costs of suit.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Chikumbirike & Associates, respondent's legal practitioners

* The passage quoted does not appear on p 996. *-Editor*

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Source:
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CHANAKIRA v MAPFUMO & ANOR 2010 (2) ZLR 178 (H)

Citation	2010 (2) ZLR 178 (H)
Case No	Judgment No. HH-155-10
Court	High Court, Harare
Judge	Chiweshe JP
Heard	7 June 2010
Judgment	21 July 2010
Counsel	*L Uriri,* for the applicant *M Kawenda,* for the respondent

Case Type Opposed application

Annotations Link to case annotations

Flynote

Arbitration - *award - setting aside of- award contrary to public policy - meaning - fundamental principle of law being violated - award violating fundamental principle of law of contract - award defiant of logic - arbitrator refusing to accept lawful acknowledgement of debt* D

Headnote

The applicant and the first respondent entered into an agreement in terms of which the applicant advanced to the first respondent a sum of money in foreign currency. As a return on this investment, it was agreed that the applicant would be entitled to 30 per cent of the capital sum invested "each and every month", regardless of the performance of the investment. E Either party could terminate the agreement by giving one month's notice, in which event the first respondent would be required to pay to the applicant the entire compounded capital, plus any outstanding returns before the expiry of the thirty day notice period. At the time the capital sum was advanced neither party had sought exchange control F approval for that transaction as then required in terms of the Exchange Control Regulations, 1996. The first respondent's repayment in terms of the agreement would also have required exchange approval. Following changes to the law in February 2009, the need to seek exchange control approval fell away. The first respondent failed to meet the terms of the agreement both before and after February 2009. The applicant terminated G the agreement on 1 October 2009. However, on 13 October 2009, the parties entered into an acknowledgement of debt, in terms of which the first respondent acknowledged his indebtedness arising from his outstanding obligations under the terminated agreement. As assurance and security of his indebtedness, the first respondent surrendered to the applicant the title deeds of a property registered in his name. The parties failed to agree H

A on the exact amount of money owed by the first respondent and referred the matter to arbitration. The arbitrator (the second respondent) found that as the agreement contravened the Exchange Control Regulations, it was subject to a suspensive condition, the non-fulfilment of which rendered the agreement void, and that any loss must lie where it fell. The applicant sought an order setting aside the award. He contended B that the award was contrary to the public policy of Zimbabwe, *inter alia,* because it was contrary to the substantive law of Zimbabwe.

Held, that in deciding whether an agreement is contrary to public policy, the interests of the community or the public are of utmost importance. Agreements which are contrary to law or morality are contrary to public policy and may not be enforced. The court's power to declare transactions or contracts contrary to public policy C should be exercised with caution and with a view to do justice as between individuals. Public policy upholds the freedom of contract and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom. The power to declare contracts contrary to public policy should thus be exercised D sparingly lest the whole field of contract is thrown into uncertainty as to the validity of contracts.

Held, further, that as to the legality of the agreement, there was no doubt that the agreement was a legal and binding document. The performance of the agreement, however, would require the prior approval of the E Exchange Control authorities. The agreement was therefore subject to that suspensive condition. The arbitrator thus erred in holding that the agreement was void on account of the parties not having obtained Reserve Bank approval in terms of the Exchange Control Regulations.

Held, further, that an arbitral decision can only be held to be contrary to public policy if some fundamental principle of the law or morality or F justice is violated or if it is so defiant of logic or accepted moral standards that the concept of justice in Zimbabwe would be intolerably hurt. It is a fundamental principle of the law of contract that the non-fulfilment of a suspensive condition

does not render the contract illegal or void; it merely suspends the operation of all or some of the obligations of the G contract until the occurrence of a future event. The arbitrator's award violated this fundamental principle of the law of contract.

Held, further, that the arbitrator further erred in that he did not give effect to the terms of the acknowledgement of debt signed by both parties in October 2009, at a time when it was no longer a requirement to seek exchange control authority to transact in foreign currency. His refusal H to recognize the acknowledgment of debt was so defiant of logic or

accepted legal and moral standards that, if upheld, the concept of justice A in Zimbabwe would be intolerably hurt.

Legislation considered

Arbitration Act [*Chapter 7:15*], Schedule, art 34

Cases referred to B

Hattingh & Ors v van Kleek 1997 (2) ZLR 240 (S)

Macape (Pty) Ltd v Executrix Est Forrester 1991 (1) ZLR 315 (S)

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

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

Case information

L Uriri, for the applicant C

MKawenda, for the respondent

Judgment

Chiweshe Jp: On 29 October 2008 the applicant and the first respondent entered into a written agreement in terms of which the applicant advanced to the first respondent the sum of US$100 000 (the equivalent then of two D hundred Old Mutual Ordinary Shares, listed on the Stock Exchange). As a return on this investment, it was agreed that the applicant would be entitled to 30 per cent of the capital sum invested "each and every month", regardless of the performance of the investment. The 30 per cent return was to accrue without deduction each and every month the capital sum remained outstanding E and, in the event that the applicant did not withdraw the 30 per cent return, such outstanding amounts were to accrue to the capital sum as capital. Either party could terminate the agreement by giving one month's notice and, in that event, the first respondent would be required to pay to the applicant the entire compounded capital plus any outstanding returns before the expiry of the thirty day notice period. Any payments still outstanding after the notice F period would accrue a 30 per cent return on investment, which would accrue to capital for each and every month it remained unpaid. Disputes arising from the performance of the agreement were to be referred to arbitration.

It is common cause that, at the time the capital sum of US$100 000 was advanced to the first respondent, neither party had sought Exchange Control G approval for that transaction as then required in terms of the Exchange Control Regulations 1996. Similarly, the first respondent's repayment in terms of the agreement would have required exchange control approval. Following changes to the law in February 2009, the need to seek exchange control approval fell away. The first respondent failed to meet the terms of the agreement before and after February 2009. The applicant then terminated H

A the agreement on 1 October 2009. However, on 13 October 2009 the parties entered into another written agreement. They signed an acknowledgement of debt in terms of which the first respondent acknowledged his indebtedness arising from his outstanding obligations under the terminated

agreement. As assurance and security of his indebtedness, the first respondent surrendered to the applicant the title deeds of stand 2253 Bluffhill Township, a property B registered in his name.

It is common cause that on 17 September 2009 and on 9 October 2009 the first respondent made payments to the applicant, the total sum of which amounted to US$158 000. The parties, however, failed to agree on the exact amount of money owed by the first respondent.

C The parties then referred the matter to arbitration. The arbitration process consisted of a claim by the applicant for payment in full in terms of the agreement between the parties and a defence by the first respondent, who argued that the agreement constituted a loan and not an investment, and as such fell foul of the Money Lending and Rates of Interest Act [*Chapter 14:14*], as it bore interest rates above the stipulated levels. The first respondent also D argued that the agreement was illegal as it contravened the Exchange Control Regulations 1996 as no authority had been obtained by either party to deal in foreign currency. For these reasons, the first respondent argued that the agreement was against public policy and that therefore the arbitrator had no jurisdiction to determine the matters under it.

E The arbitrator ruled that the agreement was not a loan but an investment and that, as such, the agreement was not against public policy as the *in duplum* rule did not apply. He, however, held that the agreement contravened the Exchange Control Regulations 1996, in that authority to pay in foreign currency had not been sought from the Reserve Bank. He was of the view that, as a result, the agreement was subject to a suspensive condition, the F non-fulfillment of which rendered the agreement void. On that basis he dismissed the claim and held, further, that as the parties were both guilty, the *in pari delicto* rule applied and the loss must lie where it falls.

Aggrieved by that arbitral decision the applicant approached this court by way of the present application. He seeks an order to the following effect:

G "It is declared that:

1. Paragraph6.2 of the arbitration award handed down by the second respondent at Harare on 13 March 2010 in the arbitration proceedings between the applicant and the first respondent is contrary to the public policy of Zimbabwe.
2. Consequently, it is ordered that the said para 6.2 of the arbitration award aforesaid be and is hereby set aside in terms of art 34(2)(b)(ii) of the Uncitral H Model Law in the First Schedule to the Arbitration Act [*Chapter 7:15*].

Chiweshe JP

3. Consequently it is ordered further that the matter be and is hereby remitted A back to the second respondent for the computation of the amount due to the applicant under the investment agreement between the applicant and the first respondent.
4. The first respondent shall pay the costs of this application only if the application is opposed."

Is the arbitration award contrary to the public policy of Zimbabwe? In terms B of art 34 of the Uncitral Model Law, a party may apply to the High Court for the setting aside of an arbitral award. Subarticle (2) thereof provides:

"(2) An arbitral award may be set aside by the High Court only if –

(a) ...

(b) the High Court finds that - C

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

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

The applicant contends that the award is contrary to the public policy of Zimbabwe *inter alia* because it is contrary to the substantive law of Zimbabwe. In terms of art 34 (5) of the Uncitral Model Law, an award is in conflict with D the public policy of Zimbabwe if the making of the award was induced by fraud or corruption or a breach of the rules of natural justice occurred in connection with the making of the award. However, the provision makes it clear that public policy may be impinged for reasons other than the above, by providing that the generality of art 34(2)(b)(ii) shall not be limited to E these categories.

In *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A), the court had occasion to deal with the nature and extent of the elusive concept of "public policy". In deciding whether an agreement is contrary to

public policy, the interests of the community or the public are of utmost importance. Agreements which are contrary to law or morality are contrary to public policy and may not be F enforced. The court's power to declare transactions or contracts contrary to public policy should be exercised with caution and with a view to do justice as between individuals. It must be borne in mind that public policy upholds the freedom of contract and requires that "commercial transactions should not be unduly tramelled by restrictions on that freedom." The power to declare G contracts contrary to public policy should thus be exercised sparingly, lest the whole field of contract is thrown into uncertainty as to the validity of contracts.

In *ZESA v Maphosa* 1999 (2) ZLR 452 (S) Gubbay CJ had this to say at 465:

> "The approach to be adopted is to apply the public policy defence ... restrictively in order to preserve and recognize the basic objective of finality in all arbitrations: H

Chiweshe JP

> A and to hold such defence applicable only if some *fundamental principle of the law or morality or justice* is violated"(my emphasis).

At 466 he said:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside ... Where however the B reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it."

In this case, I agree with the arbitrator's decision in holding that the agreement C was not a loan but an investment, in terms of which a return on investment, rather than interest accruing on a capital sum loaned, was payable. As to the legality of the agreement, there is no doubt that the agreement was a legal and binding document. It is true that its performance that would require the prior approval of the exchange control authorities. The agreement was therefore D subject to that suspensive condition. In *Hattingh & Ors v van Kleek* 1997 (2) ZLR 240 (H) the court held as follows:

> "It seems to me pertinent that s 8 of the Regulations only prohibits, but does not declare void or illegal, the transactions enumerated therein."

In *Macape (Pvt) Ltd v Executrix, Estate Forrester* 1991 (1) ZLR 315 (S) at E 321 it was held by McNally JA that

> "The contract to pay is lawful. Actual payment in pursuance of the contract is unlawful, without permission. There is no reason why the court should not order payment, subject to the condition that authority is obtained. I must make it clear that this judgment in no way inhibits the Reserve Bank in the exercise of its discretion. It is entirely for the Reserve Bank to decide whether or not to authorize the payment. If it decides not to do so the payment may not be made. F The contract remains lawful. Payment will then have to await a change either in the law or in the policy of the Reserve Bank."

In other words, "the plaintiff is entitled to his judgment and Treasury permission is a hurdle which can be jumped when it is reached."

In my view, therefore, the arbitrator erred in holding that the agreement was void on account of the parties not having obtained Reserve Bank approval in G terms of the Exchange Control Regulations. The regulations impose a punitive penalty; they do not declare void or illegal transactions made without that approval. If this view is correct, does that mean that the decision arrived at by the arbitrator, being erroneous at law, is contrary to the public policy of Zimbabwe? The decision can only be held to be contrary to public policy if H "some fundamental principle of the law or morality or justice is violated"

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or if it is so defiant of logic or accepted moral standards that the conception A of justice in Zimbabwe would be "intolerably hurt."

It is a fundamental principle of our law of contract that the non-fulfillment of a suspensive condition does not render the contract illegal or void. A suspensive condition merely suspends the operation of all or some of the obligations of the contract until the occurrence of a future event. Its non- B

fulfillment does *not per se* vitiate the contract. The arbitrator's award violates this fundamental principle of the law of contract in Zimbabwe.

More significantly, the arbitrator erred in that he did not give effect to the terms of an acknowledgement of debt duly signed by both parties in October 2009, when, owing to a change in the law, it was no longer a requirement to seek Reserve Bank authority to transact in foreign currency. His refusal to C recognize the acknowledgment of debt freely entered into by the parties, at a time when the constraint affecting the original investment agreement had been removed, is so defiant of logic or accepted legal and moral standards that if upheld, the conception of justice in Zimbabwe would be intolerably hurt. Public policy upholds, as a fundamental principle, the freedom and D sanctity of contract and requires that commercial transactions should not be "unduly tramelled by restrictions on that freedom".

For these reasons I am inclined to grant the application on the grounds that the arbitrator's decision runs contrary to the public policy of Zimbabwe. Accordingly it is declared and ordered that:

1. Para 6.2 of the arbitration award handed down by the second respondent E at Harare on 13 March, 2010 in the arbitration proceedings between the applicant and the first respondent is declared to be contrary to the public policy of Zimbabwe. Consequently it is ordered that para 6.2 of the said arbitration award be and is hereby set aside in terms of art 34(2)(b)(ii) of the Uncitral Model F Law, contained in the First Schedule to the Arbitration Act [*Chapter 7:15*].
2. The matter be and is hereby remitted to the second respondent for the computation of the amount due to the applicant under the investment agreement, as read with the acknowledgement of debt, both of which G are filed of record.
3. The first respondent pays the costs of this application.

Nyandoro & Co, applicant's legal practitioners

Kwenda & Associates, first respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/MUGUGU v POLICE SERVICE COMMISSION & ANOR 2010 (2) ZLR 185 (H)

MUGUGU v POLICE SERVICE COMMISSION & ANOR 2010 (2) ZLR 185 (H)

Citation	2010 (2) ZLR 185 (H)
Case No	Judgment No. HH-157-10
Court	High Court, Harare
Judge	Gowora J
Heard	21 July 2010
Judgment	21 July 2010
Counsel	*N Ruzengwe,* for the applicant *S Maposa,* for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Administrative law** - *review - purpose of review - function of court on review to ensure fair treatment by administrative authority - power limited to legality of administrative action or decision - court not to substitute its own opinion for that of administrative authority - audi alteram partem rule - applicability - oral hearing at appeal not absolutely necessary*

D **Practice and procedure** - *review - grounds - grounds for review cannot be raised for the first time in heads of argument*

Review - *grounds - natural justice - audi alteram partem rule - underlying principle - to ensure fairness and natural justice for persons appearing before an administrative authority - oral hearing by the administrative authority not an absolute necessity*

E **Review** -*purpose of review -function of court - to ensure fair treatment by an administrative authority - limited power of reviewing court to intervene*

Headnote

The applicant was a police officer. He was convicted of a disciplinary offence and his appeal to the Commissioner was rejected. After his conviction, F a board of inquiry was convened to determine his suitability to remain in the police force; the board recommended a reduction in rank and transfer from his existing posting. The Commissioner of Police accepted the recommendation. The applicant unsuccessfully appealed to the first respondent. He then sought to bring the board's decision on review. The ground he relied on was that the punishment recommended by the board G was excessive. The applicant also alleged that there was bias on the part of the first respondent, in that the first respondent arrived at its decision without having regard to the record of proceedings of the board and without affording the applicant or his legal practitioners a hearing on the appeal lodged. The applicant also contended that the first respondent's H bias was evident from the record, where he was castigated for not being

grateful for not having been fired as a result of his transgressions. The A primary issue was whether this was a ground of review or of appeal.

Held, that the purpose of the review process is to ensure that an individual receives fair treatment at the hands of the authority to which he has been subjected. Judicial review is a process which is concerned with the examination and supervision by the courts of the manner in which B administrative bodies have observed their obligations when related to the legislative requirements. The power to review is inherent in courts of superior jurisdiction, but such power is limited to the legality of the administrative action or decision. For the court to venture into the merits of the punishment imposed or the wisdom of the decision, without being empowered by the Act, would be tantamount to the court usurping the C authority that has been entrusted to the administrative body by the Act. The purpose of the review process is to ensure that an individual receives fair treatment at the hands of the authority to which he has been subjected. It is not within the ambit of the reviewing court's power to substitute its own opinion for that of the administrative body. The function of the court is to ensure that the administrative body does not abuse the lawful D authority entrusted to it, by treating the individual subjected to it under that lawful authority unfairly. If the circumstances show that the decision was reached fairly and in a reasonable manner, then the court would not have the power to intervene.

Held, further, that a ground for review cannot be raised for the first time in E heads of argument as r 257 of the High Court Rules, 1971 provides that the application must give a concise statement as the grounds for review.

Held, further, that the underlying principle in the right to be heard (the *audi alteram partem* rule) is that of fairness and natural justice, in that each person appearing before the administrative body is given an opportunity to put his or her position to that body. An oral hearing is not an absolute F necessity as that may not necessarily mean that the person has been heard, as may happen where the person has been given inadequate notice, is not allowed to present his case or has not been furnished with all the information alleged against him.

Held, further, that the Act did not specify the manner in which the first G respondent ought to determine appeals brought before it and thus it was safe to assume that the appeal would be on

the record, as in a normal appeal. The underlying principle in the right to heard is that of fairness and natural justice, in that each person appearing before the administrative body is given an opportunity to put his position to that body. An oral hearing is not an absolute necessity, but may be where the person has H

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A been given inadequate notice, is not allowed to present his case or has not been furnished with all the information alleged against him. When the initial board of inquiry was held, the applicant was heard. Dissatisfied with the result, he then launched an appeal. There was no suggestion that such an appeal should have been a re-hearing of the initial inquiry.

Legislation considered B

High Court Rules 1971 (RGN 1047 of 1971), r 257

Cases cited

Chief Constable v Evans [1982] 3 All ER 141

C *Heatherdale Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor* 1980 (3) SA 476 (T)

Metsola v Chrmn, PSC & Anor 1989 (3) ZLR 147 (S)

Case information

N Ruzengwe, for the applicant

S Maposa, for the respondents

Judgment

D **Gowora J**: The applicant is a service police officer within the Zimbabwe Republic Police. On 13 August 2003 he was charged under the Police Act [*Chapter 11:10*] of having contravened para 35 of the schedule to the Act, as read with ss 29 and 34 of the same Act. He was convicted on 25 August E 2003 and was sentenced accordingly. An appeal against the conviction and sentence to the second respondent met with no success. In addition, apart from dismissing the appeal, the second respondent ordered his transfer from Morris Depot. The applicant was at that stage resigned to taking the punishment meted out to him and decided against further appeals. However, in May 2004, the incident which had led his subsequent conviction was referred to F a board of inquiry, which board was tasked to enquire into his suitability to remain in the force, and on 4 August 2004 he received communication that the second respondent had approved that his rank be reduced to that of sergeant and that his transfer to another posting be confirmed.

The applicant was aggrieved by this development and on 12 August 2004 he lodged an appeal with the first respondent against the reduction in rank G through the Morris Depot acting officer in charge. Despite numerous letters from his legal practitioners for a speedy resolution, it was not until 27 June 2007 that the first respondent wrote a letter advising the applicant that the appeal had not been successful. His legal practitioners received the letter on 3 July 2007. The applicant has also complained that during the period that the H applicant and his legal practitioners were processing his appeal,

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he was placed on suspension on the basis that the applicant had appealed A against his reduction in rank. Happily for him, wiser counsel prevailed and the suspension was lifted. Although no remedy is being sought from the suspension, it is obvious that the suspension was meant to bully him into withdrawing his appeal. It is also because of unjustified actions such as this that made the applicant conclude that he was being victimised. Following B receipt of the letter of 27 June dismissing his appeal, the applicant then filed this motion for a review of the decision by the first respondent in upholding the decision of the disciplinary board. In the application, the applicant had cited a number of grounds as being the basis of review but Mr *Ruzengwe* indicated from the bar that he would no longer move for all of them.

The first ground being sought to be relied on was that the first respondent C had misdirected itself in failing to take into account that the convening of the board of inquiry and its subsequent decision were a nullity as the applicant had already been sentenced for the alleged transgression. Counsel has accepted that a misdirection is not a ground for review and has also accepted that the second respondent has the discretion under the Act to set up a board of inquiry into an officer's conduct or suitability to remain a member of the police force. D The second alleged ground for review was a failure to appreciate the facts. Again counsel accepts that this is not a ground for review but for appeal.

The third ground for review was framed in this manner:

> "C) even assuming, without admitting, that the Board of Inquiry was properly convened and empowered to hear the matter, the first respondent failed E to appreciate the fact that the punishment imposed upon me by the Board was unduly harsh, grossly unreasonable and not in tandem with the facts of the case. The Board of Inquiry/Suitability [*sic*] usually sits to determine cases of incorrigible members of the Police who despite being convicted several times for misconduct, remain unrepentant and those who will have committed 'one off' serious offences-in which cases such punishment as F reductions in rank would suffice. As a first offender with a clean 16-year record in the Police Force, I did not and does [*sic*] not deserve the punishment of reduction in rank, but at most a reprimand."

I raised a query with the applicant's counsel as to whether or not this additional ground was for a review or an appeal. Counsel was adamant that it was a ground for review. I am unable to agree. G

It is appropriate at this juncture to consider the function that a court is exercising when it reviews the actions or decisions of an administrative body. Judicial review is a process which is concerned with the examination and supervision by the courts of the manner in which administrative bodies have observed their obligations when related to the legislative requirements. It is a process in which the three arms of government, the executive, the judiciary and the H

A legislature are enmeshed in a trilateral relationship. The power to review is inherent in courts of superior jurisdiction, but such power is limited to the legality of the administrative action or decision.

In casu, the board was empowered in terms of the Act to convene an enquiry into the suitability of the applicant to remain a member of the force. Section B 50 of the Act provides as follows:

> "A board of inquiry consisting of not less than three officers of such rank not being below that of superintendent, as may be considered necessary by the Commissioner, may be convened by the Commissioner to inquire into the suitability or fitness of a Regular Force member to remain in the Regular Force or to retain his rank, seniority or salary:
>
> C Provided that no officer who is a material witness or has a personal interest in the matter shall be appointed to such a board."

Thus, the power of the Commissioner to convene a board to inquire into a member's suitability to remain in the force is undisputed. The board itself is, in terms of the section, granted the discretion either to find that a member is no longer fit to remain in the force or to reduce his rank. The first respondent D confirmed the decision of the board upon appeal. In seeking for an order from this court to the effect that the punishment of reduction in rank "was unduly harsh, grossly unreasonable and not in tandem with the facts of the case", it is my considered view that the applicant is asking the court to inquire into the merits surrounding the punishment. That would turn this court into E an appeal court to determine the correctness of the punishment, and that is synonymous with assessing the merits of the punishment imposed. The Act does not empower this court to venture into the merits of the punishment imposed or the wisdom of the decision and if the court were to do so without being empowered by the Act it would be tantamount to the court usurping the authority that has been entrusted to the administrative body by the Act. F The process of review is for the court to examine the circumstances under which the administrative body reached its decision, and it is not open to the court, in a judicial review, to scrutinize the decision lest the court is accused of usurping the powers of the administrative body. See *Chief Constable v Evans* [1982] 3 All ER 141 at 154, where Lord Brightman stated:

> G "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

The purpose of the review process is to ensure that an individual receives fair treatment at the hands of the authority to which he has been subjected. It is, H however, not within the ambit of the reviewing court's power to substitute

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its own opinion for that of the administrative body. The function of the court A is to ensure that the administrative body does not abuse the lawful authority entrusted to it by treating the individual subjected to it under that lawful authority unfairly. In the event, if the circumstances under which the decision was made are proof that the decision was reached fairly and in a reasonable manner then clearly the court does not have the power to intervene.

The applicant has, however, as part of his review, alleged that there was B bias on the part of the first respondent. The basis of the alleged bias is that the first respondent had arrived at a decision without having regard to the record of proceedings of the board and without affording the applicant or his legal practitioners a hearing on the appeal lodged. The applicant contends further that the first respondent's bias is evident from the record where the C applicant is castigated for not being grateful for not having been discharged as a result of his transgressions.

Two affidavits have been filed in opposing the application. The manner in which the affidavits were drafted leaves a lot to be desired. Although an attempt was made to respond to the allegations in the various paragraphs, a D number of paragraphs were lumped together for purposes of responding to the allegations and, as a result, it is difficult to make sense of the affidavits. The allegations by the applicant relating to alleged bias do not appear to have been responded to. I note, however, that in the heads of argument filed on behalf of the applicant, instead of making reference to the absence of a record, the applicant raises the issue of the first respondent having recommended E that he be discharged from the service instead of a mere reduction in rank.

The applicant also raises in the heads of argument an allegation of absence of logic on the part of the first respondent which was proof of gross unreasonableness. A ground for review cannot be raised for the first time in the heads of argument as the rules provide that the application including F the affidavit must give a concise statement as the grounds for review. As to the first respondent raising an issue for the first time which was not in the record, the first respondent has stated in the opposing affidavit that it was never the intention of the first respondent to discharge the applicant from the service and that the recommendation was an apparent error. A reading of the record of proceedings suggests that the first respondent accepted that G the applicant should be grateful to have his rank reduced and thus keep his job. There is no suggestion on the record that the first respondent considered that the applicant should be dismissed from his post. I do not understand the comment in the record to the effect that the applicant should be grateful that he still had a job to mean that the commission was biased against him. Rather the remark, if read within the context of the paragraph, reveals that H

Gowora J

A the first respondent's members considered the offence to have been very grave. The first respondent does not make reference to the record in its findings, but I cannot accept that this proves that the members did not have the record before them in determining the appeal. The first respondent states that the appeal was on the record and I cannot find anything on the papers before me to suggest otherwise. Sight must not be lost of the fact that the B first respondent is not a court of law and therefore the detail that would be expected from a court of law would be somewhat lacking in the record produced of the proceedings conducted by the commission set up under the Act. I am unable to find that there was bias on the part of the first respondent in considering the appeal before it.

C As to the complaint by the applicant that the first respondent did not call himself or his legal practitioners for a hearing, I find that the Act does not specify the manner in which the first respondent ought to determine appeals brought before it. The precise form of the appeal and the powers that a statutory body has in the determination of appeal should derive from the language of the enabling statute. In this instance, the Act is silent on the D form of the appeal and it is therefore safe to assume that the appeal would be on the record as in a normal appeal.

The applicant has suggested that the failure by the first respondent to call him or his legal practitioners for the appeal amounted to an irregularity. He has argued that the conduct of the first respondent was in breach of the audi E alteram partem rule. He has referred this court to a decision of the Supreme *Court Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 as authority for that proposition. I believe that the applicant's counsel failed to appreciate that, in the authority he quoted, the respondents were not acting as an appeal tribunal but were in fact the equivalent of a court of first instance. The case, however, is instructive as the court went on to discuss F what constitutes a fair hearing for purposes of the *audi alteram* rule. At pp 154D-155 Gubbay JA (as he then was) stated:

> "The *audi* maxim is not a rule of fixed content, but varies with circumstances. In its fullest extent, it may include the right to be appraised of the information and reason underlying the impending decision; to disclosure of material documents; to a public hearing, to appear with legal representation and to examine and G cross-examine witnesses. See generally, Baxter *Administrative Law* at pp 545- 547. The criterion, as I have noted, is one of fundamental fairness and for that reason the principles of natural justice are always flexible. Thus the right to be heard in appropriate circumstances may be confined to the submission of written representations. It is not the equivalent of a hearing as that term is ordinarily understood. This was stressed by Colman J in *Heatherdale Farms* (Pty) *Ltd &* H *Ors v Deputy Minister of Agriculture & Anor* 1980 (3) S.A. 476 (T), where at

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Gowora J

> 486D-G he remarked: A
>
> > ' It is clear on the authorities that a person who is entitled to the benefit of the *audi alteram partem* rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) B a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the rule. For in my view will it suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the last mentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to put forward his representations, secondly C he must be put in possession of such information as will render his right to make representations a real, and not an illusory one'."

Thus the underlying principle in the right to heard is that of fairness and natural justice in that each person appearing before the administrative body is given an opportunity to put his or her position to that body. An oral hearing is not an absolute necessity, as that may not necessarily mean that the person D has been heard, as may happen where the person has been given inadequate notice, is not allowed to present his case or has not been furnished with all the information alleged against him. In any event, the applicant does not state that when the initial board of inquiry was held, he was not given an opportunity to be heard. He was heard and being dissatisfied with the result, E he then launched an appeal. There is no suggestion that such an appeal should have been a re-hearing of the initial inquiry. I am inclined to find that the applicant was heard and that the first respondent did not commit an irregularity.

The last complaint by the applicant is that the first respondent took time to determine his appeal. He therefore prays that on that basis its determination be set aside. Going by the relief that the Administrative Justice Act provides F for, I could set aside the decision of the first respondent. That would be a *brutum fulmen* as the decision of the board of inquiry would still stand. I also find that even though the appeal took long to be determined there was no prejudice to the applicant as he remained on his salary of inspector for the time it took for the initial decision to be made that his rank be reduced G and its eventual implementation. In the event, the delay in finalization of the process may have, in the short run, acted to his benefit in terms of the salary and emoluments that went with the rank of inspector. I do not find that any relief under the Act would assist him.

In the premises, it is my view that the applicant is non-suited and the application is hereby dismissed with costs. H

Gowora J

A *Mapombere, Musakana & Ruzengwe,* applicant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/MOYO & ANOR v HASSBRO PROPERTIES (PVT) LTD & ANOR 2010 (2) ZLR 194 (H)

MOYO & ANOR v HASSBRO PROPERTIES (PVT) LTD & ANOR 2010 (2) ZLR 194 (H)

Citation	2010 (2) ZLR 194 (H)
Case No	Judgment No. HB-73-10
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	13 July 2010
Judgment	22 July 2010
Counsel	*R Dzete,* for the first applicant *T Muganyi,* for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Costs - *de bonis propriis - legal practitioner - award of such costs against practitioner foisting dishonest application on court*

Legal practitioner - *conduct and ethics - certificate of urgency - need for* D *practitioner to be satisfied that matter is genuinely urgent - duty towards client- duty to restrain clients from abusing court process and making untruthful statements - costs de bonis propriis - award of such costs against practitioner foisting dishonest application on court*

Headnote

The applicants had been evicted from premises that they were leasing, after E default judgment had been obtained against them. Applications for condonation of late noting of appeal against the default judgment had been lodged but not pursued. After their eviction, the first applicant deposed to an affidavit in support of an urgent application for a stay of execution of the eviction order, well knowing that the eviction had F already taken place. A junior legal practitioner issued a certificate of urgency, in which she alleged that the respondent had not established his rights in respect of the property.

Held, that legal practitioners, as officers of the court, are required by the rules to certify a matter urgent only after applying their own mind and judgment to the circumstances of the matter. Having done so, they G must reach a personal view which they pass to a judge, certifying in their honour and name that the matter is urgent. Where a lawyer cannot reasonably entertain the belief that he professes in the urgency of the matter he risks a conclusion that he not only acted

dishonestly but also wrongfully. Legal practitioners who certify matters as urgent when they have not bothered to apply their minds at all to the facts of the matter or H

2010 (2) ZLR p195

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A even read the papers, and those who saddle the courts with such dishonest applications, will not only be visited with costs *de bonis propriis* but also with an order that they should not recover any fees from their clients.

Held, further, that when the applicants lodged this application they had already been evicted, a fact they did not disclose to the court. Their application for condonation had, for all intents and purposes, been abandoned. Legal B practitioners have a duty to restrain their clients from abusing the process of the court and from making untruthful assertions, yet this application was littered with not only wrong conclusions of the law but downright mendacious statements.

Cases referred to C

General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd 1998 (2) ZLR 301 (H)

Graspeak Invstms (Pvt) Ltd v Delta Ops (Pvt) Ltd & Anor 2001 (2) ZLR 551 (H)

Musunga v Utete & Anor HH-90-03

Case information

D *R Dzete,* for the first applicant

T Muganyi, for the respondents

Judgment

Mathonsi J: The first respondent instituted proceedings against the two applicants in the magistrates court, seeking *inter alia* an order for their E eviction from office premises at Main Court, Bulawayo. The applicants entered appearance to defend, whereupon the first respondent made an application for summary judgment.

The magistrates court granted summary judgment on 4 March 2010, paving the way for eviction. The two applicants appear to have done nothing about the matter for some time because it was not until 5 May 2010, exactly two F months later, that they purported to file a notice of appeal in this court under case number HCA 88/10. The applicants were then represented by their current legal practitioners, who should have known that they were way out of time to note an appeal.

Days later, on 11 May 2010, the applicants filed something that looked G like an application for condonation for the late filing of a notice of appeal. It was neither a chamber application nor a court application, although the filing cover bears the heading of a court application. The said application was placed before my brother Ndou on 21 May 2010. He did not grant the order sought but raised certain queries.

H That application was not prosecuted and the applicants appear to have

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2010 (2) ZLR p196

Mathonsi J

abandoned it as they neither attended to the queries nor amended what was A clearly a defective application. On 27 June 2010 the messenger of court served the applicants with a notice of eviction which was due to take place on 5 July 2010. Again the applicants did not act immediately and were duly evicted on the set date.

Two days after eviction, on 7 July 2010, the first applicant, Thabani Moyo, B deposed to an affidavit in support of an urgent application for a stay of execution of the eviction order, well knowing that the eviction had taken place. The application was put together and certified urgent by a legal practitioner, Ms *Mbayiwa,* who certified that:

> "The applicants are due to be evicted from a property in question [*sic*] by the first respondent who has not yet fully established his right in the property because C of the pending application for condonation. This

application has the effect of condoning the late filing of the appeal and subsequently suspending the first respondent's right in the property."

If it was not deadly serious, this would be a source of amusement. What Ms *Mbayiwa* meant by this can at best be left to conjecture and at worst it was misleading the court in the worst possible manner. Legal practitioners, as D officers of the court, are required by the rules to certify a matter urgent after applying their own mind and judgment to the circumstances of the matter. Having done so they must reach a personal view which they pass to a judge in their honour and name that the matter is urgent: *General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 (H) at 302E-F; E *Musunga v Utete & Anor* HH-90-03 at pp 2-3.

Where a lawyer could not reasonably entertain the belief that he/she professes in the urgency of the matter he/she risks a conclusion that he/she not only acted dishonestly but also wrongfully. Such a conclusion is normally visited with costs *de bonis propriis* against those legal practitioners. There is no doubt that *Ms Mbayiwa* did not satisfy herself as to urgency before appending F her signature on the certificate. In any event, where in the world has a mere application for condonation given rise to conclusions made by the legal practitioner in the certificate? Be that as it may, the applicants proceeded to file this application on 9 July 2010, four days after their eviction. This did not deter them from seeking an interim relief interdicting the first respondent G from evicting them and that if eviction has taken place they should be restored pending an application for condonation which had already been rejected.

At the time the applicant lodged this application they had already been evicted. They did not disclose this to the court. Not only that, their application for condonation had, for all intents and purposes, been abandoned. Indeed, legal practitioners have a duty to restrain their clients from abusing the process H

Mathonsi J

A of the court and from making untruthful assertions; yet this application is littered with not only wrong conclusions of the law but outright mendacious statements.

This application was brought on an *ex parte* basis with the obvious intention of hoodwinking the court and snatching a judgment. In an *ex parte* application the utmost good faith must be observed by litigants and the courts frown on B such applications where they are characterised by *mala fides* and material non-disclosures as in this case: *Graspeak Investments (Pvt) Ltd v Delta Operations (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H). See also Herbstein and van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed at p 367.

I must warn legal practitioners who certify such matters as urgent when they C have not bothered to apply their minds at all to the facts of the matter or even read the papers, and those who saddle the courts with such dishonest applications, that in future the courts will not only visit them with costs *de bonis propriis* but also direct that they should not recover any fees from their clients. I have exercised my discretion in favour of the two offending practitioners in this matter in recognition that they are very junior professional D assistants.

In the result I come to the conclusion that the matter is not urgent and it is also without merit.

Accordingly the application is dismissed with costs on an attorney and E client scale.

Munjanja & Associates, applicants' legal practitioners

F *Dube-Banda, Nzarayapenga & Partners,* respondents' legal practitioners

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MAFUSIRE v GREYLING & ANOR 2010 (2) ZLR 198 (H)

Citation	2010 (2) ZLR 198 (H)
Case No	Judgment No. HH-173-10
Court	High Court, Harare
Judge	Chatukuta J
Heard	4 May 2009; 5 May 2009; 16 May 2009; 16 July 2009; 16 October 2009
Judgment	28 July 2010
Counsel	*H Zhou,* with him Ms *D V Gapare,* for the plaintiff *E Jori,* for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Damages - *assessment - pain and suffering, disfigurement and loss of amenities - how to assess damages*

Delict - *negligence - proof of - res ipsa loquitur - applicability of - driver moving onto wrong side of road - whether proof of negligence* D

Road traffic - *negligence - duty of driver - driver moving onto wrong side of road - whether proof of negligence*

Headnote

There is no obligation on a person who is driving along a road to ride through all the ruts and other rough patches on the left of the road. He is at liberty to avoid such obstacles. If he can find a better part of the road, E he is entitled to ride on that part of the road, especially when driving in the country, but then he must use more care than when he is on his own side of the road. If there is a vehicle in the way, and he wishes to pass it, then whether the road on his left is rough or not he must keep to his left. If he does drive on the incorrect side of the road, he must F exercise greater care and take every precaution to avoid colliding with vehicles approaching him: persons travelling on the correct side of the road have a paramount right and are entitled to preference in the use of the road. If any danger of collision arises, it is his duty first to give way. He must swing to his left as far, and as quickly, as possible in the face of approaching vehicles. Failure to do may be negligence. If a collision G occurs between two vehicles travelling in opposite directions along the same road when the defendant's vehicle is on the incorrect side of the road, the fact that it is on the incorrect side of the road is, as a general rule, *prima facie* evidence of negligence. When a plaintiff proves that the defendant's vehicle for no apparent reason suddenly swerved on to its incorrect side of the road, an inference of negligence could, in the H

Chatukuta J

A absence of an explanation, be drawn against the defendant: *res ipsa loquitur.* The defendant is then required to produce evidence sufficient to displace the inference of negligence which arises from the fact that he was on the wrong side of the road. If he fails to do so, the *prima facie* evidence becomes sufficient to discharge the onus which rests on the plaintiff. But if the defendant gives an explanation, the plaintiff can B succeed only if, at the conclusion of the case and on the evidence as a whole, there is a balance of probabilities in his favour that the defendant was negligent.

General damages for personal injuries are not a penalty. The are compensation intended to place the injured party in the position he would have occupied C had the wrongful act causing his injury not occurred. Where a litigant is seeking damages for pain, suffering, disablement and disfigurement, comparable cases, if there are such should be used to afford some guidance to assist the court in arriving at an award which is not substantially out of accord with previous awards. Regard must be had to all factors which are considered relevant in the assessment of general damages.

Cases referred to D

AA Underling Assuransie Assosiasie Bpk v Sodoms 1980 (3) SA 134 (A)

Gains Golden Grain Bakeries Ltd v Gouws 1929 TPD 137

Klompas NO v Potgieter 1912 TPD 863

Komichi v Tanner & Anor 2005 (2) ZLR 358 (H)

E *Marume & Anor v Muranganwa* HH-27-07

Min of Defence v Jackson 1990 (2) ZLR 1 (S)

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

Ned-Equity Ins Co Ltd v Cloete 1982 (1) SA 734 (A)

Protea Asurance Co v Lamb 1971 (1) SA 530 (A)

F *Reyneke v Mutual & Federal Ins Co Ltd* 1991 (3) SA 332 (W)

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

Case information

H Zhou, with him Ms *D V Gapare,* for the plaintiff

E Jori, for the defendants

Judgment

G **Chatukuta J**: The plaintiff issued summons claiming damages arising from a motor vehicle accident which occurred on 18 May 2007. The plaintiff's claim is founded on allegations that the accident was solely due to the negligence of the first defendant in that:

(a) he attempted to overtake another vehicle in the face of the plaintiff's H vehicle;

(b) he drove at an excessive speed; and A

(c) that he failed to take evasive action or act reasonably when an accident was imminent.

The defendants denied that the first defendant was negligent. They pleaded that the plaintiff was driving at an excessive speed in the circumstances and failed to take evasive action to avoid the accident when it was imminent. The B defendants pleaded in the alternative that there was contributory negligence on the part of the plaintiff. The defendants filed a counter-claim also claming damages arising from the accident.

The following facts are common cause. The collision between the parties' motor vehicles occurred at approximately 11 am on 18 May 2007 on the 11 C km peg along the Mazowe-Mvurwi road. The plaintiff was driving a Mazda 929 and was proceeding from Harare to Concession. The first defendant was driving a Toyota Hilux pick-up truck owned by the second defendant and was proceeding from Concession to Harare. The first defendant was driving the truck during the course of his employment with the second defendant. D

The description and topography of the scene of accident was that there was a blind rise at the scene and an embankment on either side of the road. There was tall grass on the verge of both sides of the road. There was a railway crossing in the direction from Harare just before the scene of the accident and a curve just after the railway crossing.

At the time when the accident occurred, there was a lorry in the first defendant's E lane. The point of impact was on the outer edge of the plaintiff's side of the road. Upon impact, the plaintiff's vehicle veered to the incorrect lane and hit into the lorry. The defendant's vehicle landed in the embankment. The plaintiff applied brakes before impact resulting in skid marks extending for 36 metres. The first defendant also applied brakes, resulting in skid marks F extending for 33 metres. Both parties sustained severe injuries requiring their hospitalization for some days. Their vehicles were extensively damaged. On 25 June 2007, the first defendant paid an admission of guilt fine of ZW$2 500.

Two main issues were referred to trial. The first issue for determination is who between the plaintiff and the first defendant caused the accident. The G second issue relates to the quantum of damages due and payable by the party found at fault.

[The learned judge analysed the evidence and concluded:]

Upon examination of the totality of the evidence in both the plaintiff's and defendant's cases I make the following findings: H

Chatukuta J

1. Both the A plaintiff and the first defendant were travelling at an excessive speed in the circumstances.
2. The lorry that was blocking the first defendant's lane was stationary at the relevant time.
3. Both parties were in motion on impact.

B **Contributory negligence**

The first defendant submitted that there was contributory negligence by both motorists and that the provisions of the Damages (Apportionment and Assessment) Act [*Chapter 8:06*] ought to be applied. The stance taken by the plaintiff, as has already been noted above, is that she was not to blame at all C for the collision and that the first defendant was the sole cause of the accident.

The onus to prove contributory negligence on a balance of probabilities lies with the first defendant. It is common cause that the collision occurred on the extreme left side of the plaintiff's lane. The parties were in agreement that the general rule of the road requires a driver to keep to the left side of D his or her lane of travel. See *Klompas NO v Potgieter* 1912 TPD 863 at 867; *Gains Golden Grain Bakeries Ltcl v Gouws* 1929TPD 137 and *South African Motor Law* by Cooper and Bamford 1965 at p 512. However, as submitted by Mr Jori, the rule is not absolute. Mr *Zhou* was quite selective when he quoted *Klompas NO v Potgieter* and omitted the proposition that the rule E of the road is not absolute. Wessels J observed at 868:

> "But there is no obligation on a person who is riding or driving along a road to ride through all the ruts and other inequalities on the left of the road. He is at liberty to avoid such obstacles. If he can find a better part of the road, he is entitled to ride on that part of the road, especially when riding or driving in the country. But then he must use more care than when he is on his own side of the road. If there is a vehicle in the way, and he wishes to pass it, then whether F the road on his left is rutty or not he must keep to his left. The law with regard to this is laid down in two old and well-known cases. In *Pluckwell v Wilson* 5 Carr and P 375 the following proposition is stated:
>
> > 'A person driving a carriage is not bound to keep on the regular side of the road; but, if he does not, he must use more care, and keep a better look- out, to avoid collusion, than would be necessary if he were on the proper part of the road.'
>
> G In *Chaplin v Hawes and Ors* 3 Carr and P 554, the law is stated as follows:
>
> > 'Though the rule of the road is not to be adhered to, if by departing from it an injury can be avoided, yet in cases where parties meet *on the sudden,* and an injury results, the party on the wrong side should be held answerable, unless it appears clearly that the other party on the right had ample means H and opportunity to prevent it.'"

Chatukuta J

Cooper and Bamford *supra* also state at 513 that: A

> "When a vehicle is driven on the incorrect side of the road the driver must exercise greater care and take every precaution to avoid colliding with vehicles approaching him: he must recognize that persons

travelling on the correct side of the road have a paramount right and are entitled to preference in the use of the road so that if any danger of collision arises, it is his duty first to give way. Every driver must swing to his left as far, and as quickly, as possible in the face B of approaching vehicles and the failure to do may be negligence. If a collision occurs between two vehicles travelling in opposite directions along the same road when the defendant's vehicle is on the incorrect side of the road, the fact that it is on the incorrect side of the road is, as a general rule, *prima facie* evidence of negligence. When a plaintiff proves that the defendant's vehicle for no apparent reason suddenly swerved on to its incorrect side of the road C an inference of negligence could, in the absence of an explanation, be drawn against the defendant: *res ipsa loquitur.* The defendant is then required to produce evidence sufficient to displace the inference of negligence which arises from the fact that he was on the wrong side of the road. If he fails to do so, the *prima facie* evidence becomes sufficient to discharge the onus which rests on the plaintiff. But if the defendant gives an explanation the plaintiff can succeed only if at the conclusion of the case and on the evidence as a whole there is a D balance of probabilities in his favour that the defendant was negligent."

The rule of the road is therefore not absolute. A defendant must establish that he had a reason for deviating from the correct side of the road and that he or she exercised greater due care than ordinarily exercised by a driver on his or her correct side of the road. Although the fact that the collision occurred on the wrong side would be *prima facie* evidence of liability of the person E on the wrong side of the road, the presumption can, however, be rebutted if the defendant can show that the other party contributed to the accident.

Turning back to the case at hand, I have already made a finding that the defendant was avoiding a stationary lorry in his lane when the accident occurred on his incorrect side of the road. However, given the obstruction, F and the terrain causing limited visibility, the first defendant ought to have exercised greater caution and travelled at a safe speed. The skid marks clearly indicate the excessive speed that he was travelling at when he overtook the stationary lorry.

On the other hand, the plaintiff, upon seeing movement behind the stationary G lorry, and because of the same challenges posed to the first defendant by the terrain should also have exercised caution, by reducing her speed. She failed to do so. She had just crossed a railway crossing and her speed should therefore have been greatly reduced.

Counsel for both the plaintiff and the first defendant conceded that the skid marks caused by both parties suggested that they were travelling at almost H

A the same speed. If that is so, then both parties cannot escape the conclusion that they were both travelling at excessive speeds under the circumstances. Both were therefore negligent and failed to avoid the accident when it was imminent. I am however of the view that, given the fact that the accident occurred on the first defendant's incorrect lane, he bears the greater degree of fault. Therefore I have come to the conclusion that the plaintiff's contribution B to the accident was 40 per cent and the first defendant's 60 per cent.

Damages

The next issue for determination revolves on the measure of damages, if any, that are due to each party.

C The plaintiff abandoned her claim for the following damages:

(a) hospital, X-rays and other related expenses;
(b) orthopaedic surgeon's costs;
(c) charges for towing the damaged motor vehicle;
(d) costs of replacing spectacles; and
(e) and value of the groceries lost in the accident.

D She however persisted with her claim of:

(a) US$10 000 in respect of damages for pain, shock, suffering and loss of amenities;
(b) US$5 000 in respect of future medical expenses; and
(c) US$9 000, being the pre-accident value of the motor vehicle.

E The defendant abandoned his counter-claim for special damages. He persisted with the following counter-claim:

(a) US$40 000 for pain and suffering and loss of amenities,;

(b) US$1 000 for future medical expenses; and

(c) US$4 000, being the pre-accident value of the second defendant' s vehicle.

F **Damages for pain and suffering, disfigurement and loss of amenities**

The leading case in our jurisdiction on damages *is Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S). As was stated in that case, general damages for personal injuries are not, and will never be, a penalty. They are compensation intended to place the injured in the position he would have occupied had the wrongful act causing his or her injury not been committed.

G In cases where a litigant is seeking compensation for damages for pain, suffering, disablement and disfigurement, comparable cases, when available, should be used to afford some guidance to assist the court in arriving at an award which is not substantially out of accord with previous awards in broadly similar cases, regard being had to all factors which are considered H to be relevant in the assessment of general damage. See *Protea Assurance*

Chatukuta J

Co v Lamb 1971 (1) SA 530 (A). The plaintiff referred the court to *Reyneke* A v *Mutual & Federal Insurance Co Ltd* 1991 (3) SA 332 *(W), AA Onderlinge Assuransie Assosiasie Bpk v Sodoms* 1980 (3) SA 134 (A) and *Ned-Equity Insurance Co Ltd v Cloete* 1982 (1) SA 734 (A). The cases are equally helpful in determining the damages due to the first defendant.

Whilst these cases may be useful for comparative analysis, each case must be B decided on its peculiar set of facts. In *Reyneke v Mutual & Federal Insurance Co Ltd,* the plaintiff was awarded damages for pain and suffering and loss of amenities in the total sum of ZAR56 000 for 100 per cent disability. In that case, the plaintiff was reduced by the accident to a permanent vegetative state. She was blind, mute and deaf with no prognosis of recovery. She had to be fed through a nasal gastric tube, her urine being drained through an C indwelling catheter. In *Onderlinge Assuransie Assosiasie Bpk v Sodoms* the plaintiff was awarded ZAR6 000 for general damages arising from an accident in which he lost the sight of one eye. In *Ned-Equity Insurance Co Ltd v Cloete* the plaintiff was awarded damages for pain and suffering and loss of amenities in the sum of ZAR6 000. D

Plaintiff's claim

It is not in issue that the plaintiff sustained serious injury to the knee and ankle requiring surgery. She was hospitalized at Westend Hospital for four days and received treatment during that period. She was attended to by Dr Makoni, an orthopaedic surgeon. She sustained an open dislocation of the E left patella with abrasions on the patellar femoral cartilage. The right knee was bruised, together with the left side of the neck and chest. The surgeon attended to these injuries in theatre. On 19 August2007, the surgeon compiled a report which he produced in court. He concluded that the plaintiff had a nasty permanent scar on the left knee and would develop secondary to post traumatic osteoarthritis of the left knee and ankle joints and would require a F total knee replacement in the future. He assessed her permanent disability at 7½ per cent for the knee joint, 7½ per cent for the ankle joint and 5 per cent for permanent scars, giving a total disability of 20 per cent. He concluded that that the plaintiff would have endured severe pain soon after the accident but the pain would subside with time.

The plaintiff testified that she still experienced pain on the left knee when G climbing stairs or walking for considerable distances. She can no longer do some of the household chores she used to do and can no longer kneel or jog. At the time of the accident she had abandoned formal employment as an accountant and was into horticulture. Although she had workers who did the work, she used to move around her plot supervising their work. She can H

Chatukuta J

A no longer move around with ease and this has forced her to return to formal employment as an accountant.

The defendants accepted the plaintiff's degree of permanent disability of 15 per cent for the knee and ankle joints. They however disputed the 5 per cent awarded for a scar on the knee. I am persuaded by the submissions by the B defendants to discount the 5 per cent disability. Dr Makoni was unable to justify how he arrived at that degree of disability. He conceded that, whilst the other degrees of disability, totalling 15 per cent, were arrived at based on the Workmen's Compensation Schedule, the 5 per cent was not. In his opinion, the assessment was justified because it disfigured the plaintiff in that she could no longer wear short skirts. The plaintiff did not state in her C evidence that the scar precluded her from wearing short skirts. It is therefore not clear on what basis the doctor arrived at his conclusion.

Further, I had the benefit of the evidence of Dr Vera, the first defendant's orthopaedic surgeon. He confirmed Dr Makoni's evidence that scarification was not classified as a disability under the Workmen Compensation Scheme. D He testified that a percentage would be awarded for scarification in very special circumstances, where the scarification can constitute a set back in the achievement of one's profession. He gave the example of a model. The other special circumstance was where the scarification results in interference with motion of a joint, in which event the Workmen's Compensation Schedule gives a percentage of what the scar does to movement of the joint as opposed E to appearance. In such a case, the doctor would be considering how the disfigurement contributes to disability or might give rise to pain and restricts or affects motion. The explanation by Dr Vera was very enlightening.

The plaintiff testified that she suffered severe pain soon after the accident and required medication to control the pain. She now occasionally suffers F from weather pain but has not seen the need to consult her doctor as the pain usually goes away on its own without medication. Presently, her pain and suffering cannot therefore be said to be severe. The last time that she visited her doctor for medical attention in connection with the injuries was in November 2007. Her latest visit to the doctor, just before the trial commenced, was merely in the furtherance of the prosecution of her claim G and not for medical attention.

It appears to me, in view of the cases that the plaintiff referred me to, that the claim for pain and suffering and loss of amenities in the sum of US 10 000 is excessive. As observed earlier, *in Reyneke v Mutual & Federal Insurance Co. Ltd,* the plaintiff was awarded damages for pain and suffering and loss H of amenities in the total sum of ZAR56 000 for 100 per cent disability.

Chatukuta J

The plaintiff's disability is nowhere near the pain and suffering and loss of A amenities suffered by that plaintiff. If one were to use the average exchange rate of the US dollar and rand of about 1:7 (as cited in the November 2007 Reserve Bank Daily Interbank Exchange Rate produced by the plaintiff or the estimate of 1:8 used by the defendants in their closing submissions), the award in the *Reyneke* case would come to about US$7 467 for a person B reduced to a vegetative state. The plaintiff is still pursuing her professional career as an accountant despite her 15 per cent disability, which is about a sixth of the disability in *Reyneke case.* I am cognisant of the fact that each case is determined on its own merit and an award cannot be arrived at with mathematical precision. I am inclined to award the plaintiff the sum of US$1 000 for pain and suffering and loss of amenities. C

Defendant's counter-claim

The first defendant sustained a neck injury, fractured ribs, fracture of the right talus, fracture of the right fifth metacarpal base and blunt abdominal trauma. He testified that he has developed a permanent limp and a permanent flattened talus. He is a tobacco farmer and is thus required to inspect his crops D on foot and can no longer do so as he now finds it difficult to walk because his tendons no longer supported his right foot, neither could he ride a motor bike. He was a sportsman but can no longer run or swim because of the leg injury. He testified that, like the plaintiff, the time he last visited his doctor in connection with his injuries was in November 2007 (6 months after the E accident). At the time of hearing he was still in pain.

Dr George Vera, an orthopaedic surgeon, testified that he attended to the first defendant after the accident. On 12 March 2008 he examined an x-ray taken of the defendant's ankle and concluded that

he required further surgical attention. In the medium term the first defendant would required mild pain killers. However, in the long terms he would require stronger ones. The first F defendant would develop degenerative osteo-arthritis requiring surgical relief. The doctor testified that the ankle is a weight bearing joint and subject to high stresses. The injury to the ankle was therefore serious. He assessed the first defendant's permanent disability to be 25 per cent.

The first defendant submitted that his own damages would be proportional G to those awarded to the plaintiff. He submitted that the award of US$ 10 000 for the plaintiff was excessive, given that the plaintiff had suffered 15 per cent disability and he had suggested that the plaintiff be awarded US$500.

The plaintiff did not challenge Dr Vera's assessment of the first defendant's degree of disability or that the first defendant has endured pain and suffering and loss of amenities. Ms *Gapare* urged me to make a determination on the H

Chatukuta J

A extent of the first defendant's disability on the basis of my own observations in court. I do not believe that it is competent for me to do so, for two reasons. Firstly, I am not a medical expert and do not have the competence to make that assessment. Secondly, as already indicated, the plaintiff did not meaningfully challenge the orthopaedic surgeon who attended to the first defendant and is qualified to make the assessment. The plaintiff appeared in her closing B submissions to be challenging the quantum of damages as being inconsistent with the injuries that the first defendant sustained.

It appears to me, for the same reasons that I have advanced in respect of the plaintiff's claim, that the first defendant's counter-claim for damages in the sum of US$40 000 is excessive. In the result, I award the first defendant C damages in the sum of US$1 500.

Future medical expenses

Plaintiff's claim

Dr Makoni testified that the knee replacement can be done locally and would cost almost US$10 000 consisting of: surgeon's fees US$ 1 500, anaesthetist D US$800, prosthesis US$2000, assistant's fee US$150 and hospital fees about US$5 000. The defendants did not dispute that the plaintiff had suffered 15 per cent permanent disability. Dr Makoni maintained in his evidence that the plaintiff would require a knee replacement in the future as her condition would not improve as cartilage does not naturally generate itself. The plaintiff E testified of the challenges that she now faces because of the injury to her knee. All this was not seriously challenged by the defendants. Dr Makoni had estimated that the medical expenses would be in the region of $ 10 000. The plaintiff claimed US$5 000. I am of the view that the claim by the plaintiff is reasonable given Dr Makoni's estimate.

Defendant's counter-claim

F Dr Vera explained that the amount of US$ 1 000 claimed by the first defendant would only cover expenses such as consultation fees, X-rays and pain relief medication in the short term. The surgeon confirmed the need for future medical expenses but was not certain of the exact nature of the future surgical relief. The plaintiff did not make any closing submissions regarding the G first defendant's claim for future expenses. I therefore take it that the first defendant's entitlement to this damages and the quantum thereof are not challenged. I am therefore satisfied that the first defendant has established his counter-claim for future expenses in the sum of US$1 000.

Damages for loss of motor vehicle

H It is trite that the measure of damages is the value of the motor vehicle at

Chatukuta J

the time of accident. See *Muzeya NO v Marais & Anor* 2008 (1) ZLR 326 (H); A *Komichi v Tanner & Anor* 2005 (2) ZLR 358 (H); *Marume & Anor v Muranganwa* HH-27-07; *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A) and *Law of Damages* by Visser & Potgieter at p 75. The parties are agreed on this principle of the law.

Plaintiff's claim B

The plaintiff testified that her motor vehicle was damaged beyond repair. She produced photographs of the vehicle before and after the accident. When the vehicle was purchased in 1992, it was a second hand vehicle but was in good condition. She was not sure of the value of the vehicle at the time of the accident. She did not know how the value of Z$10 billion reflected in C the summons before amendment had been arrived at. She had later amended her claim to US$9 000 based on an estimate by Amtec Motors. She however conceded under cross examination that Z$10 billion was the replacement value of the vehicle at the time when summons were issued. She conceded that she did not obtain and did not know the pre-accident value of the vehicle.

The plaintiff relied on Owen Mupambwa's evidence to establish her damages. D Owen testified that he was employed by Amtec Motors as a sales administrator and he had held that position for a year and therefore his experience at valuation of motor vehicles was a mere one year. However, his sole qualification was not in vehicle valuation but what he termed call centre management. This involved attending to client queries. Before that, he had been an assistant E systems administrator. On 28 April 2009 he valued the plaintiff's vehicle at US$9 000 as per the valuation he produced in court. Ordinarily, he relies on various factors such as the bodywork, the year of manufacture, interior of vehicle, the mileage and the prevailing economic environment in arriving at the value of a vehicle. In the present case, he only relied on the year of the manufacture of the plaintiff's vehicle in arriving at the amount of US$9 000 F as the estimated value of the plaintiff's vehicle. The other factors were not relied on because the vehicle had been extensively damaged.

Under cross-examination, Owen was confused as to whether or not his valuation of the vehicle was a pre-accident value or a replacement value of the vehicle. In one breath he testified that the estimate of US$9 000 was the G value of the vehicle before it was damaged. In the next breath, he testified that the amount reflected the replacement value of the vehicle. He testified that the value of the vehicle may have been US$6 000 in 2007 and therefore the US$9 000 was the current value of the motor vehicle. He conceded that the year of manufacture would only assist depending on how the owner of the car handled it. He had not seen the plaintiff's vehicle before and had not H

Chatukuta J

A accessed records of the service of the vehicle as alleged by the plaintiff in her evidence. He had no prior dealings involving a Mazda 929.

It is my view that the plaintiff failed to establish the value of her vehicle at the time of accident. Her expert witness, Owen, turned out to be no expert at all, with only a year's experience in the sales department, and had not dealt in Mazda 929s before. His concessions that he failed to consider the B variables used in assessing the value of vehicles did not assist the plaintiff. Therefore there was no basis for the valuation.

Ms *Gapare* conceded in the closing submissions that the damages due to the plaintiff were calculated at the time of accident. The damages that the plaintiff originally claimed were in local currency. The plaintiff did not C justify its conversion of the damages into foreign currency as they sought to do using the Interbank Exchange rate prevailing in 2007. In the result the plaintiff cannot succeed and the defendant will be granted absolution from the instance.

Defendant's counter-claim

D The second defendant's original counter-claim for the pre-accident value of its vehicle was Z$1 billion. It led evidence from the first defendant that the vehicle was 23 years old, having been manufactured in 1984. The defendants amended the counter-claim to US$4 000. The basis for the amendment was that they had also converted the local currency to foreign currency.

E The defendant's counsel also conceded that the damages under this heading are calculated as at the time of delict. The concession was proper. The damages suffered by the second defendant were

in local currency. In the light of the cases already cited, it therefore follows that the second defendant has not established its counter-claim for damages in foreign currency.

Costs

F Ordinarily costs follow the cause. Both parties have had some measure of both failure and success in their claims. I am of the view that it is fair for plaintiff to be awarded 60 per cent of her costs and the first defendant 40 per cent of his costs.

The award

G I have concluded that the plaintiff is entitled to damages for pain and suffering in the sum of US$ 1 000 and US$5 000 for future medical expenses. The total damages that she is entitled to is the sum of US$6 000. I have also made the finding that her contribution to the accident is 40 per cent. She is therefore entitled to 60 per cent of the total of US$6 000. This translates to damages H in the sum of US$3 600.

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The total damages due to the defendant are in the sum of US$2 500, being A US$1 500 for pain and suffering and US$1 000 for future medical expenses. After my finding that his contribution to the accident is 60 per cent, he is entitled to 40 per cent of the total of US$2 500. This translates to damages in the sum of US$1 000.

Accordingly, I hereby order as follows: B

Plaintiff's claim

1. The defendants be and are hereby ordered to pay the plaintiff the sum of US$3 600, jointly and severally, the one paying the other to be absolved with interest at the prescribed rate, from the date of service of summons to the date of payment.
2. Absolution from the instance be and is hereby granted in respect of C the plaintiff's claim for damages, being the pre-accident value of the plaintiff's vehicle.
3. The defendants shall pay, jointly and severally, the one paying the other to be absolved, 60 per cent of the plaintiff's costs. D

First and second Defendants' counter claim

1. The plaintiff be and is hereby ordered to pay the first defendant damages in the sum of US$1 000, with interest at the prescribed rate, from the date of service of the counter-claim to the date of payment.
2. Absolution from the instance be and is hereby granted in respect of the E second defendant's counter-claim for damages being the pre-accident value of the second defendant's vehicle.
3. The plaintiff shall bear 40 per cent of the defendants' costs.

Scanlan & Holderness, plaintiff's legal practitioners. F

Wintertons, defendant's legal practitioners.

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MCCOSH v PIONEER CORPORATION AFRICA LTD 2010 (2) ZLR 211 (H)

Citation	2010 (2) ZLR 211 (H)
Case No	Judgment No. HH-164-10
Court	High Court, Harare
Judge	Kudya
Heard	14 July 2010;15 July 2010
Judgment	28 July 2010
Counsel	*T Magwaliba,* for the plaintiff/respondent *A Moyo,* for the defendant/excipient
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Employment - *contract - remuneration - agreement to pay employee in foreign currency - lawfulness of such agreement - requirement to pay employee in "legal tender "- meaning*

D **Words and phrases** - *"legal tender "-Labour Act [Chapter 28:01] -s 12A (1)*

Headnote

The plaintiff had been employed by the defendant at a time before the general use of foreign currency became lawful. His contract expressed his salary in Zimbabwe currency, although later an acknowledgment of debt was issued by the defendant, expressed in foreign currency. The plaintiff E claimed this sum from the defendant. It was argued, on the defendant's behalf, that the agreement to pay the plaintiff in foreign currency was unlawful, both under the Exchange Control legislation and under the Labour Act [*Chapter 28:01*], s 12A(1) of which requires employees to be paid in "legal tender".

Held, that an agreement to pay an employee in a foreign currency is not F unlawful but, without the approval of the Reserve Bank, payment in a foreign currency would be unlawful.

Held, further, that s 12A (1) of the Labour Act restricts those employees who remunerate their employees in money to the use of "legal tender", to the exclusion of other modes of payment such as promissory notes, G vouchers, coupons or any form other than legal tender. The phrase "any form other than legal tender" is of wide application. It restricts payment to the use of legal tender and excludes payment in kind or money that is not legal tender. Subsection(2) permits employers who are in occupations or industries that customarily pay remuneration in kind to do so. Section 12 A(2)(e) puts it beyond doubt that remuneration in kind is not the same H as remuneration in money, and is clear proof that, in the mind of the

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legislature, legal tender in s 12A (1) was another name for "money". At A that time, foreign currency did not constitute legal tender. Legal tender is the money of a country in actual use. It is such money in the legal sense as the legislature has so defined in the statutes organizing the monetary system and is the medium legally authorized by the State for the payment of debts. Foreign currency is not legal tender, for not all money is legal B tender, but all legal tender is money. Legal tender is such money, as is the current "coin of the realm". At the time the

acknowledgment of dent was entered into, the legal tender for the payment of salaries in Zimbabwe was local currency and not foreign currency.

Legislation considered C

Exchange Control Regulations 1996 (SI 109 of 1996), ss 4 & 96 Labour Act [*Chapter 28:01*], ss 12A, 89(6) & 93

Cases referred to

Caltex (Africa) Ltd v Trade Fair Motors (Pvt) Ltd & Anor 1963 (1) SA 36 (SR) D

Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor 1994 (1) ZLR 310 (H)

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

Gambiza v Taziva 2008 (2) ZLR 107 (H)

Gondwe v Bangajena 1988 (1) ZLR 1 (H)

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

Macape (Pvt) Ltd v Executrix Est Forrester 1991 (1) ZLR 315 (S)

Rhodes Motors (Pvt) Ltd v Pringle-Wood NO 1965 RLR 395 (A); 1965 (4) SA 40 (SRA)

S v Bennett-Cohen 1985 (1) ZLR 46 (S)

S v Mafarachisi 1990 (1) ZLR 118 (S) F

S v Manyere 1984 (1) ZLR 104 (H)

S v Zakana 1976 (1) RLR 91 (G); 1976 (2) SA 248 (R)

Salisbury Municipality v Parrington & Anor 1961 (3) SA 218 (SR)

Case information

T Magwaliba, for the plaintiff/respondent G

A Moyo, for the defendant/excipient

Judgment

Kudya J: The plaintiff, a former financial director of the defendant company, filed summons on 8 July 2009 seeking payment of the capital sum of US$72 334 and interest at the rate of 10 per cent per annum from the date when the amount fell due to the date of the issue of summons in the sum of H

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A US$12 658, payment of interest on the capital amount at the rate of 10 per cent from the date of the issue of summons to the date of payment in full and costs of suit. The defendant contested the matter.

The plaintiff's cause of action was disclosed in its declaration in these terms:

3. The defendant became indebted to the plaintiff in respect of arrear salaries B and other benefits arising from a contract of employment concluded between the parties on or about 21 September 2004 that was terminated by the plaintiff's resignation from employment on 7 March 2007.
4. During the month of April 2007, the defendant partly liquidated the amount claimed by the plaintiff by delivering to the plaintiff a motor vehicle and a laptop computer whose agreed values totalled US$30 000. C
5. On or about 18 July 2007, the Group Chief Executive Officer of the defendant, Mr Hamish Rudland, acknowledged liability for the sum as at that date of US$70 000 which would attract interest at the rate of 10 per cent per annum.

The defendant raised a plea in bar based on two grounds before pleading D over to the merits. Its plea reads as follows:

1. As appears from plaintiff's declaration:
   1.1 The cause of action is predicated on a contract of employment concluded by the parties on 21 September 2004.
   1.2 The claim is for payment of alleged arrear salaries and benefits E consequent upon resignation.
   1.3 The payment of salaries and benefits during and upon termination of a contract of employment is governed by the provisions of the Labour Act [*Chapter 28:01*].
   1.4 Accordingly and in terms of s 89 (6) of the Labour Act, this Honourable F Court has no jurisdiction to hear and determine this claim.
2. Additionally but without prejudice to the above, the defendant avers that:
   2.1 The contract of employment between the parties provided for payment of salaries and benefits in Zimbabwe dollars, being the lawful legal G tender.
   2.2 The plaintiff's claim is denominated in foreign currency, namely US dollars.
   2.3 At the material time, the payment of salaries and benefits in foreign currency without exchange control approval was illegal and H unenforceable by virtue of:

   2.3.1. the Exchange Control Act [*Chapter 27:05*] A
   2.3.2. Exchange Control Regulations, 1996
   2.3.3. the Labour Act [*Chapter 28:01*].
   2.4. In the premises, the plaintiff's claim is bad and unsustainable at law and ought therefore to be dismissed with costs.

In pleading over to the cause of action set out in paras 3, 4 and 5 of the plaintiff's B declaration the defendant denied the averments and put the plaintiff to the proof thereof and reiterated that the mode of payment sought was unlawful.

In his replication, the plaintiff averred that his cause of action was premised on an acknowledgment of debt signed by a representative of the defendant and not on the terms of employment. He also averred that the defendant was C obliged to obtain the necessary foreign currency exchange approvals to pay him in foreign currency using its free funds.

At the pre-trial conference the following four issues were referred to trial:

(a) whether or not this court, in the light of s 89(6) of the Labour Act [*Chapter 28:01*], has jurisdiction to adjudicate over the dispute between D the parties;
(b) whether the contract of employment between the parties provided for payment to the plaintiff in United States dollars and the amount thereof;
(c) whether the plaintiff's claim was lawful at the material time;
(d) what amount if any is due to the plaintiff.

The plaintiff called the evidence of two witnesses and produced a 40 paged E bundle of documents. After the close of the plaintiff's case the defendant elected to open and close its case without calling any evidence. My findings of fact are based on those aspects of the evidence called by the plaintiff that survived cross-examination.

The plaintiff holds a Bachelor of Law (Honours) degree from the University F of Zimbabwe and is a chartered accountant. He was the Group Financial Director of the defendant from 1 June 2004 until his resignation on 7 March 2007. The relevant sections of his contract of employment fall under the headings Remuneration and Benefits. I set them out below.

> **"3. Remuneration**
>
> As remuneration for services rendered, the Contractor shall pay the contracted G person during the subsistence of this agreement the sum of $21 million per month, payable monthly in arrears. The salary will be subject to taxation in line with the rules and regulations of the Zimbabwe Revenue Authority. As you are on a fixed term contract the company is not liable to pay any further sums of money, which may be required of you by operation of law. This shall be reviewed every quarter H

4. Benefits

In addition to the salary stated above, you will be entitled to the following:

1.1. Cimas Medexec Medical Aid for you and your family.

1.2. Use of a company vehicle and 200 litres per month. Such allowance is for monthly usage and shall not accrue.

1.3. School fees for two children, but any change in school requires the authority of the CEO.

1.4. Cafeteria/entertainment allowance to be agreed annually by CEO.

1.5. Any other amounts will be deducted from the cafeteria allowance."

The plaintiff indicated that his claim was based on an e-mail dated 13 July 2006 which he dispatched to himself and copied to his website. It was signed and dated at the bottom of each page by Hamish Rudland, the acting chief executive officer of the defendant at the time. The purported acknowledgment of debt was sandwiched between a set of seven action plans on the first page and another set of seven action plans on the second page. The acknowledgments read:

"HR acknowledges outstanding balance to KPM of US 70K subject to update of figures

HR acknowledges 10% interest per annum calculated monthly

HR acknowledges salary US6K per month inclusive of local salary."

The plaintiff stated that HR referred to Hamish Rudland while KPM referred to the plaintiff. He stated that the defendant was to promote a company in Mauritius which would be used as the vehicle to pay top management in Zimbabwe in foreign currency and pay his outstanding debt. It was common cause that the vehicle and laptop were sold to the plaintiff as indicated in the letter by HR of 10 September 2007. He averred that the two items were valued at US$30 000 and abated the outstanding capital sum and interest.

Amongst the documents are the purported minutes that the plaintiff wrote on 15 January 2008 of a meeting he held with HR and the plaintiff's wife in which he recorded, *inter alia,* his demand for payment of the outstanding debt by Pioneer Corporation Africa (PCA) and the reluctance to pay by HR until he had received a return on his investment and an undertaking that payment would be made at a later date. He was the only one who signed those minutes.

He also relied on the minutes he authored on 18 March 2009 of a meeting between HR, E M Warhurst (EMW) and himself. They were signed by EMW and the plaintiff only. They indicate that PCA owed EMW US$15 000 and the plaintiff just over US$ 80 000. While they show that HR was unwilling to pay the debt, they record that he had signed the plaintiff's contract of employment and acknowledgment of debt in July 2006.

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Pages 38-39 of the documents show that from October 2003 to February 2007 the defendant was entitled to receive from the plaintiff US$215 000 in salary. He was paid a total of US$157 251 between October 2003 and March 2007. The capital outstanding in salary arrears was US$57 749. The amount due as interest from December 2005 to June 2009 was in the sum of US$26 462.

He was cross-examined. He based his claim on an acknowledgement of debt of 17 July 2006. The acknowledgment arose from the failure to pay salaries during the period extending from October 2003 to February 2007. He stated that he did not sue the defendant for arrear salaries that were incurred between October 2003 and July 2006 because during that period he was a member of the plaintiff's management team. He accepted that at that time legal tender in Zimbabwe was the local dollar. He was referred to s 12 A of the Labour Act. He was evasive on whether his claim was founded on a contract of employment or not. He was evasive on whether payment in US dollars was payment in kind or not. He stated that in 2006 there were no exchange control prohibitions against the payment of salaries in foreign currency, but conceded that during the period of his employment with the defendant he was never paid in US dollars. He further acknowledged that at that time the defendant did not pay any of its employees in foreign currency. He said the US dollar was used to index the payment in kind in the form of air tickets that he received for holidays outside Zimbabwe. He admitted that he could not claim in US dollars before February 2009. He accepted that the email of 18 July 2006 was made when HR had taken over as the acting chief executive officer of the defendant, but denied that it was a mere update of the company's affairs and hand over/take over summary sheet. He said it was not an exchange of information document but a contract between the plaintiff and the defendant. He accepted that it was not in the usual mode of an acknowledgement of

debt that is drawn up by legal practitioners. He averred F that at the time the defendant was obliged to pay him the Zimbabwe dollar equivalent of US$70 000 at the prevailing parallel market rate of exchange.

He called Mr Warhurst, a practising legal practitioner, who at the time was the Group Company Secretary and Managing Director of Clan Transport (Pvt) Ltd, one of the subsidiaries of the defendant. Warhurst confirmed G the accuracy of the minutes written by the plaintiff at the meeting of 18 March 2009. He said HR sought to refute indebtedness on the basis that the plaintiff had given poor service to the defendant but he accepted that the defendant owed the plaintiff arrear salaries in foreign currency for which it was unable to pay.

He was cross-examined. He was a workmate of the plaintiff during the H

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A period 2003 to 2006 when he worked for the defendant. He was owed arrear salaries in foreign currency for the period September 2005 to August 2006. He was invited by the plaintiff to the meeting of 18 March 2009 because both were creditors to the defendant. He confirmed that his salary was paid in local currency.

It is on the basis of the evidence led that I proceed to determine the issues B referred to trial.

(a) Whether or not this court, in the light of s 89 (6) of the Labour Act [*Chapter 28:01*]*,* has jurisdiction to adjudicate over the dispute between the parties

Mr *Moyo,* for the defendant, submitted that this court did not have the C jurisdiction to deal with this matter as it is a labour dispute. The plaintiff conceded in his replication that were the present matter a labour dispute he would have had to file it with the Labour Court. It seems to me, notwithstanding that this court is a superior court imbued with inherent jurisdiction, that all labour disputes must be dealt with in terms of the relevant provisions of the D Labour Act. It was common cause that s 89(6) of the Labour Act ousts the inherent jurisdiction of this court to hear labour disputes, in the first instance. Put in other words, the High Court cannot be the first port of call to any party in a labour dispute. The dispute, being one of right and not interest, would perforce be dealt with in terms of s 93 of the Labour Act by a labour officer who could refer it to arbitration from whence it would find its way E to the Labour Court.

Mr *Magwaliba,* for the plaintiff, submitted that this court had the jurisdiction to determine this matter because the plaintiff's case was found on an acknowledgment of debt and not on a contract of employment. It is correct that in our law, an acknowledgment of debt can found a cause of action. See

F *Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor* 1994 (1) ZLR 310 (H) at 311G; *Gondwe v Bangajena* 1988 (1) ZLR 1 (H) at 2A and *Salisbury Municipality v Partington & Anor* 1961 (3) SA 218 (SR) at222A.

Mr *Moyo* contended that the plaintiff pleaded his cause of action as the contract of employment. He argued that reference to an acknowledgment of liability by the defendant's acting chief executive officer in the declaration G did not shift the cause of action to that of an acknowledgment of debt. He further contended that the document purported by the plaintiff to be an acknowledgment of debt was merely an update of the company's affairs and a hand over/take over sheet.

Mr *Magwaliba* contended that the statements sandwiched between other H unrelated action plans constitute an acknowledgment of debt. His contention

---

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appears to be borne out by the sentiments expressed by McNally J in *S v* A *Manyere* 1984 (1) ZLR 104 (H) at 107 C to the effect that an "I owe you" left in a cash box would constitute an acknowledgment of debt. It is correct that the defendant did not call evidence to dispute the facts set out by the plaintiff and his witness or offer an alternative version of events. It is also correct that, subsequent to the acknowledgement of debt, two sets of minutes were written B by the plaintiff that the defendant's acting chief executive officer refused to sign, which show that he acknowledged the defendant's indebtedness to the plaintiff in the amount claimed. Again, the plaintiff's version was supported by Warhurst, who was a forthright and credible witness.

It seems to me, notwithstanding the failure by the defendant to lead evidence, C that Mr *Moyo's* contention that the plaintiff's cause of action was predicated on a contract of employment is correct. In my view, paras 4 and 5 of the plaintiff's declaration are explanatory averments of how he arrived at the capital sum and interest claimed. The legal foundation of the claim lies in the contract of employment. Para 3 of the declaration is the basis of the plaintiff's claim. I understand him to be averring that the debt for which D he seeks redress arose from unpaid salary arrears. This is confirmed in the further particulars supplied by the plaintiff as read with the information supplied to the defendant's chairman in which he collated the outstanding salaries from October 2003 to February 2007 and outstanding interest due from December 2005 to June 2009. The failure by the plaintiff to plead that E his claim was based on an acknowledgment of debt executed on 18 July 2006 further confirms that he founded his claim on unpaid arrear salaries. Accordingly, I uphold the exception raised by the defendant and dismiss the plaintiff's claim on the basis that this court lacks the jurisdiction to determine the matter by virtue of the provisions of s 89(6) of the Labour Act.

However, in the event that I am wrong, and the cause of action was properly F pleaded in terms of para 5 of the declaration, I proceed to deal with the other issues that were referred to trial.

(b) Whether the contract of employment between the parties provided for payment to the plaintiff in US dollars and the amount thereof

The plaintiff confirmed in his testimony that the contract of employment did G not provide for payment in US dollars or any foreign currency. He alleged that payment in US dollars was incorporated as a cafeteria benefit. He agreed that the contract did not delineate the US currency as the currency of account for the cafeteria allowance. He did not produce a document in writing and signed by both parties to demonstrate that the contract of employment was H

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A varied as contemplated by para 14 of the contract of employment. The second issue is determined in favour of the defendant.

(c) Whether the plaintiff's claim was lawful at the material time

The time referred to is the period from October 2003 to 7 March 2007. Mr *Moyo* submitted that it was unlawful at the time for a Zimbabwean registered B company to pay its employees in foreign currency for work performed in Zimbabwe without Exchange Control authority. He relied on the provisions of s 4(1)(a)(ii) of the Exchange Control Regulations, 1996. Mr *Magwaliba* submitted that the exchange control legislation was not violated by an agreement to pay a salary in foreign currency to the plaintiff in Zimbabwe for work done in Zimbabwe. He relied on *Macape (Pty) Ltd v Executrix* C *Est Forrester* 1991 (1) ZLR 315 (S), in which the claim was based on an acknowledgment of debt that the defendant did not sign but was reduced to writing by the plaintiff's legal representative which reflected the terms of the oral agreement reached. In his judgment at 320B-C McNally JA, dealing with ss 7 and 8 of the Exchange Control Regulations, 1977 (the precursor to D the present ss 10 and 11 of the Exchange Control Regulations, 1996) stated:

> "The essential point to be noted is that there is a clear difference between ss 7 and 8. The former proscribes only the actual payment. The latter proscribes both payment and the underlying agreement to pay.
>
> In other words, when one is concerned with payments inside Zimbabwe it is perfectly lawful to enter into the agreement to pay. But, without authority from the Reserve Bank, the actual payment may not be made. By contrast, when E dealing with payments outside Zimbabwe, it is unlawful even to enter into the agreement to pay, without first obtaining the authority of the Minister, whose powers have been delegated to the Reserve Bank."

The case dealt with the payment in local currency in Zimbabwe of a foreign resident by a Zimbabwean resident.

F The facts in *Macape supra* differ from those in the present case, in that in the former case payment was made by a local resident for the account of a foreign resident in local currency. In present case, a local resident was to pay another local resident in foreign currency. The former case concerned an outflow of foreign currency while the present matter concerns the inflow of foreign currency.

G It seems to me that the payment of an employee's salary in foreign currency, at the time, would have contravened s 4 (1)(a)(ii) of the Exchange Control Regulations. Both Chinhengo J and Gowora J held, in the separate cases of *Jumvea Zimbabwe (Pvt) Ltd & Anor v Matsika* 2003 (1) ZLR 71 (H) at 74G and *Gambiza v Taziva* 2008 (2) ZLR 107 (H) at 110-111, respectively, H that payment of foreign currency, whether inside or outside Zimbabwe,

would amount to an exchange and thus be in violation of s 4(1)(a)(ii) of the A Exchange Control Regulations. In the present case, the defendant did not make any payment but entered into an agreement to pay. Mr *Magwaliba* was therefore correct that such an agreement was not prohibited by the Exchange Control Regulations. This is what McNally JA had in mind in *Macape supra* when he said at 321A-B: B

> "The contract to pay is lawful. Actual payment in pursuance of the contract is unlawful without permission. There is no reason why the court should not order payment; subject to the condition that authority is obtained. I must make it clear that this judgment in no way inhibits the Reserve Bank in the exercise of its discretion. It is entirely for the Reserve Bank to decide whether or not to authorise the payment. If it decides not to do so the payment may not be made. The contract remains lawful. Payment will then have to await a change either C in the law or in the policy of the Reserve Bank."

I hold that the contract to pay the plaintiff in foreign currency did not contravene any exchange control regulations.

Mr *Moyo* further contended that payment in foreign currency contravened s 12A(1) of the Labour Act. Mr *Magwaliba* countered by arguing that D s 12 A(2) allowed for the payment of employees in foreign currency. Section 12A(1) and (2) read:

> **"12A Remuneration and deductions from remuneration**
>
> (1) Remuneration payable in money shall not be paid to an employee by way of promissory notes, vouchers, coupons or in any form other than legal tender. E
>
> (2) Remuneration may be payable in kind only in industries or occupations where such payment is customary, and shall be subject to the following conditions -
>
> (a) any such payment shall be appropriate for the personal use and benefit of the employee and the employee's family;
>
> (b) the value attributed to such payment shall be fair and reasonable;
>
> (c) equipment or clothing required to protect the health and safety of the employee F shall not be computed as part of the remuneration of the employee;
>
> (d) no payment shall be made in the form of liquor or drugs;
>
> (e) remuneration in kind shall not substitute entirely for remuneration in money."

Mr *Moyo* argued that, at the time of employment, legal tender was constituted by local banknotes and coins. He submitted that, though foreign currency was money, at the time, it was not legal tender in Zimbabwe. Mr *Magwaliba* G did not controvert this argument. Rather, he ingeniously contended that the fact that the Exchange Control (Payment of Salaries by Exporters in Foreign Currency for Critical Skills Retention) Order SI 127 of 2008 introduced for the first time the need for an exporter to seek exchange control authority to pay salaries in foreign currency showed that the payment of salaries in foreign currency was not proscribed before its promulgation. He went on H

A to argue that as this subsidiary legislation did not have retrospective effect, it did not affect the plaintiff whose contract of employment ended in March 2007. I, however, agree with Mr *Moyo's* rebuttal that the introduction of SI 127 of 2008 into our law was the first inroad made against the restrictive provisions of s 12A(1) against the payment of salaries in any currency other than local currency.

B Subsections (1) and (2) of s 12 A of the Labour Act recognize the payment of remuneration in cash or in kind. Subsection (1) restricts those employers who remunerate their employees in money to the use of legal tender to the exclusion of other modes of payment such as promissory notes, vouchers, coupons or any form other than legal tender. I understand the phrase "any C form other than legal tender" to be of wide application. In my view, it restricts payment to the use of legal

tender and excludes payment in kind or money that is not legal tender. Subsection (2) permits employers who are in occupations or industries that customarily pay remuneration in kind to do so. Paragraph (e) of subs (2) of s 12A puts it beyond doubt that remuneration in kind is not the same as remuneration in money. This same paragraph, in D my view, is clear proof that, in the mind of the legislature, "legal tender" in s 12A(1) was another euphemism for money. See *Rhodes Motors (Pvt) Ltd v Pringle-Wood NO* 1965 RLR 395 (A); 1965 (4) SA 40 (SRA) at 42D where legal tender is considered and treated as money; *S v Zakana* 1976 (1) RLR 91 (G); 1976 (2) SA 248 (R) where Smith J, by reference to the *Shorter* E *Oxford English Dictionary* defined legal tender to be *inter alia* "the money of a country in actual use"; and McNally JA in *S v Bennett-Cohen* 1985 (1) ZLR 46 (S) at 51B defined legal tender as currency or money. The same learned Judge of Appeal, in S v *Mafarachisi* 1990 (1) ZLR 118 (S) at 121E, approved the definition by Cowen in *The Law of Negotiable Instruments in South Africa* 5 ed vol I at p 47 that legal tender was "the medium legally F authorised by the State for the payment of debts."

Mr *Moyo's* submission that foreign currency did not constitute legal tender at the time of the plaintiff's contract of employment with the defendant is borne out by the views of textbook writers and case law. The definition of legal tender is provided by Mann in *The Legal Aspect of Money* 4 ed at 41 G in these words:

> "Legal tender is such money in the legal sense as the legislator has so defined in the statutes organizing the monetary system. Chattels which are legal tender have, therefore, necessarily the quality of money, but logically, the converse is not true,... not all money is necessarily legal tender. The question what money is to be considered legal tender is usually answered by the statutes organizing H the monetary system".

2010 (2) ZLR p222

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Again at p 186 the learned author states: A

> "Where these principles lead to foreign money being regarded as money, the conclusion is in no way affected by the established rule that foreign money is not legal tender, for not all money is legal tender, but all legal tender is money. Legal tender is such money as is 'current coin of the realm'. This does not mean more than that foreign money cannot be tendered in discharge of a debt to pay pounds sterling, but it does not touch the question of the manner of discharging B in England a debt expressed in foreign money."

Willis *Banking in South African Law* (Juta, 1981) at p 200 observes that, in terms of the South African Mint and Coinage Act 75 of 1964, the South African Reserve Bank has the power to issue and make bank notes and coins and that these coins and banknotes constitute legal tender in South C Africa. At p 191 Willis confirms that in South Africa foreign money is not legal tender. He writes:

> "The definition of foreign currency has since been amended to mean' any currency which is not legal tender in the Republic'".

Christie *Law of Contract in South Africa* 3 ed at 458 is in agreement with the observations made by Willis. D

Morse, in Vol 1 of *A Treatise on the Law of Banks and Banking* 3 ed (1888) at para 312 at p 536, recognizes the sovereign right of every state to define what is legal tender within its jurisdiction in these words:

> "The right of the depositor is not, however, necessarily to the gold or silver coin of the country; but only to such money as is by the law of the land legal tender E at the time."

In Vol 2 in para 447 at 736 the learned author defined legal tender in these words:

> "At present, in our country, the treasury notes of the United States have been made by Act of Congress a legal tender, and payment, or offer of payment, in them satisfies the duty of the bank; though it has bound itself by a specific agreement F to pay in gold or silver coin".

And in para 637 at p 978 he wrote:

> "Bank bills are not money, in the strict sense of the term; that is to say, they are not legal tender, even to pay debts due to the bank itself."

The textbook writers have equated legal tender with currency and noted that G what constitutes legal tender in any country is governed by the legislation of that country. In Zimbabwe, the term is used, *inter alia,* in s 12 A of the Labour Act, in ss 41(1), 42(1), 44(2) and 44 A of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*]*,* and in the definition sections of the Balance of Payments Reporting Act [*Chapter 22:16*] and the Exchange Control Regulations 1996.

At the time the acknowledgment of debt was entered into, the legal tender H

2010 (2) ZLR p223

Kudya J

A for the payment of salaries in Zimbabwe was local currency and not foreign currency. The defendant could not, under s 12A(1) of the Labour Act, agree to pay the plaintiff in foreign currency. That the plaintiff was aware that it was unlawful is shown by his failure to invoke the provisions of s 13 of the Labour Act for the payment of the purported arrear salaries when he left employment; and his failure to write into the terms of his contract of B employment payment of part of his salary in foreign currency.

Formal acknowledgments of debt that are usually prepared by legal practitioners contain renunciation clauses, such as the one highlighted by Young J in *Caltex (Africa) Ltd v Trade Fair Motors (Pvt) Ltd & Anor* 1963 (1) SA 36 (SR) at 36H, like *non numeratae pecuniae, non causa debiti, errore* C *calculi,* revision of accounts, and *de duobus vel pluribus reis debendi.* There were no such renunciation clauses in the acknowledgment of debt in issue. In *Macape supra* at 321 G McNally JA held that a court could go behind the making of an acknowledgment of debt to test its legality. He stated that:

> "There is no evidence before the court to show that the underlying cause of the acknowledgement of debt was illegal, and the acknowledgment itself was not D illegal."

I am satisfied that the underlying cause of the acknowledgment of debt that was relied upon by the plaintiff was illegal. A court cannot enforce an illegal contract. See *Dube v Khumalo* 1986 (2) ZLR 103 (S) at 109D.

There are other features of the case which were revealed by the plaintiff during cross-examination which militate against the enforcement of E the acknowledgment of debt against the defendant. The first was that he was never paid in foreign currency during his time of employment but was paid a salary in local currency that was indexed to the US dollar at the parallel rate of exchange to preserve the purchasing power of the local currency. The acknowledgment of debt that was executed erroneously referred to the currency F of indebtedness as the US dollar. The acknowledgment of debt therefore told a lie about itself. The second disquieting feature was that the plaintiff averred that he was to be paid in foreign currency by an offshore sister company to the defendant called PXL that was to be set up in Mauritius, in which the defendant's acting chief executive officer would have an interest. He did G not disclose whether this company was ever set up. It seems to me that he should have sought payment from that company rather than the defendant.

I determine the third and fourth issues referred to trial in favour of the defendant. Accordingly, it is ordered that:

1. The exception raised by the defendant be and is hereby upheld. H
2. The plaintiff's claim be and is hereby dismissed.

2010 (2) ZLR p224

Kudya J

3. The plaintiff shall pay the defendant's costs of suit. A

Magwaliba & Kwirira, plaintiff's legal practitioners

Kantor & Immerman, defendant's legal practitioners B

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/MUDEKUNYE & ORS v MUDEKUNYE & ORS 2010 (2) ZLR 225 (H)

MUDEKUNYE & ORS v MUDEKUNYE & ORS 2010 (2) ZLR 225 (H)

Citation	2010 (2) ZLR 225 (H)
Case No	Judgment No. HH-190-10
Court	High Court, Harare
Judge	Bere J
Heard	2 August 2010
Judgment	3 August 2010
Counsel	*T Moyo,* for the applicants *C Nyika,* for the respondents
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

Costs - *higher scale - grant of - poor conduct of legal practitioner - permissible for court to punish in costs a litigant for the poor conduct of legal practitioner*

Practice and procedure - *stare decisis - decisions of High Court - single* D *judging departing from ruling ostensibly made by two judges - decision in an urgent chamber application - not a decision made by two judges*

Practice and procedure - *application - urgent - certificate of urgency - certificate signed by legal practitioner in a matter handled by the legal firm of which he is a member - nothing improper in such conduct - not* E *necessary for practitioner from another firm to sign certificate*

Headnote

A lawyer in the firm representing the applicant in an urgent chamber application filed the certificate of urgency required by r 242(2)(b) of the High Court Rules 1971. Counsel for the respondent objected, arguing that it was not competent for a legal practitioner to either attest to an affidavit or F sign an urgency certificate for and on behalf of a client who is being represented at his firm, as such lawyer has an interest in the matter. In so doing, he relied on the decision in *Chafanza v Edgars Stores Ltd & Anor* 2005 (1) ZLR 299 (H), a judgment of Cheda J, in which Ndou J concurred. Some judges had treated this decision as binding on them as it was, on the face of it, a decision of two judges and the principle of G *stare decisis* obliged them, as judges sitting alone, to follow the decision.

Held, that it is imperative that in a civil matter in the High Court, before a judge can enjoy the privilege of concurring with or dissenting from the decision of a fellow judge of concurrent jurisdiction, that judge must have sat together with the other judge in the hearing of the matter. The G decision in *Chafanza* was not a decision of two judges sitting together. It

was given following an urgent chamber application, which would have A been heard by a single judge. There was no indication that the matter had been heard by two judges, an event that would have been extremely unusual. The decision was thus persuasive but not binding.

Held, further, that a legal practitioner who is representing an applicant in an urgent application is better positioned to prepare a certificate of B urgency than any other legal practitioner who has not been favoured with direct instructions from the applicant. This responsibility cannot be left to a legal practitioner who is a total stranger to the applicant and the application. With or without a certificate of urgency, the presiding judge determines the question of urgency. A certificate of

urgency prepared by a legal practitioner representing the client or by a legal practitioner C from the same law firm does not in any way reduce the court's discretion in determining the question of urgency. If anything, the court is better off with that kind of certificate, as opposed to being guided by a legal practitioner from a different law firm who is either not connected with the case or may have been overwhelmed by the voluminous nature of the application and therefore ends up blindly preparing or merely D signing a certificate of urgency because he has been requested to do so by a fellow legal practitioner. While an affidavit should be attested by a commissioner of oaths who is impartial, unbiased and independent in relation to the subject-matter of that affidavit, this requirement does not apply to certificates of urgency. There is, therefore, nothing improper E in a legal practitioner filing a certificate of urgency, for the purposes of r 242 (2), to certify the urgency of a matter which was being handled by the law firm of which he was a member.

Held, further, that in a proper case it is permissible to punish litigants in costs for the poor conduct of their chosen legal counsel. F

Legislation considered

High Court Act [*Chapter 7:06*], ss 3 and 4

High Court Rules 1971 (RGN 1047 of 1971), rr 242(2) and 244

Cases referred to

African Consol Resources plc v MMCZ Case No HC 2238/10 G

A-G v Chiringa Ests & Ors Case No HC 659/10

Chafanza v Edgars Stores Ltd & Anor 2005 (1) ZLR 299 (H)

Delco (Pvt) Ltd v Old Mutual Properties & Anor 1998 (2) ZLR 130 (S)

Kruger Bros & Wasserman v Ruskin 1918 AD 63

Mafu & Ors v Solusi University HB-53-07 H

Bere J

A *Pretoria Bill Posting Co v Hess* 1911 TPD 360

Route Toute BV & Ors v Sunspun Bananas (Pvt) Ltd 2010 (1) ZLR 117 (H)

S v Rolomane 1971 (4) SA 100 (E)

Smith v Hannock (1894) 2 C & D 377 (CA)

Case information

B *T Moyo,* for the applicants

C Nyika, for the respondents

Judgment

Bere J: On27 July 2010 and in case number HC 5120/10 the same applicants in this matter filed an urgent chamber application seeking to have execution stayed pending the determination of an application for rescission of judgment B issued against them in case number HC 271/10. Counsel representing the applicants had submitted before my brother Patel that the filing of the urgent chamber application had been preceded by the filing in this same court of an application for rescission of judgment.

As it turned out and contrary to the submissions made by counsel no C application for rescission of judgment had been filed in this court. On 29 July 2010 Patel J then granted the following order:-

"1. The application is withdrawn and is accordingly removed from the roll.

2. First and second applicants shall pay the first and second respondents' wasted costs on the ordinary scale".

D The application before me is exactly the same application that was brought before Patel J, the notable difference being that now the applicants have been able to file an application for the rescission of judgment granted against them. The interim relief sought is meant to suspend execution pending the determination of the application for rescission of judgment.

The other notable difference is that the initial urgent application was being F handled by a Mr Nyamadzawo, a legal practitioner from Messrs Mutamangira & Associates, Legal Practitioners, and now before me, but from the same law firm, is Mr *T Moyo.*

Mr *Moyo,* who appeared before me, was at pains to convince the court that when his colleague Mr Nyamadzawo appeared before Patel J, he had merely G stated that the application for rescission of judgment was in the process of being filed when the urgent chamber application to stay execution was being heard before Patel J. I do not accept this argument as it is inconsistent with the averments made in the summary made by Messrs Mutamangira & Associates when they stated in para 4 of the summary of the urgent application made H in terms of r 29B of the High Court Rules 1971 that:

Bere J

> "4. The applicants have filed an application for rescission of judgment and A seek a provisional order staying the execution of the writ of ejectment".

Clearly Mr *Moyo's* submissions in this regard were coloured by *mala fides.* I will come back to deal with this issue later in my judgment.

In the urgent application before me, the respondent's counsel, Mr *C Nyika,* raised basically two points *in limine* which he argued were capable of B resolving the issues before going into the merits of this matter.

Counsel's first contention was that it was not competent for Mr *Ndudzo,* a practicing lawyer with Messrs Mutamangira and Associates, to have filed the certificate of urgency in support of the urgent chamber application filed by his law firm. In raising this issue, counsel was leaning on the ratio formulated by my brother Cheda in *Chafanza v Edgars Stores Ltd & Anor* 2005 (1) ZLR 299 (H), C where he expressed the view that it is not competent "for a legal practitioner to either attest to an affidavit or *sign an urgent certificate* for and on behalf of a client who is being represented at his firm as such lawyer clearly has an interest in the matter"(my emphasis).

The second point raised by Mr *Nyika* was that the writ which the applicants D had sought to be stayed had already been executed and that any order for stay would amount to a *brutum fulmen.*

I propose to deal with the issues raised in the order they were raised.

The alleged defect in the certificate of urgency

It is clear that in raising the alleged defect in the certificate of urgency counsel E for the respondents was being guided by the *ratio* in *Chafanza supra* and many other decisions from this court which felt bound by the decision in that case.

It will be noted that there has been a divergence of opinion in this court as regards the decision in *Chafanza's* case. Basically, two schools of thought have emerged. Some judges of this court feel very strongly that the decision F in *Chafanza* was a majority decision by two judges of this court and therefore binds single judges of this court. In this regard, Kudya J remarked in *Attorney General of Zimbabwe v Chiriga Estates & Ors* HC 659/10 as follows:

> "The case of *Chafanza* was made by a panel of two judges of concurrent jurisdiction with me. In line with the principle of *stare decisis,* a single judge is bound by the determination made by a panel of two or more judges of concurrent G jurisdiction. To comply with the rules of court as interpreted in *Chafanza's* case, the Attorney-General should have utilized the services of a legal practitioner from outside his office to certify the certificate of urgency. Mr *Mutangadura* has failed to persuade me to depart from the *ratio decidendi* in *Chifanza's* case. Being the deponent in the founding affidavit he basically raised a certificate of urgency for himself. His actions were improper and in direct conflict with the principle set out in *Chafanza's* case". H

Bere J

A Patel J *in African Consolidated Resources plc & Ors v Minerals Marketing Corporation of Zimbabwe & Ors* HC 2238/10 adopted a slightly different approach from Kudya J. The learned judge acknowledged that the certificate of urgency before him was improper and undesirable but nevertheless held it was not fatally defective. Patel J appears to have adopted a more cautious approach in following the *ratio* in *Chafanza's* case.

B In contrast, Chatukuta J adopted a completely different approach *in Route Toute BV& Ors vs Sunspun Bananas (Pvt) Ltd & Anor* 2010 (1) ZLR 117 (H) at 120B when she ruled that she was not bound by the decision in Chafanza's case. The learned judge reasoned, *inter alia,* as follows:

> "Rule 242(2) simply prescribes that where an applicant is legally represented C in an urgent chamber application, the application must be accompanied by a certificate from a legal practitioner supporting the urgency of the application, ... the decision in *the Chafanza case is not binding....* "(my emphasis).

With due deference to my brother Kudya, I hold a different view of the *Chafanza* case and my conviction is that that case is not a majority decision. I am more inclined to concur with the position adopted by Chatukuta J for D the reasons which I will hereunder expand on.

Was the decision in *Chafanza* a majority decision?

On the face of it, it would seem that the *Chafanza* decision was a majority decision because of the indication on the face of the judgment that Ndou J concurred with Cheda J.

E However, a closer look at the judgment shows that this was an urgent chamber application which Cheda J had the privilege of hearing as a single sitting judge of this court. The headnote of this case as reported makes this position beyond reproach. There is no indication or suggestion that Ndou J sat with Cheda J in hearing this urgent application. If my observation is correct F (which I am certain it is) it may not have been proper for Ndou J to have concurred with Cheda J in a case which he did not sit. It is imperative that, in a civil matter, before a judge can enjoy the privilege of concurring with or dissenting from the decision of a fellow judge of concurrent jurisdiction, that judge must have sat together with the other judge in the hearing of the matter.

This situation is different from criminal reviews where judges are statutorily G empowered to review matters, sitting as single judges, if need be to write review judgments and then seek the views of another judge of concurrent jurisdiction. This approach in criminal matters is specifically provided for in terms of the High Court Act, and so is the approach in handling civil matters.

In as far as the adjudication of civil matters is concerned, ss 3 and 4 of the H High Court Act [*Chapter 7:06*] provide as follows:

Bere J

> **"3 Composition of the High Court** A
>
> Subject to section *four*, the High Court shall be duly constituted -
>
> (a) for the purpose of exercising its original jurisdiction *in any civil matter,* if it consists of one or more judges of the High Court;
>
> (b) ...
>
> (c) ...
>
> (d) ... B
>
> **4. Decision of High Court**
>
> (1) When more than two judges of the High Court *are sitting together* the decision of the majority shall be the decision of the High Court"(my emphasis).

It is quite clear to me that, in order to bring about a majority decision in the *Chafanza* case, the two judges of the High Court must have sat together to C hear the matter. Only then would their decision have constituted a majority decision.

There is also another aspect to this case that seems to confirm that Cheda J did sit alone in the hearing of this case. Order 32 r 244 of the High Court of Zimbabwe Rules 1971 reads as follows:

> "Where a chamber application is accompanied by a certificate from a legal D practitioner in terms of paragraph (b) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to *a judge who shall consider the papers forthwith:*

> Provided that, before granting or refusing the order sought, *the judge* may direct that any interested person be invited to make representations in such manner and E within such time as the judge may direct, as to whether the application should be treated as urgent"(my emphasis).

It is not accidental that both the cited rule and its proviso specifically refer to "a judge". This is consistent with the common practice in the High Court that urgent applications are normally handled by single sitting judges.

If one would want to depart from the established practice and invite another F judge of the High Court to sit with him/her in hearing an urgent chamber application one can safely do so, but this would be in extremely rare situations. However, there is no indication that this is what happened in the *Chafanza* case. Really, the sitting or otherwise of Ndou J in hearing *Chafanza's* case cannot and should not be a subject of speculation. It is clear that the judge G did not have the privilege of sitting in this matter.

If this argument is accepted (which I am convinced it should be) then the decision in *Chafanza* cannot by any stretch of imagination be regarded as a majority decision. It remains the decision of a single sitting judge and as such assumes its persuasive value and not a binding one. Logically it should follow that the debate on the certificate of urgency and its form has not been H

A sealed by the decision in *Chafanza's* case. The debate remains open and must be further broadened or considered.

Can a legal practitioner sign a certificate of urgency for and on behalf of applicant who is represented by his law firm?

I have already highlighted on the divergence of opinion in this court on this B issue. It is not my intention to re-visit the conflicting views but to expand on the debate which has been triggered by the position adopted by Cheda J in *Chafanza's* case.

Suffice it to say that the decision by Cheda J appears to have been largely influenced by the cases of *Smith v Hannock* (1894) 2 C & D 377 (CA); C *Pretoria Bill Posting Co. v Hess* 1911 TPD 360 and *S v Rolomane* 1971 (4) SA 100 (E), which cases I will briefly comment on hereunder.

My brother Cheda summed up his position in *Chafanza supra* at 300G::

> "To my mind, it is totally undesirable for a legal practitioner to either attest to an affidavit or sign an urgent certificate for and on behalf of a client who is being represented at his firm as such lawyer clearly has an interest in the matter at D hand".

There can be no doubt about the praiseworthy intentions which motivated Cheda J to formulate the *ratio* in *Chafanza's* case but, in my view, and with extreme due deference to the learned judge, he may have missed the mischief that was intended by r 242, which created the need to file a certificate of E urgency in an urgent application where one is legally represented.

The relevant rule, Order32r 242(2)of the High Court Rules 1971 is couched as follows:

> "Where an applicant has not served a chamber application on another party because he reasonably believes one or more of the matters referred to in paragraphs (a) F to (e) subrule (1)-
>
> (a) he shall set out the grounds for his belief fully in his affidavit; and
>
> (b) unless the applicant is not legally represented, the application shall be accompanied by *a certificate from a legal practitioner setting out, with reasons his belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in paragraphs (a), (b), (c), (d) or (e) of subrule (1)* "(my emphasis).

G Order 32 r 244 of High Court Rules 1971 deals with a judge who has to deal with an urgent chamber application and its proviso is worded as follows:

> "Provided that, before granting or refusing the judge may direct that any interested person be invited to make representations, in such: manner and within such time as the judge may direct, as to whether the application should be treated as H urgent."

What is clear from r 242(2) is that it is competent for an unrepresented A applicant to file an urgent application without a certificate of urgency. Such an application will be regarded as a complete application.

The need for a certificate of urgency only arises where the applicant is legally represented, in which caser242(2) would then require that the urgent chamber application be accompanied by a "certificate from a legal practitioner setting B out, with reasons, his belief that the matter is uncontentious, likely to attract perverse conduct or urgent..."

To my mind, r 242(2) does not in any way prescribe that a legal practitioner who signs an urgent certificate must not be from the same law firm representing the applicant. Rule 242(2) is very clear in its wording and it requires no C complicated interpretation. If it was intended that a legal practitioner other than the one from the law firm representing the applicant prepares the certificate of urgency, the rule would have specifically stated so. For practical considerations, I am more inclined to take the debate further and say that r 242 actually envisaged a situation where the same legal practitioner representing the applicant is expected to file the certificate of urgency in D support of the applicant's case. I say so because, when a legal practitioner is given instructions by his or her client, invariably it is the same legal practitioner who decides whether or not the matter is uncontentious, whether or not the matter is likely to attract perverse conduct or whether or not the matter should be heard on urgent basis. The assumption must be that the legal practitioner is the one who prepares the court papers and is therefore better E positioned to do an evaluation of his client's case and objectively give the court his honest and professional view as regards what r 242(2) envisages. This heavy responsibility cannot be left to a legal practitioner who is a total stranger to the applicant and the application. The rigours of private practice and the urgency of the matter do not, in my view, seem to encourage forum F shopping for another legal practitioner with no interest in the matter to be able to properly satisfy the provisions of r 242.

I use the word "interest" with guarded caution. It is fair to say that every legal practitioner has an interest in the matter that he handles but I think it may be an exaggeration to suggest that in handling that matter the legal practitioner G ceases to be oblivious of both his professional and ethical duty to the court.

It is my view that when these courts deal with legal practitioners we must operate on the assumption that such legal practitioners are fully aware of their concomitant duty to both the court and their clients. We must regard them as fully fledged professionals and officers or servants of the court. But this does not mean we have to blindly accept whatever they say. There will H

A be occasions when the court has to deal with errant legal practitioners and I think our system has sufficient safeguards to deal with such practitioners.

Rule 242 is clear that, with or without a certificate certifying the matter to be urgent, the presiding judge remains seized with the matter to the extent that the court is enjoined to determine the question of urgency. I am unable B to comprehend how the court can be prejudiced by a certificate of urgency either from the same legal practitioner representing the applicant or from a fellow practitioner from the same law firm. *In Mafu & Ors v Solusi University* HB-53-07 at p 2 of the judgment, I remarked as follows:

> "As is the practice in applications of this nature, it will be noted that the present application is accompanied by a certificate of urgency duly signed by a qualified C legal practitioner. I must, however, add a caution and say that the mere fact that there is such a certificate does not necessarily mean that the court must make a finding that the matter is urgent. The certificate of urgency must not be religiously accepted but is merely meant to assist the court in the exercise of its discretion in determining whether or not the matter is urgent"

As far as I am concerned, a certificate of urgency prepared by a legal practitioner D representing the client or by a legal practitioner from the same law firm does not in any way take away the court's discretion in determining the question of urgency. If anything, the court is better off with that kind of certificate, as opposed to being guided by a legal practitioner from a different law firm who is either not connected with the case or may have been overwhelmed E by the voluminous nature of the application and therefore ends up blindly preparing or merely signing a certificate of urgency because he has been requested to do so by a fellow legal practitioner.

I have had the privilege of acquainting myself with the cases which influenced my brother Cheda's decision in *Chafanza's* case. The cases *of Pretoria Bill* F *Resting Co v Hess* 1911 TPD 360 and *Smith v Hannock* (1894) 2 C and D 377 (CA) were cases where the courts were pre-occupied with enforcing contracts in restraint of trade. What the courts had to determine was whether the defendants were "interested in" the businesses they had disposed of, to the extent that the new owners of the business enterprises could be said to have been prejudiced by the conduct of the defendants. It is open for debate G whether these authorities would be of relevance to the issue of a certificate of urgency as provided for in r 242.

In S v Rolomane 1971 (4) SA 100 (E) the court was called upon to determine the admissibility or otherwise in evidence of an affidavit which had been commissioned by an officer who was alleged to lack the necessary qualification H in his attestation of the affidavit. The *ratio* in that case (at 102) was that

> "... the courts require for the admissibility of affidavits tendered in evidence that A they be attested by a commissioner of oaths who is impartial, unbiased and independent in relation to the subject-matter of those affidavit".

There is no doubt that this is a sound legal principle in so far as it applies to affidavits. It is, however, doubtful if this same principle could be extended to a certificate of urgency as currently provided for in our r 242 which in B my view, is very clear in its requirements.

My very strong view as highlighted is that this principle of law, sound as it is, cannot override a specific provision in our rules, particularly where the rule itself has gone further to provide sufficient safeguards by giving the presiding judge the power to either confirm or dismiss the urgency of the matter irrespective of the existence of a certificate of urgency. C

Secondly, the view that I take is that a legal practitioner who is representing an applicant in an urgent application is better positioned to prepare a certificate of urgency than any other legal practitioner who has not been favoured with direct instructions from the applicant. A legal practitioner representing an applicant is in a better position to be of greater assistance to the court because D he is familiar with the case. The question of bias or exaggerated interest, if ever it arises, will be taken care of by the presiding judge in accordance with r 244. In coming to this conclusion, I am motivated by, among other things, the fact that generally there is no legal practitioner worth his salt who would knowingly and intentionally conduct himself in such a way as to deliberately mislead the court, particularly when he is fully aware that E at the end of the day the discretion to confirm or decline urgency remains the prerogative of the court. As I stated earlier on, there will be occasions when some legal practitioners will overstep the line but, again, our system has sufficient safeguards to deal with such a scenario.

Coming to the case before me, I am satisfied that there was nothing improper F about Mr *Ndudzo* filing a certificate of urgency to certify the urgency of a matter which was being handled by his law firm. In my view, this is what it should be. In fact, it appears to me such a certificate is a better and a more informative document if prepared by the applicant's counsel. The point of objection raised *in limine* in this regard is not sustainable. I will later in this judgment come back to deal with whether or not this matter is urgent. G

The timing of the instant case

Counsel for the respondents took issue with the timing of filing this application. Counsel reasoned that the writ which the applicants sought to be stayed had already been executed by the time the urgent application was filed and that it was procedurally improper to do so. H

A For some reason, counsel for the applicants passionately argued to the contrary. Counsel's view was that no execution had been effected by the time the urgent application for stay was filed in this court on 29 July 2010.

The documentary evidence placed before this court clearly shows that execution in this case which entailed the ejectment of the now applicants, B was effected by the Deputy Sheriff, Chipinge on 27

July 2010 at 11:25 hrs. The urgent chamber application to stay execution was filed two days later, that is, on 29 July 2010.

Execution of judgment is a natural consequence of a decision by the court. It is put in motion by due process of law and once it is properly carried out C there can be no question of applying to stay it. Once the *status quo ante* is lost through due process it is virtually impossible to restore it. One has to endure the outcome of an appeal process or some other remedy like review. See the judges' sentiments *in Delco (Pvt) Ltd v Old Mutual Properties* 1998 (2) ZLR 130 (S).

It occurs to me that it was mischievous for counsel for the applicants to try D to bring an application for stay of execution of a process that had already gone beyond execution, let alone to try to argue that execution had not been effected when documentary evidence pointed to the contrary. On this basis alone, the point raised by counsel for the respondents could not be resisted.

The urgency of the matter

E I have already made a specific determination that there was nothing improper about the way in which the certificate of urgency was prepared in this case.

However, I am concerned with the conduct of the two legal practitioners who represented the applicants on two different occasions before two different judges of this court sitting separately. One cannot help but come to the F inevitable conclusion that the two legal practitioners were determined to mislead the two judges. Our expectation as judges of this court is that, when legal practitioners appear before us, they are guided by professional ethics; they strive to honestly and diligently assist the court and not to demonstrate stout efforts to mislead the court. Legal practitioners must appreciate there G is a price for dishonesty and no court can reward such conduct.

Given the circumstances of this case and in particular the valuable time lost by the legal practitioners in misrepresenting certain facts to the court, coupled with a deliberate attempt to stop execution which had already been effected, clearly the urgency in this matter was self-created and such urgency cannot H be countenanced by this court.

Bere J

Costs A

Counsel for the applicant has asked for costs on a higher scale. His frustrations are understandable, particularly given the manner in which the applicants' counsel has conducted himself in this matter. I have already highlighted some of the issues which are the cause of complaint.

I have agonised over the issue of costs, guided by the wide discretion that B the court enjoys, which discretion must be judiciously exercised. *See Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 68.

It is important to note that most of the issues complained of had nothing to do with the conduct of the applicants themselves but of their legal counsel. In a proper case, it is permissible to punish the litigants for the conduct of C their chosen legal counsel but I do not believe this is one such case.

Given the background of his case, and in particular the fact that this matter involves a deceased estate where emotions tend to run high among those family members who genuinely believe in their entitlement to the estate assets, I am not satisfied that a punitive order of costs is called for. I propose to award costs on the ordinary scale. D

Consequently I order as follows:

> That the application be and is hereby dismissed with costs.

Mutamangira & Associates, applicant's legal practitioners

Chikumbirike & Associates, respondent's legal practitioners E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/MEKI v VHUSHANGWE & ORS 2010 (2) ZLR 237 (H)

MEKI v VHUSHANGWE & ORS 2010 (2) ZLR 237 (H)

Citation	2010 (2) ZLR 237 (H)
Case No	Judgment No. HH-174-10
Court	High Court, Harare
Judge	Chatukuta J
Heard	12 October 2009; 15 October 2009; 16 October 2009
Judgment	4 August 2010
Counsel	*P Kawonde,* for the plaintiff *N Zvidzai,* for the first defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Customary law – *chief - succession to chieftainship - collateral system of succession among Shona-speaking people - principles*

Headnote

Achief is appointed by the President in terms of s 3 of the Chiefs and Headmen D Act [*Chapter 29:01*]. In making such an appointment, the President must give due consideration to the customary principles of succession, if any, applicable to the community over which the chief is to preside. Whilst among the Ndebele, the chief *(induna)* is selected by a system of primogeniture in which, upon his death, the office is passed on to his eldest son, a more complicated one is adopted by the Shona-speaking E people. The principle varies with each community. Their chiefs are chosen by a collateral system in which the position is passed from the head of one of the "special families" to that of another. Each of these families is known as an *"imbahuru"* or "royal family" and on the death of a chief *(ishe* or *mambo)* his successor is selected from the representatives of F two, three or even four "royal" families in the clan. Thus, when a chief dies, his office passes on to the representative of the next family until each has had its turn, when the cycle is repeated. One variation is that younger brothers succeed to elder brothers until the succession has been held by each in turn, when it reverts to the son of the first chief and then to the sons of the collateral lines. Another variation is that the G eldest son, regardless of the position or rank of his mother, succeeds to the personal name and position of his father. When he dies, his next youngest brother or half-brother succeeds to the father's name, until the generation of sons of the father is exhausted and the eldest grandson succeeds to the name and position of his grandfather, the determining H factor again being the order of birth amongst collateral grandsons. It is

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the task of tribal elders, mostly belonging to the ruling clan, and of other A important kinsmen, to determine which candidate has the best rights to become chief. In the event of serious rivalry recourse may be had to a *svikiro* (spirit medium) of an important ancestor to ascertain the views and wishes of the ancestral spirits.

Cases referred to B

Chagaresango v Chagaresango 2000 (1) ZLR 99 (H)

Muskwe v Nyajina & Ors HH-92-07

Ruzane v Paradzai & Anor 1989 (1) ZLR 118 (H)

Ruzane v Paradzai & Anor 1991 (1) ZLR 273 (S)

Case information

P Kawonde, for the plaintiff C

NZvidzai, for the first defendant

Judgment

Chatukuta J: The plaintiff issued summons on 23 July 2007 claiming the following relief: D

"(a) An order declaring that the only families entitled to the Mapanzure chieftainship are the following families:

1. Chimbuya
2. Magwirokona
3. Mavhengere
4. Bwangundoga
5. Mupandasekwa E
6. Gwenhamo
7. Shumbayaonda;

(b) An order declaring that, according to customary principles of succession to the Mapanzure chieftainship, the first defendant, a descendent of the Rushangwe/Vusangwe family, has no title or claim to the Mapanzure chieftainship; F

(c) An order removing the first defendant from his position as Chief Mapanzure;

(d) An order declaring the eighth to the tenth defendants acted contrary to custom when they recommended the appointment of first defendant as Chief Mapanzure; and

(e) An order of costs against any of the defendants who may oppose this G application."

On 12 October 2009 the plaintiff amended his prayer by the deletion of the first three claims. The only main issue for determination, therefore, is whether or not the recommendation for the appointment of the current chief, the first defendant, was in compliance with the customs of the Mapanzure people.

The action was defended only by the first defendant. H

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A **The History of the Mapanzure Chieftainship**

The plaintiff produced as part of his exhibits a copy of an extract of a report prepared on the chieftainship in 1965. It is not clear who the author of the report was.

The first defendant produced a copy of minutes of a meeting held in the B District Commissioner's office on 5 December 1973. The then District Commissioner who chaired the meeting was one W E J Henson. Present at the meeting from the Mapanzure people were Mangwande from the Chihava house, Mutubuki and Tafunda from the Chatikobo house, Mbombe from the Mutukwa house, Rawasindadi from the Zingoni house, Manyoka (Acting C Chief) and Mazorodze from the Gwenhamo house.

Both documents contain the genealogy of the Mapanzure chieftainship. The parties were in agreement that the genealogy reflected the chieftainship. They both relied extensively on the documents in support of their respective positions.

D The following history of the Mapanzure chieftainship, which is explained in these two documents, appears to be common cause. The great-great- grandfather of the chieftainship was Mutuna. After him came Muravu (second generation), then Mapanzure (third generation) and then Mazorodze and Mavhengere (fourth generation). Upon the death of Mapanzure, Mazorodze became the chief. It is not in issue that Mavhengere did not succeed to the E chieftainship because he predeceased Mapanzure.

Mazorodze had more than 30 sons falling under the fifth generation. These sons constitute what is referred to as "houses" in this judgment. However, only 30 sons appear in the genealogy. It is necessary to list these sons according F to their seniority as they appear in the genealogy. These were:

1. ***Mupandasekwa***	11. Tsungirai	21. Chirudumwa
2. ***Chimbuya***	12. ***Zishiri***	22. Ruchanyu
3. Kufandada	13. Mutodzaniso	23. Ganda
4. Zingoni	14. Hapanyengwi	24. Wushe G
5. Chatikobo	15. Tavareva	25. ***Bgwango***
6. Musinazano	16. Rutoro 26.	26 Tirivahera
7. Chihava	17. Kuvengashe	27. Vushangwe/Rushangwe
8. ***Shumbayawonda***	18. Rima	28. ***Gwenhamo***
9. Chizema	19. Mutukwa	29. Chivendera H
10. ***Magwirokona***	20. Gowo	30. Taiziziva

(*The names in bold are the names of Mazorodze's sons whom the plaintiff A allege were selected by Mazorodze for eligibility to succeed to the chieftainship. These are also some of Mazorodze's sons who succeeded to the chieftainship.*)

The eldest of Mazorodze's sons was Mupandasekwa, followed by Chimbuya. Upon Mazorodze's death, the next chief was Chimbuy a because Mupandasekwa had pre-deceased Mazorodze. The last chief among B Mazorodze's sons was Gwenhamo, who died in 1973. The next chief was Masimba Shumbayawonda. He was Mazorodze's grandson and of the sixth generation. Masimba Shumbayawonda died on 8 June 1987. In 1995 the first defendant was appointed the chief. He, like Masimba Shumbayawonda, falls under the sixth generation. The plaintiff is Mazorodze's great-grandson. He is the son of Chitana, Mazorodze's grandchild. Chitana was Chimbuya's C son. Chitana was of the sixth generation. The plaintiff, being Chitana's son, therefore falls under the seventh generation.

Plaintiff's case

The plaintiff testified that he was 69 years old. He resided in Waterfalls, Harare. He was a member of the Chimbuya house. The custom of the Mapanzure D people was that chieftainship revolved according to the order of the house. There were only seven houses out of more than 30 houses that were eligible for chieftainship. Mazorodze, his great-grandfather, had several wives and he gave instructions that the chieftainship would revolve among the sons of his first wife. The seven royal houses were those of Chimbuya, Chatikobo, E Magwirokona, Zishiri, Bwangundoga, Shumbayaonda

and Gwenhamo. Upon the demise of an entire generation of the royal houses, the chieftainship would move to the next generation and rotate again within those royal houses. He disputed that chieftainship was on the basis of seniority within a given generation of the Mapanzure family as a whole. His evidence was that even where the next household had a young son or a daughter, the son or daughter F would be eligible for the chieftainship despite the fact that there may have been an elderly person within the Mapanzure family. The house would not be passed over on the basis that the next chief in that house was young.

He testified that the last chief, Masimba, was from the Shumbayawonda family. Had the eighth to tenth defendants observed the proper custom of G the Mapanzure people, the chieftainship should have gone to the Chimbuya house and not to the Vushangwe house from which the first defendant hailed. The Vushangwe house was not a royal house. It was his evidence that he was supposed to have been eligible for selection as the next chief instead of the first defendant because he was from a royal house. He also stated that the proper procedure had not been adopted when Masimba Shumbayawonda H

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A was appointed chief following the death of Gwenhamo. The chieftainship should have gone to the Chimbuya house.

He further explained that, according to their custom, upon the death of a chief, a meeting would be convened to select the next chief. Initially the meeting was confined to the seven royal houses. After the meeting had selected a chief, the other members of the clan would then be involved. B The District Administrator (eighth defendant) would only be advised of the selection after the meetings of the royal houses and the clan. This traditional meeting of the royal houses was not convened and the first defendant was not selected by the royal houses. He frequently goes to the village (at least once or twice per month) and would have known if such a meeting had been held. C He only became aware of the appointment of the first defendant sometime between 2003 and 2005 through rumours when he had gone to attend a funeral. It was his evidence that the appointment of the first defendant was with the collusion of a councillor called Manyoka without any reference to the Mapanzure people. Manyoka had grown up together with the first defendant and he may have thought that if the first defendant were to die he D would be the next chief.

The plaintiff called his brother, Luckson Jayadhara Chimbuya. Jayadhara testified that he was 66 years old and also hails from the Chimbuya house. He had resided in the Mapanzure rural area for all his life. There were seven houses which were eligible for chieftainship. In terms of their custom, the E Mapanzure chieftainship would rotate within the seven houses and among the "fathers" of those houses in their order of seniority. Upon the death of Mazorodze, the chieftainship went to Chimbuya and not to Mupandasekwa's house because Mupandasekwa's children were still too young. When Chimbuya died, the chieftainship was supposed to go to Kufandada. The F appointment of Masimba Shumbayawonda as chief after Gwenhamo, was not in accordance with their custom. The chieftainship should have come to the Chimbuya house.

However, under cross-examination, he testified that the chieftainship had rotated through the line of Mazorodze's sons and it was the turn of Mazorodze's grandchildren. When Masimba was appointed as chief, the elders had realised G that he was the eldest grandchild.

He testified that the traditional meeting to select a chief after the death of Masimba and before the appointment of the first defendant was never convened. He would have known of this meeting as he resided in the rural areas. He only became aware that the first defendant was a chief well after H his appointment.

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First defendant's case A

The first witness for the first defendant was Pesanai Herbert Gosho Chatikobo. He testified that he was 71 years old and was from the Chatikobo house. He has resided in the Mapanzure rural area all his life. Mazorodze was his grandfather. Chimbuya and Chatikobo were brothers. Chimbuya was from Mazorodze's senior wife and Chatikobo from a junior wife. In terms of their B custom,

chieftainship revolved according to seniority of the "fathers" within a generation. He narrated the history of the Mapanzure chieftainship up to the appointment of the first defendant. He disputed the plaintiff's evidence that only seven sons had been chosen by Mazorodze to succeed to the chieftainship. He further disputed that the chieftainship revolved according to those seven houses as suggested by the plaintiff. His evidence was that all the C Mapanzure houses were eligible to succeed to the chieftainship. The houses are considered as one and the same house and chieftainship therefore follows the eldest surviving "father" in a given generation, irrespective of the house from which he hails. His evidence was that Gwenhamo was the last surviving "father", being Mazorodze's son. Upon his death, the chieftainship went to D the next generation of "fathers". Masimba Shumbayawonda was appointed chief because he was the eldest surviving "father" within his generation.

When Masimba Shumbayawonda died, a meeting of the houses was convened by the then acting Chief Masimba to select the next chief. The meeting was held at the homestead of the late Chief Masimba. He could not remember if representatives of the Chimbuya family attended the meeting. The houses E had initially selected Mavhengere from the Chatikobo house as the next chief. The houses also agreed at that meeting that the first defendant was the next eldest surviving "father" after Mavhengere. Mavhengere however died before his appointment hence the appointment of the first defendant as the next chief. The appointment of the first defendant was therefore in F accordance with the custom of the Mapanzure people.

The first defendant took the stand. However, it became apparent that he could not follow the proceedings and recall past events due to his advanced age. He therefore did not testify. His son, Ignatius Vushangwe, testified on his behalf. He testified as follows. He acted as an adviser to the first defendant. He testified that the selection to chieftainship was based not according to houses G but according to the seniority of the surviving "fathers". When Mazorodze died, his first son Mupandasekwa had predeceased him. Chimbuya was the second son and therefore next in line. Chimbuya had not been living among the Mapanzure people. He had to be recalled to take up the chieftainship because, according to their custom, young brothers could not take chieftainship if there was a surviving elder brother. As a result, it was possible for people H

A from the same house to succeed each other if they were the eldest surviving brothers in that generation. He explained that this was the reason why other houses had not ascended to the Mapanzure chieftainship over the years. When Gwenhamo died, the sons of Mupandasekwa, Chimbuya, Kufandada and Zingoni would have been older than Masimba Shumbayawonda who succeeded him. However, Gwenhamo ruled for a very long time and these B sons had predeceased Gwenhamo. Masimba Shumbayawonda was then found to have been the eldest among Mazorodze's grandchildren, hence his selection and appointment as chief. He disputed under cross-examination the suggestions by the plaintiff's counsel that collateral succession means succession according to houses.

C The witness conceded that he had not attended any meeting to choose the first defendant as the next chief. He testified, however, that the first defendant was residing in Rushinga, Mount Darwin, when he was selected as chief. The Mapanzure people invited him, as they had invited Chimbuya, to come and take up the chieftainship. He disputed that the first defendant had connived D with the councillor, Manyoka, that he be selected Chief Mapanzure.

Assessment of evidence

The plaintiff appeared not to be sure of the custom of the Mapanzure people on the appointment of Chief Mapanzure. This confusion is aptly captured by *Mr Kawonde* in para 6 of the plaintiff's closing submissions. It is necessary to E quote the entire paragraph of the submissions. *Mr Kawonde* stated as follows:

> "The witness indicated that the last chief was Shumbayawonda, and that after the death of Shumbayawonda, the next house in line was that of Chimbuya. However the witness could not explain how this succession would do vetail with the custom abovementioned. The witness was keen to show that the house of Vushangwe was not eligible at all to ascend to the Mapanzure chieftainship. The witness explained that Mapanzure often took two wives from the same F family. However, only the first son from the first wife would become eligible for chieftainship. Under cross-examination, the witness did not convincingly expound on how this mode of succession actually worked. This became clearer when cross-

examination was made with the assistance of pages 1-6 of Exhibit 2. The witness then altered his stance and maintained that, assuming the first defendant was eligible for chieftainship, he could not assume the Mapanzure G chieftainship because his turn had not yet arrived. In this vein, the witness contended that if the last chief had come from Shumbayawonda, the next house to provide a chief would be Chizema, followed by Magwirokona. The first defendant's house would be number 18 in the line of precedence if houses of chieftainship as shown on pages 3-6 of Exhibit 2 were followed. The witness dismissed as untrue the contention by the first defendant that chieftainship would H go by seniority."

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The concession by Mr *Kawonde* that the plaintiff was confused was, in A my view, proper. I commend him for making the concession. The plaintiff could not identify Mazorodze's children from the first wife. He also did not know if the houses that he had identified as the royal houses were from the first wife. This explains the difficulty that he experienced in explaining how succession by Mazorodze's sons from the first wife actually worked. This B mode of succession was not supported by the fact that Chatikobo, who was Mazorodze's son from a younger wife and not the first wife, ascended to the chieftainship. In any event, the plaintiff's evidence was further confused and confusing in that the first wife would only have one first son. The plaintiff's evidence that Mazorodze selected his first wife's eldest son to form a royal house begs the question as to how many first wives Mazorodze had who C gave birth to all the chiefs in the fifth generation.

The plaintiff further testified that chieftainship revolved according to houses, such that even a young child in that house, or a woman, would ascend to chieftainship if it was the turn of that house. The plaintiff testified that Mupandasekwa is one of the royal houses. He conceded that although D Mupandasekwa predeceased Chimbuya, he had young children when Mazorodze died. He could not, however, explain why these children did not ascend to chieftainship upon the death of Mazorodze if succession was according to houses, regardless of the age of the children in that house. The following is the plaintiff's evidence under re-examination on that issue: E

"Q: On p 3 of exhibit 2, under cross-examination, it was stated that those are Mazorodze's sons starting with Mupandasekwa. Mupandasekwa died whilst his father was alive. When a father died the chieftainship went to whom?

A: Chimbuya

Q: If Chimbuya died?

A: To Kufandada F

Q: Why would chieftainship devolve that way?

A: These are the fathers who were supposed to take up chieftainship

Q: Read out the names of the first five fathers (Mazorodze's sons).

A: (*plaintiff read out the names*)

Q: You said Mupandasekwa had two children. If Mupandasekwa dies would G the chieftainship go to Makatu (Mupandasekwa's son)?

A: No. Makatu is a child

Q: At what time would Makatu become chief?

A: After the line of fathers had died, the chieftainship would then go to the children. H

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Q: The defendant A says if Shumbayawonda dies there would be a meeting to find the oldest of the surviving fathers and that person becomes chief?

A: That is not correct. In the event that Shumbayawonda died the next house would be Chizema.

Q: I put it to you that the eldest surviving child becomes the chief. If the chieftainship is in the line of brothers, the eldest brother becomes chief. If B all the brothers die then the eldest son of those brothers becomes chief.

A: That is correct. The eldest surviving brother takes up the chieftainship. If there are no brothers then the eldest son.

Q: You seem to be contradicting yourself. I thought you said that chieftainship follows houses, even the smallest, now you are saying it's the brothers first.

A: It might be that you misquoted me. I said if Chimbuya house was supposed C to take up chieftainship and there are no old children then the youngest in the family succeeds."

The plaintiff's answers are inconsistent with his claim that only the royal houses succeeded to the chieftainship and that it was not on the basis of seniority. The mode of succession that appears in the answers is in fact D supportive of the succession of the Mapanzure chieftainship according to seniority. Kufandada was not from one of the alleged royal houses. He was Mazorodze's third son. Chizema was not also one of the alleged royal sons. He was the next son after Shumbayawonda. The next royal son after Shumbayawonda would have been Magwirokona.

E The explanation by the plaintiff that upon the death of Chimbuya, the chieftainship did not go to Mupandasekwa's house because Mapandasekwa's children were very young but therefore went to Chatikobo was supported by Jayadhara. Jayadhara testified that Mupandasekwa's children were so young that they had not yet started talking. This explanation is also at variance with the plaintiff's case that chieftainship rotates among the royal F houses irrespective of the age of the children from the next royal house. The plaintiff therefore conceded and supported the first defendant's contention that chieftainship was according to seniority, although he would retract the concession under the pretext that he had been misquoted.

The plaintiff could not further explain why, upon the death of Gwenhamo, the chieftainship went to Masimba Shumbayawonda of the Shumbayawonda G house instead of either to the Mupandasekwa or the Chimbuya houses. He accepted that Mupandasekwa was Mazorodze's first son and Chimbuya the second son. Gwenhamo was the twenty-eighth son and Shumbayawonda the eighth If succession follows the royal houses, the plaintiff failed to explain why the chieftainship by-passed both the Mupandasekwa and Chimbuya H houses to go to the eighth house of Shumbayawonda.

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The plaintiff's evidence that there were only seven royal houses is also A not supported in the 1965 report that he produced as an exhibit. At p 17 of Exhibit 1, it is stated that:

> "The order of birth of Mazorodze's sons as given here is probably not 100% accurate; Sister Aquina in her article 'The tribes in Victoria Reserve' *(NADA* 1965) records: 'Eight out of the twenty sons of Mazorodze ... became chiefs. B 'This implies that there were twenty sons of Mazorodze. As can be seen from the genealogy given here, I have now established there were no less than 30 sons and probably more ..."

It therefore follows that, in 1965 when Sister Aquina did her own research, eight and not seven of Mazorodze's sons had become chiefs.

Although the plaintiff's initial evidence was that the first defendant was C not entitled to ascend to the chieftainship, he finally conceded under cross- examination that he was in fact eligible. He however made a qualification that the first defendant's turn had not yet arrived. He conceded that the last chief, Masimba, was his uncle (or "father") and of the sixth generation. He further conceded that the incumbent, the first defendant, is also his uncle, his D father's brother and of the sixth generation. Masimba and the first defendant would therefore be his "fathers". If one were to go by his concessions he cannot be entitled to chieftainship as he is of the seventh generation and therefore a "son" to the incumbent. The plaintiff could therefore not be in the line of fathers as he alleged in his evidence. The plaintiff's concessions in fact support the first defendant's evidence to the effect that he (the first E defendant) was eligible for succession as he was the eldest surviving in the generation of the plaintiff's "fathers".

Turning to the question whether or not a meeting of the houses was held to select the incumbent, Jayadhara confirmed in his evidence that a meeting was indeed held although he did not attend the meeting. The fact that a F meeting was held is also confirmed by Pesanai Gozho Chatikobo. It appears to me that Pesanai was not confused as to which meeting selected the first defendant as chief as alleged by the plaintiff's counsel and confirmed in the first defendant's closing remarks. He testified under cross-examination as follows:

> "Q: Apart from members of the clan who else who is notable was present at G the meeting?
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> A: Most of the people are now dead
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> Q: (*Question was repeated*). Was the Minister present?
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> A: The Minster was not present. We might not understand each other. I am referring to the meeting where the name of the current chief emerged. That H

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A is what I have referred to as the meeting that was attended by the elders. Even the DA was not there. We were still holding meetings as the clan."

Even assuming that the witness may have been confused, I do not find that the confusion was intended to mislead the court. The witness gave the clearest explanation of the Mapanzure chieftainship which substantially tallied with the documents and genealogies that the plaintiff and the first defendant relied B on. He also gave the clearest evidence on how the meeting was convened. He stated that the meeting was convened by the acting Chief Masimba and was held at the late Chief Masimba's homestead. The plaintiff was not able to challenge this evidence.

The fact that meetings were held is further supported by the letters produced by C the parties. It is recorded in a letter dated 1 December 1993, from the District Administrator to the Provincial Administrator, that several meetings were held to choose the next chief. The last meeting, where the first defendant's selection was confirmed, was attended by members of all the houses of the Mapanzure chieftainship. There were 38 kraal heads, 120 elders of the Mapanzure chieftainship, councillor Mapanzure, Vidco and Ward chairpersons D of the Mapanzure chieftainship and the District Administrator. The letter was common to both parties' bundle of documents. In another letter dated 21 June 2004 from the Provincial Administrator to the plaintiff, produced by the first defendant, the Provincial Administrator stated:

> "I wish to advise you that this issue should not just be Chimbuya House v Bvuramai. *All houses must be involved like they were involved in the initial* E *selection process.* The initial meeting must be held without the involvement of this office. 'Tangai Mataurirana vana vanyamunhu'"(own emphasis).

I had difficulties in accepting the plaintiff's evidence that it took him over ten years to discover that the first defendant had been appointed in 1995. The plaintiff testified that he visited his communal home frequently. On the other F hand, Jayadhara testified that when the plaintiff did not visit his communal home, he (Jayadhara) would visit the plaintiff at his urban home. The appointment of a chief is a momentous occasion attended by a lot of people including senior government officials. This was confirmed by Pesanai. If the plaintiff did visit his communal home frequently, and I do not doubt him on that score, he does not appear to have been telling the truth when he said that G he only became aware of the first defendant's appointment after ten years.

Jayadhara also sought to mislead the court when he initially testified that he had also not known of the appointment of the first defendant. He resided in the rural area and such news could not have passed his ears. At least, later in his evidence he had the decency to confirm that he had heard of the H meetings where the first defendant was selected and appointed chief but he

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did not attend any of the meetings. He testified that, although he knew of the A appointment of the first defendant, he could not complain because Manyoka, the councillor, had told the villagers not to challenge the appointment as it was according to seniority. It appears to me that he would not have missed telling the plaintiff of the appointment considering that the Chimbuya family had been vying for the chieftainship since the death of Gwenhamo. B

I found the first defendant's witnesses to have been truthful and their evidence reliable. As already indicated, Pesanai gave a clear explanation of the succession process and the history of the Mapanzure chieftainship. I am mindful of the fact that Ignatius was present in court when both the plaintiff, Jayadhara and Pesanai testified. I am therefore alive to the fact B that his evidence may therefore have been influenced by that of the other witnesses. However, I found his narration of the history of the Mapanzure people to have been very clear and original. It would not have been contrived in court. He substantially supported Pesanai's evidence. He introduced evidence that had not been brought up by the other witnesses such as the fact that Chimbuya was invited to return to the Mapanzure community to C take up the chieftainship and the reasons why he had left that community. Both Pesanai's and Ignatius's evidence was consistent with the 1965 and 1973 genealogies and history of the Mapanzure chieftainship.

The issue

A chief is appointed by the President in terms of s 3 of the Chiefs and D Headmen Act [*Chapter 29:01*]. In so doing, the President must give due consideration to the customary principles of succession, if any, applicable to the community over which the chief is to preside. As indicated

earlier, following the amendment of summons and declaration by the plaintiff at the commencement of the trial, the only issue for determination is whether or F not the appointment of the first defendant was in accordance with customary principles of succession of the Mapanzure people.

The plaintiff alleges that the custom of the Mapanzure people is that they follow the collateral principle of succession, in terms of which the chieftainship revolves according to the royal houses identified by Mazorodze and not G according to seniority. Therefore, in the event that a royal house is due for chieftainship, the house will select the person to be the next chief from that house, irrespective of the age of that person.

The defendant alleged that succession is based on seniority within each generation. All the houses constitute one entity. When all the people in one generation die, the chieftainship rotates within the next generation. The eldest H

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A person within that generation will be appointed the next chief irrespective of which house they come from.

The present dispute relating to the Mapanzure chieftainship was anticipated in 1965 when Gwenhamo was still the chief. In order to avoid such a dispute, the Mapanzure chieftainship was documented in the 1965 report, in the copy of the extract that the plaintiff produced. When the report was B prepared, Gwenhamo who was the chief then, was very old and the report was intended to document the Mapanzure chieftainship so as to avoid any succession disputes. On p 2 of the report, the author lays the basis for the preparation of the report and the genealogy therein as follows:

> "They (*the Mapanzure people*) pride themselves on their confidence that they can C settle the succession amicably. Unfortunately, the elder grandsons of Mazorodze (that is the first sons of Mupandasekwa, Chimbuya, Kufandada, Zingoni, etc) were themselves older than Mazorodze's own young sons (that is, Gwenhamo, Taziziva, Chivendere etc). Therefore, Gwenhamo's own sons (who are now middle-aged) are a generation senior to the grandsons of Mupandasekwa, Chimbuya, Kufandada, etc. Yet, these latter grandsons are older than Gwenhamo's sons.
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> D It will be extremely difficult to sort out the generations of the various prospective claimants unless some research is done now."

The research then disclosed that succession of the Mapanzure chieftainship was "true collateral succession"(p 1 of exhibit 1).

The difficulty that has appeared from the evidence from both the plaintiff E and the first defendant's case is that they both do not seem to understand what collateral succession is.

The collateral principle of succession has been described in a number of decided cases in our jurisdiction. In *Ruzane v Paradzai & Anor* 1989 (1) ZLR 118 (H) Mutambanengwe J referred to a number of authorities on the F principle. He observed as follows at 121A-122A:

> "Thus, Harold Child The History and Extent of Recognition of Tribal Law in Rhodesia at p 6 says:
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> > ' Succession to chieftainship also shows a difference, being in most instances collateral. Younger brothers succeed to elder brothers until the succession has been held by each in turn, when it reverts to the son of the first chief G and then to the sons of the collateral lines. There are tribal variations, and the system is not always complete.'
>
> Similarly J F Holleman *Shona Customary Law* at p 21 says:
>
> > ' Succession to chieftainship is governed by the common principles of collateral succession prevailing in central Mashonaland. According to these principles the eldest son, regardless of the position or rank of his mother, H succeeds to the personal name and position of his father. *When he dies his*

Chatukuta J

> *next youngest brother or half-brother succeeds to the father's name, until* A *the generation of sons of the father is exhausted and the eldest grandson succeeds to the name and position of his grandfather, the determining factor again being the order of birth amongst collateral grandsons.*'
>
> And B Goldin and M Gelfand *African Law and Custom in Rhodesia* at p 46 say:
>
> > ' Whilst among the Ndebele, the chief (induna) is selected by a system of primogeniture in which, upon his death, the office is passed on to his eldest B son, a more complicated one is adopted by the

more numerous Shona- speaking people. *Their chiefs are chosen by a collateral system in which the position is passed from the head of one of the "special families "to that of another. Each of these families is known as an* "imbahuru" *or "royal family "and on the death of a chief (ishe,* mambo) *his successor is selected from the representatives of two, three or even four "royal" families in the* C *clan. Thus when a chief dies his office passes on to the representative of the next family until each has had its turn, when the cycle is repeated.* "

C Bullock *The Mashona* says at p 280:

` With very few exceptions primogeniture did not govern succession. The chieftaincy theoretically descended from the elder to the younger brothers of a family, until all had held it.' D

At 124E-G Mutambanengwe J continued:

"At pp 21-22 of Holleman's *Shona Customary Law* it is stated:

` A man cannot, for instance, succeed to his elder brother's own name and position, but he may after his brother's death, succeed to the name of their common father or forefather. Especially in the case of an old and established chieftainship its succession may involve the candidacies of numerous E clansmen between whom agnatic relations may be very remote. *As it is the relative age on a certain generation level which is, in principle, the determining factor, it is often difficult to know who is the eldest and therefore most eligible amongst the candidates.* It is the task of tribal elders, mostly belonging to the ruling clan, and of other important kinsmen, to determine which candidate has the best rights to become chief. In the event of serious F rivalry, recourse may be had to a *svikiro* (spirit medium) of an important ancestor to ascertain the views and wishes of the ancestral spirits'"(my own emphasis).

In *Chagaresango v Chagaresango & Ors* 2000 (1) ZLR 99 (H) at 107D-108 A, Muchechetere J also quoted with approval Goldin and Gelfand's *African Law and Custom in Rhodesia* and referred to *Ruzane v Paradzai & Anor* G *(supra)* and *Ruzane v Paradzai & Anor* 1991 (1) ZLR 273 (S). See also *Muskwe v Nyajina & ors* HH-92-07 at p 28.

As observed in the cases, the principle varies with each community. However, it appears that the authorities are agreed that chieftainship among most of the Shona-speaking people passes from elder brother to younger brother in one generation until all the brothers have succeeded to the throne. It is therefore H

Chatukuta J

A based on the seniority of those brothers. It then moves to the next generation. What appears from JF Holleman's *Shona Customary Law* is that sons of the chief constitute one house, irrespective of the rank of their mothers. It is the father who is the determining factor. Therefore a half-brother can succeed another half-brother, according to their seniority.

B A variation of this principle of succession is given in Goldin and M Gelfand's *African Law and Custom in Rhodesia, supra.* It is apparent from the above quote that succession can be according to houses where there is more than one royal house. But even in such a case, succession is according to seniority, with the head of one house succeeding another until each royal house has had its turn.

C As indicated earlier, the plaintiff failed to establish that there were seven royal houses. The 1965 report that he produced did not support him. I was persuaded by the evidence of Pesanai and Ignatius that Mazorodze's sons all constituted one house irrespective of their mothers and that succession was according to the seniority of these sons. The same principle of succession would equally apply in respect of Mazorodze's grandchildren and their own D children, *ad infinitum.* This explains why Chatikobo succeeded Chimbuya as chief despite the fact that the two were from different mothers.

The collateral succession practised by the Mapanzure chieftainship is captured in both the 1965 report and the 1973 minutes. In the 1965 report, it is stated that:

E "The previous *svikiro* was Gwenhamo's own half-sister, Mavengedzene (same father, Mazorodze, but different mothers). Gwenhamo 'accepted the spirits' because he seemed to have no chance of succeeding to the chieftainship. Obviously as *svikiro* he did not have a say in his own appointment-nor did he officiate at his own installation. In fact, there was simply no selection necessary after Bgwango's death.

F Gwenhamo was the last surviving son of a long line of brothers, and his selection was automatic. As the chief himself put it: 'I was son of my father' - he meant that he is the last surviving son of Mazorodze for two younger brothers Chivendera and Taiziziva, pre-deceased him"(p 2 of exhibit 1).

"Later Chimbuya died and, according to custom, Chatikobo was selected to succeed his brother. Kufandada and Zingoni had pre-deceased Chatikobo.

G Chatikobo had a small badge so he said: 'How can I take two badges?'

He, therefore, gave his own badge to his son Tasarirawona whose other name was Mukasi, and retained the big badge for himself. Chatikobo was then chief over the whole area, including that over which he himself had been placed in charge. When Chatikobo died his young brother, Shumbayawonda, took over the chieftainship, and so on until the youngest surviving son Gwenhamo. H He is our Chief today. He is the *rugohwe* (last born)"(see pp 3-4 of exhibit 1).

2010 (2) ZLR p252

Chatukuta J

The 1973 minutes (p 1. of Exhibit 2) state: A

"The District Commissioner asked for enlightenment on certain aspects of the family tree as recorded by Mr Kaschula in May 1965. It was agreed by all present that MUPANDASEKWA was the first born son of MAZORODZE, but he died before he could succeed to the Chieftainship, which then went to his young brother CHIMBUYA. His young brother KUFANDADA and ZINGONI predeceased him and the chieftainship then went to CHATIKOBO. MUSINAZANO and B CHIHAVA predeceased CHIHAVA [*It appears there was a mistake as the name was repeated. It appears the second Chihava should have been Chatikobo as he was the last chief*] and the Chieftainship therefore then went to the next brother SHUMBAYAWONDA who was predeceased by his younger brother CHIZEMA, and thence to MARGWIROKONA. He reigned a short time and then he was predeceased by his young brother TSUNGIRAI and the 'nyembi' went to the C next young brother ZISHIRI. ZISHIRI's young brothers MUTODZANISO, HAPANYENGWI, TAVARERA, RUTORO, KUVENGASHE, RIMA, MUTUKWA, GOWO, CHIRUNDUMWA, RICHANYU, GANDA and WUSHE all predeceased him and the next Chief was BGWANGO. His young brothers RUSHANGWE and TIRIVANERA died before him, so the Chieftainship went to GWENHAMO, the Chief who has just died. His younger brother CHIVENDERA and TAIZIZIVA both died as bachelors." D

The above analysis of the chieftainship clearly reflects the fact that chieftainship was according to the line of brothers and in accordance with their seniority. It was not, and it appears still is not, according to the royal houses identified by the plaintiff. The sons from the said royal houses did not succeed to the chieftainship by design. It was by misfortune. The brothers E before them had died before their turn and during the reign of their elder brothers. It is also apparent that Vushangwe, the first defendant's father, and Tirivahera did not succeeded because they predeceased Bgwango who was the chief during their lifetime. The succession of Masimba Shumbayawonda was also not by design. It was because Gwenhamo's brothers Chivendera and Taiziziva had predeceased Gwenhamo. Upon Gwenhamo's death, the F chieftainship was then to move to the next generation, the sixth generation because Gwenhamo's younger brothers, Chivendera and Taiziziva had predeceased him. He was Mazorodze's last surviving son.

Masimba Shumbayawonda was found to be the eldest in that generation hence his appointment as chief. Upon his death, the next chief had to be G the next eldest brother within the sixth generation. The first defendant falls under the sixth generation. The question as to whether there was any other person older that the first defendant within that generation was put to the plaintiff under cross-examination as follows:

"Q: The current chief is a brother to your father? A: Yes. The current chief referred to my father as elder brother. H

2010 (2) ZLR p253

Chatukuta J

Q: Is there A someone in the Chimbuya family now called 'father'?

A: Yes, there is one.

Q: Who is older between the one you refer to as your father and the current chief?

A: The current chief is older but they are almost the same age.

Q: I put it to you that your evidence that the chieftainship goes by fathers is B correct and therefore the appointment of the current chief was proper?

A: I think you misquoted me. The father from the Chimbuya house is older.

Q: It is better for you to admit that you have made an error instead of saying that I misquoted you.

A: My apologies. It might have been a slip of the tongue. I wanted to say the father from the Chimbuya house is older."

C Apart from that belated correction, the plaintiff did not advance any evidence to prove that the "father" from the Chimbuya house was older than the first defendant. Jayadhara did in fact concede that the first defendant was the oldest. This was also confirmed by Pesanai and in the letters from the District Administrator that the parties produced.

D From the above, it is my view that the first defendant, being the eldest in the sixth generation, was entitled to be appointed as Chief Mapanzure. This was in accordance with the customary principles of succession of the Mapanzure chieftainship.

In the result, the plaintiff's claim is dismissed with costs.

E *Kawonde & Co,* plaintiff's legal practitioners

Legal Aid Directorate, first defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/PEACOCK v STEYN 2010 (2) ZLR 254 (H)

PEACOCK v STEYN 2010 (2) ZLR 254 (H)

Citation	2010 (2) ZLR 254 (H)
Case No	Judgment No. HB-81-10
Court	High Court, Harare
Judge	Mathonsi J
Heard	29 July 2010
Judgment	5 August 2010
Counsel	*V Maboko,* for the applicant *T A Cherry,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Family law – *child - abduction - child born out of wedlock - mother agreeing to share custody of child with father - mother refusing to return children to father in breach of such agreement - father entitled to order under Child Abduction Act [Chapter 5:05]*

Headnote

The applicant, a South African citizen, and the respondent, a Zimbabwean D citizen, had cohabited for a number of years. Two children had resulted from their union. After the parties separated, they virtually shared custody of the children, who alternated between each of the parents over the years for one reason or another. The applicant continued providing material E support for both

the respondent and the children. The arrangement to share custody culminated in a concrete agreement at the beginning of year 2009, in terms of which the parties agreed that the applicant would take the children to South Africa, where he was based, and enrol them in a boarding school there. They further agreed that he would provide for the children while they were in South Africa and that during the F school holidays he would facilitate their return to Zimbabwe for them to be with their mother. For a while the arrangement worked well, but at the end of one school holidays the respondent refused to return the children to South Africa. The applicant applied in terms of the Hague Convention on the Civil Aspects of International Child Abduction for G an order that the children be released to him. The respondent argued that she was entitled to retain their custody as she was the sole legal guardian and custodian of the children by Zimbabwean law, given that the children were born out of wedlock. The evidence showed that the children were well looked after when they were in South Africa and generally the respondent had been happy with the arrangement. The H

A issue was whether the matter fell under the provisions of the Hague Convention which has, in Zimbabwe, the force of law by virtue of s 3 of the Child Abduction Act [*Chapter 5:05*]. In terms of the Convention, the removal or the retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person under the law of the State in which the child was habitually resident immediately before B the removal or retention. Such rights may arise by operation of law, or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State. *Held,* that the clear purpose of the Convention, as appears in the preamble and art 1, is to provide a mechanism to deal with the situation where C children are wrongfully removed or retained from the jurisdiction of their habitual residence. It is only in very exceptional circumstances that the court will have a discretion to refuse to order their immediate return as the Convention has in mind a high degree of harm to the child and a high level of intolerability. By relinquishing custody rights to the applicant while the children attended school in South Africa, the D respondent could not unilaterally vary or terminate that arrangement. The applicant was therefore entitled to be consulted before the children could be retained in Zimbabwe. While, under Zimbabwean law, the father of an illegitimate child has no inherent right over such child, here the father was already enjoying rights of custody. The retention of the minor E children was therefore wrongful in terms of art 3 of the Convention. The issue was not the custody of the children, merely the enforcement of the Convention. Custody had already been determined by the agreement of the parties and the respondent had not lost her right over the children.

Legislation considered F

Child Abduction Act [*Chapter 5:05*], s 3

Cases referred to

Douglas v Meyers 1991 (2) ZLR 1 (H)

Kumalo v Kumalo 2004 (1) ZLR 248 (H)

G *Kuperman v Posen* 2001 (1) ZLR 208 (H)

Sec for Justice v Parker 1999 (2) ZLR 400 (H)

Case information

V Maboko, for the applicant

H *T A Cherry,* for the respondent

Judgment

Mathonsi J: This is an application in terms of the Hague Convention A on the Civil Aspects of International Child Abduction. That Convention is applicable to Zimbabwe by virtue of the Child Abduction Act [*Chapter 5:05*].

The applicant seeks the immediate release of the minor children L, aged 10 years and J, aged 9 years. The two boys are enrolled in grades 4 and 3 respectively at a school in Port Elizabeth South Africa. They were taken B from school by their mother, the respondent, at the beginning of the school holiday, ostensibly to spend some time with them during the holiday which ended on 12 July 2010.

At the end of the school holiday the respondent did not return the children to school. Instead, she has argued that she is entitled to retain their custody as she is the sole legal guardian and custodian of the children by Zimbabwean C law, given that the children are illegitimate.

The genesis of the matter is that the applicant is a South African citizen, while the respondent is a Zimbabwean citizen. The two met in 1998 and had a relationship. They cohabited until 2002, when they broke up, but not before their relationship had resulted in the birth of the two boys outside wedlock. At D that time the children were aged 2 and 1, respectively. Since then the parties have virtually shared custody of the children, who have alternated between each of the parents over the years for one reason or the other.

After the parties broke up the applicant continued providing material support for both the respondent and the children. Their arrangement to share custody E culminated in a concrete agreement at the beginning of year 2009 in terms of which the parties agreed the applicant would take the children to South Africa, where he is based, and enrol them in a boarding school there. They further agreed that the applicant would provide for the children while they are in South Africa and that during the school holidays he would facilitate their return to Zimbabwe for them to be with their mother. F

That arrangement worked very well for both the parties and the children, as it was only during one of the six school holidays since they went to South Africa, that they did not return to their mother. It would appear that problems arose when the applicant started dragging his feet about facilitating the children's travel to Zimbabwe for the school holiday and insisting that G the respondent should also play at part by footing the travel bills and also collecting the children from school. This did not impress the respondent who, after collecting the children in June 2010, decided not to return them to South Africa for the opening of schools on 12 July 2010.

Currently the children are not at school but have been put at a little school to receive tuition while awaiting formal enrolment. H

Mathonsi J

A The applicant then made this application which was brought on a certificate of urgency because the applicant is seeking the release of the children for them to return to the school in South Africa before they are further prejudiced by non-attendance at school.

There is no doubt that the children went to school in South Africa by B agreement of the parents, that whilst there the applicant had full custody and responsibility over them by agreement of the respondent and that the said agreement was reached for the benefit of the children. I therefore find that the children were lawfully in South Africa to attend school and were clearly habitually resident in that country, only returning to Zimbabwe for holidays. I also find that the respondent never surrendered her custody right to the C applicant but only agreed to share that right with the applicant to facilitate the children's attendance at school.

It is also clear that the children have been well looked after in South Africa, as shown by even the respondent's admission and happiness expressed in correspondence with the applicant's wife where on 26 June 2009 she wrote:

> "Hi there N [the applicant's wife]. How you all doing? Finally managed to get D all sorted out with yoafrica so ended up with stakes of emails, fabulous. Loved all the pictures wow they are so awesome. Those pics of L are gorgeous and J playing rugby are fabulous going to print some of them for their room. Thank you N for always keeping me up to date with the boys and well just for being a great mom to my boys. Lots of love to all those fabulous kiddies, kisses and cuddles to all."

E Having said that, the first issue to be determined is whether this matter falls under the provisions of the Hague Convention which has in Zimbabwe the force of law by virtue of s 3 of the Child Abduction Act [*Chapter 5:05*]. For the matter to come under the ambit of the Convention its article 3 must be satisfied. It provides:

> F "The removal or the retention of a child is to be considered wrongful where -

(a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) At the time of removal or retention, those rights were actually exercised, G either jointly or alone, or would have been exercised but for the removal or retention.

The rights of custody mentioned in subparagraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

I have already said that the applicant had joint custody of the children with H the respondent to the extent that the children remained in South Africa and

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2010 (2) ZLR p258

Mathonsi J

this was by agreement of the parties. Mr *Majoko,* who appeared for the A applicant, argued that what is being sought is the immediate return of the children who were lawfully removed by agreement of the parties but are now being wrongfully retained in breach of that agreement.

I tend to agree *with Mr Majoko,* because by relinquishing custody rights to the applicant while the children attended school in South Africa, the respondent B could not unilaterally vary or terminate that arrangement.

Once the children were well settled at school in South Africa under his control, the question of accusations and counter accusations between the parties paled to insignificance: *Kuperman v Posen* 2001 (1) ZLR 208 (H) at 211C-D. The applicant was therefore entitled to be consulted before they could be retained in Zimbabwe. The matter then falls under the provisions C of the convention.

It matters not that, under Zimbabwean law, the father of an illegitimate child has no inherent right over such child: *Douglas v Meyers* 1991 (2) ZLR 1 (H) as argued by Mr *Cherry* for the respondent. The father was already enjoying rights of custody. Therefore I make the finding that the retention of the minor D children was wrongful in terms of art 3 of the Convention.

In trying to bring the facts of this case within the exception in art 13 of the Convention, it was half-heartedly argued in the opposing affidavit that returning the children to South Africa would place the children in psychological harm and put them in an intolerable situation, merely because they have to E learn Afrikaans as a secondary language. That argument is not sustainable because it is common cause that the school they attend is a good school and by the respondent's own admission the children have been well taken care of in South Africa by the applicant and his wife. Mr *Cherry* correctly did not pursue that line of argument in his submissions.

The clear purpose of the Convention, as appears on the preamble and art 1, F is to provide a mechanism to deal with the situation where children are wrongfully removed or shall I add, retained, from a jurisdiction of their habitual residence: *Secretary for Justice v Parker* 1999 (2) ZLR 400 (H) at 405 B-C It is only in very exceptional circumstances that the court will have a discretion to refuse to order their immediate return, as the Convention has G in mind a high degree of harm to the child and a high level of intolerability: *Kumalo v Kumalo* 2004 (1) ZLR 248 (H) at 253F-G.

It should also be understood that in this matter we are not dealing with the issue of custody of the children but merely the enforcement of the Convention. Custody has already been determined by the agreement of the parties and the respondent has not lost her right over the children. Therefore, in giving effect H

2010 (2) ZLR p259

Mathonsi J

A to the Convention the applicant will have to comply with the agreement, including facilitating the return of the children to their mother during all school holidays and also collecting them at the end of such holiday. Accordingly the application succeeds and the following order is made:

(1) That the respondent should forthwith and in any event not later than B 48 hours from the date of this order, release the children L and J to the applicant to take the said children to school in South Africa.

(2) In the event that the respondent, for any reasons, fails to comply with clause 1 above, the Deputy Sheriff be and is hereby directed and authorised to remove the children from the respondent's control and custody and hand them over to the applicant. C

(3) That the applicant is directed to facilitate the return of the children to the respondent at the end of every school term and to collect them at the end of every school holiday and return them to school as long as they remain in school in South Africa.

(4) That the respondent shall bear the costs of this application.

D *Majoko and Majoko,* applicant's legal practitioners

Webb Low & Barry, respondent's legal practitioners

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Source:
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MOHAMED v NOORMAHOMED & ANOR 2010 (2) ZLR 260 (H)

Citation	2010 (2) ZLR 260 (H)
Case No	Judgment No. HH-180-10
Court	High Court, Harare
Judge	Mawadze J
Heard	12 August 2010
Judgment	12 August 2010
Counsel	*H Zhou,* for the applicant *J Samukange,* for the first respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Appeal — *civil matter — appeal against interlocutory order or interlocutory judgment — order granting leave to execute pending appeal — such order interlocutory — leave to appeal required — appeal pending against main judgment — not permissible to grant stay of execution by means of urgent chamber application* D

Headnote

The first respondent obtained an eviction order against the applicant. The applicant noted an appeal against that order. The first respondent then applied for and obtained leave to execute pending appeal. The applicant noted an appeal against that order. The first respondent proceeded with the execution, obtaining a warrant of ejectment. The applicant brought E an urgent application to prevent the ejectment from taking place. The applicant's counsel conceded that the appeal against the order granting leave to execute was invalid, as such order was interlocutory in

nature. He argued, however, that the court could deal with the matter on the merits as the first appeal was still pending and could, on good grounds F grant a stay of execution, after considering such factors as the prospects of success on appeal, the potentiality for irreparable harm or prejudice to either party if stay of execution is granted or is not granted and the balance of inconvenience or hardship to either party. He argued that real and substantial justice enjoined the court to grant the application. G

Held, that the application was made on the basis of the second, admittedly invalid, appeal. In the papers filed of record, the argument had been that the order for leave to execute judgment pending appeal, though interlocutory, was definitive in nature hence appealable. The applicant was completely changing the thrust of his argument and new papers need to be filed. H

Mawadze J

A *Held,* further, that there were also practical problems. Firstly, the court could not meaningfully deal with the merits and demerits of the matter unless it was sitting as an appellate court. That appeal was still pending and could not be partially dealt with under the guise of an urgent chamber application, particularly as the records of the proceedings in the lower B court were not even before the court. Secondly, the applicant was simply trying to reverse the decision of the lower court when he knew the decision was not appealable. Both parties had argued the matter before the lower court, which exercised its discretion and granted the order for leave to execute pending appeal. The High Court could not review this decision in the absence of a proper application for review, C as opposed to an urgent chamber application in the form and format filed by the applicant.

Legislation considered

Magistrates Court Act [*Chapter 7:10*], s 40 (2)

Cases referred to D

Gillespies Monumental Works (Pvt) Ltd v Zimbabwe Granite Quarries (Pvt) Ltd 1997 (2) ZLR 436 (H)

Marathon Group of Companies v Alstom Zim (Pvt) Ltd & Anor HH-152-W

E *Mungwambi v Ajanta Properties (Pvt)* Ltd HH-77-08

Case information

H Zhou, for the applicant

J Samukange, for the first respondent

Judgment

F **Mawadze J**: This is an urgent chamber application for a provisional order in which the interim relief sought is stated as follows:

> "Pending the finalization of its application the first and second respondents be and are hereby interdicted from ejecting the applicant."

The terms of the final order are construed as follows:

> G "That you show cause why a final order could not be made in the following terms:
>
> 1. The first and second respondents be and are hereby stopped or interdicted from executing or enforcing the order of the magistrates court granted on 6 August 2010 in this case pending the outcome of the appeal against that order under case number Civ 'A' 537.
> 2. The second respondent bears the costs of this application in the event that H the application is opposed".

Mawadze J

The background facts of this matter are not outlined by either the applicant or A the first respondent. After sifting through the papers filed of record I consider that the brief facts of this mattercan be summarized as follows:

On 22 June 2010 the first respondent obtained an eviction order in the magistrates court against the applicant on the grounds that the applicant had breached the terms of the lease agreement by late payment of rent for B the months of March, April and May 2010. The applicant appealed to this court against that decision on 23 June 2010. That appeal had the effect of suspending the eviction order granted on 22 June 2010.

The first respondent proceeded to file an application for leave to execute pending appeal in the magistrates court on 12 July 2010, which leave was C granted on 5 August 2010, despite being opposed by the applicant. The applicant, realizing the imminent consequences of the magistrates court's order, proceeded to note an appeal against the granting of this interlocutory relief on 6 August 2010 (hereinafter referred to as "the second appeal"). Notwithstanding the noting of the second appeal, the first respondent proceeded with the execution of the order, that is ejectment, by serving a D warrant of ejectment on the applicant despite protestations by the applicant. The applicant was due to be evicted on 12 August 2010. This prompted the applicant to approach this court on 11 August 2010, on a certificate of urgency, praying for the interim relief alluded to above. The application is opposed.

At the commencement of the hearing Mr *Zhou* sought to amend the citation E of the case number in para 1 of the terms of the final order sought to read "Case number Civ 'A' 450/10" rather than "Civ 'A' 537/10". That amendment was made by consent. The purpose and significance of that amendment later became clear in Mr *Zhou's* submissions.

Mr *Samukange* raised a point *in limine* which may obviate the need to even deal with the merits of this application. In a nutshell, the point raised by F Mr *Samukange* was that there could not be a valid notice of appeal against the granting of an order of execution pending appeal from the magistrates court. In argument he submitted that such an appeal would be against an interlocutory order which is not final and definitive in nature. He argued that there is therefore no second appeal pending before this court and that, on this G basis alone, this application should fail. Mr *Zhou,* in response, conceded to this fact and in my view made a proper and informed concession.

The position of the law on that point is now settled. In *Gillespies Monumental Works (Pvt) Ltd v Zimbabwe Granite Quaries (Pvt) Ltd* 1997 (2) ZLR 436 (H) the point was made that the order granting leave to execute the ejectment order did not have a final and definitive effect on the main suit. The noting of H

A an appeal against such an order would be invalid. In *Mungwambi v Ajanta Properties (Pvt) Ltd* HH-77-08 Makarau JP, as she then was, had this to say on the same point at p 4 of the judgment:

> "... an order for leave to execute pending appeal is an interlocutory order. It is not final as it is pending the appeal. As such, in my view it can not be appealed against".

B A similar view was expressed by Mutema J in *Marathon Group of Companies v Alstom Zimbabwe (Pvt) Ltd & Messenger of Court Harare* HH-152-10 in which *Gillespies supra* was cited with approval. At p 4 of the judgment it was stated:

> "The noting of an appeal by the applicant against the magistrate's order granting C leave to execute pending appeal was invalid, and there was no basis for this application. The bringing of the application could be described as analogous to shutting of the stable door after the horse had bolted".

Section 40(2) of the Magistrates Court Act [*Chapter 7:10*] provides that appeals from the magistrates court to this court shall be against any rule or order which has the effect of a final or definitive judgment. Put in another D way, this means that where the rule or order appealed against from the magistrates court is not a final or definitive in nature, no appeal can be made.

In casu, the order for leave to execute pending appeal made by the magistrates court on 5 August 2010 is an interlocutory order. It is not decisive or definitive on the rights of the applicant. In essence, therefore, no valid appeal can be E made against such an order. That means that the the second appeal is of no force and effect. The applicant therefore cannot approach this court to seek an order to stay execution pending the appeal. That means that there is no basis for this application.

Mr *Zhou,* however, contended that this court can still deal with the merits of this case even after upholding the point *in limine* raised by Mr *Samukange.* F The argument made by Mr *Zhou* was that two appeals were noted and that, even if the second appeal is invalid and of no force and effect, the main appeal remains valid. He submitted that this court, therefore, can still proceed on good

grounds to grant a stay of execution on the basis of the main appeal being still pending. This explains Mr *Zhou's* request to amend para 1 of the G terms of the final order sought in order to expunge and replace the appeal which he had cited, as it refers to the second appeal. Mr *Zhou* sought to rely on the views expressed by Makarau JA (as she then was) in *Mugwandi supra* at p 2 of the judgment wherein it was stated:

> "The power to grant stay of execution pending appeal is a common law exercise of the power that inheres in this court. In this regard, the court enjoys the discretion H of the widest kind. The main guiding principle for the court in determining such

---

> applications is to grant stay where real and substantial justice requires such a A stay or conversely where injustice would otherwise be done".

Mr *Zhou* urged this court to deal with the merits of this case on the basis of the main appeal and consider the relevant factors which include, *inter alia,* prospects of success on appeal, the potentiality for irreparable harm or prejudice to either party if stay is granted or not granted and the balance B of inconvenience or hardship to either party.

I am not persuaded by Mr *Zhou's* argument in support of this application. While the position of the law is correctly stated by Makarau JP *in Mugwambi supra,* that proposition would not, in my view, support this application. I arrived at this position on basically two reasons.

The first reason is that in the *Mugwambi* case *supra* the urgent chamber C application seeking an order staying execution was premised on the two appeals in that case. *In casu,* the certificate of urgency is instructive. It clearly spells out that this application is premised on the appeal made on 6 August 2010, which appeal is invalid. I cannot do more than to quote the relevant part of the certificate of urgency:

> "1. On 6 August 2010 the applicant appealed against an order for leave to D execute on the judgment of the magistrates court pending appeal. The appeal is still pending. The applicant has since been served with a notice of removal, which removal is due to take place on 12 August 2010.
>
> 2. The order for leave to execute judgment pending appeal was, in the circumstances, an interlocutory order with a definitive effect, hence E appealable. The definitive effect arises from the irreparable harm that the applicant will suffer if execution proceeds more particularly in that:
>
> (a) ...
>
> (b) ..."

Similar averments are repeated in the applicant's founding affidavit. It is therefore clear that the applicant's case is premised on the appeal made on F 6 August 2010. In fact, in the papers filed of record, the applicant sought to argue that the order for leave to execute judgment pending appeal, though interlocutory, was definitive in nature, hence appealable. The valiant attempts by Mr *Zhou* to amend para 1 of the terms of the final order sought and to try and completely change the thrust of the applicant's case during the hearing G are in vain. In fact, if one were to accept Mr *Zhou*'s argument, the applicant would need to file completely new papers in this case. On that point alone, the argument by Mr *Zhou* is untenable.

The second reason why I am not persuaded by Mr *Zhou's* argument relates to the practical problems this court would encounter if it were to adopt his so-called robust approach and deal with the merits of this application on H

A the basis that the main appeal is valid and that real and. substantial justice enjoins this court to grant the provisional order. Firstly, this court cannot meaningfully deal with the merits and demerits of the granting of an order of ejectment by the magistrates court on 22 June 2010, unless it is sitting as an appellate court. That appeal is still pending before this court and cannot be partially dealt with under the guise of an urgent chamber application. The two B records of proceedings in the magistrates court are not even before this court.

The second aspect is that the applicant is simply trying to upset the decision of the lower court and circumvent the effect of a valid order for leave to execute pending appeal, which order the applicant realises is not appealable. This is akin to trying to have the second bite of the cherry, as it were.

Both C parties argued before the lower court on the relevant aspect of whether it was proper to grant leave to execute judgment pending the main appeal. The lower court exercised its discretion and granted the order for leave to execute pending appeal. This court, in my view, cannot seek to review this decision in the absence of a proper application for review. The point is made that this court cannot also be asked to review the decision by the lower court D on the basis of an urgent chamber application in the form and format filed of record by the applicant.

I find no merit at all in the arguments proffered by Mr *Zhou.* I am of the view that this is a proper case in which I should award costs against the applicant on a higher scale as prayed for. It is quite clear that the applicant E is not acting in good faith. The applicant purported to file an appeal when it was apparently aware that such an appeal was invalid. Even after conceding to this fact the applicant still sought to pursue this application, albeit on new basis, totally at variance with the papers filed of record. The honourable course of action was for the applicant to simply withdraw the matter and avoid incurring further costs. This court should express its displeasure and F award costs against the applicant on a higher scale.

In the result I make the following order:

1. The point *in limine* raised by the first respondent is upheld.
2. The application is dismissed. G
3. The applicant shall pay costs on the legal practitioner and client scale.

Sawyer & Mkushi, applicant's legal practitioner

H *Venturas & Samukange,* first respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/WILLIAMS v KATSANDE & ANOR 2010 (2) ZLR 266 (H)

WILLIAMS v KATSANDE & ANOR 2010 (2) ZLR 266 (H)

Citation	2010 (2) ZLR 266 (H)
Case No	Judgment No. HH-198-10
Court	High Court, Harare
Judge	Mawadze J
Heard	20 August 2010
Judgment	20 August 2010
Counsel	*I Ndudzo,* for the applicant *C Nhemwa,* for the respondents
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure - *application - interim relief - such relief having* C *the effect of a final order - dismissal of application*

Practice and procedure - *application – urgent - certificate of urgency - who may sign such certificate - certificate not fatally defective if signed by party's legal practitioner - need to ensure that urgency of application is reflected in the relief sought* D

Practice and procedure -*parties - company -proceedings against company - no basis for citing directors and shareholders thereof in the absence of good reason*

Headnote

In the absence of any ground to pierce the corporate veil, there is no proper E basis to cite a person as party to court proceedings against a duly registered company simply on the basis that such person is a director and shareholder of that company

While it may be improper and undesirable for a certificate of urgency to be signed by a legal practitioner on behalf of a client, in terms of r 242(2) of the High Court Rules, 1971 when such legal practitioner is a member F of the law firm representing the client, that impropriety would not, on its own, make the certificate of urgency fatally defective.

In terms of an agreement entered into between the applicant and the second respondent, the latter agreed to sell on commission certain household goods and effects on behalf of the former. To this end, the second G respondent took possession of such goods for the purpose of sale to the public. In July 2010, however, the applicant, in writing, cancelled the agreement, which cancellation was confirmed by the second respondent the following day. The second respondent sought to remain in possession of the goods until the applicant had paid it certain monies which it alleged was due. In subsequent correspondence, however, the second H

A respondent did agree to surrender all the applicant's goods on 31 August 2010. On 13 August2010, the applicant visited the second respondent's shop to conduct a stocktake but was denied access. As a result thereof the applicant brought on urgent application on the next working day, alleging that it had become "clear to the applicant that he (stood) to suffer irreparable loss because his property was no longer accessible to him B and he had no knowledge of its whereabouts". In seeking interim relief, however, he sought an order compelling the second respondent to hand over forthwith all his property, as well as an accounting of property sold. By way of final relief he sought a declarator that the property was his. The point which concerned the court was whether the relief reflected in C applicant's draft order, could properly be said to be urgent.

Held, that as far as the surrender of the goods was concerned, there was no urgency. It had already been agreed between the parties before 13 August 2010 that this would take place on 31 August 2010.

Held, further, that the declarator which was sought by the applicant was unnecessary. At no time was the ownership of the goods in issue.

D *Held,* further, that the real issue as to urgency in the matter related to the denial of access to the applicant to conduct a stocktake on 13 August 2010, but the interim relief sought did not address this aspect of the matter at all.

Held, further, that, for the foregoing reasons, the application must be dismissed. In any event, were the court to grant interim relief, it would E have the effect of a final order. This in itself would be a further reason for dismissing the application.

Legislation considered

Companies Act [*Chapter 24:03*], s 9

High Court Rules, 1971 (RGN 1047 of 1971), r 242(2)

Cases cited F

African Consol Resources plc v MMCZ Case No HC 2238/10

A-G v Chiringa Ests & Ors Case No HC 659/10

Chafanza v Edgars Stores (Pvt) Ltd & Anor 2005 (1) ZLR 299 (H)

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H) G

Madzivanzira & Ors v Dexprint Investments (Pvt) Ltd & Anor 2002 (2) ZLR 316 (H)

Madzivire & Ors v Zvarirwadzwa & Ors 2005 (2) ZLR 148 (H)

Mudekunye & Ors v Mudekunye & Ors 2010 (2) ZLR 225 (H) H

Route Toute BV & Ors v Sunspan Bananas (Pvt) Ltd 2010 (1) ZLR 117 (H)

2010 (2) ZLR p268

Mawadze J

Case information

I Ndudzo, for the applicant A

C Nhemwa, for the respondents

Judgment

Mawadze J: The applicant seeks a provisional order in the following terms:

"Terms of the provisional order granted:

1. The respondents be and are hereby ordered to forthwith hand over a property B listed in Annexture 'B' to the founding affidavit to the applicant upon service of this order.

1(a) In the event of the respondents refusing or forbidding to comply with the terms of para 1 above, the Deputy Sheriff be and is hereby authorized to retrieve the said property from the respondents' property and deliver it to the applicant. C

2. The respondents are required to account for the applicant's property sold prior to 14 July 2010 and to hand over all proceeds of such sales to the applicant within 48 hours of service of this order.

3. Leave is given to the applicant's attorney to serve a copy of this order".

The terms of the final order sought are constructed as follows:

"Terms of the final order sought: D

1. It is hereby declared that the property listed in annexture 'B' attached to the founding affidavit is the exclusive property of the applicant.

2. The respondents be and are hereby ordered to pay costs of suit on a legal practitioner client scale."

The brief facts of the matter can be briefly stated as follows. E

The applicant conducts the business of interior and exterior decorations and sells diversified specifically designed household goods and effects. On or about October 2009 the applicant entered into negotiations with the first respondent, who was allegedly representing herself and the second respondent. It was agreed that that the first respondent through the second F respondent would act as an agent of the applicant. The nature of the agency relationship was that the applicant would supply the respondents with goods for sale which would be sold on applicant's behalf by the respondents, who would in turn receive 20 per cent commission on any goods sold. On 14 July 2010 the applicant wrote to the respondents cancelling the agency agreement, alleging improper conduct and breach of the material term of the agreement G between the parties by the respondents. The second respondent by letter on 15 July 2010 confirmed the cancellation of the agency agreement but sought to remain in possession of the property listed in Annexure "B" until a certain date and that the respondents be paid certain amounts due arising from the applicant's cancellation of the agreement. The applicant persisted in demanding that he be handed over the property in Annexure "B" valued H

2010 (2) ZLR p269

Mawadze J

A at US $116 627.50 but the respondents refused, indicating that certain conditions should be met. When the applicant visited the respondent's shop on 13 August ostensibly for a stocktake the applicant was denied access to the shop. The applicant alleges that some of the property had been removed from the shop and property valued at about US $100 000 was no longer in the shop. The applicant's fear was that the respondents were disposing of the B applicant's property causing

possible irreparable loss to the applicant. The applicant then approached this court, on a certificate of urgency, praying for the interim relief already alluded to. This application is opposed.

Mr *Nhemwa,* for the respondents, raised three points *in limine,* two of which he argued are capable of resolving the matter without even going into the C merits of the application. The points *in limine* are, firstly, that the certificate of urgency is defective; secondly, that the first respondent is improperly cited; and, thirdly, that the matter is not urgent. I propose to deal with the points *in limine* first.

That first respondent is improperly cited

D Mr *Nhemwa* in argument stated that it was improper to cite Maria Katsande as the first respondent in these proceedings in her personal capacity as the agency agreement was between the applicant and the second respondent. He argued that the first respondent, despite being both a shareholder and director of the second respondent, should not be party to these proceedings in her E personal capacity. Mr *Nhemwa* submitted that the second respondent is a duly registered company in terms of the Companies Act [*Chapter 24:03*] and has a separate legal *persona* distinct from the first respondent. On the other hand, Mr *Ndudzo* countered that the first respondent was properly cited as she is the one who negotiated the agency agreement on her own behalf and that of the second respondent. Mr *Ndudzo* submitted that first respondent F at no stage produced a resolution from the board of directors of the second respondent indicating that she was acting on behalf of the second respondent.

Reference was made to *Madzivire & Ors v Zvarirwadzwa & Ors* 2005 (2) ZLR 148 (H) in support of Mr *Nhemwa's* argument. My view is that this case is irrelevant to the point in issue as it dealt primarily with the right of individual directors or shareholders to bring an action on behalf of the G company. It is common cause that the second respondent *prima facie* is a duly registered company in terms of the Companies Act [*Chapter 24:03*]. I say *prima facie* because the applicant did not contest this point although the certificate of incorporation attached as Annexure "A" to the second respondent's opposing affidavit is unsigned by the Registrar of Companies H and is a photocopy. Section 9 of the Act provides as follows:

Mawadze J

> "A company shall have the capacity and powers of a natural person of full capacity A in so far as a body corporate is capable of exercising such powers."

In the absence of any basis to pierce the corporate veil, I would agree with Mr *Nhemwa* that there would be no proper basis in law to cite the first respondent in these proceedings in her personal capacity albeit she was both a director and shareholder of the second respondent. Accordingly the first B point *in limine* is upheld. However, this would not dispose of the matter as the second respondent remains party to the proceedings.

Certificate of Urgency

Mr *Nhemwa's* submissions in this regard is that the court papers filed by the applicant are not in order as the certificate of urgency was prepared by C one Tamuka Moyo, a legal practitioner with the law firm Mutamangira & Associates who are acting as the applicant's legal practitioner. This argument is based on the *ratio* formulated by Cheda J in *Chafanza v Edgars Stores & Anor* 2005 (1) ZLR 299 (H) wherein at 300G the learned judge said:

> "To my mind, it is totally undesirable for a legal practitioner to either attest to an D affidavit or sign an urgent certificate for and on behalf of a client who is being represented at his firm as such a lawyer clearly has an interest in the matter at hand."

It is quite apparent that legal practitioners have not taken heed of the learned judge's advice, as in many urgent applications brought before this court the *ratio* formulated in the *Chafanza* case *supra* is ignored and judges have been E asked to deal with this aspect in most urgent chamber applications.

I am aware that there has been no unanimity in this court as regards the correctness of the *ratio* formulated in *Chafanza* case *supra.* To my knowledge the Supreme Court has not pronounced on this issue. The two divergent views emerging from this court can be illustrated by a few cases dealt with F by my brother and sister judges as shown below.

In Attorney General v Chiringa Estate & Ors HC 659/10 Kudya J at p 3 of judgment came to the conclusion that the *Chafanza* case was made by a panel of two judges of concurrent jurisdiction with the learned judge and that, in line with the principle of *stare decisis,* a single judge is bound G by a determination made by a panel of two or more judges of concurrent jurisdiction. The learned judge was not persuaded to depart from the *ratio decidendi* in the *Chafanza* case.

In Route Toute BV & Ors v Sunspan Bananas (Pvt) Ltd 2010 (1) ZLR 117 (H) Chatukuta J took virtually a different view from that of Kudya J. At 120B-D the learned judge had this to say: H

> A "I am persuaded by Mr *Chikumbirike's* submission that the rules do not 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 Chafanza case is not binding. It is my view that there is no conflict B of interest. Even if there was such 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."

It is apparent, therefore, that the reasoning by Chatukuta J is in conflict with the view clearly expressed by Kudya J in *Attorney-General v Chiringa Estate (Pvt) Ltd & Ors supra.* The pertinent issue, which remains unresolved C after considering these two cases, is whether, irrespective of what the correct interpretation of r 242(2), this court is not bound by the decision in the *Chafanza* case on the basis of the principle *of stare decisis,* as that decision was made by a panel of two judges.

In *African Consolidated Resources & Ors v Minerals Marketing Corporation* D *of Zimbabwe & Ors* HC 2238/10 Patel J had the opportunity of comparing the apparently conflicting conclusions arrived at by Kudya J and Chatukuta in the cases already alluded to. At p 4 of the judgment the learned judge had this to say:

> "While I am prepared to accept that the certificate of urgency in this case is improper and undesirable but not fatally defective, I might still be persuaded to E strike this matter off the roll for want of compliance with the Rules as construed and applied in Chafanza case. However, it is not necessary for me to make any definitive decision on this point in light of the following determination of the question of urgency."

The approach by Patel J in my view seems to be the middle of the road F option as it were, and is not in direct conflict with the conclusions arrived at by both Kudya J and Chatukuta J. However, in *Mudekunye & Ors v Mudekunye & Ors* 2010 (2) ZLR 225 (H), Bere J, after discussing the apparent conflicting views of Kudya J, Chatukuta J and Patel J, came to the conclusion that decision in the *Chafanza* case may not be in line with the correct interpretation of r 242(2) and that it was not a decision made G by a panel of two judges. After dealing with a number of relevant issues pertaining to the conflicting views on this matter Bere J *in Mudekunye supra* at 234 had this to say:

> "There is no doubt that this is a sound legal principle in so far as it applies to affidavits (i.e. the *ratio* in the *Chafanza* case). It is however doubtful if this same principle could be extended to a certificate of urgency as currently provided H for in our r 242 which in my view is very clear in its requirements ... My very

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> strong view as highlighted is that this principle of law sound as it is cannot A override a specific provision in our rules particularly where the rule itself has gone further to provide sufficient safeguards by giving the presiding judge the power to either confirm or dismiss the urgency of the matter irrespective of the existence of a certificate of urgency".

The definitive finding made by Bere J in *Mudekunye supra* is captured at 234F-G as follows: B

> "Coming to the case before me I am satisfied that there was nothing improper about Itai Ndudzo filing a certificate of urgency to certify the urgency of a matter which was being handled by his law firm. In my view, this is what it should be. In fact it appears to me such a certificate is better and more informative document if prepared by the applicant's counsel. The point of objection raised *in limine* in this regard is not sustainable." C

While I am prepared to accept the lucid reasoning in the judgment of Bere J, I am unable to agree with the learned judge that the *Chafanza* case was not made by a panel of two judges of concurrent

jurisdiction and that it is not binding on a single judge of this court. I am more inclined to agree with Patel J that, while on the basis of the *Chafanza* case the certificate of urgency D may under certain circumstances be deemed to be improper and that it may be undesirable for a legal practitioner to sign an urgency certificate for and on behalf of a client who is being represented by such a law firm, that on its own would not make the certificate of urgency fatally defective. The point *in limine* in this regard raised by Mr *Nhemwa* is therefore dismissed.

Urgency E

The question of what constitutes urgency was aptly dealt with in *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H) at 193 where Chatikobo J has this to say:

> "There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency ... What constitutes urgency F is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arrives the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non timeous action if there has been a delay".

See also *Madzivanzira & Ors v Dexprint Investments (Pvt) Ltd & Anor* HH G 145-02.

In casu the question of urgency is closely linked to the exact nature of the dispute between the parties. I am unable to agree with Mr *Nhemwa* that the dispute between the parties arose on 14 July 2010 when the applicant wrote the letter terminating the agency agreement. It is important in this regard to H

Mawadze J

A deal with the sequence and chronology of events to appreciate what ultimately was the dispute between the parties leading to this application.

In the letter dated 14 July 2010 the applicant did not seek the immediate return of the goods after terminating the agency agreement but stated as follows:

> "We again ask you to set a time in the next few days to enable us to collect our property".

B In the letter dated 15 July 2010 the second respondent confirmed the cancellation of the agency relationship, but sought to impose certain conditions which are summed up as follows:

> "In the event that you want to immediately collect all the items please be advised that payment of anticipated commission is required first".

C In fact, in the letter dated 15 July 2010, the second respondent indicated that despite the cancellation of the agency relationship, the applicant's goods will remain in the second respondent's shop and would continue to be sold as usual as *per* the cancelled agency agreement and that the second respondent would give monthly reports and make payments weekly to the applicant D on the goods sold. The second respondent's argument was that the second respondent had already incurred costs on the goods in the shop and would not release those goods immediately. In my view it is the contradictory nature of the second respondent's letter which initially caused problems between the parties. The second respondent while confirming cancellation of the agency agreement, still insisted that the *status quo ante* should remain.

E The subsequent correspondence between the parties is instructive. After the second respondent's letter dated 15 July 2010 the applicant then wrote to the second respondent on 2 August 2010 indicating that the applicant would collect the goods on 3 August 2010 at 1500 hrs irrespective of the second respondent's concerns raised in this letter dated 15 July 2010. However, F when the applicant visited the second respondent's shop on 3 August 2010, the second respondent locked the shop and refused to hand over the property. In a letter dated 5 August 2010, the applicant protested to second respondent about events of 3 August 2010 and proposed to collect the goods on 16 August 2010. However, before that date and on 6 August 2010, the second respondent wrote to the applicant reiterating the second respondent's G unwillingness to surrender the goods as proposed on 16 August but to surrender the goods on 31 August 2010. The applicant then capitulated and in a letter dated 11 August 2010, agreed to collect the goods on 31 August 2010 but suggested that the applicant would visit the second respondent's shop on Friday 13 August 2010 for purposes of a stocktake and accounting H pending the collection of the goods on 31 August 2010. However the second

Mawadze J

respondent was not agreeable to this and wrote in a letter dated 12 August A 2010, but only delivered to the applicant on 16 August 2010 at 1334 hrs, that the second respondent's counsel was not available on Friday 13 August and would only contact the applicant after Monday 16 August to respond to the applicant's request for a stocktake. Needless to say the applicant proceeded B to the second respondent's shop on Friday 13 August 2010 (applicant had not received the second respondent's letter objecting to this). What then transpired on 13 August 2010 is captured in para 19 of the applicant's founding affidavit. In brief, the applicant was denied access to the shop, no cash was handed over to the applicant and the applicant realised that some of the goods had been removed from the display and placed in a storeroom, tables were dumped carelessly outside and some goods, valued at about C US $100 000, were removed from the shop and the second respondent was unwilling to disclose the whereabouts of those goods.

In my view, the sequence of events clearly shows that as at 13 August 2010 both parties were agreeable that goods would be collected on 31 August 2010. The purpose of the proposed visit on 13 August 2010 was not to collect D the goods but to carry out a stocktake pending the surrender of the goods on 31 August 2010. What then prompted this application is captured in the applicant's founding affidavit at para 20:

> "On 13 August 2010 it became clear to the applicant that he stands to suffer irreparable loss because his property was no longer accessible to him and he has E no knowledge of its whereabouts and no longer trusted the promise to handover property on 31 August 2010."

It is pertinent to note that 13 August 2010 was a Friday, hence after only one working day and on 17 August 2010 the applicant filed this application. In my view, one cannot seriously argue that a delay of one day constitutes inordinate delay and therefore would qualify this matter as not being urgent. F To that extent, therefore, the applicant acted diligently and timeously in a bid to address the problem which arose on 13 August 2010. In that context, therefore, one may be inclined to rule that the matter is indeed urgent.

The problem in making such a finding arises from the relief sought by the applicant. The question to be asked first is, what was the dispute between the G parties on 13 August 2010 which prompted this application? It was certainly not in relation to ownership of the goods. The ownership of the property was never in issue at any stage. This then begs the question as to why in the final order the applicant seeks a declaration that this property in Annexure "B" belongs to the applicant. That is a non issue. It is disingenuous for Mr *Ndudzo* to argue that the applicant merely seeks a *declarator* in the final order H

Mawadze J

A when in fact what is before this court is not an application for a *declarator* but a provisional order subject to confirmation on the return date.

The other aspect to note is that as at 13 August 2010 the surrender of the goods in Annexure "B" to the application by the respondent was not an issue. The parties had agreed that this would be done on 31 August 2010. There B could not therefore have been an urgency in the surrender of the goods on 13 August 2010 when the parties had already agreed that this would happen on 31 August 2010. This would mean that, in the context of the relief sought by the applicant, which was the surrender of the goods, there is not any urgency at all. It would be a self-created urgency as the parties had agreed to 31 August as the date to collect the goods. On this basis alone, this court C is of the view that the matter is not urgent.

In my view, the dispute between the parties as at 13 August 2010 was not the ownership of the goods as prayed for in the final order. It was not the surrender of the goods as prayed for in the interim relief sought. The issue was about being allowed access to carry out a stocktake in anticipation of D the surrender of the goods on 31 August 2010. The urgency therefore was in relation to the issue of being denied access to the goods to carry out a stocktake and proper accounting. Unfortunately, this is not the relief sought by the applicant. As *per* the interim relief sought, the applicant prays for immediate surrender of the goods, which goods the applicant had agreed to collect on 31 August 2010. The interim relief does not seek to address E the issue of being allowed access to the shop for accounting and stocktake purposes. Mr *Ndudzo* did not even seek to

amend this defective provisional order, despite the persistent concerns by the court even at the eleventh hour.

In conclusion, I would also want to make the point that, even if I were to find that this matter is urgent, I am not inclined to grant the relief prayed F for. The reason is that the provisional or interim relief prayed for, if granted, has the effect of a final order. In other words, once the goods are returned to the applicant as *per* the provisional order, there would be no point, even on the return date, to deal with the question of ownership of these goods, which issue has always been a non-issue.

My finding is that there was urgency in this matter on the basis of the dispute G which arose regarding access to the goods for purposes of a stocktake and accounting. However, such urgency does not relate to the relief sought. The relief sought is misplaced and improperly drafted. This court cannot, in the absence of a proper application, proceed to amend the relief sought, the more so when such shortcomings were brought to the attention of the H applicant's counsel.

2010 (2) ZLR p276

Mawadze J

Lastly, Mr *Nhemwa* sought an award of costs on a higher scale on the basis A that this application is ill conceived, unnecessary and replete with basic errors, the more so as there was no dispute between the parties. While I agree with Mr *Nhemwa's* observations in respect of other issues he raised, I do not entirely share his overall sentiments.

At the commencement of the hearing of this matter the court pointed out B that the parties could resolve the issue without need for a fully fledged hearing of the matter. Mr *Nhemwa* was not amenable to this on account of costs. The conduct of the second respondent cannot be said to be without reproach. The second respondent was unwilling to agree unconditionally to cancellation of the agency relationship. The second respondent was unwilling to unconditionally surrender the goods and, most importantly, C seemed unwilling to allow the applicant access to the goods, which goods the second respondent admits belongs to the applicant. In other words, the second respondent was only willing to deal with the issues on the second respondent's terms, nothing less. Given those facts I find no basis to reward the second respondent's conduct with a generous award of costs as prayed for. It is only fair and just that given the nature and the outcome of this case D each party bears its own costs.

I accordingly make the following order.

1. The application is dismissed.
2. Each party is to bear its own costs. E

Mutamangira & Associates, applicant's legal practitioners

Nhemwa & Associates, respondent's legal practitioners F

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Source:
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ZCTU v OC POLICE, KWEKWE & ORS 2010 (2) ZLR 277 (H)

2010 (2) ZLR p277

Citation	2010 (2) ZLR 277 (H)
Case No	Judgment No. HB-90-10
Court	High Court, Bulawayo

Judge Mathonsi J

Heard 2 July 2010

Judgment 26 August 2010

Counsel *L Jamela,* assisted by Ms *L Chanaiwa,* for the applicant
T Makoni, for the respondents

Case Type Urgent chamber application

Annotations Link to case annotations

Flynote

Constitutional law - *Constitution of Zimbabwe 1980 - Declaration of Rights - s 21 -freedom of assembly and association - trade union - right to hold public gathering for bona fide trade union business purposes*

D **Statutes** - *Public Order and Security Act [Chapter 11:17] - regulation of public gatherings - gatherings exempt from requirements of Part IV - include gatherings held by registered trade union for bona fide trade union business purposes*

Headnote

The applicant was a registered trade union and the umbrella body of several E trade unions nationally which were affiliated to it. It had branches throughout the country and its core business was championing the interests of its members. It planned to commemorate the 1972 Hwange mine disaster by undertaking a peaceful procession along one of the streets in Kwe Kwe and observing a moment of silence. It notified the police of its plan and requested a police escort to protect its members F during that activity. The police stated that the procession should take place in Hwange and that the procession was "not approved". Further approaches from the applicant were met with the same reaction. The applicant approached the court on an urgent basis seeking authority to go ahead with the procession and an interdict against the respondents barring them from interfering with or stopping the commemoration activities.

G *Held,* that Zimbabwe is a democratic country and the freedom of assembly and association is enshrined in s 21 of the Constitution. Persons are entitled to assemble freely and associate with other persons, particularly to form trade unions and other associations for the furtherance of their interests. Sections 23, 24, 25 and 26 of the Public Order and Security Act [*Chapter* H *11:17*], which govern the holding of public gatherings and set out the

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Mathonsi J

procedure to be followed by those intending to hold such gatherings, had A no application in this case, as, in terms of s 26 A of the Act, they did not apply to, *inter alia,* gatherings held by a registered trade union for *bona fide* trade union purposes for the conduct of business in accordance with the Labour Act [*Chapter 28:01*]. The commemoration of the mine disaster was such business. The orders sought would accordingly be granted. B

Legislation considered

Constitution of Zimbabwe 1980 s 21

Labour Act [*Chapter 28:01*], Part VII

Public Order and Security Act [*Chapter 11:17*], ss 23, 24, 25, 26 and 26A C

Case information

L Jamela, assisted by Ms *L Chanaiwa,* for the applicant

T Makoni, for the respondents

Judgment

Mathonsi J: At the hearing of this urgent application, I granted the provisional order in favour of the applicant and indicated that the reasons D for doing so would follow. These are the reasons.

The applicant is a registered trade union and the umbrella body of several trade unions nationally which are affiliated to it. The applicant has branches throughout the country and its core business is championing the interests of its members.

On 14 May 2010, in the normal conduct of its functions as a trade union E representing workers in Kwekwe, the applicant notified the police in the district of its intention to commemorate the well known Hwange disaster of 6 June 1972 in which mine workers perished in a coal mine. The applicant planned to commemorate the disaster by undertaking a peaceful procession along one of the streets in Kwekwe and observing a moment of silence. The F applicant also requested a police escort to protect its members during that activity. The ceremony was originally planned for 5 June 2010.

The police responded by a letter dated 18 May 2010 signed by Superintendent E A Chivandire on behalf of the first respondent, which reads in part as follows:

> **"RE: NOTIFICATION OF PROCESSION AND POLICE ESCORT -05 JUNE** G **2010**
>
> (1) The above subject matter is relevant.
>
> (2) I appreciate your notification of your intention to carry out a commemoration of the Hwange Colliery 6 June 1972 Mine Disaster.
>
> (3) Your intention to commemorate the day is very noble. *However such commemorations should be done at the site that is at Hwange Colliery Company Kamandama Site.* H

Mathonsi J

> (4) The nation has A taken precedence of all commemorations like the Heroes' commemoration, Chimoio, Nyadzonya, Mkushi and Hwange annual commemorations which are done on the site.
>
> (5) There is nothing wrong if you can travel to Hwange and commemorate the day on 6 June 2010 in Hwange together with the Hwange Colliery Community. B
>
> (6) *I can not allow you to commemorate the day in KWEKWE and POLICE OFFICERS will be engaged in other operations taking place around the District.*
>
> (7) *Be advised that the notification is NOT APPROVED"*(the emphasis is mine).

Clearly, therefore, the police had assigned themselves the responsibility not C only to regulate the activities of the applicant but also to determine when and where the commemorations should take place. Indeed, they even abrogated a ceremony that had been planned and pencilled for Kwekwe on 5 June 2010.

The applicant again approached the first respondent on 17 June 2010 notifying him of an intention to commemorate the mine disaster on 26 June 2010 by D a procession along a road in Kwekwe. The first respondent responded by letter dated 22 June 2010 which reads in the main as follows:

> **"RE: NOTIFICATION FOR A PROCESSION AGAINST THE HWANGE 6 JUNE DISASTER.**
>
> (1) Above matter is pertinent.
>
> (2) I appreciate and buy the idea of commemorating the Hwange June 6 disaster. E
>
> (3) However *I cannot authorise the procession* because of the following reason:
>
> (i) The police officers we have are engaged in world cup and constitution making process duties.
>
> (4) *Be advised that your application is not approved"* emphasis is mine).

Again, the tone of the first respondent's letter suggests that he had assumed F the power to authorise and approve the procession before it could take place. Having met this stumbling block, the applicant shifted the commemoration date to 3 July 2010 and physically approached the first respondent to try and resolve the matter. The applicant was then advised that it was required to notify the police in terms of the Public Order and Security Act [*Chapter 11:17*] of its planned procession and its local chairperson was threatened with G unspecified reprisals if he went ahead with the procession and was advised that the police would certainly interfere with it to prevent it taking place.

This forced the applicant to approach this court on an urgent basis seeking authority to go ahead with the procession and an interdict against the respondents barring them from interfering with or stopping the H commemoration activities

2010 (2) ZLR p280

Mathonsi J

At the hearing of the matter *Mr Makoni* who appeared with the first respondent, A after raising extraneous issues relating to service of the application, submitted on the merits that the applicant had not exhausted domestic remedies. In his view, the applicant still had to negotiate with the regulating authority on the modalities of holding the procession. If that effort failed, according to Mr *Makoni,* the applicant could then approach the local magistrate. I find the B submissions made by *Mr Makoni* to be devoid of any merit.

Zimbabwe is a democratic country and the freedom of assembly and association is enshrined in s 21 of the Constitution. Persons are entitled to assemble freely and associate with other persons, particularly to form trade unions and other associations for the furtherance of their interests.

Sections 23, 24, 25 and 26 of the Public Order and Security Act [*Chapter* C *11:17*] govern the holding of public gatherings and set out the procedure to be followed by those intending to hold such gatherings. However, those provisions have no application whatsoever in the circumstances of this case. This is by virtue of the provisions of s 26A of the Act which provides:

> "Sections 23, 24, 25 and 26 shall not apply to gatherings of a class described in D the schedule."

The schedule lists gatherings to which the sections do not apply to include:

> "Gatherings held by a registered trade union for bona fide trade union purposes for the conduct of business in accordance with the Labour Act [*Chapter 28:01*]."

It was not argued for the respondent that the commemoration of the Hwange Mine disaster by a properly registered trade union did not fall under that E exemption. Therefore, by purporting to regulate the conduct of the workers' commemoration, the first respondent was engaging in an exercise in extreme futility as he possessed no such power.

To the extent that the commemoration was organised by the applicant for bona fide trade union purposes, which it was, the applicant was not required F to follow the procedure set out in ss 23 , 24, 25, and 26 of the Act as it enjoyed an exemption. The first respondent's conduct therefore betrays a lamentable ignorance of the provisions of the Public Order and Security Act [*Chapter 11:17*] which he is sworn to uphold. In the process, he has interfered with the rights of the applicant protected by Part VII of the Labour Act [*Chapter* G *28:01*] and by s 21 of the Constitution.

Accordingly the order is granted in terms of the draft order on pages 15 and 16 of the bound application.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

Civil Division, Attorney General's Officer, respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/AEPROMM RESOURCES (PVT) LTD v MAZOWE & ORS 2010 (2) ZLR 281 (H)

AEPROMM RESOURCES (PVT) LTD v MAZOWE & ORS 2010 (2) ZLR 281 (H)

2010 (2) ZLR p281

Citation 2010 (2) ZLR 281 (H)

Case No Judgment No. HH-192-10

Court	High Court, Harare
Judge	Mtshiya J
Heard	20 August 2010
Judgment	31 August 2010
Counsel	*G C Chikumbirike*, for the applicant *I Chagonda*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *interdict - when may be ordered - effect of interdict would be to review or reverse earlier decision of same court - interdict not permissible*

Headnote

D The applicant brought an urgent application before the High Court, seeking an order declaring a notice of an extraordinary general meeting of the applicant, called by the respondents, be declared null and void and preventing the respondents from acting as directors of the applicant. The application was dismissed as being not urgent. The applicant noted E an appeal against this ruling. The applicant then brought an application before the High Court, seeking an order interdicting the respondents from holding the meeting that had been called.

Held, that if the interdict were granted, the effect would be to reverse the court's earlier ruling. Whilst it was possible for the Supreme Court to be moved to grant an urgent hearing to an appeal already before it, F what the court was being asked to do was to review the court's earlier decision. That was not permissible. The relief sought was the same as the one earlier prayed for.

Legislation considered

High Court Act [*Chapter 7:06*], s 43(2)(d) H Supreme Court Rules 1964 (RGN 380 of 1964), r 58

Cases referred to

Founders Bldg Soc v Mazuka 2000 (1) ZLR 528 (H)

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

Mwatsaka v ICL Zimbabwe 1998 (1) ZLR 1 (H) H

2010 (2) ZLR p282

Mtshiya J

Case information

G C Chikumbirike, for the applicant A

I Chagonda, for the respondent

Judgment

Mtshiya J: On 20 August 2010 I dismissed this application with costs. The applicant has now placed before me a written request for the full reasons behind my dismissed of its application. The applicant says it needs the B reasons because it intends to file an appeal in the Supreme Court urgently. I give here below the reasons for my ruling.

On 12 August 2010 the applicant filed an urgent application in this court seeking the following interim relief:

"Pending the finalization of the applicant is granted the following relief:

1. The Notice of Extraordinary General Meeting, issued by the first respondent, C for a meeting to be held on 21 August 2010, is hereby declared null and void.
2. The respondents are hereby interdicted from purporting to act as directors of the applicant and interfering with and/or disrupting the applicant's management. D .
3. The respondents shall pay costs of this application.
4. That leave is granted to the applicant's legal practitioners to serve this order upon the respondents."

The application was heard and dismissed for lack of urgency by Hlatshwayo J on 19 August 2010. The result slip in the record confirms as follows: E

"Matter dismissed as not urgent."

On 19 August 2010, the day Hlatshwayo J made his ruling, the applicant noted an appeal in the Supreme Court. The notice of appeal states that the appeal is against the whole of the judgment of Hlatshwayo J and grounds of appeal are then given as follows:

"1. The learned judge erred in finding that the applicant's application, HC F 5500/10, was not urgent on the basis that there was an inordinate delay between the time the issue of applicant's contested directorship came to the attention of the applicant's deponent in HC 5500/10 and the time of filing of HC 5500/10. In so doing the learned judge failed to appreciate the fact that the issue that has instigated urgency in HC 5500/10 is the serving of notices of an Extraordinary General Meeting of the applicant, proposed by G the respondents purportedly in their capacity as applicant's directors. The fact of speculative knowledge about the improper claim to directorship by the respondents could not ground urgency in that that would essentially amount to creating urgency where none exists. Prior to the issuance of the notice to attend an Extraordinary General Meeting, therefore, the dispute as to directorship could be resolved by way of an ordinary court application. Upon the service of the notice to attend the Extraordinary General Meeting H

Mtshiya J

A however, scheduled for 21 August 2010, the need arose to interdict the respondents from acting in a manner inconsistent with the position that their status as directors is disputed. Such an interdiction could not be dealt with by way of an ordinary court application. It could only be resolved by way of an urgent chamber application, as such the learned judge erred in finding that the matter was not urgent. B

2. The learned judge also erred in finding that the averment contained in the supporting affidavit of Ann Rushwaya was evidence of the fact that as far back as the 22 June the applicant was aware of its purported change of directorship. This is so because a speculative suspicion that a party has done something unlawful does not ground urgency but the very act of actuating that illegal action, e.g. by calling for an Extraordinary General Meeting, does ground such urgency, thus despite the existence of that speculative C suspicion in June 2010, the basis of urgency has only arisen upon the serving of the notices to attend an Extraordinary General Meeting."

The judgment appealed against does not form part of the papers before me.

On 20 August 2010 the applicant filed this application seeking the following

interim relief:

D "Pending the finalization of the applicant's appeal in the Supreme Court (SC 197/10), the applicant is granted the following relief:

1. The respondents be and are hereby interdicted from holding the purported Extraordinary General Meeting of the applicant, scheduled for 21 August 2010.
2. The respondents shall pay the costs of this application."

E Clearly the above is the same relief that was prayed for on 12 August 2010.

I heard the application on the same day it was filed and indeed after hearing argument from both counsel I dismissed the application with costs.

The certificate of urgency in support of the application indicated that, since F the dismissal of the earlier application, the issue of an interdict remained alive because the extraordinary general meeting proposed by the respondents was likely to be held on 21 August 2010. Furthermore, the certificate went on, the dismissed matter (HC 5500/10) remained *res litigiosa* on account of the

appeal noted in the Supreme Court. Accordingly, it was stated, if an interdict was not granted the holding of the meeting on 21 August 2010 G by the respondents would stand to ignore the fact that there was pending litigation on the issue. The applicant therefore believed there was need for the matter to be dealt with through an urgent application.

I must hasten to mention that a few hours before the hearing of the application I had asked for heads of argument on whether or not leave to appeal was H required in respect of the appeal filed in the Supreme Court on 19 August

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Mtshiya J

2010.1 am indebted to Mr *Chikumbirike,* for the applicant, who quickly filed A heads of argument which I found useful.

In his heads of argument Mr *Chikumbirike* drew my attention to s 43(2)(d) (ii) of the High Court Act [*Chapter 7:06*] which provides as follows:

> "(2) No appeal shall lie B -
>
> (a) .....
>
> (b) .....
>
> (c) ....
>
> (d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the C following cases -
>
> (i) where the liberty of the subject or the custody of minors is concerned;
>
> (ii) *where an interdict is granted or refused;*
>
> (iii) in the case of an order on a special case stated under any law relating to arbitration"(my emphasis).

Clearly the relief sought is that of an interdict referred to in exception (ii) D above. Mr *Chikumbirike* also advised that, upon dismissing the application, the judge had intimated that his decision was final and definitive and did not therefore require leave of the judge for purposes of appeal. I concur. See *Mwatsaka v ICL Zimbabwe* 1998 (1) ZLR 1 (H).

Mr *Chagonda,* for the respondent, although intimating that leave should E have been formally sought, was, however, of the view that since the appeal was already before the Supreme Court, the applicant should have applied to that court for an urgent hearing. He said the applicant could have done so in

terms of r 58 of the Supreme Court Rules 1968, which provides as follows:

> "In any matter not dealt with in these Rules the practice and procedure of the F Supreme Court shall, subject to any direction to the contrary by the court or a judge, follow, as near as may be, the practice and procedure of the High Court".

He said the above rule opened a window for urgent applications to be brought before the Supreme Court and that many cases had been handled through that window.

Without denying the fact that indeed many cases had reached the Supreme G Court through that window, Mr *Chikumbirike,* relying on *Guwa v Willoughby Investments (Pvt) Ltd 2009* (1) ZLR 380 (S), said that, unlike the High Court, the Supreme Court had no inherent jurisdiction. He said it was a creature of statute whose powers are clearly defined in the Supreme Court Act [*Chapter 7:13*]. That being the case, there was no opening for urgent applications. H

Mtshiya J

A Mr *Chagonda* was of the view that the route taken by the applicant was simply a way of bringing back the same refused application to the same court. This was so because, if granted, the effect of the relief sought meant a reversal of the earlier decision of this court. I agree.

Indeed, if the interdict is granted, the effect is to reverse the earlier ruling of this court. As can be seen, the relief sought is the same as the one earlier B prayed for. However, Mr *Chikumbirike's* argument was that the court's duty was merely to determine whether or not, given the fact that an appeal now lies in a superior court, it could be proper for the respondents to proceed with their

proposed meeting on 21 August 2010. In support of that stance, the applicant in its founding affidavit and in line with the certificate of C urgency states, in part:

> "6. Pending the determination of that appeal therefore, the issue of the application for the interdiction of the respondents from holding the proposed meeting of 21 August 2010, remains a matter that is subject of pending litigation.
>
> 7. The applicant has a clear right to have that issue determined before any action as to holding the proposed meeting can take place. This is in line D with protecting its right to proper recourse before the law.
>
> 8. To allow the meeting to proceed therefore would amount to the sanctioning of the dealing in and with issues that are *res litigiosa.* Such a situation would inevitably cause the applicant irreparable harm as the proposed meeting seeks to make various resolutions in respect of the applicant, which resolutions are intended thereafter to be put into effect. Such a situation E must be stopped by this honourable court.
>
> 9. The risk of this irreparable harm is very imminent as the proposed meeting is scheduled for 21 August 2010 (the day after tomorrow). It is on this basis that the applicant prays for an order interdicting the respondents from holding the proposed Extraordinary General Meeting on 21 August 2010, pending finalization of the applicant's appeal in HC 5500/10".

F The details relating to the business of the meeting to be held on 21 August 2010 were not given. Whilst I am of the view that it is possible for the Supreme Court to be moved to grant an urgent hearing to an appeal already before it, my assessment in this application is that I am being asked to review the earlier decision of my brother Hlatshwayo. That cannot be and is not permissible. That being the case, there would, therefore, in the main, be no G compelling reason for me to have the earlier judgment placed before me. I simply do not have the power to review that judgment.

To the extent that the parties were heard on the merits of the case relating to the sole issue of urgency, I hold the view that this matter is now *res judicata.* I come to this conclusion on the basis that the relief being sought is the same H one that was before my brother Hlatshwayo. As argued by counsel for the

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respondents, I believe I am being asked to grant the same relief under the A excuse of an appeal now pending in the Supreme Court.

In addition to the above, I also want to recognise that generally in civil matters an appeal to the Supreme Court suspends the operation of the decision appealed against: *Founders Building Society v Mazuka* 2000 (1) ZLR 528 (H). However, given the fact that no operational order was ever granted by B this court, I do not think the general rule applies. The judge, after having heard the parties, merely refused to hear the matter on the basis of urgency and there was never any consideration of the merits of the case. There was no executable order issued by the judge. That is why it was not necessary for respondents to make an application for execution pending appeal. In line with its acceptance of that fact, the applicant, in its appeal, prays for C the matter to be "remitted to the High Court to be heard and determined on an urgent basis".

All in all and for the reasons I have given above, I find myself totally disabled from granting the relief sought. The above conclusions preclude me from going any further because the appeal in the Supreme Court is indeed intended D to direct this court to go into the merits of the matter. The prayer in the appeal specifically reads as follows:

> "That the ruling by the High Court in HC5500/10 be and is hereby set aside, and the matter is remitted to the High Court to be heard and determined on an urgent basis."

It would therefore be improper for me to do what the Supreme Court has E not yet directed this court to do.

In light of the foregoing I dismissed the application with costs.

Chikumbirike & Associates, applicants' legal practitioners F

Atherstone & Cook, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/FIRST CLASS ENTERPRISES LTD v SCANLINK (PVT) LTD 2010 (2) ZLR 287 (H)

FIRST CLASS ENTERPRISES LTD v SCANLINK (PVT) LTD 2010 (2) ZLR 287 (H)

Citation	2010 (2) ZLR 287 (H)
Case No	Judgment No. HH-187-10
Court	High Court, Harare
Judge	Gowora J
Heard	26 June 2009
Judgment	1 September 2010
Counsel	*K Ncube*, for the applicant *A Moyo*, for the respondent
Case Type	Opposed court application
Annotations	No case annotations to date

Flynote

Practice and procedure — *judgment — by consent — setting aside of — good and sufficient cause — what constitutes — defendant consenting to judgment but plaintiff not applying for judgment — plaintiff planning to amend its claim — judge mero motu granting judgment — good and sufficient* D *cause to set aside judgment*

Headnote

The applicant had filed summons against the respondent claiming damages arising from a breach of contract. The claim was expressed in Zimbabwe dollars, the currency officially in use at the time. At the pre-trial E conference, the respondent offered to settle the claim for the amount claimed in the summons. The plaintiff declined and indicated that it would be amending its claim. The matter was referred to trial on the understanding that the plaintiff would file an amendment to its claim before the trial. A trial date was set. About a week before the trial date, the defendant's legal practitioners told the plaintiff's legal practitioners F that they had filed a consent to judgment in terms of the summons. A day later, the plaintiff filed an application to amend its claim. However, unbeknown to the plaintiff, the consent to judgment that had been filed by the defendant had been granted on the same day by the trial judge in chambers. The plaintiff's legal practitioners, unaware of this, told the defendant's legal practitioners that it had always been the plaintiff's G intention to amend its claim and so would not accept the consent. The plaintiff, on discovering that judgment had been entered in its favour, applied to have the judgment set aside. It was argued that, since this was a judgment the plaintiff did not seek, the court had good and sufficient cause to set the judgment aside. The court could only have granted the H judgment upon application by the plaintiff and, in the absence of such

Gowora J

application, the court did not have grounds for entering the judgment. A The plaintiff also contended that the judgment given did not discharge the defendant's liability.

Held, that a judgment entered by consent may, under r 56 of the High Court Rules, be set aside for good and sufficient cause. In determining what would constitute good and sufficient cause, there are three broad factors: B (i) the explanation given by the applicant for his default; (ii) the *bona fides* of the application to rescind the judgment; and (iii) the *bona fides* of the merits of the defence. It is impossible to frame an exhaustive definition of what would constitute good and sufficient cause; any attempt to do so would merely constrict the exercise of a discretion which the Rules have purposely made very extensive and which it is desirable not C to abridge. The Rules permit a plaintiff, where the defendant has filed a consent to judgment, to make a chamber application for the judgment to be granted in its favour, and the court seized with the trial may then enter judgment. The procedure followed was not in accordance with rr 54 and 55. The plaintiff did not apply for judgment; the court *mero motu* granted it. The judgment was thus not granted by consent and this D fact constituted good and sufficient reason to set the judgment aside.

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 54, 55 and 56

Cases referred to E

Deweras Farm v Zimbank 1998 (1) ZLR 368 (S)

du Plessis v Hughes NO 1957 R & N 706 (SR)

Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd 1998 (2) ZLR 488 (S)

Lambert v Mainland Market Deliveries Ltd [1997] 2 All ER 826 (CA) F

Molete v Union National South British Conference Co Ltd 1982 (4) SA 178 (W)

Sibindi v ARDA 1994 (1) ZLR 284 (S)

Washaya v Washaya 1989 (2) ZLR 195 (H)

Case information

KNcube, for the applicant G

A Moyo, for the respondent

Judgment

Gowora J: On 1 August 2007 the applicant, issued a summons against the respondent claiming special damages in the sum of $4 102 500 000 in Zimbabwe dollars. The respondent entered an appearance to defend and H

Gowora J

A the matter proceeded and was duly set down for trial. A few days before the matter was due to be tried on the continuous roll, the respondent filed a consent to judgment as set out in the summons and declaration. On 4 January 2009 judgment was entered for the applicant in accordance with the consent filed by the respondent. The applicant has now launched these proceedings B to have the judgment entered in its favour set aside. The respondent opposes the application.

The founding affidavit sets out the facts leading to the granting of the judgment as follows. The applicant filed summons alleging breach of contract on the part of the respondent and seeking the payment of special damages arising out of the breach. The parties filed pleadings, resulting in the matter being C set down for a pre-trial conference before a judge in chambers. At the pre- trial conference the respondent offered to settle the matter by paying the sum claimed on the summons. The applicant declined to accept the offer and its representative advised that the applicant would be filing an amendment of the claim before the trial. The deponent avers that the judge before whom D the matter was set down for the pre-trial conference raised the issue of the replacement of the bus for the engine. The applicant's representative indicated that the issue would be dealt with just

before the trial. In the result, the matter was referred to trial on the understanding that the applicant would be filing an amendment to its claim before the trial.

E The matter was set down for trial on 19 January 2009. On 13 January 2009 the respondent's legal practitioners wrote to the applicant's legal practitioners to the effect that they had filed a consent to judgment in terms of the summons. The letter, which was served upon the latter, was received on 15 January 2009 as the date stamp thereon shows. The consent to judgment was actually filed F on 14 January, even though it was signed on 13 January 2009. On 15 January 2009 the applicant also filed an application to amend its claim. However, unbeknown to the applicant, the consent to judgment that had been filed by the respondent on 14 January 2009 had been granted on the same day by the trial judge in chambers. The applicant's legal practitioners, unaware that judgment had been entered in their client's favour in terms of the summons, G had written to the respondent's legal practitioners on 15 January 2009, responding to the letter of 13 January 2009. The response was to the effect that it had always been the intention of the applicant to amend its claim, which position the respondent and its legal practitioners were aware of. In the event, the applicant would not accept the consent and the cheque tendered H under cover of the letter of 13 January 2009 was returned to the respondent.

Gowora J

A judgment obtained by consent may, in terms of the High Court Rules, be A set aside if the applicant shows that there are good and sufficient grounds for it to be set aside. Order 8 r 56 thereof provides:

> "A judgment given by consent under these rules may be set aside by the court and leave given to the respondent to defend or to the applicant to prosecute his action. Such leave shall only be given on good and sufficient cause and upon B such terms as to costs and otherwise as the court deems fit."

Over the years, the courts have laid out general guidelines as to what would constitute good and sufficient cause. Three broad considerations have been accepted as the factors to be taken into account when determining what would constitute good and sufficient cause. These are:

(i) The explanation given by the applicant for his default; C

(ii) The *bona fides* of the application to rescind the judgment;

(iii) The *bona fides* of the merits of the defence.

See *du Plessis v Hughes NO* 1957 R & N 706 (SR) and *Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S).

In my view, the minefield that confronts a judge when considering an D application for rescission of judgment was very succinctly stated by McNally JA in *Deweras Farm v Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368 (S) at 370A as follows:

> "I respectfully agree with the *dicta* of Innes J in the oft cited case of *Cairns Executors v Gaarn* 1912 AD 186. In particular his Lordship said, 'It will be E quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the rules have purposely made very extensive and which it is desirable not to abridge.'"

According to the applicant, the court has sufficient cause to set aside the judgment because, as it complains, the respondent snatched at a bargain F resulting from the circumstances prevailing in the economy at the time, by consenting to judgment in the sum stated in the summons when it well knew that the applicant intended to amend its claim, as the amount stated in the summons had no appreciable value, and that the applicant had indicated, through its legal practitioners, that it intended to file an amendment to G the claim. The refusal by the respondent to have the judgment set aside is described by the applicant as "snatching at a judgment".

The procedure whereby a judgment may be granted by consent is provided for in Order 8 of the Rules of the High Court. The relevant rules are 54 and 55, which provide as follows:

> **"54. Requisites for consent to judgment** H

Gowora J

> A A consent to judgment shall be in writing and be signed by the respondent personally or by a legal practitioner who has entered appearance on his behalf. The respondent's signature shall be verified by an

affidavit made by someone other than himself, or by the signature of a legal practitioner acting for him and not the opposite party.

55. Judgment or Order

B Upon filing a consent to judgment with the registrar the applicant may make a chamber application for judgment and thereupon may be given an order made according to such consent."

The applicant submitted that since this was a judgment that it did not seek, the court has good and sufficient cause to set the judgment aside. It contends that the court could only have granted the judgment upon application by it C and, in the absence of such application, the court did not have grounds for entering the judgment in question. It also contends that the judgment given did not discharge the respondent's liability. Although there are no cases in point on this issue, counsel for the applicant has referred me to two case authorities, *viz: Lambert v Mainland Market Deliveries Ltd* [1977] All ER D 826 (CA) and *Molete v Union National South British Conference Co Ltd* 1982 (4) SA 178 (W). In the former case, Megaw LJ observed at 833c-g:

"I would, however, say this also: that it is a jurisdiction which ought to be exercised with very great care, and it may well be that the cases in which it falls to be exercised should only be rare. It is desirable that litigation, once apparently finished, including litigation finished by means of payment into court which is E either of the full amount claimed or an amount accepted deliberately by a applicant, ought not lightly to be allowed to be re-opened. But that there are such cases where the court has such jurisdiction is, I should have thought, apparent from the examples that were discussed during the argument before us. If, for example, the claim put forward in the county court by a applicant was one which contained a simple mistake as to the amount (as for example Lawton LJ suggested in the course of argument by the omission of a '0' in the amount of the claim making F it £150 instead of £1 500) it would be absurd indeed if it were suggested that the respondent, having received the particulars of the claim, should be in a position to then promptly pay £150 into court and then to say 'The result under the rule, is that this action is stayed and cannot be re-opened'. Another example, which I put forward during argument is: supposing a applicant discovers, when it is nearly time for trial, that the damage he has suffered is substantially increased G by reason of some event over and above what he has included in his particulars of claim. As a matter of courtesy, he, or his solicitors, notify the opposing side that he will amend particulars accordingly. Is it possible that the law is that in those circumstances a respondent receiving information could promptly make a payment in the amount of the sum at that moment included in the particulars of claim and then say; 'Well that is the end of it. This action is stayed. You, the H applicant, may not amend your pleadings because the action is stayed and the

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court has no right to remove the stay'? It cannot be so. There must be, as was A said by Green MR, cases in which the court has the power to set aside a stay."

This dicta was quoted with approval by O'Donovan J in the *Molete* case *supra.* The learned judge went on to state at 183E-F:

"I do not consider that an examination of the policy considerations underlying r 18 (1) is of assistance to the respondent in relation to the Supreme Court B Rules. There are, in my view, clear indications in r 34 that the unilateral act of a respondent in making a payment into court cannot have the effect of terminating the proceedings. Acceptance by the applicant of the money paid is essential before the original cause of action can be said to have come to an end."

A perusal of our High Court Rules reveals that this is not an option that is available to a respondent, who is instead given an option to consent to the C judgment. Both counsel are agreed that the Rules permit a plaintiff, where the defendant has filed a consent to judgment, to make a chamber application for the judgment to be granted in its favour, and that the court seized with the trial then enters judgment. The respondent concedes that the judgment, *stricto sensu,* was not entered in accordance with the procedure set out in Order 8 of the High Court Rules. The question that must then be asked is D whether this error is sufficient to constitute good and sufficient cause. I agree with the contention by Mr *Moyo* that the judgment cannot be regarded as a nullity and. even if it were, this court sitting as a court of parallel jurisdiction with the court that granted the judgment in the first place cannot possibly declare such a judgment a nullity, as that would amount to a review of the E decision of that court. This court can, however, set aside such judgment on the basis that good and sufficient cause has been established.

The respondent has placed reliance on *Washaya v Washaya* 1989 (2) ZLR 195 (H), where the court was dealing with an application to set aside a judgment granted by consent, after the legal practitioner had apparently consented without instructions to do so from his client. The court found

that, even F though the legal practitioner might not have been accorded instructions to consent, nevertheless, under the common law, such consent was recognisable and would bind the affected party.

I agree with Mt *Ncube* for the applicant that the circumstances surrounding the judgment in the *Washaya* case *supra* are different and distinguishable from G the present. In the former case, the court was dealing with a consent properly filed by a legal practitioner and on the basis of which the court duly entered judgment in favour of the applicant therein. The applicant therein actually prayed for judgment to be entered in the amount in respect of which the respondent had consented to the judgment. In the present case, the applicant did not apply for the default judgment. Instead, it was the court which *mero* H

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A *motu* granted judgment in favour of the applicant. This, presumably, is the error that the applicant is adverting to when it applies for the setting aside of the judgment on good and sufficient cause. Can this court then conclude that the judgment was entered in error and thus find that such error constituted good and sufficient cause?

B In *Sibindi v ARDA* 1994 (1) ZLR 284 (S) the Supreme Court had to consider an appeal wherein the court had *mero motu* dismissed a claim when the respondent had been in default on the date of trial and no application had been made for the dismissal of the claim. Gubbay CJ at 287F-288C observed as follows:

> "I am satisfied, however, that the learned judge erred in dismissing the action. C Indeed, Mr *Mutendadzamera,* who appeared for the respondent, very fairly conceded that he was unable to support that aspect of the judgment.
>
> The respondent was in default of appearance at the trial. It had not sought the dismissal of the action brought against it. There was, therefore, no application before the learned judge for the grant of such an order.
>
> D It is well established that a superior court has an inherent jurisdiction to dismiss an action. See *Meyer v Meyer* 1948 (1) SA 484 a*t 487;Broughton v Manicaland Air Services (Pty) Ltd* 1972 (1)RLR 350 (G) at 352B-C; 1972 (4) SA 458 (R) at 460A-B; *Schoeman en Andere v van Tonder* 1979 (1) SA 301 at 304G-H; *Kuiper & Ors v Benson* 1984 (1) SA 474 (W) at 476H-477B. But I am unaware of any decision in which that power has been exercised by the court *mero motu* and in favour of a respondent who is in default. Invariably its exercise has followed E upon the making of an application and, I believe, correctly so.
>
> An examination of the Rules of the High Court appears to me to support the view I take. They reveal that an action may be dismissed on application by the respondent where the applicant has been barred from declaring or making a claim (r 61); or on the ground that the action is frivolous or vexatious (r 75); or for non compliance with an order compelling production of a document (rr F 168 and 169 (4)) or requiring answers to an interrogatory (r 196). No provision is made for dismissal of an action solely at the instance of the court or judge."

I have quoted *in extenso* the *dicta* from the learned Chief Justice in order to put into a proper perspective the power that a court, even a superior court of inherent jurisdiction, has. In terms of the Rules of the High Court, when a respondent files a consent to judgment, the applicant may apply through the G chamber book for judgment in terms of the consent filed by the respondent. *In casu,* the applicant did not file an application for the judgment to be entered. In effect, therefore, the judgment was not granted through consent by both parties to the dispute. It was, in fact, granted by the court *mero motu.* It is for this reason that the applicant wishes to have the judgment set aside; because H it never consented thereto. The applicant has referred to two passages in the

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Washaya case *supra,* which I respectfully agree with. The first at 197A-B A is stated in these terms;

> "It is stating the obvious, but it does require stating, that for such a judgment to have any validity the essential ingredient of consent must be present. What is more, the court must be satisfied as to the presence of consent. It is for this reason that both in South Africa and Zimbabwe the governing rules prescribe B in clear and peremptory terms the form a consent to judgment must take."

And later at 201E-F:

> "It is clear, in terms of these precedents, common sense and justice, that once a court is not satisfied that a party consented to judgment then that party is entitled to *restitutio* in *integrum.* Put differently, had the court granting the judgment been aware that the party had not consented it would not have acceded to the C request that it enter judgment. The judgment must, therefore, be set aside."

As to the contention by the applicant that there was intent to amend the claim for damages, the respondent contended that the applicant wishes to amend its claim to reflect US dollars when the loss was suffered in Zimbabwe dollars. This, in my view, is an argument that should be considered by the court before whom the application to amend the claim is placed. It is not, I believe, D an argument that I can do justice to in an application for the rescission of a judgment. It is not an issue that is before me.

In the premises, I find that there is good and sufficient cause to have the consent judgment entered into on 14 January 2009 to be set aside. The parties are directed to have the matter reset down for trial. E

The question of costs is an issue. The applicant had sought costs only in the event that the application was opposed. The attitude of the respondent, in seeking to cling onto a judgment entered in circumstances where the applicant had not sought the judgment and where it had been entered to the applicant's detriment, is baffling, to say the least. Although legal practitioners F are primarily before the court to advance the interests of their clients, it goes without saying that their first duty is to the court. To defend a judgment that was obviously entered in error and, to the legal practitioner's knowledge, where the applicant was clearly intent on seeking an amendment to the claim is not conduct that a court can find to be helpful. This conduct resulted in the lengthening of proceedings that could have been concluded a while ago. G In my view, it is only proper that the respondent be ordered to pay the costs of this application.

In the result it is ordered as follows:

1. The judgment of this court dated 14 January 2009 be and is hereby set aside. H

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2. The Registrar A of this court is directed to have the matter set down for hearing for trial.
3. The respondent be and is hereby ordered to pay the costs of the application

B *Gill, Godlonton & Gerrans,* applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

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LASAGNE INVESTMENTS (PVT) LTD & ORS v HIGHDON INVESTMENTS (PVT) LTD & ORS 2010 (2) ZLR 296 (H)

Citation	2010 (2) ZLR 296 (H)
Case No	Judgment No. HH-188-10
Court	High Court, Harare
Judge	Gowora J
Heard	22 May 2008

Judgment 1 September 2010

Counsel *L Uriri*, for the applicants
L Mazonde, for the respondents

Case Type Opposed application

Annotations No case annotations to date

Flynote

Contract - *breach - remedies - specific performance - principles - party seeking specific performance must show has complied with own obligations under contract*

Contract - *cancellation - sale of land by instalments - when cancellation* D *by seller valid - notice which seller must give - effect of failure to give required notice - what purchaser must show if he seeks to allege non- compliance by seller with notice requirements*

Evidence - *onus - civil matter - onus lies on person who makes averment,* E *whether positive or negative*

Headnote

An order for specific performance in favour of a litigant is entirely within the discretion of the judicial officer before whom the application has been made. An applicant who seeks an order for specific performance must perforce establish that he has complied with his obligations under F the agreement. An applicant who seeks specific performance thus has an onus show that he is entitled to such an order in his favour. In respect of bilateral contracts, a party who seeks specific performance must first fulfil or be ready and able to fulfil his own obligation.

A seller of land under an instalment sale must if, because of a breach of contract by the purchaser, he wishes to enforce a penalty stipulation, G cancel the contract or institute proceedings for damages, give notice of his intention in terms of s 8(2) of the Contractual Penalties Act [*Chapter 8:04*]. If the purchaser seeks to rely on the non-compliance by the seller with the provisions of s 8(2), he must put facts before the court that establish that the seller did not comply and that thus the cancellation was of no force and effect. If the purchaser wishes to go further and H

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A seek other remedies, such as specific performance, he should seek a declaratory order that the cancellation was void.

The general principle regarding the burden of proof is simply stated as follows: he who avers must prove. Where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him.

Legislation considered B

Contractual Penalties Act [*Chapter 8:04*], s 8

Cases referred to

C *Chimphonda v Rodriguez & Ors* 1997 (2) ZLR 63 (H)

Crundall Bros (Pvt) Ltd v Lazarus NO & Anor 1991 (2) ZLR 125 (S)

Farmers' Co-op Soc (Reg) v Berry 1912 AD 343

Krieger v Minitzer & Anor 1949 (4) SA 821 (A)

Lake & Ors NNO v Reinsurance Corp Ltd 1967 (3) SA 124 (W)

M B Invstms (Pvt) Ltd v Oliver & Ors 1974 (1) RLR 169 (A); 1974 (3) SA 269 (RA) D

Mobil Oil Southern Africa (Pty) Ltd v Mechin 1965 (2) SA 706 (A)

Wollert v Steenkamp 1917 AD 493

Case information

L Uriri, for the applicants

E *L Mazonde,* for the respondents

Judgment

Gowora J: On 22 May 2008, after hearing counsel, I dismissed this application with costs. I am now informed that reasons for the dismissal are required, the reason being that the parties hereto or other parties with an interest in the subject matter of the application are engaged in a legal wrangle F and the judge dealing with the matter required my reasons. These are they.

Before I get into the dispute between the parties, it is necessary to lay out the history behind it. On 31 July 2001 Aluminium Industries Ltd sold to the applicant an immovable property described as Stand23 Rietfontein Township of Lot 2 of 7B Rietfontein, otherwise known as 1 Kudu Close, Highlands. The G purchase price, according to the written agreement of sale, a copy of which is attached to the applicants' papers, was the sum of $4.2 million Zimbabwe dollars. The applicant avers that it paid the purchase price in South African rand and has attached documents which seem to confirm such payment. The sale does not seem to have been given effect to as the property was then sold and real rights transferred to the first respondent herein. In an effort to H recoup their investments the applicants would appear to have entered into

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negotiations with the first respondent to secure title to the property. Before A me the applicants sought relief in terms of a draft order worded as follows:

IT IS ORDERED THAT:

(a) The purported transfer of Stand no 23 Rietfontein Township of Lot 2 of 7B Rietfontein in favour of the Second respondent be and is hereby set aside. B

(b) The title deed held in the name of the second respondent under Deed of Transfer no 3600/06 for Stand no 23 Rietfontein Township of Lot 2 of 7B Rietfontein be and is hereby cancelled

(c) The first respondent be and is hereby ordered to take all steps and sign all documents necessary to effect transfer of Stand no 23 Rietfontein C Township to the applicants or their nominee within seven days of the granting of this order, failing which the Deputy Sheriff be and is hereby authorized to sign all documents necessary to effect transfer in favour of the applicants or their nominee

(d) Costs of suit.

Although there are three applicants, the only affidavit to the founding papers D was that of the second applicant, the third applicant only filing a supporting affidavit to the answering affidavit filed by the second applicant. In the founding affidavit, the second applicant lays out the background behind the dispute. He confirms that there had been agreement concluded with Aluminium Industries but that the dispute had spilled into court and before the dispute E could be determined the property had been sold to the first respondent. Transfer had been effected to the first respondent which had then sued for the eviction of the first applicant from the premises in question. The matter was then referred to a judge for the holding of a pre-trial conference.

The applicant alleges that at the hearing the judge had directed that the two F pending matters be consolidated and heard together. I am of the view that whatever the learned judge recommended is not the issue as the litigants did not seek to have the two matters consolidated. In the event, the applicants decided to engage the first respondent for the acquisition of rights in the property which is the subject matter of this dispute. Through the exchange G of correspondence the parties were able to conclude an agreement which has led to this impasse between the parties. The terms of the agreement between the parties are not in dispute, but it would be more convenient to discuss them when dealing with the alleged breach by the applicants.

Having set out the facts which are not in dispute, I believe it would be practicable to determine the dispute under the respective heads of issues H

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A raised by the parties in the heads of argument. In their heads of argument, the applicants contend that the cancellation by the first respondent of the agreement between the parties was null and void as it was not effected in terms of the Contractual Penalties Act [*Chapter 8:04*]. Consequently, is further argued by the applicants, the tender of $5 billion by the applicants on 31 May 2006 was thus valid and constituted the final payment for the property B which entitles the applicants to full transfer in favour of the first applicant. The heads of argument filed on behalf of the respondent did not touch on the alleged irregularity of the cancellation of the agreement of sale. For this two reasons can be found. The respondent's heads of argument were filed almost two and a half weeks before those of the applicants, but more importantly C the issue of the cancellation of the agreement was not raised in the affidavits filed on behalf of the applicants. The mode of giving notice under the Act is provided for in subs (2) of s 8, which is to the following effect:

> "8 (1)No seller under an instalment sale of land may, on account of any breach of contract by the purchaser -
>
> (a) enforce a penalty stipulation or a provision for the accelerated payment of D the purchase price; or
>
> (b) terminate the contract; or
>
> (c) institute any proceedings for damages;
>
> unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.
>
> E (2) Notice for the purposes of subsection (1) shall -
>
> (a) be given in writing to the purchaser; and
>
> (b) advise the purchaser of the breach concerned; and
>
> (c) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach concerned within a reasonable period specified in F the notice, which period shall not be less than -
>
> (i) the period fixed for the purpose in the instalment sale of the land concerned; or
>
> (ii) thirty days;
>
> whichever is the longer period."

It seems to me that in order for the applicants to contend and argue on the G basis of the illegality of the cancellation of the agreement it was necessary that they lay a foundation in their papers on the absence of the notice. That, to my mind, involved their setting out the manner in which the first respondent purported to cancel the agreement and to then invoke the provisions of s 8 of the Act the and aver that there was non compliance with the Act as regards H the cancellation. They needed, in my view, to be candid with the court and

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2010 (2) ZLR p300

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state whether or not notice was given and how such notice then fell foul of A the provisions of the Act. Instead, their papers are completely silent on the question of notice and the papers do not even refer to an alleged cancellation of the agreement by the first respondent. Letters on the cancellation were produced by the first respondent in an effort to show that, by the time the tender of $5 billion was made, the agreement had been cancelled. The first B respondent annexed to its papers an undated letter from its legal practitioners addressed to the second applicant and apparently received by the latter on 29 May 2006 returning a cheque in the sum of $1 billion and confirming the cancellation of the agreement, which apparently the second applicant had been informed about. It is interesting to note that, even though the first respondent specifically raised the issue of the cancellation of the agreement in C the opposing affidavit and attached documents to confirm the said cancellation, the applicants did not, in the answering affidavit. comment on the cancellation or make any averment as to the irregularity of the said cancellation.

The way I read s 8(2) is that the purchaser who seeks to rely on non-compliance by the seller with the provisions of the Act has to put facts before the court D that establish that the seller did not comply with the provisions of the Act and that thus the cancellation, having been in contravention of the subsection, would be of no force and effect. The applicants have not seen it necessary to place

these facts before this court and it is thus impossible for me to find that the cancellation was not in accord with the provisions of the Act.

In addition to this, it seems that the applicants, in order to then succeed in E their quest for specific performance of the contract and registration of real rights in favour of the first applicant or its nominee, would have sought a declaratur to the effect that the cancellation be declared null and void and for a finding that the first respondent as a consequence was bound by the agreement and its terms. There is no such relief being sought. In the absence of such an order I cannot fathom how then as a court I can proceed to set F aside the transfer to the second respondent. A validation of the agreement of sale between the applicants and first respondent should be the precursor to an order for the setting aside of the agreement between the first and second respondent and in consequence thereof a reversal of the transfer. The applicants have not sought such relief. But I move on. G

The applicants have contended that they have paid in full for the purchase price, whilst the first respondent states that the applicants were in breach, were advised of the breach and then paid an amount of $5 billion after the agreement had been cancelled and, further, after a cheque for $1 billion tendered by them had been returned on the basis of the breach and after the agreement had been cancelled. H

Gowora J

A The terms of the agreement recorded in a letter from the applicants' legal practitioners to a director of the first respondent lay out the following terms:

(i) that the applicants would pay a sum of $2 billion on or before 28 February 2008, which payment was supposedly made and tendered; and

(ii) that the balance of $5 billion would be payable in monthly installments, B comprising of two payments of $ 1.5 billion each, payable on 31 March and 28 April respectively, and a final payment of $2 billion on 31 May 2008.

The first installment of $2 billion was paid by the applicants by way of a transfer to the first respondent's account with Standard Chartered Bank on 1 March 2006. The next payment that the applicants confirm on their papers C as having paid is one for $5 billion, again through a bank transfer to the first respondent's Standard Chartered Bank account dated 31 May 2006. The conditions as recorded by the applicants through their legal practitioners were that an initial deposit of $2 billion would be made on 28 February, with subsequent payments of $1.5 billion each on 31 March and 28 April and a final payment of $2 billion on 31 March 2006. That the applicants breached D the terms and conditions of the agreement is not in doubt. The applicants, despite their failure to abide by the conditions, contend that they were not in breach as long as they paid by the last date set for the final payment and as a consequence of the payment demand an order for specific performance.

The applicants, when they embarked on this litigation, were fully aware that E the first respondent had not only cancelled the agreement for alleged breaches, but that a payment through a cheque of $1 billion had been rejected on the basis that the agreement had been cancelled

An order for specific performance in favour of a litigant is entirely within the discretion of the judicial officer before whom the application has been F made. An applicant who seeks an order or specific performance must perforce establish that he has complied with his obligations under the agreement.

Thus an applicant who seeks specific performance has an onus show that he is entitled to such an order in his favour. The leading case in our law is that *of Farmers Co-op Society (Reg) v Berry* 1912 AD 334 at 350 where G Innes CJ stated:

> "*Prima facie,* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotzé CJ in *Thompson v Pullinger* (1894) 1 OR at 301, the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt. It is true that courts will exercise a H discretion in determining whether or not decrees of specific performance will be

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> made. They will not, of course, be issued where it is impossible for the defendant A to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words *of Storey (Equity Jurisprudence,* sec. 717(a)) 'it is against good conscience that a party should have a right of election whether he would perform his contract B or only pay damages for the breach of it'. The election is rather with the injured party, subject to the discretion of the court."

It is correct, as submitted by the applicants, that although the discretion which the court enjoys must be exercised judicially, it is not confined to specific types of cases, nor is it prescribed by rigid rules. However, the court's discretion is exercised on a consideration of the facts of each particular case. Before C I can consider whether or not I should exercise my discretion in favour of the applicants, it is in order to determine whether or not the applicants have in fact made out a case for the discretion to be exercised in their favour.

It is a well established principle in our law that, in respect of bilateral contracts, a party who seeks specific performance must first fulfill or be D ready and able to fulfill his own obligation. In *Wolpert v Steenkamp* 1917 AD 493 Innes CJ observed:

> "The contractual obligation of the seller was to hand over the business, deliver the stock and assign the lease; the contractual obligation of the buyer was to pass a bond to Niehaus in substitution of the one in existence, to take upon himself the liabilities of the lessee under the lease, and to make payment in cash of the E difference between the valuation of the stock and the amount due to Niehaus. Now in a contract of purchase and sale, as in other bilateral contracts, the party who seeks to enforce performance must first fulfill or be ready to fulfill his own obligations: see Voet 19.1.23; Grotius 3.15.3, notes, etc."

This principle was also laid out in *Lake v Reinsurance Corp Ltd* 1967 (3) SA 124 (W) by Galgut J thus: F

> "This exception is based on the principle that a trustee who wishes to enforce a contract entered into prior to insolvency by the insolvent 'cannot demand performance of any remaining obligation under the contract by such other party, unless he himself tenders complete performance of all the insolvency's obligations, including unfulfilled past ones, under the contract'. See *Tangney and Ors v Zive's Trustee* 1961 (1) SA 449 (W) at 453 and *Ward v Barrett NO* G *and Anor* 1963 (2) SA 546 (A) at 554. This principle is merely an extension of the principle applicable in all bilateral contracts, *viz.* that the party who seeks to enforce specific performance must first fulfill or be ready and able to fulfill his own obligations. See *Wolpert v Steenkamp* 1917 AD 493 at p 499."

The first respondent has contended that the applicants were in default and as a result of the default the agreement was cancelled. Not only had the agreement H

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A been cancelled, the property had been sold to the second respondent which had immediately after the sale taken transfer of ownership in the property which is the subject matter of these proceedings. The situation that is before me is therefore that of a double sale.

The applicants have argued that the first and second respondents colluded against them in concluding the sale agreement and alleged that the directors B in the two companies were the same. The applicants adduced no proof for the allegations. The applicants argue that, due to the relationship between the respondents, the second respondent must have known of its prior agreement with the first respondent and therefore the second respondent took delivery with full knowledge of the first sale in order to defeat the applicants' rights. C The applicants further contend that the transfer was clandestinely effected behind the applicants' backs, only for this to be discovered on 31 May after paying the full purchase price. They argue that the second respondent is not a *bona fide* purchaser. The respondents contend that the directors are separate and there is no relationship between the two companies.

The leading case in our jurisdiction on the question of double sales is that of D *Crundall Brothers (Pvt) Ltd v Lazarus NO & Anor* 1991 (2) ZLR 125 (S). This was a judgment of the full bench of our Supreme Court. At 131D-G their Lordships observed:

> "... The real issue is whether, in a case of a double sale where the second purchaser takes transfer with notice of the first purchaser's rights, the court must order specific performance in favour of the first purchaser, or whether it E has a discretion, or whether it is limited to an award of damages.

> The two cases are clear enough. When the second purchaser is entirely ignorant of the claims of the first purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed. *Per contra,* when the second purchaser knowingly and with intent to defraud the first purchaser takes transfer, his real right can and normally will be overturned subject to considerations of practicality."

F The applicants contend that it was for the respondents to show that the second respondent did not have notice of the first agreement of sale. Even though the allegation of notice on the part of the second respondent was averred by the applicants, the onus to disprove notice is laid on the respondents. The applicants did not cite any authority, nor did the respondent find it necessary G to advert to the legal position as to onus. In M *B Investments (Pvt) Ltd v Oliver & Ors* 1974 (1) RLR 169 MacDonald ACJ at 174E-175A, quoting with approval the following *dicta* by Greenberg JA in *Kriegler v Minitzer and Anor* 1949 (4) SA 821 (A) at 823, stated:

> "In Phipson *(supra* at p 27), after a statement that 'the burden of proof ... rests upon the party, whether plaintiff or defendant, who substantially asserts the H affirmative of the issue', it is added that 'the true meaning of the rule is that

> where a given allegation, whether affirmative or negative, forms an essential A part of a party's case, the proof of such allegation rests on him'.
>
> In the appeal from the first of the two decisions cited in *Phipson (Abrath v North Eastern Railway Company* (1883) 11 QBD 440) ... , the passage from Bowen LJ's judgment which is referred to by the learned judge is not dealt with as it was 'not seriously disputed' (see p 249) that in that case, which was a claim for damages for malicious prosecution, the burden of proving the negative, *viz:* that B there was no reasonable and probable ground for the prosecution, lay upon the plaintiff. Professor Wigmore *{supra, loc cit)* summarily dismisses the contention that the rule is an absolute one. He says:
>
> > ' It is often said that the burden is upon the party having in form the affirmative allegations. But this is not an invariable test, nor even always a significant circumstance; the burden is often on the one who has a negative assertion C to prove. A common instance is that of a promise alleging non-performance of a contract.'"

A reading of the passage quoted above clearly shows that what is stated therein is an extraction of the principle to explain who the onus lay upon in the particular circumstances of the case before his Lordship. The general principle regarding the burden of proof is simply stated as follows: he who D avers must prove. The leading case is that *of Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at p 711 in which Potgieter AJA said:

> "The general principle governing the determination of the incidence of onus is the one stated in the *Corpus Iuris: semper necessitas probandi incumbit illi qui agit* (D.22.3.21). In other words, he who seeks a remedy must prove the grounds therefor. There is, however, also another rule, namely, *ei incumbit* E *probatio qui dicit non qui negat* (D 22.3.2). That is to say the party who alleges or, as it is sometimes stated, the party who makes the positive allegations must prove *(Kriegler v Minitzer and Another* 1949 (4) SA 821 (A) at 828J. Together with these two rules must be read the following principle, namely, *agere etiam is videtur, qui exceptione utitur nam reus in exceptione actor est* (D. 44. 1.1.) This principle is stated thus by Davis AJA in *Pillay v Krishna and Anor* 1946 AD 946 at p 952: F
>
> > ' Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded, *quo ad* that defence, as being the claimant for his defence to be upheld he must satisfy the court that he is entitled to succeed on it'"

Looking at the manner in which the applicants presented their case, it leaps G to the mind that a bald allegation was made that the two respondents are closely linked in terms of the directors who manage the affairs of each of the companies. It seems to me that the applicants are mistaken in their belief

that it was not for them to establish that the respondents were closely linked and that therefore the agreement of sale between the two was entered into in order to frustrate the rights of the applicants. In my view, the applicants had H

A the burden to establish, not just the alleged relationship, but also such other factors as would lead this court to conclude that the agreement was entered into by the second purchaser with the full knowledge that the applicants had concluded an agreement with the first respondent and that,

despite this, the second purchaser had then concluded its own agreement whereby the applicants were prejudiced of their rights in the *res venditi* as a result. Apart B from allegations on the part of the applicant on the supposed nature of the relationship between the two and the conclusion therefore of fraud, there are no facts placed before me to substantiate the claims. In my view, the *onus* to establish the fraudulent nature of the relationship lay squarely upon the applicants but they have failed to discharge it.

C The applicants have further argued that from the circumstances and manner in which transfer was effected it was done clandestinely behind the applicants back showing that there was connivance on the part of the first and second respondents. Based on the *dicta* in *Chimphonda v Rodrigues & Ors* 1997 (2) ZLR 63 (H), the applicants contend that, if the second buyer had knowledge of the first sale, either at the time of the sale or it took transfer of the property, C then unless there are special circumstances affecting the balance of equities, the first buyer can recover the property from the second buyer who can then claim damages against the seller.

In my view the *dicta* in *Chimphonda's* case did not introduce any new principle that was not considered in *Crundall's* case. Regarding the alleged D knowledge of the prior sale by the second respondent, in the founding affidavit the applicants averred that they had learnt with surprise of the transfer of the property to the second respondent "a company whose relationship with the first respondent is unclear. It is also suspected by the applicants that same is a shelf company owned by the first respondent or its management and the sole purpose of the transfer was to defeat the applicant's rights". Both respondents F filed affidavits denying the existence of any relationship between them. In answer to those affidavits, the applicants filed an even briefer affidavit and where it concerned the involvement of the second respondent, this is what the applicants averred:

> "The applicants maintain that the transfer to the second respondent was clearly for the purpose of defeating the applicants' rights and for this reason applicants H have since cause a caveat to be placed on the property."

And later on they state:

> "The applicants persist with their claim that the second respondent has been conveniently used by the first respondent to defeat the applicants' rights. Therefore the title purportedly held by the second respondent over the property is not *bona* F *fide."*

2010 (2) ZLR p306

Gowora J

A perusal of those passages clearly shows that nowhere is it imputed or A stated in precise terms that the second respondent ever had knowledge of the first sale, apart from a bald allegation that it was a shelf company wholly owned by the first respondent. In the answering affidavit, it seems that it has been accepted that there is no relationship between the two companies and with that acceptance goes the allegation or imputation of notice of the first agreement on the part of the second respondent. It then does not assist B for the applicants to seek to argue in the heads of argument that the second respondent had notice of the first agreement of sale when the facts presented by the applicants themselves do not support such an argument.

The applicants, in their conduct of this case, appeared to be making their case based on the heads of argument and not on the papers filed. Legal C argument has to be based on a sound factual basis as laid out in the papers. The case for the applicants on the evidence adduced in the affidavits does not establish that the second respondent ever had notice of the first agreement, either at the time the agreement was concluded or before it took transfer. What the applicants seek herein is to make the court rely on suspicions and suppositions. That is clearly not in order. They needed to prove notice of D the agreement on the part of the second respondent. I therefore have to find that the second respondent was ignorant of the sale and as a consequence its real right in the property cannot be disturbed.

It is not necessary in view of the conclusion that I have reached to decide whether or there are special circumstances affecting the balance of equities. E The question, in my view, does not arise.

In the premises I find that the applicants have not made out a case for me to set aside the sale between the first and second respondents, and in consequence reversal of the transfer. The application is therefore dismissed with costs.

Mutamangira, Maja & Associates, applicants' legal practitioners F

Chibune & Associates, respondents' legal practitioners G

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/MINISTER MINES & MINING DEVELOPMENT & ORS v AFRICAN CONSOL RESOURCES PLC & ORS 2010 (2) ZLR 307 (H)

MINISTER MINES & MINING DEVELOPMENT & ORS v AFRICAN CONSOL RESOURCES PLC & ORS 2010 (2) ZLR 307 (H)

Citation	2010 (2) ZLR 307 (H)
Case No	Judgment No. HH-205-10
Court	High Court, Harare
Judge	Hungwe J
Heard	25 August 2010
Judgment	6 September 2010
Counsel	*J Samukange*, for the applicants *F Mutamangira*, for the first respondent *J Muchada*, for the second respondent *J R Tsivama*, for the third respondent
Case Type	Application for rescission of judgment
Annotations	Link to case annotations

Flynote

Court - *contempt - refusal by court to hear a party guilty of contempt - when appropriate - only justified for grave considerations of public policy - party guilty of contempt not a fugitive from justice -party not* D *precluded from presenting its case*

Mines and minerals - *mining claim - registered- title to claim - may not be disputed after having been held for two years - interruption of running of period - Mines and Minerals Act [Chapter 31:05] — s 58 — section assumes that person seeking protection thereunder has valid title to claim -* E *company possessing title to mining claims not being duly registered at time it acquired such rights - effect - exclusive prospecting order - reservation against pegging of claims - effect*

Mines and minerals - *prospecting and mining rights - dominium vesting in President - rights held in trust for the public -public having vested* F *interest in identity of persons registered to mine for minerals - need for transparency in mining affairs*

Practice and procedure-*judgment - rescission-grounds - original judgment tainted by fraud -failure of party to make full disclosure in regard to mining claims -position at common law - broad discretion of court to rescind its own judgment even if it be a final judgment - fraudulent* G *concealment of information from court - court entitled to rescind its own judgment*

Practice and procedure -*judgment - rescission - application -when may be made - case on appeal to Supreme Court - nothing to preclude a party from seeking rescission - motion proceedings when such proceedings* H *may be utilized*

Practice and procedure *-parties - locus standi -party in contempt - whether* A *can be heard - distinction from fugitive from justice*

Headnote

"Where the judgment sought to be rescinded was given in default, no question of a final judgment having been given on the merits can arise. Hence, no considerations *of functus officio* or *res judicata* apply to B thwart an application for rescission. In such a case, even at common law, it is recognized that the court has a very broad discretion to rescind (on sufficient cause shown) a judgment given by default. Even where judgment is given in the presence of the parties and where the merits of the cause are considered, the court still retains a power to rescind that judgment. The power in this case would be more sparingly exercised C since the final judgment would be *res judicata* as between the parties and would appear to be a complete discharge of the office. On principle, however, justice demands that a final discharge tainted by fraud should not be permitted to stand" (*dicta per* Gillespie J in *Harare Sports Club & Anor v United Bottlers Ltd* 2000 (1) ZLR 264 at 268 followed).

"It is a strong thing for a court to refuse to hear a party to a cause and it is D only to be justified by grave considerations of public policy. It is a step which a court will only take where the contempt itself impedes the course of justice and where there is no other effective means of ensuring his compliance" *(dicta per* Denning LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567 at 574 followed). E

On 24 September 2009, the applicants had obtained an order from the High Court concerning the legality of registration of various mining claims in their favour. In April 2010, however, the respondents sought directions from the judge who had granted the order, upon the basis that the applicants had fraudulently concealed certain facts from the court when seeking that order. In particular, the respondents alleged that the F applicants had failed to disclose that the second to fifth applicants (all being subsidiary companies of the first applicant) did not exist at the time of the prospecting pegging and registration of the mining claims which were the basis of the court application. The respondents further alleged that at the time the claims were being prospected and pegged, the area G in question had been reserved against prospecting and pegging because of the existence of certain exclusive prospecting orders which the judge had subsequently held to have been invalid by reason of their expiration.

As a result of the respondents' application for directions, and after submission from the applicants, the judge directed that the matter proceed on the basis of an application for the rescission of judgment in respect of the H

A court order of 24 September 2009. At the commencement of argument, the applicants raised a number of points *in limine* which, they submitted, ought to preclude the court from hearing the application. In particular, they submitted that the court order having been given, the court was *now functus officio* and that, in any event, as that order was under appeal to the Supreme Court, the High Court had no jurisdiction to entertain B the application. The applicants also submitted that as the respondents had failed to comply with an interim order of the Supreme Court, they were approaching the court with dirty hands and had forfeited any right to be heard.

The applicants further argued that, in any event, as there were serious disputes C of facts the matter would have to proceed by way of trial action rather than a court application. On the merits, the applicants disputed the respondents' claim that they were guilty of fraudulent non-disclosure, arguing that, unbeknown to them, while the second to fifth applicants had indeed not been registered as companies at the time of the prospecting, pegging and registration of the claims, no prejudice to the respondents D had arisen. As far as the alleged existence of the exclusive prospecting orders were concerned, the applicants argued that the concession made on behalf of the respondent, at the initial application, that the cancellation of the registration of applicants claims was wrongful, was a correct concession. The court, the applicants argued, correctly held that those E exclusive prospecting orders did not the reserve area of the claims against prospecting and pegging. In any event, the applicants submitted that s 58 of the Mines and Minerals Act [*Chapter 21:05*] barred any attempt to impeach the applicants' title to the claims as the mining location had been registered for a period excess of two years.

Held, that where a party can show a fraudulent concealment of information F relevant to the issue to be decided, the court is entitled under its common law discretion to exercise its powers and to

grant rescission. On the facts, the court was satisfied that a basis had been established for such a fraudulent concealment by the applicants and that as a result the court was not *functus officio* and the matter was properly before it.

G *Held,* further, that the fact that the order of 24 September 2009 was under appeal to the Supreme Court did not deprive the court of its jurisdiction to hear the matter. There is nothing in principle preventing a party from pursuing an application for rescission while an appeal from the same judgment is pending.

Held, further, that the argument that the respondents could not be heard H because they were in contempt could not be sustained. Even if correct,

the first respondent was not a fugitive from justice and was still amenable A to justice. The second and third respondents were parties in the matter at the direction of the court and sought no order of court. The interests of justice would not be served if they were precluded from arguing their cases.

Held, further, that as far as the merits were concerned, the initial proceedings B had been brought by way of motion proceedings and there was no reason why the present proceedings could not similarly be determined. The applicants could not be heard to say that the fact that the second to the fifth applicants had not been registered as companies at the time when the mining claims had been registered in their names resulted in no prejudice. This is because the *dominium* in and right of searching and C mining for minerals vests in the President in terms of s 2 of the Mines and Minerals Act. The President holds these rights in trust for and on behalf of the public. The public has a vested interest in who is registered to extract minerals, how transparently the registration of such rights are conducted and who stands to benefit therefrom. Therein lay the prejudice.

Held, further, that the applicants could not rely on" rights" protected by s 58 of D the Act as they never acquired any such "rights" in the first place. When they were granted such "rights" they did not exist, as their registration as companies had not been effected. Further, and on the facts, the area of the mining claims was reserved against pegging in terms of a pre- existing exclusive prospecting order. E

Held, further, that on the facts, the applicants were guilty of fraudulent non-disclosure of material facts when they were granted the court order of 24 September 2009. The court had been misled and its order must be rescinded with costs

Legislation considered F

Constitution of Zimbabwe 1980, s 24

High Court Rules 1971 (RGN 1047 of 1971), rr 4C & 449

Mines and Minerals Act [*Chapter 21:05*], ss 2, 20, 35(1) & 58

Cases referred to

Chirambasukwa v Min of Justice 1998 (2) ZLR 567 (S) G

de Wet & Ors v Western Bank Ltd 1977 (4) SA 770 (T)

De Witts Auto Body Repairs (Pty) Ltd v Fedgen Ins Co Ltd 1994 (4) SA 705(E)

Escom v Rademeyer 1985 (2) SA 654 (T)

Firestone SA (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) H

Hungwe J

A *Garlick's Est v CIR* 1934 AD 499

Garfield v Minister of Defence 1986 (2) ZLR 112 (H)

Hadkinson v Hadkinson [1952] 2 All ER 567 (CA)

Harare Sports Club & Anor v United Bottlers Ltd 2000 (1) ZLR 264 (H)

Jackman v Jackman 1969 (2) RLR 534 (G)

Min of Home Affairs v Bickle 1983 (1) ZLR 99 (S)

Mulligan v Mulligan 1925 WLD 164

Rajah & Rajah (Pty) Ltd& Ors v Ventersdorp Municipality & Ors 1961 (4) SA 402(A)

Sabawu v Harare West Rural Council 1989 (1) ZLR 47 (H)

Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC); 2007 (3) *BCLR* 300 (CC)

Stumbles and Rowe v Mattinson 1989 (1) ZLR 172 (H)

Tshivhase Royal Council & Anor v Tshivhase & Anor 1992 (4) SA 852 (A)

Case information

J Samukange, for the applicants

F Mutamangira, for the first respondent

J Muchada, for the second respondent

J R Tsivama, for the third respondent

Judgment

Hungwe J: This is an application for the rescission of a judgment of my own that I gave on 24 September 2009 in favour of the applicants regarding the legality of the registration of various mining claims in the names of the applicants. It is important that I set out the order which I gave then and what thereafter occurred leading to the present proceedings. On 24 September 2009, I gave the following order:

"1. African Consolidated Resources plc claims issued to the third, fourth, fifth and sixth applicants within the area previously covered by Exclusive prospecting order 1523 held by Kimberlitic Searches (Pvt) Ltd 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 plc claims area as indicated on annexure 'B' to the papers. In that regard it is hereby ordered that third respondent cease all its prospecting and mining activities in the said area.

IT IS FURTHER ORDERED AS FOLLOWS:

3. That the second respondent returns to the applicants' possession the 129 000 carats of diamonds seized from the applicants' offices in Harare on 15 January 2007.

4. The second respondent returns to the applicants all diamonds acquired by the second respondent from the African Consolidated Resources plc claims

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area using the register kept by the second respondent in compliance with the Kimberley Process Certification Scheme.

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

6. That first, second and third respondents pay the applicants' costs on a legal practitioner and client scale, the one paying the others to be absolved.

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

The second and third respondents noted an appeal to the Supreme Court. They made a chamber application under SC 230/09 seeking to set aside para 7 of the above order. In SC 1/10 the Supreme Court issued an order effectively setting aside that paragraph. The appeal is, however, still pending in the Supreme Court.

In the meantime, on 28 April 2010, the first respondent, through his legal practitioners, addressed correspondence to the registrar of this court seeking directions in terms of r 4C of the Rules of this Court. The relevant portion of that correspondence reads:

"3. In arriving at this decision (the order of 24 September 2009 above) the D court determined the issue of the currency of De Beers 1520 and 1523 Exclusive Prospecting Orders, ('EPOs') over the Marange area ('Marange') and whether an application for the extension of EPO 1523 had the effect of reserving the ACR claims area from prospecting and pegging.

4. The court held that the EPOs were invalid by reason of their expiration and that, consequently, the application for extension of EPO 1523 did not E have the effect of reserving the ACR claims area.

5. The court further held that the ACR claims area was open for prospecting and pegging at the time that ACR pegged and registered their claims, and further that the ACR claims were valid and remained valid from the date they were pegged.

6. In arriving at the decisions aforementioned, the ACR group concealed certain fundamental facts which completely disentitle the ACR group of the F relief which the court granted. The ACR group fraudulently concealed the facts in order to gain an unfair advantage and for the purpose of procuring a favourable judgment. It is therefore our humble request that the court, having regard to the fraud committed by the ACR group, give directions, on the proper course of action and procedure to be taken at law in order to procure the rescission of the Judgment procured by fraud.

7. We assert that the following facts were fraudulently concealed by the ACR G group:

7.1 The subsidiary companies; Dashaloo Investments (Private) Limited, Possession Investments (Private) Limited, Olebile Investments (Private) Limited, and Heavy Stuff Investments (Private) Limited ('the ACR subsidiaries') did not exist at the time of the prospecting, pegging and registration of the mining title that is subject of the above matter. H

Hungwe J

7.2 Section 20 A of the Act provides that only a 'person' can be granted a prospecting licence. A 'person' in this context refers to a juristic person, so constituted by the act of incorporation, or a natural person;

7.3 It is clear that at the time that the certificates of registration were issued to the ACR subsidiaries, there was no such person to whom such certificates could be granted because all mining rights purportedly held by the ACR subsidiaries were acquired between 4 April and 19 June 2006, yet the ACR B subsidiaries were incorporated on 29 June 2006 up to 14 July 2006, after the purported issue of the certificates of registration (mining claims);

7.4 ...

7.5 ...

7.6 Further, and more importantly, at the time of the ACR group pegged their claims, the Marange area was reserved against prospecting and C pegging by virtue of the operation of Reservation Notice 1518 issued on 19 February 2004, which notice was posted on the Notice Boards of the Mining Commissioner's offices in Mutare and Harare, and recorded in a 'Reservation Notice Register'.

7.7 It is incompetent to acquire mining title through a prospecting licence or the pegging of claims in an area reserved against prospecting and pegging. The ACR group fraudulently concealed the fact of the existence of the D reservation from the court and procured the registration of their claims by fraud ..."

I directed the registrar to seek the other parties' response to the request. On 19 May 2010 the applicants, through their legal practitioners, responded in the following terms: E

"1. As the honourable judge has handed down his judgment and an appeal has been noted, the honourable judge is *functus officio.* He can no longer deal with the matter and indeed it is not 'before him' as contemplated in r 4C of the High Court Rules. His decision in HC 6411/07 can only be considered by the Supreme Court on appeal.

2. Nonetheless our clients have requested that for record purposes we respond F to the false allegations made on behalf of the Minister of Mines and Mining Development, without in any way conceding that they give rise to a need for directions in terms of r 4C of the High Court Rules.

3. Our clients deny that they have fraudulently concealed that their subsidiary companies did not exist at the time the ACR claims were duly registered by the Assistant Mining Commissioner Mutare. When our clients decided to register the claims that had been pegged, they purchased shelf companies G for this purpose from a local company, Paracor Company Registration Services. This is common practice and indeed our client has purchased over 80 shelf companies from Paracor in this manner. Our clients were assured that the companies had been duly registered and accordingly they utilized the names of the shelf companies in order to obtain registration of the claims. To knowingly use unregistered companies would have been of H no benefit to ACR and indeed would have been inexplicable in logic.

Hungwe J

> The Minister was however a party to case number HC 6411/07 and he filed A opposing papers. In none of the opposing papers filed by him were any of these 'new' and supposedly fraudulent issues mentioned, despite their existence at that time. It would seem that the reckless and unsubstantiated allegation of fraud is merely an attempt to conceal the incompetence and ineptitude on the part of the Minister in failing to mention these objections (which, surprisingly, now seem to have assumed huge importance).
>
> 4. Even if the shelf companies were incorporated a short time after the claims B were registered in their names, there was no prejudice to the public interest. In *Rajah & Rajah (Pvt) Ltd v Ventersdorp Municipality & Others* 1961 (4) SA 402 (A) the Appellate Division considered a case where a trading licence had been issued to a company which had not been registered at the time the licence was issued. The court held that since there had been no intention to deceive on the part of the brothers who had applied for the licence in C the name of the company, and in view of the fact that the municipality had failed to prove that there had been any prejudice or that it would be in the public interest to cancel the existing licence of the company, the licence would be considered valid ...
>
> 5. Furthermore s 58 of the Mines and Minerals Act provides for the barring of impeachment of title where a mining location has been registered for a D period exceeding 2 years. It is not competent in terms of that section for any person to dispute the validity of title to the ACR claims on the ground that the pegging was invalid or illegal or the provisions of the Act were not complied with prior to the issue of the certificates of registration ...
>
> 6. Our clients deny that when the ACR group registered the claims the Marange Area was reserved against prospecting and pegging in terms of RA 1518 that was purportedly issued in 2004. The Minister does not admit, although E he is well aware of it, that the Mining Commissioner, Harare purported to exercise her powers outside her area of jurisdiction. He also fails to disclose that notice of the said RA was not advertised in the *Gazette* as required by s 35(1) of the Act. ... Further he does not disclose that in 2006 the Mining Commissioner Harare and the Mining Commissioner Mutare recommended that the reserved area mentioned in RA 1518 'be extended' to include the Marange area and it was extended long after the ACR claims had been F registered ..."

Upon careful consideration of the matters raised in both correspondences and having due regard to and mindful of the need for finality to litigation, I decided that it would not be in the interest of justice to ignore a party's effort to draw the court to a possible fraud. I therefore directed that the first G respondent files a court application in terms of r 449 of the Rules of Court dealing with the issues he raised in the correspondence. Consequently, papers were filed in which the first respondent sought rescission of judgment on the basis that the applicant had obtained a judgment favourable to its case by fraudulently suppressing certain information which would have disentitled it to the orders it eventually got in its favour. H

Hungwe J

A The applicants strenuously oppose the application for rescission and raise five points *in limine* which, in the applicants' view, ought to preclude this court from hearing the application. As I understood it, the first point raised on behalf of the applicants was that this court should not allow the respondents any audience since they come to this court with dirty hands. They had B flagrantly and contemptuously refused to comply with the Supreme Court order of 25 January 2010. Mr *Samukange* who appeared for the applicants put this issue as follows:

> "The respondents have not complied with this order. They have not ceased all mining operations as ordered by the Chief Justice. They have gone further and auctioned the diamonds mined from the applicants' claims, in total violation of C the Chief Justice's order. They have therefore approached the court with dirty hands. They should not be heard. The respondents have not shown respect for the rule of law. The principle for the rule of law is that court orders are obeyed, especially by the first respondent who took an oath to obey the laws of this country ..."

Mr *Samukange* submits that the respondents, by failing to comply with the D order of the Supreme Court in the particular circumstances in which they have done so, have approached this court with dirty hands; and that by reason of that status they have forfeited the right to apply for any such indulgence as they now apply for. He relies for this submission on a number of cases. The first such case is an unreported 2005 judgment of this court in which reliance was placed on the American case of *Tegan v Casaus* (the citation E of which is not given). He also placed reliance on a paragraph

recited by the judge in the unreported 2005 judgment of this court from the judgment of de Waal J in the South African case *of Mulligan v Mulligan* 1925 WLD 164.

Secondly, Mr *Samukange* took the point that as this court had pronounced itself in the judgment of the 24 September 2009, this court was *functus officio.*

F The third point taken by the applicants was that as the matter is under appeal in the Supreme Court, and since that court had made an order suspending the order of this court, then this court has no jurisdiction to entertain this application.

The fourth point *in limine* was that there is another pending matter i.e. HC G 2230/10 brought by the applicant against the respondents, where the first respondent's decision is being challenged. The first respondent can still raise these issues in that matter. In any event, that matter deals with the same issues which are being raised here.

Finally, Mr *Samukange* took the point that since this application is premised H on an allegation of fraud, the first respondent adopted the wrong procedure.

2010 (2) ZLR p316

Hungwe J

He ought to have realized that there would be a serious dispute of fact A requiring proper ventilation through action rather than motion proceedings.

On behalf of the first respondent, Mr *Mutamangira* argued that the points *in limine* really amount to arguments directed to the merits of the matter.

As for the first point taken *in limine,* that the respondents are in contempt of court and as such must not be heard, in view of their failure to comply with B the order of 25 January 2010 by the Chief Justice, Mr *Mutamangira* pointed out that the judgment will show that only the second and third respondents appealed to the Supreme Court. The first respondent did not. As he was not before the Supreme Court, the order made thereat does not in any way bind him. In the circumstances therefore the first respondent cannot, by any stretch of imagination, be said to be in contempt of that order. The dirty hands C principle cannot preclude the first respondent against whom there is no order requiring him to do or to refrain restraining him from doing anything from approaching the court for relief.

As to whether the fact that the matter is pending in the Supreme Court, Mr *Mutamangira* argued that the present proceedings are not the same as the D matters under appeal. In any event, there is nothing preventing this court from entertaining an application of this nature as it is completely different from that with which the Supreme Court is seized.

Mr *Muchada,* for the second respondent, added that the Supreme Court, in effect, struck down para 7 of the 24 September judgment. The result was that E the judgment under appeal was now suspended by operation of law not by the interim relief granted to the applicants therein. It will be seen, he went on, that the second respondent does not carry out mining operations. As such, since the interim relief was directed at maintaining a standstill position at the mining site, the dirty hands principle does not affect any of the parties now before this court. F

Mr *Tsivama,* for the third respondent, took this point a step further. He reminded the court that the second and third respondents did not file any application in the present proceedings nor do they seek any relief out of these proceedings. In the circumstances, therefore, the dirty hands principle cannot affect the respondents. The second and third respondents are in court G as interested parties not as petitioners seeking relief.

After hearing submissions regarding the points raised *in limine,* I directed that I be addressed on the merits so that a composite judgment is rendered.

This is an application for rescission by the first respondent of a judgment granted in favour of the applicant. The present application is premised on allegations that the applicant procured judgment in its favour by willfully H

2010 (2) ZLR p317

Hungwe J

A suppressing evidence relevant for the determination of the issues before the court. Had the court been appraised of the true facts, it would not have granted judgment favourable to the applicant.

Put differently, the first respondent alleges that the applicants obtained and secured judgment in their favour by fraud. The allegation of fraud relates to two points. First, it is alleged that the applicants did not disclose that at the time they registered B the claims under the names of the subsidiaries, those subsidiaries were not yet incorporated. Second, it is alleged that the applicants did not disclose that the area under which the claims in issue fell was part of an area reserved against prospecting and pegging.

In his founding affidavit the first respondent avers that it was discovered, C after judgment, that all ACR subsidiaries were incorporated well after they had registered claims in their respective names. As an example, certificates of registration of claims numbered G1402 to G1419 and G 1704 to G1722 issued to Dashaloo are dated between 4 April and 1 June 2006. Dashaloo was only incorporated on 29 June 2006. The same can be said in respect of each of the ACR subsidiaries. The subsidiaries fraudulently misrepresented D to the Chief Mining Commissioner that each of them was incorporated at the time when certificates of registration were issued.

However, this was not the case at the time. As the subsidiaries were not by then incorporated, they did not in fact exist. By falsely misrepresenting to the Mining Commissioner that they were incorporated and thus entitled to take E title to the claims, the subsidiaries are guilty of fraudulent misrepresentation. That disentitles them to the order which this court granted in applicants' favour.

Section20 of the Mines and Minerals Act [*Chapter 31:05*] provides that only a person can be granted a prospecting licence. A juristic person is created by an act of incorporation. Since none of the subsidiaries were incorporated, F then there was no "person" to whom the certificates of registration could be validly issued, first respondent argued.

Armed with the fraudulently acquired certificates of registration, the subsidiaries then embarked on a slew of litigation asserting that the subsidiaries had lawfully and validly acquired the certificates of registration. The first respondent asserts that the applicants fraudulently concealed the true facts G from this court and as a result obtained a judgment in their favour on the basis of this fraud.

In an affidavit deposed to by Ian Harris on behalf of the applicants, the deponent denies that any fraud was committed. He avers that the companies were bought as shelf companies. It was believed that they were already H registered and were used to register claims to be held by them. He claims

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that since the companies were registered soon thereafter no-one suffered A any prejudice.

In any event, any attack on the applicants' title is saved by the provisions of s 58 of the Mines and Minerals Act aforesaid.

The applicant counter-applies for an order declaring illegal all mining carried out by anyone else other than the applicant upon the area covered by special B grants and a further order declaring as expired the said special grants.

The first issue to resolve is whether this court is properly seized with this matter.

As I pointed out in my directive to the first respondent's legal practitioners, the allegation of fraud was directed at the judgment obtained before me. It is C a serious matter for one party to make against another, especially where both parties are represented by counsel. Can this court rescind its own judgment without falling foul of the Rules of Court? In other words, when can a court grant rescission of a judgment?

Mr Samukange, for the applicants, submitted that once this court pronounced D itself on the matters before it on 24 September 2009, it became *functus officio.* As such, there is no basis at law upon which it could consider itself properly seized with the matter. Mr *Samukange* needed no authority for this trite position. It is well established in our law that once a court has duly pronounced a final judgment, it becomes *functus officio;* its jurisdiction in the case having been fully and finally exercised, its authority over the subject E matter ceases: *Firestone SA (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 at 306F; *Chirambasukwa v Minister of Justice* 1998 (2) ZLR 567 (S).

On the other hand, *Mr Mutamangira,* for the first respondent, urged the court to find that there is ample basis under common law permitting the court to exercise its inherent jurisdiction in addition to the Rules. Rule 449(1) of the F High Court Rules provides:

"449 (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 G

(b) in which there is an ambiguity or patent error or omission, but only 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 own emphasis).

In terms of the common law, the court has power to rescind a judgment obtained by default of appearance, provided that sufficient cause has been H

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A shown. In respect of rescission of judgment in terms of the rules, it has been held that this is a matter for the discretion of the court, which discretion should be exercised judicially. Where wilful default was found, it has been held that there was no room for the exercise of this discretion, but this approach has been questioned and the better view seems to be that wilful default or gross negligence on the part of the applicant constitutes no absolute bar to the B grant of the indulgence of rescission but that it is a factor, although a weighty one, to be considered in the broad conspectus of the application which is to be taken into account, together with the merits of the defence raised to the plaintiff's claim, in the determination of whether good cause for rescission has been shown: *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co* Ltd 1994 (4) SA 705 (E) at 708F-709H; Herbstein & van Winsen *Civil* C *Practice of the Superior Courts in South Africa* 4 ed at pp 691-2.

In *de Wet & Others v Western Bank Ltd* 1977 (4) 770 (T) at 776 it was held *inter alia* that:

"Before a judgment would be set aside under the common law, an applicant would have to establish a ground on which *restitutio in integrum* would be granted by D our law such as fraud or *justus error* in circumstances: *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 at 166-168; *Semme v Incorporated Law Society* 1933(1)TPD213 at p 215;*Makins v Makins* 1958 (1) SA 338 (A) at p 343; *Athanassiou v Schultz* 1956 (4) SA 357 (W). It would appear that the procedure to set aside a judgment on grounds justifying *restitutio in integrum* is by way of action."

E The position set out above recognizes the finality of a judgment once delivered or issued. See *Estate Garlick v Commissioner of Inland Revenue* 1934 AD 499 at 502-503.

Under the common law, a judgment can be altered or set aside only under limited circumstances.

F In *Stumbles & Rowe v Mattinson; Mattinson v Stephens & Others* 1989 (1) ZLR 172 (H) Greenland J had occasion to consider whether this court can set aside its own interlocutory orders. He held that while the court normally does not have jurisdiction to temper or interfere with its own judgments, because in relation thereto, it is *functus officio,* it does have jurisdiction over orders made in interlocutory and procedural matters. He held further that in G terms of this jurisdiction, the court has powers to set aside such orders on good and sufficient reasons, including the fact that the basis of the order has been destroyed or shown to be non-existent. At p 178 he stated;

"This is particularly so when the matter is interlocutory *(per* Squires J in *Sayprint Textiles v Girdlestone* 1983 (2) ZLR 322). It is also so where the matter is procedural *(per* Stratford JA in Ex parte *Barclays Bank* 1936 AD 431). I H support the propositions that the court is entitled to regulate its own rules. It is

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trite that the rules are intended to expedite procedure and relief. To insist that A the court is bound by a procedural order which it knows to be fatally defective is to insist on the court conducting a sham trial. It is illogical, senseless unjust and unreasonable to say to a litigant, 'We will proceed with this expensive and protracted exercise, which is a trial and you can start all over again when the Supreme Court rightly sets aside the proceedings because of this fatal procedural defect.'" B

He goes on to make a very clear distinction between interlocutory matters and those in which final orders are made and observed that the distinguishing feature is that, in final orders and judgments, the matter takes on the character of *res judicata,* the essence of which is that the issue, having been *fairly contested by* the parties, is finally resolved. It seems to me that, by extension, it cannot be said that a matter was fairly contested when the party resorted C to concealing relevant information from the court in what may amount to fraud. Where, therefore, a party could show such

fraudulent concealment of information relevant to the determination of the issue to be decided then the court should under its common law discretion, exercise its powers and grant rescission. D

In *Harare Sports Club & Anor v United Bottlers Ltd 2000* (1)ZLR 264 (H) at 268 Gillespie J took up the discussion on the discretionary powers of court in respect of rescission at common law thus:

> "The perceived strictures of this common law were seen as abated by rules of court. These permit the rescission of default judgment 'on good and sufficient cause'; the rescission, variation or correction of judgments or orders for error E and the rescission of judgments entered in terms of a written consent for 'good and sufficient cause'. The rules (especially rr 56 and 63) were seen as relaxing the common law.
>
> Our law, however, is not aptly a casuistic set of rules and exceptions but rather a just and logical application of principle. It is therefore not surprising, and most to be welcomed, that this rigid and brittle view of this area of the law has been F reconsidered. It is now recognised that the complicated rules may be explained in principle and that the principle is by no means as intractable as was defined earlier in the last century.
>
> Thus, where the judgment sought to be rescinded was given in default, no question of a final judgment having been given on the merits can arise. Hence, no considerations *of functus officio* or *res judicata* apply to thwart an application G for rescission. In such a case, even at common law, it is recognised that the court has a very broad discretion to rescind (on sufficient cause shown) a judgment given by default.
>
> Even where judgment is given in the presence of the parties, and where the merits of the cause are considered, the court still retains a power to rescind that judgment. The power in this case would be more sparingly exercised since final judgment would be *res judicata* as between the parties and would appear to be a H

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> A complete discharge of the court's office. *On principle, however, justice demands that a final discharge tainted by fraud should not be permitted to stand.* The other traditionally recognised exceptions are also explained on the basis that policy prefers to regard a judgment procured in some circumstances of ignorance of relevant documents to the contrary (for example) as not constituting a final discharge of the court's function. Further instances where the court is not held to *be. functus officio* are those specified in r 449. As has been said in connection B with the counterpart in South Africa of this rule, this rule -
>
> > ' sets out exceptions to the general principle that a final order, correctly expressing the true decision of the court cannot be altered by the court... the court has a general discretion whether or not to grant an application for rescission under r 42(1).'
>
> The apparently ill-assorted, eclectic instances gathered under that rule do share C the common thread that in each case there are sound policy reasons, counteracting any suggestion of *functus officio,* for recognising a court's discretion to revisit its order. The rule does not provide statutory exceptions to, but has been said to codify (or perhaps better consolidate) the common law"(my emphasis).

I respectfully associate myself with these sentiments.

D Whilst the common law rule regarding rescission of orders in interlocutory matters is settled as having been trammeled by the rules, the position regarding rescission of final judgments is that it can only be permissible in circumstances where a party could establish a ground for *restitutio in integrum* such as fraud *or justus error.* I am satisfied that *in casu* the first respondent has discharged the onus in that regard. Consequently I find that E this matter is properly before me. The line of authorities which caution against revisiting one's judgment proceed on the basis that the final judgment has been fairly obtained. I doubt whether in cases where there is strong evidence that judgment was not properly procured these authorities would maintain the same position. I express no views on this but leave the question open F as to what constitutes a fairly procured judgment. One that was obtained by fraud or some such malfeasance cannot qualify to be treated as having been fairly obtained.

Having decided that this court is properly seized with the matter, the next issue to decide is whether by reason of contempt, the first respondent should not be heard.

G I have set out in detail the basis upon which this point was raised on behalf of the applicant. It is that the respondents have failed to comply with the order of the Supreme Court of 25 January 2010, therefore they have approached the court with dirty hands. I must decide first whether the first respondent should be considered as having shut himself out of the doors of this court by virtue H of lack of clean hands. What qualifies a litigant for the title of dirty hands? Is

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this some immutable principle of our law or is it just a moral precept aimed A at compliance with court orders? If it is a rule of law, what is its content?

In *Mulligan v Mulligan* 1925 WLD 164 the following appears:

> "... Before a person seeks to establish his rights in a court of law, he must approach the court with clean hands; where he himself, through his own conduct, makes it impossible for the process of the court (whether criminal or civil) to be given B effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests. .. .were the court to entertain a suit at the instance of such a litigant, it would be stultifying its own processes and it would, moreover, be conniving at and condoning the conduct of a person, who ... sets the law and order in defiance."

Mulligan, admitting that he was a fugitive from justice, approached the court C for certain relief in civil proceedings against his wife. De Waal J held that, as a fugitive from justice, Mulligan was not entitled to invoke the process of the court.

In *Escom v Rademeyer* 1985 (2) SA 654 (T) at 662, dealing with a fugitive from justice, Stegmann J held:

> "I do not wish to be understood to hold that the principle in question can never D be invoked against a defendant or respondent who happens to be a fugitive from justice. It may very well be that a fugitive who is a defendant does not enjoy the right ordinarily enjoyed by a defendant to institute a claim-in-reconvention. He may suffer other disadvantages in respect of procedural, and even substantive, rights ordinarily enjoyed by a litigant. It is not necessary for me to deal with the question on so broad a basis. I hold only that whatever the disadvantages that E may be suffered by a fugitive from justice seeking to answer process of the court issued against him, they do not deprive him of the right to ask for such time as the court may deem fit in the circumstances to enable him to provide the answer he has been called upon to give. I hold that the respondent, although a fugitive from justice, has *locus standi* at least to approach the court for an extension of time in which to comply with the requirements of the rule *nisi."* F

In *Sabawu v Harare West Rural Council* 1989 (1) ZLR 47 (H) at 50 Greenland J, citing Romer LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA), observed that the duty of every person to obey an order of court gives rise to two consequences.

> "'The first is that anyone who disobeys an order of the court... is in contempt and may be punished by committal or attachment or otherwise. The second G is that no application to court by such person will be entertained until he has purged himself of his contempt'.
>
> It is clear to me from the above cited authorities that the court has discretion in the matter. In exercising that discretion a court will not lightly deprive a party of his right to be heard.
>
> As Denning LJ (as he then was) said in *Hadkinson v Hadkinson supra* at 574: H

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> A 'It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave consideration of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and where there is no other effective means of securing his compliance."
>
> This approach was adopted by Greenfield J in *Jackman v Jackman* 1969 (2) RLR 534 (G), who proceeded to hear a party still in contempt because of the B particular facts of the case."

In *Minister of Home Affairs v Bickle* 1983 (1) ZLR 99 (S) at 106 Fieldsend CJ said:

> "If the courts are to fulfil the obligations put upon them by the Constitution they cannot, save in most exceptional circumstances, deny an aggrieved person access to them. Section 18(1) of the Constitution provides that every person is C entitled to the protection of the law and s 18(9) provides that every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

It must not be forgotten that what we are dealing with in the present matter is the impact of administrative action by Government upon the individual. D In this area the courts should not be astute to find reasons for abdicating their responsibility. The learned Chief Justice went on to counsel (at 107) that courts should not deny a person an opportunity to seek their protection unless he has by his conduct put himself outside the processes of the court. It is not part of the courts' function to deny a person access to them in order, E for example, to assist some administrative process.

The public policy consideration in this case appears to me to be governed by s 24 of the Constitution. This grants to any person who alleges that the Declaration of Rights has been or is likely to be contravened in relation to him the right to apply to the Supreme Court for relief. This constitutional F right of access should prevail unless it is plain that the contempt of which the applicant may be guilty itself impedes the course of justice.

In *Garfield v Minister of Defence* 1986 (2) ZLR 112 (H) Mfalila J had occasion to consider the question whether a litigant should be denied access to court where he stood to be regarded as a fugitive from justice. He said at 115:

> "The decision in *Maluleke v Dupont NO & Anor* 1966 RLR 620 dealt with the G rights of a fugitive from justice or of one who had definitely placed himself beyond the reach of the law. The court held per Quènet JP that' the law will deny its protection to those who place themselves beyond its reach'. The present case concerns a party who is within reach of the law but in contempt of court. The difference between a fugitive from justice and one who is merely in contempt was highlighted by this court in *S v Neill* 1982 (1) ZLR 142. In his judgment H with which McNally J (as he then was) concurred, Squires J stated:

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> ` Despite the concession made by Mr *Deeks,* I am not at all sure that there is A a discretion in the court where a litigant is a fugitive from justice. The matter after all is one *of locus standi in judicio,* the right and basis to approach the court for relief. And in our law it seems to be clear that the only category of person who has absolutely no right to institute proceedings at law is the fugitive from justice or outlaw.'"

These cases clearly spell out the consequences of being either in contempt B of court or a fugitive from justice. However, unlike a fugitive from justice or an outlaw, a party in contempt is not absolutely barred from being heard in a court of law. The court can still hear him even before he has purged his contempt if the interests of justice demand it. This is because, unlike a fugitive from justice, who has placed himself beyond the reach of the law by leaving the jurisdiction, the person in contempt is within its reach thus C the weight of the law can descend on him at any time.

An analysis of the above cases leads me to conclude that the first respondent has not disqualified himself from seeking the assistance of this court in asserting his rights. This must be so, firstly, because he was not party to the order given by the Supreme Court. Secondly because he cannot be D characterized as a fugitive from justice in the sense that he has put himself beyond the physical reach of the courts. Even if I be wrong in holding this view, I still come to the same conclusion that the principle of dirty hands cannot apply to the first respondent because, even assuming that he is in contempt of court, he is not a fugitive from justice by virtue of which he E would suffer from an absolute incapacity to be heard.

The first respondent is still amenable to justice. There are several steps open to the court to ensure that he purges any contempt if any is found against him. In my view, the same reasoning applies to the second respondent and third respondent but for different reasons. Firstly, the two State enterprises are in court by virtue of the directive of this court. It will be an absurdity if F this court were to order that a party appears before it and then turn around and refuse to hear it on the basis of the dirty hands doctrine. Secondly, in the exercise of the discretion vested in this court, I am of the view that justice would not be served if these two entities are not permitted to argue their case. In any event, they do not seek any order from the court. G

The other two points *in limine* taken by Mr *Samukange* both raise the issue of jurisdiction. First was that the matter is currently pending before the Supreme Court and therefore this court has no jurisdiction to entertain it. No authority was cited for this proposition, but reliance was placed on the words of the Chief Justice at p 9 where he stated that the effect of his order was to suspend the 24 September judgment of this court. He urged this court H

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A to find that it cannot rescind an express order of a superior court. Second was that there is another pending matter before this court where the same issues are raised by applicants.

With respect to Mr *Samukange,* I do not see how an inquiry into whether or not this court was willfully mislead into giving the judgment which it gave B could be said to overturn the judgment of the superior court. In any event there is ample authority for the proposition that there is nothing in

principle preventing a party from pursuing an application for rescission while an appeal of the same judgment is pending. See Herbstein and van Winsen *op cit* 4 ed at p 700.

The learned authors express the view that the pursuit of an appeal is no bar C to the success of an application for rescission. See also *Tshivhase Royal Council & Anor v Tshivhase* & *Another, Tshivhase & Another v Tshivhase & Anor* 1992 (4) SA 852 at 865, where Nestadt J pointed out;

> "Mr *Zeiss* made one further submission, namely, that the first appeal was a bar to the application for rescission. I disagree. In principle, I can see no reason why Kennedy and Ligege were not entitled to pursue this quite separate and D independent remedy, irrespective of the pending first appeal. Rule 42(1) (c) does not (unlike s 36(c) of Act 32 of 1944) require that no appeal should be pending. Nor, as counsel suggested, were the appellants put to any election between pursuing the appeal and applying for rescission. They could do both."

I am in respectful agreement with the opinion of that court, which is highly persuasive on the point, if regard is had to the similarities between the rule E under interpretation in that matter and our very similarly worded equivalent. It was on the basis of the above that I declined to uphold the points raised *in limine* on behalf of the applicants.

The question remaining for decision is whether on the basis of the papers before me, a case has been made for the rescission of judgment on account F of it having been obtained or procured by fraud. The applicants urged the court to refuse to hear the first respondent as an action was more suited for proof of fraud than motion. In my view, any matter that can be brought by action, if the circumstances indicate it, can be brought by motion. This is particularly so, when, as in the present case, the initial proceedings were commenced by motion proceedings.

G As I pointed out above, the matter before me in September 2009 proceeded on the following basis and assumption; that the ACR subsidiaries were by the time they obtained registration of certain claims in their names, duly incorporated in terms of the laws of Zimbabwe, and as such, had the capacity to contract; that when they pegged their claims in the Chiadzwa mining area, there was H no reservation in force but that a company called Kimberlitic Searches held

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certain rights in the form of Exclusive Prospecting Orders (EPOs) for which A an application for extension had been lodged with the Mining Affairs Board but that before a decision had been made the EPOs expired. Upon expiration of such EPOs, the land was then open for prospecting, but not before, since this other company held the said rights; that the registration of the said rights by the Assistant Mining Commissioner was therefore right and proper in B those circumstances. It is the subsequent cancellation by the Minister which failed to adhere to the peremptory requirements of s 50 of the Mining Act which prompted the application in HC 6411/07.

Indeed, so straightforward was the case for the applicant that counsel for the first respondent in the initial application, one Mr *Maposa,* conceded in his heads of argument that the cancellation was wrongful. I agreed with C him. Although now, with hindsight, I am able to question the aptitude of the officers in the Civil Division of the Attorney-General's Office, at the time of the previous hearing I had no reason to question their probity. It seems to me now quite a lot of information was kept away from the court in order to ensure a certain outcome. The judgment of 25 September was quite clearly a D desirable outcome for the applicants, although I am not sure who else desired it. The question I must now determine is whether that judgment is liable to be rescinded on the basis that it was obtained by fraud.

A judgment obtained by fraud of one of the parties, whether by perjury, forgery or in any other way such as the fraudulent withholding of documents, cannot be allowed to stand. There is no doubt that a court can amend, alter or set E aside a judgment obtained by fraud, but only under limited circumstances.

The view I took of the matter is that one of the parties having brought it to my attention that judgment may have been procured by fraud, in the exercise of my inherent powers at common law and having been steeped in the facts upon which I based my earlier judgment, it appeared to me that in all the F circumstances of this case that the ends of justice will be served taking into account the convenience to the parties and to avoid a multiplicity of litigation, at the same time ensuring finality to litigation that I hear the respondent's application. See *Stumbles & Rowe supra per* Greenland J at 178.

The applicants sought to downplay the consequences of non-incorporation G by averring that since no-one was prejudiced therefore no finding of fraud could possibly arise. I disagree. The allegation of fraud emanating from the office of the first respondent arises from the fact that the rights in issue relate to mining. Section 2 of the Mines and Minerals Act vests all rights to minerals in the President of the Republic of Zimbabwe subject to the provisions of the Act. It recites thus: H

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A **"2 Rights to minerals vested in President**

The *dominium* in and the right of searching and mining for and disposing of all minerals, mineral oils and natural gases, notwithstanding the *dominium* or right which any person may possess in and to the soil on or under which such minerals, mineral oils and natural gases are found or situated, is vested in the President, subject to this Act."

B The President holds these rights in trust and on behalf of the citizens. The public therefore has a vested interest in who is registered to extract this national resource; how transparently was the registration of such rights conducted; who stands to benefit from the manner the rights in question are dealt with and so on. The list of such points of interest is not exhaustive. Suffice it to say that whatever the intention of the applicants may have been, C the court is entitled to draw any reasonable inference that is supported by facts. If therefore the applicants chose to rely on a method of registration that fell foul of the law they only have themselves to blame. It is difficult to appreciate how the submission that public interest was not prejudice is made. Fair competition by investors require that they all follow same rules D regarding registration of rights.

Serious consequences follow failure to comply with the legal requirements set out in the Companies Act [*Chapter 24:03*]. As an example, where a company was not duly incorporated, it could not lawfully carry out any juristic act unless there existed a pre-incorporation contract by virtue of which mandated natural persons could lawfully carry out such acts for subsequent E ratification by the company.

Without incorporation such a company could not pass any resolution to authorize anyone, even its own promoters, to act for it in any lawful transaction. Section 20 of the Mines and Minerals Act provides:

"20 Prospecting licences

F (1) Subject to this section and section *twenty-four,* any person who is a permanent resident of Zimbabwe or any duly appointed agent of such person may take out at the office of any mining commissioner one or more prospecting licences on payment of the appropriate fee prescribed in respect of each such licence.

(2) On making application for a prospecting licence the applicant shall furnish to the mining commissioner his full name and permanent postal address, which G shall appear on the licence issued to him, and such other information as the mining commissioner may require.

(3) The mining commissioner may refuse to issue a prospecting licence, but shall forthwith report each refusal to the Secretary.

(4) Upon receipt of a report in terms of subsection (3), the Secretary shall refer the report to the Minister and shall, if so instructed by the Minister, direct the H mining commissioner to issue a prospecting licence."

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In respect of the Mines and Minerals Act, such a company could not apply A for, let alone accept, any mining rights without contravening the law. It could not therefore nominate an agent in terms of the provisions of s.20 of the Act. The first applicant is a London Stock Exchange listed company. I take judicial notice of the fact that it is manned by personnel who are highly acquainted with the requirements of operating in foreign environments. What B haste then could have prompted such an international company to overlook such basic requirements of the law? It could be that they were anxious to lay their hands on the claims, like any investor would be anxious to do, but if they did so without regard to the law, they could hardly cry foul if someone pointed to the lack of legal personality at the relevant time.

The act of securing "rights" without following the laid down procedure C evinces an intention to mislead. That to my mind is self-evident. What this act signifies is that the applicants were able to put up a ruse upon which the relevant officials in the Mines Ministry acted. When they had the

certificates at hand they then launched a legal onslaught against the Ministry of Mines for "unlawful" cancellation of "claims". D

I therefore cannot accept the bare denial that no prejudice, actual or potential, could have been occasioned by the act of entering into a mining venture without first acquainting itself with the legal requirements of the Zimbabwean law. The first respondent sets out quite exhaustively the prejudice suffered by the action of applicant's promoters. It appears from the voluminous E affidavits filed in the present and other cases before the courts that the applicants cut several corners in order to secure "rights" to certain mining claims in Chiadzwa. The applicants had successfully hoodwinked this court into granting it a favourable judgment in the process.

Mr *Samukange* for the applicants relied on the authority *of Rajah & Rajah* F *(Pty) Ltd and Ors v Ventersdorp Municipality and Ors* 1961 (4) SA 402 (A) for the proposition that the courts will not interfere on review with the decision of a quasi-judicial tribunal where there has been an irregularity, if it is satisfied that the complaining party suffered no prejudice by the grant of a licence to an incorporated body. The answer to that is to be found in the wise words of Moseneke J writing the majority decision in the South G African Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 300 (CC) at p 322 where he says:

> "It is trite that a company, prior to incorporation, has no corporate personality. Even so the applicant did not rely on any pre-incorporation agreement under s 35 of the Companies Act. The cases the applicant cites are plainly distinguishable. They relate to licensing procedures, which are markedly different from the tender H

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> A process which compels strict and equal compliance by all competing tenderers on the closing day for submission of tenders,"

In that case, as in the present, Balraz, a black-owned company, was found to have breached the terms of s 172 of the Companies Act because it commenced business by entering into initial tender agreements with the tender board B prior to being issued with a certificate to do so.

In casu Mr *Samukange* argued that because the applicants have held title to the claims for a period in excess of two years, the applicants' title is now protected by virtue of s 58 of the Mines and Minerals Act. I disagree. The applicants never acquired any rights in the first place, since they did not exist when the Assistant Mining Commissioner purported to issue such "rights" C to them. In any event, in order to benefit from s.58, the applicants should have held the title to the mining rights for two years. It is not disputed that the applicants acquired the "rights" in 2006. By the end of that year, the first respondent had effected the initial cancellation. To my mind, that juristic act interrupted the running of the two year prescriptive period. What is worse, D they have now been found to have misled this court and everyone else that they had acquires such "rights".

A more damning piece of evidence which was not placed before me in September 2009 is reservation order 1518 made in terms of s.35(1) of the Mines and Minerals Act.

E Section 35 provides thus:

> **"35 Reservations against prospecting and pegging**
>
> (1) The mining commissioner may, and, if so instructed by the Secretary on the authority of the Minister, shall, reserve by notice posted at his office any area against prospecting and pegging, and all rights possessed by the holder of any prospecting licence or exclusive prospecting order to prospect for and peg F minerals shall cease and may not be exercised within such area as from the date and hour of the posting of such notice or such later hour or later date and hour as may be specified in such notice:
>
> Provided that the holder of a mining location, other than an exclusive prospecting reservation, within any such area shall retain and may exercise all rights lawfully held by him which existed at the date and hour as from which such notice takes G effect in terms of this subsection."

The effect of declaring an area reserved is plain: no-one can prospect or peg. All rights possessed by holders of any prospecting licence or exclusive prospective orders to prospect for or peg minerals cease. Only the rights of a holder of a mining location within the area which existed at the time of H the pegging are saved.

Hungwe J

I have already adverted to the evidence placed before me in respect of the A reservation according to the applicants. The truth of the matter is that the applicants knew when they appeared in September before me that there had been reservation of the area in dispute as far back as 2004. The impression they created in September 2009 was that this reservation did not cover the area in which their claims lay. Indeed, they swore an affidavit to this effect in B other proceedings arguing that an extension of the initial reservation 1518 was surreptitiously undertaken in order to disentitle them of their already existing claims. Presently *Mr Samukange* still argues that this issue was placed before me. I am at a loss as to how he can say this. Had this been placed before me, I do not see how *Mr Maposa* would have made the concession he did or how I could have missed the effects of such clear prohibition. C

Had he been forthright with the court in September 2009, one would have expected him to clearly state that there is a dispute as to the nature and extent of the original reservation area 1518. One would have expected him to argue that certain of the applicants' claims are saved from the effect of a reservation since they pre-existed the declaration of reservation. He would D have, in other words, confessed and avoided the issue. He did not. To my mind, his clients knew back then the effect a disclosure of this aspect of the matter would have on their case. They chose to selectively place certain information before me at the exclusion of this aspect of it. I am convinced that applicants knew that, had this court's attention been drawn to the s 35 E reservation, the court would not have granted the order it did.

In order for this court to set aside the judgment of 25 September 2009, the first respondent must prove three items, namely:

(a) That the evidence upon which the judgment was given was in fact incorrect;

(b) That it was made fraudulently and with intent to mislead; and F

(c) That it diverged to such an extent from the true facts that the court would, if the true facts had been placed before it, have given a judgment other than what it was induced by the incorrect evidence to give.

Having regard to the above analysis I am satisfied that the first respondent G has met the above requirements. He is entitled to the order for rescission.

In light of the above, I see no need to express myself in respect of the counter- application Should a result of the counter-application be required for what it is worth, I find that the applicants have no *locus standi in judicio* to seek the order that they seek in the counter-application on the basis that they do not have any title to any claims in the Marange diamond fields. H

Hungwe J

A In any event, the counter-application suffers from a fatal deficiency for non- joinder in these proceedings of other parties whose rights would be adversely affected by the order which they are seeking.

Further, a counter-application must, in the very least, in order to qualify as such in terms of the Rules, be an answer to the main claim by the first respondent. Put differently, it must seek to counter in a similar vein, the B application brought by the first respondent. Instead, the applicants want, through these proceedings, the court to make a *declaratur* whose effect would be to jeopardize parties who are not before me. It is not.

In the result therefore, I make the following order. It is ordered that:

1. The judgment of this court dated 24 September 2009 in HC 6411/07 be C and is hereby set aside.
2. The counter-application is dismissed with costs.
3. Applicants are to pay the respondents' costs.

Venturas & Samkange, applicant's legal practitioners

D *Mutamangira & Associates,* first respondent's legal practitioners

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

Sawyer & Mkushi, third respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/NYANDORO v MINISTER HOME AFFAIRS & ANOR 2010 (2) ZLR 332 (H)

NYANDORO v MINISTER HOME AFFAIRS & ANOR 2010 (2) ZLR 332 (H)

Citation	2010 (2) ZLR 332 (H)
Case No	Judgment No. HH-196-10
Court	High Court, Harare
Judge	Patel J
Heard	6 July 2010; 7 July 2010; 8 July 2010
Judgment	7 September 2010
Counsel	*S Mutambasere* and *P Maguchu*, for the plaintiff *M M Svotwa*, for the defendants
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Damages - *assessment of - delict - actio in juriarum - principles - purpose of award of non-patrimonial loss - need for conservative approach - need for objective value to be placed upon injuries - bodily injury - assault by police on person taking part in peaceful demonstration - D contumelia - assault in public place and photograph of assault published in newspaper - serious example of contumelia*

Headnote

The plaintiff claimed damages for an assault by members of the police force. He had been involved in a peaceful demonstration organised E by a non-government organization. The police had broken up the demonstration. Most of the crowd ran away and dispersed, but the plaintiff was caught and assaulted by about 10 to 12 policemen. A photograph was published in a newspaper, depicting a policeman running behind the plaintiff and brandishing a baton within striking distance. The plaintiff fell to the ground and continued to be assaulted. He and others were F taken to Harare's central police station, where he was further assaulted by two police officers. The injuries he received resulted in hospitalization and surgery. Because of his injuries, he was unable to continue with his two occupations, of ferrying goods from Harare to a rural company and selling produce from horticulture farming. His savings were exhausted G in medical expenses. The quality of his life was greatly reduced as a result of the assault upon him and he was no longer able to assist his three dependent children who were still at school.

Held, that the assaults upon the plaintiff's physical integrity were unlawful in that they were perpetrated without lawful authority. They were also patently wrongful as being demonstrably incompatible with *boni mores* H

A and the legal convictions of the community concerning the exercise of police powers.

Held, further, that the broad purpose of an award for non-patrimonial loss is to enable the claimant to overcome the effects of his injuries and to provide psychological satisfaction for the injustice done to him. Since pain and suffering cannot be accurately measured, the quantum of B compensation to be awarded can only be measured by the broadest general considerations. The compensation awarded should be assessed so as to place the injured party, as far as is possible, in the position he would have been in if the wrongful act causing him injury had not been committed. However, general damages do not constitute a penalty but are designed C to compensate the victim and not to punish the wrongdoer. The court is entitled and has a duty to heed the effect its decision may have upon the course of awards in the future. Moreover, awards generally must reflect the state of economic development and current economic conditions of the country. Consequently, they should tend towards conservatism lest some injustice be done to the defendant. No regard is to be had to the D subjective value of money to the injured party and, therefore, the award cannot vary according to whether he is a millionaire or a pauper. Thus, the courts are concerned not with the probably erroneous value that a person would put on his own life and limbs, but with the dispassionate and neutral value which society at large would deem appropriate on the E basis of the prevailing value of money in that society.

Held, further, that in determining prospective loss, all the contingencies must be considered, including facts known at the date of the trial, in deciding whether or not there is a reasonable probability of pecuniary loss occurring in the future. In assessing pain and suffering, regard may be given to the age of the claimant because an older person has less F resistance to pain than a younger person.

Held, further, that the aspect of *contumelia* is as important as pain and suffering and it is necessary to take into account the public and private embarrassment suffered by the plaintiff as a result of the wrongful conduct. The plaintiff was initially assaulted in a public place in full view of his colleagues and passers-by. The photograph was also published for all G of a newspaper's readers to see. The assault was aggravated by the fact that it was committed by members of the police who are State servants paid from public funds. The plaintiff was consequently humiliated and embarrassed and must therefore be entitled to appreciable damages for H *contumelia.*

2010 (2) ZLR p334

Patel J

Cases cited A

Admin-General SWA & Ors v Kriel 1988 (3) SA 275 (A)

Bay Passenger Tpt Ltd v Franzen 1975 (1) SA 269 (A)

Feldman (Pty) Ltd v Mall 1945 AD 733

Min of Defence & Anor v Jackson 1991 (4) SA 23 (ZS); 1990 (2) ZLR 1 (S)

Musadzikwa v Min of Home Affairs & Anor 2000 (1) ZLR 405 (H) B

Radebe v Hough 1949 (1) SA 380 (A)

Robinson v Fitzgerald 1980 ZLR 508 (G)

Sadomba v Unity Ins Co Ltd & Anor 1978 RLR 262 (G); 1978 (3) SA 1094 (R)

Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 C

Sigournay v Gillbanks 1960 (2) SA 552 (A)

Southern Ins Assn Ltd v Bailey NO 1984 (1) SA 98 (A)

Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657

Zungu v Admin, Natal & Anor 1971 (1) SA 284 (D)

Case information

S Mutambasere and *P Maguchu,* for the plaintiff D

M M Svotwa, for the defendants

Judgment

Patel J: The plaintiff in this matter claims the sum of US$9 798.20 as damages for unlawful assault allegedly perpetrated by members of the Zimbabwe Republic Police (ZRP) acting within the course and scope of E their employment. The defendants admit that the plaintiff was arrested and detained by members of the ZRP but deny that he was assaulted during his arrest and detention.

The issues for determination are relatively straightforward and are as follows:

(1) Whether or not the plaintiff was unlawfully assaulted by members of the F ZRP acting during the course and within the scope of their employment.

(2) If so, the quantum of damages, if any, suffered by the plaintiff as a result of the assault.

Evidence for the plaintiff

Monday Bopoto Nyandoro, who is the plaintiff in this matter, testified as G follows. He is presently 63 years old and, at the time of the alleged assault, he was an active member and office-bearer of the National Constitutional Assembly (NCA), a non-governmental organisation based in Zimbabwe.

On 5 November 2005, he was involved in a peaceful NCA demonstration proceeding along Robert Mugabe Road in Harare. The NCA group of about 300 people was running and singing along the side of the road and H

A dropping political flyers as they proceeded, without obstructing the traffic on the road. At the corner of Inez Terrace, members of the ZRP Support Unit disembarked from about six lorries and began running towards the crowd. They wore police uniforms and were wielding rubber batons. Most of the crowd ran away and dispersed, but the plaintiff was caught and assaulted by about 10 to 12 policemen. He produced in evidence a photograph taken from B a newspaper, *The Zimbabwean* (dated 11 to 17 November 2005), depicting a policeman running behind the plaintiff and brandishing a baton within striking distance [Exh 1]. The plaintiff fell to the ground and continued to be assaulted. He was then lifted and shoved into one of the police lorries, where he was trampled upon whilst lying down.

C The lorry was then driven to Harare Central Police Station (Harare Central) where he was separated from the other arrestees and taken to two senior police officers in the Law and Order Section. These officers took turns to assault him under the sole of his left foot for a period of approximately one- and-a-half hours. He was then taken to the holding cells at Harare Central and detained for four days until he was eventually released.

D Thereafter, he continued to feel severe pain in his chest, ribs and left leg. He was then taken to Shamva Hospital where he was treated with medication as an out-patient for two weeks [Exh 2]. As his condition did not improve, he sought the assistance of the NCA and was taken to a Dr Coric at the Medical Centre in Harare. After being X-rayed and scanned, he was referred E to St Anne's Hospital where his left leg was operated upon and drained. He was subsequently discharged and taken to Dandaro Hospital where he was admitted for two weeks of rehabilitation. He produced a medical affidavit from Dr Coric, dated 2 February 2006, detailing his injuries and indicating the likelihood of permanent injury [Exh 3]. The affidavit, which was compiled F after his discharge from Dandaro Hospital, only mentions the injuries to his left foot and is totally silent as to the injuries to his chest and ribs. He was unable to explain this omission when cross-examined on the point.

After his discharge, he continued to walk with crutches till the end of 2006. His left leg still aches and sometimes becomes numb and he walks with a severe limp. He continues to visit Dr Coric every two to three months for G examination and prescription of pain-killers.

Before his injuries, he was self-employed as the director of a rural supply company, ferrying goods from Harare and selling produce from horticulture farming. He used to derive the equivalent of US$460 to US$550 per month from both of these occupations. He is now unable to continue with either H occupation because of his injuries. His savings have been exhausted in

medical expenses, as evidenced by receipts for part of the hospital fees and A transport costs incurred by him in 2006 [Exh 4]. The quality of his life has been greatly reduced as a result of the assault upon him and he is no longer able to assist his three dependant children who are still at school.

Evidence for the defendants

Sergeant Hangwane Singo has been with the ZRP for 15 years. In November B 2005 he was engaged at Harare Central with the duty of gathering security information. He testified that he first met the plaintiff at about 4.00 p.m. on 5 November 2005, after he was arrested and brought to Harare Central. Pursuant to instructions from his member-in-charge, he detained the plaintiff as a suspect for investigation by the CID Law and Order Section. C The plaintiff was limping before his detention but did not complain of any injury. After detaining the plaintiff, he did not see him again. He could not say whether or not the plaintiff was assaulted by any member of the CID Law and Order Section.

Inspector Douglas Shoko has been a policeman for 19 years and was stationed at Harare Central in the CID Law and Order Section during D 2005. His evidence was that on 6 November 2005 he was instructed by his officer-in-charge to investigate the NCA demonstration suspects. Together with two colleagues he took fingerprints from the 13 suspects and recorded their profiles. Subsequently, certain defence lawyers came to represent the suspects while their warned-and-cautioned statements were being recorded. E All of the suspects, including the plaintiff, signed statements drafted by their lawyers. The uniform response of all the suspects was to deny the charge against them and to state that their possession of flyers and placards was not unlawful. Thereafter, the witness escorted all the suspects to the holding cells for detention. He then compiled dockets in respect of each suspect and forwarded the dockets to the Attorney-General's Office. In compliance with F the direction from that office and after instructions from his officer-in-charge, he released all of the suspects from custody on the afternoon of 8 November 2005. When he saw the plaintiff for the first time, he did not seem to have been injured. He did not notice whether the plaintiff was limping at that time. When the plaintiff was released, he was physically well and did not G appear to be limping.

Under cross-examination, the witness stated that the plaintiff was arrested at approximately 11.30 a.m. on 5 November 2005. On that day the witness was deployed elsewhere and only arrived at Harare Central at 8.00 p.m. He was therefore not present at the time of the alleged assault on the plaintiff. As regards Exhibit 1, he recognised the assailant as a police officer by virtue H

A of his police uniform but was unable to identify him by name. He was also unable to recognise the victim in the photograph as being the plaintiff because the face in the photograph was unclear. Additionally, all the suspects that he interviewed on 6 November 2005, including the plaintiff, were wearing NCA tee-shirts and would not have been allowed to change their clothing before being photographed.

B When questioned by the court, the witness stated that the dockets opened for the suspects were no longer available as they had been destroyed in 2009, after the passage of three years, in accordance with Police Standing Orders. However, these Orders are silent as to the handling of dockets where civil litigation is pending in relation to the arrest and detention of suspects.

C Sergeant Hangwane Singo was recalled by the court to clarify the details of Exh 1. He identified the plaintiff in court as being the person that he met on 5 November 2005. However, he could not recall what the plaintiff was wearing on that day as there were 13 suspects in all and not all of them were wearing NCA tee-shirts. Moreover, he could not recognise or identify the victim in the photograph or the assailant police officer.

D **Unlawful assault**

The plaintiff's testimony is that he was assaulted by members of the ZRP on 5 November 2005, initially, at the NCA demonstration and, subsequently, at Harare Central after he was arrested. The evidence for the defendants is silent as to what happened to the plaintiff, before and immediately after his arrest E at 11.30 a.m. and until 4.00 p.m. when he was detained by Sergeant Singo.

It seems reasonably clear that the assailant in the photograph [Exh 1] is a policeman and that the person about to be assaulted is indeed the plaintiff. It is therefore proper to infer that the plaintiff was in fact assaulted before his arrest, as stated in his evidence. As regards the plaintiff's assertion that F he was further assaulted soon after his arrest, the defendants have adduced nothing to gainsay his evidence of having been assaulted under his left foot. On a balance of probabilities, his position appears to be corroborated by Sergeant Singo's testimony to the effect that the plaintiff was limping before his detention. It is further supported by the medical reports produced at the trial [Exhibits 2 & 3] showing the nature and extent of his injuries.

G There can be no doubt whatsoever that the assaults upon the plaintiff's physical integrity were unlawful in that they were perpetrated without lawful authority. They were also patently wrongful as being demonstrably incompatible with *boni mores* and the legal convictions of the community concerning the exercise of police powers. See *Musadzikwa v Minister of* H *Home Affairs & Anor* 2000 (1) ZLR 405 (H) at 416.

Patel J

Vicarious liability A

As regards the responsibility of the defendants for the actions of its employees, it is trite that an employer is vicariously liable for the conduct of his employees within the course and scope of their employment, even where such conduct has not been authorised, so long as it is closely connected with conduct which has been authorised. The employer's liability extends to such unlawful B actions of his employees, including assault, as may reasonably be regarded as modes, although improper modes, of doing what he has authorised. See *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 742-743; *Zungu v Administrator Natal & Another* 1971 (1) SA 284 (D) at 285.

In the instant case, the assaults on the plaintiff were carried out by members of the ZRP acting within the course and scope of their employment, albeit C improperly, in performing their duties and powers of arrest and detention. It follows that the defendants must be held vicariously liable for those assaults.

General and special damages

As regards general damages, the broad purpose of an award for non-patrimonial loss is to enable the claimant to overcome the effects of his injuries and to D provide psychological satisfaction for the injustice done to him. Since pain and suffering cannot be accurately measured, the quantum of compensation to be awarded can only be measured by the broadest general considerations. *See Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199; *Southern Insurance Association Ltd v Bailey N. O.* 1984 (1) SA 98 (A) at 117-119. E

More specifically, the compensation awarded should be assessed so as to place the injured party, as far as is possible, in the position he would have been in if the wrongful act causing him injury had not been committed. See *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665. However, general damages do not constitute a penalty but are designed to compensate the victim and not to punish the wrongdoer. The court is entitled and has a duty to heed the effect F its decision may have upon the course of awards in the future. Moreover, awards generally must reflect the state of economic development and current economic conditions of the country. Consequently, they should tend towards conservatism lest some injustice be done to the defendant. See *Sigournay v Gillbanks* 1960 (2) SA 552 (A); *Bay Passenger Transport Ltd v Franzen* G 1975 (1) SA 269 (A) at274-275; *Sadomba v Unity Insurance Co Ltd & Anor* 1978 RLR 262 (G); 1978 (3) SA 1094 (R) at 1097; *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S); 1991 (4) SA 23 (ZSC) at 27-28.

In this context, no regard is to be had to the subjective value of money to the injured party and, therefore, the award cannot vary according to whether he is a millionaire or a pauper. Thus, the courts are not concerned with the H

Patel J

A probably erroneous value that a person would put on his own life and limbs, but with the dispassionate and neutral value which society at large would deem appropriate on the basis of the prevailing value of money in that society. See Munkman *Damages for Personal Injuries and Death* (16 ed) at p. 18; *Radebe v Hough* 1949 (1) SA 380 (A) at 386.

B In determining prospective loss, all the contingencies must be considered, including facts known at the date of the trial, in deciding whether or not there is a reasonable probability of pecuniary loss occurring in the future. See Feltoe A *Guide to the Zimbabwean Law of Delict (2006)* at p 84. In assessing pain and suffering, regard may be given to the age of the claimant because an older person has less resistance to pain than a younger person. See Visser C & Potgeiter *The Law of Damages* (1993) at pp 399-400.

With respect to loss of amenities of life, these were described in *Administrator- General SWA & Ors v Kriel* 1988 (3) SA 275 (A) at 288E-F:

> "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 D 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".

The aspect of *contumelia* is as important as pain and suffering and it is E necessary to take into account the public and private embarrassment suffered by the plaintiff as a result of the wrongful conduct. See *Robinson v Fitzgerald* 1980 ZLR 508 (G) at 510. As for disfigurement, this includes, *inter alia,* scars and limping caused by a leg injury. See Visser & Potgeiter *op cit* at p. 91.

Quantum of damages

F The plaintiff claims both special and general damages in respect of hospital and transport costs, loss of income, pain and suffering, *contumelia,* loss of amenities of life, and permanent disability and disfigurement. His total claim is for the sum of US$9 789.20.

The plaintiff's uncontested evidence is that he suffered excruciating pain as G a result of the assaults upon him and that he underwent a surgical operation to correct the effects of the leg injury that he sustained. Moreover, Dr Coric's medical affidavit [Exh 3] indicates that the force used to inflict that injury was severe. Again, the fact that the plaintiff was hospitalised for a prolonged period demonstrates the gravity of his injury, while his relative age would H have diminished his capacity to resist pain. As for the future, the plaintiff

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testified that he still walks with a severe limp and is periodically prescribed A pain-killers to assuage his pain.

In contrast to the evidence relating to the plaintiff's leg injury, there is nothing to substantiate the alleged injuries to his chest and ribs. The out-patient record from Shamva Hospital dated 10 January 2006 and Dr Coric's affidavit of 2 February 2006 [Exhibits 2 & 3] are silent in this regard and the plaintiff B failed to produce any other medical evidence to support his claim. As for the injury to his leg, the plaintiff only sought treatment at Shamva Hospital some two months after he sustained this injury. It can therefore be fairly inferred that the extended pain that he suffered would have been aggravated by his delay in seeking professional medical attention. With respect to future pain and suffering, the plaintiff claims the same amount as he claims for C the period before the trial. However, apart from his evidence as to the use of pain-killers, there is nothing to suggest that the extent of his pain and suffering before and after the trial are similar or comparable so as to justify the same award in respect of both periods.

As regards the loss of amenities of life, the plaintiff's claim is based on his D inability to assist his children as he was able to do when he was of sound and healthy body. While it might be granted that the plaintiff's sense of helplessness in this respect has reduced his self-esteem, it cannot be accepted that it impinges on the simple but vital functions and faculties described in *Kriel's* case *(supra)* to such an extent as to entail substantial diminution in E the full pleasure of living.

With reference to the claim for *contumelia,* it is clear from the newspaper photograph [Exh 1] that the plaintiff was initially assaulted in a public place in full view of his NCA colleagues and passers-

by. The photograph was also published in *The Zimbabwean* for all of its readers to see. Moreover, the assault was aggravated by the fact that it was committed by members of F the ZRP who are State servants paid from public funds. The plaintiff was consequently humiliated and embarrassed and must therefore be entitled to appreciable damages for *contumelia.*

The plaintiff's claim for disfigurement is also clearly established, not only from his testimony but also from Dr Coric's affidavit [Exh 3] which evinces G the likelihood of permanent injury to the plaintiff's left foot. He still suffers from a limp and his prospect of recovery is slimmer because of his advanced age. However, there is nothing in the evidence before the court to show that the surgery on his leg resulted in permanent scarring.

Turning to the claim for special damages, the plaintiff is undoubtedly entitled to recover his proven transport costs and medical expenses as per the receipts H

Patel J

A [Exhibit 4] produced at the trial. However, it is not clear how the amount of his claim for hospital expenses incurred at Shamva Hospital in the sum of ZW$260 000 has been converted into the figure of US$494. Moreover, the plaintiff did not produce any documentary evidence of the expenses that he might have incurred at the other clinics and hospitals where he received B medical treatment.

As for loss of earnings, the injury to the plaintiff's leg must have reduced his capacity to carry out his erstwhile occupation but could not have entirely incapacitated him from earning a living. Nevertheless, he must be compensated in some measure for his diminished capacity in the immediate aftermath of his injury.

C **Disposition**

Having regard to the foregoing findings and the legal guidelines applicable to the plaintiff's specific claims, as well as the conditions prevailing in our economy, I am inclined to award the following amounts as special and general damages:

D Transport costs	US$20
Hospital expenses	US$80
Loss of income	US$400
Shock, pain and suffering	US$1500
E Future pain and suffering	US$750
Contumelia	US$1500
Loss of amenities of life	US$250
Disability and disfigurement	US$500
F TOTAL	US$5 000

In the result, judgment is granted in favour of the plaintiff as against the defendants for the payment of:

(i) US$5 000 as special and general damages for unlawful assault;

(ii) interest on the foresaid sum at the prescribed rate of 5 per cent *per* G *annum* calculated from the date of the summons to the date of full and final payment;

(iii) costs of suit.

Zimbabwe Human Rights NGO Forum PIU, plaintiff's legal practitioners

H *Civil Division of the Attorney-General's Office*, defendants' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/SABLE CHEMICAL INDUSTRIES LTD v EASTERBROOK 2010 (2) ZLR 342 (S)

SABLE CHEMICAL INDUSTRIES LTD v EASTERBROOK 2010 (2) ZLR 342 (S)

Citation	2010 (2) ZLR 342 (S)
Case No	Judgment No. S-18-10
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA and Garwe JA
Heard	23 March 2009
Judgment	14 September 2010
Counsel	*L Uriri*, for the appellant *A Muchandiona*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Costs - *de bonis propriis - failure of legal practitioner to act professionally*

Employment - *Labour Court - appeal from - question of law - what constitutes*

Employment - *code of conduct - disciplinary proceedings under - nature of such proceedings - proceedings intended to be flexible and less formal* D *than in court of law - hearing must be fair and audi alteram partem rule must be observed - need for flexibility must not be at the expense of the principles of fairness*

Employment-*code of conduct - disciplinary proceedings under - disciplinary committee - whether properly constituted - whether employee waived* E *right to challenge composition of committee - whether composition of committee amount to substantial compliance with code of conduct-all questions of fact, not law*

Word and phrases - *"question of law" - meaning - phrase used in three distinct though related senses-serious misdirection on the facts amounts* F *to a misdirection in law - question of fact - examples of*

Headnote

The appellant company appealed against a judgment of the Labour Court, which had allowed an appeal by the respondent seeking an order setting aside his dismissal from employment by the appellant. The Labour Court had found, firstly, that the disciplinary hearing committee had not been G properly constituted. Secondly, the Labour Court found that, even on the merits, the alleged offences had not been proved and that at most what was proved was poor or lack of supervision which, under the code of conduct, called for a severe warning or final written warning. The appellant argued that these decisions were wrong in law; in addition, it was argued that the respondent, by attending the disciplinary committee's H

A hearing, had waived his right to impeach the composition of the committee; and that the Labour Court erred in law by ignoring the fact that it was impossible to strictly comply with the provisions of the code owing to the seniority of the respondent and that the disciplinary committee as constituted amounted to substantial compliance with the code of conduct.

B *Held,* that, in labour matters, proceedings before a disciplinary hearing committee established under a code of conduct are intended to be flexible and less formal than proceedings in a court of law. While there is a need for flexibility in these circumstances, there is also a need for a fair hearing and in particular for the *audi alteram partem* rule to be observed. Labour tribunals, under the guise of flexibility, cannot violate C the principles of fairness and do so with impunity.

Held, further, that the term "question of law" is used in three distinct, though related, senses. First, it means a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. Second, it means a question as D to what the law is and, third, it means any question which is within the province of the judge instead of the jury. It is also settled that a serious misdirection on the facts amounts to a misdirection in law, as the giving of reasons that are bad in law constitutes a failure to hear and determine according to law.

E *Held,* further, that whether or not a disciplinary committee, established under a labour code of conduct, is improperly constituted is a question of fact, as is whether an employee, being the subject of a disciplinary hearing, consented to the composition of a committee and thus waived his rights to impeach its composition. Waiver is a question of fact and not law.

F *Held,* further, that none of the persons who were supposed to constitute the disciplinary committee in terms of the appellant's code of conduct were involved in the deliberations of the committee. Instead, the appellant's acting general manager, whose participation in the disciplinary proceedings was not provided for in the code of conduct, presided over the inquiry on his own. The finding that the disciplinary committee was G not properly constituted was a matter of fact and not law. The result was that the proceedings were a nullity.

Held, further, that legal practitioners, being officers of the court, are required to act professionally. Failure to do so may, in appropriate cases, result H in costs being borne by the legal practitioner *de bonis propriis.*

Garwe JA

Cases referred to A

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

Madoda v Tanganda Tea Co 1999 (1) ZLR 374 (S)

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

Case information

L Uriri, for the appellant

A Muchandiona, for the respondent B

Judgment

GARWE JA: This is an appeal against the judgment of the Labour Court which allowed with costs an appeal by the respondent seeking an order setting aside his dismissal from employment by the appellant.

The background to this matter is as follows. The respondent was employed C by the appellant as a supplies manager. As supplies manager the respondent controlled both the stores and purchasing sections of the appellant. These were different sections with different functions, with stores being responsible for receipting and issuing of stock items whilst the purchasing section was responsible for purchasing items required by the various departments of the D appellant. The separation of functions between the two sections was intended to act as an internal control measure. It was common cause that owing to the fact that the position of buyer in the purchasing section was

vacant, the respondent delegated buying duties to one Godfrey Hugwi ("Hugwi") who was the stores controller. The effect of such delegation was that Hugwi became E responsible for buying items in addition to his normal duties of receiving stock, storing such stock and issuing such stock to the various departments that constituted the appellant. This resulted in the internal control measures being prejudiced as Hugwi could now make purchases without reference to anyone and at the same time carry out his stores function. It is common cause that Hugwi, armed with the purchasing powers and his purchasing F limit of Z$1 million, engaged in fraudulent activities which resulted in serious financial prejudice to the appellant. Amongst other things, he inflated prices on purchases made and connived with one Felix Mabodo, who was the credit supervisor, to conceal the fraud. Hugwi also neglected his duty of making a follow up on rejected goods which would have been supplied to but rejected by the appellant. G

The respondent was invited to attend a disciplinary hearing to answer four allegations. He was subsequently found guilty of three of the charges and dismissed from employment. He then appealed to the Labour Court.

The Labour Court found, firstly, that the disciplinary hearing committee had not been properly constituted. The appellant's code of conduct provided, H

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Garwe JA

A *inter alia,* that the disciplinary hearing committee was to be chaired by the personnel manager or his nominee and was to comprise a member of management from the department or section, two members of the workers' committee, the offender and, if he so wished, his representative and, lastly, a representative from the personnel department to document the proceedings.

B It is common cause in this case that the disciplinary hearing committee was composed of Mr Nhunduru, the acting general manager, the respondent, who attended as the offender, and Mr Nyamande from the Human Resources Department, who was present simply to record the proceedings. Consequently, the Labour Court was of the view that there was no disciplinary committee at all, comprising, as it did, only the acting general manager, who in any C event was not empowered to chair the committee.

Secondly, the Labour Court found that, even on the merits, the alleged offences had not been proved and that at most what was proved was poor or lack of supervision which, under the code of conduct, called for a severe warning or final written warning.

D The Labour Court accordingly allowed the appeal with costs, set aside the dismissal and ordered the respondent's reinstatement.

Dissatisfied with this decision, the appellant appealed to this court. Its grounds of appeal are:

1. That the Labour Court erred on a question of law in holding that the E disciplinary committee was improperly constituted.
2. The Labour Court erred in ignoring the fact that the respondent had consented to the composition of the disciplinary committee and therefore waived any right to impeach the composition of the committee.
3. The Labour Court erred in that it ignored the fact that it was impossible F to strictly comply with the provisions of the code owing to the seniority of the respondent and that the disciplinary committee as constituted amounted to substantial compliance with the code of conduct.
4. The Labour Court erred, as a question of law, in not finding the respondent guilty of the serious offence of gross negligence or inefficiency in the performance of his duty.

G The respondent, in his submissions, has contended that the issues raised in the grounds of appeal are issues of fact and not law. Since appeals to this court are on questions of law only, the appeal should therefore be dismissed with costs. The respondent has further argued that no misdirection on the part of the court *a quo* has been shown. For this additional reason, the appeal H should also be dismissed.

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Garwe JA

The issue that falls for determination at this stage, therefore, is whether the A grounds of appeal raise issues of law. If, indeed, the appeal raises issues of fact only, then the appeal would not properly be before this court. To decide this question one must of necessity consider the meaning of the term "question of law".

The term "question of law" is used in three distinct though related senses. B First, it means "a question which the law itself has authoritatively answered to the exclusion of the right of the Court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter". Second, it means "a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter". And C third, "any question which is within the province of the judge instead of the jury is called a question of law." See *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S) at 220D-F.

The position is also settled that a serious misdirection on the facts amounts to a misdirection in law as the giving of reasons that are bad in law constitutes D a failure to hear and determine according to law. For an appellant to avail himself of a misdirection as to the evidence, the nature and circumstances of the case must be such that it is reasonably probable that the tribunal would not have determined as it did had there been no misdirection; in other words, that the determination was irrational. See *Hama v National Railways of* E *Zimbabwe* 1996 (1) ZLR 664 (S) at 670A-B.

I now revert to the grounds of appeal. The question, as already noted, is whether the grounds of appeal raise issues of law.

The first ground of appeal is that the Labour Court erred on a question of law in holding that the disciplinary committee was improperly constituted. It is the respondent's submission that this question is one of fact and not law. F I agree with the respondent's submission in this regard.

It was common cause in this case that none of the persons who were supposed to constitute the disciplinary committee in terms of the appellant's code of conduct were involved in the deliberations of the committee. Instead, the acting general manager of the appellant, whose participation in the disciplinary G proceedings is not provided for in the code of conduct, presided over the inquiry on his own and thereafter found the respondent guilty and dismissed him. The only other person present at the hearing was a representative of Human Resources whose duty was to record the proceedings. The disciplinary committee therefore was composed of only the acting general manager. The respondent attended the hearing only to answer allegations of misconduct. H

Garwe JA

A There can be no doubt that the disciplinary committee was not properly constituted. Indeed, the court *a quo* reached the conclusion that the nature of the irregularity was such as to render the disciplinary proceedings null and void. *In Madoda v Tanganda Tea Co Ltd* 1999 (1) ZLR 374 (S) at 379C, which case is on all fours with the present, Sandura JA remarked:

> "In my view, where a disciplinary committee is established in terms of a registered B code of conduct and the composition of the committee is not as provided for in the code, the deviation from the provisions of the code constitutes a procedural irregularity. In addition, the attendance and participation of a stranger at the disciplinary hearing is an irregularity which renders the proceedings at least voidable at the instance of the convicted employee ..."

C At 379H-380A the learned Judge of Appeal further remarked:

> "In the circumstances, the combined effect of the absence of two members of the workers' committee from the hearing, and the presence of the group human resources manager at the hearing was fatal and vitiated the proceedings because the disciplinary committee was not properly constituted in terms of the code."

There can be no dispute that in the present case the finding that the disciplinary D committee was not properly constituted is a matter of fact and not law. Indeed, this court has held in *Madoda v Tanganda Tea Co supra* that in this situation the proceedings are null and void. By no stretch of imagination can it be suggested that this is a finding of law and not fact. There is no suggestion by the appellant that the court *a quo* misdirected itself on the facts in coming to the conclusion that the committee was not properly constituted E and that such misdirection constitutes a question of law. I would agree with the respondent that this ground of appeal raises a question of fact and not law. An

appeal which raises a question of fact would not properly be before this court and on that basis would be dismissed. The first ground of appeal must therefore fail.

F The second ground of appeal is that the court *a quo* erred in ignoring the fact that the respondent had consented to the composition of the disciplinary committee and therefore waived any right to impeach the composition of the committee.

The position is now settled that:

> G "... when one of the parties, by his words, actions or inaction, has evinced an intention not to enforce one or more or all of his rights under the contract we select whichever word seems most appropriate from a list which includes abandonment, acquiescence, release, renunciation, surrender and waiver": R H Christie *Law of Contract in South Africa* 3 ed at p 485.

That waiver is a question of fact and not law is beyond dispute. In *Law of* H *Contract in South Africa,* the learned author remarks at p 490:

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Garwe JA

> "Whether a particular act evinces an unequivocal intention to waive a particular A right is a question of fact in each case, but some assistance can be derived from cases on facts of frequent occurrence."

At p 493 the learned author further remarks:

> "An allegation of waiver or anything akin to it should be specially pleaded, and because close investigation of the facts and surrounding circumstances will B almost always be necessary, the court is unlikely to be able to dispose of the matter on affidavits."

It is clear, therefore, that the question whether the respondent waived any rights he may have had is a question of fact and not law. That question cannot properly be raised on appeal before this court.

The third ground of appeal is that the court *a quo* ignored the fact that it was C impossible to strictly comply with the provisions of the code owing to the seniority of the respondent and that the disciplinary committee as constituted amounted to substantial compliance with the code of conduct. In particular, the appellant has submitted that there was no other manager or supervisor who could attend the hearing. The Finance Manager's contract had been D terminated. The remaining employees in the finance, accounts and stores departments were all junior to the respondent.

It is true that proceedings before disciplinary hearing committees established under a code of conduct are intended to be flexible and less formal than proceedings in a court of law. Various decisions of the High Court and E Supreme Court in this jurisdiction have stressed the need for flexibility in these circumstances. Those same decisions have also stressed the need for a fair hearing and in particular for the *audi alteram partem* rule to be observed. It is not part of our law that tribunals can, under the guise of flexibility, violate the principles of fairness and do so with impunity. F

It is common cause that, in terms of Part 1.3 of the code of conduct, the code was to apply to *all* employees of the appellant. The code went further to provide for the composition of a disciplinary hearing committee. It is common cause in this case that the committee that heard the matter was not, in any way, constituted in terms of the code of conduct.

The *court a quo* considered the submission that it would have been impossible G for the appellant to comply with the code because the contracts of the other managers had been terminated. The court, however, came to the conclusion that, faced with this situation, the appellant should have considered other lawful options rather than proceed to violate the provisions of the code. I agree with the conclusion reached by the court *a quo.* H

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Garwe JA

A Whether it was impossible to strictly comply with the provisions of the code and whether the disciplinary committee as constituted amounted to substantial compliance with the code, in the absence of evidence that the court misdirected itself on the facts, is a question of fact and not law. This ground of appeal must also fail.

B The last ground of appeal is that the court *a quo* erred in not finding the respondent guilty of the serious offence of gross negligence or inefficiency in the performance of his duties. Again, in the

absence of a suggestion that there was a misdirection on the facts, that ground is clearly one of fact. For example, in a criminal case, whether the facts as proved establish mere theft or robbery is a question of fact and not law.

C The court *a quo* considered the totality of the facts and came to the conclusion that:

> "the sum total of the charges the appellant faced simply amounts to poor or lack of supervision, which at most falls under category 2 offences. . .".

That conclusion cannot be categorized as irrational. It is clear that the D respondent was guilty of failing to put in place some mechanism to oversee and monitor the activities of Hugwi. Although serious financial prejudice was occasioned as a result of such failure, the conclusion that the respondent was guilty of no more than poor or lack of supervision cannot be impugned. A simple act of misconduct can result in serious consequences. One must E therefore look to the act itself rather than its consequences in determining the appropriate conviction. I am satisfied that this ground of appeal, like the other three before it, raises no issues of law.

This appeal must fail in its entirety because none of the grounds of appeal raise any issues of law. I think this is a proper case to issue a stern warning to F legal practitioners to act professionally and ensure that only those appeals that raise issues of law are heard by this court. The legislature, for good reason, has provided that there can be no appeal on the facts but only on the law. In order to get around this provision, some legal practitioners couch their grounds of appeal so that, on the face of it, they appear to raise issues of law when in fact they do not. The first ground of appeal in the present matter, G namely that the court *a quo* erred on *a question of law* in holding that the disciplinary committee was improperly constituted is a good example. The words "on a question of law" have been added simply to give the impression that what is being raised is a question of law and yet the real issue raised in that ground of appeal is whether or not the committee was properly constituted H clearly is an issue of fact.

Garwe JA

Legal practitioners must be reminded that they are officers of this court and A that they should act professionally. In an appropriate case it may well be appropriate in future for this court to order that the costs be borne by the legal practitioner *de bonis propriis.* It is not a small matter that this court has needlessly been made to preside over a matter which the law has specifically provided should not be brought before this court. B

The appeal is accordingly dismissed with costs.

SANDURA JA and ZIYAMBI JA concurred.

Wilmot & Bennett, appellant's legal practitioners B

Danziger & Partners, respondent's legal practitioners

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MEREKI v FORRESTER EST (PVT) LTD 2010 (2) ZLR 351 (H)

Citation 2010 (2) ZLR 351 (H)

Case No Judgment No. HH-199-10

Court High Court, Harare

Judge	Makoni J
Heard	11 February 2010
Judgment	15 September 2010
Counsel	*T M Kanengoni*, for the applicant *P C Paul*, for the respondent
Case Type	Application for rescission of judgment
Annotations	No case annotations to date

Flynote

Practice and procedure *–judgment - default judgment - rescission -grounds for - "wilful default" on part of applicant - meaning - order granted in error - may be set aside on application by either party*

Practice and procedure - *striking out - of defence - must be on application* D *by other party - not competent for judge to strike out defence mero motu*

Headnote

An applicant for rescission of default judgment cannot be said to be in "wilful default" where he had no knowledge of the proceedings or that the matter had been set down.

E A judge has no power to strike out a defendant's defence *mero motu* for failure to comply with directions in terms of r 182 of the High Court Rules. There must, in addition to the failure, be an application by the other party.

An order granted in error in the absence of any party affected by it may, on application by any party affected, be set aside in terms of r 449 of the F High Court Rules, 1971.

Legislation considered

High Court Rules 1971 (RGN 1074 of 1971), rr 63(2), 182(11) & 449

Cases referred to G

Deweras Farm (Pvt) Ltd & Ors v Zimbank 1998 (1) ZLR 368 (S)

Greenberg v Meds Veterinary Laboratories (Pty) Ltd 1977 (2) SA 277 (T)

Matambanadzo v Zvavamwe S-99-02

Roland & Anor v McDonnell 1986 (2) ZLR 216 (S)

Sibindi v ARDA 1994 (1) ZLR 284 (S)

H *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S)

Makoni J

Stockil v Griffiths 1992 (1) ZLR 172 (S) A

Zimbank v Masendeke 1995 (2) ZLR 400 (S)

Case information

T M Kanengoni, for the applicant

P C Paul, for the respondent

Judgment

Makoni J: The applicant approached this court seeking an order to B rescind the order granted by this court on 1 April 2009 in HC 6379/07. He approaches the matter from two fronts He seeks rescission in terms of r 63 as well as in terms of r 449 of the High Court Rules 1971 (the rules). His basis for seeking the order is that he was not aware that the matter had been set down for a pre-trial conference. He did not receive the correspondence C from his legal practitioners advising him of the set down date. He would receive correspondence from his legal practitioners through his son's garage address. The person who would receive the correspondence left the employ of his son. He did not hand over the correspondence to anyone.

The applicant also avers that he has a *bona fide* defence on the merits on the D basis that the respondent has no *locus standi* to bring an *actio rei vindicatio* claim against him. The land in dispute was acquired and ownership now vests in the State.

The applicant also avers that the judgment was erroneously sought and erroneously granted as the proceedings of the pre-trial conference were not done in terms of r 182(11). No oral application was made to strike out the E applicant's plea.

The application is opposed on the basis that the applicant failed to give a reasonable explanation of his default. He did not file a supporting affidavit from his legal practitioners to support his story. The respondent also avers that it did not file a *rei vindicatio* claim but a claim for damages. F

I will first deal with the application in terms of r 63.

Rule 63(2) provides that a court may set aside a default judgment if it is satisfied that there is good and sufficient cause. The factors to be taken into account in considering whether or not there is good and sufficient cause to rescind a judgment have been set out in a number of cases in our jurisdiction. G

In *Roland & Anor v McDonnell* 1986 *(2)ZLR 216 (S) at 226E-F DUMBUTSHENA* CJ had this to say:

> "In coming to a final decision one has to ask whether the defendant has shown 'good and sufficient cause' within the meaning of r 63 of the High Court Rules. Did the court *a quo* take into account:
>
> (a) the defendant's explanation of his default H

> (b) the A *bona fides* of the application to rescind the judgment; and
>
> (c) the *bona fides* of the applicant's defence on the merits of the case, and did the court normally consider these matters in conjunction with each one and cumulatively".

See also *Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368 (S), *Stockil v Griffiths* 1992 (1) ZLR 172 (S) and *Songore* B v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S).

I will deal with each of these factors in turn.

Applicant's explanation for his default

The applicant's explanation is that he was not aware that the matter had been C set down for a pre-trial conference. Mr *Paul* conceded, in his submissions, that the applicant was not aware of the set-down date. He took issue with the fact that the applicant's legal practitioners should have filed an affidavit to explain their conduct. It was his submission that the legal practitioners did not do enough to bring the date to the attention of the applicant. The issue that then falls for determination is whether the applicants default was D wilful. "Wilful default" was defined in *Zimbabwe Banking Corporation v Masendeke* 1995 (2) ZLR 400 (S) at 402C as occurring:

> "When a party, with full knowledge of the service or set down of the matter, and of the risks attendant upon default, freely takes the decision to refrain from appearing"

E See also *Matambanadzo v Zvavamwe* S-99-02.

It is clear from the above authorities that the applicant's default cannot be described as wilful. He did not have any knowledge of the set-down date of the pre-trial conference, neither did he have knowledge of the subsequent renounciation of agency by his legal practitioners. He did not take a conscious F decision not to attend the pre-trial conference.

In my view, the conduct of the applicant's legal practitioners is beyond reproach. They did what they could in the circumstances. They directed correspondence to the address provided by the applicant. When they did not receive a response, they proceeded to renounce agency. In my view, once G there is a concession that the applicant was not aware of the set-down date, that is the end of the enquiry.

The *bona fides* of the application and the *bona fides* of the applicant's defence on the merits

I agree with the applicant's counsel's approach to deal jointly with the above H factors as they have a direct bearing on each other.

2010 (2) ZLR p354

Makoni J

What constitutes a *bona fide* defence has been dealt with in A *Greenberg v Meds Veterinary Laboratories (Pty) Ltd* 1977 (2) SA 277 (T), quoted with approval in *Roland & Anor supra* at 227D-E, in the following terms:

> "The sole question for decision, therefore, is whether the applicant has a *bona fide* defence to that application. The onus is on the applicant for rescission to establish that fact. The requisites for success in establishing it were stated in B *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) as:
>
> > ' It is sufficient if he makes out *a prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case, and produce evidence that the probabilities were actually in his favour.'"

The plaintiff's (respondent in this matter) claim in HC 6379/07 is that C it legitimately carries on farming operations from Frogmore Farm. The defendant (applicant in this matter) wrongfully and unlawfully moved his belongings and personnel onto a portion of the farm and wrongfully and unlawfully interfered with the plaintiff's farming operations. This resulted in the plaintiff suffering damages in the sum of US $38 250 which he now D prays for.

In his plea, the defendant contends that his actions were lawful as his occupation of the farm was consequential upon an offer letter from the Government of Zimbabwe.

There is a dispute, as between the parties, whether the farm in question E has acquired. The applicant contends that is was acquired and as a result the respondent has no *locus standi* to bring the claim as it is based on a *rei vindicatio* claim. The respondent contends that the farm was not acquired and that there are judgments of this court to that effect. In any event, the respondent's claim is not a vindicatory action.

In my view, the applicant has made out a *prima facie* defence which, if F established at the trial, would entitle him to the relief applied for. He is putting in issue the legitimacy of the plaintiff to carry on farming activities on the farm. He has also claimed to have moved on the farm legitimately based on the offer letter given to him by the Government. These issues need to be ventilated at a full trial. The issue of whether the respondent G has the necessary *locus standi in judicio* to sue the applicant as an occupier is before the Supreme Court in SC 31/08 and SC 163/08. It is a live issue which needs determination.

Having made a finding that the applicant has a *bona fide* defence, it means that the application is made *bona fides.* H

2010 (2) ZLR p355

Makoni J

A **Rule 449**

The applicant submits that the judgment could be set aside in terms of r 449 as it was erroneously granted, in that the provisions of r 182(11)(b) were not followed. The record reflects that no oral or chamber application to strike out the defendant's defence was made as is provided for in the Rules. It can only be inferred that the judge who dealt with the pre-trial conference struck B out the applicant's defence *mero motu.*

Mr *Paul,* who also represented the respondent at the pre-trial conference, conceded that no oral application to strike out the applicant's defence was made. The concession by Mr *Paul* is very noble as he could have argued otherwise as the applicant was in default.

C Rule 182(11) deals with course of action available to the court at a pre-trial conference where one party is in default. It provides:

> "A judge may dismiss a party's claim or strike out his defence or make such other order as may be appropriate if-
>
> (a) the party fails to comply with directions given by a judge in terms of subrule (4), (6), (8) or (10) or with a notice given in terms of subrule (4); and D
>
> (b) any other party applies orally for such an order at the pre-trial conference or makes a chamber application for such an order".

The rule makes use of the conjunctive "and" between paras (a) and (b). What this means is that the situations contemplated in those paragraphs must both be fulfilled in order for the court to validly strike out a defaulting E party's defence.

In casu it is not in dispute that the applicant failed to comply with a notice given to him in terms of r 182(4). There is a concession from the respondent that it did not make an oral application for the striking out of the defendant's defence. This suggests that the judge struck off the applicant's defence *mero* F *motu.* This brings out the issue whether a judge has the power to strike out a defendant's defence *mero motu.*

An almost similar issue was dealt with in *Sibindi v ARDA* 1994 (1) ZLR 284 (S) at 287G-288B. Gubbay CJ was dealing with a situation in which the court *a quo* had dismissed the plaintiff's claim when the defendant was in default of appearance at the trial. There was no application before the judge G to grant such an order. He had this to say at pp 287G-288A-B:

> "It is well established that a superior court has an inherent jurisdiction to dismiss an action. *See Meyer v Meyer* 1948 (1) SA 484 (T) at487; *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 (1)RLR 350 (G) at 352B-C, 1972 (4) SA458 at 460 A-B; *Schoeman en Andere v van Tonder* 1979 (1) SA 301 (O) at 304 G-H; *Kuiper & Ors w Benson* 1984 (1) SA 474 (W) at476H-477B. But I am unaware of any H decision in which that power has been exercised by the court *mero motu* and

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Makoni J

> in favour of a defendant who is in default. Invariably its exercise has followed A upon the making of an application and, I believe, correctly so.
>
> An examination of the Rules of the High Court appears to me to support the view I take. They reveal that an action may be dismissed on application by the defendant where the plaintiff has been barred from declaring or making a claim (r 6); or on the ground that the action is frivolous or vexatious (r 75); or for non- compliance with an order compelling production of a document (r B 168 and 169(4)) or requiring answers to an interrogatory (r 196). No provision is made for dismissal of an action solely at the instance of the court or judge"

I would add r 182(11) to the rules referred to in the above quotation. It does not provide for a dismissal of an action solely at instance of the court or judge.

I would agree with the applicant that the order to strike out the defendant's defence was granted in error. In terms of r 449 (1)(a) the court may, *inter alia,* C upon application of any party affected, rescind an order that was erroneously granted in the absence of any party affected by it. The facts of this case fall squarely within the ambit of r449(1)(a).

In the result, I will make the following order.

1. The judgment of this court granted on 1 April 2009 be and is hereby D rescinded.
2. The respondent is to pay the applicant's costs of suit.

Chikumbirike & Associates, applicant's legal practitioners E

Wintertons, respondent's legal practitioners

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Source:
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SAMUDZIMU v DAIRIBORD HOLDINGS LTD 2010 (2) ZLR 357 (H)

Citation	2010 (2) ZLR 357 (H)
Case No	Judgment No. HH-204-10
Court	High Court, Harare
Judge	Chiweshe JP
Heard	1 September 2010
Judgment	15 September 2010
Counsel	*I Chagonda*, for the applicant *S V Hwacha* and M Chigoma, for the respondent
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

Arbitration - *award - challenge to - award granted following referral in terms of Labour Act - Labour Court having exclusive jurisdiction - registration of such award - award not suspended nor set aside on appeal or review - High Court's power to register award*

D **Court** – *jurisdiction - High Court - arbitral award - award granted following referral in terms of Labour Act - challenge to such award - Labour Court having exclusive jurisdiction*

Employment - *Labour Court - arbitral award - award granted following referral in terms of Labour Act - challenge to such award - Labour* E *Court having exclusive jurisdiction*

Headnote

The applicant sought to register with the High court an arbitral award made in his favour against the respondent. The respondent opposed the application on the basis that the award offended against public policy in terms of arts 34 and 36 of the UNCITRAL Model Law set out in the Schedule F to the Arbitration Act [*Chapter 7:15*]. The respondent had also lodged an appeal with the Labour Court against the award; that appeal was still pending. The question arose whether the High Court had jurisdiction, in view of the wording of s 89 of the Labour Act [*Chapter 28:01*].

Held, that the extent to which the provisions of the Arbitration Act are G applicable in labour matters is governed by s 98(2) of the Labour Act, which provides that" subject to this section, the Arbitration Act shall apply to a dispute referred to compulsory arbitration". Section98 provides, *inter alia,* for the referral of matters to compulsory arbitration, the appointment of arbitrators, appeals against decisions of arbitrators, reviews and other remedies. These provisions are detailed and comprehensive. It could not H have been the intention of the legislature that parties aggrieved by the

---

Chiweshe JP

decision of an arbitrator in a labour dispute could seek a remedy in terms A of the UNCITRAL Model Law set out in art 34 or 36 of the Schedule to the Arbitration Act. Those articles are not applicable where the award sought to be challenged relates to a labour dispute. The mechanisms for challenging such awards are provided for in the Labour Act and must be accessed through the

Labour Court. No other court has jurisdiction B to entertain such matters. However, with regard to the registration of an award, for as long as the arbitral award has not been suspended or set aside on review or appeal in terms of the Labour Act, there was no basis upon which the High Court could decline to register the award.

Legislation considered C

Arbitration Act [*Chapter 7:15*], arts 34 and 36 of Schedule

Labour Act [*Chapter 28:01*], ss 89 & 98

High Court Rules 1971 (RGN 1047 of 1971), r 229A

Case referred to

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

Case information

I Chagonda, for the applicant

S VHwacha and *M Chigoma,* for the respondent

Judgment

Chiweshe JP: The legal issue that arises in this chamber application E is whether the provisions of the Labour Act [*Chapter 20:01*] exclude the jurisdiction of the High Court in areas where the Labour Court has jurisdiction.

Section 89(6) of the Labour Act provides:

> "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 F subsection (1)."

That section spells out the functions, powers and jurisdiction of the Labour Court.

In *Tuso v City of Harare* 2004 (1) ZLR 1 (H) Bhunu J had occasion to consider the legal import of s 89(6) of the Labour Act. The learned judge G concluded at 3F as follows:

> "It is manifestly clear to me that the intention of the legislature was to expressly exclude the jurisdiction of all other courts in areas where the Labour Court has jurisdiction in the first instance."

I am in entire agreement with that conclusion. It is important to note the historical context in which the Labour Court was created. Its predecessor, the H

Chiweshe JP

A Labour Relations Tribunal, was limited in terms of its powers and jurisdiction. Its decisions were subject to review by the High Court in much the same way as the decisions of any other domestic tribunal would be. Even then, this court always took the view that a litigant must first exhaust the internal remedies available to it in terms of the Labour Act, before approaching it for relief.

In 2003 the Labour Relations Tribunal was transformed into a court, whose B powers of review were the same as those of the High Court, subject to the provisions of s 89(1) of the Labour Act. The intention of the legislature clearly was to establish a one stop shop for all labour matters and provide finality in litigation involving labour issues. Otherwise, why create a structure that is parallel to the High Court? However, this exclusive jurisdiction only exists C for matters provided for in s 89(1) of the Labour Act.

In the present application, the applicant seeks to register an arbitral award with this court in terms of s 98(14) of the Labour Act. The respondent opposes the application on the basis that the arbitral award offends public policy in terms of arts 34 and 36 of the UNCITRAL Model Law set out in the Schedule to the Arbitration Act. It has incorporated, by reference to papers it filed in D a separate application, and has argued that the present application and the other application should be heard together. I agree with the applicant that the correct procedure would have been for the respondent to file a chamber counter application in terms of r 229A of the High Court Rules, which reads:

> "Where a respondent files a notice of opposition and an opposing affidavit , E he may file, together with these documents, a counter application against the applicant, in the form, *mutatis mutandis,* of a court

application or a chamber application whichever is applicable."

In any event, it would be improper to join the two applications because the time within which the second respondent in the other application (the arbitrator) must file a notice of opposition has not expired. The second respondent's F defence in that application is therefore not yet known.

I have, however, taken the liberty to consider the heads of argument filed by the respondent under the other application for the purposes of determining the present application. I agree with the applicant that the extent to which the provisions of the Arbitration Act are applicable in labour matters is governed G by s 98 of the Labour Act, subs (2) of which provides:

> "Subject to this section, the Arbitration Act [*Chapter 7:15*] shall apply to a dispute referred to compulsory arbitration."

Section 98 provides, *inter alia,* for the referral of matters to compulsory arbitration, the appointment of arbitrators, appeals against decisions of arbitrators, reviews and other remedies. Those provisions are detailed and H comprehensive. Clearly, it could not have been the intention of the legislature

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Chiweshe JP

that parties aggrieved by the decision of an arbitrator in a labour dispute A seek remedy in terms of art 34 or 36 of the UNCITRAL Model Law set out in the Schedule to the Arbitration Act.

I agree with the applicant that the correct interpretation would be that the Labour Act takes precedence over the Arbitration Act and any other enactment. The intention of the legislature was to have all labour matters initiated and B resolved to finality in terms of the Labour Act. Equally, the legislature must have intended that such matters be dealt with by the Labour Court to the exclusion of any other court.

Articles 34 and 36 of the UNCITRAL Model Law set out in the Schedule to the Arbitration Act are not applicable in cases where the award sought to be challenged relates to a labour dispute. The mechanisms for challenging such C awards are provided for in the Labour Act and must be accessed through the medium of the Labour Court. No other court has jurisdiction to entertain such matters.

In the present case, the respondent has lodged an appeal with the Labour Court. The appeal is still pending. Should the respondent wish to have the D arbitrator's determination suspended pending appeal or dealt with in any other interim way, it is to that court that it must direct its application.

Accordingly, for as long as the arbitral award has not been suspended or set aside on review or appeal in terms of the Labour Act, there is no basis upon which this court may decline registration of the same. E

It is therefore ordered as follows:

1. The arbitral award issued by Mr Manase, an independent arbitrator, be and is hereby registered in terms of s 98(14) of the Labour Act [*Chapter 28:01*].
2. In terms of the said arbitral award, the respondent shall pay the applicant F an amount of US$287 491.
3. The respondent is to pay the costs of this application.

Atherstone & Cook, applicant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/S v TIRIVANHU 2010 (2) ZLR 361 (H)

S v TIRIVANHU 2010 (2) ZLR 361 (H)

Citation	2010 (2) ZLR 361 (H)
Case No	Judgment No. HH-219-10
Court	High Court, Harare
Judge	Uchena J
Heard	16 September 2010
Judgment	16 September 2010
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C **Criminal law** - *offences under Criminal Law Code - sexual offences - rape -penetration - meaning*

Headnote

Rape can only be committed when the accused's penis penetrates the victim's vagina. The penetration need not be full penetration; the slightest D penetration is sufficient. There must, however, be evidence that there was penetration. In the absence of such evidence, an accused person cannot be convicted on a charge of rape. Merely to touch the outside of the female genitalia with the male organ does not constitute penetration, although a verdict of attempted rape may be appropriate. The penalty for an attempt may be the same as for the substantive offence.

Legislation considered E

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 65, 189 & 192

Cases referred to

F *S v Mhanje* 2000 (2) ZLR 20 (H)

S v Sabawu 1999 (2) ZLR 314 (H)

S v Torongo S-206-96

Judgment

Uchena J: The accused person was convicted on three counts of contravening G s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to five years' imprisonment of which three years were suspended on conditions of good behaviour and the remaining two years were suspended on condition he performed 840 hours of community service. The accused was 16 years old at the time he committed the offences. He was 19 at the time he was convicted and sentenced. The complainant was H 12 years old at the time she was raped.

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The facts on which the accused was convicted are that he, on three different A occasions, had sexual intercourse with the complainant. The complainant, in her evidence on pp 5 and 8 of the record, said that on the first occasion the accused did not insert his penis into her vagina but "placed it outside her vagina near the hole". On the second occasion, she said, the accused inserted his penis into her vagina and had sexual intercourse with her. She felt pain B and bled from her vagina. On the third occasion, she said, the accused tried to insert his penis into her vagina but she resisted, and the accused's male organ "only touched the outside" of her vagina.

The regional magistrate convicted the accused of contravening s 65 of the Code on all three counts. He reasoned as follows:

> "Looking at what the complainant said in all the counts she said in *(sic)* the first incident, his penis touched the genitalia and near C the vulva but did not penetrate inside her vagina. On the second incident his penis penetrated and she felt pain and bled, and on the third incident his penis only touched the vagina. It must have been erect in *(sic)* all the occasions, the medical affidavit says penetration was effected. In my view when the complainant said his penis did not penetrate her vagina in the first and third occasions but touched her vagina the slightest D penetration is enough from a legal perception point of view. See *S v Mhanje* 2000 (2) ZLR 20 (H)".

It is apparent that the regional magistrate's understanding of penetration is not correct, nor is it in agreement with the case law he cited. In *S v Torongo* S-206-96 Korsah JA said at p 7 of the judgment:

> "As far as the law is concerned placing the male organ at the orifice of the female E organ, resulting in the slightest penetration, constitutes rape".

In *S v Mhanje* 2000 (2) ZLR 20 (H), which the regional magistrate relied on, it was held:

> "that the medical perception of what constitutes penetration does not coincide with legal penetration. For rape to take place, it is not necessary that there should F be full penetration. The slightest degree of penetration will suffice."

In *S v Sabawu* 1999 (2) ZLR 314 (H) at 316 Chatikobo J said:

> "It is a trite proposition that for the purposes of the crime of rape, penetration is effected if the male organ is in the slightest degree within the female body. It is not necessary to prove that the hymen was ruptured. If authority were required G for this settled proposition I would refer to *S v Mhlanga* 1987 (1) ZLR 70 (S) at 72F and *S v Torongo* S-206-96".

In *Sabawu supra* the two girls' genitals had been penetrated as bruises were found inside the *labia minora,* and the other girl's hymen was reddish though not ruptured, showing the accused's penis had had contact with her hymen but failed to penetrate it. H

Uchena J

A These cases clearly demonstrate that rape can only be committed when the accused's penis penetrates the victim's vagina. The penetration need not be full penetration, as the slightest penetration is sufficient. There must, however, be evidence that there was penetration. In the absence of such evidence an accused person can not be convicted on a charge of rape. *In Mhanje supra* B at 22 Garwe J (as he then was) said:

> "For purposes of the case at hand the essential element that needs close examination is the aspect of sexual intercourse. Hunt *supra* at p 440 says:
>
> > ' There must be penetration, but it suffices if the male organ is in the slightest degree within the female's body. It is not necessary in the case of a virgin that the hymen should be ruptured, and in any case it is unnecessary that C semen should be emitted. *But if there is no penetration there is no rape, even though semen is emitted and pregnancy results.*
>
> ' The fact that there would be no rape if the accused fails to penetrate his victim's vagina, but emits semen which flows into his victim's vagina leading to her pregnancy, proves that the crucial contact is that of the accused's penis penetrating the victim's vagina".

D In this case the accused, according to the complainant's own evidence, failed to penetrate her on the first and third occasions, but succeeded in penetrating her on the second occasion. In respect of count one she said he "placed it outside her vagina near the hole". This means the accused's penis was not inside her vagina but outside it near the hole. There could therefore not have been any penetration when his penis was outside the complainant's vagina. E The regional magistrate therefore erred when he convicted the accused of rape in count one, when the complainant's evidence proved that there was no penetration.

On count three, the complainant said "the accused tried to insert his penis into her vagina but she resisted, and the accused's male organ "only touched F the outside' of her vagina".

The complainant's evidence clearly proves there was no penetration as the accused's penis "only touched the outside of her vagina". To touch is to be in contact with, but does not mean there was penetration. Contact which constitutes rape is that which includes the accused's penis's penetration of G the female's vagina, even if such penetration is slight. In the circumstances, the accused was again wrongly convicted of rape in count three.

The accused's conduct in counts one and three constitutes an attempt to contravene s 65 of the Code. In terms of s 189 of the Code one can be convicted of attempting to commit an offence. Section 189 provides as follows: H

"(1) Subject to subsection (1), any person who -

Uchena J

(a) intending to commit a crime, whether in terms of this Code or any other A enactment; or

(b) realising that there is a real risk or possibility that a crime, whether in terms of this Code or any other enactment, may be committed;

does or omits to do anything that has reached at least the commencement of the execution of the intended crime, shall be guilty of attempting to commit the B crime concerned.

(2) A person shall not be guilty of attempting to commit a crime if, before the commencement of the execution of the intended crime, he or she changes his or her mind and voluntarily desists from proceeding further with the crime."

In this case the accused had in counts one and three gone beyond the preparatory stages to rape the complainant. He had exhibited an intention to C have sexual intercourse with the complainant without her consent. He had removed his shorts and the complainant's pants. He had, in count one, placed his penis outside the complainant's vagina near the hole. In count three, he had placed his penis just outside the complainant's vagina. He had in both counts gone beyond the commencement of the execution of the intended rapes. If the complainant had not resisted him, he would have raped her. He D therefore attempted to rape the complainant in counts one and three. The accused's convictions for rape on counts one and three are set aside and are substituted by those of attempting to contravene s 65 of the Code.

The sentence imposed by the regional magistrate remains within the deserved punishment in spite of the convictions in two of the counts being reduced E to attempted rape. Section 192 of the Code provides that the sentence for an attempt shall be the same as that of the substantive offence. It provides as follows:

"Subject to this code and any other enactment, a person who is convicted of incitement, conspiracy or attempting to commit a crime shall be liable to the same punishment to which he or she would have been liable had he or she F actually committed the crime concerned."

The regional magistrate sentenced the accused to five years' imprisonment of which three years were suspended on conditions of good behaviour and the remaining two years were suspended on condition he performed 840 hours of community service. The guidelines issued by the national committee G on community service in November 2002 limits the maximum number of hours which can be imposed to 630 hours. The regional magistrate therefore imposed more hours than was permissible. He ordered that the 840 hours be performed within six months of the imposition of the sentence. The accused was sentenced on 9 July 2010. He is still serving his sentence and can therefore benefit from the reduction of the hours to be performed from H

Uchena J

A 840 to 630 hours. The sentenced imposed by the regional magistrate is amended by deleting the words "840 hours" and substituting them with the words "630 hours".

B Bhunu J agrees.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/CHIKADAYA NO v CHENGA & ORS 2010 (2) ZLR 366 (H)

CHIKADAYA NO v CHENGA & ORS 2010 (2) ZLR 366 (H)

Citation	2010 (2) ZLR 366 (H)
Case No	Judgment No. HH-211-10
Court	High Court, Harare
Judge	Kudya J
Heard	21 June 2010; 22 June 2010; 29 June 2010
Judgment	22 September 2010
Counsel	*B Diza*, for the plaintiff *S Chirorwe*, for the first defendant No appearance for the second, third or fourth defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Estoppel - *requirements - sale of land by person other than true owner - representation by conduct or otherwise that person disposing of property entitled to do so - culpa - no negligent representation by owner - compelling considerations of fairness - when estoppel may be based on such considerations - sale of land set aside* D

Property and real rights - *ownership - vindication - estoppel - negligent representation - when owner of property can be estopped from vindicating property from third party- compelling considerations of fairness-when estoppel may be based on such considerations*

Property and real rights - *ownership - vindication - sale of land – vendor* E *not true owner -purchaser of land acting mala fide - entitlement of true owner to set sale aside -purchaser not entitled to rely upon registration of land in his name - vendor's lack of title rendering sale a nullity*

Property and real rights - *res litigiosa - alienation of- res litigiosa may not be sold after institution of proceedings - when a thing becomes res litigiosa - alienation after litis contestatio - need to protect rights of* F *non-alienating party*

Headnote

At the centre of protracted litigation involving the parties was a stand under the jurisdiction of the City of Harare, which the late husband of the plaintiff had purchased therefrom but which had been registered in the name of G the second defendant. In 1998, her late husband had been obliged to sue the second defendant, his young brother, in the High Court, for the cession of his rights in the stand. For technical reasons, his claim was dismissed without consideration of the merits. His appeal, however, was successful and in June 2001 the matter was remitted to the High Court for continuation of the trial. He was successful and, in February 2002, the H

A High Court had ordered the second defendant to cede all his rights and interest in the stand to him. As a result, the second defendant lodged an appeal which was dismissed in November 2004 for want of prosecution. However, when plaintiff's late husband sought to execute on the High

Court judgment, he discovered that, in 2001, while the earlier appeal to the Supreme Court was still pending, the City of Harare had transferred B the stand to the second defendant and to the third defendant, his wife. Shortly thereafter, they had passed transfer therein to the first defendant.

The present proceedings were commenced by means of a court application in December 2004. The plaintiff's late husband sought therein the cancellation and the transfer of the stand to the first defendant and its C transfer to him. Thereafter, the application was converted into a trial action and, in his declaration, he alleged that the first defendant was a *mala fide* purchaser and had obtained a defective title to the stand. Alternatively, he alleged that he was entitled to the relief of *rei vindicatio.* Subsequently, he died and his widow, in her capacity as the executrix dative of the estate, become the plaintiff.

D There was no appearance for the second, third and fourth respondents, but the first defendant opposed plaintiff's claim and denied any *mala fides* on his part. He alleged that he had no knowledge whatsoever of the fraud perpetrated upon the plaintiff's late husband at the time he purchased the stand and took possession thereof. He submitted that the plaintiff could E not vindicate the stand because he was now the registered holder of title therein. He submitted that, in any event, the failure of the plaintiff's late husband to interdict the second defendant from disposing of the stand was a misrepresentation to him that the second defendant was the lawful holder of the title in the stand. The plaintiff, he submitted, was thus estopped from exercising her right of vindication. The first defendant F also submitted that because he had lived on the stand since 2001, had taken out a loan to buy it and had affected improvements thereon, there were compelling reasons of fairness which precluded the plaintiff from exercising her right in respect of the stand. Finally, the court itself sought submissions on whether a *res litigiosa* (being the stand which was the subject matter of the litigation) could be alienated.

G *Held,* that on the facts the court was satisfied that the first defendant was aware of the claims of plaintiff's late husband when he bought the stand and he was thus a *mala fide* purchaser. The plaintiff was, therefore, for that reason alone entitled to a judgment in her favour.

Held, further, that there were other reasons entitling the plaintiff to relief. H Her late husband was the true owner of the rights, title and interest in

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the stand and the first defendant was in possession thereof. The plaintiff A was, therefore, entitled to the remedy of vindication. It did not assist the first defendant to allege that he was the registered holder of title in the stand as he had purchased his rights in the property from the second defendant, but the second defendant had no rights therein to sell. The purported sale was a nullity. B

Held, further, that it also did not assist first defendant to plead estoppel as, on the facts, it could not be said that any alleged failure of the plaintiff's late husband to interdict the second defendant from disposing of the stand amounted to a misrepresentation. There were also no compelling considerations of fairness which might assist him. He was aware of the claims of the plaintiff's late husband when he bought the stand and C took possession thereof. His title was based on fraud and could not find refuge in estoppel.

Held, further, that the sale of the stand in 2001 by the second defendant to the first defendant without protecting the rights of the non-alienating party, who at that time was the plaintiff's late husband, was a nullity. D At the time of the sale, pleadings had closed and the contested rights in the stand were *res litigiosa* which could not be alienated.

Held, further, that the plaintiff was entitled to relief. Cancellation of title should be ordered so as to enable the plaintiff to execute on the order of the High Court of February 2002. E

Legislation considered

Civil Evidence Act [*Chapter 8:01*], ss 27(1) and 28(1)

Cases referred to

Chikadaya v Chikadaya & Anor 2000 (1) ZLR 343 (H) F

Chikadaya v Chikadaya & Anor 2001 (1) ZLR 421 (S)

Chikadaya v Chikadaya & Anor HH-1-02

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

MacFoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC)

Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd 1976 (1) SA 441 (A) G

Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town City Council 1986 (2) SA 656 (C)

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

Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd and Another 1978 (1) SA 671 (A) H

Kudya J

A *Zimbabwe Banking Corporation & Anor v Shiku Distributors (Pvt) Ltd & Ors* 2000 (2) ZLR 11 (H)

Case information

B Diza, for the plaintiff

S Chirorwe, for the first defendant

B No appearance for the second, third or fourth defendants

Judgment

Kudya J:On24March2009, the first defendant consented to the substitution of the plaintiff for her husband who died after *litis contestatio.* The full history of this case is reported in *Chikadaya v Chikadaya & Ors* 2000 (1) ZLR 343 (H) and its sequel judgments of *Chikadaya v Chikadaya & Anor* 2001 (1) ZLR 421 (S) C and *Chikadaya v Chikadaya & Anor* HH-1-02.

At the time the plaintiff purchased the rights, title and interest in stand 6058 Glen View, the property in dispute, he owned another property in the municipal jurisdiction of the City of Harare. To circumvent the municipal prohibition against owning two properties in its jurisdiction, he had the property registered in the name of the second defendant, his young brother D Zakeyo Chikadaya. On 25 September 1998 he sued his younger brother for the cession of rights in the property. The brother contested the action. On 1 March 2000, Smith J of his own accord non-suited the plaintiff on the basis of the dirty hands principle and dismissed his claim without hearing the merits. The plaintiff noted an appeal to the Supreme Court on 29 March

E 2000. The notice of appeal was served on both his young brother's legal practitioners, Wintertons and the City of Harare. That the notice of appeal was served on the City of Harare is apparent from the order of the Supreme Court which indicates that at the hearing of the appeal on 4 June 2001, there was no appearance for the City of Harare. In a judgment delivered on 14 June 2001, the Supreme Court upheld the appeal, set aside the order of the F High Court and remitted the matter to the lower court for the continuation of the trial on the merits. The subsequent trial was held on 3 and 4 September

2001. In a judgment handed down on 20 February 2002, Smith J ordered the younger brother to cede his rights, title and interest in the property to the plaintiff, failing which the Deputy Sheriff was authorised to act in his stead. The second defendant noted an appeal in case no. SC 85/02 which G was dismissed on 15 November 2004 for want of prosecution.

When plaintiff sought to execute the judgment of 20 February 2002, he discovered that, while the appeal was pending, the City of Harare had under Deed of Transfer No. 1284/2001 transferred the property to the second and third defendants. On 13 March 2001, in case No. 11678/1998, the second H defendant filed a letter dated 6 February 2001 of his change of address of

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Kudya J

service from the property in dispute to 15 733-75 Close Sunningdale 2. A Attached to that letter were, amongst other things, correspondence dated 24 November 2000 from his conveyancers, Gambe and Associates, legal practitioners. On 6 December 2000 the second and third defendants executed an agreement of sale with the first defendant at Sommerfield Real Estate. On 5 February

2001, the second defendant inspected the appeal record in B case HC 11678/1998. On 14 February 2001 the second and third defendants passed transfer of the property in dispute to the first defendant.

As a result of the discovery and in order to execute the judgment on the merits of Smith J, the plaintiff filed a court application against the present defendants on 8 December 2004. He sought the cancellation of the sale and transfer of the property to the first defendant, the transfer of the property C to him and the eviction of all parties claiming occupation through first defendant and costs on the scale of legal practitioner and client. Although the application was served on all the defendants, it was opposed by the first defendant only. On 20 March 2007, the application was by consent referred to trial due to the material disputes of facts that were replete in the pleadings. The founding affidavit stood as the summons, while the first defendant's D opposing affidavit became the appearance to defend. The plaintiff was directed to file a declaration and thereafter the normal rules of court were to apply. The plaintiff averred in his declaration that the first defendant took transfer of the property when he was aware that the rights, title and interest in the property held by the second defendant were being challenged by him E in the Supreme Court.

In his declaration the plaintif set his cause of action thus:

1.1 First defendant is a *mala fide* purchaser who obtained defective title. As such plaintiff is entitled to recover this property as against this defendant.

1.2 Alternatively, plaintiff is entitled to the relief of *rei vindicatio* as against F the first defendant.

1.3 Alternatively, plaintiff is entitled to such damages as shall constitute the replacement value of the property at the date of judgment as against first, second, and third defendants jointly and severally, the one paying the others to be absolved.

1.4 Alternatively, plaintiff is entitled to such damages as shall constitute G the replacement value of the property at the date of judgment as against second and third defendants jointly and severally.

He prayed for transfer of the property from the first defendant to himself and, in the alternative, prayed for such damages as would constitute the replacement value of the property at the date of judgment and costs of suit. H

2010 (2) ZLR p371

Kudya J

A The first defendant denied that at the time he purchased the property he was aware of the pending legal wrangle between the two brothers. He averred that he was an innocent purchaser and prayed for the dismissal of the claim with costs.

At the pre-trial conference that was held on 1 April 2010 two issues were B referred to trial. These were:

1. Whether the first defendant was a *bona fide* purchaser of the property in question
2. Whether the plaintiff is entitled to the remedy of *rei vindicatio* under the circumstances

C The plaintiff testified on 21 June 2010. She did not know the first defendant until she met him at the pre-trial conference. Before that date her late husband was the one who was personally attending to the case. She stated that the property in issue was purchased and developed by her husband. He built an eight roomed house. She accurately related the court history of the legal wrangle between her husband and the second defendant. When her D husband sought to take cession, he discovered that the first defendant had taken transfer of the property during the period that the appeal against the first judgment was pending. She averred that her late husband had told her that the first defendant had been a tenant at the property in dispute before he purchased it. She alleged that he was aware of the legal wrangle between the two brothers because her husband had alerted all tenants that the property E belonged to him.

Under cross-examination she conceded that her husband did not protect his rights in the property by interdicting the second defendant and the City of Harare from undermining his claim by ceding it to third parties. She was adamant that the City of Harare was served with the notice of appeal which F would have alerted it against the transfer of the property to the second and third defendants. She was shown the deed of sale between the second and first defendant dated 6 December 2000 and the deed of transfer into first defendant's name dated 14 February 2001. She challenged their

authenticity and averred that the second defendant fraudulently sold the property which was the subject of litigation between the two brothers.

G She was shown the second defendant's instructions to Sommerfield Real Estate to sell; copies of the advertisements printed in *The Herald* of 30 November 2000; the offer made by the first defendant for the purchase of the property and the acceptance form signed by the second defendant. She remained adamant that the first defendant was aware of the legal dispute that H was raging between her husband and the second defendant.

2010 (2) ZLR p372

Kudya J

The first defendant gave evidence, produced four documentary exhibits and A called the further evidence of Chiedza Chemere. He told the court that he saw exhibit 1, an advertisement in the *Herald* of 30 November 2000 for the sale of a four bed roomed house with title deeds in Glen View 3 that had been flighted by Sommerfield Real Estate. An employee of the estate agency, Mr Machudze, directed him to the property in issue. It was a seven roomed house B which was not painted; its windows were incomplete and some were broken, some roofing asbestos were cracked and the verandah was not fully roofed; some doors were missing and others were broken; it had no gate or durawall. He was satisfied from his discussions with the tenants at the property that it was for sale. After viewing the property he completed exhibit 2, an offer form, on 1 December 2000 and offered $500 000 for the property. The estate C agent showed him exhibit 4, a document dated 15 November 2000 from the City of Harare to the second defendant's conveyancers authorizing them to transfer the property into the joint names of the second and third defendants. An agreement of sale between the second defendant and his wife as sellers and the first defendant as the purchaser, exhibit 3, was signed by the parties at the offices of the estate agent on 6 December 2000. D

He borrowed the purchase price from his pension fund. It was a requirement for the loan that title be registered in his name. He took title on 14 February 2001 and surrendered it to his pension fund. He took occupation at the end of February 2001. As soon as he took occupation, the plaintiff's husband came to the property and laid claim to it. He denied ever renting the property before E taking occupation. He further stated that before he purchased the property he was not aware of the legal dispute that raged between the plaintiff's husband and the second defendant.

He was cross-examined. He maintained his version that he was oblivious of the dispute between the two brothers before he purchased the property. After he took transfer and residence at the property the plaintiff's husband F visited the property three times when he was at work. When he confronted the second defendant, he assured him that the property belonged to him and not to his difficult brother. He conceded that as the property was municipal property, it was not registered with the deeds registry and therefore no caveat could be registered over the property. G

He called Chiedza Chemere. She alleged that she resided at the property as a tenant with two other tenants. She stated that the plaintiff's late husband used to visit the property on a motor cycle and at times by car. He would come early in the morning, sprinkle some water and lay claim to the property. Her landlord, the second defendant, had instructed the tenants to give him access to the property and thereafter ignore him. She alleged that all the tenants H

2010 (2) ZLR p373

Kudya J

A were notified by the second defendant at the end of December 2000 that the house was for sale and were instructed to allow prospective purchasers to view the property. She stated that she used to see the first defendant in 2000 when her child was in grade one. When she was asked when she first saw him, she stated that she first saw him in February 2001 when the second defendant introduced him as the new owner of the property in issue.

B Under cross-examination, she said she resided at the property from February 2000 until February 2001. She was confused on whether she ever saw first defendant C when he came to view the property. She prevaricated. In one breath she averred that she first saw him in February 2001 when he was introduced as the new owner and in another breath averred that she first saw him in 2000 when he came to view the property. She then further contradicted herself by averring that she could not recall when he first came to view the house as many potential buyers came to see the property in December 2000 and January and February 2001. She did not know whether the plaintiff's husband

ever met the first defendant before he purchased the house. She denied that D the first defendant was ever a tenant at the house.

Chiedza contradicted herself. I formed the opinion that she had been coached on what to say. However, she gave evidence which established that the tenants were aware of the plaintiff's claim over the property. Her testimony further established that during the duration of her tenancy, the plaintiff's E husband constantly visited the property and laid claim over it. It was also the evidence of the first defendant that even after he took occupation, the plaintiff's husband continued to visit and did not relent in laying claim over it.

Whether the first defendant was aware of the legal wrangle between plaintiff and second defendant and third defendant and thus a *mala* F *fide* or a *bona fide* purchaser of the property

This issue arose from the averment that was first made by the plaintiff's husband in his founding affidavit that the first defendant was a tenant at the property at the time he had the legal dispute with the second defendant. The plaintiff's husband further averred that he had personally alerted the defendant of the dispute and warned him against purchasing the property. G He labeled the first defendant a *mala fide* purchaser. The first defendant disputed the allegations in his opposing affidavit and deposed that he was a *bona fide* purchaser. The onus to show that the first defendant was a *mala fide* purchaser lies on the plaintiff. She was not personally involved in the dispute between her husband and his brother. She did not know the first defendant H until the pre-trial conference of 1 April 2010. Her husband, who alleged that

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he alerted the first defendant of the dispute at the time that he appealed to A the Supreme Court against the first judgment, died before he could testify.

Sections 27 and 28 of the Civil Evidence Act [*Chapter 8:01*] provide:

> **"27 First-hand hearsay evidence**
>
> (1) Subject to this section, evidence of a statement made by any person, whether orally or in writing or otherwise, shall be admissible in civil proceedings as B 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.
>
> (2) ... (not relevant)
>
> (3) If a statement referred to in subsection (1) -
>
> (a) ... (not relevant)
>
> (b) is contained in a document, no evidence of the statement shall be admissible C except the document itself, or a copy of the document if such copy is admissible in terms of this Act or any other law.
>
> (4) In estimating the weight, if any, to be given to evidence of a statement that has been admitted in terms of subsection (1), the court shall have regard to all the circumstances affecting its accuracy or otherwise and, in particular, to -
>
> (a) whether or not the statement was made at a time when the facts contained in it were or may reasonably be supposed to have been fresh in the mind D of the person who made the statement; and
>
> (b) whether or not the person who made the statement had any incentive, or might have been affected by the circumstances, to conceal or misrepresent any fact.
>
> (5) ... (not relevant) E
>
> **28 Evidence in previous legal proceedings**
>
> (1) Where a person has previously—
>
> (a) given evidence; or
>
> (b) made an affidavit that was produced in evidence;
>
> in any legal proceedings, whether civil or criminal, and he has died or cannot be found or compelled to give evidence or for some other good and sufficient cause cannot reasonably be called to give evidence in or make an affidavit for F the purposes of any subsequent civil proceedings, a document which purports to be-
>
> (i) a transcript of his evidence or a copy of his affidavit, as the case may be, in the former legal proceedings; and
>
> (ii) certified by the official having custody of the record of the former

legal proceedings as a true transcript of the evidence or copy of the G affidavit, as the case may be, shall be admissible on its production by any person as evidence of the fact stated therein.

(2) ..."

In terms of ss 27 (1) and s 28 (1) of the Civil Evidence Act, *supra,* the affidavits made by the plaintiff's husband are admissible. The only rider placed by H

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A s 27(4)(b) of the same Act is the weight to be attached to them, regard being had to the incentive he might have had to conceal or misrepresent any fact.

There was no evidence demonstrating that the first defendant was a tenant at the property or that he was aware of the pending appeal in the Supreme Court other than the averments to that effect in the answering affidavit of the B plaintiff's husband. The evidence of the first defendant's witness, Chiedza, showed that the plaintiff's husband regularly visited the property in 2000 riding a motor cycle or driving a car; and on such visits he would advise the tenants thereat that the property was his before sprinkling some water thereon. This period of his incessant and relentless visits coincided with the period of the appeal that was pending in the Supreme Court. The first C defendant confirmed that these visits and claims continued even after he took occupation. Further, the first defendant averred that he talked to the tenants when he viewed the property. He made the offer to purchase after he was shown exhibit 4, the document from the City of Harare which identified the second defendant and his wife as the holder of the rights, title and interest D in the property. No evidence was called by either party on the report that the first defendant received from the tenants. Regard being had to the evidence of Chiedza Chemere on the behaviour and claims of ownership of the house by the plaintiff's husband, it seems to me that the tenants would naturally have advised him of that conduct and those claims. In addition, his avowed lack of E interest in visiting the property between the date of purchase and occupation betrayed his prior knowledge of the plaintiff's claim in the property. He only went to the property after the registration of title because he believed that would defeat the plaintiff's entitlement in the property.

The probabilities confirm that he must have been aware of the claims of the plaintiff's husband to the property when he purchased the rights in the F property on 6 December 2000. The plaintiff averred that she was told by her husband that the first defendant was aware of his claims to the property. The onus to prove that the first defendant was a tenant at the property rested on the plaintiff. She did not call any evidence to show that he resided at the property. She did not know the tenants at the property. She thus relied on G the first hand hearsay of her husband. While the plaintiff failed to prove that the first defendant was a tenant, I am satisfied that that she has proved on a balance of probabilities that he was aware of the claim of the plaintiff's husband to the ownership of the rights, title and interest in the property.

A consequence of this finding is that the first defendant was a *mala fide* H purchaser.

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Kudya J

The above finding would form an adequate ground to grant judgment in A favour of the plaintiff. However, it is on the basis that I might be wrong in holding that the first defendant was a *mala fide* purchaser that I proceed to determine the second issue referred to trial.

Whether the plaintiff is entitled to the *rei vindicatio*

The *rei vindicatio* is a remedy that is available to the owner of property for its B recovery from the possession of any other person. The two essential elements of the remedy are, firstly, proof of ownership and, secondly, possession of the property by another person.

Mr *Chirorwe,* for the first defendant, on the one hand, submitted that the remedy was not available to the plaintiff because the first defendant is the C registered holder of title in the property. The first defendant took registered title on 14 February 2001. He took occupation on 28 February 2001. He holds title in the property and he possesses it.

Mr *Diza,* for the plaintiff, on the other hand, contended that the transfer of title by the City of Harare to the second and third defendants and the D subsequent registration of title in the first

defendant's name were based on the fraud perpetrated by the second defendant who took title on the basis of an assignment to him of the rights, title and interest of the plaintiff. He therefore submitted that as the plaintiff was the true owner of the rights, title and interest in the property he was entitled to vindication.

The judgment of Smith J on the merits of the dispute between the two E Chikadaya brothers awarded the rights, title and interest in the property in dispute to the plaintiff. It determined as between them that the plaintiff was the holder of the rights, title and interest in the property, which rights he had retained in the second defendant's name. In other words, the plaintiff was the principal while his brother was his agent. The purported disposal of the F rights, title and interest in the property by the agent was carried out outside the mandate given to him by his principal. The second defendant purported to be the owner and disposed of the property in the full knowledge that the property did not belong to him. He did so in order to cheat and defeat the true owner of his rights in the property.

Wille and Millin's *Mercantile Law in South Africa* 17 ed at p 149 states: G

> "If, however, a vendor, knowing himself not to be the true owner of one thing, represents himself to be the owner and sells it to a person ignorant of the truth so as wilfully to expose the latter to the danger of having the possession taken away from him by the true owner, the law regards such conduct on the part of the vendor as fraudulent; and the buyer is entitled to repudiate the contract and sue the seller for damages even before he is evicted: *Kleynhans Bros v Wessels*' H

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> A *Trustee* 1927 AD 271; and see *van der Westhuizen v Yskor Werknemers* 1960 (4) SA 803 (T)."

It seems to me that these sentiments are pertinent to the present matter. The plaintiff was the true owner of the rights, title and interest in the property which his young brother purported to dispose to the first defendant. He disposed of the rights in the property, which rights he did not have. As was B pointed out by Lord Denning in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is C sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

In the same vein are the words of Makarau JP, as she then was, in *Karitawu*D *v Karitawu & Ors* 2007 (2) ZLR 64 (H) at 69H-70A that:

> "Nothing legal can flow from a fraud. His appointment was null and void *ab initio* on account of the fraud. It is as if it was never made. It is a nothing and upon which nothing of consequence can hang."

It is apparent from the sentiments expressed by Malaba J, as he then was, in *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262 (H) E at 265 G -266E that the true owner of the property is entitled to recover it from any person who has possession of it without his consent. In the present matter, I am satisfied that the plaintiff has established that her husband was the true owner of the rights, title and interest in the property and the first defendant has possession of it. She is entitled to the remedy of vindication.

F Mr *Chirorwe* further contended that the plaintiff was estopped from vindicating the property because of his negligence in failing to protect his rights in the property. He was alive to the fact that the incidence of onus to establish estoppel fell on the second defendant. He relied on the factors of estoppel that are set out in *Stanbic Finance Zimbabwe Ltd v Chivhungwa, supra,* at 266F-G that:

> G "Estoppel depends upon an allegation that a representation was made by the owner *(Mashave's* case *supra* at p 438D). In *Oakland Nominees supra* at p 452A-G Holmes JA said:
>
> '(i) There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it. A helpful decision in this regard is *Electrolux (Pty)* H *Ltd v Khota & Anor* 1961 (4) SA 244 (W) with its reference at p 247 to

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> the entrusting of possession of property with *indicia* of *dominium* or *jus* A *disponendi.*
>
> (ii) The representation must have been made negligently in the circumstances.

(iii) The representation must have been relied upon by the person raising the estoppel.

(iv) Such person's reliance upon the representation must be the cause of his acting to his detriment.'" B

Mr *Chirorwe* contended that the plaintiff misrepresented to the first defendant that the second defendant was the holder of the rights, title and interest in the property by his inaction in that he did not interdict him from disposing of those rights to unsuspecting members of the public. It was common cause that at the time the second defendant sold the rights in the property, he was engaged in litigation with the plaintiff over the ownership of those rights. C Although Smith J had dismissed the plaintiff's case on technicalities on 1 March 2000, the matter was still extant by virtue of the notice of appeal filed by the plaintiff on 29 March 2000. The notice of appeal was served on both the second defendant and the City of Harare. It was common cause that the effect of the notice of appeal was to suspend the judgment of 1 March 2000. D

I called for the record in case number HC11 678/98. My perusal of the record revealed the following information. The second defendant and the plaintiff were called upon to inspect the appeal record firstly on 22 September 2000 and later on 26 January 2001. On 5 February 2001 the second defendant certified the accuracy of the record of proceedings while the plaintiff did so on 23 February 2001. The second defendant wrote to the Registrar on 6 E February 2001 notifying him of his new address of service and informing him that he had sold the property in dispute to the first defendant. He attached with the letter the full agreement of sale to the first defendant executed at Sommerfield Real Estate on 6 December 2000; and a letter written to him by Gambe and Associates on 24 November 2000 to effect transfer of the F property from the City of Harare to him and his wife together with the statement of account for such transfer, the rates clearance certificate and the tax clearance certificate. He filed the letter on 13 March 2001. The appeal was argued in the Supreme Court on 4 June 2001 and judgment granting the appeal was issued on 14 June 2001. The case was heard on the merits on 3 and 4 September 2001 and judgment delivered on 20 February 2002. G The rights, title and interest in the property were awarded to the plaintiff. The second defendant noted an appeal on 13 March 2002. It was dismissed on 15 November 2004 by the Supreme Court for want of prosecution by the second defendant. In all the court process, the City of Harare was cited. The award to the plaintiff still stands, hence the present suit to recover the rights in the property from the defendants. H

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A It was unclear to me why the plaintiff should have interdicted both the second defendant and the City of Harare from transferring the property from the second defendant. The first defendant did not lead any evidence to show that the plaintiff was aware that the second defendant and the City of Harare could do so. The vigour with which the second defendant contested the appeal and action and noted an appeal reasonably led the plaintiff to B believe that he was holding onto the disputed rights. The first defendant did not demonstrate by way of evidence that the plaintiff was aware of the disposal of rights in the property. If anything, once the City of Harare was served with the notice of appeal, it ought to have forestalled the transfer of title to the second and third defendants. The evidence gathered from case C no. 11678/98 shows that the second defendant only revealed the sale on 13 March 2001 after he had transferred the property to the first defendant. The fact that the plaintiff only became aware of the sale when he wanted to enforce the judgment on the merits is proof that the letter of 6 February 2001, which was filed on 13 March 2001, was never served on him. That the sale of the property was advertised in the *Herald* of 30 November 2000 D was a fact that could not reasonably have been known by the plaintiff. The description in the advertisement was inadequate for any one to identify it with the property in issue. It seemed to me that the second defendant was more interested in convincing prospective purchasers of his good title to the property rather than in notifying the plaintiff of his intention to dispose it. It E is clear to me that the second defendant acted in haste to obtain registered title behind the plaintiff's back and entered into an agreement of sale with the first defendant even before he had received title. Both the second defendant and the City of Harare had been served with the notice of appeal which notified them that the rights, title and interest in the property were still the subject matter of litigation.

F I am satisfied that the first defendant has failed to prove any misrepresentation by conduct or otherwise by the plaintiff. The other three factors noted in *Stanbic Finance Zimbabwe Ltd supra* are dependent on misrepresentation. In the absence of misrepresentation they all fall away.

In the alternative, Mr *Chirorwe* sought to rely on para (b) found in G *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 452A-B where Holmes JA stated

that:

> "Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner. Consistent with this, it has been authoritatively laid down by this court that an owner is estopped from asserting his rights to H his property only -

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(a) where the person who acquired his property did so because, by the *culpa* A of the owner, he was misled into the belief that the person from whom he acquired it, was the owner or was entitled to dispose of it; or

(b) (possibly) where, despite the absence of *culpa,* the owner is precluded from asserting his rights by compelling considerations of fairness within the broad concept of the *exceptio doli.* "

He submitted that, in the absence of negligence, the plaintiff was precluded B from asserting his rights by compelling considerations of fairness. He contended that the compelling grounds of fairness were that the first defendant has continuously resided at the property from28 February 2001. He purchased the property using a loan from his employer which he fully repaid. He has made improvements on the property. That may be so. Like the plaintiff, he C was cheated by the second defendant. However, I do not think that these are compelling considerations of fairness. These must be counterpoised against the judgment of 20 February 2002 which declared the plaintiff as the true owner of the rights, title and interest in the property. The plaintiff started as long ago as in 1998 to assert his rights. Even when the first defendant purchased the rights that the second purported to have in the property, the D plaintiff asserted his rights to him. When he took title and occupation, the plaintiff continued to assert his rights. Whatever improvements he made, he did so fully aware of the plaintiff's claim. The compelling considerations of fairness are in favour of the plaintiff.

It does not appear to me that the fraudulent behaviour of the second defendant E would ever find refuge in estoppel. The first defendant's title based as it was on fraud cannot stand. The second defendant disposed of the rights, title and interest in the property that he did not hold. All subsequent proceedings that were based on such disposal were void.

There is another basis for determining this matter in favour of the plaintiff. At the request of the court, both counsel made further oral submissions on F whether a *res litigiosa* could be alienated. The *World Dictionary of Foreign Expressions* at p 344 defines *res litigiosae* as "disputed things". It states that under Roman law it meant "things, rights or properties which were involved in a pending suit". In *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd and Another* 1978 (1) SA 671 (A) at 676H, *res litigiosae* were G defined as "things that are the subject-matter of litigation".

Both counsel submitted, on the authority of *Zimbabwe Banking Corporation Ltd & Anor v Shiku Distributors (Pvt) Ltd & Ors Anor* 2000 (2) ZLR 11 (H) at 18F, that a thing that is the subject matter of litigation could not be sold after the institution of action. D Zeffertt "The Sale of a *Res Litigiosa* "1971 (88) *South African Law Journal* 407 suggested that Roman Dutch H

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A writers such as Voet indicated that "all personal actions have the effect of rendering their subject matter *res litigiosa* at the stage of *litis contestatio.* The relevant stage is not the time of commencement of action, but the time of *litis contestatio."* Zeffertt's view in this regard was affirmed by Berman J in *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town City Council* 1986 (2) SA 656 (C). The learned judge held that in a real action B (action *in rem)* the land became *res litigiosa* on the service of summons, while in a personal action that status was achieved at the closure of pleadings.

In the present matter, it is unnecessary for me to determine whether the rights in issue were real or personal rights, as at the time of alienation summons had been served and pleadings closed. Under either heading, the contested C rights were *res litigiosa.*

Berman J further held that a *res litigiosa* could not be alienated after *litis contestatio* without protecting the rights of the non-alienating party. His decision was rooted in the doctrine of effectiveness, whose underlying rationale is to protect the power of the court to execute its own judgment and thereby uphold and maintain its dignity. I hold that the sale of the rights in D the

property after the closure of pleadings without protecting the plaintiff's rights therein rendered it a nullity.

The plaintiff's main claim was for the transfer of the property in issue from the first defendant. It seems to me that the competent order that can be granted is not the transfer of the property to the plaintiff; but the cancellation of the E first defendant's title. The result of the cancellation would be to return the property to the holder of title before the transfer was effected. It appears from the papers that the second defendant and his wife Beauty Mpofu took title before they transferred it to second defendant. It would be necessary to cancel their title too. Thereafter title would revert to the City of Harare while the cession held by the second respondent would be restored. The effect of F this judgment would be to restore the prevailing position contemplated by the judgment of Smith J of 20 February 2002. The plaintiff would then have to execute that judgment in the proper way.

Accordingly, it is ordered that:

1. The transfer of Stand 6058 Glen View Township to Cladios Chenga G under Deed of Transfer No. 1285/2001 be and is hereby cancelled.
2. The transfer of Stand 6058 Glen View Township to Zakeyo Chikadaya and Beauty Mpofu under Deed of Transfer No. 1284/2001 be and is hereby cancelled.
3. The plaintiff shall execute the order of 20 February 2002 granted in case H no HC 11678/98.

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4. The first, second and third defendants shall pay the plaintiff's costs of suit on a A legal practitioner and client scale, jointly and severally, the one, paying the others to be absolved.

Musunga and Associates, plaintiff's legal practitioners

Gambe and Associates, first defendant's legal practitioners B

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CEPRAT FARMING (PVT) LTD v BRIGHTLAND FARMING (PVT) LTD 2010 (2) ZLR 383 (H)

Citation	2010 (2) ZLR 383 (H)
Case No	Judgment No. HH-213-10
Court	High Court, Harare
Judge	Mtshiya J
Heard	24 June 2010
Judgment	29 September 2010
Counsel	Mrs *M Matshiya*, for the applicant *F Chimwamurombe*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Contract - *pledge - parate executie - validity - when such provision valid - need to apply for judicial sanction to enforce agreement*

Headnote

D In return for goods supplied, but not paid for, the respondent signed an agreement in which it pledged two cold rooms in payment of the debt. A final date for payment was stipulated and when the respondent did not pay, the applicant sought relief under the *parate executie.* The respondent argued that, in order to execute on the basis of the pledge agreement, E the applicant ought first to obtain a judgment authorising the sale of its (the defendant's) property.

Held, that the issue was not to prove a claim but to enforce an agreement. All that the applicant sought was judicial sanction to deal with the pledged assets. The common law, insofar as stipulations for *parate executie* are concerned, is that stipulations, which are not so far-reaching as to be F contrary to public policy, are valid and enforceable; that, as a matter of practice, creditors seeking to enforce such stipulations should take the precaution of applying for judicial sanction before doing so; and that the debtor can avail himself of the court's assistance in order to protect himself against prejudice at the hands of the creditors.

G *Held,* further, that the pledge agreement constituted clear consent by the respondent to *parate executie.* It established that the respondent indeed owed the plaintiff the sum in question. Accordingly, once the existence of the document was established and found to be authentic or genuine and to have been entered into freely and voluntarily, the applicant's H case must succeed.

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Cases referred to A

Changa v Standard Finance Ltd 1990 (2) ZLR 412 (S)

SA Bank of Athens Ltd v van Zyl [2006] 1 All SA 118 (SCA)

Sakala v Wamambo & Anor 1990 (2) ZLR 263 (H)

Case information

Mrs *M Matshiya,* for the applicant B

F Chimwamurombe, for the respondent

Judgment

Mtshiya J: This is an application for relief based on the principle *of parate executie* (i.e summary execution). The applicant seeks the following relief:

> "(i) That the applicant, in terms of the agreement signed by the parties on 22 January 2010, be allowed to attach and sell in execution, two Renson C Refrigerator cold rooms together with the compressors as spelt out in the agreement of the parties.
>
> (ii) That the messenger of court be allowed to carry the execution and such costs of execution be levied on the respondent.
>
> (iii) That the respondent pays costs of this application at an attorney and client D scale."

The background to the relief sought is as follows:

In 2009 the applicant supplied the respondent with flour worth US$7 500.

Upon failure to pay the applicant for the flour, the respondent pledged its refrigerator and coldrooms for the debt. The pledge agreement, signed by E both parties on 22 January 2010, provides as follows:

> "AGREEMENT TO PLEDGE

made and entered into by and between

BRIGHTLAND FARMING P/L T/A as Q-TEES,

(Hereinafter referred to as 'THE PLEDGOR') F

and

CEPRAT FARMING P/L

(hereinafter referred to as 'THE PLEDGEE')

WHEREAS the parties herein have agreed to enter into this pledge agreement.

AND WHEREAS the parties have agreed to reduce the terms and conditions of this agreement into this document as follows: G

1. The parties have agreed that Q-tees owe the pledge US7 500 arising from flour supplied to the pledgor.
2. The pledgor undertakes to settle USD 5 000 by 15 February and the balance of USD 2 500 by 28 February 2010.
3. The Pledgor herein pledges the following movable assets to the Pledgee as security for the debt: H

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3.1. Two Renson refrigerator coldrooms. A

3.2. One coldroom is non-functional and the other is working.

3.3. Each of the coldroom has a compressor

3.4. It is agreed that the coldrooms are valued at USD9 000.

4. The parties have agreed that in the event of failure of payment by the Pledgor, Ceprat Farming shall proceed to attach and sell the coldrooms to B recover their money. This shall be done immediately."

It will be noted from the above document that final payment was due on 28 February 2010. That did not happen and hence this application which was filed on 9 April 2010.

In line with the principles of *parate executie,* the applicant wants this court C to compel the respondent to honour clause 4 of the pledge agreement. The applicant submitted that, in approaching the court, it did not want to take the law into its own hands and realises that in terms of the law it is the sheriff or his deputy who is authorised to execute orders or judgments of this court. Furthermore, the applicant submitted that the agreement relates D to the delivery of movable assets. To that end, the applicant correctly relied on *Changa v Standard Finance Limited* 1990 (2) ZLR 412 (S) where Beck JA said the following at 414A-C:

> "It was settled in *Osry v Hirsh, Loubser and Co Ltd* 1922 CPD 531 that as far as movables are concerned an agreement for their delivery to the creditor and sale by him by means of *parate* execution is valid and binding. That decision E was approved and followed by Beadle J (as he then was) in *Aitken v Miller* 1951 SA 153 (SR), 1950 SR 227. The recognition extended under the civil law to such agreements is subject, however, to the qualifications expressed at p 547 of *Osry's* case *(supra)* in these terms;
>
> ` It is however, open to the debitor to seek the protection of the court if, upon any just ground he can show that in carrying out the agreement and F effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights.'"

In other words, the creditor, although entitled to parate *executie,* is not entitled to act in a manner that prejudices the rights of the debtor.

Notwithstanding the decision in *Sakala v Wamambo & Anor* 1990 (2) ZLR 263 (H), where it was held that "the law regarding *parate executie* is not in G accordance with sound jurisprudence and requires fresh examination", the above remains the law in this country.

In my view, the pledge agreement, quoted in full above, constitutes clear consent by the respondent to parate *executie.* Accordingly once the existence of the document is established and found to be authentic or genuine, the H applicant's case must succeed.

Mtshiya J

It was the applicant's submission that the application procedure followed A was correct because there were no material disputes of fact in the case.

The respondent was of the view that, in order to execute on the basis of the pledge agreement, the applicant ought to obtain a judgment first authorising the sale of its (the defendant's) property.

The respondent also alleged that the pledge agreement was not signed freely B and voluntarily. The managing director of the respondent, who signed the agreement, states the following in the opposing affidavit:

> "(i) While it is admitted that there was a document that was signed, I need to highlight that the document was not signed freely and voluntarily as I was under a great deal of undue influence and pressure. This becomes vividly apparent if one looks at paragraph 4 of the document which literally ousts C the jurisdiction of this Honourable Court and it gives the applicant power to resort to self-help by allowing him to 'attach and sell' immediately the pledged property. I am advised by my legal practitioners that such an agreement which ousts the jurisdiction of the courts is unlawful and I believe the advice to be correct. The agreement is therefore not enforceable
>
> (ii) In the normal circumstances, I could not accept to sign a document in terms D of which I had actually contracted out of my rights. The reason was that the applicant's officials had come to my place of business and made a lot of threats and in fear of my life and limb, I ended up succumbing to their demands that I should sign the document. I signed it against my will. It was signed at the police station with the threat of incarceration.
>
> (iii) There being no judgment, the Deputy Sheriff and not [*sic*] the Messenger E of Court cannot make an attachment and thus the application should fail on an attorney scale because it is misconceived and a waste of this court's time".

The respondent further argued that the applicant had not proved the purchase by it of flour worth USD7 500 and in any case, it was urged, the property allegedly pledged was worth much more than the applicant's claim. F

Notwithstanding acceptance by our courts of the law relating to *parate executie,* it should always be borne in mind that summary execution is a drastic remedy. In *Sakala supra* Sansole J said at 267H-268A:

> "In my view, summary execution is a drastic remedy which a pledgee is able to extract from a pledgor because of his advantageous position over the pledgor. G It is tantamount to taking the law into one's own hands. Consequently, such a provision in an agreement should be construed strictly. This is done 'in order to protect debtors and to prevent creditors taking undue advantage of the impecunious position of the debtors'. (See *Osry's* case at p 541). Speaking for myself Shylock may have his pound of flesh but without any drop of blood. The law must not countenance any prejudice which is caused by a pledgee who is in such an advantageous position". H

2010 (2) ZLR p387

Mtshiya J

A *In casu,* if the order sought were to be granted, the court will have accepted that the respondent indeed owed the plaintiff the sum of USD7 500. This court can only arrive at that conclusion by way of accepting the pledge agreement as having been entered into freely and voluntarily. Once the court takes that position, then there would be no reason for it to deny the B applicant the relief it seeks.

The applicant has approached this court on the understanding that the debt is accepted or acknowledged by the respondent through the pledge agreement and hence the need to be granted authority by this court to execute against the pledged assets. The applicant is therefore not asking this court to decide on whether or not the respondent owes it USD7 500. That aspect distinguishes C this application from one for summary judgment brought in terms of r 64 of the High Court Rules. The applicant's approach to this court is in line with sentiments expressed in *SA Bank of Athens Limited v van Zyl* [2006] 1 All SA 118 (SCA). It was, in that case, stated by Erasmus AJA, citing the words of Hurt J and approved by Heher JA, in *Juglal NO v Shoprite Checkers* D *(Pty) Ltd* 2004 (5) SA 248 (SCA), as follows:

> "In summary, the common law, insofar as stipulations for *parate* execution are concerned, is that stipulations, which are not so far-reaching as to be contrary to public policy, are valid and enforceable; that, as a matter of practice, creditors seeking to enforce such stipulations take the precaution of applying for judicial sanction before doing so; and that the debtor can avail himself of the court's E assistance in order to protect himself against prejudice at the hands of the creditors"

In casu the issue was not to prove a claim but to enforce an agreement. All the applicant seeks is judicial sanction to deal with the pledged assets.

In its submissions the respondent correctly states that "an application F should stand or fall on the basis of its founding affidavit". Apart from what I quoted above as having been said by the respondent's managing director in the opposing affidavit, there is nothing more before me to support the allegation that the pledge agreement was not signed freely and voluntarily. It is alleged that threats were made at the respondent's place of work and at the police station. One would have expected independent evidence in the G form of supporting affidavits. None were submitted. The alleged threats were supposedly made on or before 22 January 2010. The respondent only found it necessary to reveal the threats three months later i.e on 28 April 2010. If there were indeed any threats, the same would have long been reported to the police. The respondent knew where the police station was. He says he H had been there.

Mtshiya J

Accordingly, my finding is that it is most improbable that any undue influence A and threats were ever used to force the respondent to sign the detailed pledge agreement.

It was also argued that the doctrine of *parate executie* did not apply *in casu* because coldrooms are fixed to buildings and therefore become part of the immovable property. That submission does not find support from the B opposing affidavit. However, I also do not agree that a coldroom necessarily becomes part of the immovable property. A coldroom can be stationed/ fitted in a building and remains capable of being detached/removed from a building. It is an identifiable, independent and movable asset that can be bought separately. It is, therefore, with respect to this case, executable. The assets were identified in detail and set aside to meet the debt by their owner, C namely the respondent *in casu.*

It is trite that a judgment creditor can only execute to the extent of his claim. Accordingly, if the executed assets realise more than the claim, the balance remaining upon satisfying the judgment creditor's claim will always be for the credit of the judgment debtor. In view of the foregoing, and taking a D robust approach to this case, as I believe I must do, I am unable to accept that there are material disputes of facts to warrant trial. Accordingly the relief sought accords with the principle of *parate executie.* The application, in my view, has merit.

I therefore order as follows:

(i) That the respondent be and is hereby ordered to pay the applicant the E sum of US$7 500

(ii) That assets pledged by the respondent in the agreement signed by the parties on 22 January 2010, namely two Renson refrigerator cold rooms together with the compressors, be and are hereby declared executable for the purposes of satisfying the amount referred to in (i) above. F

(iii) That the messenger of court be and is hereby authorised to carry out the execution envisaged in (ii) above and that costs of execution be levied on the respondent; and

(iv) That the respondent be and is hereby ordered to pay costs of this application at an attorney and client scale. G

Mtetwa & Nyambirai, applicant's legal practitioners

Madanhi, Mugadza & Co, respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/MPOFU v COMMISSIONER OF POLICE & ANOR 2010 (2) ZLR 389 (H)

MPOFU v COMMISSIONER OF POLICE & ANOR 2010 (2) ZLR 389 (H)

Citation 2010 (2) ZLR 389 (H)

Case No	Judgment No. HH-8-11
Court	High Court, Harare
Judge	Karwi J
Heard	29 September 2011
Judgment	29 September 2011
Counsel	*P Kawonde*, for the applicant Mr *Pashapa*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

C **Employment** - *wrongful dismissal - damages in lieu of reinstatement - assessment - period of unemployment covering time when abandoned Zimbabwean currency was still in use - calculation of equivalent figure in US dollars - deduction for failure to mitigate loss - calculation of*

Headnote

D The applicant had been dismissed from the police force following a conviction for assault. The dismissal took place before the determination of his appeal against the conviction. The appeal was successful and, after lengthy litigation, the Supreme Court held that the dismissal, being based on a conviction which had been quashed, was irregular. The court ordered E that the matter be remitted to the High Court to determine whether the applicant should be reinstated or paid damages in lieu of reinstatement. The claim for reinstatement was abandoned and the issue was the quantum of damages. One of the considerations was how to deal with the fact that most of the time when the applicant was unlawfully out of employment was during the Zimbabwe dollar era. The Zimbabwean F currency having been effectively been abandoned, an award in that currency would be worthless.

Held, that the principles governing the payment of such damages are well settled. An employee is entitled to be awarded the amount of wages or salary he would have earned had it not been for the for premature termination of his contract by the employer. He may also be compensated G for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach. It is also settled law that the employee must mitigate his loss. He cannot just sit and do nothing. If he fails to take up other employment when it would have been reasonable to do so, a deduction will be made in respect of the H remuneration he would have earned from the substituted employment.

2010 (2) ZLR p390

Karwi J

Further, the measure of damages accorded such employee is the actual A loss suffered by the employee represented by the sum due to him for the unexpired period of the contract less any sum he earned or could have earned during such latter period in similar circumstances. *Held,* further, that the figures proposed by the applicant, being based on his actual salary figures in local currency, converted at the various official B rates prevailing at the time, produced an unrealistic total of around 4 times what the current salaries are in US dollars. The sum payable should be reduced accordingly. A deduction should also be made in respect of the employment which he could reasonably have been expected to have found.

Editor's note: the Supreme Court judgment referred to is *Mpofu v Commissioner* C *of Police & Anor* 2008 (2) ZLR 117 (S).

Cases referred to

Ambali v Bata Shoe Co Ltd 1999 (1) ZLR 417 (S)

Art Corporation v Moana 1989 (1) ZLR 304 (S) D

Gauntlet Security Services (Pvt) Ltd v Leonard 1997 (1) ZLR 583 (S)

Madyara v Globe & Phoenix Industries (Pvt) Ltd 2002 (2) ZLR 269 (S)

Schierhout v Min of Justice 1926 AD 99

ZUPCO v Daison 2002 (2) ZLR 628 (S) E

Case information

P Kawonde, for the applicant

Mr Pashapa, for the respondent

Judgment

Karwi J: The applicant in this matter was charged with and convicted of assault in July 1999. He was fined $400 or in default of payment ordered to serve two months in prison. He was further sentenced to imprisonment for F one month, all of which was suspended for five years on certain conditions. He successfully appealed against both conviction and sentence.

Following the appellant's conviction and before his appeal was heard, the first respondent summarily dismissed the applicant from the service of the Zimbabwe Republic Police in terms of s 48(a) of the Police Act [*Chapter* G *11:10*]. Following his success in the appeal against both conviction and sentence, the applicant requested to be reinstated in his job, but his request was turned down. He then appealed to the second respondent against the decision to dismiss him. The second respondent dismissed his appeal on the basis that his appeal was out of time. The applicant was dissatisfied with the decision of the second respondent and sought to have it set aside on review H

A by this court on 17 October 2003. This court dismissed the application for review. He then appealed to the Supreme Court. The Supreme Court set aside the dismissal as unlawful and remitted the matter to this court for purposes of determining whether following the dismissal of applicant he should be reinstated or paid damages in lieu of reinstatement.

B In referring the matter to this court, Chidyausiku CJ had this to say at 122:

> "Having concluded that the dismissal of Mpofu was unlawful, I hold the view that on the facts of this case, in particular the fact that this is essentially a labour dispute and the time that has elapsed since the dismissal of Mpofu, and the nature of the employment involved in this case, the parties should have an opportunity to address the issue of reinstatement or payment of damages in lieu of reinstatement. The issue of whether or not Mpofu should reinstated or paid C damages in lieu of reinstatement has never been addressed, either in court or in the court *a quo.* In my view, the parties should be given an opportunity to debate that issue before a determination on it is made."

The matter was then set down by this court and the parties made submissions on whether or not Mpofu should be reinstated or paid compensation in lieu D of reinstatement and, if so, the quantum of the damages.

With regard to the issue of whether or not the applicant should be reinstated or paid compensation in lieu of reinstatement, the applicant's initial view as presented by his then legal practitioner was that the preferred option was one of reinstatement. The reason given at the time was mainly that it was difficult E to assess or calculate the damages because the bulk of the damages from 1999 to 2009 would have to be computed in Zimbabwe dollars, a currency that was no longer applicable in our country. Awarding the applicant such damages in Zimbabwe currency would effectively amount to no relief to him now. However, the applicant's position changed soon after Mr *Kawonde,* his then legal representative, had renounced agency. The applicant's current F position is that he accepts that the best way forward was the payment of damages in lieu of reinstatement. The first respondent

also prefers the payment of damages as the best way forward. I must add that I totally agree with the first respondent's view in this matter as it is the only choice anyway. Reinstatement is inappropriate, in my considered view, because there has been a total breakdown of the working relationship between the parties. It G is clear that there is no longer any mutual trust, confidence and integrity. Any absence of those attributes in the Police force or between or amongst its members would make the working relation unworkable. The first respondent has also made it clear that it no longer would want to continue employing the applicant. In *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S) H at 349 it was held that:

2010 (2) ZLR p392

Karwi J

> "It is easy to conceive a situation in which, albeit no blame whatsoever attaches A to the employee, the inescapable inference is that the personal relationship between him and the employer has broken down to the extent that trust in one another has been lost. For a court to order reinstatement against a backdrop of animosity and ill-will, solely because an employee unreasonably and out of wounded pride seeks it, would be to permit the continuation of an intolerable personal relationship, one which will make it impossible for the employee to B perform his duties either to his own satisfaction or that of his employer"

Innes CJ stated the same thing in *Schierhout v Min of Justice* 1926 AD 99 at 107 when he referred to:

> "... the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship, and the absence of mutuality, for no court could by its order compel a servant to perform his work C faithfully and diligently."

McNally *JA in Art Corporation Ltd v Moyana* 1989 (1) ZLR 304 (S) at 313 also stressed the same point when he said (citing Benedictus & Bercusson

Labour Law: Cases and Materials):

> "The obvious remedy for unjustified unfair involuntary termination is re- employment, if the employee so wishes, and otherwise compensation. The D first remedy is not available at common law. The essentially reciprocal nature of contractual obligation means that it is impossible to force an unwilling party to remain bound to a contract against his will. "

It seems to me, therefore, that the applicant should be paid damages in lieu of reinstatement. E

I shall now proceed to determine the issue of the payment of damages in lieu of reinstatement. The quantification of such damages is not an easy task, particularly where the bulk part of the period within which the applicant was unlawfully out of employment is during the Zimbabwe dollar era.

The principles governing the payment of such damages are well settled in our F law. An employee is entitled to be awarded the amount of wages or salary he would have earned save for premature termination of his contract by the employer. He may also be compensated for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach. *See Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S), *Madyara v Globe & Phoenix Industries (Pvt) Ltd* 2002 (2) ZLR 269 (S), *Zimbabwe* G *United Passenger Co v Daison* 2002 (2) ZLR 628 (S) and *Gauntlett Security Services (Pvt) Ltd v Leornard* 1997 (1) ZLR 583 (S). Our law is also settled, in that the employee must mitigate his loss. He cannot just sit and do nothing. If he fails to take up other employment when it would have been reasonable to do so, a deduction will be made in respect of the remuneration he would have earned from the substituted employment. Further, according to our law, H

2010 (2) ZLR p393

Karwi J

A the measure of damages accorded such employee is the actual loss suffered by the employee represented by the sum due to him for the unexpired period of the contract, less any sum earned or could have earned during such latter period in similar circumstances.

In an effort to quantify what is due to the applicant, the first respondent approached the Reserve Bank of Zimbabwe with a request to quantify what B the applicant would be entitled to during the period 1999 to 2009, using the various exchange rates which were applicable during the different stages along the 10 year period. The Reserve Bank kindly obliged and came up with what I belief is an unrealist cumulative figure of US$259 014.72, inclusive of salary, bonuses, allowances, leave days and medical aid. A close analysis C of the schedules submitted would show that during most of

the time the applicant would have been paid an average salary of around US$600 per month excluding all other allowances. A good example in point is the salary applicable in the schedule for the entire 2002. It is my considered view that there is no way a constable would have been paid over US$600 per month. It is also my considered view that a realistic salary would have been something D akin to the current position, which is a salary of around US$ 150 to $200 per month. If my view is correct, as it is based on the current and true salaries being paid to constables, then it means the applicant would have to be paid a quarter of the figure which was used in most schedules submitted, including that submitted by the applicant.

E It must also be mentioned is that, in an effort to assist the court with the formula to quantify what is due to applicant, the first respondent approached the Pensions Office, which indicated that the best way to resolve this matter was to treat the applicant as a retiring member of the police force, who would be retiring at 50 years of age, and would be entitled to a lump sum payment of US$ 6101.57 and a monthly pension of US$97 until he dies. The Pensions F Office had used a straight monthly salary of US$165.

The applicant's position is that he accepts a lump sum payment of a pension of US$6101.57 and a monthly pension of US$79. He would also want, in addition, US$312 450.83, being salary, allowances, bonuses, loss of free accommodation, leave days and loss of medical services, making a total of G US$ 318 552.40. His claim for salary and benefits above was based exactly on the over-dramatized and unrealistic schedule drawn up by the Reserve Bank, which I referred to earlier on. The applicant also requested that he be promoted to rank of sergeant for the purposes of pension only. His request was based on his high hopes of promotion at the time based on some examination he had passed. The first respondent has indicated that it was unwilling to H treat the application as an urgent for purposes of calculation of damages.

Karwi J

My considered view is that issues of promotion are best left to be decided A by the employer and is not for the court to decide.

It seems to me that, having decided, as I have done above, that the Reserve Bank of Zimbabwe had assumed high rates of monthly salary of US $600, in calculating the applicant's dues, and that the current rates used by the Pensions Office at US$165 would be appropriate, it follows that the correct figures B the applicant is entitled to are a quarter of the figure which was submitted by the parties. When the above figures are applied, this would mean that the applicant is entitled to US$78 113, which figure includes arrear salaries, allowances, bonuses and leave days.

The applicant did not adduce evidence to show that he sourced for alternative employment soon after being unlawfully dismissed from employment. The C law requires that he secures alternative employment. He cannot just sit at home for more than 10 years expecting payment in full from his employer. In the absence of evidence to show that the applicant obtained alternative employment, it is my considered view that it was reasonable to expect the applicant to have searched for alternative employment. In view of that finding, D it is equitable that a deduction be made from his entitlement in respect of the remuneration he would have earned from the substituted employment. A reasonable deduction would have to be based on the same rate of US$ 165 per month for a period of ten years. Such deduction would come up to US$ 19800. When that deduction is considered, it means that the applicant is entitled to US$58 313. In addition, he is also entitled to a lump sum pension payment E of US$6 101.57 and a monthly pension of US$97.00 (or such other rates as are applicable by the Pension Office to people of the rank of the applicant).

After taking all the above into consideration it is ordered as follows:

1. The first respondent be is hereby ordered to pay the applicant damages in lieu of reinstatement in the sum of US$58 131 being arrear salaries, F bonuses, accommodation, leave days and medical services.
2. The first respondent is ordered to pay the applicant a lump sum pension of US$6 101.57 and a monthly pension of US$97 until his death.
3. Both respondents are to pay the costs of suit. G

Kawonde & Co, plaintiff's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/S v GARANEWAKO 2010 (2) ZLR 395 (H)

S v GARANEWAKO 2010 (2) ZLR 395 (H)

Citation	2010 (2) ZLR 395 (H)
Case No	Judgment No. HH-242-10
Court	High Court, Harare
Judge	Mutema J
Heard	30 September 2010
Judgment	30 September 2010
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C **Criminal law** - *offences under Criminal Law Code - unlawful entry into premises - meaning of "premises" - premises do not include land on which a building is situated - correct charge to bring one of unlawfully entering onto such land*

Headnote

D The accused was convicted of unlawful entry into premises, in contravention of s 131 of the Criminal Law Code [*Chapter 9:23*]. He had opened the sliding gate of the complainant's yard and entered the yard, where he was discovered. On review:

Held, that the conviction was wrong. "Premises", for the purposes of s 131 E of the Code, means any movable or immovable building or structure used for human habitation or storage. The crime of unlawful entry into premises is nothing more than a codified version of the old offence of housebreaking with intent to commit a specified crime within the premises so broken into. The mere opening of a sliding gate of a perimeter wall surrounding the yard of a dwelling premises and only entering that yard, F as happened *in casu,* can never legally found the crime of unlawful entry into premises. There is patently a world of difference between unlawful entry into premises and criminal trespass, which relates to and is limited to land as we know it (usually with written signs prohibiting entry) or an enclosed area on which is situated a building or structure ordinarily used for human habitation or for storage of property and is outside that G building but is surrounded by a sufficient wall, fence or hedge that is continuous and has an entrance or entrances, either barred, or capable of being barred, by a gate or other means (what is commonly referred to as a yard). The correct charge should therefore have been criminal H trespass as defined in s 132(1)(a) of the Code.

Mutema J

Legislation considered A

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 130, 131 & 132

Cases referred to

R v Lawrence 1954 (2) SA 408 (C) B

R v Makoelman 1932 EDL 194

R v Piet M'tech 1912 TPD 1132

S v Rayiti 1984 (1) ZLR 269 (H)

Judgment

Mutema J: The accused in this case was arraigned before a magistrate sitting at Chitungwiza facing a charge of contravening s 131 of the Criminal C Law (Codification and Reform) Act [*Chapter 9:23*]. The section criminalises unlawful entry into premises. The charge was framed thus: "In that on the 6 day of April, 2010 and at Number 133 Svinurai Phase 1, Dema, Walter Garanewako unlawfully and intentionally and without permission from Babra Mhizha the lawful occupier of the premises concerned or without lawful D authority entered the premises at Number 133 Svinurai Phase 1, Dema *by opening the sliding gate"*(my emphasis).

The pertinent facts read:

> "4. On 6 day of April, 2010 and at around 03.00 hours the complainant entered her homestead and was surprised to see that her sliding gate was opened.
>
> 5. When she entered the gate she found the accused person standing aimlessly E *(sic)* near her motor vehicle.
>
> 6. She called him asking him who he was but he kept quiet and later moved towards her.
>
> 7. The accused person then took the state of a drunkard *(sic)* person and began stammering."

He was subsequently arrested. He pleaded guilty to the charge as framed, F *supra,* and was duly convicted and sentenced to eight months' imprisonment, wholly suspended on condition he performed 280 hours of community service at Kunaka Hospital in Dema.

The scrutinising senior regional magistrate was not satisfied with the propriety of the charge given the attendant facts of the case. He then referred the matter G for review, commenting, *inter alia:*

> "The accused person is said to have gained entry into the complainant's yard enclosed by a durawall on 6 April, 2010. He accessed the yard by opening a sliding gate. He did not enter the house but was interrupted whilst in the yard. The issue is whether the enclosed yard is a structure or premises for the purposes of unlawful entry ... H

Mutema J

> A I talked to the magistrate and she felt her interpretation was correct. I also talked to fellow regional magistrates and other magistrates in the provincial courts and the answers I got made me to write this scrutiny minute *(sic)* so that we would be guided by the Higher Court. I feel that the proper charge should have been trespass under s 132 ..."

The observations made herein are pertinent, in that from a substantial number B of review matters, it has been gleaned that a sizeable number of magistrates have no clue regarding the distinction between the offences of unlawful entry into premises in terms of s 131 and criminal trespass in terms of s 132 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Subsection (1) of s 131 provides:

> "(1) Any person who intentionally and without permission or authority from the C lawful occupier of the premises concerned, or without other lawful authority, enters the premises shall be guilty of unlawful entry into premises..."

Subsection (2) spells out aggravating circumstances to include, where the convicted person -

> "(a) entered a dwelling house; or D

(b) knew there were people present *in the premises;* or..."(emphasis supplied).

Section 132 provides:

"(1) Any person who -

(a) enters any land knowing or realising that there is a real risk or possibility that such entry is forbidden; or

(b) having entered any land, fails or refuses without lawful excuse to leave the E land when called upon to do so by the lawful occupier or any other person with apparent authority to require him or her to leave;

shall be guilty of criminal trespass and liable to a fine not exceeding level five or imprisonment for a period not exceeding six months or both.

(2) It shall be presumed, unless the contrary is shown, that a person accused of criminal trespass knew or realised that there was a real risk or possibility that F entry into the land in question was forbidden where the land was an enclosed area.

(3) For the purposes of subsection (2) an 'enclosed area' means an area of land the perimeter of which is enclosed by a sufficient wall, fence or hedge that is continuous except for one or more entrances that are barred or capable of being barred by a gate or other means."

Section 130 defines the word "premises" as "any movable or immovable G building or structure which is used *for human habitation or for storage,* and includes an outbuilding, a shed a caravan, a boat or a tent"(emphasis supplied).

Now, the definition of "premises" in s 130 is so clear and unambiguous that it admits of no other rule of statutory interpretation except the ordinary grammatical meaning of the words employed. "Premises", for the purposes H of unlawful entry, means any movable or immovable building or structure

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Mutema J

used for human habitation or storage. Apart from those structures mentioned A in the section, the term also includes such structures as a house or storeroom - buildings or structures ordinarily used for human habitation or storage of property. The legislature deliberately employed the phrase "in the premises" in para (b) of s 131(2) cited *supra,* in spelling out aggravating circumstances - where the convicted person knew there were people present B "in the premises" when he committed the unlawful entry. It did not use the phrase "on the premises", which would mean outside the dwelling-house or storage structure. It is pertinent to note that the crime of unlawful entry into premises is nothing more that a codified version of the old offence that used to be called housebreaking with intent to commit a specified crime within the premises so broken into. There is certainly and patently a world C of difference between this offence and the one of criminal trespass, which relates to, and is limited to land, as we know it (usually with written signs prohibiting entry) or an enclosed area on which is situated a building or structure ordinarily used for human habitation or for storage of property and is outside that building but is surrounded by a sufficient wall, fence or hedge that is continuous and has an entrance(s) either barred or capable of being D barred by a gate or other means (what is commonly referred to as a yard).

A brief look at case law authorities that have dealt with the definition of premises for the purposes of unlawful entry, would be salutary in unravelling this seeming confusion existent in some judicial officers of the lower courts. *In R v Piet M'tech* 1912 TPD 1132, a tent wagon used as a residence for E a person or his family was held to be a structure and therefore a dwelling within the meaning of the relevant statute for the purposes of an offence of housebreaking.

In *R v Makoelman* 1932EDL194 the accused was convicted of housebreaking with intent to steal and theft (our present day unlawful entry into premises). The evidence showed that the accused broke open a yard door (the equivalent F of a durawall gate) and stole a ladder kept in a cellar (an underground room ordinarily used for storage purposes especially for wine). It was not shown that the cellar door was locked or closed or even that it had a door. It was held that, as the evidence was consistent with the cellar having been entered through an open door, window or other aperture, or the ladder having projected G from the cellar and having been removed without entry into the cellar, and as the breaking into the yard was not housebreaking, the conviction should be altered to one of "not guilty of housebreaking; guilty of theft". Of pertinence to note from the case is that the breaking open of the yard door and entry into the yard itself, as well as into the cellar itself, without displacing any obstacle to facilitate the entry did not constitute housebreaking (unlawful H

Mutema J

A entry). By the same token, in the instant case, the opening of the sliding gate and the entry into the yard did not and cannot amount to unlawful entry into premises. At best, it is criminal trespass - simple and straightforward. In *R. v Lawrence* 1954 (2) SA 408 (C), breaking into a cabin of an officer on a ship in dock with intent to steal was held to be correctly designated as housebreaking (unlawful entry into premises). Ogilvie Thompson J, at 409F- B G held that the cabin of the ship broken into was ordinarily used for human habitation by the ship's second officer and hence the crime was correctly designated as housebreaking He relied on Gardiner & Lansdown *South African Criminal Law and Procedure* Vol 2 5 ed p 1553 where they state that to constitute the crime of housebreaking with intent to commit a crime, C "the premises broken into must be such as are, or might ordinarily be, used for human habitation or for the storage or housing of property of some kind".

In *S v Rayiti* 1984 (1) ZLR 269 (H) it was stated that the word "house", as applied to the crime of housebreaking, is a term of art covering premises or structures that are not houses in ordinary parlance. The test whether a structure or premises can be broken into is whether it is such as is, or might D ordinarily be, used for human habitation, or for the housing or storage of property of some kind. There must, in addition, be some degree of permanence about the purpose for which the structure is used. Items such as caravans and camping tents, which are specifically designed and intended for human habitation, would constitute "premises" even though, by their very nature, they are more likely than not to stand empty and unused or to be folded up E and not used for substantial periods.

Given the foregoing, it is as clear as day follows night that the mere opening of a sliding gate of a perimeter wall surrounding the yard of a dwelling premises and only entering that yard, as what happened *in casu,* can never legally found the crime of unlawful entry into premises as envisaged by s F 131 of the Criminal Law (Codification and Reform) Act. On the facts of the case, the competent charge should have been criminal trespass as defined in s 132(1)(a) of that Act, whose maximum sentence of a custodial term is imprisonment for a period not exceeding six months, not the eight months that was meted out.

G In the result, I am unable to confirm that the proceedings in this case are in accordance with true and substantial justice. I accordingly refuse my certificate. It is hoped that this judgment is brought to the urgent attention of the acting Chief Magistrate for circulation to all her magisterial stations H to avoid recurrence of similar errors.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/S v DUBE 2010 (2) ZLR 400 (H)

S v DUBE 2010 (2) ZLR 400 (H)

Citation	2010 (2) ZLR 400 (H)
Case No	Judgment No. HB-116-10
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	7 October 2010

Judgment 7 October 2010

Counsel Details not supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

Criminal law - *offences under Criminal Law Code - sexual offences - sexual intercourse with young person - charge must be one of rape where young female person is of or under the age of 12 years - age of young person - need to establish age accurately*

Headnote

The accused, allegedly aged 18 years, was charged with having extra-marital D sexual intercourse with a young person, in contravention of s 70(1)(a) of the Criminal Law Code [*Chapter 9:23*]. The age of the girl was said in the charge sheet to be 12 years, but no evidence of her age was led. The accused pleaded guilty but denied knowing her age. When the accused was questioned about his understanding of the essential elements of the offence, he did not admit knowing that she was a "young person" E as defined in the Code. Section 61 defines "young person" as a "boy or girl under the age of 16 years". No minimum age is provided. The scrutinising regional magistrate was of the view that, in the light of s 64(1) of the Code, the accused should have been charged with rape. This section provides that "A person accused of engaging in sexual F intercourse ... with a young person of or under the age of 12 years shall be charged with rape ... and not with sexual intercourse ... with a young person". The trial magistrate was of the view that s 70(4) of the Act was permissive in that it provides that rape is a competent charge for intercourse with a female person below the age of 12 years. Because the complainant was aged 12 years and not below the age of 12 years, G the magistrate considered that a charge under s 70(1) was competent.

Held, that it is always critical to determine the exact age of the complainant in cases involving the sexual abuse of children. This derives from the provisions of the Code which give rise to varying types of charges and the penalties to be meted out. What was placed before the court was patently incomplete, if not inaccurate, information. To say the H

A complainant was aged 12 years was inaccurate and problematic, as it was not clear whether she was celebrating her 12th birthday on the day of the offence, or had already attained that age or was in her 12th year. It was therefore necessary to ascertain the exact age by means of her birth certificate, or from medical evidence as to her probable age if the date of birth was not known. None of this was done. The same applied B to the age of the accused.

Held, further that the Code restates the common law position that young persons of and under the age of 12 are incapable of consenting to sexual intercourse. Offenders against this group should not be charged under s 70(1), which relates to sexual intercourse with a young person. A "young person" effectively is one aged 13 years or over but below 16 C years. Section 70(4) buttresses this position.

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 64(1), 64(2) & 70(1)(a)

Case information

D *Editor's note:* s 64(2) of the Criminal Law Code provides:

> "A person accused of engaging in sexual intercourse ... with a young person above the age of 12 years but of or below the age of 14 years shall be charged with rape ... and not with sexual intercourse ... with a

young person ... unless there is evidence that the young person ... was capable of giving consent to the sexual intercourse ... and gave his or her consent thereto".

E This subsection allows the prosecution to bring a charge other than rape, if there is evidence of consent, where the complainant is "above the age of 12 years but of or below the age of 14 years".

Section 70 provides:

"(1) Subject to subsection *(2)*, any person who -

(a) has extra-marital sexual intercourse with a young person; or

(b) commits upon a young person any act involving physical contact that would F be regarded by a reasonable person to be an indecent act; or

(c) solicits or entices a young person to have extra-marital sexual intercourse with him or her or to commit any act with him or her involving physical contact that would be regarded by a reasonable person to be an indecent act;

shall be guilty of sexual intercourse or performing an indecent act with a young person, as the case may be, and liable to a fine not exceeding level twelve or imprisonment for a period not exceeding ten years or both.

(2) It shall be no defence to a charge of sexual intercourse or performing an G indecent act with a young person to prove that he or she consented to such sexual intercourse or indecent act."

The exact wording of s 70(4) is: "For the avoidance of doubt... *the competent charge* against a person who has sexual intercourse with a female person below the age of twelve years shall be rape ... and not sexual intercourse with a young person"(my H emphasis).

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Mathonsi J

Judgment

Mathonsi J: This matter was referred to me by the scrutinising regional A magistrate who found himself unable to certify the proceedings as being in accordance with real and substantial justice for two reasons

The first reason is that the regional magistrate felt that the accused should have been charged with rape as provided for in s 64(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as opposed to being charged B with contravening s 70(1)(a) of the same Act.

The second reason is that the regional magistrate was of the view that the accused person had not admitted an essential element of the charge relating to the issue that the complainant was below the age of 16 years. In view of that, he strongly felt that the plea should have been altered to that of not guilty.

Defending his actions, the trial magistrate argued that there is a conflict C between s 64(1) and s 70(4)(a)(i) of the Criminal Law Code. He reasoned that while the former section brings, under the ambit of the crime of rape, sexual intercourse with a female *of or under* the age of 12 years, the latter section seems permissive in that it provides that rape is a competent charge for intercourse with a female person *below the age of 12 years.* The trial D magistrate felt he was therefore at liberty to proceed under s 70(1)(a) because the complainant was aged 12 years and not below the age of 12 years.

The scrutinising regional magistrate then sought assistance in resolving these issues and referred the matter to me.

The facts are that the accused is aged 18 years and he was charged with E having sexual intercourse with a young person in violation of s 70(1)(a) of the Criminal Law Code. The allegations are that on 16 December 2009, the accused, who is a cousin of the complainant, had visited the complainant's home at Malibeng village in Beitbridge area overnight. He had sexual intercourse with the complainant once and left.

Subsequent to that, it was discovered that the complainant had fallen pregnant F and this led to the arrest of the accused, who was charged, as already pointed out. At the appearance of the accused before the trial magistrate at Beitbridge magistrates court on 17 May 2010, neither the birth certificate of the complainant nor that of the accused were produced. No evidence at all was led as to the ages of either the accused or the complainant. Indeed, G even the facts placed before the

court did not contain the date of birth of the complainant. The closest the court came to knowing her age is from the charge sheet which reads in part as follows:

> "Contravening section 70(1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] 'Having sexual intercourse with a young person' In that on the 16th day of December 2009 and at Malibeng area, Beitbridge, Shakeman H

2010 (2) ZLR p403

Mathonsi J

> A Dube unlawfully had extra-marital sexual intercourse with Lungisani Ndlovu a young female person aged twelve years."

How it was alleged that the complainant is aged 12 years is not apparent from the papers and no inquiry was made into that. The accused pleaded guilty to the charge, but in doing so he qualified his plea by saying he "did not know her age." This did not deter the trial magistrate from finding him B guilty as charged.

In going through the essential elements of the offence with the accused person, the dialogue between the magistrate and the accused went like this;

> "Facts read and understood. Annexure 'A'
>
> Q. Are they true and correct? C
>
> A. Yes
>
> Q. Anything to add or subtract
>
> A. When I committed the offence, I did not set out to do it. I had paid them a visit and whilst whiling up [*sic*] time she approached me and started caressing me holding my private parts. I remonstrated and asked why she was doing that and she told me she was more experienced and there was nothing she did not know. She let go of me and I was given a room to put D up at her homestead. Whilst asleep she came to the bedroom naked without anything in her under garments. I asked her to go away and (she) told me not to panic and not to be afraid. I was ... (illegible)... and I knew she had a lot of boyfriends. I had sex with her once and I went back home. She was not a virgin ...
>
> Her physical appearance she seemed mature.
>
> E **Essential Elements**
>
> Q. Correct you were at Malibeng Area, Beitbridge on the 16th December 2009.
>
> A. Yes
>
> Q. Whilst there you had sexual intercourse with Lungisani Ndlovu.
>
> A. Yes
>
> Q. You knew she was a juvenile or minor below 16 years. F
>
> A. I *was not aware, I saw her body.*
>
> Q. She is your relative and you visit each other.
>
> A. Yes
>
> Q. You knew she was attending primary school
>
> A. Yes
>
> Q. What grade G
>
> A. Seven
>
> Q. For how long have you known her?
>
> A. I saw her grow up from childhood.
>
> Q. You knew she was younger than you.
>
> A. Yes
>
> Q. By how many years?
>
> A. I am not sure H
>
> Q. When did she start school?

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Mathonsi J

> A. I do not remember but I was in grade seven when she started school. A
>
> Q. How old are you?
>
> A. I am 18 years old.

Q. So you see she is a young person.
A. I skipped grade six so I should have been in grade six. I however understand the offence.
Q. Any right to do what you did?
A. No B
Q. Is your plea of guilty an admission of the charge, facts and ... (illegible)
A. Yes
Q. Any defence to offer?
A. No V: Guilty as pleaded."

It is clear from this dialogue that the accused did not admit knowledge C that the complainant was a "young person" as defined in the Criminal Law Code. In fact, the trial magistrate resorted to cross-examining the accused, who clearly denied knowledge of the age of the complainant. This was an unrepresented accused person and it was the duty of the magistrate to assist him. The moment the accused challenged the age of the complainant (in fact, D he said, the complainant "seemed mature" from her physical appearance), the magistrate should have altered the plea to one of not guilty.

Judicial officers are obliged to ensure that an unrepresented accused receives a fair trial and to ensuring that justice is done. Even where the judicial officer does not believe the defence proffered, he or she must still allow the accused E person to ventilate it and not to play big brother over the accused person. The court must always satisfy itself that the admission of guilt is genuine, as there are dangers of convicting on a guilty plea. It is simply untested. See *S v Chiredzero* HH-14-88. The magistrate therefore erred in convicting the accused on the basis of a plea which the accused had qualified.

Looking at the charge itself, I have already stated that no investigation F whatsoever was conducted on the exact age of the complainant. The magistrate merely relied on the charge sheet, which was not explicit in its wording, only alleging that the complainant was 12 years old. It is always critical to determine the exact age of the complainant in cases involving the sexual abuse of children. This derives from the intricate provisions of the G Criminal Law Code which give rise to varying types of charges and indeed penalties to be meted out.

What was placed before the court was patently incomplete, if not inaccurate, information. To say the complainant was aged 12 years was as inaccurate as it was problematic. Just what does it mean? Could it be that she was celebrating her 12th birthday on the day of the offence, or had already attained that age H

Mathonsi J

A or was in her 12th year? It was therefore necessary to ascertain the exact age by means of her birth certificate and/or medical evidence as to her probable age, if the date of birth was not known. None of this was done.

The same goes for the accused person. The magistrate contented himself with accepting his evidence that he was 18 years old. It was necessary to B clarify his exact age as it would have gone a long way in assisting the court in assessing sentence.

Section 61, which is the definition section of Part III of the Criminal Law Code defines "young person" as "a boy or girl under the age of 16 years". It therefore puts a lid on what a young person is, without specifically providing a minimum age. For one to determine how to apply the provisions of ss 64 C and 70, it is imperative to conduct an investigation of what the intention of the legislature was.

Section 64(1) provides:

> "A person accused of engaging in sexual intercourse, anal sexual intercourse or other sexual conduct with *a young person of* or under the age of twelve years *shall* be charged with rape, aggravated indecent assault or indecent assault, as D the case may be, and not with sexual intercourse or performing an indecent act with a young person or sodomy"(my emphasis)

This provision is peremptory by virtue of the use of the word "shall" in the section and means that, because young persons of or below the age of 12 years are incapable in law of consenting to sexual intercourse, the accused E must be charged with rape and not under s 70(1), which relates to sexual intercourse with a young person.

It was the intention of the legislature to give effect to that common law position and it specifically provide that both young persons under and aged 12 years are covered by that section. That position is buttressed by an examination F of s 70(4)(a)(i) of the Criminal Law Code which provides:

> "For the avoidance of doubt it is declared that the competent charge against a person who has sexual intercourse with a female person *below* the age of twelve years shall be rape."

That whole section deals with offences against "young persons". I have already stated that s 61 limits the definition of young person to 16 years, G while not setting a minimum cut off. For it to be understood, it must be read in conjunction with s 64(1), which includes those aged 12 in the group of those incapable of consenting, to the extent that an offender against that group should be charged with rape.

It must follow, therefore, that for all intents and purposes, those falling under the G definition of "young persons" are those of 13 years and below 16 years.

Mathonsi J

Any other construction of these provisions will not effectively address the A mischief the legislature intended to address, namely, to punish attackers of young persons of and below the age of 12 severely.

In any event, if the legislature intended to let off those who have sexual intercourse with young persons aged 12, it would have specifically said so. To the extent that the wording of s 70(4)(a)(i) is silent on those aged 12, B limiting itself to those below the age of 12 must be understood to mean that it does not oust the specific provisions of s 64(1) which includes them. To hold otherwise would lead to an absurdity.

I therefore come to the inescapable conclusion that the trial magistrate should not have allowed the charged preferred against the accused to stand, as he should have been charged with rape. C

The accused was sentenced to perform 210 hours of community service which commenced on 21 May 2010 and was completed within 6 weeks from that date. He has therefore served his sentence. Nothing can be done now to remedy the situation.

For these reasons I refuse to certify the proceedings as being in accordance D with real and substantial justice and withhold the certificate. Herald

Ndou J agrees..

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MABAIRE v JAILOSI & ANOR 2010 (2) ZLR 407 (H)

Citation	2010 (2) ZLR 407 (H)
Case No	Judgment No. HH-228-10
Court	High Court, Harare
Judge	Kudya J
Heard	21 July 2010
Judgment	13 October 2010

Counsel *B Diza*, for the plaintiff
Ms *S Kundai*, for the defendants

Case Type Civil trial

Annotations No case annotations to date

Flynote

Damages - *assessment - loss of support - how should be calculated - what evidence is required - how resulting sum should be adjusted*

Headnote

D Damages for loss of support constitute general damages, and as such, are calculated as at the date of judgment. In most cases, the plaintiff relies either on medical or actuarial evidence; or on the general evidence of the deceased's earning capacity prior to his or her death; or on both. Where there is proof of loss of support, even in the face of inadequate evidence, the court is enjoined "to pluck a figure from the air". Judgment E will, however, be denied to a plaintiff who through lack of diligence fails to produce evidence that would have been available to him or her. The total amount of loss of support that is arrived at may be subjected to two discounts. The first of these discounts caters for the capitalization rate of the award. This is often equivalent to the rate of interest that the plaintiff would earn on investing the award. The second discount caters F for contingencies, such as errors in calculations, taxation and other unforeseen events. While the level of maintenance that the deceased used to provide to his family is important, the court cannot use the expenses incurred by the plaintiff to calculate the loss of support without reference to the deceased's earning capacity. It is a basic fact of life that expenses G may often be much higher than a breadwinner's earning capacity, so to use the expenses to calculate the estimated loss of support may distort the award for loss of support to the prejudice of the defendant and would amount to an improper exercise of the court's discretion.

Cases referred to

H *Biti v Minister of State Security* 1999 (1) ZLR 165 (S)

Cattle Breeders Farm (Pvt) Ltd v Veldman 1973 (2) RLR 261 (A); 1974 (1) SA 169 (RA) A

Ebrahim v Pittman NO 1995 (1) ZLR 176 (H)

Graaff v Speedy Tpt 1944 WLD 236

Hulley v Cox 1923 AD 234

Jameson's Minors v Central South African Railways 1908 TS 575 B

Lebona v President Versekeringsmaatskappy Bpk 1991 (3) SA 395 (W)

Legal Ins Co Ltd v Botes 1963 (1) SA 608 (A)

Mavheya v Mutangiri & Ors 1997 (2) ZLR 462 (H)

Min of Defence & Anor v Jackson 1990 (2) ZLR 1 (S)

Nicols v Pearl General Ins Co & Anor 1994 (1) ZLR 193 (H)

Rusike v Tenda Tpt (Pvt) Ltd & Anor 1997 (1) ZLR 495 (H) C

Santam Ins Co Ltd v Paget (1) 1981 ZLR 73 (A)

Venture Capital Co of Zimbabwe Ltd v Chirovero Invstms (Pvt) Ltd 2000 (2) ZLR 30 (H)

Case information

B Diza, for the plaintiff D

Ms *SKundai,* for the defendants

Judgment

Kudya J: Liability in this matter is admitted. The dispute concerns the measure of damages that is due to the plaintiff. On 1 June 2010 the parties filed a stated case, which reads:

1. It is common cause between the parties that on 15 November 2006 at E No. 17 418 Flanagan Road Hillside Harare, the first defendant, who was driving in the course and scope of his employment, drove a Mazda B2500 registration number R58PY onto the plaintiff's property.
2. It is common cause that the plaintiff's husband was standing just outside the gate of his property when the first defendant veered off the road and F rammed into him causing his death instantly.
3. It is common cause that as a result of the accident the electric gate, the intercom device and the adjacent wall were extensively damaged.
4. It is common cause that the first and second defendants are admitting liability with regards to negligently causing the death of the plaintiff's G husband who was the breadwinner for his family.
7. The issue which the parties have failed to agree on is with regards to the computation of damages due to the plaintiff.
8. In the premises, the Honourable Court is requested to adjudicate on the question of the amount of damages due and payable to the plaintiff as H

Kudya J

A against the defendants and to make such order as to costs as seems just under the circumstances.

In her summons issued on 5 November 2009, the plaintiff sought damages in the sum of US$19 102 for the cost of repairing the electric gate, intercom and wall; US$144 000 for her personal loss of support; US$66 000 for the B loss of support of her three minor children with the deceased; interest on these amounts at the rate of 30 per cent per annum from the date of judgment to the date of payment and costs of suit. At the commencement of trial the plaintiff applied to amend her summons by the substitution of US$2 970 for US$19 102 for the cost of repairing the electric gate, intercom and wall and 5 per cent for 30 per cent for the interest sought. The amendments were C granted by consent.

In her declaration she placed the retirement age of the deceased had he lived at 65. As he died at 50, her claim traverses a period of 15 years. She further averred that the deceased spent US$800 per month in maintaining her and US$500 per month in maintaining each child. She then multiplied these D amounts by the number of months it would take him to support each child to its majority year and for 15 years for her to arrive at the totals she sought.

The evidence

The plaintiff gave evidence. She was the sole witness in her case. She produced eight documentary exhibits. The defendants opened and closed E their case without calling any evidence. The measure of damages will thus be determined on the basis of the testimony of the plaintiff that survived cross-examination.

The plaintiff was married to the deceased by civil rites. The marriage was blessed with four children, namely, Tsitsi, who at the time that her mother testified, was in her final year at the Midlands State University, Rumbidzai F (born 29 August 1991) who was in Form IV at a boarding school in Harare, and the twins Faith and Anesu (born 7 April 1995) who were in Form III at a boarding school in Chiweshe. The deceased was born on 6 September 1956 and was 50 years old when he met his death. He was a businessman who ran his own construction company and was a farmer growing tobacco and G paprika and rearing poultry and cattle. She is a school teacher at a primary school in Harare. She produced her pay slip as exh 8.

Loss of support for the children

She testified that the tuition for the Form IV child was US$1 090 per term. She produced exh 1, the school fees invoice for Rumbidzai, a boarder at H Hillside High School. The invoice indicates that tuition and boarding fees

Kudya J

are in the sum of US$950 while uniforms cost US$150. The invoice for the A twins, exh 2, shows that the school fees for each child was pegged in the sum of US$295 a term. She produced exh 3, a quotation from a Harare- based school uniform stockist dated 11 June 2010 indicating the cost of the school requirements of each girl of US$569 and for the boy of US$617. She indicated that she spends US$400 per month on her food and tuck for B the school children; she spends US$40 every term on fuel in visiting the children at school once a term. Her other expenses are US$80 a month on the maid, US$200 a month on fuel, US$70 a month for the telephone, and US$400 a month on rentals inclusive of water and electricity. Her children used to go on holiday twice a year during the April and December school holidays. She would need US$3 000 a year for the local holidays in Kariba, C Nyanga and Victoria Falls for the children.

Repair to gate, intercom and wall

The repairs were done in 2006 by a sole contractor. She did not keep the invoices of the cost of repairs. She failed to lead his evidence because she could not locate him. She bought a new gate. She sourced for quotations D from suppliers and fitters who are in the business of manufacturing gates, selling intercoms and repairing walls similar to her own. She produced these quotations as exh 4. Raymond Alarms and Gates quoted an amount of US$2 505 on 14 June 2010; Aderan Enterprises (Pvt) Ltd quoted an amount of US$2 280 on 15 June 2010 while Fencerite Services (Pvt) Ltd provided her a quotation of US$2 970 on 16 June 2010. Construction business D

She stated that her late husband was a builder by profession. He would buy undeveloped stands and build and then dispose of the developed property. She produced three agreements of sale of the properties that he developed and sold as exh 5. These were the property in Ruwa that was sold for a cash sum of ZW$66 000 on 17 November 2000; the property in Katanga E in Norton that was sold for the cash sum of ZW$700 000 in March 2001 and the property in Good Hope, Marlborough, Harare that was sold for ZW$4 200 000, revalued, on 24 August 2006. She estimated, with great difficulty, the profit margin from the construction business at 25 per cent.

Farming

He was a commercial farmer. He commenced to grow tobacco in 2003 at the G family farm in Chivhu. He grew tobacco on 3 hectares, had three permanent workers but would hire seasonal labour on a needs basis. She produced the fourteen paged Zimbabwe Industry Tobacco Auction Centre (Zitac) sales statements of the tobacco deliveries made by the deceased as exh 6. The long and short of exh 6 was that in the 2005 selling season the deceased delivered H

Kudya J

A a total of 23 bales weighing 1 430 kgs sold at an average of US$0.7152 per kg. It also shows that in the 2006 selling season the deceased sold a total of 10 bales with a mass of 543 kgs at an average of US$0.98 per kg. The farm was, however, repossessed by her mother-in-law after her husband's death

He was also a poultry farmer. He would order 500 chicks every month. He B reared 300 chicks at the farm and 200 at his Harare home. He would sell the grown broilers after 7 weeks to outlets in Harare. He sold an average of 400 birds a month. She produced three purchase orders from three customers who purchased the broilers from the deceased as exh 7. These were a Farm and City cash receipt dated 1 June 2006 for the purchase of 300 broilers; a purchase order by Metro Café dated 24 July 2006 for 91 kilograms of C chicken and another purchase order from Four Girls Enterprises of 1 August 2006 for 28 birds.

After her husband's death she carried on with the poultry project, but at a reduced rate. She rears both layers and broilers. She multitasks as a cross- border trader and conducts extra lessons and organizes round tables with D other women to augment her salary. She moved out of the

matrimonial house in January 2010 and rented a smaller one in order to benefit from the rental differentials between the two properties. She rents out the matrimonial property for US$1 000 and rents a much smaller property for US$400.

She was cross-examined. She revealed that the construction company was a registered private company. Her husband was the driving force behind it. She E was a co-director and secretary of the company. It folded on his demise. She did not have any documentation to show the levels of income and expenditure of the company. She averred that her in-laws forcibly dispossessed her of the company documents on the demise of her husband. Her husband earned a salary from the company but she could not recall the amount. During his F lifetime, he only sold the three houses whose agreements she produced. The proceeds were used to support the family and to purchase farming equipment. These were repossessed by her mother-in-law. She did not have documents to indicate the viability of the farming activities. She believed her standard of living testified to the high net worth of her late husband.

The poultry venture was viable as he used to sell 400 birds every month. She G indicated that the present cost of rearing a bird was US$2.50 and she sold each bird at US$5. She has continued to rear 200 birds at her new home. She sells about 150 birds every month and earns a profit of US$375 every month. She had a car which was fueled and serviced by the construction company. The daily home expenses were all charged to the company. She needed H US$500 every year to maintain the matrimonial home. She acknowledged

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Kudya J

her failure to produce evidence on the full extent of her husband's annual A income during his lifetime.

The Law

The law on the computation of damages is set out in a plethora of cases and in both ancient and modern text books. I was referred to some of the cases and text book writers by both counsel. Mr *Diza,* for the plaintiff, referred B

to *Lebona v President Versekeringsmaatskappy Bpk* 1991 (3) SA 395 (W); *Nicols v Pearl General Ins Co & Anor* 1994 (1) ZLR 193 (H); *Hulley v Cox* 1923 AD 234; *Ebrahim v Pittman NO* 1995 (1) ZLR 176 (H); *Cattle Breeders Farm (Pvt) Ltd v Veldman 1974* (1) SA 169 (RA). Ms *Kundai,* for the defendants, referred to *The Quantum of Damages in Bodily and Fatal Injury Cases* by Corbett, Buchanan and Gauntlett 3 ed; *Jameson's Minors* C *v Central South African Railways* 1908 TS 575 *and Hulley v Cox, supra.*

It is well to remember that damages for loss of support constitute general damages, and as such, are calculated as at the date of judgment. See *Biti v Minister of State Security* 1999 (1) ZLR 165 (S) at 173 A, *Graaff v Speedy Transport* 1944 WLD 236 at 238-9 and Corbett *et al, supra* at pp 96 and 97. D The *locus classicus* case on the point is *Jameson's Minors v Central South African Railways, supra.* At 602 Innes CJ stated that:

> "There only remains the question of damages, and it is one of the most difficult points in this case. The general principles which should guide us are plain. I need only refer to Voet, who lays down the rule very clearly. He says (9.2.11):
>
> > 'According to the modern practice the scope of this action' - that is, an E action by the widow or children of a man who has been killed through the default of another - 'has been extended, in as far as an action is now allowed to the wife and children of any husband or father killed through another's default, for such damages as the equity of the judge will determine, account being taken of the maintenance which the deceased would have been able to supply, and had usually supplied, out of his labour, to the wife F and children, or to other near relatives'.
>
> I do not think Voet intended to restrict, or that we should restrict, the word 'maintenance' - *victus*- to the supply of mere necessaries of life. It must include all the material advantages, conveniences, comfort and support, which the father would have afforded the claimants, but for his death. The language used shows that the court must pay regard to what the deceased had been used to supply in the G past - that is, to the station in life of the parties, and the comforts, conveniences and advantages to which they had been accustomed. Only actual material loss can be taken into account in an action of this kind. The court is not justified in awarding compensation for a shock to the feelings, or in granting relief on any sentimental ground. But clearly the plaintiffs are entitled to compensation for the pecuniary loss involved in a reduced

income, and a restricted provision for the supply of what they have been accustomed to, and could reasonably have H

2010 (2) ZLR p413

Kudya J

A anticipated that the deceased man would continue to supply. Our law lays down no hard and fast rule for such a calculation. It leaves a large discretion to the judge to award what under the circumstances he considers right."

Again, in *Hulley v Cox, supra* at pp 243-4 the learned Chief Justice affirmed these views when he stated that:

"Some authorities consider that the calculation should be based upon the principle B of an annuity (see Grotius 3.33.2; Matthaeus De *Criminibus 48.5.11).* Voet, on the other hand, favours a more general estimate. Such damages, he thinks, should be awarded as the sense of equity of the judge may determine, account being taken of the maintenance which the deceased would have been able to afford and had usually afforded to his wife and children *(Commentarius ad Pandectas* 9.2.11). That would seem the preferable view as giving a greater latitude to deal C with varying circumstances. It is at any rate desirable to test the result of an actuarial calculation by a consideration of the general equities of the case."

And yet again Holmes JA crystallized these overall principles in *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 614E-F thus:

"The remedy has continued its evolution in South Africa - particularly during the D course of this century - through judicial pronouncements, including judgments of this court, and it has kept abreast of the times in regard to such matters as benefits from insurance policies. The remedy relates to material loss 'caused to the dependants of the deceased man by his death'. It aims at placing them in as good a position, as regards maintenance, as they would have been in if the deceased had not been killed. To this end, material losses as well as benefits and prospects must be considered. The remedy has been described as anomalous, E peculiar, and *sui generis-but* it is effective. In assessing the compensation the trial judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations. In its present form, robust and practical, the remedy illustrates the growth and flexibility of the system of law, basically Roman-Dutch, which we have as a heritage in this country."

F These views have been followed and applied in a number of decisions in both Zimbabwe and South Africa. In fact, the practical steps in estimating the damages for loss of support that are set out by Corbett *et al op cit* at pp 84 to 96 affirm and are largely based on these sentiments. In all the decided cases on loss of support that I have consulted, the plaintiffs either relied on medical or actuarial evidence; or on the general evidence of the deceased's G earning capacity prior to his or her death or on both. In this jurisdiction actuarial evidence was adduced in *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S) at 12E. *In Rusike v Tenda Transport (Pvt) Ltd & Anor* 1997 (1) ZLR 495 (H) Bartlett J referred to the actuarial method and the future earning capacity with contingencies discounted method as some of H the ways that may be used to establish damages for loss of support.

2010 (2) ZLR p414

Kudya J

It is clear that where there is proof of loss of support even in the face of A inadequate evidence the court is enjoined "to pluck a figure from the air". See Fieldsend CJ in *Santam Ins Co Ltd v Paget* (1) 1981ZLR73 (A) referred to *in Rusike's* case, *supra,* at 500B-C. In *Jackson's* case Gubbay JA, as he then was, confirmed at 11H-12A that there are cases "where it was incumbent upon the trial court to 'pluck a figure out of the air' or 'plunge blindly into the unknown.'" The learned Judge of Appeal proceeded at 13G and 15B B to make "arbitrary" assessments. However, as was stated by Bartlett J in *Ebrahim v Pittman NO supra* at 187F and 188C and by Gillespie J in *Mavheya v Mutangiri & Ors* 1997 (2) ZLR 462 (H) at 469F and *Venture Capital Co of Zimbabwe Ltd v Chirovero Investments (Pvt) Ltd* 2000 (2) ZLR 30 (H) at 40 A-C, judgment will be denied to a plaintiff who through C lack of diligence fails to produce evidence that would have been available to him or her.

The total amount of loss of support that is arrived at may be subjected to two discounts. The first of these discounts caters for the capitalization rate of the award. This is often equivalent to the rate of interest that the plaintiff would earn on investing the award. In *Jackson's* case, *supra,* it was pegged D at 8 per cent. At the moment the rate of interest in Zimbabwe differs from one financial institution to the other. Real interest on savings is in negative territory as it is often swallowed up by bank

charges. In the present matter, no purpose would be served in discounting the judgment debt by the rate of interest that the plaintiff would earn were she to invest it. The second E discount caters for contingencies. The basis was set out in *Jackson's* case at 17F. The point is, however, made in that case that the fortunes of life are not always adverse but may turn out to be favourable. In *Jackson's* case the contingency allowance was set at 20 per cent. This caters for errors in calculations, taxation and other unforeseen events such as weather disparities, the absence of inputs, the shortage of chicks, the outbreak of diseases that F may have adversely impacted on the deceased's ability to farm and rear chicken had he lived.

Quantum of damages

Mr *Diza* urged me to award damages for loss of support based solely on the proven expenses of the plaintiff. He relied on *Lebona v President* G *Versekeringsmaatskappy Bpk* 1991 (3) SA 395 (W). The facts in that case were that the plaintiff, the widow of a man who had been her partner in a customary union, claimed damages for loss of support after her husband's death, which had been caused by the negligence of a driver insured by the respondent. The dispute involved *inter alia* the question of whether the deceased had been under a legal duty to maintain the plaintiff. It appeared H

Kudya J

A from the evidence that the deceased had been a hawker who had practised his trade without the necessary licence. Flemming J held that in resolving the above dispute, two questions had to be answered: (a) whether a maintenance court would have held that the deceased had a duty to maintain the plaintiff and (b) whether the said court would in the circumstances have made an order for maintenance. He further held that as the deceased had earned his B income in an unlawful manner; (a) had to be answered not with reference to the deceased's earning capacity but with reference to his actual income. It seems to me that that case does not support the submission made by Mr *Diza,* for Flemming J went further to determine the earning capacity of the deceased in a bid to estimate the loss of support. In my view, while the level of maintenance that the deceased used to give to his widow and children C is important, the court cannot use the expenses incurred by the plaintiff to calculate the loss of support without reference to the deceased's earning capacity. This is because it is a basic fact of life that expenses may often be much higher than a breadwinner's earning capacity. Thus to use the expenses to calculate the estimated loss of support may distort the award for loss of D support to the prejudice of the defendant and in, my view, would amount to an improper exercise of the court's discretion.

Mr *Diza* conceded, on the authority *of Ebrahim v Pittman NO* 1995 (1) ZLR 176 (H) at 187B-188C, that the failure by the plaintiff to adduce tax returns and substantial proof of earnings of the deceased was a material flaw in the plaintiff's claim. He, however, submitted that the plaintiff had led sufficient E evidence upon which the court could assess her damages.

Ms *Kundai,* for the defendants, conceded that sufficient evidence had been led by the plaintiff to establish the loss of support to the children for their educational requirements and upkeep (school fees, uniforms and food). The educational requirements for the children are set out in exh 4. She contended F that the plaintiff had failed to prove that the cost of taking the children on holiday twice a year to the country's resorts in Kariba, Nyanga and Victoria Falls would be approximately US$3 000 a year. I did not hear her challenge the plaintiff's assertion that the children used to go on such holidays when their father was alive. The plaintiff indicated that they would drive to and from and spend three nights at these resorts. She did not produce any quotations from G the service providers from these resorts to assist the court in computing an estimate of such expenses. This was evidence that she could have produced with a little diligence on her part.

It is apparent that the plaintiff was supported by her husband. Her salary as a teacher would have been inadequate to cater for the high standard of H living she was accustomed to. She lived in an up-market accommodation

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Kudya J

which had a three-bedroom guest wing and which property she is renting out A for US$1 000. She lives in a smaller property for which she pays US$400 inclusive of water and electricity. She makes

a profit of approximately US$600 on her rental account. This profit, in my view, would be adequate to cater for the insurance and maintenance costs of the matrimonial property and the municipal rates and taxes that are borne by the owner. I will not discount from B the final award that I will grant her any gain she makes on the rental account because her decision to move to a cheaper accommodation was triggered by her failure to meet the expenses of maintaining the matrimonial home such as the municipal and electricity charges that were levied in foreign currency. She lost the prestige, conveniences and comfort associated with residing in her large house. The gain she makes compensates for the fall in her standard C of living occasioned by the death of her husband.

Her evidence that she used to derive benefit from the sale of 400 chickens but presently benefits from the sale of 150 chickens after the repossession of the farm by her mother-in-law was not challenged. Her loss of income from the loss of 350 chickens at a profit margin of US$2.50 a bird amounts to US$875.00 a month. I would have to discount availability of chicks and D other vicissitudes that could possibly affect the rearing of chickens and would reduce the expected profit to approximately US$600 a month. The material loss over a 15-year period would be approximately US$108 000.

The loss of the farm affected the tobacco income. The average mass sold was approximately 1 000 kg a year. The price would depend on the quality. E It could rise to as much as US$4 per kg in the market. It would be fair to estimate that he would have produced tobacco worth a dollar per kilogram. He would have earned a gross income equivalent to US$1 000 a year from the sale of tobacco. The plaintif did not lead any evidence on the cost of producing this amount of tobacco. I have decided, as I am permitted to do, to pluck a figure out of the air of the cost of producing the tobacco of 50 per F centum. Over 15 years she would have lost US$7 500 from growing tobacco.

She lost income from the cessation of the development of immovable property. It does not appear that he operated a company, so the principle enunciated in *Cattle Breeders Farm (Pvt) Ltd v Veldman* 1973 (2) RLR 261 (A); 1974 (1) SA 169 (RA) that should be regarded as its *alter ego* would G not apply. The properties were not sold in the name of a company. One was sold in the deceased's name and the other two in both the deceased and the plaintiff's names. The plaintiff did not adduce evidence on the costs incurred in developing the properties. She plucked from the air a profit margin of 25 per centum. I am prepared to accept it. The first property that he developed and disposed of was the Ruwa property. The agreement of sale H

Kudya J

A indicates that it was sold on 17 November 2000 for a cash sum of ZW$66 000 in local currency. At the time the official exchange rate of US$1 was ZW$38. The deceased grossed in Zimbabwe dollars the equivalent of US$1 736.84. The second property, the Katanga property, was sold in March 2001 for ZW$700 000. At that time the official exchange rate of the Zimbabwe B dollar to the United States dollar was 55:1. The amount was equivalent to US$12 727.27. The last property to be sold was the Marlborough property. It was sold on 25 August 2006 for the sum of ZW$4 200 000, revalued. The sale took place after the first revaluation of the local currency of 1 August 2006 which saw the removal of the three zeroes from the Zimbabwe dollar. After the revaluation, in August 2006 the Zimbabwe dollar was pegged to C the United States dollar at the rate of $250 revalued to US$1. The deceased received the equivalent of US$16 800.

These calculations reveal that over a period of six years the deceased received a gross sum equivalent to US$31 265. I have accepted that he made a profit of at least 25 per centum from the gross receipts; which was equivalent to D US$7 816.25. His average profit over the six year period would have been equivalent to US$1 302.71. This would translate to the sum of US$19 540.65 over the fifteen years of active life that still awaited him. I would add the prospective proceeds from the tobacco crop of US$7 500 and the loss of the chickens sold of US$108 000 to this figure and arrive at a total of US$ E 135 040.65. I would round it off to approximately US$135 000. In my view, this would have been the amount which would have been equivalent to material loss suffered by the plaintiff from the premature death of her husband at the hands of the defendants.

I do not in the exercise of my discretion, for reasons already advanced above intend to discount for any capitalization of this amount. I would, however, F in the light of the sentiments expressed in the *Jackson* case, discount for contingencies at the rate of 20 per centum. This would leave an amount for loss of support for the plaintiff and her children of US$ 108 000.

The claim for the cost of repairs for the gate, intercom and wall was reduced to US$2 970. The lowest quotation that was supplied was in the sum of G US$2 280. By the time the plaintiff issued summons, the gate, intercom and wall had long been repaired in Zimbabwean dollars. She did not produce the cost of such repairs. It is not possible in the absence of that evidence to determine the value of the repairs at the time in United States dollars. The plaintiff has failed to prove the measure of her damages for these repairs. H I would grant the defendants absolution from the instance on this claim.

Kudya J

Costs are always in the discretion of the court. The plaintiff has succeeded A in receiving an award of damages for loss of support. She is entitled to her costs of suit.

Disposition

Accordingly, it is ordered that the defendants shall pay to the plaintiff, jointly and severally, the one paying the other to be absolved: B

(a) The sum of US$108 000 together with interest thereon at the rate of 5 per cent per annum from the date of judgment to the date of payment in full.

(b) Costs of suit.

Musunga & Associates, plaintiff's legal practitioners C

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

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Source:
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AGRICULTURAL BANK OF ZIMBABWE LTD v NICKSTATE Investments (Pvt) Ltd & Ors 2010 (2) ZLR 419 (H)

Citation	2010 (2) ZLR 419 (H)
Case No	Judgment No. HH-231-10
Court	High Court, Harare
Judge	Gowora J
Heard	13 May 20101; 9 May 2010; 20 May2010; 19 July 2010; 23 July 2010; 23 July 2010
Judgment	20 October 2010
Counsel	*J Dondo*, for the plaintiff *M Kamudefivere*, for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Company - *corporate veil - lifting of- when permissible - company a shell controlled entirely by two persons for their own benefit - court entitled to lift veil and enter judgment against them*

D **Contract** - *breach - remedies - specific performance - innocent party's right to elect specific performance in lieu of damages - compensation payable if guilty party fails to perform - value fixed as at date of trial - assessment of value if contracted item no longer available*

Practice and procedure -*pleadings - amendment of - procedure to be* E *adopted - need to make written application to court*

Headnote

A registered company is a legal *persona* in its own right and endowed with its own separate legal *persona* which is distinct from its shareholders. However, in certain exceptional circumstances, where the company is controlled in terms of activities and decisions by another person, the F courts will allow the corporate veil to be lifted to reveal the real person behind the company. When the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association. Thus, where there has been fraudulent or improper use of a company a court is entitled to disregard the separate corporate personality of a company and pierce the G veil. In a situation where the company was the vehicle through which the directors acquired property to enhance their estate, it would be just and proper to order that the corporate veil be lifted and judgment entered against both the company and its directors.

Where there has been a breach of contract, the innocent party has a choice H of claiming for specific performance or claiming a sum of money *(ad*

pecuniam solvendam) as a remedy. Where a purchaser claims specific A performance in respect of the item contracted for, he chooses not to crystallise his claim. By making this choice, he shows a willingness to treat the obligation by the seller as still continuing, with the value the item may have at the date of trial. Where the court awards specific performance, with an order of damages failing delivery, the compensation B is fixed in relation to the value of the item at the date of trial. If the item is not longer available - for example, if it is no longer in production - the value of an equivalent item may be used to assess what should be paid. Pleadings can be amended at any time before judgment is issued. The courts will grant an amendment to pleadings unless the application to amend is *mala fide* and provided the amendment should not be seen to cause C prejudice to the other litigant which cannot be cured by an order of costs necessitated by the need to further postpone the matter. The overriding consideration is that the parties should be, so far as is possible, able to place all the issues in contention between them before the court and enable the court to ventilate all aspects of the dispute between the parties. The procedure is not specifically laid down in the rules of court, but the D practice is that an application has to be made to court for the amendment to be granted, the procedure being governed by r 226 of the High Court Rules 1971. An amendment made other than by a written application is irregular, though in appropriate circumstances the irregularity may be condoned under r 4C. E

Legislation considered

High Court Rules 1971 (RGN1074 of 1971), rr4C, 132, 143, 151 & 226

Cases referred to

Avery v Bowden (1856) 26 LJ QB 3; 119 ER 1119 F

Bowman v Stanford 1950 (2) SA 210 (D)

Bray & Edwards v Rhodesia Consol Ltd 1911 SR 60

Gering v Gering & Anor 1974 (3) SA 358 (W)

Lategan & Anor NNO v Boyes & Anor 1980 (4) SA 191 (T)

Radiotronics (Pty) Ltd v Scott Lindberg & Co Ltd 1951 (1) SA 312 (C) G

Salomon v Salomon & Co [1897] AC 22

Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A)

UDC Ltd v Shamva Flora (Pvt) Ltd 2000 (2) ZLR 210 (H)

Wallersteiner v Moir (No 1) [1974] 3 All ER 217 (CA)

ZFC v Taylor 1999 (1) ZLR 308 (H) H

Case information A

J Dondo, for the plaintiff

M Kamude fivere, for the defendants

Judgment

Gowora J: At the commencement of the trial, the plaintiff sought an amendment to its claim by the deletion of the amounts of $14 800 000 000 B and $660 000 000 000 and their substitution with the amounts of US$22 560 and US$ 1 015 470 respectively, the first amount being the replacement cost of one vehicle and the second amount being the global sum for forty five brand new trucks. I granted the application to amend in the face of opposition from Mr *Kamudefwere* and indicated that I would furnish my reasons together with the reasons for judgment.

C The law is abundantly clear on the question of amendments to pleadings, and the court has a very wide discretion not only in regard to the scope of the amendment but also with regard to the time when an amendment can be applied for. In the exercise of its discretion, the court will generally be guided by the principle that such amendment should not be seen to cause D prejudice to the other litigant which cannot be cured by an order of costs necessitated by the need to further postpone the matter. Invariably, therefore, courts have been liberal in allowing amendment of pleadings, and it is trite that pleadings can be amended at any time before judgment is issued. It is also a general rule that the courts will grant an amendment to pleadings E unless the application to amend is *mala fide.*

Mr *Kamudefwere* opposed the granting of the amendment on two fronts. The first contention was that the amendment had been brought by way of a notice of amendment which was not in the form of an application and therefore the form adopted was inadequate. It was his submission that failing consent, an amendment can only be made on notice. For this contention I was referred F to *ZFC v Taylor* 1999 (1) ZLR 308 (H). At 310G-311B Gillespie J had this to say:

> "Failing consent then it is necessary to make application either to court or a judge in chambers, depending upon the criteria set out in r 226. The application must be served upon the opposing party; be supported by affidavit showing good G cause; and must be accompanied by a draft order. Only once an order has been given can process or a pleading be considered to be amended, and only after its amendment is the amended document susceptible of response by way of pleading or requests for particularity. A 'notice of amendment' such as I have earlier described is not provided for in the rules and it is an irregular pleading".

I have not been referred to any other authority where the manner of applying H for an amendment to pleadings has been discussed. The only other authority

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Gowora J

that I have come across is *UDC Ltd v Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (H), A in which Chinhengo J commented as follows at 215F-G:

> "Quite correctly, they allow for an amendment to be effected by consent of the parties to the proceedings and, where the parties have not agreed, application for leave to amend is provided for. I do not think our rules go far enough. A party may object to an amendment without giving the matter any serious thought. There is no provision in our rules to compel the objecting party to at B least apply its mind to the application to amend. Its mere objection, whether unwarranted or otherwise, is the trigger for the application to be made to the court. The reasons for objecting are then given in the affidavits which must be filed with the court. I think we will do well to emulate the procedure in South African courts. There it is possible to amend a pleading without the necessity of obtaining the leave of the court." C

I believe that generally the procedure for the amendment of pleadings is as stated by their Lordships in the two authorities that I have referred to above. An application has to be made to court for the amendment to be granted and application procedure is governed by r226 which requires that all applications made for whatever purpose in terms of the rules or any other law, other than applications made orally during the course of a hearing, shall be made as D a court application in writing to the court on notice to all interested parties or as a chamber application in writing to a judge. In relation to a chamber application, this is permissible where the matter is urgent, the rules or any other enactment so provide or the relief sought is procedural or the provisional order does not require interim relief. E

I concur with the sentiments by Gillespie J to the effect that an amendment made, other than by a written application, is irregular. This view is bolstered by an examination of rr 132, 134 and 151. Rule 132, which itself permits the amendment of pleadings, does not specify the form that the application should take. This, in my view, has led to the confusion regarding the manner in which such amendments should be brought to the court. The informality F pertaining to such an application is presumed when a court is given the discretion to allow an amendment at any stage of the proceedings. The rules in South African courts have set out the steps that precede an application to amend pleadings which is made to the court and, as Chinhengo J stated, we would be better placed in this jurisdiction if we emulated those rules, as they leave no room for doubt or ambiguity as to the form and manner of G filing such application.

In casu, the application was triggered by a "Notice to Amend" filed by the plaintiff on 5 February 2010. In May 2010 the plaintiff had filed another "Notice to Amend" the claim. The defendants had not responded to either, the professed intent to oppose only being made orally when the plaintiff H

Gowora J

A moved for the amendment at the start of the trial. Whilst the defendants did not consent to the proposed amendments, they also did not indicate a lack of consent on their part. It is also worthy to note that these courts entertain such applications and consider them on the basis of the informal applications that are routinely filed by applicants without taking issue with the form adopted, which may well be the reason why Gillespie J found it necessary B to spell out the proper procedure for the filing of such applications. I accept that the procedure adopted was irregular, but I am unable to find that it was defective so as to warrant my refusal to grant the application due to want of form. I am further persuaded in this view by the fact that the defendants had ample notice of the intent on the part of the plaintiff to move for an C amendment to the claim and decided for reasons best known to themselves not to indicate their opposition to such a move. I believe, therefore, that they have not been taken by surprise and would have been fully prepared to oppose the application due to the lengthy notice they had. Finally, the rules of this court, under r 4C, grant this court the discretion to depart from D the rules in an appropriate case. This, in my view, is one such case, and I repeat the oft quoted *dictum* that the rules are made for the court and not *vice versa.* There has been no prejudice occasioned to them and indeed Mr *Kamudefwere* never raised the issue of prejudice.

Mr *Kamudefwere* also submitted that the amendment sought to have an E assessment of contractual damages assessed at the date of judgment. He contended that the governing principle was that contractual damages had to be assessed as at the date when performance was due and not as at the date of judgment. Mr *Dondo, per contra,* submitted that a pleading can be amended at any time even up to appeal stage, provided that certain requirements have been met.

F In *UDC Ltd v Shamva Flora (Pvt) Ltd supra* Chinhengo J set out the guiding principles as follows:

1. The court has a discretion whether to grant or refuse an amendment;
2. an amendment cannot be granted for the mere asking; some explanation G must be offered therefore;
3. The applicant must show *that prima facie* the amendment has something deserving of consideration, a triable issue
4. The modern tendency lies in favour of granting the amendment if such facilitates the proper ventilation of the dispute between the parties;
5. G The party seeking the amendment must not be *mala fide;*

Gowora J

6. It must not cause an injustice to the other side which cannot be compensated A by costs;
7. The amendment should not be refused simply to punish the applicant for neglect;
8. A mere loss of time is no reason, in itself, to refuse the application; and B
9. If the amendment is not sought timeously, some reason should be given.

Courts of superior and inherent jurisdiction, both here and in South Africa have adopted a liberal approach whereby an amendment to pleadings will be allowed where the amendment will not cause prejudice which cannot be cured without an award of costs or unless the court is of the view that the application is *mala fide.* It must be noted that the overriding consideration in C the consideration of an amendment to pleadings is that the parties are as far as is possible able to place all the issues in contention between them before the court and enable the court to ventilate all aspects of the dispute between the parties. Courts have emphasized as well that pleadings are made for the court and not the court for pleadings, thus granting themselves the very wide D discretionary powers that they exercise when granting amendments. I must also accept that an amendment cannot be had for the mere asking.

In casu, the application is meant to change the amount being claimed from Zimbabwe dollars to United States dollars. Can this court say that the application is *mala fide?* The view I take is that it cannot, nor can this court E determine at the stage of application for an amendment whether or not the purported claim in United States dollars would be available to the plaintiff for breach of the contract. Mr *Kamudefwere* is correct when he suggests that generally the court will award damages assessed as at the date that the performance would have been due, that is as at the date of breach. However, the question of nominalization is an issue that would be determined after F the parties would have presented their respective cases to court. It was not appropriate, in my view, that I consider that issue before the parties had ventilated the issues relating to the dispute between them. It seems to me that the defendants have not opposed the granting of the amendment on any of the time worn principles governing the granting or refusal of applications G to amend pleadings. The reasons that were advanced in opposing the relief were themselves not supported by relevant authorities. I saw no prejudice that would be occasioned to the defendants if the amendment was allowed and in the event the parties were ready to proceed to trial and did so. It was for these reasons that I granted the application. I turn now to the determination of the matter on the merits. H

2010 (2) ZLR p425

Gowora J

A The plaintiff in this matter is a commercial bank which is primarily involved in lending to persons, both corporate and individual, engaged in agricultural pursuits. It is a statutory corporation. In 2006 it flighted an invitation for the tender of supply of trucks of an engine capacity ranging from 1.8 to 2 litres. The invitation to tender, the tender by the first defendant and the contract itself were the main documents produced before me by the parties. The B invitation is dated 2 November 2006 and calls upon established companies to urgently tender for the supply and delivery of brand new trucks within the range of 1.8 litres to 2 litres. Certain other specifications not germane to this dispute are listed. The invitation then spells out information that is "mandatory" to enable the plaintiff to make a concrete acceptance of the C quotation and contract decision. Firstly, it is stated that prices quoted shall be in Zimbabwe dollars, which price shall be fixed during the bidder's performance of the contract and not subject to any variation of any account. The invitation also spelt out that a bid submitted with an adjustable price condition would be treated as non responsive and would be rejected. Prices were required to be inclusive of value added tax. The invitation to tender also D required the company profile of the bidder as well as a list of major clients and contactable references. Added to this was the requirement of payment schedules, delivery and fallback position should delivery not be effected as anticipated. Other stipulated requirements are not germane to this dispute and will consequently not be referred to.

E The first defendant was amongst the companies that responded to the tender. After an adjudication process, it was decided to award the tender to the first defendant and a contract for the supply of the vehicles was concluded between the parties. Two days after the signing of the contract the plaintiff paid an amount in excess of $1.8 billion Zimbabwe dollars into a current F account operated by the first respondent with a commercial bank. The contract provided for specific dates for delivery of the vehicles to the plaintiff. Needless to say, the delivery schedule stated in the delivery clause

was not adhered to as the defendant defaulted, and in fact it has not made any delivery up to today, necessitating the plaintiff issuing summons for relief from this court.

In its summons, the plaintiff prays for the delivery of the vehicles in question G or, in the alternative, for payment of the value of the vehicles as at the time of judgment. The second and third defendants are husband and wife and the only directors of the first defendant. The plaintiff has prayed, as against the two, for an order lifting the corporate veil and for judgment against them jointly and severally with the first defendant, on the basis that they cannot H be divorced from the latter.

2010 (2) ZLR p426

Gowora J

At the pretrial conference three issues were extracted for trial. I will therefore A dispose of the dispute on the basis of those issues.

The first issue for trial was whether the agreement made and entered into by and between the parties was conditional upon the first defendant obtaining foreign currency from the Reserve Bank of Zimbabwe. It is pertinent, therefore, in resolving this issue to examine the contract documents and B other documents have a bearing on the relationship between the parties. The tender bid document from the first defendant focused on the Ford Ranger 1800 STD. A brief description of the vehicle is given, which description is on the physical features of the vehicle not its mechanical capacity. The quoted price is Z$37 500 000 per unit, with a total price of Z$ 1 687 500 000 C for the forty five vehicles. The quotation confirms that the price is inclusive of value added tax.

A warranty is given for three years or 100 000 km, whichever comes first. The first respondent also confirmed an ability to supply and deliver at a stipulated time. There were no indications of conditions that required to be met before delivery could be effected. Next, the first defendant provides, in D the tender document, a list of vehicles and motor cycles that are presumably available. There is no caption with the list to state whether these are readily available or whether the first defendant is able to easily source the same. Pictures of the vehicles and motor cycles, together with specifications, are provided in detail. Included in the tender documents is a letter written by E the second defendant. The letter, written on 27 November 2006 opens with the sentence:

> "We, the undersigned, hereby tender and should this letter be accepted in whole or part, undertake to supply motor vehicles as per the requirement of the tender, and in conformity with the Fund's General Conditions of Tender, and F the specifications, the articles described or referred to in this document or such said articles as may be ordered by the Fund in, consideration of the prices as Nickstate Investments (Pvt) Ltd are concerned."

The contract was then concluded on the basis of these documents. Clause 3 of the contract is in the following terms:

> "It is agreed that the seller *sells* forty five (45) brand new Ford Ranger, pick up G trucks"(the emphasis is mine).

It is further agreed that the pick up trucks shall comply with the following specifications:

(i) they shall be long wheel base

(ii) the engine capacity shall be 1.8 litres H

2010 (2) ZLR p427

Gowora J

A Clause4 provides that" the vehicles are bought with the following accessories on each one of them" and a list of the accessories is then provided (my emphasis).

Clause 5 of the contract reads:

> "The purchase price of the vehicles is the sum of (Z$l 687 500 000) (one billion six hundred and eighty seven million, five hundred thousand Zimbabwe dollars) B based on a unit price of ZW$37 500 000 (thirty seven million five hundred thousand)."

Clause 7 reads as follows:

> "It is agreed that the price referred to in clause 5 above is fixed and not subject to any variation whatsoever.'

C Delivery is covered in clause 9 which is in the following terms:

> "The motor vehicles shall be delivered to the customer's premises that is to say, Hurudza House No 14-16 Nelson Mandela Avenue, Harare duly registered in two batches as follows:
>
> (i) 15 (fifteen) vehicles by 31 January 2007
>
> (ii) 30 (thirty) vehicles by 28 February 2007"

D In its declaration, the plaintiff alleged that the first defendant had breached the terms of the agreement and that, despite being paid in full for the vehicles, the first defendant had failed to deliver any of the vehicles and, further, that, despite numerous requests by the plaintiff, the first defendant had failed and or neglected to deliver the said vehicles. In response to this averment, the E defendants had denied that they had failed neglected or refused to deliver and that the plaintiff was aware that the defendants had applied to the Reserve Bank for the allocation of foreign currency. It was further averred by the defendants that the allocation was approved on 9 February 2007, but the bank did not have the required foreign currency to avail to the defendants F to fulfill the terms of the contract.

The contract concluded by the parties does not make mention of the need for the defendants to source for foreign currency to purchase the vehicles. This is accepted by the defendants. Their contention, however, is that the fact that the vehicles had to be imported should be presumed and it did not need to be written down. It was contended that the vehicles could not be G purchased in Zimbabwe dollars and payment had to be made in a currency acceptable to the manufacturer and it is precisely because the defendants had to import the vehicles that they had approached the Reserve Bank for the allocation of foreign currency. Although accepting that the written contract was never varied in writing, it is suggested by the defendants that the parties H communicated through correspondence which clearly established that there

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was an understanding between the parties that the defendants needed to A source funds through the Reserve Bank of Zimbabwe in order to import the vehicles to be delivered to the plaintiff by the first defendant.

The defendants produced to court a number of letters written by the second defendant explaining or seeking to explain the delay in delivery of the vehicles. The first letter is dated 29 January 2007, which was a mere two B days before the date scheduled for the delivery of the first batch and the explanation given for the anticipated delay in delivery is the late approval of the allocation of foreign currency. An assurance is given in the letter that everything was under control. The second letter dated 15 February 2007 again speaks of the delays in obtaining foreign currency allocation (approval?). The writer goes further to state that arrangements had been made for the first C batch of fifteen vehicles to be in the country by 28 February 2007. It was stated further that the supplier had refused to accept an advance payment that had been arranged due to the fact that it had come from a bank in South Africa. The last sentence in the letter is to the effect that correspondence from the Reserve Bank was being attached and the defendants were vigorously pushing for payment and the vehicles would be released "soon". Attached D to the letter in question was a Reserve Bank approval for the defendants to pay for the vehicles through their bank. There was no allocation of funds on the certificate produced.

The letters addressed to the plaintiff were not responded to. The plaintiff's witness, Mrs Chinodya, explained that when the defendants started coming E up with excuses on the delivery of the vehicles they were requested to put their explanations in writing. The witness told the court that the position of the plaintiff was that the contract was for the supply and delivery of vehicles and not for the importation of the same. The plaintiff was hopeful that the endeavours by the defendants would succeed, but when the contract was concluded, it was never a term of the contract that the defendants would require F an allocation of foreign currency from the Reserve Bank of Zimbabwe in order for them to perform their obligations on the contract. The contract was never varied, a position accepted by the defendants. I was unable to accept the contention by Mr *Kamudefwere* that the fact that the vehicles would be imported was presumed and it did not need to be written in the contract. He G did not cite any authority for this submission and I am not persuaded that this is a correct principle of the law of contract.

Apart from the letters written by the second defendant after the contract was concluded, I have not seen any evidence pointing to a condition that the defendants had to obtain foreign currency from

the Reserve Bank of Zimbabwe in order to comply with their obligations under the agreement. H

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A The plaintiff's witness, Mrs Chinodya, emphasized that what was concluded was in fact an agreement of sale of the stated number of vehicles and that tenders were invited for supply of the vehicles in the local currency. She was adamant that any tenders that were quoted in foreign currency were turned down. She also said that the issue of the need for foreign currency arose after the first defendant failed to meet the delivery dates and in her B view it was nothing but an excuse. I find no reason to doubt the veracity of her evidence and on this issue I find for the plaintiff. Her evidence was given in a straightforward manner and she made a better impression on the court than did the second defendant, who was very evasive and unwilling to answer difficult questions under cross examination. Overall, looking at the C evidence of the two witnesses against the backdrop of the documents which preceded the contract and the contract itself, it is my view that the contract was not conditional upon the first defendant being allocated foreign currency by the Reserve Bank as pleaded by the defendants. I find that therefore that performance by the defendants was not conditional upon obtaining foreign currency from Reserve Bank.

D The first defendant was incorporated as a company in 2006 and commenced operations in full in 2007. When the contract, which is the subject matter of this dispute, was concluded the first defendant had been operational for just a year. The second and third defendants, who are husband and wife, are the only directors of the first defendant and the second defendant indicated to E the court that he is, in fact, the *alter ego* of the first defendant. The plaintiff averred in its declaration that the second and third defendants, where the contract with the plaintiff was concerned, had, instead of ensuring that due compliance by the first defendant of its obligations to the plaintiff, wrongfully, unlawfully and fraudulently diverted funds paid by the plaintiff in terms of the agreement for their own purposes.

F Mr *Kamudefwere,* in his submissions at the close of the trial, did not seek to address the question of whether or not the corporate veil should be lifted as prayed for by the plaintiff. He in fact conceded that the second defendant was the *alter ego* of the first defendant. He did not mention the third defendant. *Per contra,* it is contended by Mr *Dondo* that the shares in the company are G all owned by the second and third defendants and that therefore judgment should be entered against all the defendants jointly and severally.

It is a fundamental and trite principle of law that a registered company is a legal *persona* in its own right and endowed with its own separate legal *persona* which is distinct from its shareholders. * It is also settled law that

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in certain exceptional circumstances, where the company is controlled in A terms of activities and decisions by another person, the courts have allowed the corporate veil to be lifted to reveal the real person behind the company. I will respectfully refer to a passage by Margo J in *Gering v Gering & Anor* 1974 (3) SA 358 (W) at 361 where the learned judge stated:

> "There are three companies, apart from Lauren Lyn (Pty) Ltd, in which the first B defendant has a 100 per cent interest in the shareholding. It is true that, in the case of these companies, their records are not *stricto sensu* in the possession, custody or control of the first defendant in his personal capacity. However, on the facts, these companies are his creatures and his instruments. He is conducting business through them, or holding assets through them, and they are separate juristic personalities, they are in substance merely part of the machinery by C which he alone conducts his business affairs."

In certain cases courts have gone as far as stating that a company is the agent of the controlling shareholder. In the English case of *Wallersteiner v Moir (No 1)* [1974] 3 All ER 217 (CA) Lord Denning had this to say at 238a-c:

> "I am prepared to accept that the English concerns - those governed by English company law or its counterparts in Nassau or Nigeria-were distinct legal entities. I am not so sure about the Liechtenstein concerns such as Rothschild Trust, the D Cellpa Trust or Stawa AG. There was no evidence before us of Liechtenstein law. I will assume, too, that they were distinct legal entities, similar to an English limited company. Even so, I am quite clear that they were just the puppets of Doctor Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got with in reach of them. Transformed into legal language, they were his agents to do as he commanded. He was the E

> principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as his creatures - for whose doings he should be and is responsible. At any rate, it was up to him to show that any one else had a say in their affairs and he never did so..."

I have been urged by the plaintiff's counsel to enter judgment against all three defendants jointly and severally. This is, however, despite a concession F from counsel that the third defendant played a minimal role in the affairs of the first defendant. The extent of her shareholding in the company was not established in evidence. I did not hear Mr *Kamudefwere* argue against the lifting of the corporate veil.

The second defendant was candid enough to admit that he was the *alter ego* G of the first defendant. The evidence of the extent of personal control of the company on his part could not be disputed. He controlled its finances. He personally responded to the offer to tender from the plaintiff. He attended the meetings with the representatives of the plaintiff to decide the terms and conditions of the contract. He signed the contract for the supply of the vehicles to the plaintiff. He wrote every single letter that was addressed to the plaintiff H

A regarding the contract. He personally made commitments to assist the plaintiff in disposing of the Ford trucks at a good price when they would have been delivered in an effort to persuade the plaintiff into purchasing alternative vehicles from Willowvale Motor Industries because the first defendant had not delivered in terms of the contract. More telling, however, is the manner in which the money deposited into the first defendant's bank was treated by B him, if I accept the contention by him that a billion dollars was deposited into an investment account of the company to secure the value of the deposit. Although he was quizzed on the whereabouts of the billion dollars, the second defendant was unable to state how much was in the investment account, his response being that he would have to check with the bank.

C It is not in dispute that the second defendant drew cheques in his personal name against the account into which the purchase price paid by the plaintiff was deposited. It is further not in dispute that within a week from the date of such money being deposited almost the entire amount had been consumed. When the purchase price was deposited the account held an amount of $177 107 578.64. After the deposit the balance shot to $1 864 607 578.64. D By 11 December 2006 the balance in the account stood at $218 294 649.64. Of the amount withdrawn from the account, $2 200 000 went into the second respondent's account. The evidence adduced by the investigator of the plaintiff was to the effect that the defendants purchased an immovable property and a motor vehicle from the deposit. It cannot be gainsaid that the entire amount has been consumed but the vehicles have not been purchased.

E The first defendant itself has no assets and it is obvious from an examination of the transactions on the bank account that it is the vehicle through which the second defendant mobilized funds with which to enhance his estate. The two million odd dollars that he paid himself soon after the plaintiff deposited money into the business account of the second defendant cannot be justified. F The second defendant was unable to explain why this money had been paid to him. It is worth noting that in the summary of evidence filed on behalf of the defendants that the contention is made that there is nothing prohibiting the first defendant from accessing or investing any money paid into the business account. It is also not disputed that an amount of $180 million was used from the account to pay for a property in Marlborough although it is G contended that the purchase of the property had been planned well before the plaintiff paid any money into the account. The point is made that the $ 180 million constitutes the 10 per cent deposit that the defendants had paid to the plaintiff in terms of the contract.

It is very obvious that the second defendant did not differentiate between H himself and the company and he felt clearly that whatever was in the account

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of the company belonged to him to deal with as he pleased. In fact, he admitted A that the company was solely his and his counsel described the company as his *alter ego.* It is only appropriate, therefore, that the corporate veil be lifted where he is concerned and that whatever liability may found to attach to the company should also attach to the second defendant.

The third defendant's position in relation to the activities of the company is B not so clear. She did not attend and give evidence on her own accord, despite the fact that an order was sought against her jointly with the first and second defendants. The question exercising my mind is whether or not the plaintiff is entitled to obtain an order against her jointly with the other two. She is undoubtedly a shareholder, although the extent of her shareholding in the C first defendant has not been stated. She chose not to enlighten the court. In its declaration the plaintiff made the averment that the purchase price paid by it had been diverted by the second and third defendants and used in purchasing luxury items such as vehicles. Specific mention of an immovable property in Marlborough was made. The purchase was not denied, nor was it denied that it was purchased for the second and third defendants. Apart from the D issue of the properties purchased with the funds belonging to the plaintiff, there is no other reason advanced before me to justifying my uplifting the corporate veil. Is this sufficient reason in the absence of control on the part of a defendant?

The authorities from this jurisdiction that I was referred to do not touch E on this aspect of the dispute and in my research I was able to find a South African case which may assist me in determining whether or not the corporate veil should also be lifted in relation to third defendant. I wish to quote, with respect, a few excepts from the judgment of le Roux J in *Lategan & Anor NNO v Boyes & Anor* 1980 (4) SA 191 (T).at 200E-F the learned judge stated:

> "In his admirable work, *Modern Company Law,* L C B Gower devotes a full F chapter (Chapter 10) to the subject 'Lifting the Veil' (3 ed at 189-217). He deals with it as exceptions to the principle of *Salomon v Salomon & Co* [1897] AC 22 (HL), which finally enshrined the sanctity of a separate corporate personality distinct from its members".

And at 200H-201C he stated: G

> "I was also referred to an interesting article in(1967) 30 *Tydskrif vir Hedensdaagse Romeins-Hollande Reg* at 216 et seq by M L Benade, where the author pleads for a more realistic view of corporate identity in South Africa to bring it in line with the 'positive' approach of American courts, which may be summed up in the words of Judge Sanborne in *US v Milwaukee Refrigerator Transit Co* (1905) 42 Fed 247 at 255, where he held that a company should be seen as an entity H

Gowora J

> A ' but when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association'.
>
> This approach appears to be in line with that in modern England (as sketched by Gower *supra)* and is based on common sense and a developed sense of equity. An excellent example is afforded by the case of *Gilford Motor Co v* B *Horne* [1933] Ch 935 (CA) where the defendant, who was a former employee of the plaintiff, had contracted with the latter not to approach its customers. He promptly formed a company and it proceeded to contravene the contract. The court interdicted both the defendant and the company which it described as a device with a stratagem, a mere cloak and a sham, which it considered an instrument in the defendant's hands."

C And further on at 210F-H the learned judge concluded:

> "A true precedent for this principle does exist in our case law, namely the case of *Orkin Bros Ltd v Bell* 1921 TPD 92, where the directors of a company were held personally liable to a seller who sold goods to a company at the instance of its directors when they knew the company to be insolvent circumstances and completely unable to pay for the purchase and it appeared that the sole purpose D of the transaction was to diminish the personal liability of the directors under a contract of suretyship. This was held to constitute a fraud on the seller and he obtained judgment against the directors personally.

I have no doubt that our courts would brush aside the veil of corporate identity time and again where fraudulent use was made of the fiction of legal personality. In the present case, however, there is no evidence that the second defendant E fraudulently failed to mention the position of the sureties ..."

The authorities are agreed that, where there has been fraudulent or improper use of a company, a court is entitled to disregard the separate corporate personality of a company and pierce the veil. The first defendant herein was the vehicle through which the second and third defendants acquired property F to enhance their estate. The two are husband and wife and, although the title of the immovable property was not produced to the court, there was no denial from the defendants of the allegations in the declaration that the plaintiff's purchase price had been used to buy luxury items for themselves. The improper use of the money paid towards the purchase of the vehicles is evident from the manner in which the account was virtually depleted G within a week of almost the entire

sum. No reasonable explanation was forthcoming from the second defendant and the third defendant offered no explanation at all. An allegation of fraud is serious and it would have been in the interests of all the defendants if the third defendant had come to court to try and dispel the accusations by the plaintiff on the alleged use of the H money. I can therefore only go by the bank account submitted to the court

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which showed improper usage of the money deposited by the plaintiff into A the first defendant's bank account.

It would not be uncharitable to describe the first defendant as a shell. It has no assets in its own name: this much being admitted by the second defendant. It operates a bank account which is at the sole disposal of the second defendant to deal with as he pleases. He does as he pleases with money in the account, B which apparently is the only asset that could be said to be in the name of the company. But that said, even the money does not remain long in the account, as it utilized almost as soon as it is credited to the account and such usage is not in the business of the company but for the benefit of its shareholders. It does not have on its books any of the vehicles it tendered to supply. It actually required payment in full of the purchase price in advance C from the plaintiff in order to source for the vehicles and once that payment was made the second defendant dealt with it in a manner that would result in enhancement of the estate of the second and third defendants. This is an example of a fiction of separate corporate entity of a registered company. The second and third defendants, in the manner in which they make use of D the first defendant, might as well have described themselves as a partnership, as that is in effect what they are. The enterprise that is the first defendant is a mere tool for their exclusive use. In my view, the company exists for the convenience of its shareholders. The fiction of a separate corporate entity does not in fact exist in this case and it would only be just and proper for me to order that the corporate veil be lifted and judgment entered against E all the defendants, including the third defendant, who is clearly benefitting from the existence of the company. In my view, the plaintiff has therefore established a proper case for the lifting of the corporate veil in relation to both the second and the third defendants.

I turn now to the substance of the relief being prayed for. The plaintiff has claimed for specific performance or in the alternative payment of the F replacement cost or value of the vehicle. It is trite that our law entitles a plaintiff to claim specific performance and it is within the discretion of the court to decide whether or not the plaintiff is on the facts of the matter before it entitled to an order for specific performance. It is generally accepted that the court's discretion must be exercised judicially upon a consideration of G all the relevant facts.

Legally, a seller has the obligation to deliver the thing sold to the purchaser in a deliverable condition. That they are obliged to do this has never been denied by the defendants. It emerged in evidence that the vehicles which the parties had contracted for had gone out of production. It was not in dispute that it was possible for the manufacturer to supply the model but H

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A that it would be at a higher cost than normal. In view of this development, the defendants contended that they were unable to comply with an order for specific performance due to impossibility. Ordinarily, the onus to establish impossibility of performance lies on the defendant. † The defendant must place facts before the court which may lead the court to find that it is impossible for the defendant to perform its obligations in terms of the contract. The B defendants have not pleaded impossibility of performance and, in a plea filed on their behalf on 4 December 2007, they were evincing a willingness to abide by the terms of the contract, provided they were allocated foreign currency by the Reserve Bank of Zimbabwe. Further to that, in a summary of evidence filed more than a year later, the defendants again aver that they are willing to perform the contracts if the foreign currency is availed. Yet, C in his evidence, the second defendant claimed that he had informed the plaintiff, in letters written to the legal practitioners, that the manufacturer had discontinued the assembly of the model being pursued by the plaintiff. It seems to me that the second defendant is not being candid with this court. It turns out, however, that the plaintiff has established through independent D means that the vehicle is no longer in production and I have to accept the evidence from the defendants that the model the parties had contracted for is no longer

in production. It is, therefore, quite obvious that the remedy of specific performance is no longer available for the plaintiff, the only possible remedy now being an award of damages.

It now remains for me to determine the question of damages. At the E commencement of the trial I allowed an amendment to the plaintiff's claim from one sounding in Zimbabwe dollars to one for United States dollars. The plaintiff called one Israel Ukama to give evidence on the amount being sought as damages. The witness told the court that he was employed as a manager with Coppola Motors, a company involved in the purchase and F sale of vehicles. The company has been involved in that business from its incorporation in 1999. He was referred to various invoices sent to the plaintiff by a number of companies, including his own relating to prices of trucks available on the market. He confirmed that the Ford Ranger 1.8 was no longer in production and that it had been replaced by Ford Ranger 2.2, which had a bigger engine capacity. He said that the nearest vehicle to the G Ford Ranger 1.8 was the Mazda BT 50 or the Ford Ranger 2.2 litre single cab in terms of price and not engine capacity, although these last two had the same engine capacity. The Mazda, however, was a twin cab. He said that these were the cheapest vehicles on the market. He was unable to give the specifics of the vehicles or technical figures on the vehicles that he had

quoted on and he said he could not as it had not been suggested to him that A he would have to do so. His evidence was that the BT 50 was being sold at US$18 000 and the Ford Ranger 2.2 litre at US$20 000.

A plaintiff seeking payment of damages must prove his damages. Where a plaintiff fails to prove his damages, the court may grant absolution from the instance in favour of the defendant. However, where a plaintiff has led all B the evidence it is within his power to adduce, then the court must assess the damages based on the evidence placed before it as best as it can. The court can only consider this principle if the plaintiff shows that he has suffered some damages and that only the quantum remains in issue. See *Bowman v Stanford* 1950 (2) SA 210 (D). At 222-3 Selke J commented:

> "But to make such *dicta* into inflexible rules applicable in every instance without C regard to the circumstances of the parties in respect of the availability of the evidence, or to the precise nature of the claim or the particular injury or loss claimed for, would, it seems to me, result not infrequently in injustice. There must be many types of claims due to breaches of contract which do not admit, for various reasons, of strict or detailed proof in terms of so much money. For example, loss of business, especially in relation to the future, cf. *Bower v Sparks,* D *Young and Farmers' Meat Industries Ltd* 1936 NPD 1 at p 23."

It is generally accepted that damages for breach of contract are to be calculated at the time when performance was due, because the import behind an award of contractual damages is to place the plaintiff in the position he would have occupied had the contract been fulfilled. The rationale for fixing the time of E assessment to the date when performance was due is to avoid the plaintiff or defendant being unfairly favoured through the vagaries of prices of a fluctuating market. Even where the seller repudiates the contract before the time fixed for delivery and the buyer accepts the repudiation as an anticipatory breach, the buyer may elect to bring an action for damages but, *prima facie,* damages are still to be assessed as at the date fixed for due performance. F

This is however not the issue for determination before me. The seller *in casu* did not repudiate. The seller failed to deliver on the fixed date for delivery but promised to deliver even after summons was issued. The buyer therefore has an option to claim for an order for specific performance or for payment of money *(ad pecuniam solvendam)* in pursuance of the contract. See *.Bray* G *& Edwards v Rhodesia Consolidated Ltd* 1911 SR 60. When a purchaser claims for specific performance for the item contracted for, a purchaser chooses not to crystallize his claim. By making this election the purchaser has shown a willingness to treat the obligation by the seller to deliver as still continuing and to it with the value it may have at the date of trial. Where the court awards the purchaser specific performance, with damages failing H

A A Delivery, the compensation is fixed in relation to the value of the item at the date of trial. See *Radiotronics (Pty) Ltd v Scott Lindberg & Co Ltd* 1951 (1) SA 312 (*C); Avery v Bowden* (1856) 26 LJ QB 3; 119 ER 1119.

It is clear that I cannot award specific performance as the vehicles contracted for have been phased out from production. Even the defendants finally B conceded an inability to effect delivery in terms of the contract. The only option is to award the plaintiff damages representing the value of the vehicles that it purchased from the defendants. As the vehicles are no longer on the market this is no easy task. I will have to asses the damages on the evidence that has been placed before me. The plaintiff has submitted that damages should be assessed based on the value of the Mazda BT 50 as it is the vehicle C nearest to the Ford Ranger 1.8 litre in terms of engine capacity. Indeed, the second defendant had suggested in a letter to the plaintiff that it, the plaintiff, purchases the vehicles as alternative whilst the parties awaited delivery of the Ford Ranger 1.8 litre from South Africa. The Mazda BT 50I is valued at US$18 000 per unit and is readily available in the country. It seems to me only fitting that I award damages to the plaintiff based on the value of D the Mazda. I will therefore issue an order for payment by the defendant of damages equal to 45 Mazda BT 50 Is. In the premises I will order as follows:

IT IS HEREBY ORDERED:

1. The defendants be and are hereby ordered, jointly and severally, the one paying the others to be absolved, to pay to the plaintiff the sum of E US$850 000 together with interest thereon at the prescribed rate with effect from the date of judgment to the date of payment in full.
2. The defendants shall, jointly and severally, the one paying the others to be absolved, pay the plaintiff's costs of suit on the legal practitioner-client scale as provided for in the Law Society tariff for legal practitioners.

F *Chinamasa, Mudimu Dondo,* plaintiff's legal practitioners

Muringi Kamdefwere, defendants' legal practitioners

* *Salomon* v *Salomon & Co* [1897] AC 22
† *Tamarillo (Pty) Ltd* v *B NAitken (Pty) Ltd* 1982 (1) SA 398 (A)

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BRUFORD v ATTORNEY-GENERAL & ORS 2010 (2) ZLR 438 (H)

Citation	2010 (2) ZLR 438 (H)
Case No	Judgment No. HH-232-10
Court	High Court
Judge	Chiweshe JP
Heard	24 September 2010
Judgment	13 October 2010
Counsel	Ms *N G Maphosa*, for the applicant *T R Zvekare*, for the first respondent *T O Dodo*, for the second, third and fifth respondents
Case Type	Urgent chamber application

Annotations No case annotations to date

Flynote

Court - *magistrates court – jurisdiction - eviction order following on criminal conviction - nature of such order - such order an exercise of magistrate's civil jurisdiction - noting of appeal against conviction - whether magistrate entitled to order execution of civil order notwithstanding noting of appeal* D

Land - *acquisition - former owner of acquired land refusing to vacate - conviction under s 3 (5) of Gazetted Lands (Consequential Provision) Act [Chapter 20:28] - eviction order following conviction - noting of appeal against conviction - magistrate nevertheless entitled to order execution pending appeal* E

Headnote

The applicant was a farmer whose farm had been expropriated under the land reform exercise. The farm had been allocated to the fourth respondent. The applicant did not move off the farm and was prosecuted under s s 3 (2) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. He was convicted and sentenced and issued with an order evicting him F from the land to which the offence related. He noted an appeal against conviction and sentence. The first respondent applied to the magistrate for, and was granted, leave to execute the eviction order pending appeal, on the grounds that the appeal had no prospects of success and that it had been filed for purposes of delay. The applicant filed an application to G review the magistrate's decision on the grounds that the whole process was grossly irregular and the consequent order grossly unreasonable. It was argued that the magistrate had no jurisdiction to order execution pending appeal. The Magistrates Court Act [*Chapter 7:10*] is silent about granting criminal courts further jurisdiction to issue orders to suspend or execute, pending appeal, any judgment given under criminal law. H

A Being a creature of statute, the court had no inherent jurisdiction and, accordingly, no power to order execution of its own judgments despite noting of an appeal. A court which does not have inherent jurisdiction cannot issue orders for the execution of its own judgment pending appeal. The civil magistrates court is conferred by s 40 of the Act with specific authority to issue an order of execution pending appeal, but nothing in B the Act extends the same jurisdiction to a criminal magistrates court. It was also argued that if the court were to qualify as a civil court, it would not have had jurisdiction to order eviction with regards to a property whose value was well in excess of the given monetary jurisdiction.

The respondents argued that the court, upon conviction and sentence, had C to in addition, issue an eviction order. It would be an absurdity if the criminal court so issuing such orders were to be precluded from enforcing them. The magistrate's jurisdiction in cases such as the present derives from s 3(5) of the Gazetted Lands (Consequential Provisions) Act. The provisions of s 3(5) are peremptory.

Held, that where the trial court is of the opinion that the appeal has no prospects D of success and that it is being lodged only for purposes of delay, it may order execution of the order pending appeal. Once it is accepted that in terms of s 3 (5) of the Act, the magistrate has the jurisdiction to give the order he gave and that jurisdiction of necessity includes the power to execute the orders so granted, it must also be accepted that where an E appeal is lodged or noted, the magistrate may, of his own accord or upon application, order execution pending appeal, if he is of the view that the appellant's grounds of appeal are frivolous and without merit. Section 3(5) of the Act refers to "any court". It does not distinguish between superior and subordinate courts. Thus the powers given under s 3(5) apply with equal efficacy, regardless of the level of jurisdiction of any such court as F provided for in any other legislation. The magistrates court is an entity which is endowed with both civil and criminal jurisdiction. There is no provision that says a magistrate cannot, in an appropriate case, exercise elements of both his civil jurisdiction and his criminal jurisdiction where the enabling Act so directs. The jurisdiction of a magistrate is conferred by the Magistrates Court Act "and any other enactment." The magistrate's G jurisdiction to issue an eviction order is, in terms of the Gazetted Lands (Consequential Provisions) Act,

founded upon the conviction, not upon the monetary value of the land or occupation in question. The magistrate is directed to issue an eviction order upon conviction. No reference is made to his monetary jurisdiction, nor is there a provision that says he H can only issue such an order "subject to the jurisdiction conferred upon

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him by the Magistrates Court Act." To interpret the position otherwise A would lead to a glaring absurdity. *

Legislation considered

Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], s 3(5)

Magistrates Court Act [*Chapter 7:10*], ss 11, 40(3) & 49 B

Cases referred to

ANZ (Pvt) Ltd v Min of Information & Publicity & Ors 2005 (1) ZLR 222 (S)

Chiriga v A-G Case No HCH 502/10

Fordham v Min of Lands Case No. HCH 429/10 C

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

Kassim v Kassim 1989 (3) ZLR 234 (H)

Mupinge Farms (Pvt) Ltd v A-G Case No.HCH 5628/08

Nyaguwa v Gwinyayi 1981 ZLR 25 (H)

Case information

Ms *N G Maphosa,* for the applicant D

T R Zvekare, for the first respondent

T O Dodo, for the second, third and fifth respondents

Judgment

Chiweshe Jp: The applicant appeared before a magistrate charged with contravening s 3(2) of the Gazetted Land (Consequential Provisions) Act E [*Chapter 20:28*] ("the Gazetted Land Act"). He was convicted and sentenced on 6 July 2010 and issued with an order evicting him from the land to which the offence related. He appealed against both conviction and sentence. The appeal is still pending. The first respondent filed an application with the third respondent for leave to execute the eviction order pending appeal on the grounds that the appeal had no prospects of success and that it had been F filed for purposes of delay. Notwithstanding opposition by the applicant, the third respondent granted the application for leave to execute the eviction order pending appeal. Displeased by that turn of events, the applicant filed an application to review the decision of the third respondent on the grounds that "the whole process was a gross irregularity and the consequent order grossly unreasonable to such an extent that no reasonable court would have G come up with the same conclusion". In the present application the applicant

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Chiweshe JP

A seeks an order staying the execution of the eviction pending the determination of the application for review and subsequently the pending appeal.

Ms *Maphosa,* for the applicant, made the following submission. The third respondent, the magistrate, had no jurisdiction to order execution pending appeal. She contended that the Magistrates Court Act [*Chapter 7:10*] is silent B in granting criminal courts further jurisdiction to issue orders to suspend or execute pending appeal any judgment given under criminal law. Section 3(5) of the Gazetted Land Act gives the C magistrates court criminal powers to order mandatory eviction consequent upon conviction. The magistrate is solely conferred with authority to issue an eviction order. He is not conferred with authority to revisit the case subsequently and order execution pending appeal. The magistrates court is a creature of statute and as such, its powers are

created and defined by statute. The court has no inherent jurisdiction and, accordingly, no power to order execution of its own judgments despite the noting of an appeal. After the magistrate has given an order he becomes *functus officio.* The general principle is that once the court has announced its D final judgment or order, it has itself no authority to correct, alter or supplement such judgment or order. It there upon becomes *functus officio,* its jurisdiction having been fully and finally exercised, its authority over the subject matter ceases. In support of her submissions, *Ms Maphosa* cited authorities such as *Nyaguwa v Gwinyayi* 1981 ZLR 25 (H), *ANZ (Pvt) Ltd v Minister of State for Information and Publicity & Ors* 2005 (1) ZLR 222 (S) and *Kassim v* E *Kassim* 1989 (3) ZLR 234 (H).

She continued with the following submissions. The magistrate, the third respondent, had misdirected himself in stating that he had been conferred with jurisdiction by virtue of an implied authority stemming from the provisions of s 3(5) of the Gazetted Land Act. He was of the view that the legislature F could not have intended to authorize him to issue the eviction order without impliedly conferring authority to issue subsequent orders to effect such eviction. She submitted that the third respondent grossly misinterpreted the law with regard to jurisdiction. He must work within the four corners of the enabling Act - he cannot go beyond the prescribed limits without specific enabling statutory provisions. Citing *Hama v National Railways of* G *Zimbabwe* 1996 (1) ZLR 664 (S), she argued that "there is a presumption against alteration of the common law by statute law, unless the words of the statute are plain and unambiguous and an intention to alter the common law is evident from the wording of the enactment". There is no such wording at all in the enabling Act, plain or unambiguous. Nothing at common law H or in the legislation concerned supports the notion of implied jurisdiction.

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Therefore the decision of the third respondent to order eviction pending A appeal is a nullity.

Ms *Maphosa* then made the following submissions. The position at common law is that a court which does not have inherent jurisdiction cannot issue orders for the execution of its own judgments pending appeal. The civil magistrates court is conferred by s 40 of the Magistrates Court Act, with B specific authority to issue an order of execution pending appeal. Nothing in the Magistrates Court Act extends the same jurisdiction to a criminal magistrate's court. The High Court has issued several declaratory orders to the effect that in those cases where, in terms of s 63 of the Magistrates Court Act an order has been suspended by virtue of the noting of an appeal, that order, consequent to a conviction, shall remain suspended until the appeal C has been disposed of. She cited the following cases in that regard: *Mupinge Farms Pvt Ltd v Attorney-General HH* 5682/08, *Chiriga v Attorney-General* HH 502/10 and *Fordham v Minister of Lands* HH 4629/10. In terms of s 63 of the Magistrates Court Act, any order that does not relate to the punishment of imprisonment or a fine, shall be suspended upon the noting of an appeal. D In addition, in terms of SI 21 of 2009, the maximum monetary jurisdiction of a civil magistrates court is pegged at $2 000. Therefore, even if the third respondent acting in a criminal capacity, were to qualify as a civil court, he would not have had jurisdiction to order eviction with regard to a property whose value is well in excess of the given monetary jurisdiction. Accordingly, the third respondent's eviction is a nullity for want of jurisdiction. Further, E at the time the third respondent sat to grant leave to execute, the matter was already pending before a superior court by way of appeal and review. The same issues were pending to be dealt with before the High Court.

The respondents have opposed this application. The first respondent stated that the applicant was prosecuted for refusing to vacate State land in terms of s 3(2) of the Gazetted Land Act. Mr *Zvekare,* for the first respondent, argued F that because the applicant had no lawful authority to occupy State land, he was properly convicted and sentenced. The eviction order pursuant to that conviction was issued in terms of s 3(5) of that Act. This provision, it was argued, incorporates civil processes into what is otherwise a criminal matter. Accordingly the process created under s 3 may be described as being *sui* G *generis* in that both the criminal and the civil process apply in terms of that section-hence the conviction and sentence representing the criminal element and the eviction representing the civil element. This fusion is a creature of statute, argued Mr *Zvekare.* Of necessity the court, upon conviction and sentence, must in addition, issue an eviction order. Further, it would be an absurdity if the criminal court so issuing such orders were to be precluded H

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A from enforcing the same. He submitted that the appeal lodged by the applicant against the conviction and sentence had no merit or prospects of success and that it constituted an abuse of court process, having been filed for purposes of delay. He submitted that none of the applicant's rights had been violated. On the contrary, it is the rights of the State and that of the fourth B respondent which had been violated. The purpose of these prosecutions is to create vacant possession for the land reform programme and ensure the success of that programme. The applicant is instead clinging on to the land by whatever means, even if his position is no longer legally tenable. The magistrate, contrary to the applicant's assertions, is not correcting his order or altering it nor is he supplementing it. What the magistrate is doing in this C case is to give effect to the order that he has made.

Mr *Zvekare* further submitted that the magistrates court has no inherent jurisdiction and that therefore the authorities cited by Ms *Maphosa* are irrelevant. Rather, the correct position is that the magistrate's jurisdiction in cases such as the present derives from s 3(5) of the Gazetted Land Act. The provisions of s 3(5) are peremptory - the court shall issue an order to D evict the person so convicted. The application for leave to execute pending appeal can only be entertained by the trial court. At that stage, it alone is privy to the merits of the case and therefore best placed to entertain such an application. In the instant case, the magistrate considered the merits of the case and agreed with the first respondent that the appeal was frivolous and E that the reason for appeal was to extend the illegal occupation of State land by the applicant. The magistrate's order was legally competent and not a nullity as contended by the applicant.

Mr *Zvekare* also submitted that this application is not urgent, because the applicant does not have any right to the land in question as it has become F the property of the State by operation of law. The applicant has neither a permit, an offer letter nor lawful authority to occupy State land. Any other defence that he might have had was ventilated before the magistrate in a full trial and properly dismissed. The State must be allowed now to exercise its full authority over the land in question. The balance of probabilities clearly favour the State and the beneficiaries to whom it has allocated the land. The G applicant is at liberty to pursue the matter by way of appeal or review, but because there is a court ruling to the effect that he has no lawful authority to occupy this land, the issue no longer merits urgent attention. Further, the application for review is likely to be heard soon. By bringing the present application, the applicant wants the present judge to determine the application H for review and the appeal prematurely. That is an abuse of court process.

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Mr *Dodo* represented the second, third and fifth respondents. He argued that A the applicant must first comply with the magistrate's order of eviction before approaching this court. Since the applicant has approached this court with dirty hands, he should not be heard. Furthermore, the monetary jurisdiction for magistrates as may be prescribed from time is not relevant to cases under s 3(5) of the Gazetted Land Act as that section confers unlimited monetary B jurisdiction with respect eviction orders.

The fourth respondent stated that he is the holder of an offer letter relating to the land in question. He is authorized to move onto the farm. So far he has moved onto the fields without hindrance. He expects the applicant to move off the farm.

The thrust of the applicant's argument is that, while conceding that the C provisions of s 3(5) of the Gazetted Land Act empower the magistrate to issue an eviction order upon conviction, that Act does not further empower the magistrate with authority to revisit the case and entertain an application for execution of that order pending appeal.

Subsection (5) of s 3 of the Gazetted Land Act reads as follows: D

> "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 conviction relates."

Does this provision exclude the power to execute the magistrates' own orders given in terms thereof? In the absence of any provision to the contrary, the E power to grant such orders includes the power to execute them. In this regard, the magistrates court is empowered to execute its own judgments by virtue of the general provisions of the Magistrates Court Act which provisions remain relevant notwithstanding the fact that the magistrate is dealing with a matter prescribed under a different statute, namely the Gazetted Land Act

The noting of an appeal, in the absence of any statutory provisions to the F contrary, suspends the execution of the order. In my view, where the trial court is of the opinion that the appeal has no prospects of success and that it is being lodged only for purposes of delay, it may order execution of the order pending appeal. Once it is accepted that in terms of s 3(5) of the Gazetted Land Act the magistrate has the jurisdiction to give the order he G gave, and that jurisdiction of necessity includes the power to execute the orders so granted, it must also be accepted that where an appeal is lodged or indicated, the magistrate may, of his own accord or upon application, order execution pending appeal if he is of the view that the appellant's grounds of appeal are frivolous and without merit. The provisions of s 40(3) of the Magistrates Court Act are clear. I agree, therefore, with the magistrate when H

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A he contends that the powers to order execution flow and follow from the powers conferred upon him to grant such orders in the first place. These powers are exercisable throughout the subsistence of such order. Where at law the execution of such order may have been suspended by the noting of an appeal, the magistrate retains the discretion to order execution despite the noting of the appeal, if he is satisfied that the appeal has been noted for B purposes of delay.

Section 3(5) of the Gazetted Land Act refers to "any court". It does not distinguish between superior and subordinate courts, the former being of unlimited or original jurisdiction. Thus the powers given underthat provision apply with equal efficacy, regardless of the level of jurisdiction of any such C court as provided for in any other legislation.

The provisions of s 3 of the Gazetted Land Act include both criminal and civil processes. The criminal function, in the event of a conviction, automatically and peremptorily leads to the eviction of the convicted person. Whilst this arrangement may appear novel, it is certainly one that was intended by the D legislature to deal with a rampant mischief- that of former owners of gazetted land who refuse to vacate such land to give way to State programmes. The prosecution in terms of the said s 3 serves both as a judicial inquiry as to whether the accused has any rights to the land in question, and if not, as punishment for refusal to vacate gazetted land. And in the same trial an eviction order, in itself a civil remedy, will ensue upon conviction.

E None of the criminal and civil processes in the section are themselves novel. What may be new is the fact that a single court is involved in both civil and criminal processes in one sitting and may mete out both criminal and civil sanction. But even that is not entirely unheard of. There have been statutory provisions in which the criminal courts, on conviction, are mandated to give F both a criminal sentence and, in addition, a civil remedy such as forfeiture, seizure, restitution, compensation and now eviction.

The applicant argues that a magistrates criminal court has no jurisdiction to grant a civil remedy such as eviction. And even if, according to the applicant, such criminal court were to put itself in the shoes of a civil court, G it still would not have jurisdiction to order execution pending appeal as the monetary value of the land or the occupation concerned far exceeds the monetary jurisdiction of the magistrates civil court. I think it is misleading to conceive the magistrates court as two separate entities - a civil court and a criminal court. The correct position is that the magistrates court is one entity, endowed with both civil and criminal jurisdiction. The jurisdiction H of the magistrates court in civil cases is provided for under s 11 of the

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Magistrates Court Act, whilst the jurisdiction of the court in criminal matters A is provided for under s 49 of that Act. There is no provision that says a magistrate cannot, in an appropriate case, exercise elements of both his civil jurisdiction and his criminal jurisdiction where the enabling Act so directs. Further, it is important to bear in mind that the jurisdiction of a magistrate is conferred by the Magistrates Courts Act "and any other enactment." There is no provision that says that a magistrate cannot combine, in an appropriate B case, the jurisdiction conferred upon him by the Magistrates Court Act and that conferred by any other enactment.

Section 40 of the Magistrates Court Act for instance deals with appeals. Subsection (3) thereof reads:

"(3) Where an appeal has been noted the court may direct either that the judgment C shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application."

In the present case, the magistrate's decision is supportable on the basis of this provision. The question of lack of monetary jurisdiction does not arise as that is covered by the provisions of s 3 (5) of the Gazetted Land Act in D terms of which the trial proceeded. The magistrate's jurisdiction to issue an eviction order is, in terms of that Act, founded upon the conviction, not upon the monetary value of the land or occupation in question. The magistrate is directed to issue an eviction order upon conviction. No reference is made to his monetary jurisdiction nor is there a provision that says he can only issue such an order "subject to the jurisdiction conferred upon him by the E Magistrates Court Act." To interpret the position otherwise would lead to a glaring absurdity. The legislature could not have intended to limit the jurisdiction of the magistrate to property whose value does not exceed $2 000. If that were the case, given the size and value of the properties that the legislature must have intended to target, no eviction orders would ever be issued on the authority of a magistrate. Such an interpretation is not only F at variance with the intention of the legislature (so clearly expressed in language plain and unambiguous) but would defeat the whole purpose of the object of that section. Indeed, what is being proposed is that such eviction orders are only tenable at the High Court, it being a court of unlimited jurisdiction. I am unable to agree with that proposition. Not only would the G High Court be faced with a serious backlog in view of the magnitude of the land acquisition programme, but the process of acquisition itself would be rendered ineffective as a result.

The legislature, in its wisdom, has empowered "any court", including the magistrates court (whose physical presence throughout the country is much more widespread than that of the High Court), to be the vehicle through H

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A which the provisions of s 3 of the Gazetted Land Act shall be executed. If the legislature had intended otherwise, appropriate provision would have been made. I am therefore of the view that the third respondent had jurisdiction to entertain the application to execute the eviction order pending appeal and to determine the fate of such application.

B Accordingly, it is ordered that the application be and is hereby dismissed with costs.

Sawyer & Mkushi, applicant's legal practitioners

C *Civil Division, Attorney-General's Office,* respondents' legal practitioners

* *"Editor's note: Quaere,* whether the effect of this judgment would be that a mag- istrate could order the execution of an award of compensation in a criminal case, in spite of the noting of an appeal against conviction. Under s 372 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] such an award, when registered, has the effect of a civil judgment

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HUSAIHWEVHU & ORS v UZ-USF COLLABORATIVE RESEARCH PROGRAMME 2010 (2) ZLR 448 (H)

Citation 2010 (2) ZLR 448 (H)

Case No	Judgment No. HH-237-1
Court	High Court, Harare
Judge	Gowora J
Heard	31 August 2010
Judgment	20 October 2010
Counsel	*A Moyo*, for the applicants *H Mutasa*, for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Arbitration - *award - registration - grounds on which registration may be refused - public policy defence - limited application of- effect of error on part of arbitrator - not sufficient to set aside award-failure to* D *plead public policy defence - not fatal if defence manifest from record*

Headnote

In dealing with applications seeking to set aside arbitral awards, the approach to be adopted is to construe the public policy defence, as set out in art 36(1)(b)(ii) of the First Schedule to the Arbitration Act [*Chapter 7:15*] E*,* as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognize the basic objectivity of finality in all arbitrations, and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated.

An award by an arbitrator is not contrary to public policy merely because the arbitrator was wrong in law or in fact in reaching the conclusion F that he arrived at.

Consequent upon an arbitral award which had been made in favour of the applicants, an application was made to the High Court for its registration by the applicants in terms of s 98(14) of the Labour Act [*Chapter 28:01*]. It was opposed by the respondent. At issue was the award of an arbitrator G concerning what salaries and benefits were due by the respondent to its employees, the applicants. Notwithstanding that the respondent had failed to raise the point in its pleadings, it was argued on its behalf that the arbitrator's award was in error and contrary to public policy for purposes of art 36(1)(b) of the First Schedule to the Arbitration Act, and as such should not be registered. Other than a bald statement to that H

A effect the respondent had placed no facts before the court to establish that the award was contrary to public policy

Held, that even though it had not been specifically pleaded, if indeed there was clear evidence on record that the award was contrary to the public policy of Zimbabwe, then that defence must be considered.

Held, further, granting the registration with costs, that whether or nor the B arbitrator erred was not an issue and should not concern the court in considering whether registration in terms of the Labour Act should be granted. The issue to be decided was whether the award was so outrageous in its defiance of logic and acceptable moral standards as to result in an injustice that was contrary to public policy. This had not been established.

Legislation considered C

Arbitration Act [*Chapter 7:15*], First Schedule, art34, 36(1)(b)and36(3) Labour Act [*Chapter 28:01*], s 98(14)

Cases referred to

Delta Operations (Pvt) Ltd v Origen Corporation (Pvt) Ltd 2007 (2) ZLR 81 (S)

Paktila Invstm Ltd v Klockner East Asia Ltd (1994) 19 *Yearbook of Commercial Arbitration* 674

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

Remisager Power Co Ltd (India) v General Electric Co (US) (1995) 20 *Yearbook of Commercial Arbitration* 681

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

Case information

A Moyo, for the applicants

HMutasa, for the respondent

Judgment

Gowora J: This is an application for the registration of an award issued in favour of the applicants under the Labour Act on 30 March 2010. The registration is sought in terms of s 98(14) of the Labour Act [*Chapter* 28:01] ("the Act"). The respondent opposes the granting of the relief being sought.

In his heads of argument Mr *Moyo* had, as a point in *limine,* submitted that the respondent had been found by the Labour Court to have had dirty hands and that this court should also find the same and should not hear the respondent. Mr *Moyo* advised from the bar that the point in *limine* had been abandoned and the matter then proceeded on the merits.

The background to this dispute is as follows: The applicants were employed by the respondent on the basis of written contracts which determined the terms

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and conditions of their employment. The contracts were then terminated by the respondent and the dispute was referred to Mr *Mutongoreni,* an arbitrator, who made an award in favour of the applicants on 31 August 2007. The terms of his award were as follows:

1. First issue in dispute is answered as follows:

   The contracts of employment between the respondent and complainants were not terminated in accordance with the provisions of the contracts of employment between the parties.
2. *Second issue in dispute is answered as follows:*

   Complainants had a legitimate expectation for the automatic renewal of their respective contracts of employment.
3. *Third issue in dispute is answered as follows:* Complainants were unfairly dismissed.
4. *Fourth issue in dispute is answered as follows:*

   Contracts of employment should be deemed automatically renewed on the same conditions with effect from 1 July 2007.
5. *Fifth issue in dispute is answered as follows:* Contracts of employment were unlawfully terminated.
6. *Sixth issue in dispute is answered as follows:*

   Complainants must be deemed to be under respondent's employment from the date of the purported termination to the date of this arbitration i.e. 31 August 2007 (being a period of two months).

Aggrieved by the award, the respondent noted an appeal to the Labour Court, which again found in favour of the applicants and dismissed the appeal. The dispute was then referred to another arbitrator for the determination of salaries and benefits payable to the applicants. The arbitrator, Mr *Matsikidze,* then made an award on 31 March 2010 which is the subject matter of the dispute before me.

The respondent, in seeking to oppose the registration of the award, has argued, firstly, that the award is the subject matter of an appeal in the Labour Court and has attached a copy of the notice of appeal to its opposing papers. G However, the respondent concedes in the same affidavit that the noting of an appeal does not suspend the operation of the award.

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. H

2010 (2) ZLR p451

Gowora J

> A (2) An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against.
>
> (3) ... (not relevant)."

In my view, this section does not require interpretation or amplification. The language is clear and unambiguous and it is probably the reason why B Mr *Mutasa* did not dwell on the noting of the appeal either in his heads of argument or in his oral address.

The second issue raised in the opposing affidavit was that the respondent had applied to the Labour Court for an order staying execution of the arbitral award. The applicants have attached to the answering affidavit filed on their behalf an order issued by the Labour Court on 17 May 2010 refusing the C application for an order for a stay of execution. The opposing affidavit did not touch on any other ground for opposing the grant of the order sought before me.

In the heads of argument filed before this court, *Mr Mutasa* submitted that if the award was enforced, the respondent would be practically deprived of a D right to challenge the content of the award despite the fact that the respondent is entitled to such challenge. He submitted, further, that this court is entitled to look into the content of the award itself and in this regard he adverted to the appeals pending in the Labour Court. He *cited Pamire & Ors v Dumbutshena NO & Anor* 2001 (1) ZLR 123 (H). It is a judgment by Makarau J (as she E then was). The passage referred to me is at 128B-C and reads as follows:

> "... To therefore grant the full reward in the absence of complete performance by the second respondent does make justice turn on its own head, in my opinion. It is a violation of Zimbabwe's notion of elementary justice and constitutes a palpable inequity that would hurt the conceptions of justice in Zimbabwe. Justice in Zimbabwe ought to be conceived as fair, even-handed and non discriminatory F between the rich and poor. To recognize the award would have the effect of dispelling this conveption".

Mr *Mutasa,* in pursuing his argument, further submitted that in terms of art 36(1)(b)(ii) of the first schedule to the Arbitration Act [*Chapter 7:15*] this court should refuse to register the award on the basis that it is contrary to public policy. He contended further that once there were unfair provisions G in the award that would be contrary to public policy and the award could not stand that test. He argued that the arbitrator had wrongly read the judgments and had ruled that the applicants would be deemed as the respondent's employees until their contracts were lawfully terminated.

When Mr *Matsikidze* determined the level of salaries and benefits due to the H applicants, he stated as follows:

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Gowora J

> "The question I used to ask myself, is what did the Labour Court rule in this A particular case. Clearly from the paragraph quoted above, the Labour Court made it clear that these employees remain employees of the respondent 'until their contracts were lawfully terminated'. The question which naturally follows is: 'Are the contracts in question lawfully terminated?' The answer is no. In that regard my hands are tied. I cannot alter the judgment of the Labour Court. What I can simply do is to interpret or effect its meaning. In that view, my task B will be to determine salaries and benefits up to the date of lawful termination".

Clearly the status of the employees *vis-à-vis* their employer was not determined by the arbitrator whose award is before me, but by Mr *Mutongereni* on 31 August 2007 and confirmed by the Labour Court on 12 March 2009. The pertinent paragraph in the judgment reads thus:

> "What are the terms and conditions referred to herein? Obviously the arbitrator C is referring to the same terms and conditions of the contracts of employment previously signed by the respondents. In those contracts the appellant is obliged to give 90 days' notice should the appellant intend to terminate contracts

due to lack of funding. Therefore para 6 of the award cannot be interpreted to mean what the appellant submitted, that the respondents were only reinstated for two months. The arbitrator was only emphasizing that the respondents are deemed to D have been in the appellant's employment for the past two months. The contracts were renewed for 12 months. I am not satisfied therefore that the appellant has complied with the arbitrator's ruling. The appellant has not complied with the arbitrator's ruling as the appellant has not re-instated the respondents, neither has the appellant been paying the respondents' salaries."

The respondent herein was not happy with the judgment of the Labour Court E and sought leave to appeal, which leave was denied on the basis that it was approaching the court with dirty hands due to non-payment of the award by the arbitrator and refusal to reinstate the applicants. The respondent did not seek leave from the Supreme Court. The judgment of the Labour Court has therefore not been set aside. It is trite that a judgment or order of a court is binding on the parties thereto unless and until it has been set aside. F

In addition to the above, the respondent has not, in its opposing affidavit, set out the facts upon which it alleges that the award is contrary to public policy. *Mr Mutasa* sought for the first time to raise the issue in his heads of argument and not in the affidavit opposing the order being sought. It is trite that facts on which a party relies on should be averred in an affidavit and G should not be argued from the bar, as that is tantamount to counsel giving evidence from the bar. Mr *Moyo* however did not object and I will therefore lay out the gist of the argument by Mr *Mutasa.*

He contended that the arbitrator had wrongly read judgments and had consequently, ruled that the applicants would be deemed as respondent's employees until their contracts were lawfully terminated. He further H

Gowora J

A complained that the arbitrator had then awarded what he deemed to be arrear salaries and future salaries, instead of assessing damages that would result from a finding that a contract had been unlawfully terminated. He submitted that that finding on its own was patently wrong in two respects: firstly, that it had never been in dispute that the contracts were fixed term contracts and that, when the Labour Court ruled that they were deemed renewed, it could B not have been for a period exceeding twelve months. He further submitted that the arbitrator has not indicated on the award that he reminded himself or took into account that the applicants had an obligation to mitigate damages. He contended that if an arbitrator ignores or disregards a provision of law such award may not be enforced. For this proposition he referred me to *Delta* C *Operations (Pvt) Ltd v Origen Corporation (Pvt) Ltd* 2007 (2) ZLR 81 (S).

In opening his submissions Mr *Mutasa* made reference to art 36 (1)(b) of the first schedule to the Arbitration Act [*Chapter 7:15*], which obliges a court to refuse to register an arbitral award if the court finds that -

"(i) ... D

(ii) the recognition or enforcement of the award would be contrary to the public policy of Zimbabwe."

This subclause should be read with art 36(3), which provides:

"For the avoidance of doubt and without limiting the generality of paragraph (1)(b)(ii) of this article, it is declared that the recognition or enforcement of an award would be contrary to the public policy of Zimbabwe if- E

(a) the making of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred with the making of the award."

As stated earlier, this defence of public policy was not pleaded by the F respondent but even in his submissions *Mr Mutasa* did not mention fraud, corruption or the violation of the rules of natural justice. Paragraph (3) of art 36 does not, however, limit the court to these grounds in determining the issue of the defence of public policy. The manner in which I understood Mr *Mutasa*'s argument is that he was alluding to error on the part of the arbitrator.

The question, then, is whether the alleged error alluded to by Mr *Mutasa* can be G such as to cast the award as one contrary to the public policy of Zimbabwe. The meaning of the phrase "contrary to public policy" was extensively discussed by Gubbay CJ *in Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S). This is what the learned Chief Justice stated at 465C-466D:

"What has to be focused on is whether the award, be it foreign or domestic, is H contrary to the public policy of Zimbabwe. If it is, then it cannot be sustained,

Gowora J

no matter that any foreign forum would be prepared to recognize and enforce A it".

In my opinion, the approach to be adopted is construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognize the basic objectivity of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated. This is illustrated by *dicta* in many cases, of B which the following are impressive.

In *Paktila Investment Ltd v Klockner East Asia Ltd* (1994) 19 *Yearbook of Commercial Arbitration* 664, the Supreme Court of Hong Kong remarked at 674:

> 'The public policy defence is construed narrowly and I deprecate any the attempt to wheel it out on all occasions. As the US Court of Appeals for the Second Circuit said in *Parsons & Whittemore v RAKTA* 508 F 24 969 (2d Cir 1974): C
>
> > "... the convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would *violate the forum State's most basic notions of morality and public justice"*(my emphasis).

Similarly, in *Leopold Lazarus Ltd v Chrome Resources SA,* reported in (1979) D 4 *Yearbook of Commercial Arbitration* 311 at 312, the Court de Justice, Canton of Geneva, underscored that before the defence of public policy can be upheld:

> 'There must be a violation of fundamental principles of the Swiss legal order, *hurting intolerably the feeling of justice ...* This exception of public order should not be twisted in order to avoid application of international conventions which are signed by Switzerland and which form part of Swiss E law' (my emphasis).

Finally, in *Remisager Power Co Ltd (India) v General Electric Co (US)* reported in (1995) 20 *Yearbook of Commercial Arbitration* 681, the Supreme Court of India at 702 concluded that enforcement of an award:

> '... would be refused on the grounds that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian F law; or (ii) the interests of India; or (iii) justice or morality.'

The difficulty, then, is not with the formulation of an appropriate and acceptable test. It is with the application of that test in an endeavour to determine whether the arbitral award should be set aside or enforcement of it denied, on the ground of a conflict with the public policy of Zimbabwe.

I am conscious, as emphasized by Sir Michael Kerr in his article entitled 'Concord and Conflict in International Arbitration' published in (1997) 13 *Arbitration* G *International* 121 at 140, that:

> 'In most countries, the spirit of the New York convention has rightly been upheld to require what a US Circuit Court of Appeals has referred to as 'general pro-enforcement bias.'

In casu, the effect of an enforcement of the arbitral award would have been to allow Maposa to take advantage of a position that he had deliberately engineered. H

Gowora J

A Counsel for ZESA submitted that this 'turns justice on its head', the error of the arbitrator being so fundamental as to make a refusal to set aside the award, or, to permit the enforcement of it, a violation of Zimbabwe's elementary notions of justice".

Mr *Moyo* contended that the failure by the respondent to plead art 36 of the First Schedule to the Arbitration Act [*Chapter 7:15*] would result in the B court declining to consider the defence of public policy, thus leaving the court to register the award under the provisions of s 98(14) of the Labour Act [*Chapter 28:01*]. The view I take is that the defence is been provided for in a statute and, if indeed the papers that are placed before me establish the defence, it would be an injustice not to afford the respondent the benefit of the defence, merely because it was not specifically pleaded even though C it is manifest from the record. If indeed the registration of the award would be contrary to the public policy of this country and there is clear evidence on the record, I would venture to say, with respect, that the court would have to consider the defence and afford the respondent the protection under the Arbitration Act.

D Mr *Mutasa* argued that the arbitrator had awarded arrear salaries and future salaries instead of damages. It seems to me that the import of the defence under arts 34 and 36 is not to imbue the court before whom the award is to be registered or set aside with powers of appeal to determine the correctness of the decision by the arbitrator. This court is not, in this instance, sitting as a court of appeal to adjudicate the correctness or erroneous nature of E the reasoning of the arbitrator. Its

task is to consider whether the award by the arbitrator is one that should not be registerable having regard to the requirements of arts 34 and 36 of the Arbitration Act. I am persuaded that an award by an arbitrator is not contrary to public policy merely because the arbitrator was wrong in law or in fact in reaching the conclusion that F he arrived at. It is also clear from an examination of the papers that the respondent has not placed before the court the basis upon which it seeks to rely on the defence of public policy under the Arbitration Act. This court would only intervene and uphold the defence of public policy where it is established that the reasoning or conclusion in the award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far G reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award: *per* Gubbay CJ in *Zimbabwe Electricity Supply Authority v Maposa supra* at 465D-E.

The courts in this country have construed the defence of public policy very H restrictively so that the objective of finality to arbitration is achieved. It

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Gowora J

follows, therefore, that the grounds upon which an award may be set aside A or those on which a court may refuse to register the award are very narrow. Whether or not the arbitrator erred is not an issue that should concern this court in deciding whether or not the award should be registered in terms of the statutory provisions providing for registration. The issue to be decided is whether or not the respondent has shown that its registration would be contrary B to the public policy of Zimbabwe and, in my view, the respondent, apart from a mere bald statement, has not shown that it would be. The respondent referred me to *Delta Operations (Pvt) Ltd v Origen Corporation (Pvt) Ltd supra* which re-affirmed the principles that had been set out by Gubbay CJ in the case of *Zimbabwe Electricity Supply Authority v Maposa supra.* He did not advance any cogent argument as to how the authority he cited supported C the defence that was proffered on behalf of the respondent. There had been no facts placed before the court on which legal argument supporting the defence could then be premised. In my view, the point raised by Mr *Moyo* - that the defence had not been pleaded - had merit as the defence lacked foundation and could not be advanced further than to argue error on the part of the arbitrator. I find, therefore, that the respondent has not established that D the reasoning by the arbitrator was so outrageous in its defiance of logic and acceptable moral standards as to lead me to conclude that an injustice was done to the respondent. I find, consequently, that registration of the award is not contrary to public policy.

In the premises an order in favour of the applicants, as well as costs, will E issue in terms of the draft.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Kantor & Immerman, respondents' legal practitioners F

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Source:
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NGWENYA & ANOR v NDEBELE NO & ANOR 2010 (2) ZLR 457 (H)

Citation 2010 (2) ZLR 457 (H)

Case No Judgment No. HB-122-10

Court High Court, Bulawayo

Judge	Mathonsi J
Heard	12 October 2010
Judgment	21 October 2010
Counsel	*R Ndlovu*, for the applicant *T Makoni*, for the respondent
Case Type	Application for criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure - *trial - multiple accused- separation of trials - may only be ordered on application by prosecutor or accused - factors to take into account when application made*

Headnote

D A separation of trials may not be ordered by the court *mero motu;* an application must be made by the prosecutor or one of the accused. If no such application is made, it is not an irregularity if the court does not *mero motu* order a separation and there would be no grounds for review arising from the failure to order a separation. If an application E is made, the court has a discretion as to whether to order separation of trials. There is no rule of law that separate trials should be ordered where an essential part of one accused person's defence amounts to an attack on a co-accused; this would be a matter which the court should take into account in determining whether to order separate trials or not. F It is not correct to say that, where co-accused persons incriminate each other, even where there is no desire to use the evidence of any of them against the other, a separation of trials should be ordered.

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 206

G Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 158 & 190

High Court Act [*Chapter 7:06*], s 27

Case referred to

H *S v Ismail* 1994 (1) ZLR 377 (S)

2010 (2) ZLR p458

Case information

R Ndlovu, for the applicant A

T Makoni, for the respondent

Judgment

Mathonsi J: These are two applications in which the applicants, who are husband and wife, seek review of the criminal proceedings at the magistrates court of Tsholotsho. B

The applicants were jointly charged, along with two other people, namely Cowboy Moyo and Mkhululi Moyo, with armed robbery in contravention of s 126 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). On 15 April 2010 the magistrate delivered judgment in which he convicted the four of them. The applicants were convicted as C accessories after the fact.

The magistrate was of the view that, considering the seriousness of the offence, it might be necessary to sentence them to imprisonment beyond his five year jurisdiction as a provincial magistrate. The magistrate then referred the matter to the Attorney-General in terms of s 54(2) of the Magistrates Court Act [*Chapter 7: 10*], as read with ss 225 and 228 of the Criminal Procedure D and Evidence Act [*Chapter 9:07*].

On 4 May 2010, the Attorney-General directed that the matter be transferred to the High Court for sentence and the trial magistrate duly complied with that directive. As it is, the matter is pending in this court awaiting sentence.

The applicants did not wait for sentence by this court but instead, on 18 E May 2010, they separately filed applications for review of the criminal proceedings, which applications are identical. The grounds upon which the applicants seek to have the proceedings reviewed are set out as follows:

> "1. The respondent have *(sic)* failed to properly afford the applicant a fair hearing in terms of section 18 of the Constitution of Zimbabwe in that they F did not apply the concept of separation of trial in terms (of) section 190 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].
>
> 2. Effectively, this resulted in applicant being convicted for armed robbery by common purpose, which is wrong."

The relief sought by both applicants is that the proceedings be quashed and G the matter remitted for a trial *de novo* before a different magistrate. The applicants argue that, by failing to separate the trials of the two of them from those of their co-accused, they lost the opportunity to cross-examine their co-accused who implicated them in the commission of the offence. This therefore prejudiced them, as a result of which they are entitled to have the proceedings set aside. H

Mathonsi J

A At the trial, it was common cause that, after robbing the complainant, Cowboy and Mkhululi Moyo, who are brothers, carried the stolen property to the applicants' home where they surrendered the property to the applicants in the early hours of the morning of 29 January 2010. In fact, both applicants admitted having received the property and hiding it in their granary from where it was recovered by the police after they had conducted a search. It B was also common cause that Cowboy and Mkhululi Moyo had given the applicants the firearm they had used in the commission of the offence, which the applicants hid in a trunk from where it was later recovered by the police after a search.

Although Cowboy had testified that he and Mkhululi had been sent by the C applicants to go and commit the robbery, the magistrate does not appear to have believed that story. In fact, he convicted the applicants on the basis of their own admissions and not on the testimony of their co-accused. In his judgment the magistrate made the following observations which are telling indeed:

> "Accused 2 was not telling the truth as to his whereabouts at the time of the D robbery. The State has proved that he was with accused 1. That is why he was to 'assist' in carrying the property to accused 4's homestead. The accused 1 committed the offence of armed robbery with his brother accused 2. They used a firearm, knife and a whip to induce submission to the taking of the property and cash. Accused 3 and 4 were not there. Accused 3 and 4 only assisted after the commission of the offence. They both knew that the property had been E stolen or was the subject of the robbery. They received the property at night and hid it in the granary. The 'tool' they hid in a trunk. ... It is nonsensical for accused 3 and 4 to say that they put the property in the granary out of fear that a 7-year-old brat could burn it. What of the gun that they put in the kitchen? They knew it was a gun ... The accused 3 and 4 actually concealed evidence of the commission of the offence by hiding it in a granary and not telling the F police where the property and the gun were."

It was on the basis of these findings that the magistrate convicted both applicants "as accessories after the commission of the crime of the armed robbery".

Section 206 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] provides:

> G "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;
>
> renders to the actual perpetrator any assistance which enables the actual perpetrator H to conceal the crime or to evade justice or which in any other way associates

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Mathonsi J

> the person rendering the assistance with the crime after it has been committed; A shall be guilty of being an accessory to the crime concerned."

This is the provision under which the applicants were convicted and on the evidence available the decision of the trial magistrate cannot be faulted.

Section 158 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] allows for a joint trial of accused persons implicated in the same offence as B was done in this case. In terms of s 190 of that Act:

> "When two or more persons are charged in the same indictment, summons or charge, whether with the same offence or with different offences, the court may at any time during the trial *on the application of the prosecutor or of any of the accused,* direct that the trial of the accused or any of them shall be held separately from the trial of the other or others of them, and may abstain from C giving a judgment as to any of such accused"(the emphasis is mine).

Clearly, therefore, that section gives a judicial officer the discretion, at anytime during the trial, to separate the trials of two or more accused persons. However, that discretion, while it has to be exercised judicially, can only be so exercised at the instance of the prosecutor or the accused person. The D court cannot *mero motu* separate trials.

A fortiori, a judicial officer certainly does not fall into error by not *mero motu* separating trials of jointly charged accused persons. The exercise of the discretion of the magistrate in terms of s 190 can only be interfered with where it can be shown that it has led to a miscarriage of justice. Can it be E said in this matter that the failure by the magistrate to order a separation of trials, where he did not even have a right to do so without an application being made, has led to a miscarriage of justice? I do not agree with Mr *Ndlovu,* for the applicants, that it does. See *S v Ismail* 1994 (1) ZLR 377 (S) at 379G-H and 380A where Korsah JA stated:

> "The trial court does not fall into error if, without invocation, it did not *mero* F *motu* separate the trials of accused persons jointly charged.

There is no rule of law that separate trials should be ordered where an essential part of one accused person's defence amounts to an attack on a co-accused, but the matter is one which the judge should take into account in the determination of an application, whether to order separate trials or not." G

At 381C-D the learned judge of appeal went on to say:

> "There reposes in the judicial officer a discretion to separate the trials of the co-accused. This discretion is sometimes exercised in favour of an applicant where evidence admissible against one of the accused would not be admissible against the others or where the separate trial would enable the State to call an accomplice as a witness. But it remains a discretion." H

2010 (2) ZLR p461

Mathonsi J

A In the case before me no such situation obtained and, more importantly, there was no application for such separation. It would not have achieved anything. The applicants seem to suggest that where co-accused persons incriminate each other, even where there is no desire to use the evidence of any of them against the other, a separation of trials should be ordered. That is not correct.

B In any event, can it be said that there are grounds of review in this matter? Section 27 of the High Court Act [*Chapter 7:06*] sets out the grounds upon which a matter can be brought on review before this court as being:

(a) absence of jurisdiction;

(b) interest in the cause, bias, malice or corruption on the part of the presiding person; C

(c) gross irregularity in the proceedings or the decision

(d) common law grounds like unreasonableness.

I have already stated that the magistrate did not fall into error by not *mero motu* separating the trials when no application for that was made. I have also stated that the magistrate did not believe the story of the applicants' co- D accused but merely convicted them as accessories after the commission of the robbery on the strength of their admission to assisting the main perpetrators to conceal the stolen property and the weapon. Therefore, no amount of flummery with the evidence of

Cowboy and Mkhululi will change the roles played by the two applicants in the crime. There are simply no grounds of review in this matter.

In addition to that, it is undesirable for accused persons to halt criminal proceedings by making frivolous review applications before proceedings have been concluded. The best option is to await the finalisation of proceedings and then pursue the challenge whether by appeal or review. In this case, the application is without merit and may have been undertaken to delay the conclusion of the matter.

In the result, I make the following order, that:

The applications in matters number HC 98/2010 and HC 99/2010 be and are hereby dismissed with costs.

R Ndlovu & Co, applicant's legal practitioners

Criminal Division, Attorney-General's Office, respondents' legal practitioners

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Source:
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DUBE v OC ZRP, NKAYI DISTRICT, & ORS 2010 (2) ZLR 462 (H)

Citation	2010 (2) ZLR 462 (H)
Case No	Judgment No. HB-125-10
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	14 October 2010
Judgment	21 October 2010
Counsel	Mrs *L Chanaiwa*, with her *L Jamela*, for the applicant Respondents in default
Case Type	Criminal application
Annotations	No case annotations to date

Flynote

Criminal procedure – *arrest - without warrant - requirement for reasonable suspicion to exist before arrest may be made - maximum period for which arrested person may be held by police before being brought to court - arrest - with warrant - requirement to bring arrested person before court within 48 hours*

Headnote

Before arresting a person without a warrant (except a person who commits an offence in the presence of the arresting detail), the arresting detail must formulate a reasonable suspicion that

an offence has been committed. E Section 25(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] requires that there be "reasonable grounds to suspect" that an offence has been committed. Once the person is arrested and brought to a police station, s 32 of the Act demands that the person can only be detained for a period not exceeding 48 hours at a police station unless he is brought before a judicial officer who is the only authority empowered F to order a further detention. No reckoning of time allows the detention of a suspect for a period exceeding 96 hours before being brought before a judicial officer. This procedure applies even in respect of 9th Schedule offences, as the 21 day detention allowed for such offences can only be ordered by a judicial officer. Police officers have no authority whatsoever G to detain suspects beyond the prescribed period of time.

Even where a warrant for arrest is issued, s 34(3) requires the suspect to be brought "as soon as possible before a judicial officer on a charge of the offence" mentioned in the warrant. It is regrettable that senior officers policing an entire region would believe that they have a legal right to detain suspects for a period of 14 days; no such right exists. H

A It is also disturbing, to say the least, for a senior police officer, commanding an entire district, to admit that a suspect was arrested only for a crime docket to be opened later and for investigations to commence when the suspect was already languishing in custody. This means that, at the time of the arrest, the arresting detail could not have entertained any reasonable suspicion that the suspect had committed an offence. The requirement B to bring suspects before a judicial officer within the prescribed period is meant to curb the excesses of police officers who erroneously believe they can keep suspects for 14 days without charge.

Legislation considered

C Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 25(1), 32 & 33

Cases referred to

S v Chiyangwa 2005 (1) ZLR 163 (H)

S v Kinfe S-60-98

D *S v Makwakwa* 1997 (2) ZLR 298 (H)

Case information

Mrs *L Chanaiwa,* with her *L Jamela,* for the applicant

Respondents in default

Judgment

Mathonsi J: The applicant is a political activist who has been organising E political meetings for one Abednico Bhebhe, a former member of parliament for Nkayi South Constituency. He was arrested on 17 June 2010 at his home in Nkayi at around 2300 hours. He alleges that he was arrested without a warrant and was not informed of the reasons of his arrest but was merely taken to Nkayi Police Station where he was detained that same night.

F The applicant was not taken to court and when his legal practitioner was notified of the continued detention of the applicant she visited him at Nkayi Police Station on 21 June 2010 where she was able to talk to the applicant through the fence. That interview revealed that, even at that stage, some four days after his arrest and detention, the applicant had not been charged and did not know the reason for his arrest. He had not been taken before a G judicial officer but was being held *incommunicado.*

As the applicant remained in detention without charge at Nkayi Police Station with the officer in charge of that station indicating that he had been arrested on the instructions of the first respondent who was away and that it was only the first respondent who could order his release, an urgent application was H filed in this court on behalf of the applicant on 24 June 2010.

Mathonsi J

A provisional order was granted on the same date, the interim relief of which A reads as follows:

"TERMS OF THE INTERIM RELIEF GRANTED

1. That first, second, third and fourth respondents and any person or authority acting or purporting to act through him and/or on his behalf, be an is hereby ordered to take the applicant before a magistrate not later than 4:30pm on 25 June 2010. B
2. That this order shall stand notwithstanding the noting of any appeal."

That order was served together with the urgent application on the police in Nkayi on 25 June 2010 at 3pm. By then, it had been eight days since the detention of the applicant. Presumably in response to the court order but certainly not in compliance with it, the respondents released the applicant C from custody. Mrs *Chanaiwa,* appearing for the applicant, submitted that since then no further action has been taken against the applicant and he has certainly not been prosecuted for any offence.

On 29 June 2010, days after releasing the applicant from custody, the respondents filed opposition to the application and the confirmation of the provisional order. In his opposing affidavit, the first respondent makes D interesting revelations. The affidavit in question reads in part as follows:

"1.0 I, Jairos Wilstaff Chiwona, do hereby make oath and swear that; I am currently the Officer Commanding Nkayi District and the first respondent in this matter and in that capacity I am authorised to depose to this affidavit.

2.0 Ad Para 1-6 No issues arising E

3.0 Ad Para 7-9

It is admitted. The applicant was arrested on the 17th June 2010 at about 2300 hours on the strength of a warrant of apprehension issued by myself on the 17th June 2010. *A copy of which is attached and marked as Annexure A'. The warrant of apprehension clearly indicates that the applicant was being arrested for C/s 15(1) (c) of the Public Order and Security Act* [*Chapter* 11:17]. The applicant was arrested by number 054082J Sergeant Nkala and F number051531L Sergeant Makandizhe who showed the applicant the warrant of apprehension and informed him of the reason for his arrest. *Nkayi CR 18/6/10 was subsequently opened and investigations commenced.* It is thus not true that the applicant was arrested without a warrant of apprehension and that he was arrested without a charge. It is mischievous and deliberate misleading of the court by NOSIMILO CHANAIWA to say that there G was no warrant of apprehension and the applicant was not informed of the reason of his arrest. As a matter of fact the report by officer in charge Nkayi Police Station indicates that NOSIMILO CHANAIWA was aware of the existence of the charge and of the warrant of apprehension before she made the founding affidavit on 24 June 2010.

4.0 Adparal0-ll H

Mathonsi J

5.0 Ad para A 12-16

6.0 Ad para 17-21

It is not true. *From the date of arrest to the 25th June 2010, which is the date the applicant was released on remand, we have been making investigations into the case and these investigations are yet to be completed.* B They are likely to be protracted since they will involve interviews with certain media houses that have published information to the effect that the meeting took place. *The law provides for a person arrested with a warrant of apprehension to be detained for a period not exceeding 14 days and to be brought before a judicial officer as soon as possible.* May it be pointed out that even before the application the police had already decided and had C actually made an effort to place the applicant on remand but unfortunately the magistrate THABEKHULU DUBE and the prosecutor MAXWELL HAPANYENGWI decided to recuse themselves from the case where they even denied the police the right to have the applicant appear before them. *As a result we had to release him out of custody.* They even refused to have a hearing of the case despite being shown the provisional court order, which directed the police to take the applicant before a magistrate. *Because of the* D *foregoing the police complied with all legal procedures from* the time of arrest up to the time of the applicant's release. The question of costs should therefore not be raised. I pray therefore that the application be dismissed. Thus sworn at Bulawayo this 29th day of June 2010.

E Signed,

Joram Wilstaff Chiwona Signed

Commissioner of oaths"(the emphasis is mine throughout).

That the celebrated and time honoured principle of our criminal justice system that an accused person is innocent until proven guilty is still part of our law is beyond doubt. So is the principle that

the police should investigate the F alleged commission of a crime and formulate a reasonable suspicion that an accused person has committed an offence before effecting an arrest. These legal and social mores have been with us since time immemorial. For a senior police officer, commanding an entire district, to swear that a suspect was arrested only for a crime docket to be opened later and for investigations to commence when the suspect was already languishing in G custody is disturbing, to say the least. It means that at time of the arrest, the arresting detail could not countenance any reasonable suspicion that the suspect had committed an offence.

Section 25(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] authorises a police officer to arrest without warrant where "he or she has H reasonable grounds to suspect", that a person has committed a First Schedule

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Mathonsi J

or Ninth Schedule offence. *In casu,* the police have maintained that this was A an arrest with a warrant. It is therefore not necessary to discuss the law on arrest without warrant. The warrant in question has not been produced. It is unlikely that such warrant existed and where the police have failed, despite having more than four months to spare, to produce it, the reasonable inference is that it does not exist. B

The deposition made by the first respondent is shocking indeed. He has confidently said that where a warrant of apprehension has been issued by him, they are entitled to detain the suspect for a period of up to 14 days. Regrettably, in heads of argument filed on behalf of the respondents, they could not refer me to any such provision, because it simply does not exist. It is not counsel's failure to dig up a law applied by the police in Nkayi that is C regrettable, but the knowledge that senior officers policing an entire region would believe that they have a legal right to detain suspects for a period of 14 days, when no such right exists. To think that other suspects out there not so fortunate as to afford legal representation have their rights trampled upon as a result of the ignorance of law enforcement agents makes one shudder. D

The position of our law relating to the arrest of suspects is a simple one. It is that before arresting a person, except one who commits an offence in the presence of the arresting detail, such arresting detail must formulate a reasonable suspicion that an offence has been committed. Section 25(1)(b) of the Criminal Procedure and Evidence Act talks of "reasonable grounds to suspect" that an offence has been committed. E

Section 33 allows a judge, magistrate or a justice of the peace to issue a warrant of arrest of a suspect or for further detention of a suspect arrested without a warrant on written application made to him or her by the Attorney General, local prosecutor or an officer in charge of a station holding a rank of at least assistant inspector. Even then the applicant must show that he has F reasonable grounds of suspicion against that person.

Once arrested and brought to a police station, s 32 of the Act demands that a suspect can only be detained for a period not exceeding 48 hours at a police station unless he is brought before a judicial officer, who is the only authority empowered to order further detention.

Even where an arrest warrant is issued, s 34(3) requires the suspect to be G brought "as soon as possible before a judicial officer on a charge of the offence" mentioned in the warrant.

The proviso to s 32(3) makes it absolutely clear that no reckoning of time shall allow the detention of a suspect for a period exceeding 96 hours before being brought before a judicial officer G

Mathonsi J

A This procedure applies even in respect of Ninth Schedule offences, as the 21 day detention allowed for such offences can only be ordered by a judicial officer. Police officers do not have any authority whatsoever to detain suspects beyond the prescribed period of time.

Officer Chiwona has sworn to an affidavit that the warrant that he issued for B the arrest of the applicant was for contravention of s 15(1)(c) of the Public Order and Security Act [*Chapter 11:17*]. This was despite the fact that the section in question was repealed by s 282 of Act 23 of 2004, that is, the Criminal Law Code [*Chapter 9:23*]. At the time he purportedly issued the warrant, the section under which he wanted to arrest the applicant did not exist.

Even if I am wrong in my finding that the warrant in question did not exist, C reference to a repealed section of the Public Order and Security Act rendered it invalid and unenforceable. If the applicant was arrested on the strength of an invalid warrant, that arrest was therefore unlawful. As that icon of English Law, Lord Denning put it; "You cannot put something on nothing and expect it to stand; it will collapse."

D The applicant was not brought to court within 48 hours or as soon as possible as provided by the law. In fact, he was not brought to court at all while the first respondent wallowed in the mistaken view that he was entitled to detain him for a period of up to 14 days. Section 13(2) of the Constitution guarantees every citizen's right to liberty.

In *S v Chiyangwa* 2005 (1) ZLR 163 (H) Hungwe J at 169C-E quoted with E approval the following pronouncement in the American case of *McNabb v United States* 318 US 332 (1943) at 343:

> "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of the F cherished liberties. Experience has therefore counselled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be trusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its indication."

G This is apposite in this case because the requirement to bring suspects before a judicial officer within the prescribed period is meant to curb the excesses of police officers who erroneously believe they can keep suspects for 14 days without charge. In fact, in this case, even the contemplated charge was in terms of a non-existent section of the Public Order and Security Act.

H *In S v Makwakwa* 1997 (2) ZLR 298 (H) at 305C-D Gillespie J said:

Mathonsi J

> "The lesson to be learned from this is that delay in bringing a detained person A before a magistrate will only be countenanced when that delay is excusable on some objective ground."

See also *S v Kinfe* S-60-98 (unreported) at p 4.

The respondents have alleged that the applicant could not be brought to court because the magistrate and the prosecutor recused themselves. It has B not been explained how and why this bizarre occurrence came to pass. I am of the view however that this excuse is as lame as it is unsustainable. The police could have easily brought the applicant to a magistrate in Bulawayo, if indeed this unlikely occurrence happened. They did not.

In any event, the tone of the first respondent's affidavit suggests that this was done after the provisional order had been issued directing that the C applicant be brought before a magistrate. By then, the applicant's detention was already unlawful; in fact, it was unlawful from the very beginning and could not be cured by the belated reference to the resident magistrate and the prosecutor for Nkayi.

In the result I make the following order: D

(1) That the provisional order granted on 24 June 2010 be and is hereby confirmed.

(2) That there is no lawful basis for the first and second respondents to have the applicant detained in police cells for a period exceeding that provided for at law. E

(3) That respondents shall bear the costs of this application on a legal practitioner and client scale, jointly and severally, the one paying the others to absolved.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners F

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Source:
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VAN DEN BERG & ANOR v LANG 2010 (2) ZLR 469 (H)

Citation	2010 (2) ZLR 469 (H)
Case No	Judgment No. HB-129-10
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	15 October 2010; 19 October 2010
Judgment	21 October 2010
Counsel	*S Chamunorwa*, for the applicant Miss *H Moyo*, for the respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Property and real rights - *spoliation order - application for - defences to - length of time taken to bring application - relevance of - applicant not in possession - complete defence*

Headnote

D The applicants had at some stage occupied and operated mining sites owned by the respondent. The facts did not show clearly on what basis they did so; there appeared to be some sort of partnership or tribute agreement. A dispute arose between the parties and the respondent took possession of the sites. The applicants sought a spoliation order; the respondent E averred, in answer, that the applicants had abandoned the sites and that as owner he was entitled to re-take possession. He also argued that the applicants were not entitled to bring a spoliation application several months after the event; they should have acted immediately.

Held, that although, depending on its length, the period of delay may not *per se* constitute a bar to the grant of a spoliation order, it could well F be a relevant factor in deciding whether the dispossession had been consented to.

Held, further, that a respondent may, as a general rule, raise only two defences in spoliation proceedings:

(a) the applicant was not in the peaceful and undisturbed possession of the thing in question at the time of deprivation; or G

(b) the respondent has not committed spoliation .

With regard to the first defence, the respondent may prove that the applicant did not exercise the measure of physical control which was necessary to acquire or retain possession or that the intention to derive a benefit from holding the thing was absent. Regarding the second defence, the H respondent may, for instance, prove that his act of dispossessing the

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applicant was in fact not unlawful, in that it amounted to counter-spoliation A or was justified in terms of some statutory enactment or took place with the consent of the applicant. The

applicants did nothing to rebut the averment that they had abandoned the sites, so the defence must succeed.

Cases cited

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

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

Manga v Manga 1991 (2) ZLR 251 (S)

Quarrying Enterprises (Pvt) Ltd v John Viol (Pvt) Ltd & Ors 1985 (1) ZLR 77 (H) C

Case information

S Chamunorwa, for the applicant

Miss *H Moyo,* for the respondent

Judgment

Mathonsi J: This matter is characterised by a lack of disclosure of useful information that would enable one to make an informed decision on the facts D . The brevity of the papers filed and the obvious unwillingness of counsel to clarify the dispute that exists between the parties constitute a challenge indeed. What can be gleaned from the papers and submissions made by counsel is that the parties entered into some kind of a partnership sometime in August 2009, which was not reduced to writing, in terms of which they may have E agreed to mine jointly at True Blue Mine in Filabusi. The detailed terms of the agreement are not clear, but it would appear that the two applicants were to operate or mine from certain mine dumps while the respondent did the same on other dumps. All the mining claims belong to the respondent.

This understanding subsisted for some time but a dispute has arisen between the parties which has propelled the applicants to institute summons proceedings F against the respondent seeking confirmation of the existence of a partnership and a debatement of the partnership accounts. Alternatively, they seek damages for unjust enrichment. The summons was issued on 27 September 2010.

In their declaration in that matter the applicants allege that, in terms of the agreement, the respondent was required to contribute in the form of the mine G dumps or plants under his claim and accommodation for them. On their part, they were to contribute capital of $10 000, expertise and labour. They do not allege that they did make the contribution in pursuance of the agreement. The applicants further allege in their declaration that the respondent now denies the existence of the partnership and has given them notice to vacate the house that they occupy and to cease all operations on the unnamed mine H

Mathonsi J

A dump which they operate. The respondent has entered appearance to defend that action but is yet to file a plea.

On 12 October 2010 the applicants issued this urgent application, which has been opposed by the respondent. The applicants allege in the founding affidavit deposed to by the first applicant and verified by the second applicant, B which is very brief indeed, as follows:

> "(5). The facts which give rise to the present application are that the respondent has unlawfully and without our consent taken possession of two mining plants which have always been under the control of myself and the second applicant. The mining plants which were taken over are called the' OFFICE PLANT' which the respondent took over sometime in June 2010 and the 'SPORO PLANT' which he took over on 2 September 2010. As a direct, C result of the respondents take over of the said mining dumps, water supply to the mining plant called the 'DRC PLANT' which we are currently working on will be cut as soon as respondent starts operating the SPORO PLANT which is likely to happen on the second or third week of October 2010. This will gravely affect our mining operations as we need water for the cyanidation process.
>
> (6). I am advised, which advice I accept, that in an application of this nature, D which is for a spoliation order, all I need to allege is that I was in undisturbed use, occupation or control of certain property and that my use, occupation or control has been interfered with. In that regard, I confirm that

having been in undisturbed control of the mining dump and the respondent has without my consent or that of the second applicant taken it over."

E The affidavit ends there and is signed before a commissioner of oaths. How the applicants came to occupy the dumps, what they did on them and how the respondent has "despoiled" them is not explained.

In his opposing affidavit, the respondent says nothing about the existence of a partnership agreement between himself and the applicants or any other relationship between them. By implication, he seems to accept that the F applicants once enjoyed possession of the two plants. He, however, premises his opposition on the fact that the mining claims belong to him and his wife and that, at the time he took them over, "the applicants were not working on them and had long abandoned them". He seems to suggest, without saying it though, that to the extent that the applicants had abandoned the mines, he as the owner of the claims, was at liberty to take them over. He then firmly G maintains that the applicants lost possession, not through his actions, but through their own conduct of abandonment.

At the first hearing of this matter on 15 October 2010, Mr *Chamunorwa,* who appeared for the applicants, requested a postponement to enable him to confer with the applicants on the allegations of abandonment which he was H not aware of. It was drawn to his attention that he may need to supplement

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Mathonsi J

his papers because, as they stood, they did not contain sufficient particularity A to clarify the relationship between the parties and what it is the respondent is alleged to have done to constitute spoliation.

When the hearing resumed on 19 October 2010, no further papers had been filed and Mr *Chamunorwa* took the view that the applicants' papers, as they stood, made out a case for the relief sought. He had no explanation as B to the alleged abandonment other than to argue that the onus to prove that abandonment extinguished possession rested upon the respondent. For that proposition he relied on *Quarrying Enterprises (Pvt) Ltd v John Viol (Pvt) Ltd & Ors* 1985 (1) ZLR 77 (H). In that case Ebrahim J (as he then was) stated at 83G-H:

> "Ownership is a fundamental concept of our law. It is acquired and extinguished C only in certain circumstances. The Council maintains that it had the right to dispose of these blocks because;
>
> (a) they had been abandoned, and
>
> (b) they were found on its land.
>
> In order to prove that ownership has been extinguished by abandonment, it is D necessary to prove an intention to abandon."

We can easily dispose of that argument as being without merit at all. The *Quarrying Enterprises* case is clearly distinguishable from the present case as it dealt with ownership and not possession.

It was submitted on behalf of the respondent that the remedy of spoliation, E being a quick remedy, should be resorted to immediately and cannot be brought several months after the alleged spoliation took place. I do not agree with this argument because, in *Manga v Manga* 1991 (2) ZLR 251 (S) at 255B the Supreme Court held that a delay of five months could not be regarded as acquiescence by a party to dispossession. See also *Botha &* F *Anor v Barrett* 1996 (2) ZLR 73 (S) at 78C.

In *Botha supra,* the Supreme Court however stated at 78D that:

> "Although, depending on the length, the period of delay may *not per se* constitute a bar to the grant of a spoliation order, it could well be a relevant factor, in deciding whether the dispossession had been consented to."

That brings me to the issue of whether the applicants have made a case for a G spoliation order. The requirements for such an order to be granted are twofold and have to be proved for a spoliation order to be granted. They were stated in *Botha supra* at 77E as follows:

> "(a) that the applicant was in peaceful and undisturbed possession of the property, and, H

Mathonsi J

> (b) that the A respondent deprived him of the possession forcibly or wrongfully against his consent."

See also *Kramer v Trustees, Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 (C) at 753.

A respondent in an application of this nature can repel the application by B raising essentially two defences. According to Silberberg and Schoeman *The Law of* '*Property* (2 ed by D G Kleyn, A Boraine and W du Plessis) at p 138.

> "A respondent may, as a general rule, raise only the following defences in spoliation proceedings:
>
> (a) applicant was not in the peaceful and undisturbed possession of the thing in question at the time of deprivation; C
>
> (b) respondent has not committed spoliation .
>
> With regard to the first defence *the respondent may in an appropriate case prove that the applicant did not exercise the measure of physical control which was necessary to acquire or retain possession or that the intention to derive a benefit from holding the thing was absent*. Regarding the second defence, the respondent may, for instance, prove that his act of dispossessing the applicant D was in fact not unlawful in that it amounted to counter spoliation, was justified in terms of some or other statutory enactment or took place with the consent of the applicant"(the emphasis is mine).

In casu, the respondent has argued that the applicants abandoned the mine dumps and that, at the time that he took them over, they were not in possession at all as a result of their own conduct. The applicants were given an opportunity E to file supplementary affidavits to disprove this claim. They elected not to do so. In law, this is a clear defence to an application for spoliation. I agree with Ms *Moyo,* for the respondent, that the applicants have failed to prove a clear right as could be prosecuted by way of a spoliation application. While the time they took to bring this application may not, on its own, act as a bar F to the grant of a spoliation order (see *Botha supra),* it is relevant in showing the applicants' lack of interest in the mine dumps. It would appear that this application was triggered by an unexplained fear that respondent may cut water supplies to the "DRC plant", which applicants hold dear, and not by the takeover of the "office" and "Sporo plants". If indeed the takeover of these plants had been an issue, the applicants would have protested at the G time the first take over took place.

This application would have been viewed in a different light if it had been an application to protect the applicants' right to water supply. It is not. Having come to the conclusion that the applicants have not been able to prove the essentials of a spoliation application, it is not necessary for me to deal with H the other procedural issues raised on behalf of the respondent.

Mathonsi J

Accordingly, this application is dismissed with costs. A

Calderwood, Bryce Hendrie & Partners, applicants' legal practitioners

Webb, Low & Barry, respondent's legal practitioners B

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MUSARIRI v MUTAVAYI & ORS 2010 (2) ZLR 475 (H)

Citation 2010 (2) ZLR 475 (H)

Case No Judgment No. HH-226-10

Court High Court, Harare

Judge	Musakwa J
Heard	12 June 2009
Judgment	21 October 2010
Counsel	*C Chipere*, for the plaintiff *N Mhlolo*, for the first and second defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Family law - *husband and wife - divorce - division of property following divorce - wife granted half share in matrimonial home - wife's right to home - extent of such right where property registered in husband's name - sale of home - whether wife entitled to have sale set aside - failure* D *of wife to obtain cession or transfer of her half share thereof - no title conferred on her in respect of former matrimonial home - subsequent sale to third party - husband entitled to sell house -wife having no more than a personal right against husband in respect of her half share in the former matrimonial home*

Headnote

E Consequent upon the divorce between the plaintiff and the first defendant, the parties were awarded, by the magistrates court, equal shares in the former matrimonial home. The plaintiff, however, did not arrange for a cession or a transfer of her half share in the house into her name. Thereafter, the first defendant, in whose name the house was registered, F sold the house, at a proper market value, to the second defendant and transfer in accordance with the sale was duly made. The first defendant thereafter calculated the plaintiff's 50 per cent share of the proceeds of the sale, less the estate agent's commission and duly paid her, at her instance, by payment into the bank account of her sister-in-law. The G plaintiff, however, alleged that she had been unaware of the sale and did not consent thereto. She sought an order nullifying the agreement of sale between the first and the second defendants, alternatively an order that the agreement was valid only in respect of the first defendant's half share in the house. The second defendant joined the first defendant in opposing the order sought and submitted that she was entitled to evict H the plaintiff from the house which she continued to occupy.

Held, that plaintiff's consent to the sale of the house was not required because A she did not hold any rights thereto. The court order awarding her a half share in the house did not amount to conferment of title therein. In the absence of a cession or a transfer of the half share of the property into her name, she had no more than a personal right against the first defendant.

Held, further, that having regard thereto and the fact that the house was sold B at a proper market value, the plaintiff's claim to set aside the sale must be dismissed, in its entirety, with costs.

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 121(1) C

Cases referred to

Cattle Breeders Farm (Pvt) Ltd v Veldman (2) 1973 (2) RLR 261 (A); 1974 (1) SA 163 (RA)

Chivise v Dimbwi 2004 (1) ZLR 12 (H)

Maponga v Maponga & Ors 2004 (1) ZLR 63 (H)

Muswere v Makanza 2004 (2) ZLR 262 (H) D

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

National Provincial Bank Ltd v Ainsworth [1965] 2 All ER 472; [1965] AC 1175

Semwayo & Anor v Chatara & Anor HH-48-07 E

Case information

C Chipere, for the plaintiff

N Mhlolo, for the first and second defendants

Judgment

Musakwa J: Following the plaintiff's and the first defendant's divorce in the Magistrate's court at Norton, they were both awarded equal shares in F house number 4334 CABS, Ngoni, Norton. The first defendant subsequently sold the house to the second defendant.

The plaintiff is seeking an order nullifying the agreement of sale that was concluded between the first and the second defendants or alternatively, that the agreement is valid only in respect of the first defendant's half share. On the other hand the second defendant, apart from contesting this action also G filed a counterclaim in which she is seeking the plaintiff's eviction from the premises as well as the payment of holding over damages.

The plaintiff and the defendant had been married for twelve years. Upon their divorce in 2006 the court ordered as follows: H

Musakwa J

"1. ... A

2. ...

3. That distribution of property be shared as follows:

   i. Plaintiff to get 50% of the matrimonial home No 4334 Cabs Norton

   ii.

4. ..." B

The plaintiff testified that she only got to know that the house had been sold after she was served with a notice of eviction by the second defendant in March 2007. She denied ever making arrangements for her share of the proceeds of the sale to be deposited in her sister-in-law's account. It was C her testimony that the first defendant used to deposit money for her use into that account when he was working in Bulawayo. This evidence was meant to explain how the first defendant got details of the account. The plaintiff also conceded that the house was registered in the first defendant's name.

Mable Dominica Tudu, the plaintiff's sister-in-law, confirmed that she is the D holder of a bank account with ZB Bank, Angwa Street branch. She stated that she had no idea how the money was deposited into her account. She also had no knowledge of how the first defendant got details of her bank account. However, she confirmed that in 1994 the first defendant used to deposit money meant for the plaintiff in her account. She had last communicated with the first defendant between 1999 and 2000.

E The plaintiff is said to have subsequently informed her that the first defendant had deposited money into her account. This was in September2008. Although she queried why the money had not been paid directly to the plaintiff, she did not verify with the bank. She said she did not check with the bank because of the prevailing hyperinflation and the fact that she used to receive money F form her brothers who were based in South Africa. However, the remittances from her brothers were not done on a monthly basis. She could not detail the amounts she used to receive from her brothers.

The first defendant testified to the effect that, following their divorce, he consulted on the sale of the property. This culminated in the second defendant being secured as a buyer. He subsequently went with the second defendant to G view the house and found the plaintiff present. The plaintiff is said to have expressed her displeasure. This was on 19 February 2007.

The plaintiff refused to go to the agent's office as she said the house was not for sale. A selling price of Z$30 000 000 was agreed upon. After the money had been deposited into his account, the

first defendant withdrew H the agent's commission. Thereafter he showed the plaintiff the balance. The

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2010 (2) ZLR p478

Musakwa J

plaintiff made her calculations and came up with a figure of Z$13 887 500 A as being her share.

The first defendant advised the plaintiff that he could only transfer her share electronically. He even suggested that the plaintiff open an account with Beverley Building Society in Norton but she declined as she said the process was cumbersome. The plaintiff then called her sister-in-law in B the first defendant's presence and was given an account number. The first defendant asked the plaintiff to clarify with her sister-in-law which names she was using. That is when the plaintiff was told to use the name Tudu. Since the bank's branch was not indicated, another phone call was made and the branch was given as Angwa Street. On 26 February 2007, the first defendant C drove to Harare and made the transfer from the Beverley Building Society. Thereafter he agreed with the plaintiff to vacate the house by 13 April 2007.

The first defendant was later advised that the account into which he made the transfer was erroneous. He went to the bank to verify the details and noted the anomaly. A second transfer was then made on 7 March 2007. The new account number was furnished to him by the plaintiff. He also stated D that he advised the plaintiff that he had deposited the money into her sister- in-law's account.

Christina Mazuru testified on how she concluded the agreement of sale with the first defendant and how payment of the purchase price was done. She also explained that she visited the property in question in order to view it E . She saw the plaintiff and they exchanged greetings. Thereafter she proceeded to view the house. After making payment, she gave the first defendant up to the end of March to vacate the property. According to her, she did not consider the purchase price low because when she enquired from the bank teller how much had been deposited by her daughter, she was referred to F the bank manager.

Before the second defendant assumed occupation of the property, she was served with summons issued by the plaintiff from the Norton magistrates court. She and the first defendant attended court where the plaintiff's case was dismissed. It would appear that the plaintiff had sought an interdict to stop the sale of the house but that was *a fait accompli.* G

It was during the second defendant's cross-examination that she disclosed entering into the agreement of sale on behalf of her daughter. The daughter, Blessing Jimmy Kupara, is based outside the country.

Counsel for the plaintiff's written submissions make no reference to any case law. This does not assist the court in resolving any legal issues. Counsel H

2010 (2) ZLR p479

Musakwa J

A cannot limit their addresses to a discussion of the facts without applying relevant authorities to the facts.

On the other hand, counsel for the defendants submitted that the rights between the plaintiff and the first defendant are personal rights which cannot bind third parties. In this respect reference was made to *Muzanenhamo & Anor* B *v Katanga & Ors* 1991 (1) ZLR 182 (S) and '*National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472; [1965] AC 1175.

It was further submitted that it is not good enough for the plaintiff to claim that she has a right to the property as a former spouse of the first defendant or that the second defendant had knowledge that she had an interest in the property. There has to be proof that the property was sold in order to defeat C the plaintiff's rights or that it was not sold for value to the second defendant. In this respect reference was made to *Cattle Breeders Farm (Pvt) Ltd v Veldman (2)* 1973 (2) RLR 261 (A); 1974 (1) SA 163 (RA) and *Maponga v Maponga & Ors* 2004 (1) ZLR 63 (H).

There is a plethora of authorities regarding the rights of a wife to a house that D constitutes matrimonial property. A great number of such authorities have criticized the law as it is heavily tipped in favour of the husband where the property is solely registered in his name. By far the majority of such decisions are by Makarau JP (as she then was) and amongst them are *Maponga v*

Maponga supra, Chivise v Dimbwi 2004 (1) ZLR 12 (H), *Semwayo & Anor v Chatara & Anor* HH-48-07 and *Muswere v Makanza* HH-16-05. Whilst E upholding precedent as enunciated in *Muzanenhamo*'s case, Makarau JP had this to say *in Maponga's* case at p 69:

> "It is hoped that a future court will venture to suggest that the bedrock upon which the principles that govern the rights of wives to matrimonial property is outdated and that the principles have long outlived their mediaeval purposes.

F I am shackled to the mediaeval chains by precedent." *In Muzanenhamo & Anor v Katanga & Ors supra* the parties were estranged. Prior to the filing for divorce by the wife, the husband sold the matrimonial home that was registered in his name to the appellants. The appellants sought to enforce the agreement but that application was dismissed by the High Court. On appeal the decision of the High Court was set aside. In upholding G the appeal McNally J. A had this to say at pp 185-188:

> "Perhaps one can begin by reminding oneself that ownership and possession are two different things. A landlord owns, a tenant possesses. Possession by the tenant does not prevent the landlord from selling. The purchaser may take ownership subject to the lease. Ownership and possession may reside in two different people simultaneously. I appreciate that the wife is not a tenant. But H her position is closer to that of tenant than to that of owner.

Musakwa J

It is important therefore to determine the nature of Mrs Katanga's right in the A property.

She does not claim ownership. She claims two things. First, a right of occupation based on the spoliation order and alternatively on her right, as a wife, to occupy the matrimonial home. Second, a right to claim transfer of the stand to herself in the division of matrimonial assets on divorce, by virtue of the provision of s 7 of the Matrimonial Causes Act, 33 of 1985. B

Her right of occupation based on the spoliation order is a personal right against Mr Katanga. He was the other party in those proceedings. The Muzanenhamos were not. So it seems to me there are three questions to be answered in connection with her occupation of the stand:

1. Can the Muzanenhamos evict her in the face of the spoliation order?
2. Can the Muzanenhamos evict her in the fact of her claim to a right of C occupation as a wife?
3. Can the Muzanenhamos evict her or claim transfer to themselves in the face of her claim, in the matrimonial proceedings, to transfer of the house into her name?

The first question was not dealt with in argument before us. Certainly it seems clear that the order of 16 December 1987 (the spoliation order) is not before D us by way of appeal. We cannot interfere with it. Particularly we cannot, as requested, delete the word 'permanently' from the order then made, however anomalous that word may be.

On the other hand there is no doubt that the spoliation order regulates rights as between Mr and Mrs Katanga. It is not an order binding as against the Muzanenhamos, who were not parties to that action. It gives Mrs Katanga no E more than a personal right as against her husband.

It may be argued that the Muzanenhamos were aware of the dispute between the Katangas and knew that she would resist the sale of the house to them and any attempt to evict her. I accept that this is true, but I do not see any basis for saying that in consequence the spoliation order is binding on them.

Lord Upjohn made this point very firmly in *National Provincial Bank Ltd v* F *Ainsworth* [1965] 2 All ER 472; [1965] AC 1175 (HL) when he said:

> 'The right of the wife to remain in occupation even as against her deserting husband is incapable of precise definition; it depends so much on all the circumstances of the case, on the exercise of purely discretionary remedies, and the right to remain may change overnight by the act or behaviour of either spouse. So, as a matter of broad principle, I am of the opinion that the rights of husband and wife must be regarded as purely personal *inter* G *se* and that these rights as a matter of law do not affect third parties.'

He made it clear that this applied whether or not the third party was aware of the dispute.

I conclude therefore that if the other problems can be overcome, the mere existence of the spoliation order is no bar to an order of eviction in favour of the Muzanenhamos. H

Musakwa J

A No [in]justice will, on the face of it, be done to her by allowing the transfer to go through. And since her attempt to stop the transfer is based on equity alone, a finding that equity is satisfied if the transfer to the

Muzanenhamos takes place is fatal to her cause. It might have been different if he had been attempting to defeat her claim for relief in the matrimonial proceedings. But I do not believe that a wife can raise such a claim just because the husband is disposing of an asset. There must be some evidence that he is disposing of the asset 'at undervalue to B a scoundrel, the accomplice of the husband' *(Chhokar v Chhokar* [1984] FLR 313), or that in some way he is attempting to defeat her just rights. In England, under their far more complex and comprehensive legislation, the test is 'Am I satisfied that the disposition was made with the intention of defeating the wife's claim for financial relief?' If the answer is 'no, as it must be here, the court will not stop the disposition. See generally *Rayden & Jackson on Divorce* Vol I, 15 C ed pp 886-7 and the Noter-up to p 887.

I conclude therefore that Mrs Katanga has not shown any equitable consideration which would or should cause the court to intervene on her behalf to stop the *prima facie* lawful wish of Mr Katanga to sell his property to the Muzanenhamos.

Once it is accepted that there is no equitable basis for denying the husband's *prima facie* right to transfer the property registered in his own name, the other D questions resolve themselves relatively simply.

There can be no proper basis for the Registrar of Deeds to regard the ruling of 16 December 1987 as a ruling [as] to ownership. It is a ruling only in relation to possession or occupation and a ruling only as between Mrs Katanga and Mr Katanga. The interdict does not prohibit transfer either expressly or by necessary implication. The Registrar has, as I have said, made a report in which E he simply notes that on the issuing of the rule nisi which led to the order of 16 December 1987 'an examiner's caveat was noted pending determination of the case'. He makes no further submissions and concludes 'I have no objection to the application (by the Muzanenhamos) and I would abide by the findings of this Honourable Court.'

I turn secondly to consider whether she may have a right of occupation arising from her status as a wife. This is always a difficult problem for the courts to F solve. See for example *Jackson v Jackson* [1971] 3 All ER 774 (CA); *Cattle Breeders Farm (Pvt) Ltd v Veldman (2)* 1973 (2) RLR 261 (A) and *Owen v Owen* 1968 (1) SA 480 (E).

It is essentially a matter of equity. The courts will intervene where, for instance, the husband sells the house as part of a policy of harassment arising out of divorce proceedings. Here that is not the case. He had been transferred to Mutare and G had acquired a property there. He sought to sell the Harare property long before the divorce proceedings began. As the then Chief Justice said in the *Cattle Breeders* case, *supra,* at 267E:

> 'A long line of cases seem to have laid down the proposition that even if the husband may be the defaulting party, he may eject the wife from the matrimonial home, provided he offers her suitable alternative accommodation H or offers her the means of acquiring such suitable accommodation.'

2010 (2) ZLR p482

Musakwa J

Here the husband has offered her half the net proceeds of the house if the sale A and transfer is allowed to go through and if she vacates the property. I do not see this as a case where equitable considerations demand that she be allowed to stay on in occupation of the stand.

The final question for us to decide is whether she can prevent transfer of the property into the name of the Muzanenhamos?

It seems to me that her claim to stop transfer, because of the possibility that B she might succeed in obtaining transfer herself as a result of the divorce proceedings, is a shadowy claim indeed. The power of the court under s 7 of the Matrimonial Causes Act is a discretionary and equitable power. Stand 964 is not 'the matrimonial home'. That home was established in Mutare after the husband was transferred there and she joined him. She claims he drove her out, but nonetheless, the Mutare property had become the matrimonial home. Stand C 964 is no more than a property of Mr Katanga in the proceeds of which she has a potential interest. But it is, as Mr *Wernberg* puts it, an interest in the nature of a mere *spes,* a hope. And as I have noted Mr Katanga has undertaken to let her have half the net proceeds on sale (provided she yields vacant possession). That seems to me to satisfy the criterion of equity."

Although the magistrate's court awarded the plaintiff a half share in the D matrimonial home, this did not translate into plaintiff's co-ownership of the property. The rights to the property remained with the first defendant. In other words the plaintiff and the first defendant did not proceed to have the plaintiff's interests registered against the property. The first defendant could dispose of the property without the plaintiff's consent.

In the present case there was no evidence that the property was not sold for E value. The first defendant's evidence that the plaintiff worked out her share after deduction of the agent's commission was not challenged. Therefore the plaintiff was satisfied with the selling price.

The plaintiff's consent to the disposal of the property was not required. This is because she did not hold any rights to the property. The court order F awarding her a half share of the property does not

amount to a conferment of title to the property. The plaintiff and the second defendant should have arranged for cession or transfer of the half share to the plaintiff.

As regards the transfer of the plaintiff's share of the proceeds of sale into her sister-in-law's account, the first defendant's testimony that this was at G the plaintiff's instance was not challenged. It is improbable that the sister-in- law, Mable Dominica Tudu, did not bother to verify how much money was in her account because she used to receive remittances from her brothers. In the first place, Mabel Dominica Tudu did not state that she received such remittances regularly. She could not have been so indifferent as not to ascertain her bank balances at any given time as she wanted this court to H

Musakwa J

A believe. There is proof that money due to the plaintiff was deposited into Mabel Dominica Tudu's account but for some reason the plaintiff did not access it. That cannot be blamed on the first defendant.

On the other hand, the counterclaim by the second defendant is flawed in two respects. Whilst the defendant's plea was filed on 19 June 2007, the B counterclaim was only filed on 11 September 2009. The plaintiff's plea to the counterclaim was that it was not filed in accordance with the rules as it was filed out of time. Reference was made to Order 18 r 121 (1) of the High Court Rules, which provides that:

> "(1) A claim in reconvention shall be so described and shall be bound and filed with the defendant's plea.
>
> C (2) A claim in reconvention shall be governed *mutatis mutandis* by the rules relating to a declaration, including rules 110 and 111."

Therefore, on the above rule alone, the counterclaim fails. There is also the additional factor that, although the counterclaim was instituted in the second defendant's name, she did not actually appear before this court. The only person who purported to testify on her behalf was her mother. However, the D mother did not file any power of attorney authorizing her to represent the defendant. In any event, in her testimony the mother did not even touch on the counterclaim in question.

In the result it is ordered as follows:

(a) The plaintiff's claim is hereby dismissed with costs E

(b) The second defendant's counterclaim is hereby dismissed with costs.

Bachi Muzawazi, plaintiff's legal practitioners

Mushonga Mutsvairo & Associates, first and second defendants' legal F practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/SIBANDA v GUMBO & ANOR 2010 (2) ZLR 484 (H)

SIBANDA v GUMBO & ANOR 2010 (2) ZLR 484 (H)

Citation	2010 (2) ZLR 484 (H)
Case No	Judgment No. HB-139-10
Court	High Court, Bulawayo
Judge	Mathonsi J

Heard 15 October 2010

Judgment 28 October 2010

Counsel *M Ncube*, for the applicant
G Nyoni, for the first respondent

Case Type Chamber application

Annotations No case annotations to date

Flynote

Practice and procedure - *summary judgment - application - notice of application - application in magistrates court - at least seven days' notice to be given -failure to comply with rule - grant of summary judgment a gross irregularity*

Practice and procedure *-parties - locus standi – husband - wife leasing* D *property - husband neither owner of property nor a signatory to lease agreement - no locus standi to bring a claim against the lessee based on lease agreement*

Review - *grounds for - gross irregularity in proceedings or decision - failure to adhere to a peremptory procedural requirement - such failure* E *constituting a gross irregularity - granting eviction order when issue of non-payment of rent had been referred to trial - also a gross irregularity*

Headnote

Order 15 r 1(2) of the Magistrates Court (Civil) Rules 1980, which provides that summary judgment applications shall be made on not less than seven days F notice, is a peremptory provision that admits of no discretion whatsoever. Failure to comply with it can only amount to a gross irregularity as envisaged by s 27(1) of the High Court (Act) [*Chapter 7:06*].

In urgent chamber proceedings in the High Court, the papers disclosed that the applicant had entered into a lease agreement with the wife of the first respondent. She was the registered owner of the property. Consequent G upon the alleged failure of applicant to pay rent in respect of the leased premises, the first respondent issued summons in which he sought an order in the magistrates court for eviction. In the summary judgment proceedings which followed, the magistrate rejected the applicant's submission that the first respondent did not have *locus standi* as he was not a party to the lease agreement. She granted the order of eviction, H

A while at the same time referring the dispute concerning the non payment of the rent for trial.

Held, that as the first respondent was not the registered owner of the leased premises nor was he a party to the lease agreement between his wife and the applicant, he did not have *locus standi* to sue for the eviction in his own name. His marriage did not give him contractual or vindicatory rights.

B *Held,* that the decision of the magistrate to grant eviction while at the same time referring the dispute over the rentals to trial was a gross irregularity. Until the question of the non payment of the rent had been resolved, there could be no eviction.

Legislation considered C

High Court Act [*Chapter 7:06*], s 27 (1)

Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), Order 15, r 1(2)

Cases referred to

Bridges & Hulme (Pvt) Ltd v Magistrate, Bulawayo & Anor 1996 (1) ZLR 542 (H)

D *Muswere v Makanza* 2004 (2) ZLR 262 (H)

Case information

M Ncube, for the applicant

G Nyoni, for the first respondent

Judgment

E **Mathonsi J**: The applicant entered into a lease agreement with Karen Zakeyo, the first respondent's wife, in January 2010 in terms of which he leased house No. 1 -3 Dublin Road, Riverside, Bulawayo from the said Karen Zakeyo, who is out of the country. At the conclusion of the lease agreement Karen Zakeyo was represented by her father one, Amos Zakeyo, by virtue of a power of attorney.

F For sometime, the applicant dealt with and paid rent to Amos Zakeyo but at a later stage the first respondent returned to Zimbabwe from where he was and took over the responsibility of dealing with the applicant. The house in question is registered in the sole name of Karen Zakeyo.

It is common cause that the first respondent does not hold a power of G attorney to act on behalf of his wife. However, on 14 September 2010, the first respondent issued summons out of the magistrates' court in Bulawayo seeking an order for the eviction of the applicant from that house for non- payment of rent.

The applicant caused an appearance to defend to be entered and filed a plea. H As the first respondent took the view that the applicant did not have a *bona*

Mathonsi J

fide defence and that appearance had been entered for purposes of delay, A he filed an application for summary judgment on 28 September 2010. That application was served on first respondent on 30 September 2010 and was set down for hearing on 7 October 2010.

On that date, the matter was argued before the magistrate who dismissed the applicant's contention that the first respondent lacked *locus standi in* B *judicio* by reason that there was no privity of contract between him and the applicant, the lease agreement having been entered into between the applicant and first respondent's wife. She curiously granted an order for the eviction of the applicant, while referring the dispute over the alleged non-payment of rentals, to trial. In doing so, she reasoned as follows: C

> "It is therefore this court'(s) consideration that the issue of arrear rentals be dealt with at a later stage affording defendant ample time to file his opposing papers. In the meantime defendant is evicted from the premises."

In terms of the summons filed in the magistrates court, the basis for seeking eviction was non-payment of rent and it is not easy to understand how D summary judgment could be granted for eviction when the court accepted the existence of a triable issue on the payment of rent.

The applicant has filed a court application for review of the proceedings in this court under case number HC 142/10 which matter is now pending. He has cited a number of grounds for review but the ones that I find compelling are: E

(a) gross irregularity in the proceedings on the basis of failure to comply with the rules of court.

(b) gross irregularity in the proceedings on the basis of lack of *locus standi in judicio* on the part of the first respondent, who was plaintiff in the magistrates court.

(c) gross irregularity in the decision in that, while accepting that there was F a triable issue involving the alleged non-payment of rent, which was the sole reason for seeking eviction in the summons, the magistrate still found it fit to grant the eviction order.

The grounds upon which this court can review the proceedings and indeed G the decision of the magistrate are set out in s 27(1) of the High Court Act, [*Chapter 7:06*] which provides:

> "Subject to this Act, and any other law, the grounds on which any proceedings and decision may be brought on review before the High Court shall be –
>
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned; H

Mathonsi J

(b) interest A in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;

(c) *gross irregularity in the proceedings or the decision"*(the emphasis is mine).

Mr *Ncube,* for the applicant, strongly argued that it was a gross irregularity B for the matter to be set down on short notice, thereby failing to accord the applicant sufficient time to prepare his opposition. Order 15 r 1(2) of the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980) provides:

> "An application in terms of subrule (1) (i. e. summary judgment application), *shall be made on not less than seven days' notice* delivered not more than seven days C after the date of the defendants appearance to defend ..."(my emphasis).

In casu the messenger of court's return of service shows that the applicant was served on 30 September 2010, which gave the applicant virtually four days notice instead of the prescribed seven days. Order 15 r 1(2) is a peremptory provision by virtue of the use of the word "shall" in that rule.

D It admits of no discretion whatsoever and I do not agree with Mr *Nyoni,* who appeared for the first respondent, that failure to comply with that rule is an irregularity but not one that is gross as envisaged by s 27(1)(c) of the High Court Act. In my view, failure to comply with a peremptory provision can only amount to a gross irregularity. To hold otherwise would make nonsense E of that provision.

The first respondent is not the registered owner of the rented premises. He was not a party to the lease agreement concluded between his wife and the applicant. The claim that he filed was based on a lease agreement he was not privy to. In my view, he did not have *locus standi in judicio* to sue for the F eviction of the applicant in his own name. His marriage to Karen Zakeyo did not give him contractual or vindicatory rights of whatever nature. See *Muswere v Makanza* 2004 (2) ZLR 262 (H). After all, all marriages in this country are out of community of property.

There is also the issue of the decision to grant eviction while referring the dispute over rentals to trial. It is like the proverbial putting the cart ahead of G the horse. Eviction could only be premised upon proof of non-payment of rent. Where the alleged non-payment had not been determined, there could be no eviction. Mr *Nyoni* sought to rely *on Bridges and Hulme (Pvt) Ltd v Magistrate, Bulawayo and Anor* 1996 (1) ZLR 542 (H) as authority for the argument that the magistrate may have made a wrong conclusion of law but H that is not reviewable.

Mathonsi J

I do not agree with that argument. In fact, that case is authority for the A proposition that a party is entitled to seek relief by way of review where the magistrates court refused to determine a matter it should have determined, as in this case. The magistrate referred to trial the issue of non-payment of rent but granted eviction. This was a gross irregularity, entitling the applicant to approach this court by way of review. B

I am therefore satisfied that the applicant has an arguable case on review. In the result, I make the following order, that:

(1) the provisional order be and is hereby granted in terms of the amended draft order.

(2) the interim relief be granted, that the respondents be and are hereby C interdicted from evicting the applicant from House No. 1 -3 Dublin Road, Riverside Bulawayo pending the finalisation of the court application for review filed under case no. HC Civil Review 142/10.

Cheda and Partners, applicant's legal practitioners

Moyo and Nyoni, first respondent's legal practitioners D

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Source:

MUTYASIRA v GONYORA 2010 (2) ZLR 489 (H)

Citation	2010 (2) ZLR 489 (H)
Case No	Judgment No. HH-218-10
Court	High Court, Harare
Judge	Chitakunye J
Heard	28 October 2010
Judgment	28 October 2010
Counsel	Details not supplied
Case Type	Referral in terms of r 313 of the High Court Rules
Annotations	No case annotations to date

Flynote

C **Administration of estates** - *curator bonis -fees - currency in which fees payable - work done before advent of new currency system - estate not wound up until after new currency system in force - value of estate expressed in US dollars - fee expressed as percentage of value of estate - curator entitled to payment in US dollars*

Headnote

D The applicant had been appointed *curator bonis* in litigation involving a deceased estate. His appointment was set aside and he demanded to be paid his fee for the work he had done. This work had been done before the multi-currency system had been implemented in Zimbabwe. E The respondent, who was the executor of the estate, contended that he could only be paid when the estate had been wound up. It was after the implementation of the multi-currency system that the respondent advertised the first interim administration and distribution account for the estate. The account was drawn up in United States dollars. The applicant subsequently submitted his bill for the work done. After a hearing, the F taxing master determined that the applicant's fee should be 10 per cent of the value of the estate and that it should be paid in US dollars. The respondent argued that the fee should be based on Zimbabwe dollars, the currency prevailing at the time the work was done.

Held, that the applicant's entitlement to payment arose from s 96 of the G Administration of Estates Act [*Chapter 6:01*], under which he was entitled to receive out of the assets of the estate a reasonable compensation for his work in the administration of the estate, the amount to be assessed and taxed by the Master, subject to the review of the High Court. It was necessary for the applicant to wait until the respondent had lodged the account to have the Master assess and tax his fees. It was not possible to H calculate the applicant's fees in Zimbabwean dollars when the executrix

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had used United States dollars. The respondent also claimed and was A paid only in US dollars, even though some of her work had been done before the advent of the new currency system.

Legislation considered

Administration of Estates Act [*Chapter 6:01*] ss 56 & 96

Estate Administrators (Registration and Examination) (Amendment) B Rules (SI 54 of 2007)

Cases referred to

Mutyasira v Gonyora & Anor 2007 (1) ZLR 318 (S)

In re *Est Matimura* 2010 (1) ZLR 17 (H) C

Judgment

Chitakunye J. This matter was referred to me in chambers in terms of the provisions of Order 38 r 313 of the High Court Rules 1971. The basic background is as follows.

In 1976 the late Muchineripi Rishon Gonyora (hereinafter referred to as the D deceased) married the respondent in terms of what is now the Customary Marriages Act [*Chapter 5:07*]. The deceased died on 13 August 2002 in Harare. Barbra Gonyora registered the deceased's estate at Harare magistrates civil and customary law courts. On 17 October 2002 an edict meeting was held before a provincial magistrate. The respondent was appointed executrix E dative, with the powers to ascertain and verify the assets and liabilities of the deceased, which included documentary proof of current bank balances, documentary proof of liabilities, balances with mortgage, a plan of how the estate was to be distributed among the beneficiaries and presentation of that plan before a magistrate on an agreed return date for approval.

On 25 August 2005, while the executrix was still to lay the distribution F account and inheritance plan before a magistrate and this was close to three years after her appointment, the Master called her for a special meeting on 30 August 2005 to discuss all matters related to her late husband's estate. She duly attended the meeting with other beneficiaries of the estate. At that meeting, the Master appointed the claimant as a *curator bonis* in the estate. Letters of confirmation were granted to the claimant by the Master on the G following day.

On25 September 2005, the Master, purporting to be acting in terms of s25 of the Administration of Estates Act [*Chapter 6:01*], gave notice in the *Gazette* of an edict meeting to be held at his offices on 5 October 2005. The notice was, however, gazetted on 7 October 2005, two days after the meeting. H

Chitakunye J

A The applicant and other beneficiaries, however, attended the meeting as they had been notified by other means. At that meeting, the *curator bonis* was then appointed as executor dative. He thereafter went about carrying out the duties of his office and compiled a first and final liquidation account of the estate. His involvement was first challenged by the filing of the first court application, case no. HC 5567/05. He thereafter sought to dispose certain B assets of a company with the Master's consent in order to satisfy payments to certain beneficiaries and estate duties. This led to the filing of an urgent application by the respondent in HC 221/06.

In both applications, the respondent, who was the applicant, submitted that she was properly appointed by the Master as the executrix dative; further, C that she was not lawfully removed before the Master appointed the claimant; and, lastly, that the appointment by the Master of the claimant was in her view therefore void.

The fate of the two applications was decided on 19 May 2006, by Kudya J, when he made an order that: D

> "1. The appointment of the second respondent Mr Kenias Mutyasira as the Executor Dative to the Estate, late Muchineripi Rishon Gonyora DRH1989/02/DR1854/05 be and is hereby declared null and void.
>
> 2. The appointment of Barbra Gonyora, the surviving spouse, as Executrix Dative to the Estate late Muchineripi Rishon Gonyora DRH 1989/02/ DR1854/05 on 17 October 2002, be and is hereby declared valid. E
>
> 3. The fees of the second respondent for administering the estate shall be paid by the estate up to the date that the second respondent was served with the application in case No. 5567/05.
>
> 4. The second respondent shall return all the assets and documents of the estate under his custody and control to the applicant within ten days of this order. F

5. The costs in case No. 5567/05 and HC 221/06 including the costs of the hearing of the urgent application of 25 January 2006 shall be borne by the Estate Late Muchineripi Rishon Gonyora."

The claimant was not satisfied with some aspects of the judgment and so appealed to the Supreme Court. That appeal was dismissed with costs on

28 May 2007. See *Mutyasira v Gonyora & Anor* 2007 (1) ZLR 318 (S).

G The claimant made an effort to be paid his dues as *curator bonis* and as executor dative in terms of the judgment by Kudya J. Such effort was resisted by the respondent, who contended that he could only be paid when the estate had been wound up. In this regard, there is a letter by the respondent's legal practitioners to the claimant dated 15 June 2007 in which they stated in H para 2 thereof, *inter alia,* that:

Chitakunye J

"Your claim for costs will be dealt with during the ordinary course of winding A up of the estate."

On 29 June 2007 the respondent's legal practitioners sent another letter to the claimant in which they stated categorically in the second last paragraph that:

"Your fees are calculated from the assets of the estate. They are therefore only determinable after the Account reflecting the assets of the Estate has been drawn B and lodged."

On 30 January 2008 the parties held a meeting with the Master. The issue for discussion pertained to the payment of executor's fees and finalization of the estate. In that meeting, Mr Mutyasira is recorded as having submitted that his bill should be taxed to enable him to lodge his claim for payment. C The respondent's counsel, Mr *Chikumbirike,* is recorded as having reiterated that Mr Mutyasira's fees would be due when the estate was wound up, not when the court order was granted. The Master resolved that Mr Mutyasira should lodge his bill for taxation on the following day.

Apparently no taxation took place, as the executrix dative, Barbra Gonyora, D had not yet drawn up the estate's account. It was only on25 September 2009 that she advertised the first interim administration and distribution account for the estate. The account was drawn up in United States dollars.

On 11 January 2010 Mr Mutyasira presented his bill for taxation in respect of fees for work done as a *curator bonis* and as executor dative of the estate E late Muchineripi Rishon Gonyora.

On 3 March 2010 the parties appeared for taxation. After deliberations and arguments by both sides, the taxing officer, Mr S Madi, made the following decision:

"1. That Mr K. Mutyasira is entitled to 10% of the gross value of the estate F in terms of the provisions of the Estate Administrators (Registration and Examination) (Amendment) Rules, 2007 (No. 1) for his work as Curator *Bonis;* and

2. that for his work as an Executor, Mr K. Mutyasira is entitled to 50% of the fees claimed by the Executrix Barbra Gonyora."

At that meeting Mr *Mufara,* representing Barbra Gonyora, objected to have G the curator's and executor's fees for Mr K Mutyasira being paid in United States dollars. He argued that the judgment by Kudya J was premised on Zimbabwean dollars and in any event, the work had been done in 2005 when the Zimbabwean dollar was still in circulation. Mr K Mutyasira, on the other hand, insisted that payment had to be in United States dollars. H

Chitakunye J

A Faced with the above, the taxing officer referred the issue to me for determination in terms of Order 38 Rule 313 of the High Court Rules. That rule states that:

"The taxing officer may, without filing any formal documents submit any point arising at a taxation for decision by a judge in chambers, and it shall be competent for the taxing officer and for the legal practitioners who appeared at the taxation B to appear before the judge respecting such point."

The issue for determination is whether or not Mr K. Mutyasira is entitled to be paid in United States dollars for his curator's and executor's fees when that work was done in the year 2005 when the Zimbabwean dollar was still in circulation.

C I invited the parties to file heads of argument dealing specifically with that issue.

The claimant's position was to the effect that he should be paid in United States dollars as that is the currency in which the account was presented. He argued that the judgment by Kudya J did not refer to the currency to be used. Although the work was done in 2005 and, as per the judgment D by Kudya J, he should only be paid up to when he was served with the application challenging his appointment, he could not have his bill taxed then due to the litigation in this matter, which was protracted. Though at one stage he liquidated some estate property to pay some beneficiaries, he could not legally pay himself at the time due to the litigation that was ongoing. E He also pointed out that, in any case, counsel for the respondent made it clear that Mr Mutyasira's bill could only be taxed after the account had been drawn up. To that effect he referred to correspondence from the respondent's legal practitioners dated 15 June 2007 and 29 June 2007 buttressing that point. It was the claimant's contention that in light of all this, his fees fell due and payable in September 2009, when the first interim administration F and distribution account was lodged.

The respondent, on the other hand, contended that the claimant must be paid in the currency that was obtaining at the time the work was done, which was the Zimbabwean dollar. The respondent's attitude was also to the effect that, by referring the issue to me, I was in effect being asked to review Kudya J's G judgment. As Kudya J's judgment was passed long before the multi-currency regime came into force, it could only have related to payment in Zimbabwean dollars. It is my view that counsel for the respondent missed the point. The point is not about reviewing the order by another judge. The judgment by Kudya J set out the period for which the claimant must be paid. The period was set as from the time of his appointment to the time when he was served H with a court application challenging his appointment. That period is not

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being challenged at all. The issue was merely in what currency should the A claimant be paid in light of the multi-currency regime that came into effect well after the judgment, but before the claimant had had his bill assessed and taxed. That issue can be resolved by looking at the basis for assessing the fees and when they should be paid.

Section 56 of the Administration of Estates Act [*Chapter 6:01*], hereinafter B referred to as "the Act", states that;

> "Every executor shall, in respect of his administration, distribution and final settlement of any estate, be entitled to claim, receive or retain out of the assets of such estate, or from any person who as heir, legatee or creditor is entitled to the whole or any part of such estate, such remuneration as may have been fixed by the deceased by will or deed or otherwise as fair and reasonable compensation C to be assessed and taxed by the Master, subject to the review of the High Court, upon the petition of such executor or of any person having an interest in such estate."

Section 96 of the Act states that:

> "Every tutor, either testamentary or dative, and every curator, either nominate or dative, shall, in respect of his administration and management of any estate, be D entitled to claim, retain and receive out of the assets of such estate a reasonable compensation for his care and diligence in the said administration, to be assessed and taxed by the Master, subject to the review of the High Court or any judge thereof, upon the petition of any such tutor or curator or of any person having an interest in the said estate."

In casu the taxing officer, upon being presented with the claim, assessed E and taxed the bill. He came to the conclusion that, for the claimant's role as curator dative for the period that he so acted, a reasonable compensation is 10 per cent of the gross value of the estate. He based that assessment on the provisions of Part C to the Estate Administrators (Registration and Examination) (Amendment) Rules 2007 (SI 54 of 2007) which provides for F the remuneration of tutors and curators in percentage terms in relation to the value of the capital assets. That part provides remuneration of 5 per cent on the value of capital assets on assuming control and 5 per cent on the value of capital assets upon termination of control. This is how the officer appears to have come to a total percentage of 10 per cent of gross value of the estate.

For his role as executor dative for the period up to when his office was G challenged, the taxing officer came to the conclusion that a fair and reasonable compensation for the duties and work he did during that period is 50 per cent of the fees claimed by the executrix Barbra Gonyora.

The awards in percentage terms were not challenged in respect of the two roles he performed in relation to this estate. H

Chitakunye J

A In as far as the fees for *curator bonis* are based on the value of capital assets, it is my view that it is akin to the claimant retaining 10 per cent of the estate as his fees. If that were to happen, surely no one would begrudge him if he decided to dispose that portion in a currency of his choice. As is stated in s 96 of the Act, the executor is "... entitled to claim, retain and receive out of the assets of such estate a reasonable compensation for his care and diligence in B the said administration ..." The 10 per cent that the claimant was awarded as his fees cannot, in my view, be converted to the monetary value of such 10 per cent in the year 2005, it is a 10 per cent value of capital assets which he is entitled to retain. An award in percentage terms does not really matter in which currency it is realized, as long as at the end of the day it remains C 10 per cent of the value of the capital assets.

In the same vein, on examining the work done by the claimant, the taxing officer came to the conclusion that a fair and reasonable compensation for all that he did was an award of 50 per cent of the fees claimed by Barbra Gonyora. As that was expressed in percentage terms, it is not affected by D the change of currencies. All that has to be ensured is that his fees are 50 per cent of the fees claimed by Barbra Gonyora, no less and no more. In as far as Barbra Gonyora has lodged the account in United States dollars, surely the percentages should be calculated using that currency.

Counsel for the respondent did not in their submissions deny that it was necessary for the claimant to wait till the respondent had lodged the account E to have the Master assess and tax his fees. I also did not see any proposal of how they hoped to calculate the claimant's fees in Zimbabwean dollars when the executrix had used the United States dollars. In fact, in their own letter dated 29 June 2007, which has already been referred to above, the respondent's legal practitioners stated to the claimant that:

> " F Your fees are calculated from the assets of the estate. *They are therefore only determinable after the account reflecting the assets of the estate has been drawn and lodged*"(emphasis is mine).

Reference was made to In re *Est Matimura* 2010 (1) ZLR 17 (H). In that case a legal practitioner was appointed executor. In presenting his bill to the taxing officer, the executor sought to rely on the Law Society tariff of G 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 tariff came into operation. The taxing officer was dealing with a bill based on the Law Society of Zimbabwe tariff. It was in those circumstances that H Bere J said at p 20C that:

Chitakunye J

> "It is clear that the taxing officer was within his rights to demand that work done A 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." B

At 21B the learned judge went on to say:

> "In any event, it is inconceivable, in my view, 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."

I agree with the learned judge on the above view. It is however important C to distinguish that scenario from the present. In *Est Matimura* the tariff was set on an annual basis. The tariffs were changed from year to year. For each year, legal practitioners were expected to charge as per the tariff. *In casu* the basis for the fees is not on a given tariff, but on a percentage basis.

Regarding curator's fees, the percentage is based on the value of the capital D assets of the estate in terms of the provisions of the Estate Administrators (Registration and Examination) (Amendment) Rules *supra.* That percentage has not changed or been altered upon the advent of the multi-currency regime. It is that percentage that the claimant was awarded. It would appear to me that the legislature opted to tie the curator's fees to the value of the assets for a purpose. It may as well be

that it was to ensure that the curator got a just E compensation for his role as curator and that such compensation be related to the value of the assets involved.

In taxing and assessing the executor's fees, the taxing officer opted to award it in percentage terms in relation to the executrix Barbra Gonyora's claim and did not use the Law Society tariffs. The executrix's fees were presented in F United States dollars. It is common cause that the executrix was appointed and did some of the work before the multi-currency regime, yet she did not seek to be paid in Zimbabwean dollars for that work. She did not divide her remuneration into two different eras. She is clearly seeking to be paid in United States dollars for work done during the Zimbabwe dollar period because her remuneration is due after she has completed the work and the G Master has assessed and taxed it. That has been done in a multi-currency era, hence her fees are expressed in US dollars. I am of the view that the 50 per cent awarded to the claimant is of the executrix's claim in value terms. If the claimant is to realize that percentage in value terms, he should be paid in the same currency as the executrix. If payment is made in any other currency it must be such that it equates to that percentage award.. Payment in a currency H

Chitakunye J

A and amount that would not equate to 50 per cent would not accord with the award. It would thus not be a fair and reasonable compensation.

Accordingly, I am of the view that the claimant is entitled to be paid his compensation or fees, for both roles as curator and as executor, as assessed and taxed by the taxing officer in the currency in which the account was B prepared and lodged, that is, in United States dollars.

Wintertons, claimant's legal practitioners

C *Chikumbirike & Associates,* respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/S v MASINA 2010 (2) ZLR 498 (H)

S v MASINA 2010 (2) ZLR 498 (H)

Citation	2010 (2) ZLR 498 (H)
Case No	Judgment No. HH-245-10
Court	High Court, Harare
Judge	Uchena J and Assessors
Heard	5 October 2010; 6 October 2010; 7 October 2010
Judgment	5 November 2010
Counsel	*T Mapfuwa*, for the State *B Diza*, for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal law - *defences - intoxication - whether can ever reduce murder to culpable homicide - mitigatory effect of intoxication -provocation - when may reduce murder to culpable homicide -person being provoked while intoxicated - such provocation mitigatory* D

Headnote

Diminished responsibility due to drunkenness and provocation, according to the non-statutory Roman Dutch criminal law, though capable of leading to a reduction of a murder charge to culpable homicide or an acquittal, does not ordinarily lead to such results, but to the accused being convicted of murder, the drunkenness and provocation being merely mitigatory. E

Under the codified criminal law set out in the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], the legislature altered the common law position on voluntary intoxication to the extent that that defence can never result in the reduction of a murder charge to that of culpable homicide. Section222 of the Code introduced a new offence of voluntary intoxication leading to unlawful conduct, where the effect of the intoxication leads F to the accused lacking the requisite intention, knowledge or realisation required to commit the crime originally charged. This new offence is not the same as culpable homicide, as culpable homicide does not attract the same sentence as murder (the crime originally charged).

Under the Code, intoxication is not a defence unless it is such that the G accused lacked the requisite intent to commit the crime charged; it may be mitigatory (s 221(1)).

For provocation to reduce murder to culpable homicide, it must be such as would lead the accused to act without intention, or with intention but having completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and H

A circumstances to lose his or her self-control (s 239(1)). If 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 is not entitled to a partial defence but the court may regard the provocation as mitigatory (s 239(2)). Similarly, if a person, while in a state of voluntary intoxication, is provoked into any conduct by something which would B not have provoked that person had he or she not been intoxicated, the court shall regard such provocation as mitigatory when assessing the sentence (s 224).

Legislation considered

C Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 3, 221(1), 224, 239(1) & 239(2)

Cases referred to

S v Gambanga 1998 (1) ZLR 364 (S)

S v Matida S-198-98

D *S v Slatter & Ors* 1983 (2) ZLR 144 (H)

S v Stigling en 'n Ander 1989 (2) SA 720 (A)

S v Wild 1990 (1) SACR 561 (A)

Case information

T Mapfuwa, for the State

E *B Diza,* for the accused

Judgment

Uchena J: The accused was charged with, murder in contravention of s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. She pleaded not guilty.

The facts of this case are generally common cause. The accused was the F deceased's daughter. She is a woman of advanced age, though she said she does not know her age as she cannot read or write. The deceased was staying with the accused at the farm where the accused worked. The deceased was aged and blind. She therefore needed the accused's assistance as she at times soiled her clothes. The accused had stayed with her for three years.

G On 25 December 2007 the accused's employer threw a Christmas party for his employees. The accused left for the party early in the morning. She left the deceased at home. She had given her food and left her drinking beer. The accused drank a lot of beer at the party, resulting in her having to be carried home by Loyce Ruzvidzo and her husband. They left her sleeping in the verandah after Loyce had given the deceased food she had brought from the party. The accused must have been taken to her house before lunch

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as she says in her confirmed warned and cautioned statement, which was A produced by consent, that her drunkenness prevented her from feasting on the sadza which had been prepared for the Christmas party. She slept on the verandah until sunset, when she woke up intending to go to the toilet. As she walked out, she stepped on human excrement by the kitchen door. The deceased used the kitchen as her bedroom. The accused went into the kitchen B and confronted the deceased, telling her that she must learn to use the toilet. The deceased responded by saying she had done what she did because she (the accused) had left her alone when she went to the party. The accused took a walking stick which the deceased used for walking and assaulted the deceased on the forehead. As the deceased fell down, she struck her again on the head. The deceased fell on bricks which were in the kitchen. The C accused then struck her twice on the ribs, and left for the party.

The accused pleaded not guilty, raising the defence of drunkenness and provocation. She said she was provoked by stepping on the deceased's excrement and the deceased's remark that she had defecated by the kitchen door because she (the accused) had left her (the deceased) alone when she went to the party. She further said that her ability to properly assess the events D and react appropriately was impaired by her having been drunk at the time she assaulted the deceased.

The State attempted to dispute the manner in which the assault took place by calling Dr Dhlakama and Jane Chimusanga. Dr Dhlakama's evidence was to the effect that the depression he found on the occipital region of the E deceased's head could not have been caused by a walking stick, unless it was a heavy one, as the skull bone is hard and can not be easily depressed. However, he conceded that the depression could have been caused by the deceased falling on an object, but said that was unlikely, in view of the location of the depression. Under cross-examination, he agreed that, if the deceased fell headlong on to the bricks which were found with blood, such F a fall could have caused the depressed skull.

Jane's evidence was on her finding blood-stained bricks, a stone, a glove and metal bars in the kitchen. The fact that these items were blood-stained is not in dispute. The accused's explanation is that these things were being kept in the kitchen and got blood-stained when the deceased fell headlong on to the G bricks. The doctor and Jane's evidence is circumstantial. All they say is the deceased had a depressed skull, and that the items mentioned above were blood-stained. The inference sought to be drawn by the State, through Dr Dhlakama, is not the only reasonable inference which can be drawn from the facts before the court. The accused's explanation can also be a reasonable inference from the facts. The fact that bricks, stones. metal bars and a glove H

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A were blood-stained does not mean they were all used to assault the deceased. A glove could never have caused the depression described by Dr Dhlakama. Jane said she found them near the deceased's head, and that the deceased was lying face down. This may be the explanation for the depressed skull and the blood-stained objects found near the deceased's head. In a criminal trial, if the accused's story might be true, she must be given the benefit of B the doubt. In *S v Matida* S-198-98 at p 3 of the judgment Ebrahim JA said:

> "There is nothing on the record of evidence to justify a finding that his explanation cannot reasonably be true and he must therefore be given the benefit of the doubt, even though the army driver's version seems more probable"

See also *S v Slatter & Ors* 1983 (2) ZLR 144 (H) at 174.

C We therefore accept the accused's version and proceed to determine the case on the common cause facts explained above. We also accept that the accused intended to cause the deceased's death, as admitted in her warned and cautioned statement.

Mr Mapfuwa, for the State, submitted that the accused caused the deceased's death with actual intent. He relied on the accused's confirmed warned and D cautioned statement which was produced by consent as exh 1. In the relevant parts of her warned and cautioned statement, the accused said:

> "I have understood the above caution. I admit to the allegations being leveled against me because I wanted her to die before my death as she caused problems in my family, I could be hardly happy as I was being assaulted wherever I could go on allegations of possessing goblins to attack other people. On Christmas day, E all farm workers were invited to a party organized by farm owner, hence after breakfast I went to the tobacco barns which was the venue, and this was after I had given Esinath some tea, then opaque beer which I had left her drinking. On arrival at the venue we were given opaque beer, after which we were given clear lagers. I quickly succumbed to drunkenness and was escorted to my residence by Dondito and his wife rendering me unable to feast on the party sadza. At almost F sunset I woke up particularly sober and surprised that I was at my residence. As I woke up I found that Esinath had relieved herself by the house instead of excreting in a scrapmetal structure for that purpose and this triggered my anger as I went into her room and struck her on the head using her walking stick thereby sustaining a deep cut, and further assaulted her on the left ribs twice, then started out and headed towards the party venue. When I struck her on the head she cried, 'Why are you assaulting me', I gave a response and when I made G the first strike on the rib cage, she painfully responded this time without a cry, and on the second strike she gave no response. I returned to the party. I drank a little beer, then in the company of Mrs Manhiri and Mrs Mukarakaza we left the venue ...
>
> ... On arriving home I checked on Esinath and felt that she was not breathing, I went to call Mrs Dondita to see what had happened. She came but did not H enter the house, instead she called Mrs Manhiri and Mrs Mukarakuza. Mrs

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> Mukarakuza arrived and lit some thatching grass and we all observed a pool A of blood which had oozed out from Esinath's head injury and that Esinath had died. Hauring [*sic*] then commenced and people gathered, my husband Gideon Namurera, who was at work was advised by Mrs Dandito. What pained me most was that Esinath was bragging openly on the death of my three brothers, and my four children, and when I went to find the causes of their death she was pinpointed. She was also saying on her death she wanted a pillow, referring to B me, so I decided to let her die before myself."

Mr *Mapfuwa* had, in cross examining the accused, reinforced what the accused said in her statement about having intended to cause the deceased's death for the reasons there mentioned. He pointed out that she had woken up sober from her drunken sleep. She noticed the deceased had excreted by the house. She realised she had stepped on human excrement. She went into C the kitchen and asked the deceased about it. She then assaulted the deceased with her walking stick on the forehead. She heard her cry, asking why she was assaulting her. She saw her fall onto the bricks. When she struck the deceased on the ribs for the first time, she noticed that the deceased responded painfully, without crying out. When she struck the deceased on the ribs for D the second time, she noticed that the deceased did not respond to the pain inflicted by that blow. She then stopped the assault and went back to the party. This is a detailed and revealing analysis of the accused's consciousness at the time she assaulted the deceased. It gives details of the deceased's vocal response to her receiving pain from the initial blows to her lifeless response to the last blow. According to *Mr Mapfuwa,* it proves that the accused was no E longer drunk and knew what she was doing. He referred us to *S v Sibanda v State* S-9-71 where the Supreme Court held that if the accused is drunk, but knows what he is doing, he should be held accountable for his actions.

We agree with his factual analysis of the accused's conduct, and her appreciation of what she was doing. I also agree with his appreciation of the F law as it was before the codification of our criminal law. The accused in her statement said she wanted the deceased to die before her because she ("the deceased") had said she wanted the accused to be her pillow when she dies. This reveals a conscious decision on her part to cause the deceased's death, hence her assaulting her till she could not respond to the pain inflicted by G the last blow.

Mr *Diza,* for the accused, submitted that the accused should be acquitted because, she acted in a drunken state after being provoked by the deceased. He submitted that she had been provoked by

stepping on the deceased's excrement, and the deceased's tugging onto her dress. He submitted that the events leading to the deceased's death were not premeditated, but a result H

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A of a drunken reaction to provocation. He referred us to *S v Gambanga* 1998 (1) ZLR 364 (S) at 366D-F, where Ebrahim JA said:

> "A successful plea of diminished responsibility has been said to reduce a charge of murder to culpable homicide: *S v Chitiyo* 1987 (1) ZLR 235 (S) at 239B. This statement requires considerable qualification. It has been held in some South African cases that non-pathological criminal incapacity could constitute B a complete defence: *S v Kensley* 1995 (1) SACR 646 (A) at 658. It has been said that:
>
> > '... an accused person should not be held criminally responsible for an unlawful act where his failure to comprehend what he is doing is attributable not to drink alone, but to a combination of drink and other facts such as provocation and severe mental or emotional stress ... Other factors which C may contribute towards the conclusion that he failed to realise what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing his criminal liability. But in every case the critical question is - what evidence is there to support such a conclusion?' *Per* Diemont AJA (as he then was) in *S v van Vuuren* 1983 (1) SA 12 (A) at 17 G-H."

D Ebrahim JA at 367C-E further commented as follows:

> "However, I have been unable to find a case where murder was reduced to culpable homicide on the basis of sane criminal incapacity. That it should be able to do so seems to me to be inconsistent with principle.
>
> There are numerous cases, though, where a conviction for murder was returned, E the accused's state of diminished responsibility being held to reduce the accused's moral, but not his legal responsibility. See, for example, *S v Sulpisio supra; S v Sibiya* 1984 (1) SA 91 (A); *S v Phillips & Anor* 1985 (2) SA 727 (N); *S v Taanorwa* 1987 (1) ZLR 62 (S); *S v Chiwambutsa* 1987 (2) ZLR 59 (S); *S v Laubscher supra; S v Chin'ono* 1990 (1) ZLR 244 (H); *S v Calitz* 1990 (1) SACR 119 (A). There is nothing in the facts of the present case to take it out of the ordinary run of cases."

F Diminished responsibility due to drunkenness and provocation, according to the non-statutory Roman Dutch criminal law, though capable of leading to a reduction of a murder charge to culpable homicide or an acquittal, does not ordinarily lead to such results, but to the accused being convicted of murder, the drunkenness and provocation being merely mitigatory. The G defence succeeded in *S v Wild* 1990 (1) SACR 561 (A), referred to in *Gambanga (supra),* where the court said that "if on the evidence there is a reasonable doubt whether the accused had criminal capacity, he should be given the benefit of the doubt." That must have been the basis of Mr *Diza's* submission that the accused in this case must be acquitted because she acted H in a drunken state, after being provoked by the deceased.

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Mr *Diza* further submitted that the weight of the walking stick is not such A as can be described as a weapon which can be used by a person intending to cause death. He thus concluded by saying the accused's actions on 25 December2007 were not accompanied by an intention to cause the deceased's death. He argued that the intention to kill the accused admitted in her warned and cautioned statement was not considered and operationalised at the time B the accused attacked the deceased. He submitted that such intention must accompany the *actus reus* for the accused to be convicted of murder. He referred us to *S v Stigling en 'n Ander* 1989 (2) SA 720 (A) where it was held that intention to kill must be proved beyond reasonable doubt. He thus argued that it had not been proved that the accused realised that death would result from her actions. This submission cannot succeed, because the C accused specifically said she decided that the deceased must die before her own death. She then executed her intention by assaulting the deceased until she could not respond to the blows she was delivering.

Submissions by counsel for the State and defence, though well researched and argued, did not take into consideration the changes introduced to the D defences of intoxication and provocation by *Chapter XIV Part IV* and s 239 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In view of the provisions of s 3 of the Code, I brought these to their attention, after which I granted them an adjournment to enable them to make additional submissions on the defences referred to above as codified by the Code. Section 3 of the Code provides as follows: E

"(1) The non-statutory Roman-Dutch criminal law in force in the Colony of the Cape of Good Hope on the 10th June, 1891, as subsequently modified in Zimbabwe, 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 F on relevant aspects of-

(a) the criminal law referred to in subsection (1); or

(b) the criminal law that is or was in force in any country other than Zimbabwe."

In his additional submissions, Mr *Mapfuwa,* for the State, submitted that the accused is guilty of murder as she was no longer intoxicated when she G attacked the deceased. He argued that she had the requisite state of mind when she caused the deceased's death. He repeated his earlier analysis of the accused's state of mind. He relied on s 221 of the Code for his submissions. Section 221 provides as follows:

"(1) If a person charged with a crime requiring proof of intention, knowledge or the realisation of a real risk or possibility - H

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(a) was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an A essential element of the crime; but

(b) the effect of the intoxication was not such that he or she lacked the requisite intention, knowledge or realisation;

such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing the sentence to be imposed.

B (2) Where a person is charged with a crime requiring proof of negligence, the fact the person was voluntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime shall not be a defence to any such crime, nor shall the court regard it as mitigatory when assessing the sentence to be imposed."

In terms of s 221(1)(a), the accused should have been intoxicated at the C time she committed the act constituting the crime charged. In this case, Mr *Mapfuwa* argued that the accused was no longer intoxicated when she attacked the deceased. His reliance on s 221 is therefore erroneous as the section only applies to cases where intoxication still had an effect on the accused. In terms of s 221(1)(b), if the effect of the intoxication "was not D such that he or she lacked the requisite intention, knowledge or realisation ... such intoxication shall not be a defence to the crime". This means that if it is proved that the intoxication did not prevent the accused from appreciating what she was doing, the defence of intoxication will not succeed. The fact that the accused was intoxicated, though not to the extent of preventing her from appreciating what she was doing, can only be considered as mitigation. E *Mr Mapfuwa's* submission is that the accused was no longer intoxicated. He is therefore saying the defence of intoxication is not available to the accused, even to the extent of being merely mitigatory. His submission can therefore not be based on s 221 as that section is intended for an accused who acts with intention while drunk, but not to the extent of not knowing what he is doing

In the event that the accused succeeds in the defences advanced in Mr F *Diza's* further submissions, and as he submitted is convicted of a crime requiring proof of negligence, in terms of s 221(2) intoxication would not be a defence to such an offence, and cannot be considered in mitigation. Mr *Mapfuwa's* application of s 221 to the facts of this case, though erroneous, is persuasive when considered from the correct perspective. We do not G agree with Mr *Mapfuwa's* submission that the accused was completely sober when she assaulted the deceased. We are of the view that the accused, though appreciating what she was doing as demonstrated by her detailed narration of how she assaulted the deceased, was still intoxicated, but not to the extend of not being able to formulate the requisite intention.. We hesitate to find that she was completely sober because she had just woken up from H her drunken sleep. She had been brought home completely drunk, at or just

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before lunch time. She had slept on the verandah because of her drunken A state, and had just woken up. We therefore conclude that she was drunk, but that the effect of the intoxication was not

such that she lacked the requisite intention, knowledge or realisation. Therefore, in terms of s 221(1) of the Code, her intoxication cannot be a defence to the crime of murder, but can merely be regard as mitigatory when assessing the sentence to be imposed.

In his further submissions Mr *Diza* relied on s 224 of the Code, which provides as follows:

> "If a person, while in a state of voluntary intoxication, is provoked into any conduct by something which would not have provoked that person had he or she not been intoxicated, the court shall, in accordance with Part IX, regard such provocation as mitigatory when assessing the sentence."

He submitted that the accused was provoked while drunk, and must therefore be found not guilty of murder but guilty of culpable homicide as provided by s 239(1), which provides as follows:

> "(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 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 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 - 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-eighth."*

Mr Diza submitted that the accused was provoked by stepping on the deceased's excrement, and the deceased's tugging on to her dress in circumstances which would not have provoked her if she had not been intoxicated. Thus far I would agree with his application of the provisions of s 224 of the Code to the facts of this case. However, he went on to argue that in terms of s 239(1) the accused should be found not guilty of

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culpable homicide. He clearly had abandoned his earlier submission based on the *dicta* in *S v Gambanga (supra)* that the accused should be acquitted.

This demonstrates the benefit of reading the Code when dealing with crimes committed after the codification of our criminal law. The provisions of s 224, which Mr *Diza* relied upon, do not envisage the provocation it refers to, to be such as would reduce the crime to culpable homicide because the provocation is such as would not have provoked the accused, had he or she not been intoxicated. It cannot therefore be provocation, which in terms of s 239(1) would reduce murder to culpable homicide. The provocation envisaged by s 239(1) is such as would lead the accused to act without intention or with intention but having completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances to lose his or her self-control. Section 224 of the Code is intended to cover situations mentioned in s 239(2) of the Code where the accused would act with intention, or the provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control. The provisions of s 224 are not consistent with the provisions of s 239(1), but are consistent with those of s 239(2) of the Code. The reference to Part IX in s 224, in the case of murder, can therefore only be referring to s 239(2) whose provisions, like those of s 224, provide that provocation can only be considered as mitigation. In terms of s 224 and Part IX of the Code the accused is not entitled to a partial defence in terms of s 239(1). Intoxication in such cases can only be considered as mitigatory.

In fact, a close examination of Chapter XIV Part IV of the Code reveals that the legislature altered the common law position on voluntary intoxication to the extent that that defence can never result in the reduction of a murder charge to one of culpable homicide. Section 222 introduced a new offence of voluntary intoxication leading to unlawful conduct, where the effect of the intoxication leads to the accused lacking the requisite intention, knowledge or realisation required to commit the crime originally charged. Such an accused would still be "liable to the same punishment as if-

(i) he or she had been found guilty of the crime originally charged; and

(ii) intoxication had been assessed as a mitigatory circumstance in his or G her case."

This means the new offence of voluntary intoxication leading to unlawful conduct is not the same as culpable homicide, as culpable homicide does not attract the same sentence as murder (the crime originally charged).

In the final analysis, Mr *Diza's* reliance on s 224, *and Mr Mapfuwa's* erroneous H reliance on s 221(1) which we accepted with a finding that intoxication

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still had an effect on the accused, leads to the same result. In both cases A intoxication is not a defence to the crime of murder, but a mitigating factor to be considered in sentencing the accused for murder.

The accused is therefore found guilty of murder in contravention of s 47(1) (a) of the Code as charged. B

Musunga & Associates, accused's legal practitioners C

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MUNHUMUTEMA v TAPAMBWA & ORS 2010 (2) ZLR 509 (H)

Citation	2010 (2) ZLR 509 (H)
Case No	Judgment No. HH-265-10
Court	High Court, Harare
Judge	Mutema J
Heard	17 September 2010
Judgment	17 November 2010
Counsel	*D C Kufaruwenga*, for the applicant *D Ochieng*, for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Court - *contempt - what constitutes - failure to comply with court order - need for court order to be one that creates an enforceable obligation*

Employment-*wrongful dismissal - order for reinstatement - effect-court not entitled to create new contract of employment - order for reinstatement* D *made after normal date for employee's retirement - no new contract created - employer obliged to pay only up to retirement date*

Headnote

The applicant was dismissed from his employment by the third respondent bank in 1995. In June 1999 he had passed the date on which he would E have been due to retire. The applicant appealed against the decision. In December 1999, the Employment Council for the Banking Undertaking, sitting as an Appeals Board, resolved that an incorrect code of conduct had been used. It allowed the appeal and ordered that the applicant be reinstated with full pay and benefits from the date of his initial discharge to the date that the hearing in terms of the correct code of conduct took F place. The bank lodged an appeal to the then Labour Relations Tribunal. On 6 March 2003 the Tribunal dismissed the appeal and upheld the Employment Council's decision of reinstatement. The applicant having passed his retirement date by then, all that he was owed by the bank by way of back pay was calculated and tendered to him, together with an *ex gratia* lump sum payment, but the applicant rejected the tender. G Thereafter, the bank approached the Labour Court to quantify the amount payable to the applicant. This was after the parties had in vain attempted to settle out of court. In 2007 the Labour Court ruled that the bank was barred from approaching the court until after purging its contempt of not complying with its earlier judgment upholding the Employment H Council's decision of reinstatement. The applicant approached the

Labour Court for a contempt order against the respondents and, when A that court ruled that it had no jurisdiction, approached the High Court. The respondents argued that the order of the Labour Court was not one which could rise to contempt proceedings and that the ruling of the Tribunal had been complied with.

Held, that contempt of court is a generic term descriptive conduct in relation B to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it in order to resolve their disputes. Civil contempt involves disobedience by a party to a specific order of the court made against him in the action. It is punishable because the administration of justice would be undermined if court orders could be disregarded with impunity. But where a court C order imposes no enforceable obligation, a party disobeying such an order is not in contempt.

Held, that upon reinstatement the ordinary contractual relationship between employer and employee resumes: the *status quo ante* dismissal is restored and the relationship should continue with all the rights and obligations under the contract of employment until such time as the D contract is terminated on lawful grounds. The contract of employment between the parties was to run until the applicant attained the age of 60 years (his retirement age) in June 1999. It could only be extended if both parties agreed, which was not the situation here. What the bank did, by calculating all salaries with corresponding increments together with interest that were owed to the applicant and tendering the same to E him, effectively amounted to reinstatement. The orders of the Appeals Board and of the Labour Relations Tribunal were made well after the applicant's retirement date provided for in the contractual relationship between the two parties. They could create no rights for the applicant outside the normal contract of employment between the parties, for to F do otherwise would entail creating a new agreement for the parties. This no court is legally competent to do.

Cases referred to

A-G v Times Newspapers Ltd [1973] 3 All ER 54 (HL)

Commercial Careers College (1980) (Pvt) Ltd v Jarvis 1989 (1) ZLR 344 (S)G

Standard Chartered Bank Zimbabwe Ltd v Matsika 1997 (2) ZLR 389 (S)

Case information

D C Kufaruwenga, for the applicant

D Ochieng, for the respondents H

Judgment

A **Mutema J**: The present feud has its genesis in matters of employment law. The first and second respondents are the third respondent's managing director and human resources manager respectively. The applicant was employed by the third respondent as a manager. In 1995 he was dismissed from employment by the respondents. On21 December 1999, the Employment Council for the Banking Undertaking, which heard the applicant's appeal, B resolved that an incorrect code of conduct had been used and ordered that the applicant" should be reinstated with full pay and benefits from the date of his initial discharge, to the date that the hearing in terms of the NEC's Code of Conduct (SI 111 of 1994) takes place". Dissatisfied with this decision, the third respondent lodged an appeal to the then Labour Relations Tribunal. On C 6 March 2003 the Labour Relations Tribunal dismissed the appeal and upheld the Employment Council's decision of reinstatement. This is the judgment number LRT/H/19/2003. Thereafter, the third respondent approached the Labour Court to quantify the amount payable to the applicant. This was after the parties had attempted in vain to settle out of court. The Labour Court ruled that the third respondent was barred from approaching the court D until it had purged its contempt of not complying with its earlier judgment upholding the Employment Council's decision of reinstatement. This is the judgment number LC/H/156/2007.

Thereafter, on7 July 2008, the applicant lodged contempt of court proceedings against the third respondent in the Labour Court. That application was E dismissed on the basis that the Labour Court had no jurisdiction to entertain it. On 22 September 2009 the applicant registered the two Labour Court judgments cited above with this court for enforcement purposes.

The current application, filed on 6 July 2010, avers that the applicant has, on countless occasions, tendered his services to the third respondent but the respondent, via its agents, the first and second respondents, has scoffed at F him and refused to reinstate him.

The order sought in terms of the draft reads:

> "IT IS ORDERED THAT:
>
> 1. The first, second and third respondents are hereby declared in contempt of judgment number LRT/H/19/2003 of the Labour Relations Tribunal G (delivered on 2 September 2002) and judgment number LC/H/156/2007 of the Labour Court (delivered on 21 May 2007) which were registered with the court in terms of s 92B of the Labour Act [*Cap 28:01*].
> 2. The first and second respondents shall be committed to prison for ninety (90) days until such time they comply with the aforesaid orders.
> 3. The third respondent is hereby ordered to pay a fine of US$500 per day H from the date of the granting of this order up to the date upon which the

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> third respondent complies with judgment number LRT/H/19/2003 of the A Labour Relations Tribunal (delivered on 2 September, 2002) and judgment number LC/H/156/2007 of the Labour Court (delivered on 21 May 2007) which were registered with this court in terms of s 92B of the Labour Act [*Chapter 28:01*].
> 4. The costs of this application shall be borne by the first, second and third respondents jointly and severally, the one paying the other being absolved, B on a legal practitioner and client scale".

The respondents opposed the application on the main plank that the facts of the matter do not ventilate any semblance of contempt of court. Firstly, the judgment of the Labour Court of 21 May 2007 (LC/H/156/2997) is not an order *ad factum praestandum* that can be enforced by contempt of court C proceedings. Secondly, the judgment (LRT/H/19/2003) dated 2 September 2002 was complied with, in that the applicant was reinstated and all that he was owed by the third respondent by way of back pay was calculated and tendered to him, but the applicant rejected the tender. It so happened that, due to effluxion of time, by the time the applicant was reinstated, he had already reached retirement age but he refused to retire. D

Contempt of court was described by Lord Diplock *in Attorney-General v Times Newspapers Ltd* [1973] 3 All ER 54 (HL) at 71 as follows:

> "Contempt of court is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes. One E may leave aside for the purposes of the present appeal the mere disobedience by a party to a civil action of a specific order of the court made on him in that action. This is

> classified as a 'civil contempt'. The order is made at the request and for the sole benefit of the other party to the civil action. There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity ...". F

Now, on the facts of the present case, does the respondents' conduct amount to disobedience of a court order? Regarding judgment LC/H/156/2007, the import of the order was that the employer ("the third respondent") was barred from approaching the court until after purging its contempt of failing to reinstate the applicant to employment. It therefore imposed no enforceable G obligation and, in the event, the order should not have been registered in terms of s 92B of the Labour Act. Its registration created no order *ad factum praestandum* that can be enforced. Perhaps had the respondents approached the court in pursuit of the same subject matter, one could argue that they would have disobeyed that court order, but that is not the case. Since none of the respondents breached or disobeyed that order, which in any event H

Mutema J

A created no enforceable obligation, I find no ground upon which it can be said that the respondents are in contempt of court, regarding this particular order.

As regards the other judgment - LRT/H/19/2003 - the operative part of that judgment reads:

> "The appeal is accordingly dismissed and the decision appealed against is upheld with costs".

B The decision that had been appealed against was that of the Employment Council for the Banking Undertaking, sitting as an appeals board. That board had ruled that "Stanbic should effectively reinstate Mr Munhumutema up to the day that they hold the new initial hearing. His reinstatement should be with full back pay of all monies owed to him". That ruling was given, as already stated above, on 21 December 1999. After the third respondent had appealed against that ruling to the Labour Relations Tribunal, that appeal was dismissed on 6 March 2003.

C The question which begs an answer is whether the respondents, particularly the third respondent, did comply with the board's order for reinstatement with D full back pay of all monies owed to him as upheld by the Labour Relations Tribunal on 6 March 2003, when the Tribunal confirmed the appeals board ruling of 21 December 1999. Of note is the fact that the applicant had been dismissed as far back as 1995. In 1995, the applicant was not yet due for retirement but by 21 December 1999 he had passed his retirement age of 60 years, which was due in June 1999.

E The third respondent contends that it did comply with the order of reinstatement with full pay and benefits. The applicant contends to the contrary.

On the facts of this case, was the applicant reinstated? In *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S), it was held that:

> "Reinstatement meant no more than a directive that the employee be replaced in F her post and remunerated. It did not entail the further obligation on the part of the employer to provide work."

And in *Standard Chartered Bank Zimbabwe Ltd v Matsika* 1997 (2) ZLR 389 (S) it was held that from an order of reinstatement, the following consequences are said to flow: G

(a) the employee is entitled to be replaced in his post;

(b) there is no obligation on the employer to provide him with work;

(c) the employer must continue to remunerate him upon the tender of his services;

(d) the employer is to restore him to the pay roll with effect from the H stipulated date.

Mutema J

Upon reinstatement, the ordinary contractual relationship between employer A and employee resumes, i.e. the status *quo ante* dismissal is restored and the relationship should continue with all the rights and obligations under the contract of employment until such time as the contract was terminated on lawful grounds. What the third respondent did *in casu,* by calculating all salaries with corresponding increments together with interest that were B owed to the applicant and tendering the same to him, effectively amounted to reinstatement.

The order of the appeals board, and indeed that of the Labour Relations Tribunal, created no rights for the applicant outside the normal contract of employment between the parties, for to do

otherwise would entail the Tribunal creating a new agreement for the parties, which no court is legally competent C to do. The contract of employment between the parties was to run until the applicant attained the age of 60 years (his retirement age) which was due in June 1999. Despite having been dismissed in 1995, the applicant, on being reinstated pursuant to the Tribunal's order, had what he was owed until his retirement age calculated and tendered to him on 10 June 2006, including an D *ex gratia* payment of $ 15 million by way of cheque. However, for reasons best known to himself, the applicant refused to accept the payment.

Paragraph 1.20 of the third respondent's Pension Fund Rules clearly stipulates that the normal retirement age is 60 years. Paragraph 5.1.1 (iii) allows retirement past the normal retirement date if the member so wishes and *the* E *employer is agreeable* but not later than the attainment of age *70 years* (my emphasis). In the instant case, no such agreement to extend the applicant's retirement age up to 70 years was ever reached by the parties. The contention by the applicant that "in terms of the proviso to r 5.1.1 (ii) of the Pension Rules, the retirement age provided for in the Pension Rules does not apply to an employee who has been made redundant" is a misinterpretation of the F relevant paragraph. The proviso sought to be relied upon reads:

> "It is specifically provided that the age requirements shall not apply in respect of a member whose retirement is due to retrenchment or redundancy."

This proviso is only relevant to and limited to subpara (ii) which governs early retirement, stipulating age 55 years (or 50 years in respect of a female member). These are the age requirements which "shall not apply in respect G of a member whose retirement is due to retrenchment or redundancy". The proviso does not at all apply to the normal retirement age in subpara (i).

Although the appeals board, and *a fortiori* the Labour Relations Tribunal, ordered applicant's reinstatement by the third respondent "up to the day that they hold the new initial hearing... with full back pay of all monies owed to H

A him", both orders were made well after the applicant's retirement date of age 60 years as contemplated by the contractual relationship between the two parties. It cannot, by any stretch of the imagination, be construed to mean that the employment contract was meant to endure after the cut off date of retirement. As it is, the applicant is now well over 73 years and no initial hearing has been held. Can it then be argued that the applicant has rights B emanating from the contractual relationship? To hold so would not only be absurd, but would be tantamount to the court either making or extending a contract for the parties which is legally incompetent for any court to do. I am sure the order of reinstatement did not contemplate such an eventuality. The reinstatement was confined by implication to the date of the applicant's C retirement as per the original contract of employment. Had the anomaly *prima facie* extant in the order been laid bare to both tribunals, the wording of the reinstatement order would certainly have taken it into account.

In the event, the third respondent did comply with the order of reinstatement and there is nothing on the papers to sustain the contention that the respondents committed a civil contempt of court. Consequently, the application be and D is hereby dismissed with costs.

Dzimba, Jaravaza & Associates, applicant's legal practitioners

E *Atherstone & Cook,* respondents' legal practitioners

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PECHI INVESTMENTS (PVT) LTD v NYAMUDA 2010 (2) ZLR 516 (H)

Citation	2010 (2) ZLR 516 (H)
Case No	Judgment No. HB-142-10
Court	High Court, Bulawayo
Judge	Malaba J
Heard	25 October 2010
Judgment	18 November 2010
Counsel	Miss *H Moyo*, for the applicant Respondent in person
Case Type	Application for recusal
Annotations	No case annotations to date

Flynote

Court *-judicial officer - recusal - grounds for - bias - need for applicant to show reasonable possibility of bias and to prove facts from which such possibility may be inferred - judicial officer having previously expressed an opinion in case - not per se a ground for disqualification* D

Headnote

The applicant entered into a lease agreement with the respondent for a specific period which was renewable until 31 July 2006, after which the respondent could lease the property on a monthly basis if he so wished. The applicant resolved to terminate the lease agreement and gave the respondent due notice. However, after further negotiations, the respondent agreed to E vacate the leased property on 30 September 2008. The respondent did not vacate the property. The applicant then instituted legal proceedings. The hearing of the matter was postponed on a number of occasions due to various ploys adopted by the respondent. The respondent failed to attend on one occasion and the applicant applied for default judgment. The judge refused to grant it because the respondent was a layman and F a self-actor. Both parties were present at the next postponed hearing but the respondent was not properly dressed.

When the next postponed hearing was due to start and the applicant was making submissions, the respondent interjected, applying for a postponement on the grounds that he wanted to seek legal representation and that he G had not had time to go through the papers as the notice of set down was served on him on the day before the hearing. A witness was called to testify as to the service of the notice and the respondent also testified. After hearing the witnesses, the judge made various findings which were contrary to the testimony of the respondent. At the final hearing the parties appeared and the respondent was properly dressed but again he had no H

A file or documents. He sought a further postponement on two grounds. Firstly, since the judge had made a finding that he was not truthful with regard to the service of the notice of set-down, he was of the opinion that the judge was going to be biased against him in the event that the case was heard on the merits. Secondly, he still wanted representation in the person of an advocate.

B *Held,* that disqualification arises whenever a judicial officer's relationship to the parties is such, or his interest in the case is such, or his knowledge of the facts of the case or of the antecedents of the parties is such, as would tend to bias his mind at the trial. The test of judicial bias is not whether there has been actual bias, but whether there is a likelihood of C bias or whether a

reasonable man, in all the circumstances, might suppose that there was an improper interference with the course of justice. The possibility of bias, and not actual bias, is all that the applicant has to prove, but he must prove facts from which the possibility can be inferred. The facts from which that possibility may be inferred must be special to the particular case, not a general consideration on the grounds of which D bias may be vaguely conjectured.

Held, further, that there is no rule which states that a judge is disqualified from sitting in a case merely because, in the course of his judicial duties, he has previously expressed an opinion in that case. There would be as little justification for such a rule as for a rule which laid down that a judge E who in a judgment expressed his opinion as to the correct interpretation of an Act of Parliament could not sit in a subsequent case between different parties where the same question of interpretation was involved.

Held, further, that 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 F 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 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. An impartial judge is a fundamental prerequisite for G 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. Judicial officers should adopt a robust approach.

Held, further, that where bias is alleged, the judicial officer should bear in mind H the possibility of lack of *bona fides* on the part of the applicant. Above

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all, it should be borne in mind that the applicant bears a weighty onus A in proving not only his reasonableness but also that of his apprehension.

Cases referred to

Head & Fortuin v Woolaston NO & Anor 1926 TPD 549

Masedza & Ors v Magistrate Rusape & Anor 1998 (1) ZLR 36 (H) B

Matapa v Bhila NO & Anor HH-84-10

S v de Vries 1964 (2) SA 110 (E)

Silwana & Anor v Magistrate, District of Picketburg & Anor 2003 (5) SA 597(C)

Slade v Pretoria Rent Bd 1943 TPD 246

SA Commercial Catering & Allied Workers Union & Ors v Irvin & C *Johnson Ltd* 2000 (3) SA 705 (CC)

Take & Save Trading CC & Anor v Standard Bank of SA 2004 (4) SA 1 (T)

Yoffe v Koppies District Licensing Bd 1948 (3) SA 748 (T)

Case information

Miss *H Moyo,* for the applicant

Respondent in person D

Judgment

Cheda J: This is an application for recusal. The main case deals with a request/prayer for eviction of the respondent from a property situated at 123 George Silundika Street, Bulawayo, and costs on an attorney and client scale.

Briefly, the background to this matter is as follows. On 17 September 2004 E the applicant entered into a lease agreement with the respondent in respect of a lease of the above property for 11 months, from 1 September 2004 to 31 July 2005, which was renewable until 31 July 2006 and thereafter the respondent was to continue to lease the property on a monthly basis if he so wished. In January 2008 the applicant resolved to terminate the lease agreement and gave the respondent

three months' notice which effectively F was to terminate on 30 April 2008. However, further negotiations were made, culminating in the parties mutually agreeing that the respondent vacates the property on 30 September 2008. A memorandum to that effect was drawn up and signed by both parties. However, the respondent did not vacate the property, a situation which resulted in these proceedings. The reasons for G such failure are an integral part of the main proceedings before this court.

After the parties had filed their papers the applicant applied for a notice of set down, which was granted, and the matter was set down for hearing on 12 October 2010. The notice of set down was served on the respondent the same day. Upon receipt of the notice of set down, the respondent filed what he termed "Request for Postponement", which reads as follows: H

Cheda J

A "I refer to the above matter and to your notice of set down dated 12/10/10 which was received on the same day in the afternoon. Please note that the notice period given (3 days) is inadequate and inconsistent with the stipulated two weeks notice as per the rules of this Honourable Court.

May I also advise that I need to engage an advocate for this matter which is so complicated due to the number of points of law involved. As a result I propose B that this matter be removed from the roll for the good of both parties.

By copy of this letter the Honourable Judge who will preside over this case is respectfully advised not to bother to read the case, since we are not ready for the matter to be heard."

The respondent did not attend the hearing on 18 October 2010. *Miss Moyo,* for the applicant, applied for a default judgment on the basis that the C respondent should have appeared in court to seek postponement. While she was indeed entitled to apply for default judgment, I did not grant it for the following reasons:

(a) the respondent is a layman and a self-actor;

(b) the matter is very important to the parties; D

(c) on many occasions such default judgments often result in applications for rescission, which applications can be avoided as they waste both the litigants' and the court's time.

Needless to say, Miss Moyo was not happy with my decision. The postponement was granted and couched in the following terms:

E "IT IS ORDERED THAT:

(1) the matter be and is hereby postponed to 25 October at 1415 hours;

(2) applicant must serve the respondent with a notice of set down.

(3) in the event that the respondent is in default, for whatever reason, the matter will proceed in his absence;

(4) no other postponement will be allowed by this court; F

(5) costs will be costs in the cause."

On the day of the hearing, both parties were present. The respondent was, however, not properly dressed, as he was wearing a short-sleeved shirt with neither tie nor jacket. I must remark here that the respondent is a self-actor, who has professionally drafted all his documents before the court and is fully conversant with the rules of this court, as evidenced by the presentation of his G case. In addition, he has a very good command of English and seems to have mastered the relevant legal terms used in this court. In fact, he is amongst the very few self-actors who can articulate their cases so well. Above all, he struck me as a very intelligent man indeed. One certainly cannot take away that skill from him. In fact he is a rare self-actor. For that reason, I did not H believe him when he stated that his failure to dress properly was due to his

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Cheda J

ignorance, as he struck the court as being a very educated man who is very A familiar with the basic court procedures and court etiquette. It is pertinent to note that when he appeared in court on 25 October 2010, he did not bring his file with him. One of the terms of the order of 18 October 2010 was that the matter was to proceed on 25 October 2010 without fail. However, the respondent still appeared in court without his file or documents in readiness B for the hearing.

On 25 October 2010 during the hearing, the respondent interjected when the applicant was making submissions. He applied for a postponement on two grounds:

(1) he wanted to seek legal representation; and

(2) he had not had time to go through his papers as the notice of set down C was handed to him on the evening of 24 October 2010.

Miss Moyo, in response, contradicted him and stated that the respondent was not being truthful to the court, because service was effected by the instructing legal practitioner, Mr Madzivire, who happened to have been present in court.

In order to clarify this issue I asked the legal practitioner, Mr Madzivire, D to take the witness stand and give evidence. His evidence was that on 18 October 2010, he proceeded to the respondent's place of business and found one Sebastian Nyamuda (the manager for the respondent) who refused to accept service for and on behalf of the respondent. His reason for refusal was that he was not authorised to receive documents for and on behalf of a third E party. Mr Madzivire took the documents back to his office, whereupon he was advised by the senior partner to go back and re-serve on whoever was present. He went back and again found Sebastian who, for the second time, refused to accept service. He then left the notice of set down on Sebastian's desk. It was also his evidence that, while he was at the respondent's offices, he saw three other people sitting there and one of them he now recognized F as the respondent. The respondent cross-examined him but he stuck to his evidence. I found him to have been a truthful witness who had no reason to lie to the court.

The respondent also took the witness stand. He stated that his failure to attend court on 18 October 2010 was because he was under the impression that his G "Request for Postponement" was enough to excuse him from attending court. With regard to the service of the notice of set down for 25 October, he stated that he was not present at the premises as he was in Harare and only arrived on the evening of 24 October, when the hearing was on 25 October at 10.00 hours. On Mr Madzivire's averment that he was in fact present, he denied this and went further to state that Mr Madzivire must have seen his brother. H

Cheda J

A When questioned as to why he did not bring his file or documents with him when he knew that the matter was set down for hearing on 25 October, he stated that he was of the view that the matter was going to be postponed as he wanted to seek legal representation. Although he told the court that Mr Madzivire must have seen his brother, he made no effort to lead evidence from his brother to counter that assertion. His brother's evidence was, in B my opinion, necessary as it could have helped the court to see whether or not they looked alike.

Miss *Moyo* argued that the matter should proceed, as the respondent was aware of all the issues involved since he had drafted all his papers and even filed his heads of arguments as far back as May 2009. She further argued that C the time required for legal representation would have been adequate from the time he was served with a notice of hearing on 12 October 2010 to date.

After hearing the evidence led in court, I made the following findings:

(a) the respondent had been deliberately avoiding the hearing, hence his non-attendance on 18 October, thereby seeking a postponement by filing D his notice of intention to do so but failing to come to court to apply for the said postponement;

(b) on this day he was vague when asked how long the postponement to seek legal advice should be. He had been equally vague with regard to the time he required to look for legal representation in his "Request for E Postponement" filed of record;

(c) he was casual in his dressing on 25 October 2010, when he was aware that he was coming to court;

(d) he was present when Mr Madzivire effected service on Sebastian on 18 October; F

(e) he was not genuine when he stated that he wanted the matter postponed in order to seek legal advice, as he had always been aware of the pending hearing but chose not to take any steps whatsoever in securing the said legal representation. He failed to do so between 18 and25 October when he had the opportunity to do so.

Mr Madzivire is a legal practitioner and an officer of this court. He has no G personal interest in this matter, other than that of his client. He had no reason to lie that the respondent was present when he was not, because it was not a requirement to effect personal service anyway. Therefore, the mention of the respondent's presence does not enhance the effect of service at all, but it was, in my view, mentioned to buttress the truthfulness of his averments H and nothing else.

2010 (2) ZLR p522

Cheda J

I find that the respondent was an untruthful witness, as it is clear to me that A he has been trying to avoid this matter being heard. He lied that he was not present on 18 October, yet Mr Madzivire saw him. It is Mr Madzivire's evidence that, although he did not know him then and was seeing him for the first time, he is the same person whom he saw when he effected service on 18 October 2010. I found the respondent not to have been a credible B witness as far as this aspect of the case is concerned and I therefore reject his explanation in relation to his application for postponement.

As he came to court without his file and/or documents on 25 October, I was of the view that he should be given a second chance to read and bring his documents the following day, that is 26 October, and possibly seek legal representation. I therefore again exercised my discretion and postponed the C matter to 26 October 2010 to which he agreed. On 26 October 2010 the parties appeared and this time he was properly dressed, but again he had no file or documents and sought a further postponement on the following grounds:

(a) since I had made a finding that he was not truthful in his evidence with regard to Mr Madzivire's attendance at his premises on 18 October, he was of the opinion that I was going to be biased against him in the event D that I heard this case on the merits;

(b) he still wanted legal representation in the person of an advocate.

I will deal with the issue of legal representation first. A litigant has a legal right to instruct a legal practitioner of his choice at his own expense. That is his constitutional right. The respondent, as a self-actor, has always been aware E that all pleadings have closed and, as such, is fully aware of the disputed facts and issues involved, hence the contents of his heads of arguments filed of record. It is trite that a litigant should be allowed to exercise his right to legal representation, but my view is that this right should not be used to frustrate a legitimate due process.

Our courts have, time without number, emphasized that litigation must come F to an end at some point. In my view, a postponement of a case should be done when the applicant for the postponement has a just cause for doing so, not merely to use it as a matter of course. After all, a legal right can never be absolute but is subject to the convenience and rights enjoyed by others. Asked why he had not instructed a lawyer to date or at least from 18 October 2010 G when he first indicated that he wanted to instruct an advocate, his response was that he presently had no money and also that he required at least two months to do so. This type of attitude towards litigation is not acceptable, particularly when he admitted that he has been using the leased property to conduct his restaurant business from October 2008 to date without paying rent, even token rent for that matter. In as much as a postponement can be H

2010 (2) ZLR p523

Cheda J

A granted to allow legal representation, such postponement should not be granted where it is clear that it is designed to postpone the day of reckoning. It is under those circumstances that further postponement should not be granted.

His second point is that the matter should be postponed in order to allow another judge to preside over this case. His reason is that, since I have B already found that he was not truthful when he told the court that he was not present on 18 October when service of the notice of set down was effected, it means that I am already biased against him as I have made a character classification of him.

Our law allows recusal where the judicial officer has a bias which interferes with his impartiality. The reason for this approach is to provide a safe escape C or exit for those judicial officers who find themselves in situations where the conclusion of the existence of bias is inescapable. This is based on purity of motive in the performance of judicial work. A test of judicial bias was laid down in *Slade v Pretoria Rent Board* 1943 TPD 246 where it was stated that the test of judicial bias is not

whether there has been actual bias, but whether there is a real likelihood of bias, or whether a reasonable man, in D all the circumstances, might suppose that there was an improper interference with the course of justice.

In *S v de Vries* 1964 (2) SA 110 (E) it was held that disqualification arises whenever the judge's or magistrate's relation to the parties is such, or his interest in the case is such, or his knowledge of the facts of the case or of E the antecedents of the parties is such, that it would tend to bias his mind at the trial. Further, in *Head & Fortuin v Woolaston NO & Anor* 1926 TPD 549 at 558, Stratford J stated:

> "I agree that possibility of bias and not actual bias is all that the plaintiffs have to prove, but they must prove facts from which the possibility can be inferred".

F It is now settled law that the allegation of bias must be proved - see *Masedza & Ors v Magistrate Rusape & Anor* 1998 (1) ZLR 36 (H), referred to in *Matapa v Bhila NO & Anor* HH-84-10 (not reported).

This principle was also considered in *Yoffe v Koppies District Licensing Board* 1948 (3) SA 748 (T) at 752, where van den Heever JP stated:

> "Obviously the facts from which that possibility may be inferred must be special G to the particular case, not a general consideration on the ground of which vaguely bias could be conjectured.
>
> *In casu the* respondent objects to the present court continuing with hearing the parties on the merits. The fact of the matter is that the court's finding was based on *viva voce* evidence where the demeanour of the witnesses came into sharp focus, whereas the next stage of the case relates to the merits. In my view, as the H decision will be based on papers filed of record and not oral evidence, the court

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Cheda J

> is not disqualified to hear the main arguments. As the authorities have already A made clear, the test is the reasonable likelihood of bias and not mere conjecture.
>
> A judicial officer's training leaves him reasonably equipped to keep an open mind throughout the adjudication of a matter before him, at the same time being guided by the judicial oath of office of dispensing justice without fear or favour, affection or ill will.
>
> In *R v T* 1953 (2) SA 479 at 482 E-H Centlivres CJ had this to say: B
>
> > 'Thus there is nothing to prevent a judge, who has refused provisional sentence on the ground that the probabilities as disclosed in affidavits are in favour of the defendant, from hearing the principal case, nor is there anything to prevent a judge who has granted absolution from the instance from sitting in a further case between the same parties where the facts alleged are the same as those alleged in the previous case. *...it is sufficient* C *to say that there is no rule in South Africa which lays down that a judge in cases other than appeals from his judgments is disqualified from sitting in a case merely because in the course of his judicial duties he has previously expressed an opinion in that case.* There would be as little justification for such a rule as for a rule which laid down that a judge who in a judgment expressed his opinion as to the correct interpretation of an Act of Parliament could not sit in a subsequent case between different parties where the same D question of interpretation was involved'"(my emphasis).

It is now settled law therefore that the test for bias is the reasonableness of a litigant. In *Silwana & Anor v Magistrate, District of Piketberg & Anor* 2003 (5) SA 597 (C) at 603-604, quoted with approval in *Matapa's* case *supra,* Foxcroft J ably stated:

> "In decisions in recent years judges have been reminded that one should not be E unduly sensitive about applications for recusal. As Howie JA (as he then was) said in S *v Roberts* 1999 (4) SA 915 (SCA) at 923; 1999 (2) SACR 243,
>
> > 'It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officr from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to F preside after recusal should have occurred renders the further "proceeding" a nullity."
>
> *Mönnig's* case 1992 (3) SA 482 (A) is referred to, and also the remarks in *S v Malindi and Ors* 1990 (1) SA 962 (A) at 969G 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) and *South African Motor Acceptance Corporation (Edms) Bpk* G *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 H

A objective one. *The fact that 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'"*(my emphasis).

In *South African Commercial Catering & Allied Workers Union & Others v Irvin & Johnson Ltd* 2000 (3) SA 705 (CC) at714-715 the South African Constitutional court *(per* Cameron AJ), dealing with the concept of B apprehension of bias, stated:

"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 Roberts,* decided shortly after *Sarfu,* where the Supreme Court of Appeal C 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. D 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.'

The 'double' unreasonableness requirement also highlights the fact that mere E apprehension 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 adjudicating 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."

F The courts called on judicial officers to perform a delicate balancing act, that of making a finding of the existence of reasonableness in the apprehension of bias against a supine approach by judicial officers at the mere mention of the word bias. In the test case of *Take & Save Trading CC & Anor v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) Harms JA observed that:

"Everyone is entitled to a fair trial and that includes the right to a hearing before an G 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 for purposes H of emphasis and because they are particularly germane to this case:

> 'The question is whether a reasonable, objective and informed person would A 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.
>
> 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 B part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.

That is one side of the coin. The other is this:

> '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 umpire to see that the rules of the game C 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 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. Fairness of court proceedings requires of

> the trier to be actively D involved in the management of the trial, to control the proceedings, to ensure 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 E withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (and more often than not at the suggestion of 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 F the mere termination of mandate does not, contrary to popular belief, entitle a party to a postponement as of right.
>
> 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 G on appeal, taking into account the degree of the trial court's aberration."

The emphasis is on the need for judicial officers to adopt a robust approach. The courts should therefore, where bias is alleged, bear in mind the possibility of lack of *bona fides* on the part of the applicant. Above all, it should be borne in mind that the applicant bears a weighty onus in proving not only his reasonableness but that of his apprehension. H

2010 (2) ZLR p527

Cheda J

A In Zimbabwe the correct legal position is that highlighted in the *Matopo* case *supra* where Uchena J stated:

> "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."

In casu, the question which falls for determination is whether or not the respondent's apprehension of bias on the part of the court is reasonable and whether or not the respondent himself is reasonable. The respondent has been C a self-actor throughout the litigation process. As pointed out above, he is one of the few self-actors who articulate themselves very well. In that regard, I find that he was not reasonable in apprehending bias, as he understands the legal principles, and also that, despite all his flimsy excuses, I have been bending over backwards to accommodate him in the circumstances where I should possibly not have. As of 5 May 2009 he has been aware that the day D of hearing was nigh, but on 18, 25 and 26 October he has been throwing all kinds of tricks in order to avoid the matter being heard. This is borne out of by the following facts;

(i) his failure to appear in order to apply for a postponement on 18 October;

(ii) his assertion that he only became aware of the hearing on 24 October, E though this does not help him much as he had already filed his heads of arguments as far back as 5 May 2009;

(iii) his appearance in court on 25 and 26 October without his file or documents in the anticipation that his request for postponement would be acceded to.

F I also hold the view that, bearing in mind that the court has not even looked at the merits of the case, therefore his apprehension is also unreasonable.

It is clear from the authorities that the double requirement approach places a heavy burden on the part of the litigant who alleges bias. In my mind, the respondent has dismally failed to pass this tough test which, for all intents and purposes, is designed to curb abuse of such a noble principle. This, to me, is G an abuse of the legal system. In my mind, the fact that the court pointed out these ills based on facts in an interlocutory application of this nature does not, and will not, influence the court in hearing submissions on the merits of this matter. I come to this conclusion bearing in mind the need for good case management, fairness and the need to curb the unnecessary increase H of backlogs in our courts. See the *Matopo* case *supra.* I further make this

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2010 (2) ZLR p528

Cheda J

conclusion with full knowledge that justice should not only be done but be A seen to be done at all times.

Miss *Moyo* also submitted that, in the event that a postponement is granted, the respondent should be placed on terms, with regard to a date of hearing and payment of costs on a higher scale and that the respondent should not be heard before settling the said costs. B

As set out above, on two occasions the court has bent over backwards to allow the respondent to appear in court so as to present his case, but all those efforts have been met with one flimsy excuse after another, all, in my view, designed to avoid a hearing. I am, therefore, persuaded to accede to applicant's submissions, through Miss *Moyo,* that this matter should be C heard without further ado.

The following order is therefore made, that:

(1) this matter be and is hereby set down for hearing on 25 November 2010 at 1415 hours;

(2) the respondent be and is hereby ordered to pay wasted costs for 18, 25 and 26 October 2010 on the attorney-and-client scale; D

(3) the respondent be and is hereby ordered to settle the applicant's costs before the hearing date, failing which he should not be heard;

(4) the matter shall proceed on 25 November 2010, irrespective of whether or not the respondent has secured a legal representative. E

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/S v MUPATSI 2010 (2) ZLR 529 (H)

S v MUPATSI 2010 (2) ZLR 529 (H)

Citation	2010 (2) ZLR 529 (H)
Case No	Judgment No. HH-73-11
Court	High Court, Harare
Judge	Karwi J and Mavangira J
Heard	23 November 2010
Judgment	23 November 2010
Counsel	*A Demo*, for the appellant *F I Nyahunzvi*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

C **Criminal procedure** - *charge - splitting of charges - rule against improper splitting of charges - dominant purpose of accused in committing interrelated offences - accused should only be charged with that offence which was his*

dominant purpose

Criminal procedure - *onus of 'proof' - explanation given by accused - no* D *onus on an accused to convince court of truth of his explanation - if explanation reasonably possible, accused entitled to acquittal*

Headnote

"No onus rests on an accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that E explanation is improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal"*(dicta per* Greenberg J *in R v Difford* 1937 AD 370 at 373 followed).

"Where the accused, in pursuance of the dominant intention, commits a F number of offences, the proper thing to do is to charge him with only that offence which was his dominant purpose"*(dicta per* Beadle CJ in *S v Brereton* 1970 (2) RLR 272 (A) at 277A followed).

The appellant was charged, convicted and sentenced in the magistrates court, firstly, of obstructing or defeating the course of justice and, secondly, of malicious injury to property. The evidence revealed that he was a G policeman who solicited a lift on a rural road, from three other policemen, whom he did not know. These policemen were in a truck and on their way to a business centre in order to make an arrest. The appellant and three others, one of whom was his brother and coincidentally the very person whom the policemen intended to arrest, climbed into the back H of the truck. Thereafter, the three police details realized that the person

they were going to arrest was seated in the back of truck. The driver A stopped the vehicle and all three police details attempted to arrest him. The appellant vigorously opposed their attempt to arrest his brother and, in the course of so obstructing the police, threw stones, injuring one them and damaging the truck. In an appeal from the magistrate's court, the question arose as to whether there had been an improper B splitting of charges.

Held, that, as the evidence established that the appellant's dominant purpose was to prevent the arrest of his brother and the police vehicle was damaged in trying to achieve that purpose, it was an improper splitting of charges to charge the appellant with the crime of malicious damage to property as well as that of defeating or obstructing the course of justice. C The conviction and the sentence on the latter charge had, therefore, to be set aside.

Cases cited

S v Brereton 1970 (2) RLR 272 (A) D

R v Difford 1937 AD 370

S v Grobler & Anor 1966 (1) SA 507 (A)

S v Jambini 1982 (2) ZLR 213 (H)

S v Mutawarira 1973 (1) RLR 292 (A)

R v Peterson & Ors 1970 (1) RLR 49 (A)

S v Simon 1980 ZLR 162 (G) E

Case information

A Demo, for the appellant

F I Nyahunzvi, for the respondent

Judgment

Mavangira J: After hearing the parties in this matter we dismissed the F appeal against conviction and sentence in count 1 in its entirety and allowed the appeal against sentence in count 2. The following are our reasons for doing so.

The appellant, who is a police officer, was charged with, firstly, defeating or obstructing the course of justice and, secondly, malicious damage to G property. He pleaded not guilty to both counts but

was convicted after a trial. He was sentenced on the first count to 18 months' imprisonment, of which nine months' imprisonment was suspended for 5 years on condition of future good behaviour. On the second count he was sentenced to 18 months' imprisonment, of which nine months' imprisonment was also conditionally suspended for five years. A further three months' imprisonment was suspended H

A on condition the accused paid restitution of $15 000 000 to the Ministry of Home Affairs. Both sentences were ordered to run concurrently.

The accused now appeals against both convictions and sentences.

The facts are that police details from Chivhu Police Station were driving towards Mupatsi Business Centre where they intended to go and arrest one B Mabasa Phoni Mupatsi. Whilst they were on their way, they were flagged down by the accused who asked for a lift to Mupatsi Business centre. The accused called three colleagues who boarded the police vehicle with him. It was a pick-up truck and they jumped into the back of the truck. After travelling a short distance therefrom, one of the police details realised that Phoni Mabasa Mupatsi, whom they intended to arrest at the business centre, C was one of the passengers who they had just given a lift in the vehicle.

The police stopped their vehicle. One Sergeant Munyaradzi alighted from the vehicle and went to where Phoni Mabasa Mupatsi (Phoni) was seated. He identified himself to Phoni, placed his hand on Phoni's shoulders and told him that he was under arrest. Sergeant Munyaradzi told Constable Marufu, who D had also alighted, to handcuff Phoni as he was a wanted person. Constable Marufu managed to handcuff Phoni's right hand. It was at this stage that the accused jumped out of the vehicle and stated that the police details were not going to take Phoni with them. The accused grabbed Sergeant Munyaradzi while the other occupants came to wrestle Sergeant Munyaradzi, who was trying to handcuff Phoni's other hand. Sergeant Chatikobo, who had alighted E and left the engine running, was holding Phoni's legs.

During the scuffle the accused shouted that they would destroy the vehicle. The accused started throwing stones towards Sergeants Chatikobo and Munyaradzi who were wrestling with Phoni as they tried to handcuff him. The accused threw stones which struck Sergeant Munyaradzi on the left thigh F and the left shoulder. He also threw a stone which struck the windscreen of the truck on the driver's side. The details, who were trying to handcuff Mupatsi, then released him and also advised Constable Marufu, who was being attacked by two of the accused's colleagues, to retreat. The accused and his colleagues then went away with the handcuffs as well as the car keys which the accused had removed from the ignition during the scuffles. The G police thus failed to arrest Mupatsi.

The accused was only arrested at his residence when the police returned with reinforcements.

The facts related above give rise to the two counts with which the accused was charged. The charges are that he defeated or obstructed the course of H justice by making it impossible for the police to arrest Mupatsi, who was

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wanted by the police in connection with certain criminal allegations. Secondly, A that he maliciously idamaged the State in its property, in that he struck and damaged the police vehicle windscreen with a stone.

The question to be determined is whether there has been an improper splitting of charges. In *R v Peterson & Ors* 1970 (1) RLR 49 at 51G-I Beadle CJ stated:

> "In the earlier cases to which the learned judge referred with approval, two basic B tests are set out. One is that where a man commits two acts, of which each, standing alone, would be criminal but does so with a single intent, and both acts are necessary to carry out that intent, then he should only be convicted of one criminal offence. Another commonly applied test, which is a useful one in certain circumstances, is that the same evidence which is essential to prove one criminal act should not be used again as essential evidence to prove another. Where the essential evidence in such cases proves two criminal acts, C only one should be charged. There are, however, many instances where this test is inapplicable. This test, however, is only applicable where the evidence is essential evidence, proving an essential ingredient of the offence. The

mere fact that evidence may be relevant to two separate charges has, of course, little bearing on this problem."

In *S v Simon* 1980 ZLR 162 (G) at 164B-C Dumbutshena J (as he then D was) stated:

"On the evidence as disclosed in the record it is clear that accused held himself out as a policeman in order to induce the complainants to part with their property or money. The criminal acts thus separately charged, that is, the two counts of robbery on the one hand and the contravention of s 70(1)(a) of the Police Act on the other hand, were done with one criminal intent and constituted one E continuous criminal transaction, and the evidence necessary to establish the two counts of robbery involved proving the impersonation. See *R v Tarewa* 1949 SR 158; 1949 (4) SA 347 (SR) at 348; *R v Malako* 1959 (1) SA 569 (O)."

In that case, Dumbutshena J invited comments from the Attorney-General. He quoted the comments received from the Director of Public Prosecutions. The comments read in part: F

"The approach to be used in such cases was laid down by the Appellate Division in *S v Brereton* 1970 (2) RLR 272 (A) where it was said at p 277A:

` In such cases, where the accused, in pursuance of the dominant intention, commits a number of offences, the proper thing to do is to charge him with only that offence which was his dominant purpose.'"

The headnote in *S v Jambani* 1982 (2) ZLR 213 (H) reads: G

"It frequently occurs, during the course of criminal conduct, that several offences are committed. To charge the accused with all those offences, however, may well result in prejudice to him, since the whole of the criminal conduct imputed to him in substance only constitutes one offence. In such a situation, the correct course is to charge the accused with that offence which was his dominant purpose. This does not mean that the test of 'dominant purpose' is the only one to be applied; G

Mavangira J

A in some situations it may still be appropriate to charge the accused with more than one offence."

Further still, in *S v Mutawarira* 1973 (1) RLR 292 at 296C-F Beadle CJ said:

"The law on the subject of splitting of charges was extensively examined by the Appellate Division of South Africa in *S v Grobler & Anor* 1966 (1) SA 507 (A), and by the General Division of this court in *R v Peterson & Ors* 1970 (1) RLR 49. B *Peterson's* case *(supra),* in effect, adopted all the reasoning in *Grobler's* case *(supra).* The principle which appears from *Grobler's (supra)* (I quote from p 518 where Wessels JA quotes from the judgment of Kotzé JP in the case of *Gordon v R* 1909 EDC 254), is that:

'It is difficult, if not impossible, in view of the decided cases, to lay down a hard and fast rule, which will apply with justness in every instance…'"

C Wessels JA summed up the approach to this problem at p 523 thus:

'Having regard to the genesis of the rule (which could in my opinion be more aptly described as a rule of practice against the duplication of convictions) I am of the opinion that it was designed to prevent a duplication of convictions in a trial where the whole of the criminal conduct imputed to the accused constitutes in substance only one offence which could have been properly D embodied in one all-embracing charge and where such duplication results in prejudice to the accused.'"

In casu, it is clear that the appellant's dominant purpose was to prevent the arrest of his brother, Phoni. The police vehicle was damaged during the process of trying to achieve that dominant purpose. From a perusal of the E authorities, including those cited above, it would appear that what happened in this case was therefore an improper splitting of charges. For that reason the conviction on the second count, of malicious damage to property, cannot be allowed to stand.

The appellant contends that on the merits of the case he ought not to have been F convicted of defeating or obstructing the course of justice. He contends that he did not know that these were police officers. This contention is disproved by his own statement in his defence outline when he stated as follows:

"... They now demanded fare and this made me to suspect that they were not police officers."

If it was the alleged demand for fares which made him suspect that the G persons who had given them a lift were not police officers, then it confirms that the police details had in fact, as they stated, identified themselves as police officers.

The appellant also contends that the lower court ought not to have convicted him on the basis that it did not believe his version. The case of *R v Difford* H 1937 AD 370 at 373 was cited. Greenberg J

stated therein that:

Mavangira J

> "No onus rests on an accused to convince the court of the truth of any explanation A which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

The trial court, having found the appellant's story to be false and unacceptable B, was justified in convicting the appellant. The appellant's contention to the contrary in this regard is based on an erroneous appreciation of the *dictum* in the *Difford* case. The conviction is properly justified and supported by the evidence on record. The court's judgment is clear and based on sound grounds. I thus find no valid concerns which have been raised in relation C to the conviction.

Regarding sentence, the accused being a police officer, was dealt with appropriately by the trial court. His whole conduct during the whole incident is deplorable. It shows lawlessness which cannot be expected, let alone condoned or taken lightly, if exhibited by a police officer. Furthermore, knowing that these were police officers, he ought to have conducted himself in a manner D as to complement their efforts, not to frustrate them. A custodial sentence was called for. The lower court's reasoning in this regard cannot be faulted.

In the result, the conviction and sentence in count 1 are upheld while in count 2 the conviction is quashed and the sentence set aside. These were the reasons for our dismissal of the appeal against conviction and sentence in count 1 in its entirety while allowing the appeal against conviction and E sentence in count 2.

KARWI J concurred.

Chihambakwe, Mutizwa & Partners, appellant's legal practitioners F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/S v THOMPSON 2010 (2) ZLR 535 (H)

S v THOMPSON 2010 (2) ZLR 535 (H)

Citation	2010 (2) ZLR 535 (H)
Case No	Judgment No. HH-259-10
Court	High Court, Harare
Judge	Uchena J, Kudya J & Chatukuta J
Heard	16 September 2010
Judgment	24 November 2010
Counsel	*R T L Matsika*, for the appellant *S Fero*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Negligence - *motoring case - sudden emergency - driver's prior negligence making it impossible for him to avoid accident - defence of sudden emergency not applicable*

Headnote

D The appellant, who was driving a car towing a trailer, was involved in an accident in which a child was killed. The appellant's vehicle was at the tail end of a convoy of four cars. He was not familiar with the road or how to get to their destination. He failed to notice the sign indicating a primary school ahead, the school itself and the crossing ahead sign E for school children. These were all on his left hand side. The latter sign was 600 m before the scene of the accident. The appellant was driving at a speed below the maximum allowed speed. There was fairly high grass along the side of the road and the child suddenly emerged from the grass and ran into the road without checking whether it was safe for her to do so. The appellant took avoiding action but was unable to avoid F hitting the child, who died instantly. The appellant raised the defence of sudden emergency.

Held, that in these cases, the court does not only look at the actions of the driver when the crisis occurred, but also beforehand. Here, when the crisis occurred, there was nothing that the appellant could do to avoid the accident. However, before this he had driven negligently, in that he G failed to see the school, its sign post and the danger warning sign when he ought to have done so. The appellant's focus must have been on keeping pace with the vehicles that were in front of him and he thereby incapacitated himself from keeping a proper look out of his surroundings. Had he done so, he would have taken adequate preventive measures to H avoid the collision. Having made it impossible for himself to deal with

what was then no doubt a sudden emergency, he could not call in aid A the doctrine of sudden emergency.

Cases referred to

Road Accident Fund v Landman 2003 (1) SA 610 (C)

S v Ball 1993 (2) ZLR 384 (S) B

S v Duri 1989 (3) ZLR 111 (S)

S v Ferreira 1992 (1) ZLR 93 (S)

R v Freddy 1963 (1) R & N 119 (SR); 1963 (2) SA 128 (SR)

S v Nortje 2003 (1) ZLR 255 (H)

R v Oscar 1963 (1) R & N 115 (SR); 1963 (2) SA 134 (SR)

Santam Ins Co Ltd v Nkosi 1978 (2) SA 784 (A) C

Case information

R T L Matsika, for the appellant

SFero, for the respondent

Judgment

Kudya J: This is an appeal against conviction in which I find myself in the same situation Hawthorn ACJ was *in R v Freddy* 1963 (1) R&N 119 (SR); 1963 (2) SA 128 (SR) at 128-129 D *and R v Oscar* 1963 (1) R&N 115 (SR); 1963 (2) SA 134 (SR). The appeal came before my brother Uchena and my sister Chatukuta on 27 October 2009. Their opinions differed on the matter and in accordance with the provisions of s 4(2) of the High Court Act [*Chapter 5:07*], judgment was suspended until a third

judge was present. E I was the third judge. Unlike in the *Freddy* case, *supra,* I did not read the judgments prepared by my brother and sister as the matter was in terms of s 4(4) of the High Court Act, *supra,* reset for further argument.

Initially, the respondent was represented by Mr *Chikosha,* who opposed the appeal. When the matter was reset for further argument Mr *Chikosha* was indisposed and the respondent was represented by Mrs *Fero.* Unlike F Mr *Chikosha,* Mrs *Fero,* both in her written heads of argument and oral submissions, supported the appeal and conceded that the appellant had been wrongly convicted. She later abandoned the concession in response to our questions on the effect of the admissions made by the appellant during the course of the trial in the court *a quo.* G

The appellant was convicted by the resident magistrate at Murewa on 21 August 2006 of culpable homicide. He was driving a Honda Odyssey vehicle and drawing a trailer when on 25 February 2005 he hit and killed the nine-year-old deceased, Shylene Motsi, at the 46.5 km peg along the Marondera-Musami Road in Murewa. He was sentenced on the date of conviction to a fine of ZWD4 000 or in default of payment to undergo 60 H

Kudya J

A days' imprisonment. On 30 August 2006, the appellant filed the present appeal. He listed eight misdirections which he averred were apparent from the face of the record of proceedings. He averred that the circumstances in which the fatal collision took place did not support the finding of negligence reached by the trial magistrate.

The facts of the matter are found in the testimonies of four witnesses and four B documentary exhibits. The State called the evidence of Rutendo Mazanhi, Yolanda Takarova and the investigating officer, Sergeant Gift Karonga, while the appellant was the sole witness in his defence. Rutendo Mazanhi and Yolanda Takarova, who were nine and seven years old at the time of the accident, were in the company of the deceased. They were on their way C home from school. Sergeant Karonga wrote in exhibit A, the traffic accident book, that he arrived at the scene 30 minutes after the collision, while the appellant stated that he did so after 15 minutes.

The appellant was driving a Honda Odyssey light motor vehicle and was towing a trailer along the 7 metre wide bituminous Marondera-Musami road. He was with his wife and two sons in the motor vehicle. He was at the tail D end of a convoy of four cars led by Mrs Lesley Swart, who was the only person who knew the way to the farm where they were going for a picnic. He had never driven on that road before. Unbeknown to him, at about 2:15 pm, the deceased was walking from Mabika Primary School in the company of Rutendo, Yolanda and Chenai Murare. The school was on the left hand side E of the appellant. Between the school and the main road is a dust road which runs parallel to the main road. The ground between the dust road and the tarred road was covered by grass which was 1.2 m tall. The dust road was connected to the tarred road by diagonally running foot paths. The school girls were walking along the dust road. The deceased, Yolanda, and Chenai used one of the diagonal paths to reach the edge of the tarred road, a spot F some 200 m to 250 m from their school. They were all hidden from the appellant's view by the long grass. The deceased emerged from the grass and ran into the road. When she was in the center of the road, she realized that there was an oncoming vehicle travelling in its correct lane. She stopped and hesitated and then ran forwards into the lane for traffic coming from the opposite direction. The oncoming vehicle left its lane of travel and went into G the lane she had taken and hit her when she was a metre from the edge of the road. She was thrown into the air, fell into the road and instantly died. It was common cause that she died from the injuries sustained from the collision as amply demonstrated by the post mortem report.

The investigating officer compiled the traffic accident book and drew a H sketch plan, which he later enlarged into exhibit A. He recorded statements

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Kudya J

from the two school girls who testified in court. He allowed the appellant A and his elder son to write down their respective versions of events in the traffic accident book. At his trial, the appellant testified that he did not notice the Mabika Primary School sign, the school itself and the "crossing ahead" sign for school children that were all on his left hand side. It was the uncontroverted testimony of the investigating officer that the latter sign was B 600 m before the scene of the

accident. He confirmed the testimony of the two school girls on how the accident occurred. He stated that the deceased suddenly emerged from the long grass on the side of the road and ran into the road some 5.5 m in front of his vehicle. In order to avoid hitting her, he jumped on his brakes. The little girl looked at him and appeared to be retreating. He released his brakes, swerved to his right into the lane for traffic C coming from the opposite direction, but the girl carried on running and he hit her with the front of his vehicle where the number plate is affixed and she bounced off the front of his car to the right. He went over her without running her with his wheels. He lost control of his vehicle and went off the road into the long grass on his right hand side. He travelled in the grass for 21.5 m before coming to a stop in the tarred road in his wrong lane. He D produced four photographs of the danger warning sign that were taken by his legal practitioner a year after the accident.

In his well written judgment, the trial magistrate found the circumstances that prevailed as the appellant was driving were:

1. That Mabika Primary School and its sign post were visible to a driver E travelling along the road in question. He, however, found that the danger warning sign for children crossing ahead was 1.5 m high though partially obscured by the 1.2 m long grass, leaving the top portion visible for 30 centimetres which would have been visible to the appellant just as it was visible to the investigating officer who drew it in the sketch plan F in the traffic accident book on the day of the accident.
2. The 1.2 m long grass on both sides of the road made the deceased and her companions inconspicuous to the appellant.
3. That the deceased just ran into the road without checking whether it was safe for her to do so. G
4. That the appellant was travelling at a speed of 100 km/h through a built up residential rural area that he was not familiar with. That the maximum speed permissible for light vehicles on that portion of the road was 120 km/h. He was driving a light motor vehicle and was towing a trailer. He was travelling in a convoy and at approximately the same speed with three other vehicles that were not towing any trailers. H

Kudya J

A He proceeded to apply these circumstances to the three-pronged foreseeability test propounded by WE Cooper *Motor Law* vol 2 "Principles of Liability"(Juta, 1987) at p 49 and found the appellant culpable for the death of the deceased. The first question set out by Cooper is whether a reasonable man in the position of the appellant would have foreseen the possibility of harm to others. The trial court relied on the concession made by the appellant under B cross-examination that his speed was unsafe in a rural residential area which he was not familiar with and on a road which was bounded on both sides by 1.2 m long grass. He found that his visibility was obscured by the long grass and held that a reasonable driver in his shoes would have foreseen the possibility of harm to others in those circumstances. The second question C set out by Cooper is whether a reasonable man in these circumstances would have taken precautions to prevent the harm. The trial magistrate reasoned that a speed of 100km/h was not a safe speed to travel at for a vehicle that was towing a trailer. His reasoning was based on two factors. The first was that his companions, who were not towing any trailers, were also travelling at that speed. The second was the further concession by the appellant that he D did not apply his emergency brakes for fear of overturning. He also found that the failure by the appellant to observe the Mabika Primary School, its sign post and the danger warning sign for children crossing demonstrated that he was not keeping a proper look out. He held that his duty of care towards the deceased began long before he reached and not at the point at which he first observed the deceased. While he accepted that the appellant E would not have been able to avoid the accident at the time he first saw the deceased darting across the road, he found that the failure to keep a proper look out and the unsafe speed that the appellant was travelling at prevented him from taking the precautions that a reasonable man in his shoes would have taken to prevent the harm that befell the deceased. The last question F posed by Cooper was whether the appellant took the necessary precautions to avert the harm. The trial magistrate held that the measures he took on seeing the child at 5.5 m ahead were compromised by his earlier failures to drive at a safe speed on approaching a school and on seeing a danger warning sign ahead.

G In the final analysis, the trial magistrate agreed with the appellant's counsel of record that the cases of *S v Duri* 1989 (3) ZLR 111 (S), *S v Ferreira* 1992 (1) ZLR 93 (S) and S v

Ball 1993 (2) ZLR 384 (S) were distinguishable from the present matter in that in those cases the drivers had seen the children at an appreciable distance before the accident. He, however, opined that while the long grass and the failure by the child to check the road before crossing H contributed to the accident the appellant failed to reduce his speed to suit

Kudya J

the exigencies posed by the school, its sign and the danger warning sign A because he was not keeping a proper lookout. He came to the conclusion that the contributory negligence of the deceased reduced the appellant's negligence to ordinary negligence.

Mrs *Matsika* submitted that the trial magistrate ought to have assessed the negligence of the appellant from the time he first saw the child dart in front of B him. She submitted that the long grass and the actions of the deceased created a sudden emergency which exonerated the appellant from any wrongdoing. She further argued that confronted with the sudden emergency the appellant by applying his brakes and swerving to the right acted as would a reasonable driver in his shoes. However, she conceded that the appellant ought to have seen the school, its sign post and even the danger warning sign before the C child suddenly ran into the road. Mrs *Fero* adopted her written submissions and did not support the conviction. She basically agreed with the appellant's counsel by conceding that a sudden emergency was created by the long grass and the actions of the deceased. In fairness to Mrs *Fero,* she abandoned her concession when we sought her comments on the admissions of negligence D that appeared to have been made by the appellant under cross-examination in the court *a quo.*

In *S v Duri, supra,* Duri was travelling at a speed of between 90 km/h and 100 km/h when he saw the child 80 m in front of him on the side of the road. The child dashed into the road after his goat when he was 40 m away and Duri E hit both the boy and his goat and killed them. At 112F it was found that even if he had been travelling at 20 km/h he would not have been able to avoid hitting the boy. His appeal against conviction was dismissed on the basis that he did not take preparatory steps like slowing down, removing his foot from the accelerator and placing it adjacent to the brake or carefully watching the movements of the boy and his goat for the first sign of dangerous activity on F their part that would have empowered him to take evasive action when the collision seemed imminent. At 113G McNally JA stated that:

> "Having made it impossible for himself to deal with what was then no doubt a sudden emergency, he cannot call in aid the doctrine of sudden emergency."

In *S v Ferreira* at 96A, the appellant's conviction of culpable homicide G arising from the death of a seven year old boy who dashed in front of his boat towing vehicle was upheld after a consideration of the "totality of the facts". He had been driving at 90 km/h. He had removed his foot from the accelerator but had not placed it on the brake pedal. The boy dashed in front of him and he violently applied his brakes and veered slightly to his left. He was unable to avoid the child. At 95D-F Gubbay CJ stated that: H

Kudya J

> A "There is a very definite duty upon a motorist who knows himself to be in the near vicinity of young children, for they have a propensity for impulsive and sometimes irrational action. Children should not be credited with the same mature intelligence and presence of mind as grown-up people. A motorist must anticipate that a child on or just next to the road may unexpectedly decide to run across oblivious of danger. He must keep his vehicle under such control as to be able to suddenly pull up if a child starts to cross the line of his route. He B must prepare himself for such an eventuality. It has been aptly remarked that young children are 'as wide as the road; and are liable to get into the way of a motorist without any overt warning. Thus greater care is demanded towards children than is necessary for the safety of adults."

At 96F-H he emphasised the need to drastically reduce speed as a preparatory C step to stopping to avoid a collision in these terms:

> "It is clear to my mind that the scene confronting the appellant was such as to impose upon him a duty to substantially reduce his speed of 90 km/h, albeit there was no indication at that stage of an intention on the part of any of the children to cross the road. Obviously, the appellant was alive to the possibility of a sudden movement into the road by one or more of the children for he took D his foot off the accelerator. But that action was totally inadequate. The vehicle was travelling along a level stretch of road and the precaution the appellant took over the rapidly decreasing distance would have barely, if at all, slowed the

vehicle down. He ought, additionally, to have realized that the braking power of the vehicle would be adversely affected by the weight of the boat carrying trailer."

E In *S v Ball, supra* at 385A-C McNally JA had this to say about the defence of sudden emergency that was relied on by Mrs *Matsika* and conceded by Mrs *Fero*:

> "In a series of cases involving the unintentional killing of children this court has emphasised the high standard of care that must be exercised by motorists when passing children on the side of the road. *See S v Duri* 1989 (3) ZLR 111 (S); *S* F *v Ferreira* 1992 (1) ZLR 93 (S) and *S* v *Beets* S-90-93. But there is no absolute liability. Each case turns on its own facts.
>
> In each of the cases to which I have referred, it could be said that, when the crisis occurred, there was no way the driver could avoid the child. In each case, therefore, the court was in effect, ruling that a properly cautious driver would have done something before the crisis arose to ensure either that he could avoid G it, or that he could prevent it, or both.
>
> By slowing down considerably or moving to the centre or far side of the road when this is possible, one may be satisfied that even if the child does suddenly dash into the road one will be able to avoid him. By hooting or flashing one's lights one may be satisfied that the child is aware of one's presence. With a small child one may need to take both avoiding and preventive action. With an older H child one or other may be an adequate and reasonable precaution."

2010 (2) ZLR p542

Kudya J

Similar sentiments were expressed by Chiweshe J, as he then was, in S v A *Nortje* 2003 (1) ZLR 255 (H) at 258D-E.

The point made in these cases is that the court does not only look at the actions of the driver when the crisis occurred but also before it did. The trial magistrate properly looked at the actions of the appellant when the crisis occurred and found that there was nothing he could do at that stage B to avoid the accident. However, he found him negligent on the basis of his omissions before the crisis occurred. I am unable to fault his findings or his reasoning. After all, under cross-examination by State counsel, the appellant virtually admitted that he drove negligently. He accepted that he failed to see the school, its sign post and the danger warning sign when he ought to have done so. The evidence of the investigating officer also revealed that C other school children were walking along the dust road that was parallel to the school when he arrived at the scene of the accident. The appellant's focus must have been on keeping pace with the vehicles that were in front of him. He incapacitated himself from keeping a proper look out of his surroundings. Had he done so, he would have taken adequate preventive measures to avoid the collision. In *Santam Insurance Co Ltd v Nkosi* 1978 (2) SA 784 (A) D Corbett JA at 791F - 792E makes the point that a motorist has an even higher duty of care towards hidden children whose presence he ought reasonably to foresee or anticipate. Thring J adopted this reasoning *in Road Accident Fund v Landman* 2003 (1) SA 610 (C) and found a mother who hit a school girl who suddenly ran in front of her motor vehicle from E behind a bus that was dropping school children at a school pick up and drop station negligent in that she proceeded at "an unabated speed of as much as even 40 km/h".

Before concluding, I wish to indicate that the appellant was not travelling at a safe speed. He does not appear to have been aware of his speed at the time of the accident. In the traffic accident book he gave his speed as 60 km/h. In F his evidence, he said it was 100 km/h. It seems to me that this contradiction demonstrates that he was not paying attention to his speedometer. He was therefore not keeping a proper look out. But even if he were travelling at 100 km/h, it was not a safe speed to travel at in the vicinity of a school and on a road with long grass on its edges. The speed limit for a light vehicle G that was not towing a trailer would have been 120 km/h on that road. In terms of the Road Traffic (Maximum Speed Limit) Regulations 1995 (SI 63 of 1995), the maximum speed for any light vehicle drawing a trailer in a bituminous road with a width in excess of 6 m was 100 km/h. The appellant was travelling at the permissible maximum speed in conditions which required a lesser speed. H

2010 (2) ZLR p543

Kudya J

A I am satisfied that the appellant was correctly convicted. Accordingly, his appeal against conviction is dismissed. UCHENA J and CHATUKUTA J concurred.

Wintertons, appellant's legal practitioners

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

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RITENOTE PRINTERS (PVT) LTD v ADAM AND CO & ANOR 2010 (2) ZLR 544 (H)

Citation	2010 (2) ZLR 544 (H)
Case No	Judgment No. HH-263-10
Court	High Court, Harare
Judge	Gowora J
Heard	11 November 2010
Judgment	24 November 2010
Counsel	*T Mpofu*, for the applicants. *S Mupindu*, for the first respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Appeal - *noting of - effect - appeal against order of statutory tribunals or courts other than courts of inherent jurisdiction - whether noting of appeal suspends operation of order against which appeal is made - need* D *for clarification of the law*

Practice and procedure - *order - grant of - another order relating to same matter still extant - court cannot give order in conflict with extant order*

Headnote

In two separate actions in the magistrates court, the respondent obtained eviction orders against the applicant from two premises it leased E from the respondent. The applicant appealed against the magistrate's judgments in both matters. It also filed *ex parte* applications for an order staying execution of the judgment in both matters. The applications were dismissed by the magistrate. In the meantime, pending judgment on those applications, the applicant filed applications in the High F Court under certificates of urgency for orders staying execution of the judgments. The respondents opposed the granting of the applications. The respondent proceeded to execute against the judgment despite the noting of the appeal. The order from the magistrate dismissing the application for a stay of execution came after the process has started. The applicant sought an order restoring its occupation and the return of G property taken. It argued that the noting of the appeal to the High Court against the judgment of the magistrates court mean that the respondent had to obtain leave to execute pending appeal.

Held, that a court cannot be seen to be giving an order differing from an order which is still extant. This would result in two orders from two different courts which would be in conflict with each other and would H

A cause confusion as to which order would be binding upon the parties. To do so would constitute a clear departure from rules of procedure and an open invitation to litigants to treat orders of court with contempt.

Held, further, that the common law position is that superior courts have an inherent jurisdiction to regulate their own procedures and process. A rule of practice therefore evolved whereby the operation of the judgment of B a superior court is suspended upon the noting of an appeal against that judgment. There is some divergence of the authorities in our jurisdiction as to whether this rule applies to appeals against judgments that do not emanate from courts of superior or inherent jurisdiction Some authorities take the view that the concept of a rule of practice is appropriate only C to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation. Section 40(3) of the Magistrates Court Act [*Chapter 7:10*] provides for the court to direct either that the judgment be executed pending appeal or that execution be suspended pending the determination of an appeal. This provision indicates the absence D of an inherent discretion within the magistrates court for the automatic suspension of the operation of a judgment or order upon the noting of an appeal and is specifically intended to provide the court with the power to suspend the operation of a judgment upon the noting of an appeal. Other authorities have held that, in the absence of a clear indication by the law E giver to the contrary, the common law position - that the execution of all judgments is suspended upon the noting of an appeal - is not ousted by the silence of the legislation in terms of which an appeal is lodged. The reason for the common law rule is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by levy under a writ, or by execution of the judgment in any other F manner appropriate to the nature of the judgment appealed from. The latter view is preferable, but the law needs to be clarified.

Held, further, that the damage that was meant to have been prevented *in casu* happened, not because the applicant did not seek to protect its interest, but because, due to uncertainty in the law, the respondent, as judgment creditor, proceeded to execute against the judgment despite the noting of G the appeal. However, it was not clear how the court could rule in favour of the applicant. The applicant had the right either to appeal against the ruling of the magistrate or to seek a review. It chose to do neither and instead sought an order to stay execution. The High Court could not give an order that was different from the magistrate's order, as long as H that order was extant.

Quaere: whether the Supreme Court, at the earliest opportunity, should revisit A its decision in *Phiri & Ors v Industrial Steel Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S) and clarify the law relating to the suspension of judgments from statutory tribunals or courts of inferior jurisdiction upon the noting of appeals therefrom.

Legislation considered B

Magistrates Court Act [*Chapter 7:10*], s 40(3)

Cases referred to

Chatizembwa v Circle Cement HH-121-94

Founders Bldg Soc v Mazuka 2000 (1) ZLR 528 (H) C

Kudinga v Dhliwaya & Anor 2008 (1) ZLR 223 (H)

Phiri & Ors v Industrial Steel Pipe (Pvt) Ltd 1996 (1) ZLR 45 (S)

PTC v Mahachi 1997 (2) ZLR 71 (H)

S v Chakwinya 1997 (1) ZLR 109 (H)

S v Ndiweni 1983 (2) ZLR 49 (H)

S v Taenda 2000 (2) ZLR 394 (H) D

Vengesai & Ors v Zimbabwe Glass Industries Ltd 1998 (2) ZLR 593 (H)

Case information

T Mpofu, for the applicants.

S Mupindu, for the first respondent. E

Judgment

Gowora J: These matters were referred to me in chambers and as the parties were the same and the issues from the matters identical I decided to hear them together.

The founding affidavit for both matters has been deposed to by one John Kanokanga, who is a director of the applicant. The contents of both affidavits F are identical, except as they relate to the addresses of the premises that are in issue in each of the matters, and I will therefore set out the basic facts outlined in the affidavit. The applicant was leasing two premises from the respondent, namely, 109 Leopold Takawira Street and 147 Mbuya Nehanda Street and Nelson Mandela Avenue respectively. In December 2009 the respondent G issued summons out of this court for the eviction of the applicant from the premises at 147 Mbuya Nehanda Street and, in April 2010, it followed suit for the eviction of the applicant from 109 Leopold Takawira Street. When both matters reached pre-trial conference stage, the respondent filed notices of withdrawal in respect of both and instituted applications in the magistrates court at Harare in September 2010. H

Gowora J

A The applicant opposed the applications but was unsuccessful and ultimately the court ordered that the applicant be evicted from both premises. On 24 September2010 the applicant appealed against the judgment of the magistrate in both matters. It also, on the same date, filed applications *ex parte* for an order staying execution of the judgment in both matters. The applications were dismissed by the magistrate. In the meantime, pending judgment on B those applications, the applicant filed these applications under certificates of urgency for orders staying execution of the judgments. The respondents have opposed the granting of the applications.

The nature of the relief sought in both matters is also identical. What the applicant seeks in the provisional orders, except for the description in para 4 C of the premises to which the applicant seeks restoration in either of the applications, is in the following terms:

> **"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
>
> D Attachment, ejectment and execution against property carried out by 1st respondent at No 109 Leopold Takawira Street Harare be and is hereby declared unlawful.
>
> 2
>
> Second respondent shall return to applicant all attached property pending finalization of appeal
>
> 3
>
> First respondent is barred from further attaching in execution applicant's property pending finalization of appeal
>
> 4
>
> Respondents be and are herby ordered to restore occupation of No 109 Leopold Takawira Street.
>
> **INTERIM RELIEF GRANTED**
>
> F Pending the determination of this matter the applicant is granted the following interim relief:
>
> 1
>
> Respondents be and are hereby barred from selling in execution applicant's property which they attached which is captured in the notice of attachment.
>
> 2
>
> G Respondents be and are hereby ordered to restore occupation at the concerned premises to applicant forthwith

That this provisional order be served by the applicant's legal practitioners on the respondents."

Mr Mpofu, on behalf of the applicant, submitted that the noting of the appeal H to this court is against the judgment of the magistrates court, hence the

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need for a judgment creditor to obtain leave to execute pending appeal. The A common law position is that superior courts have an inherent jurisdiction to regulate their own procedures and process. A rule of practice therefore evolved whereby the operation of the judgment of a superior court is suspended upon the noting of an appeal against that judgment.

I will start my discourse on this issue with an examination of the provisions B of the Magistrates Court Act [*Chapter 7:10*]. Section40(3) of the Magistrates Court Act provides for the court to direct either that the judgment be executed pending appeal or for a stay of the judgment pending the determination of an appeal. This provision, in my respectful view, acknowledges the absence of an inherent discretion within the court for the automatic suspension of the operation of a judgment or order upon the noting of an appeal. The C subsection therefore is specifically intended to provide the court with the power to suspend the operation of a judgment upon the noting of an appeal.

It appears, however, that there is some dissent in our jurisdiction as to the application of this rule to appeals against judgments that do not emanate from courts of superior or inherent jurisdiction. The notion that this rule is D of general application was disabused by Gillespie J in *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H). It was reaffirmed by Mungwira J in *Founders Building Society v Mazuka* 2000 (1) ZLR 528 (H) at 531 wherein she stated:

> "I find that I cannot express my view on the matter better than by making reference to the following remarks of Gillespie J in *Vengesai & Ors v Zimbabwe Glass* E *Industries Ltd* 1998 (2) ZLR 593 (H) at 598:
>
> > 'In stating the common law, Corbett JA referred to the automatic stay of execution upon the noting of an appeal, as a rule of practice. That is not a firm rule of law, but a long established practice regarded as generally binding, subject to the court's discretion. The concept of a rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. F Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation. Moreover, the authorities cited by Corbett JA are authorities relevant to appeals from superior courts.
> >
> > The reference to this rule as a rule of practice shows the acceptance by the learned judge of appeal of the analysis by Jansen J. This analysis leads inexorably to the conclusion that the grant or withholding of a stay of G execution is, at common law, a matter of discretion reserved to a court in which such discretion is imposed. It follows that, in the absence of any statute specifically conferring such discretion on an inferior tribunal or authority, or otherwise regulating the question of enforcement of judgments pending an appeal from that authority, no such discretion can exist. Such a court or authority can exercise only the powers conferred by the statute. It cannot order suspension of its own judgments notwithstanding an appeal. H

> > A The only basis upon which its judgments or order can be supposed to be stayed is where its enabling statute provides for the situation. ... [The] grant, whether automatic or not, of a stay of execution of a judgment pending appeal is an inseparable part of an exercise of discretion by the court from which the appeal lies, to order the enforcement of its judgment notwithstanding the appeal or any temporary stay. It follows that the question B of enforcement pending appeal of judgment from an inferior court cannot possibly be regulated according to a rule of practice derived from common law, and applicable in superior courts of inherent jurisdiction.'"

In *Chatizembwa v Circle Cement* HH-121-94 (not reported), Smith J, in considering the same issue in the context of an appeal to the Labour Tribunal by an applicant dismissed in terms of a registered code of conduct, stated C at p 4 of the judgment:

> "If the legislature had intended that the decision of the body concerned under the code of conduct should be suspended pending an appeal, it would have said so as is done in s 113(3). In addition, it would have inserted a power enabling the Labour Relations Tribunal to declare otherwise in appropriate circumstances. The fact that it did not make a specific provision to that effect is a clear indication D that it did not intend the noting of an appeal to suspend the decision appealed against. The introduction of the concept of registered codes of conduct which are binding on employers and employees is, to my mind, consistent with

principle that determinations made in accordance with the provisions of a registered code should have effect until such time as any appeal is determined."

These *dicta* appear, in my view, to run counter to what was expressed by E Korsah JA in *Phiri & Ors v Industrial Steel Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S) at 49D where he stated:

> "I am of the persuasion that, in the absence of a clear indication by the law giver to the contrary, the common law position that the execution of all judgments is suspended upon the noting of an appeal, is not ousted by the silence of the statutory instrument, in terms of which the respondent's appeal to the Tribunal F was lodged upon the effect of such appeal against the order made by the Minister."

Earlier on in the judgment this is what the learned judge of appeal stated:

> "By Roman-Dutch Law the execution of all judgments is suspended upon the noting of an appeal: *Reid & Anor v Godart & Anor* 1938 AD 511 at 513, *per* de Villiers JA, cited with approval by Adam J in *Arches (Pvt) Ltd v Guthrie* G *Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H) at 154G. De Villiers JA explained that-
>
> > 'The foundation of the common law rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by levy under a writ, or by execution of the judgment in any other manner appropriate to H the nature of the judgment appealed from.'"

2010 (2) ZLR p550

Gowora J

The damage that was meant to have been prevented *in casu* has happened A , not because the applicant did not seek to protect its interest, but because due to uncertainty in the law, the judgment creditor proceeded to execute against the judgment despite the noting of the appeal. The order from the magistrate dismissing the application came after the process has started.

In PTC v Mahachi 1997 (2) ZLR 71 (H) Chaitkobo J chose to follow *Phiri's* B case. In *Kudinga v Dhliwayo & Anor* 2008 (1) ZLR 223 (H) Makarau JP (as she was then) added her voice to those of eminent judges who before her had expressed the fervent calls for clarity in the law relating to the suspension of judgments from statutory tribunals or courts of inferior jurisdiction and for the Supreme Court to revisit its decision in *Phiri's* case. I respectfully agree.

I have been urged by counsel for the applicant to exercise my discretion C and right a wrong that has been alleged to have been committed against the applicant. This submission is premised on the view that the noting of the appeal automatically suspended the operation of the order appealed against. In my view, the respondent, given the uncertainty in the law, may have felt justified in its entitlement to execute against the judgment in the D absence of an order from the court suspending execution of the same. The law, however, is on the side of the applicant in that, based on *Phiri's* case, the noting of the appeal by the applicant automatically suspended execution of the judgments in both matters.

Mr *Mpofu* has urged me to right the wrong that has been done to the applicant E as regards the execution of the judgments pending appeal. He has, relying on *S v Taenda* 2000 (2) ZLR 394 (H); *S v Chakwinya* 1997 (1) ZLR 109 (H); and *S v Ndiweni* 1983 (2) ZLR 49 (H), urged this court to exercise its discretion to remedy the wrong to the applicant. It seems to me that the authorities cited by counsel are of no assistance as the court in those cases exercised the review powers of the High Court in criminal matters. The court F then invoked the provisions of s 18(2) of the Constitution which requires that a person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. Counsel did not elaborate as to how I should exercise my jurisdiction in favour of the applicant. It seems to me that the applicant had the right either G to appeal against the ruling of the magistrate or seek a review. It chose to do neither and instead approached this court for an order to stay execution in complete disregard of the earlier proceedings before the magistrate.

Mr *Mupindu* submitted that the applicant was improperly before the court in that an application for a stay of execution had been made by the applicant to the magistrates court and had been dismissed. He wondered whether H

2010 (2) ZLR p551

Gowora J

A the applicant was seeking a review or an appeal against the decision of the magistrates court. The magistrate had apparently dismissed the application on the premise that the noting of the appeal

had suspended the operation of that judgment. Mr *Mpofu,* incorrectly in my view, submitted that the applicant was not dissatisfied with that judgment as it was a correct statement of the law. Accepting, as the applicant did, that it was a correct statement of the B law, the applicant would appear to have decided to approach this court for the exact same relief denied it by the magistrate. What it has done, however, is to mount the same application to this court and ignore totally the order of the court *a quo* dismissing the application for a stay of execution. The order of the court *a quo* dismissing the application for a stay is still extant and, in my view, this court cannot be seen to be giving an order differing C from that order whilst it is still extant. This would result in two orders from two different courts which would be in conflict with each other. Which order would then be binding upon the parties? To do so would constitute a clear departure from rules of procedure and an open invitation to litigants to treat the orders of court with contempt, because that is what my order D would constitute.

In the premises, the applicant is non suited and the applications are dismissed with costs.

Hamunakwadi Nyandoro & Nyambuya, applicants' legal practitioners

E *Mupindu Legal Practitioners,* first respondent's legal practitioners

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Source:
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WILLIAMS & ANOR v MSIPHA NO & ORS 2010 (2) ZLR 552 (H)

Citation	2010 (2) ZLR 552 (H)
Case No	Judgment No. S-22-10
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Cheda JA, Ziyambi JA& Garwe JA
Heard	4 June 2009
Judgment	26 November 2010
Counsel	*L Uriri*, with him *T Mpofu*, for the applicants *F Chimbaru*, for the respondents
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 13 — protection of right to liberty — deprivation of liberty on reasonable suspicion of having committed an offence — need for State* D *to show that conduct alleged would constitute offence charged — only then can question be determined of whether facts give rise to reasonable suspicion*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 24(2) — application to refer allege breach of constitutional* E *right to Supreme Court — only grounds on which such application may be refused —*

need to form opinion that application "frivolous" or "vexatious" — such an extraordinary remedy to be used only in clear and exceptional cases

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of* F *Rights — s 24(2) — application to refer allege breach of constitutional right to Supreme Court — Supreme Court's powers under subsection — court having power to make any order appropriate to secure or enforce impugned right-power includes grant of interlocutory relief or any other order which would prevent substantial prejudice and injustice pending resolution by the court of the constitutional issue — court's power to* G *control its own process — includes power to prevent of execution of a judgment pending hearing of an application*

Criminal law — *offences under Criminal Law Code — s 37(1) (a) (i) — acting with intent to disturb the peace, security or order of the public — what provision is aiming at — provision not intended' to prevent public gatherings* H

2010 (2) ZLR p553

A **Criminal procedure** — *remand — requirements for — need for court to be satisfied that facts alleged constitute offence charged — need for court to have reasonable suspicion that accused committed offence*

Words and phrases — *"frivolous" — "vexatious"*

Headnote

B The applicants were officers of an organization, the objective of which was the promotion of the rights of women in Zimbabwe. Together with about 300 other women, they went to an open ground outside a building complex in Bulawayo where they assembled. The building complex housed offices used by civil servants from various Government departments. The applicants and their associates sang, danced, chanted slogans and C waved placards in the direction of the offices. The crowd remained calm and peaceful during and after addresses by the applicants. At the end of the addresses, the police ordered the crowd to disperse. The applicants protested what they said was an unwarranted interference by the police with a legitimate exercise of the rights to freedom of assembly and freedom D of expression. The rest of the people who had assembled dispersed as the applicants were arrested and taken to a local police station, where they were charged with the offence of contravening s 37(1)(a)(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. This penalizes any person who acts together with one or more other persons present with him or her in any place or at any meeting with the intention E or realising that there is a real risk or possibility of forcibly disturbing the peace, security or order of the public or any section of the public.

When they were later brought before a magistrate for remand pending trial, the applicants challenged the legality of their prosecution and remand on the ground that the facts on which the charge was based would F not, if proved at the trial, constitute the offence with which they were charged and thus could not give rise to a reasonable suspicion in the mind of a police officer or a judicial officer, acting carefully, that they had committed the offence. They contended that, as that was the only ground on which the State was authorized by law to deprive them of personal liberty for the purpose of ensuring their appearance at the G trial, the prosecution and remand constituted an arbitrary deprivation of personal liberty in contravention of s 13(1) and a violation of the right to the protection of the law guaranteed under s 18(1) of the Constitution. The magistrate nonetheless remanded the appellants. At a subsequent hearing, an application was made for the matter to be referred to the H Supreme Court in terms of s 24(2) of the Constitution. The magistrate

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refused to do so, essentially on the grounds that he considered that the A applicants were playing for time.

The applicants alleged that the magistrate failed to comply with the requirements of s 24(2) of the Constitution, resulting in an arbitrary refusal of access to the Supreme Court in violation of the fundamental right of the applicants to the protection of the law. The applicants also B applied for an interim order restraining the magistrate and the third respondent (the Attorney-General) from commencing the trial, pending determination of the matter by the Supreme Court. They argued that the facts alleged did not constitute a contravention of the section under which they were charged. The respondents argued that the Supreme Court had no jurisdiction in constitutional cases involving allegations of C contravention of fundamental rights and freedoms to grant interlocutory relief by way of interim orders.

Held, that under s 24(4) of the Constitution, the Supreme Court has the jurisdiction make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the D enforcement of the fundamental human rights and freedoms

guaranteed under Chapter III. A wide discretionary power is given to the Supreme Court as to the remedies it can employ to achieve the objectives for which the power conferred on it under s 24(4) was intended to be exercised. The only condition restricting the choice of a particular remedy is that consideration must be given to the question whether the E remedy is appropriate for the purpose of the enforcement or securing the enforcement of the fundamental human right or freedom found to have been violated or likely to be violated in relation to the applicant. The discretionary power is broad enough to permit the granting of interlocutory relief by way of an interim order restraining conduct F which would otherwise have the effect of rendering the enforcement or securing the enforcement of the fundamental human right or freedom ineffectual. Here, the application for an interdict alleged that to start the trial pending resolution of the main application would constitute a violation of the applicants' fundamental right to the protection of the law G guaranteed under s 18(1) of the Constitution. The court is empowered also to make any order that would preserve matters between parties to the main application in a state that would, as far as is possible, prevent substantial prejudice and injustice pending resolution by it of the dispute in the main application so as to enable it to render a meaningful and effective judgment. The court must be able to intervene, not only against H

A the direct dictates of the judgment of the lower court, but also against its effects.

Held, further, that once the Supreme Court is seized with a matter, it has inherent jurisdiction to control its process. That jurisdiction includes the power to control the process of the court, including the prevention of execution of a judgment pending the hearing of an application. It thus B has the power to restrain the magistrate and the Attorney-General from relying on the magistrate's decision to refuse to refer the constitutional questions and from commencing the trial of the applicants pending final determination of the main application, because to commence the trial would tend to negate or render nugatory the judgment of the court on C the main application when it was given. Applying the normal tests for when an interdict may be granted, this was a suitable case for granting interlocutory relief to the applicants.

Held, further, that the right to an effective judicial protection of a fundamental human right or freedom requires that the judicial officer should act in accordance with the requirements prescribed by the Constitution for the D protection of the particular right or freedom. When an application is made under s 24(2) to refer a constitutional question to the Supreme Court, the only restriction on the obligation to refer the question imposed on the judicial officer is the discretion given to refuse a request for a referral when in his opinion the raising of the question is "merely frivolous or E vexatious". The formation of such an opinion is the pre-condition for the refusal of the referral. Although the formation of the opinion denotes a subjective state of mind, it presupposes compliance with a process in which objective procedural and substantive standards are observed and met. The opinion which the person presiding in the lower court is required to form is a particular opinion in the sense that he is expected F to form it by reference to specific criteria. The judicial officer is required to have knowledge of the ordinary and natural meaning of the words "frivolous or vexatious", which constitutes the standard which he must conscientiously and objectively apply to the facts on which the question as to the contravention of the fundamental human right or freedom is raised. The word "frivolous" in its ordinary and natural meaning connotes G an action or legal proceeding characterized by lack of seriousness, as in the case of one which is manifestly insufficient. The request would have to be found, on the facts, to have been obviously lacking in seriousness, unsustainable, manifestly groundless or utterly hopeless and without foundation in the facts on which it was purportedly based. The word H "vexatious" means that the question is being put forward for the purpose

of causing annoyance to the opposing party, in the full appreciation A that it cannot succeed; it is not raised *bona fide* and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless. Accordingly, refusal of a referral of a question as to the contravention of a fundamental human right or freedom to the Supreme Court, which under s 24(4) of the Constitution is the court with original B jurisdiction to determine the matter, is an extraordinary remedy intended to be used in clear and exceptional cases. Here, the magistrate proceeded on the assumption that the charge was valid and did not consider whether the application was frivolous or vexatious. The magistrate thus failed to comply with the requirements of s 24(2) of the Constitution.

Held, further, that under s 13(2)(e) of the Constitution, an accused person C may be deprived of personal liberty where there is reasonable suspicion of him having committed a criminal offence. The judicial officer must, therefore, make a finding that the facts on which the charge laid against the accused person is based provide ground for a reasonable suspicion of him having committed the offence with which he is charged. Where the accused challenges the legality of the charge on the ground that D the offence itself was not committed, the onus is on the State to first show that, if proved at the trial, the facts on which the charge is based would constitute the offence with which the accused person is charged. Only then would the question arise whether the facts provide grounds for a reasonable suspicion that the accused committed the offence, as E required by s 13(2)(e) of the Constitution. The magistrate was required to take into account the essential elements of the offence and the conduct which, if proved at the trial, would constitute the offence charged. He was required to apply the knowledge of the statute to the conduct actually committed by the applicants and decide whether it constituted F the proscribed conduct.

Held, further, that s 37(1)(a)(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] proscribes acts which have, as their direct and obvious consequence, serious disturbance of the peace, security or order of the public or any section of the public prevailing immediately before the occurrence of the conduct. Examples would be acts of G violence committed by people assembled together or a speech in which the speaker incites his audience to violence. The conduct does not in itself constitute the offence. It becomes an offence if it is intended to produce the consequence of forcible disturbance of the peace, security or order of the public or any section of the public or when it is realised as a real possibility that forcible disturbance of the peace, security or H

A order of the public or any section of the public would result from it. The primary object of the section is the preservation of the peace, security or order of the public. The statute is not intended to be used to punish acts which are an exercise of the fundamental human rights to freedom of assembly and freedom of expression which are are protected under the Constitution. When properly construed, the statute presupposes B that there are acts which can be committed by people gathered together at any place or at any meeting consonant with the maintenance of the peace, security or order of the public or any section of the public. As the exercise of the fundamental rights to freedom of assembly and freedom of expression, given by ss 20(1) and 21(1) of the Constitution, C presupposes the existence of an organized society in which the existence of peace, security or order of the public is the quintessence of the security of these liberties, they cannot be held to include in their exercise the right to virtually destroy that which is essential for their enjoyment. The statute is intended to be used to punish conduct which constitutes abuse of the fundamental rights to freedom of assembly and freedom D of expression through behaviour or words which are inimical to public welfare. Whilst it does not proscribe advocacy of ideas, it does proscribe advocacy of violent action. The applicants were simply exercising their fundamental rights to freedom of assembly and freedom of expression. Their conduct, if proved at the trial, could not constitute the offence E they were charged with. What the applicants did was germane to the purpose for which the fundamental rights to freedom of assembly and freedom of expression are guaranteed under the Constitution. They did all they did in a peaceful gathering, whilst preserving their willingness to act in conformity with the law. The acts they committed were acts to which the statute would not apply as the conduct was wholly protected F by the Constitution.

Legislation considered

Constitution of Zimbabwe 1980, ss 13(1), 13(2), 20(1), 21(1),18(1) & 24(2) G

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s37(1)(a)(i)

Cases referred to

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

A-G v Blumears & Anor 1991 (1) ZLR 118 (S)

Boordman v A-G [1996] 2 LRC 196

H *Maharaja v A-G, Trinidad & Tobago (No. 2)* [1979] AC 385 (PC)

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

*Net*One Cellular (Pvt) Ltd v 56Net*One Employees & Anor* 2005 (1)

ZLR 275 (S) *S v Cooper & Ors* 1977 (3) SA 475 (T)

Case information

L Uriri, with him *T Mpofu,* for the applicants B

F Chimbaru, for the respondents

Judgment

Malaba DCJ: This an application in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution") for an order declaring that the refusal by the first respondent ("the magistrate") to refer to the Supreme Court for determination, questions raised by the applicants in proceedings before him C as to the contravention of fundamental rights guaranteed under ss 13 (1)(right to personal liberty) and 18(1) (right to the protection of the law) violated the applicants' right to the protection of the law and setting the refusal aside.

The applicants asked that, consequent upon the refusal of referral being set aside, the questions they raised in the proceedings in the magistrates court D be determined. The main question raised is whether s 37(1)(a)(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Act"), the contravention of which the applicants were charged with in the criminal proceedings in the lower court, is in violation of the fundamental human rights to freedom of expression and freedom of assembly guaranteed the E applicants under ss 20(1) and 21(1) of the Constitution respectively. In the event, the main question is not answered in their favour, the applicants asked that the alternative question they raised be determined. It is whether their prosecution and remand pending trial on the criminal charge are not, on the facts, a violation of their fundamental rights to personal liberty and the protection of the law. In either case, the relief sought is by way of an order F declaring the exercise of the relevant power of the State unconstitutional.

The background facts are these. The applicants are founder and co-ordinator respectively of Women of Zimbabwe Arise (WOZA), an organization the objective of which is stated as being the promotion of the rights of women in Zimbabwe. On 16 October 2008 at 11.15 am the applicants, together with G about three hundred other women, proceeded to an open ground outside Mhlahlandlela building complex in Bulawayo where they assembled. The building complex houses offices used by civil servants from various Government departments. The applicants and their associates sang, danced, chanted slogans and waved placards in the direction of the Government offices. They knew that civil servants were at work in the offices at the time. H

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A It was not stated by the public prosecutor in the criminal proceedings what the contents of the songs and slogans were.

Inscribed on some of the placards were messages expressing disapproval of the political agreement signed by the leaders of the three main political parties in the country on 15 September 2008 aimed at bringing to an end B the national economic and political crisis then prevailing. Other placards bore statements which sought to draw the attention of the Government to grievances associated with shortage of teachers in schools.

The applicants addressed the gathering under the watchful eyes of police details who stood nearby. The contents of the speeches made were not disclosed in the outline of the facts on which the public prosecutor relied C in the application for the applicants' remand on the charge of contravening s 37(1)(a)(1) of the Act. The crowd remained calm and peaceful during and after the addresses by the applicants. At the end of the addresses the police ordered the crowd to disperse. The facts are silent on the reason why the dispersal order was given. There was no suggestion that the gathering had D not been authorized. Be that as it may, the applicants protested what they said was an unwarranted interference by the police with a legitimate exercise of the rights to freedom of assembly and freedom of expression. The rest of the people who had assembled dispersed as the applicants were arrested and taken to a local police station. There, they were charged with the offence of

contravening s 37(1)(a)(i) of the Act. The statute punishes with a fine not E exceeding level ten or imprisonment or a period not exceeding five years or both, any person who:

> "... acts together with one or more other persons present with him or her in any place or at any meeting with the intention or realising that there is a real risk or possibility of forcibly ... F
>
> (i) disturbing the peace, security or order of the public or any section of the public".

The applicants were later brought before the magistrate for remand pending trial. Through their legal representative, they challenged the legality of their prosecution and request for remand on the ground that the facts on which the charge was based would not, if proved at the trial, constitute the offence with G which they were charged. The argument was that the facts could not give rise to a reasonable suspicion in the mind of a police officer or a judicial officer, acting carefully, that they had committed the offence. The contention was that, as that was the only ground on which the State was authorized by law to deprive them of personal liberty for the purpose of ensuring their appearance H at the trial, the prosecution and remand constituted arbitrary deprivation of

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personal liberty in contravention of s 13(1) and a violation of the right to the A protection of the law guaranteed under s 18(1) of the Constitution.

Section 13(1) of the Constitution prohibits deprivation of any person's personal liberty except in the cases and on the grounds specified under subs (2). Section 13(2)(e) authorizes the deprivation of any person's personal liberty when there is a reasonable suspicion of him having committed or being B about to commit a criminal offence. That is the only ground on which the law authorizes a judicial officer to deprive a person charged with a criminal offence of his personal liberty by means of an order of remand in or out of custody to ensure that the person appears at the trial.

It was incumbent upon the public prosecutor to show that the prosecution and C request for the remand of the applicants were based on facts which provided ground for a reasonable suspicion that they had committed the offence with which they were charged. The magistrate was under a duty to ensure that the applicants were only deprived of personal liberty by means of an order of remand pending trial on facts which gave rise to a reasonable suspicion of their having committed the criminal offence with which they were charged. D

The public prosecutor had placed before the magistrate the document containing an outline of the facts on which the charge against the applicants was based. He argued that those facts gave rise to a reasonable suspicion that, by conducting themselves in the manner they did on 16 October 2008, the applicants committed the offence of contravening s 37(1)(a)(i) of the E Act. The contention was based on the assertion in para 5 of the outline of the facts that "the accused persons had no right whatsoever to act in the manner they did." The magistrate accepted the contention by the public prosecutor and ordered that the applicants be remanded out of custody to a trial date. The commencement of the trial was postponed on the subsequent occasion F at the request of the applicants.

On 5 March 2009 the applicants, through their legal representative, raised with the magistrate questions as to contravention of their fundamental rights. They requested the magistrate, as they were entitled to do under s 24(2) of the Constitution, to refer the questions to the Supreme Court for determination. The magistrate was obliged, under the same provision, to refer the questions G to the Supreme Court "unless in his opinion the raising of the question is merely frivolous or vexatious".

The magistrate refused to refer to the Supreme Court the questions as to the contravention of the fundamental rights of the applicants guaranteed under ss 13(1) and 18(1) of the Constitution. In the reasons for the decision he said: H

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> A "The issue of the constitutionality or otherwise of the charge the accused are facing is only being raised now after three other applications brought by the defence to prevent the trial of this matter on three other dates. It is my objective view that matters brought before this court must be tried on trial date if all witnesses are present, the court is properly constituted, the defence is present and aware of the trial date and if the accused is in a healthy state making it proper for comprehensive proceedings. A postponement must be refused save B for very compelling reasons. From the attitude of the defence, it would appear from

the circumstances and the charge and the facts of the case the accused are playing for time and deliberately frustrating the course of justice by preventing the commencement of the trial".

The applicants made the present application alleging that the magistrate failed to comply with the requirements of s 24(2) of the Constitution. The C contention is that the failure to comply with the requirements of s 24(2) resulted in an arbitrary refusal of access to the Supreme Court in violation of the fundamental right of the applicants to the protection of the law. The applicants also made, within the framework of the main application, an application for an interim order restraining the magistrate and the third D respondent from commencing the trial pending determination of this matter by the Supreme Court.

The founding affidavit deposed to by the first applicant sets out the grounds on which the application for interlocutory relief was made. She said that a cursory examination of the facts on which the constitutional questions were raised would show that the questions were serious and could hardly be E described as merely "frivolous or vexatious" within the meaning of s 24(2) of the Constitution. She claimed that an objective view of the conduct committed on 16 October 2008 would confirm that it could not constitute the offence of contravening s 37(1)(a)(i) of the Act, as no reasonable court could find from the facts that they did what they did with the intention of forcibly disturbing F the peace, security or order of the public or that they foresaw the real risk or possibility of forcibly disturbing the peace, security or order of the public.

The first applicant said that they would suffer irreparable harm in the form of substantial injustice if the trial was allowed to commence before the determination of the main application. They would be put under the emotional stress of having to plead to and defend a charge, the legality of which was G open to serious doubt. The harm they would suffer would not be reversed or cured by a final order following the determination of the main application.

Mrs *Chimbaru,* for the respondents, did not deny that the applicants had good prospects of success on the main application. She conceded that the prospects of success were high on the constitutional question as to whether the prosecution and remand of the applicants on H the charge of contravening

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s 37(1)(a)(1) of the Act constitute a violation of their fundamental rights A to personal liberty (s 13(1)) and the protection of the law (s 18(1)). She was unable to argue that the applicants would not suffer irremediable harm should the trial be commenced and carried on before the determination of the main application.

Mrs *Chimbaru* took the view that the Supreme Court has no jurisdiction in B constitutional cases involving allegations of contravention of fundamental rights and freedoms to grant interlocutory relief by way of interim orders. In her heads of argument, she stated that the only recourse available to the applicants was to apply to the magistrate for postponement of the commencement of the trial pending determination of the main application.

In light of the challenge to the jurisdiction of the Supreme Court to C grant interlocutory relief in constitutional cases involving allegations of contravention of fundamental rights and freedoms, it is necessary first to determine the question of jurisdiction. When the Supreme Court hears and determines applications brought to it pursuant to s 24(2) of the Constitution as to contravention of fundamental human rights and freedoms guaranteed D under Chapter III, it exercises the special original jurisdiction conferred on it under s 24(4) of the Constitution. There is no provision in the Constitution by which the Supreme Court is given, in express terms, power in cases of constitutional adjudication involving contravention of fundamental human rights and freedoms, to grant interlocutory relief by way of interim orders. The answer to the question as to the competence of the Supreme Court to E make interim orders in fundamental human rights litigation depends on the construction of s 24(4) of the Constitution.

Section 24(4) of the Constitution provides that the Supreme Court shall have original jurisdiction to hear and determine any application made by any person pursuant to subs (1), and "make such orders, issue such writs and give such F directions as it may consider appropriate for the purpose of enforcing or securing the enforcement" of the fundamental human rights and freedoms guaranteed under Chapter III. A wide discretionary power is given to the Supreme Court as to the remedies it can employ to achieve the objectives for which the power conferred on it under s 24(4) of the Constitution was G intended to be exercised.

The only condition prescribed as a restriction of the choice of a particular remedy is that consideration must be given to the question whether the remedy is appropriate for the purpose of the enforcement or securing the enforcement of the fundamental human right or freedom found to have been violated or likely to be violated in relation to the applicant. The discretionary power H

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A is broad enough to permit the granting of interlocutory relief by way of an interim order restraining conduct which would otherwise have the effect of rendering the enforcement or securing the enforcement of the fundamental human right or freedom ineffectual. There would be no justification at all for a construction which restricts the power to "make such orders ... as it may consider appropriate for the purpose of enforcement or securing the B enforcement" of fundamental human rights or freedoms to the making of final orders.

The broad discretionary power as to remedies is clearly ancillary to the exercise of the power "to hear and determine any application pursuant to subsection (1)". No application alleging a contravention of a fundamental C human right or freedom and seeking redress can come to the Supreme Court other than pursuant to the procedure under s 24(1) of the Constitution. In this case, the application for interlocutory relief alleged that the commencement of the trial of the applicants pending resolution of the main application would constitute a violation of the applicants' fundamental right to the protection D of the law guaranteed under s 18(1) of the Constitution. Both the main application and the application for the interim order were made pursuant to subs (1) of s 24 of the Constitution.

There would be no basis for construing the language by which the power "to hear and determine any application pursuant to subsection (1)", is given to the Supreme Court restrictively as limiting it to the final hearing and E determination of the merits of the main application. The meaning of the language used makes the power broad enough to permit its exercise in an application for interlocutory relief where a preliminary hearing and summary assessment of the merits of the case is required.

Considering the importance of constitutional adjudication on contraventions F of fundamental human rights and freedoms and the objectives intended to be achieved by the exercise of the original jurisdiction conferred on the Supreme Court under s 24(4) of the Constitution, it must be accepted that the court is empowered also to make any order that would preserve matters between parties to the main application in a state that would, as far as is possible, prevent substantial prejudice and injustice pending resolution by it of the G dispute in the main application so as to enable it to render a meaningful and effective judgment. The court must be able to intervene not only against the direct dictates of the judgment of the lower court but also against its effects. See *Macdonald v Canada (AG)* (1994) 1 SCR 311 at 329.

In any event, the common law position is now settled that once this court H is seized with a matter, it has inherent jurisdiction to control its process.

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That jurisdiction includes the power to control the process of the court, A including the prevention of execution of a judgment pending the hearing of an application – see *Net*One Cellular (Pvt) Ltd v 56 Net*One Employees & Anor* 2005 (1) ZLR 275 (S).

In this case, this means that the court has power to restrain the magistrate and the third respondent from relying on the decision of the former refusing B the request for referral of the constitutional questions and commencing the trial of the applicants pending final determination of the main application, because to commence the trial would tend to negate or render nugatory the judgment of the court on the main application when it is given.

The principles governing the exercise of the discretionary power of granting or refusing interlocutory interdictory relief are the same in private and C constitutional law cases raising questions of contravention of fundamental human rights and freedoms, provided that in the latter cases public interest is taken into account in deciding where the balance of inconvenience lies. In *Air field Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S) at 517 C-E it is stated:

"It must be borne in mind that an interim interdict is an extraordinary remedy, D the granting of which is at the discretion of the court hearing the application for the relief. There are, however, requirements which an applicant for interim relief must satisfy before it can be granted. In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267A-F, Corbett J (as he then was) said an applicant for such temporary relief must show:

'(a) that the right which is the subject matter of the main action and which E he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;

(b) that, if the right is only *prima facie* established, there is a well- grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing F his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy.'"

The application of the three stage test to the facts shows that this is a suitable case for granting interlocutory relief to the applicants in terms of the draft G interim order. On the first test, the existence *of a prima facie* right to the protection of the law which the applicants seek to protect under the main application can only be established by a preliminary and tentative assessment of the merits of the case, given the nature of the interests involved and the complexity of the process of establishing contravention of fundamental human rights and freedoms. A stringent examination of the merits of the H

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A case at the interlocutory hearing stage is unwarranted, as the object is to ensure that the application for interim relief is not frivolous or vexatious. A concession was made on behalf of the respondents that, upon a summary examination of the facts, the applicants had established the existence of a *prima facie* right to the protection of the law.

B On the second test of the likelihood of the applicants suffering irreparable harm should the interim order be refused, it is the nature of the harm which has to be considered, not its magnitude. It is clear that commencing the trial of the applicants before the determination of the main application would itself constitute a violation of the fundamental right to the protection of the law. It is proper to assume that such harmful effect of the conduct of the C State on the fundamental right of the applicants would be irreparable. It is the sort of harm that would not be susceptible to monetary compensation, nor would it be cured or removed when the final order on the main application is made in their favour.

The "balance of inconvenience" test involves the determination of the question D which of the parties is likely to suffer greater harm as a result of the granting or refusing of the interlocutory relief, taking into account the public interest. In this case, the applicants would suffer greater harm if interlocutory relief is refused than would befall the respondents should it be granted. The effect of the final order sought on the main application would be the interruption of the criminal proceedings pending determination of the question of the E constitutional validity of the charge and *ipso facto* whether the prosecution and remand of the applicants pending trial on the charge violates their fundamental rights to personal liberty and the protection of the law.

If the determination of the main application could have been made immediately upon the application being lauched and final relief granted, the commencement F of the trial by the magistrate and the third respondent would have been prevented and the *status quo* maintained pending final determination of the constitutional questions by the Supreme Court. In commencing the trial, the respondents would be taking advantage of the reasonable delay in the determination of the main application whilst putting the applicants under the trauma of the emotional stress of being compelled to plead to and defend a G charge in proceedings that should not have been taking place.

In seeking the interim order restraining the magistrate and the third respondent from commencing the trial before the determination of the main application, the applicants are in reality invoking judicial protection of their fundamental right to the protection of the law. Public interest in the strict enforcement H of the rule in the field of criminal law to the effect that no person should

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be charged with an offence on the basis of facts which if proved at the trial A would not constitute the offence concerned, supports the granting of the interlocutory relief pending determination of the legality of the charge on which the criminal proceedings instituted against the applicants is based.

I now turn to determine the second question. It is whether or not the refusal by the magistrate to refer the constitutional question to the Supreme Court is B a violation of the applicants' fundamental right to the protection of the law guaranteed under s 18(1) of the Constitution. The answer lies in the examination of what the magistrate was required by s 24(2) of the Constitution to do and what he actually did as the basis of the refusal. The right to an effective judicial protection of a fundamental human right or freedom requires that the judicial officer should act in accordance with the requirements prescribed C by the Constitution for the protection of the particular right or freedom.

The law may require, for example, that a decision which has the effect of limiting a fundamental human right or freedom be made only when a specified procedure has been strictly followed and particular factors taken into consideration. The judicial officer is then under a duty to strictly D comply with the requirements of the procedure and conditions prescribed by the law in the determination of the question. The principle of the rule of law embodied in the fundamental right to the protection of the law is of a peremptory nature entailing an obligation that binds the judicial officer to act in accordance with the law, failing which he or she makes the determination based on arbitrariness. E

The procedural and substantial requirements with which the person presiding in a lower court is required has to comply under s 24(2) of the Constitution, are integral parts of the protection for the right of access to the Supreme Court given to any person who has raised in the proceedings in that court, a question as to the contravention of a fundamental right or freedom and F requested the judicial officer to refer the question to the Supreme Court. The only restriction of the obligation imposed on the judicial officer is the discretion given to him or her to refuse a request for a referral when in his opinion the raising of the question is "merely frivolous or vexatious".

The purpose of these procedural and substantive requirements is the provision G of protection to the person who has complied with the pre-conditions of raising the question as to the contravention of the fundamental human right or freedom in the proceedings and the making of the request for a referral from the arbitrariness of the person presiding in the lower court.

A refusal of a request for a referral based on an opinion formed in accordance with the procedural and substantive requirements prescribed under s 24(2) of H

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A the Constitution, constitutes a permissible denial of access to the Supreme Court. What all this means is that under the system governing the exercise of judicial power, the legal basis of an opinion does not follow from the choice of factors by the person presiding in the lower court alone but must rest upon objective factors prescribed by the law.

B The Constitution guarantees to any person the fundamental right to the protection under a legal system that is fair but not infallible. Judicial officers, like all human beings, can commit errors of judgment. It is not against the wrongfulness of a judicial decision that the Constitution guarantees protection A wrong judicial decision does not violate the fundamental right to the protection of the law guaranteed to a litigant because an appeal procedure C is usually available as a remedy for the correction of the decision. Where there is no appeal procedure, there cannot be said to be a wrong judicial decision because only an appeal court has the right to say that a judicial decision is wrong. See *Maharaj v A-G of Trinidad & Tobago (No. 2)* [1979] AC 385 (PC) at 399D-H; *Boordman v A-G of Trinidad & Tobago* [1996] 2 LRC 196 at 205i-206b.

D It is the failure by the judicial officer to comply with the requirements of the protection provided by the law of the fundamental human right or freedom which results in the violation or likelihood of violation of the right or freedom against which the Constitution guarantees to the litigant the right to the protection of the law. It is, therefore, important in every case of E an alleged violation by a judicial officer of a fundamental human right or freedom to understand what it is that the judicial officer was required by the law to do and what he did, in order to decide whether there was failure of judicial protection which caused a violation of the fundamental human right or freedom concerned.

F In this case, the magistrate was required to form an opinion that the raising of the constitutional questions as to the contraventions of ss 13(1) and 18(1) of the Constitution was "merely frivolous or vexatious". The formation of the opinion is made the pre-condition for the refusal of the referral. The framers of the Constitution confided the power to form the opinion in the person presiding over the proceedings in which the question is raised. It must be his or her G judgment and not that of the Supreme Court.

Although the formation of the opinion denotes a subjective state of mind, it presupposes compliance with a process in which objective procedural and substantive standards are observed and met. The opinion which the person presiding in the lower court is required to form is a particular opinion in the H sense that he or she is expected to form it by reference to specific criteria.

2010 (2) ZLR p568

Malaba DCJ

The raising of a question in a court of law is an action or legal proceeding A which includes all material facts required to be proved by the party raising the question to entitle him or her to relief. The raising of a question on facts which, when proved, would not entitle the person who raises it to relief is to do so without the grounds prescribed by law. It is raising a question that is not a serious question to be tried.

The judicial officer is required to have knowledge of the ordinary and natural B meaning of the words "frivolous or vexatious", which constitutes the standard which he or she must conscientiously and objectively apply to the facts on which the question as to the contravention of the fundamental human right or freedom is raised.

In *S v Cooper & Ors 1977* (3) SA 475 (T) at 476D, Bosh off J said that the C word "frivolous" in its ordinary and natural meaning connotes an action or legal proceeding characterized by lack of seriousness as in the case of one which is manifestly insufficient. The raising of the question for referral to the Supreme Court under s 24(2) of the Constitution would have to be found on the facts to have been obviously lacking in seriousness, unsustainable, D manifestly groundless or utterly hopeless and without foundation in the facts on which it was purportedly based.

In F *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) it was held that the ordinary and natural meaning of the words "frivolous or vexatious" in the context of s 24(2) of the Constitution had to be borne in mind and applied to the facts by the person presiding in the lower court to form the requisite opinion. E Gubbay CJ at 157 said:

> "In the context of s 24(2) the word 'frivolous' connotes, in its ordinary and natural meaning, the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word 'vexatious', in contra-distinction, is used in the sense of the question F being put forward for the purpose of causing annoyance to the opposing party in the full appreciation that it cannot succeed; it is not raised *bona fide* and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless. See *Young v Holloway & Anor* [1895] P 87 at 90-91; *Dyson v A-G* [1911] 1 KB 410 (CA) at 418; *Norman v Mathews* (1916) 85 LJ KB 857 at 859; *S v Cooper & Ors* 1977 (3) SA 475 (T) at 476D-G; *Fisheries* G *Development Corporation of SA Ltd v Jorgensen & Anor* 1979 (3) SA 1331 (W)at 1339 E-F."

Whilst s 24(2) upholds the ability of a litigant to assert his or her right of access to the Supreme Court under judicial control to ensure that the raising of the question is based on grounds which would entitle him or her to relief sought if proved at the hearing, it also sets out the criteria on the basis of H

2010 (2) ZLR p569

Malaba DCJ

A which legal proceedings that are abusive of the process of the Supreme Court can be identified. The standard by which the facts on which the raising of a question is based must be measured is put so high to enable the person presiding in the lower court to stop legal proceedings that should not have been launched at all. In other words, refusal of a referral of a question as to the contravention of a fundamental human right or freedom to the Supreme B Court, which under s 24(4) of the Constitution is the court with original jurisdiction to determine the matter, is an extraordinary remedy intended to be used in clear and exceptional cases.

The reasons for the refusal by the magistrate of the request by the applicants for the referral to the Supreme Court of the two constitutional questions show C that he raised for his consideration the false issue of the postponement of the trial. He proceeded on the basis of the presumption that all the requirements of a valid charge to be determined by the criminal proceedings had been met. His attitude was that the procedure that was due was the commencement of the trial, the postponement of which he was not prepared to countenance. D The magistrate did not address his mind to the question whether or not the questions were raised on facts which would have made it clear to any prudent person that they could not sustain the allegation of the contravention of the fundamental rights concerned. He does not appear to have appreciated that it was his duty to comprehend the ordinary and natural meaning of the words "merely frivolous or vexatious" in the context of s 24(2) of the Constitution E as the standard he was required to apply in the assessment of the facts on which the raising of the questions was based in order to form the requisite opinion on the basis of which he could validly refuse the request for referral of the question to the Supreme Court.

As a matter of fact, it could hardly be said that the raising of the question F whether the prosecution and remand of the applicants pending trial on the charge based on their conduct of 16 October 2008 violated their fundamental rights to personal liberty (s 13(1)) and protection of the law (s 18(1)) was "merely frivolous or vexatious" within the meaning of s 24(2) of the Constitution. The question related to matters that needed serious consideration. The facts on which the questions were raised could, if proved at the hearing G in the Supreme Court, establish the alleged contravention and entitle the applicants, to the relief sought. There was, therefore, failure on the part of the magistrate to comply with the requirements of s 24(2) of the Constitution which resulted in the violation of the applicants' fundamental right to the protection of the law. The refusal to refer the constitutional questions to the H Supreme Court is therefore set aside.

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Malaba DCJ

That brings me to the third question. The court is now in a position to A determine the questions raised by the applicants as to the contravention of their fundamental rights to personal liberty and protection of the law. It is not necessary to determine the question of the constitutional validity of s 37(1)(a)(i) of the Act. That does not, in any way, underrate the argument addressed to the court with commendable ability by Mr *Uriri.* B

An examination of the provisions of the Act shows that s 37(1)(a)(i) was not applicable to the conduct of the applicants as constituted by the facts on which they were charged. The magistrate did not make the finding that the facts, if proved at the trial, would constitute the offence the applicants were accused of having committed. He just did not apply his mind to the consideration of C that question. I proceed to determine the question raised in the alternative on the presumption that s 37(1)(a)(i) of the Act is constitutionally valid.

Respect for the fundamental right to the protection of the law is a guarantee for judicial protection of the fundamental right to personal liberty. Section 13(2)(e) of the Constitution authorizes deprivation of an accused person of personal liberty where there is reasonable suspicion of him having committed D a criminal offence. That is the only ground on which a judicial officer faced with a request by a public prosecutor for the remand of an accused person is authorized by law to deprive the accused person of his or her liberty by an order of remand, in or out of custody, for the purpose of ensuring his or her appearance at the trial on the charge. E

Section 13(1) of the Constitution requires that a judicial officer must not make a decision depriving an accused person of personal liberty by means of an order of remand pending trial unless the only ground prescribed under s 13(2)(e) exists. The duty of the judicial officer is to make a finding that the facts on which the charge laid on the accused person is based provide F ground for a reasonable suspicion of him or her having committed the offence with which he or she is charged: *A-G v Blumears & Anor* 1991 (1) ZLR 118 (S) at 122 A-B.

A reasonable suspicion that an accused person has committed the offence with which he is charged presupposes that the facts on which the charge G is based would, if proved at the trial, constitute the offence. Where the accused person challenges the legality of the charge on the ground that the offence itself was not committed, the *onus* is on the State to first show that, if proved at the trial, the facts on which the charge is based would constitute the offence with which the accused person is charged. Only then would the question whether the facts provide ground for a reasonable suspicion that H

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A the accused person committed the offence as required by s 13(2)(e) of the Constitution arise.

Given that the right to personal liberty is among the fundamental human rights guaranteed under the Constitution against interference by the State, any restriction on it has to be closely scrutinized and construed in the narrowest B sense to ensure that deprivation of personal liberty is on the ground and for the purposes prescribed by the law. The right to personal liberty is in fact a right to protection from arbitrary deprivation.

To determine the question whether the conduct committed by the applicants and for which they were charged with the crime of contravening s 37(1)(a)(i) of the Act would, if proved at the trial, constitute the offence they were charged C with, the magistrate was required under s 13 (2)(e) of the Constitution to take into account the essential elements of the offence and the conduct which, if proved at the trial, would constitute the offence charged. He was required to apply the knowledge of the statute to the conduct actually committed by the applicants and decide whether it constituted the proscribed conduct.

D The magistrate did not do any of these things. The thrust of Mr *Mpofu's* argument was that the effect of the protection the Constitution provides for the fundamental right to personal liberty would be evaded if a court did not examine the facts on which a charge laid on an accused person is based and evaluate them according to the objective standards prescribed by s 13(2)(e) of the Constitution.

E The examination of the essential elements of the crime of contravening s 37(1) (a)(i) of the Act shows that the statute proscribes acts which have as their direct and obvious consequence serious disturbance of the peace, security or order of the public or any section of the public prevailing immediately before the occurrence of the conduct. What readily comes to mind, by way F of examples, are acts of violence committed by people assembled together or a speech in which the speaker incites his or her audience to violence. The conduct does not in itself constitute the offence. It becomes an offence if it is intended to produce the consequence of forcible disturbance of the peace, security or order of the public or any section of the public or when it is realised as a real possibility that forcible disturbance of the peace, security G or order of the public or any section of the public would result from it.

The primary object of s 37(1)(a)(i) of the Act is the preservation of the peace, security or order of the public. It is clear that the statute is not intended to be used to punish acts for the commission of which the fundamental human rights to freedom of assembly and freedom of expression are protected under H the Constitution. When properly construed, the statute presupposes that there

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are acts which can be committed by people gathered together at any place A or at any meeting consonant with the maintenance of the peace, security or order of the public or any section of the public.

As the exercise of the fundamental rights to freedom of assembly and freedom of expression presupposes the existence of an organized society in which the existence of peace, security or order of the public is the quintessence of the B security of these liberties, they cannot be held to include in their exercise the right to virtually destroy that which is essential for their enjoyment. The peaceful nature of an assembly of people is a fundamental element of the democratic principle of the freedom of assembly, as well as the pre-condition for its enjoyment.

When strictly construed, therefore, the statute is intended to be used to punish C conduct which constitutes abuse of the fundamental rights to freedom of assembly and freedom of expression through behaviour or words which are inimical to public welfare. Whilst it does not proscribe advocacy of ideas, it does proscribe advocacy of violent action.

A judicial officer faced with the question whether or not to remand an D accused person on a charge of contravening s 37(1)(a)(i) of the Act must, in the analysis of the facts on which the charge is based, bear in mind the national commitment to the principle that the coming together of people in a democratic society to petition for the redress of grievances and to express views or opinions or to discuss political and governmental issues of the day E consonant with the peace, security or order of

the public, is an indispensable means for the maintenance of the system of representative and accountable government established by the Constitution.

A balance must be struck, as required by the Constitution, between the interests of the individuals to come together in the exercise of fundamental rights F to freedom of assembly and freedom of expression which are foundational to any democratic society and the obligation on the State to maintain the peace, security and order of the public or any section of the public, as in cases where the conduct of those assembled together causes actual forcible disturbance or poses a real and obvious danger to the peace, security or order G of the public or any section of the public.

The examination of the conduct for which the applicants were charged with a contravention of s 37(1)(a)(i) of the Act shows that they were simply exercising their fundamental rights to freedom of assembly and freedom of expression. Their conduct, if proved at the trial, could not constitute the offence they were charged with. The facts could not have provided ground H

Malaba DCJ

A for a reasonable suspicion of their having committed the offence with which they were charged.

Had the magistrate acted in accordance with the requirements of s 13(2)(e) of the Constitution and examined the conduct of the applicants in the light of the offence with which they were charged, he would have found that the B applicants had not gathered for the sinister purpose of bringing about serious disturbance of the peace, security or order of the public or any section of the public. In singing, dancing, chanting slogans and waving placards with messages that did not incite violence, the applicants used legitimate means of expressing views or opinions on the political and governmental issues of the day.

C The applicants were entitled to express disapproval of the political agreement signed by the three main political parties in the country on 15 September 2008. They were also entitled to do what they did to draw the attention of the Government to the grievances arising from shortages of teachers for their children in schools at the time. They had a right to communicate D their grievances to the people they considered had the right to receive the information.

There was no allegation in the outline of the facts relied upon by the public prosecutor when he applied for their remand, that the conduct of the applicants involved in its nature any direct and obvious danger to the peace, security or order of the public or any section of the public. The facts were silent as E to whether the applicants acted with the intention of forcibly disturbing the peace, security or order of the public or any section of the public or that they realized that there was a real possibility that their conduct would have the prohibited consequences. The contents of the songs and slogans chanted were not disclosed. There was no suggestion that, in their addresses, the applicants F incited their audience to take any action which could immediately have provoked serious disturbance of the peace, security or order of the public.

The gathering had not been marked by any acts of violence or followed by any disorder. In fact, the applicants do not seem to have been arrested for what actually took place at the gathering. What appears to have prompted their arrest was the protest they raised against what they considered was an G unwarranted interference by the police with the exercise of their fundamental rights when the latter ordered the crowd to disperse. The police had in fact allowed the gathering to take place until after the applicants had finished addressing the crowd.

It does not, of course, follow that police should always break up a peaceful H assembly even where it has not been authorized. They have a discretion

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under s 29(2) of the Public Order and Security Act [*Chapter 11:17*]. If the A gathering in this case had not been authorized, by allowing it to go on as they did, the police details who were there used their discretion. Once that had happened, they should have taken into account whether the assembly violated the rights and freedom of others or whether it constituted a direct and obvious danger to the peace, security or order of the public or any section B of the public before they decided to disperse the assembly.

It is clear, therefore, that what the applicants, together with the other members of the gathering, did was germane to the purpose for which the fundamental rights to freedom of assembly and freedom of expression are guaranteed under the Constitution. They did all they did in a peaceful gathering whilst C preserving their willingness to act in conformity with the law. The acts they committed were acts to which the statute would not apply as the conduct was wholly protected by the Constitution.

There was failure on the part of the magistrate to act in accordance with the requirements of the protection for the fundamental right to personal liberty guaranteed under s 13(1) of the Constitution. A constitutionally relevant D violation occurs if the overall survey of all the relevant circumstances, as has been undertaken *in casu,* unequivocally shows that the requirements of the protection for a fundamental human right or freedom which are indispensable from the point of view of the principle of the rule of law, were not observed by a State official in the exercise of State power. E

As a result of the failure by the judicial officer to comply with the requirements of the protection provided under s 13(2)(e) of the Constitution, there was an incompatibility between the law and the order of remand made by the lower court. There was a violation of the applicants' right not to be deprived of personal liberty save as may be authorized by law. There was also a violation F of the applicants' right to the protection of the law guaranteed under s 18(1) of the Constitution.

It is therefore declared that the prosecution and remand of the applicants on allegations of having contravened s 37(1)(a)(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] on 16 October 2008 amount G to a deprivation of their personal liberty save as may be authorized by law in contravention of s 13(1) of the Constitution and are a denial of the fundamental right of the applicants to the protection of the law guaranteed under s 18(1) of the Constitution of Zimbabwe.

The second and third respondents are to pay the costs of the application jointly and severally, the one paying the other to be absolved. H

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Malaba DCJ

A The application for an order declaring s 37(1)(a)(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] unconstitutional is for the purposes of this case dismissed with no order as to costs.

CHIDYAUSIKU CJ, CHEDA JA, ZIYAMBI JA, and GARWE JA concurred.

B *Kossamu Ncube & Partners,* applicants' legal practitioners

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

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Source:
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COMMERCIAL FARMERS' UNION & ORS v MINISTER OF LANDS & ORS 2010 (2) ZLR 576 (H)

2010 (2) ZLR p576

Citation	2010 (2) ZLR 576 (H)
Case No	Judgment No. S-31-10
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Garwe JA& Cheda AJA
Heard	30 September 2010

Judgment 26 November 2010

Counsel *A P de Bourbon SC,* for the applicants
P Machaya, with him *N Mutsonziwa,* for the respondents

Case Type Constitutional application

Annotations Link to case annotations

Flynote

Court - *hierarchy of courts in Zimbabwe - Supreme Court - no appeal therefrom - SADC Tribunal - no appeal to Tribunal from Supreme* D *Court - non-binding nature of SADC Tribunal's decisions*

Land - *acquisition - rural land - challenge to acquisition - courts having no jurisdiction to entertain challenge to acquisition -former owner of acquired land - no right to remain on land - offer letter or other document in respect of acquired land - rights given by such document - person to whom such document is issued has right to occupy land - right of such* E *person to seek eviction order against former owner*

Headnote

The applicant farmers' union and a number of commercial farmers brought an application in terms of s 24 of the Constitution, seeking relief under various heads. The farmers in question were owners or occupiers of land F that had been acquired by the State in terms of s 16B of the Constitution. In terms of s 16B, former owners or occupiers of land that has been acquired must cease occupation of the acquired land within ninety days. The ninety days had since expired but the individual applicants had remained in occupation of the land. They complained that (a) they G were being improperly treated because of their race in contravention of s 23 of the Constitution; (b) they were being denied protection of the law and equality before the law under s 18 of the Constitution; (c) they were being unfairly tried on charges of contravening s 3 of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*]*;* (d) the racial imbalance sought to be addressed in the land reform programme had H

A been achieved, rendering any further evictions of white farmers unlawful; and (e) the public officials mentioned in the body of the application and affidavits had breached their duties in terms of s 18(1a) of the Constitution to uphold the rule of law and to act in accordance with the law. They asked for a moratorium on any further evictions, prosecutions and acquisitions. Reference was made by the applicants' counsel to the B ruling in the applicants' favour by the SADC Tribunal *(Mike Campbell (Pvt) Ltd & Ors v Republic of Zimbabwe* 2008 (2) 343 (SADC)).

Held, that the SADC Tribunal has no place in the hierarchy of courts in Zimbabwe and no appeal lies from any court to that Tribunal. Its decisions are at best persuasive but are not binding.

C *Held,* further, that former owners and/or occupiers whose land has been acquired by the acquiring authority in terms of s 16B(2)(a) of the Constitution cannot challenge the legality of such acquisition in a court of law. The jurisdiction of the courts has been ousted by s 16B(3)(a) of the Constitution.

Held, further, that land that is the subject of Bilateral Investment Protection D Agreements is liable to compulsory acquisition.

Held, further, that the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] and, in particular, s 3 of that Act, is constitutional. Accordingly, all Zimbabweans have a duty to comply with the law as provided for in that Act and prosecutions for contravening the Act are constitutional E and therefore lawful.

Held, further, that every former owner or occupier of acquired or gazetted land who has no lawful authority is legally obliged to cease occupying or using such land upon the expiry of the prescribed period (90 days after the acquisition). By operation of law, former owners or

occupiers of acquired land lose all rights to the acquired land upon the expiration F of the prescribed period.

Held, further, that a former owner or occupier of acquired land who without lawful authority continues occupation of acquired land after the prescribed period commits a criminal offence. If the former owner or occupier continues in occupation in open defiance of the law, no court of law has the jurisdiction to authorise the continued use or possession of the G acquired land.

Held, further, that litigants who are acting outside the law, that is, in contravention of s 3 of the Act, cannot approach the courts for relief until they have complied with the law.

Held, further, that a permit, an offer letter and a land settlement lease are H valid legal documents when issued by the acquiring authority in terms

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of s 2 of the Act and s 8 of the Land Settlement Act. The holder of such A permit, offer letter or land settlement lease has the legal right to occupy and use the land allocated in terms of the permit, offer letter or land settlement lease.

Held, further, that the Minister may issue land settlement leases in terms of s 8 of the Land Settlement Act [*Chapter 20:01*]. In doing so he is B required to comply with the other provisions of that Act. However, he may also authorise occupation of acquired land by means of an offer letter or a land settlement lease.

Held, further, that while s 3(5) of the Act confers on a criminal court the power to issue an eviction order against a convicted person, it does not take away the Minister's right or the right of the holder of an offer C letter, permit or land settlement lease to commence eviction proceedings against a former owner or occupier who refuses to vacate the acquired land. The holder of an offer letter, permit or land settlement lease has a clear right, derived from an Act of Parliament, to take occupation of acquired land allocated to him or her in terms of the offer letter, permit or land settlement lease. The Legislature conferred on the holder of an offer letter, permit or land settlement lease the *locus standi,* independent of the Minister, to sue for the eviction of any illegal occupier of land allocated in terms of the offer letter, permit or land settlement lease.

Held, further, that the holders of offer letters, permits or land settlement E leases are not entitled as a matter of law to self-help. They should seek to enforce their right to occupation through the courts. Where, therefore, the holder of an offer letter, permit or land settlement lease has resorted to self-help and the former owner or occupier has resisted, both parties are acting outside the law. If either party resorts to violence, the police should intervene to restore law and order. F

Held, further, that the Acquisition of Farm Equipment or Material Act [*Chapter 18:23*] does not authorise the holder of an offer letter, permit or land lease to take it upon himself to seize such equipment without reference to the acquiring authority. If the acquiring authority acquires such equipment, the acquisition can be challenged in the Administrative Court. G

Legislation considered

Constitution of Zimbabwe 1980, s 16B

Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], s 3

Supreme Court Act [*Chapter 7:13*], s 26 H

Cases referred to A

Associated Newspapers of Zimbabwe (Private) Limited v Minister of State for Information and Publicity and Ors 2005 (1) ZLR 222 (S)

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

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

Tom Beattie Farms (Pvt) Ltd & Anor v Mugova & Anor Civil application No. SC 32-09 [1]

Case information

A P de Bourbon SC, for the applicants

P Machaya, with him *N Mutsonziwa,* for the respondents

Judgment

Chidyausiku CJ: This application is made in terms of s 24(1) of the Constitution of Zimbabwe (hereinafter referred to as "the Constitution"). The applicants seek the relief set out in the draft order.

The applicants 2 to 10 (hereinafter referred to as "the individual applicants") are former owners or occupiers of land that has been acquired by the State in terms of s 16B of the Constitution. In terms of s 16B of the Constitution, former owners or occupiers of land that has been acquired must cease occupation of the acquired land within ninety days. The ninety days have since expired. Despite the expiry of the ninety days, the individual applicants have remained in occupation of the acquired land. Section 3 (2) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] (hereinafter referred to as "the Act") explicitly provides that a former owner or occupier who does not cease to occupy acquired land on the expiry of the period prescribed shall be guilty of an offence.

The applicants allege that their constitutional rights, as guaranteed in *Chapter III of the* Constitution, have been violated in a number of respects. They have detailed the respects in which their rights have been violated in para 16 of the founding affidavit, which reads as follows:

> "16. The object of this application is generally to seek and secure the protection by the courts of the applicants in terms of s 24 of the Constitution. The individual applicants and the CFU acting on behalf of its general membership complain that:
>
> (a) they are being improperly treated because of their race in contravention of s 23 of the Constitution;
>
> (b) they are being denied protection of the law and equality before the law under s 18 of the Constitution; and that

> (c) they are being unfairly tried on charges of contravening s 3 of the Gazetted Lands (Consequential Provisions) Act; and that
>
> (d) the racial imbalance sought to be addressed in the land reform programme has been achieved, rendering any further evictions of white farmers unlawful; and that
>
> (e) the Ministers, Ministry officials, magistrates, public prosecutors, court officials, police and military (all being public officials) mentioned in the body of the application and affidavits have breached their duties in terms of s 18(1 a) of the Constitution to uphold the rule of law and to act in accordance with the law."

On the basis of the alleged violations of their rights set out above, the applicants seek the relief set out in para 20 of the founding affidavit as read with the draft order. Paragraph 20 of the founding affidavit reads as follows:

> "20. The applicants seek the protection of the law as provided for in subss (1) and (1 a) of s 18 of the Constitution by placing a moratorium on:
>
> 20.1 the occupation by holders of offer letters for agricultural land which is still or already occupied by third persons particularly those white farmers who may have been in occupation at the time of enactment of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*].
>
> 20.2 the institution and pursuit of prosecutions against such people under s 3(3)(a) of the (a) foresaid Act.
>
> 20.3 the seizure of farm equipment and material by the holders of offer letters and the acquisition of such property in the name of the first respondent.
>
> 20.4 the institution and pursuit of proceedings in the Administrative Court in applications by the Minister of Lands for confirmation of the acquisition of movable items so acquired.

The applicants pray that the moratorium remains operative pending an application by the respondents to show cause why they contend the racial imbalance as envisaged in the Land Reform Programme has not been addressed."

The draft order reads:

> "1. That it be and is hereby declared that:

(a) The prosecutions and criminal proceedings in respect of the applicants referred to in PART VIII of this application for allegedly contravening s 3(2) as read with s 3(3) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] are invalid and of no force and effect G in that they are in conflict with ss 16A, 18(1), 18(1 a), 18(9) and 23 of the Constitution of Zimbabwe; and

(b) The purported attempts of whatsoever nature or kind by the first respondent to acquire farm equipment and material of the applicants referred to in PART VIII of this application are invalid and of no force and effect in that they are in conflict with ss 18(1), 18(1 a), 18(9) and 23 of the Constitution. H

2010 (2) ZLR p581

Chidyausiku CJ

2. That a A moratorium be and is hereby ordered in respect of any attempt or intention by any of the respondents:

(i) to evict any white farmer from any farm referred to in PART VIII and of any member of the first applicant presently in occupation of their properties who have not been evicted by order of a competent court having final effect and who were conducting farming operations as at B the date of the filing of this application; and

(ii) to acquire any farm equipment or material of any of the applicants referred to in PART VIII of this application.

3. The moratorium referred to in para 2 above shall remain in force until:

(a) the respondents show good cause why, by application to this court, that the alleged racial imbalance in redistribution of land for resettlement C as referred to in the programmes of land reform produced by the first respondent has not been redressed; and

(b) the first respondent has complied with its programme of land reform.

4. The respondents shall pay the costs of this application jointly and severally the one paying the other to be absolved."

D *Mr Machaya,* the Deputy Attorney-General, represented the first respondent. He initially raised a number of preliminary objections to the application and filed a written application for the preliminary points raised to be determined before consideration of the merits of this case. The preliminary points raised by the Deputy Attorney-General may be summarised as follows - E

1 The allegation that the criminal prosecutions of t he applicants in terms of s 3(3) of the *Gazetted Lands Act* [*Chapter 20:28*] are unlawful by reason of the fact that they contravene s 18(1) of the Constitution is devoid of merit as that issue has been decided in the matter of *Tom Beattie Farms (Pvt) Ltd & Anor v Mugova & Anor* Supreme Court appeal no. 32/09. The court order issued in that case reads in relevant part:

F "IT IS DECLARED THAT:

(1) **...**

(2) ...

(3) Sections 3(2) and 3(3) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:08*] are consistent with section 18(1) of the Constitution of Zimbabwe. Consequently the prosecution of the applicants under G s 277(3), as read with s 277(5), of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and ss 3(2) and 3(3) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:08*] is lawful.

(4) The Workshop held at Chegutu on 6 February 2009 and its deliberations did not violate the applicants' rights protected in terms of s 18(2) of the Constitution of Zimbabwe. H

(5) ...."

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The reasons for that judgment are yet to be given. However, the order A explicitly declares s 3(2) and s 3(3) of the Act as constitutional and the prosecution of formers owners and occupiers is lawful;

2. The issue of the alleged unfair trials in contravention of s 18(1a) of the Constitution and s 18(9) of the Constitution in court proceedings following a workshop held at Chegutu was similarly determined in B

Beattie & Anor supra;

3. The issue of discrimination against the applicants in contravention of s 23 of the Constitution is not justiciable in terms of s 16B(3) of the Constitution;
4. The issue of whether or not enough land for resettlement has been acquired C is a policy issue and not a legal issue and therefore not justiciable;
5. The alleged contraventions of ss 18(1), 18(9), 18(1a) and 23 of the Constitution in respect of the acquisition of equipment are too vague for this court to make a determination; and
6. No case has been made out for the granting of the moratorium sought. D

In my view, there is substance in all the above preliminary points taken by the Deputy Attorney-General. However, at the commencement of the hearing in this court, the Deputy Attorney-General advised the court that he did not wish to persist with his written application that the preliminary issues be determined before the merits of the case. He indicated that his new E stance is that the preliminary issues he raised be considered as part of his submissions on the merits.

I will deal with the applicants' complaints, as set out in para 16 of the founding affidavit, *seriatim.*

(a) Are the applicants being treated in a discriminatory manner in F contravention of s 23 of the Constitution?

The applicants allege that the discrimination against them is in the following three respects -

(i) They allege that it is only land belonging to white commercial farmers that has been compulsorily acquired; G

(ii) It is only white commercial farmers who are being prosecuted in terms of s 3 of the Act; and

(iii) White commercial farmers are not being allocated land in terms of the Land Reform Programme.

It is common cause that the land *in casu,* which the individual applicants occupy, was acquired by the State in terms of ss 16A and 16B of the H

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A Constitution. Sections 16A and 16B of the Constitution, in relevant part, provide as follows:

"16A Agricultural land acquired for resettlement

(1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the B following factors shall be regarded as of ultimate and overriding importance -

(a) under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;

(b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980; C

(c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land;

and accordingly -

(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and D

(ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.

(2) In view of the overriding considerations set out in subsection (1), where agricultural land is acquired compulsorily for the resettlement of people in E accordance with a programme of land reform, the following factors shall be taken into account in the assessment of any compensation that may be payable -

(a)-(g)....

16B Agricultural land acquired for resettlement

(1) In this section-

F 'acquiring authority' means the Minister responsible for lands or any other

Minister whom the President may appoint as an acquiring authority for the purposes of this section;

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

(2) Notwithstanding anything contained in this Chapter - G

(a) all agricultural land -

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

(ii) that is identified after the 8th July, 2005, but before the appointed day, H in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land

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Acquisition Act [*Chapter 20:10*], and which is itemised in Schedule 7, A being agricultural land required for resettlement purposes; or

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

A. settlement for agricultural or other purposes; or

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

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

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

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

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

(a) shall not apply to a court to challenge the acquisition of the land by the E State, and no court shall entertain any such challenge;

(b) may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired.

(4) ...

(5) ... F

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

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

In terms of s 16B of the Constitution, the individual applicants have been stripped of all the rights to the land they previously owned or occupied. Section 16B of the Constitution vests all the rights of previous owners and occupiers in the State. *In casu,* the only link the individual applicants have to the land is their continued occupation of the acquired land, which continued H

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A occupation has been rendered a criminal offence by an Act of Parliament authorised by s 16B(6) of the Constitution.

Section 16B of the Constitution contains *a non abstante* clause. Consequently, s 16B prevails over all other sections of the Declaration of Rights provisions of the Constitution. All other sections in the Declaration of Rights or *Chapter III of the* Constitution are subject to s 16B of the Constitution. In B other words, any rights conferred on anybody in terms of the Declaration of Rights or *Chapter III* of the Constitution can be derogated in terms of s 16B of the Constitution. Such derogation would not constitute a violation of the Constitution. In terms of s 16B of the Constitution, a litigant cannot successfully contend that the acquisition of his or her land is unlawful because C it violates a right conferred on the litigant in terms of the Declaration of Rights contained in *Chapter III* of the Constitution. It follows that a litigant whose land was acquired in terms of s 16B of the Constitution

cannot seek to set aside the acquisition of that land on the basis that such acquisition violated the rights conferred on the litigant by a provision contained in the Declaration of Rights or *Chapter III of the* Constitution, such as ss 18 and D 23 of the Constitution.

Apart from the *non abstante* clause, s 16B(3) of the Constitution ousts the jurisdiction of the courts to enquire into the legality or otherwise of the acquisition of land in terms of s 16B(2)(a) of the Constitution. In

Mike Campbell (Pvt) Ltd & Ors v Minister of National Security Responsible E *for Land, Land Reform and Resettlement and Anor* 2008 (1) ZLR 17 (S) at 43F-44E Malaba JA (as he then was), who delivered the unanimous judgment of this court, had this to say:

> "By the clear and unambiguous language of s 16B(3) of the Constitution the Legislature, in the proper exercise of its powers, has ousted the jurisdiction of courts of law from any of the cases in which a challenge to the acquisition of F agricultural land secured in terms of s 16B(2)(a) of the Constitution could have been sought. The right to protection of law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away. The ouster provision is limited in effect to providing protection from judicial process to the acquisition of agricultural land identified in a notice published in the *Gazette* in terms of s 16B(2)(a). An acquisition of the land referred to in s 16B(2)(a) would be a lawful acquisition. G By a fundamental law the Legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded.
>
> The right to protection of law under s 18(1) of the Constitution, which includes the right of access to a court of justice, is intended to be an effective remedy at the disposal of an individual against an unlawful exercise of the legislative, H executive or judicial power of the State. The right is not meant to protect the

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

In the face of the clear language of s 16B(3) of the Constitution, a litigant C can only approach the courts for a review and for a remedy relating to compensation. In this regard, the learned judge of appeal in the same judgment had this to say at p 44-45:

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

Mr *de Bourbon* cited the decision of the SADC Tribunal *in Mike Campbell (Pvt) Ltd and Ors v Republic of Zimbabwe* 2008 (2) 343 (SADC), which he submitted was in stark contrast to this court's decision in the *Mike Campbell* case *supra.* It is not clear why this judgment was cited. Mr *de Bourbon* in his submission made the point that his clients reserve the right to benefit G from the decision of the SADC Tribunal.

For the avoidance of doubt, I wish to make the following observations regarding the status and the relationship between this court and the SADC Tribunal.

The legal system of Zimbabwe consists of the following courts in their order of ranking. At the base are the small claims courts, established in terms of the Small Claims Act [*Chapter 7:12*], and the local courts, established in terms H

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A of the Customary Law and Local Courts Act [*Chapter 7:05*]. Above these are the magistrates courts, established in terms of the Magistrates Court Act [*Chapter 7:10*]. Above the magistrates courts are the labour courts and the administrative courts, established in terms of the Labour Act [*Chapter 28:01*] and the Administrative Court Act [*Chapter 7:01*] respectively. Above the labour courts and the administrative courts is the High Court, established in B terms of the High Court Act [*Chapter 7:06*]. At the apex of the legal system of Zimbabwean courts is the Supreme Court of Zimbabwe, established in terms of the Supreme Court Act [*Chapter 7:13*].

Section 26 of the Supreme Court Act provides as follows:

> **"26 Finality of decisions of Supreme Court**
>
> C (1) There shall be no appeal from any judgment or order of the Supreme Court.
>
> (2) The Supreme Court shall not be bound by any of its own judgments, rulings or opinions nor by those of any of its predecessors."

The decisions of the Supreme Court are final. No appeal lies from the Supreme Court to any other court. No appeal lies to the SADC Tribunal D from the Supreme Court. The decisions of the SADC Tribunal are at best persuasive but certainly not binding.

The SADC Tribunal has not been domesticated by any municipal law and therefore enjoys no legal status in Zimbabwe. I believe the same obtains in all SADC States, that is, that there is no right of appeal from the South African Constitutional Court, the Namibian Supreme Court, the Lesotho Supreme E Court, the Swaziland Supreme Court, the Zambian Supreme Court and the Supreme Courts of other SADC countries to the SADC Tribunal.

I now turn to deal with the complaint that the Attorney-General is being discriminatory, in that only white commercial farmers are being prosecuted for contravening s 3 of the Act. The applicants contend that because of this F discrimination the Attorney-General should be interdicted from prosecuting the individual applicants.

Section 3 of the Act provides that a former owner or occupier of land acquired in terms of s 16B of the Constitution who does not cease to occupy or use the acquired land "shall be guilty of an offence". Section 16B(6) of the G Constitution authorises Parliament to enact s 3 of the Act. The race of an accused is not an essential element of the offence. The essential elements of contravening s 3 of the Act are - (1) proof that the land has been acquired in terms of s 16B of the Constitution; (2) the former owner or occupier has not ceased to use or occupy the acquired land; and (3) the former owner or occupier has no lawful authority to continue to occupy the land. Once these H essential elements have been established, prosecution is inevitable.

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There is no suggestion on the papers that in deciding to prosecute the Attorney A - General has taken into account anything other than the essential elements set out above. The applicants do not allege that there are black commercial farmers who, as former owners or occupiers, are contravening s 3 of the Act but have not been prosecuted. If this were the contention, there might be merit in the complaint. The individual applicants, as a group of white B commercial farmers, have taken a deliberate and conscious decision to act in defiance of the law by continuing to occupy acquired land without authority. They cannot be heard to complain that only white commercial farmers are being prosecuted. What is the Attorney-General supposed to do if it is only white commercial farmers who are breaking the law? It is an abuse of court process for the applicants to approach this court seeking an interdict against C the Attorney-General in these circumstances.

In any event, s 76 of the Constitution provides for the independence of the Attorney-General. It provides in s 76(7) that the Attorney-General shall not be subject to the direction or control of any person or authority in the D exercise of his prosecutorial authority.

In my view, the solution to this problem is in the hands of the individual applicants and like-minded commercial farmers. All they have to do is obey the law by vacating the acquired land. Once they vacate the acquired land within the prescribed period no prosecution can arise. If they have any legal claim to the acquired land or arising from the acquired land they can launch E legal proceedings after vacating the acquired land as is required by law.

I therefore find that the applicants' complaint as set out in para 16(a) of the founding affidavit has no substance.

I now turn to deal with the complaints set out in paras 16 (b) and (c) of the founding affidavit. The complaints set out in paras 16 (b) and (c) are very F similar and linked to each other. It is convenient to deal with them together.

(b) *Are the individual applicants being denied protection of the law and equality before the law under s 18 of the Constitution?*; and

(c) *Are the individual applicants being unfairly tried on charges of* G *contravening s 3 of the Gazetted Lands (Consequential Provisions) Act?*

The complaints contained in these two subparagraphs are similar to the complaint raised in subpara (a) of para 16 of the founding affidavit, which I have already dealt with. Much of what I have stated in regard to subpara (a) of para 16 above applies with equal force to the complaints in subparas (b) and(c) of para 16. H

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A The land previously owned by the individual applicants was acquired by the State in terms of s 16B of the Constitution. Section 16B has an overriding effect on other sections of *Chapter III* of the Constitution.

The effect of s 16B of the Constitution is that it renders agricultural land occupied under Bilateral Investment Protection Agreements (BIPAs) liable to B compulsory acquisition if the acquiring authority considers that it is required for resettlement purposes or any other purpose as prescribed under s 16B(2) (a)(iii) of the Constitution.

It is, therefore, not open to the applicants to argue that such an acquisition of land in terms of s 16B is invalid by reason of a violation of a right guaranteed C in the Declaration of Rights in the Constitution.

As regards the complaint that the individual applicants are being unfairly or illegally prosecuted for contravening s 3 of the Act, the answer is to be found in *Tom Beattie Farms (Pvt) Ltd and Anor v Mugova and Anor* Civil Application No. SC 32/09 in which this court issued the order cited above. There is nothing in Mr *de Bourbon's* submissions that persuades this court to D revisit the order issued in *Tom Beattie's* case *supra.* This court has determined that s 3 of the Act is constitutional. It is not open to the applicants to contend that prosecutions in terms of s 3 of the Act are unconstitutional.

I have already sufficiently dealt with the complaint of discrimination in the prosecution of the individual applicants.

E The complaints of the individual applicants as set out in paras 16 (b) and

(c) have no substance.

(d) *Has the racial imbalance sought to be addressed in the land reform programme been achieved, rendering any further evictions of white farmers unlawful?*

F The issue of whether land should be acquired for the land reform programme, how much land should be acquired for that purpose, from whom it should be acquired, and to whom the acquired land should be allocated are matters for the Executive. They are policy issues that are not justiciable. What is justiciable is whether the acquisition itself and the allocation of the land has G been done in accordance with the law.

(e) *Have Ministers, Ministry officials, magistrates, public prosecutors, court officials, the police and the military (all being public officials) mentioned in the body of the application and affidavits breached their duties in terms of s 18(1 a) of the Constitution to uphold the rule of law* H *and to act in accordance with the law*?

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This complaint, as elaborated in the submissions, boils down to three A complaints, namely -

(a) That the Minister has been issuing offer letters to individuals in respect of land which he acquired in terms of s 16B of the Constitution. He is doing this despite the land being still

occupied by former owners.;

(b) That the holders of the offer letters have sought through self-help to B evict the former owners from the acquired land. This has led to conflict between the holders of the offer letters and previous owners.; and

(c) That Ministry officials, magistrates, public prosecutors, court officials, the police and the military have not assisted the former owners in the conflict described in para (b), despite the duty imposed on them by s 18(1a) of C the Constitution. The applicants contend that the conflict between the holders of the offer letters and the former owners is so widespread and the failure by public officials to assist them in this conflict is so prevalent that the rule of law has been eroded to the extent that the individual applicants are entitled to a moratorium of the land reform programme D and other relief sought in the draft order.

The complaint in para (a) raises the issues of whether the Minister can lawfully issue offer letters to individuals and whether he can lawfully issue offer letters to individuals before the acquired land is vacated. It also raises the issue of the respective rights of the holders of the offer letters and the E former owners of the acquired land.

Dealing firstly with the issue of whether the Minister has the legal authority to issue an offer letter to an individual. Section 2 of the Act, in relevant part, provides as follows:

"2 Interpretation F

(1) In this Act –

'lawful authority' means -

(a) an offer letter; or

(b) a permit; or

(c) a land settlement lease;

and 'lawfully authorised' shall be construed accordingly; G

'offer letter' means a letter issued by the acquiring authority to any person that offers to allocate to that person any Gazetted land, or a portion of Gazetted land, described in that letter;

'permit', when used as a noun, means a permit issued by the State which entitles any person to occupy and use resettlement land; ...". H

2010 (2) ZLR p591

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A The Legislature in enacting the above provision clearly intended to confer on the acquiring authority the power to issue to individuals offer letters which would entitle the individuals to occupy and use the land described in those offer letters. The draftsman could have used better language to convey the legislative intent, but there can be no doubt that s 2 of the Act confers on the acquiring authority the power to allocate land using the medium of an B offer letter. This provision is not in any way inconsistent with ss 16A and 16B of the Constitution. If anything, it fits in well with the overall scheme envisaged in ss 16A and 16B of the Constitution, which is that the acquiring authority acquires land and reallocates the land so acquired. The acquisition of land and its redistribution lies at the heart of the land reform programme. C I have no doubt that the Minister as the acquiring authority can redistribute land he has acquired in terms of s 16B of the Constitution by means of the following documents: (a) an offer letter; (b) a permit; and (c) a land settlement lease. The Minister is entitled to issue a land settlement lease in terms of s 8 of the Land Settlement Act [*Chapter 20:01*]. However, if the Minister allocates land by way of a land settlement lease in terms of s 8 of the Land D Settlement Act he is enjoined to comply with the other provisions of that Act, such as s 9, which requires him to consult the Land Settlement Board which obviously has to be in existence. I do not accept the contention by the applicants that the Minister can only allocate acquired land by way of a land settlement lease which he presently cannot do because there is no Land E Settlement Board in existence.

The Minister has an unfettered choice as to which method he uses in the allocation of land to individuals. He can allocate the land by way of an offer letter or by way of a permit or by way of a land settlement lease. It is entirely up to the Minister to choose which method to use. I am not persuaded by the argument that because the offer letter is not specifically provided for in the F Constitution it cannot be used as a means of allocating land to individuals.

I am satisfied that the Minister can issue an offer letter as a means of allocating acquired land to an individual.

Having concluded that the Minister has the legal power or authority to issue an offer letter, a permit or a land settlement lease, it follows that the G holders of those documents have the legal authority to occupy and use the land allocated to them by the Minister in terms of the offer letter, permit or land settlement lease.

On the other hand, s 3 of the Act criminalises the continued occupation of acquired land by the owners or occupiers of land acquired in terms of s 16B H of the Constitution beyond the prescribed period. The Act is very explicit

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that failure to vacate the acquired land by the previous owner after the A prescribed period is a criminal offence. It is quite clear from the language of s 3 of the Act that the individual applicants, as former owners or occupiers of the acquired land, have no legal right of any description in respect of the acquired land once the prescribed period has expired.

It was argued that previous owners and occupiers of acquired land have the B right to remain in occupation until they have been tried and convicted and an order for eviction issued in terms of s 3(5) of the Act, which provides as follows:

> **"3 Occupation of Gazetted land without lawful authority**
>
> (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 C the offence relates."

Section 3(5) of the Act does not confer on the individual applicants the right to remain in occupation until conviction. Section 3(5) of the Act simply directs the presiding magistrate in criminal proceedings for a contravention of s 3 of the Act to issue an eviction order. It gives the magistrate jurisdiction D or power, which he or she would not otherwise have, to issue an eviction order. Generally speaking, magistrates in criminal proceedings have no jurisdiction to issue an eviction order against an accused person upon conviction. Section 3(5) of the Act confers on the criminal court jurisdiction to issue an eviction order and directs the presiding magistrate to exercise E the power. Thus a proper reading of s 3(5) of the Act simply confers certain jurisdiction on the presiding magistrate. It does not in any way confer on the individual applicants as previous owners or occupiers of acquired land the right to continue in occupation after the expiry of the prescribed periods. It therefore follows that the conflict between the individual applicants and former owners or occupiers of acquired land on the one hand and the F holders of offer letters on the other hand is a conflict between legally entitled occupants, that is, the holders of offer letters, and the illegal occupants, the former owners and occupiers.

An offer letter issued in terms of the Act is a clear expression by the acquiring authority of the decision as to who should possess or occupy its land and G exercise the rights of possession or occupation on it.

The holders of the offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights. The individual applicants, as former owners or occupiers of the acquired land, lost all rights to the acquired land by operation of the law. The lost rights have been acquired by the holders H

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A of offer letters, permits or land settlement leases. Given this legal position, it is the holders of offer letters, permits and land settlement leases and not the former owners or occupiers who should be assisted by public officials in the assertion of their rights.

This leads me to the issue of whether Ministry officials, magistrates, public B prosecutors, court officials, the police and the military have a duty in terms of s 18(1a) of the Constitution to assist, as alleged, the individual applicants as former owners or occupiers of the acquired land.

Section 18(1 a) of the Constitution provides as follows:

> **"Provisions to secure protection of law**
>
> (1a) Every public officer has a duty towards every person in Zimbabwe to C exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law."

As I have already stated, the individual applicants' continued occupation of the acquired land is illegal in terms of s 3 of the Act. Their continued occupation of the acquired land constitutes a criminal offence. I do not D accept that s 18(1)(a) of the Constitution imposes an obligation on a public official to assist persons in the commission of a crime. Indeed, assisting a criminal or a person in doing that which Parliament has decreed constitutes a criminal offence is in itself a crime, of aiding or abetting the commission of a criminal offence.

E By seeking to prevent the institution and prosecution of criminal proceedings in cases in which they are acting unlawfully, the individual applicants are clearly frustrating the observance of the rule of law by the relevant public officials in the discharge of their duty in terms of s 18(1 a) of the Constitution. A moratorium on the implementation of a national programme such as the F land reform programme cannot be granted to protect unlawful conduct regardless of the race or colour of the perpetrators. It is unfortunate that the individual applicants seem to think that the duty to observe the rule of law falls on others and not on them because they belong to a particular race. The obligation on the State is to arrest, prosecute and punish those who commit criminal offences on the farms regardless of their race or colour, but it does G not need a moratorium on the implementation of the land reform programme for it to carry out its constitutional mandate to uphold the rule of law.

I have no doubt in my mind that s 18(1a) of the Constitution does not impose a duty on the Ministry officials, magistrates, public prosecutors, court officials, the police and the military to assist former owners of acquired land H in breaking the law by remaining in unlawful occupation of acquired land.

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Be that as it may, one of the allegations made against a Government official A , a magistrate, is a cause for concern. The applicants allege that a magistrate presided over a criminal trial of a former owner of gazetted land offered to him by the Minister in terms of an offer letter. The magistrate is alleged to have convicted the former owner and ordered eviction, obviously to enable the magistrate to take occupation. Unfortunately the magistrate was not party B to these proceedings and therefore cannot respond to these allegations. If these allegations are true, the conduct of the magistrate is totally unacceptable and I hope disciplinary action was taken. If not, it should be taken. If the allegations are true, the proceedings were certainly irregular and should be set aside on review. The individual applicant concerned should take the matter for review. C

It was submitted that some of the individual applicants and other former owners or occupiers of acquired land have court orders issued by the magistrates courts and the High Court authorising their occupation of acquired land after the prescribed period. If such orders were issued, they would have the effect of authorising the doing of something that Parliament has decreed should not D be done. This court, or any other court for that matter, has no jurisdiction to authorise the doing of that which Parliament has decreed would constitute a criminal offence. Put differently, a court of law cannot authorise an individual to commit a criminal offence.

It was submitted that the orders were issued in spoliation proceedings. Spoliation proceedings cannot confer jurisdiction where none exists. A court E of law has no jurisdiction to authorise the commission of a criminal offence. In any event, spoliation is a common law remedy which cannot override the will of Parliament. A common law remedy cannot render nugatory an Act of Parliament.

Apart from this, there is the principle that a litigant who is acting in open F defiance of the law cannot approach a court for assistance. See *Associated Newspapers of Zimbabwe (Private) Limited v Minister of State for Information and Publicity and Ors* 2005 (1) ZLR 222 (S). Indeed, if this point had been raised as a preliminary point, the probabilities are that this application would have been dismissed on that point alone. A former owner who is occupation of acquired land in open defiance of the law cannot approach the courts for G assistance.

I am satisfied that this complaint is without substance.

As regards the relief relating to the seizure of farm equipment, this court has jurisdiction to adjudicate. The Acquisition of Farm Equipment or Material Act [*Chapter 18:23*] has made provision for the manner in which the H

Chidyausiku CJ

A acquiring authority can acquire, either by agreement or compulsorily, any farm equipment or material not currently being used for agricultural purposes for the utilisation of that farm equipment or material on any agricultural land. Such acquisition is subject to confirmation by the Administrative Court where the owner or holder of the farm equipment or material contests such acquisition. Payment for such farm equipment or material must be B made within a reasonable time or, where the farm equipment or material is compulsorily acquired, within the time frame provided for in the Acquisition of Farm Equipment or Material Act.

The acquisition of farm equipment or material outside the provisions of the Acquisition of Farm Equipment or Material Act would be unlawful. The C owner of such farm equipment or material would have the right to approach the courts for protection. The Acquisition of Farm Equipment or Material Act does not authorise the holder of an offer letter, permit or land lease to take it upon himself or herself to seize such equipment without reference to the acquiring authority.

I, however, agree with the submission of the Deputy Attorney-General that the D claims relating to the acquisition of equipment as set out in this application are too vague for this court to make a determination.

In conclusion, I would summarise the legal position as follows -

(1) Former owners and/or occupiers whose land has been acquired by the acquiring authority in terms of s 16B(2)(a) of the Constitution cannot E challenge the legality of such acquisition in a court of law. The jurisdiction of the courts has been ousted by s 16B(3)(a) of the Constitution. See also the *Mike Campbell* case *supra.*

(2) The Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*]*,* and in particular s 3 of that Act, is constitutional. See *Tom Beattie's* case F *supra.* Accordingly, all Zimbabweans have a duty to comply with the law as provided for in that Act and prosecutions for contravening the Act are constitutional and therefore lawful.

(3) Every former owner or occupier of acquired or gazetted land who has no lawful authority is legally obliged to cease occupying or using such land upon the expiry of the prescribed period (ninety days after the acquisition). G See subss 3(2)(a) and (b) of the Act and s 16B of the Constitution. By operation of law, former owners or occupiers of acquired land lose all rights to the acquired land upon the expiration of the prescribed period.

(4) A former owner or occupier of acquired land who without lawful authority continues occupation of acquired land after the prescribed H period commits a criminal offence. If the former owner or occupier

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continues in occupation in open defiance of the law, no court of law A has the jurisdiction to authorise the continued use or possession of the acquired land.

(5) Litigants who are acting outside the law, that is, in contravention of s 3 of the Act, cannot approach the courts for relief until they have complied with the law. *See Associated Newspapers of Zimbabwe (Private) Limited* B *v Minister of State for Information and Publicity and Ors supra.*

(6) A permit, an offer letter and a land settlement lease are valid legal documents when issued by the acquiring authority in terms of s 2 of the Act and s 8 of the Land Settlement Act. The holder of such permit, offer letter or land settlement lease has the legal right to occupy and use the land allocated to him or her in terms of the permit, offer letter or land C settlement lease.

(7) The Minister may issue land settlement leases in terms of s 8 of the Land Settlement Act [*Chapter 20:01*]. In doing so he is required to comply with the other provisions of that Act.

(8) While s 3(5) of the Act confers on a criminal court the power to issue D an eviction order against a convicted person, it does not take away the Minister's right or the right of the holder of an offer letter, permit or land settlement lease to commence eviction proceedings against a former owner or occupier who refuses to vacate the acquired land. The holder of an offer letter, permit or land settlement lease has a clear right, derived E from an Act of Parliament, to take occupation of acquired land allocated to him or her in terms of the offer letter, permit or land settlement lease. F No doubt the Legislature conferred on the holder of an offer letter, permit or land settlement lease the *locus standi,* independent of the Minister, to sue for the

eviction of any illegal occupier of land allocated to him or her in terms of the offer letter, permit or land settlement lease.

(9) The holders of offer letters, permits or land settlement leases are not entitled as a matter of law to self-help. They should seek to enforce their right to occupation through the courts. Where therefore the holder of an offer letter, permit or land settlement lease has resorted to self-help and the former owner or occupier has resisted, both parties are acting outside G the law. If either party resorts to violence, the police should intervene to restore law and order.

Turning to the issue of costs: it has become the practice of this court not to award costs in the case of genuine applications to this court for the enforcement of rights guaranteed under the Constitution. However, this application does not fall into that category. It is an application by the individual applicants H

2010 (2) ZLR p597

Chidyausiku CJ

A who are acting in open defiance of the law. It is devoid of any merit and is an abuse of court process. For this reason, this court will register its disapproval by awarding costs against the applicants in this case.

Accordingly, the appeal is dismissed with costs awarded against the applicants jointly and severally, the one paying the others to be absolved.

B MALABADCJ, ZIYAMBI JA, GARWE JA, and CHEDAA JA concurred.

Kevin Arnott, Legal Practitioner, applicants' legal practitioner *Civil Division of the Attorney-General's Office,* first respondent's legal C practitioners

1 *Editor's note*: the judgment in this matter has not yet been issued.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/TOTAL ZIMBABWE (PVT) LTD v APPRECIATIVE INVESTMENTS (PVT) LTD 2010 (2) ZLR 598 (H)

TOTAL ZIMBABWE (PVT) LTD v APPRECIATIVE INVESTMENTS (PVT) LTD 2010 (2) ZLR 598 (H)

2010 (2) ZLR p598

Citation	2010 (2) ZLR 598 (H)
Case No	Judgment No. HH-268-10
Court	High Court, Harare
Judge	Kudya J
Heard	25 October 2010; 26 October 2010; 10 November 2010
Judgment	1 December 2010
Counsel	*H Zhou*, for the plaintiff *T Mpofu*, for the defendant
Case Type	Civil trial

Annotations No case annotations to date

Flynote

Landlord and tenant - *tenant - statutory tenant - when statutory tenancy is created - terms of statutory tenancy - relocation of lease on expiry - no real distinction from statutory tenancy* D

Headnote

The plaintiff issued summons seeking an order confirming the cancellation of a lease agreement it had with the defendant. The summons was duly served and the defendant entered appearance and filed its plea. It was common cause that the defendant entered into a lease agreement with Mobil Oil Zimbabwe (Pvt) Ltd ("Mobil") on 1 February 2002 for the E lease of a workshop, office space and other spaces and appurtenances. The lease expired by the effusion of time after six months and the parties did not execute a new written agreement. Instead, from time to time they discussed and agreed on the new amount for the monthly rent. Mobil was acquired by the plaintiff in 2006 and thus the plaintiff assumed its F rights and obligations, including those pertaining to the lease agreement. The relationship between the parties was tumultuous. The introduction of the multi-currency system in Zimbabwe in February 2009 adversely affected the currency of account between the parties. The plaintiff desired payment of rent in a functioning currency, while the defendant attempted to use the new currency regime as a springboard for renegotiating the G terms of lease. The defendant did not pay any rent from February 2009 until 28 July 2009 when the plaintiff cancelled the lease agreement. The defendant remained firmly *in situ* and had not paid any rent up to the date of the trial. At the pre-trial conference that was held on 5 July 2010 two issues were referred to trial. Firstly, whether or not the defendant breached the lease agreement by not paying rent from February 2009 H

A to date. Secondly, if the breach was established, whether the plaintiff was entitled to an order for ejectment and the payment of arrear rents and holding over damages.

Held, that the meaning of statutory tenancy is provided in s 22 of the Commercial Premises (Rent) Regulations 1983 (SI676 of 1983). Statutory tenancy is the legal relationship born out of a lease that has expired, B either by the effluxion of time or in consequence of notice duly given by the lessor, in which the lessee, however, continues to pay the rent due, within seven days of due date, and performs the other conditions of the lease. Section 23 of the Regulations provides that lessee who, by virtue of s 22, retains possession of any commercial premises is, so long as he C retains possession, entitled to the benefit of all the terms and conditions of the original contract of lease, so far as those terms and conditions are consistent with the provisions of the Regulations. The effect of ss 22 and 23 is that the original lease is renewed to the extent that it is consistent with the regulations. A relocation after a lease has expired is a new contract, which may be express or tacit. If the re-letting is express, D the question of which of the terms of the expired lease forms part of the new contract is a question of interpretation. Where the relocation is tacit, there is a presumption that the property is re-let at the same rent and that those provisions that are incidental to the relationship of landlord and tenant are renewed. Provisions that are collateral, independent of and not incidental to that relationship are not presumed to be incorporated in the E new letting. There is not much difference between a statutory tenancy and a tacit relocation. As in a tacit relocation, the terms and conditions of the original lease that are incidental to the relationship of landlord and tenant and consistent with the provisions of the Regulations, as opposed to those that are collateral and independent, are renewed.

F *Held,* further, that one of the essential elements of a lease is the payment of rent. The defendant did not pay any rent. It was aware of the amount of rent that the plaintiff had unilaterally set. It did not dispute the amount but was only willing to pay it once the plaintiff agreed to the three new conditions that it had raised. The defendant breached the lease agreement by failing to pay the rent that was unilaterally imposed by the plaintiff. G The plaintiff was entitled to cancel the lease for such breach.

Legislation considered

Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), ss H 22 & 23

Cases referred to A

Chibanda v Hewlett 1991 (2) ZLR 211 (H)

Chibanda v Musumhiri & Anor 1992 (2) ZLR 50 (H)

Doll House Refreshments (Pty) Ltd v O'Shea & Ors 1957 (2) SA 345 (T)

Irvine v H M The Queen in right of Canada 1998 (1) ZLR 328 (S)

Jackson v Unity Insurance Co Ltd 1999 (1) ZLR 381 (S)

Local Authorities Pension Fund v F & R Travel Tours & Car Sales B *(Pvt)* Ltd HH-90-10

Mtuda v Ndudzo 2000 (1) ZLR 710 (H)

Mungadze v Murambiwa 1997 (2) ZLR 44 (S)

Negowac Svcs (Pvt) Ltd v 3D Hldgs (Pvt) Ltd & Anor 2009 (2) ZLR 446 (H) C

Parkside Hldgs (Pvt) Ltd v Londoner Sports Bar 2005 (2) ZLR 68 (H)

Case information

H Zhou, for the plaintiff

TMpofu, for the defendant

Judgment

Kudya J: The plaintiff issued summons out of this court on 8 September D 2009. It sought an order confirming the cancellation of the lease agreement it had with the defendant, the eviction of the defendant and all those claiming occupation through it, arrear rent, holding over damages, interest and costs of suit. The summons was served on the defendant on 9 September 2009. The defendant entered appearance on 11 September and filed its plea on 30 E October 2009.

The plaintiff called the evidence of its Territory Manager, Lovemore Kuwana ("Kuwana"), and produced two documentary exhibits. The first exhibit was the site layout plan of stand 892A Nelson Mandela Avenue, Harare ("the leased premises"), while the second exhibit was a 65-paged bundle of documents consisting of the lease agreement and correspondence entered into F between the parties through their legal practitioners. The defendant called the evidence of its managing director, Ronald Mhlanga ("Mhlanga"), and produced the third exhibit which was a 14-paged bundle of correspondence exchanged between the parties.

It was common cause that the defendant entered into a lease agreement G with Mobil Oil Zimbabwe (Pvt) Ltd ("Mobil") on 1 February 2002 for the lease of the workshop, office space, empty space and other appurtenances shown in the site layout plan of the leased premises. The lease expired by the effluxion of time after six months and the parties did not execute a new written agreement. Instead, they would from time to time discuss and agree on the new amount of monthly rent payable. Mobil was acquired by the H

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A plaintiff in 2006. The plaintiff thus assumed all the rights and obligations of Mobil, including those pertaining to the lease agreement with the defendant.

The relationship between the parties was tumultuous, as demonstrated by the action brought by the plaintiff against the defendant in this court in2007. The plaintiff withdrew that action on 9 January 2009. On 15 January 2009 the defendant's former legal practitioners wrote to the plaintiff's erstwhile legal B practitioners acknowledging receipt of the notice of withdrawal and sought the plaintiff's input and comment on four proposals it wished included in a written lease agreement. The defendant proposed a five year lease with an option to renew, the inclusion in the lease of the parking space allocated to the defendant, the inclusion in the lease of the informal *pro rata* sharing

of C utility charges and the exploration of the policy of the plaintiff of leasing the whole premises to a single lessee as opposed to two lessees as prevailed at the premises. The currency which underpinned the lease relationship between the parties was the local currency. The introduction of the multi-currency system of payments in Zimbabwe in February 2009 adversely affected the currency of account between the parties. The plaintiff desired payment of D rent in a functionary currency, while the defendant attempted to use the new currency regime as a springboard for renegotiating the terms of lease. The meetings arranged between the parties failed to take place. The defendant did not pay any rent from February 2009 until 28 July 2009 when the plaintiff cancelled the lease agreement. The cancellation stampeded the defendant into making frantic efforts to save the lease by offering to pay the outstanding E rent. It was common cause that the defendant has remained firmly *in situ* and has not paid any rent to date.

The parties differed on whether or not the defendant was aware of the amount of the rent that was due in foreign currency before the service of summons. The pith of Kuwana's evidence was that he personally handed F the statements of rent due to the defendant's managing director, Mhlanga, on the due dates until the lease was cancelled on 28 July 2009. Mhlanga denied ever receiving the statements and indicated that he only became aware of the amount that the plaintiff unilaterally imposed when he was served with the summons. Each party relied on the correspondence exchanged between them to support its averment.

G The onus, on a balance of probabilities, to show prior knowledge of the amount of rent due per month lay on the plaintiff. Kuwana testified that, when the defendant failed to pay up, he arranged a meeting with Mhlanga for payment of the outstanding rent and for the execution of a new lease agreement. He relied on the tone of the letter written by the defendant's H then legal practitioners on 15 May 2009 as indicated of the defendant's

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prior knowledge of the amount of rent due. It reads in the relevant part: "He A further advises us that it was agreed by the parties that should the above request be met, our client will start paying his rent. To date no response had been given to our client and he is too anxious to meet his obligation of paying you rent." The plaintiff responded to that letter on 28 July 2009 and disputed the existence of an agreement to forego rent due until the issues of B the formalization of parking space, its request for a longer lease and exclusive use of the premises were agreed. Mr *Zhou,* for the plaintiff, contended that the term "rent" in that letter was used in its technical sense of being synonymous with the actual amount of money demanded by the plaintiff. He further argued that the defendant had prior knowledge of the amount claimed by the plaintiff; otherwise it would have asked in that letter what the monthly rent C payable was. Mr *Mpofu,* for the defendant, contended that "rent" was used in its wide and generic sense of an unquantified and unknown amount of money that the defendant would pay after agreement was reached between the parties. He further contended that the letters written by the former legal practitioners for the defendant on 30 July and 29 September 2009 and the plea demonstrated that the defendant was ignorant of the actual amount of D monthly rent demanded by the plaintiff.

The difficult task of assessing the credibility of Kuwana and Mhlanga and the probabilities in order to determine this issue was minimized by the admission made by Mhlanga, under the heat of searching cross-examination, that he was aware of the amount of monthly rent that was unilaterally set by the plaintiff E in foreign currency before 5 May 2009. Before he made this admission, Mhlanga had maintained that he did not know the amount the plaintiff regarded as monthly rent until the defendant was served with summons. He had stuck to the suggestion made in the letter the defendant's legal practitioners wrote to the plaintiff on 30 July and 29 September, that the plaintiff had not F advised the defendant of what it regarded as a fair and reasonable amount of monthly rent payable. He had suggested that the statements drawn and produced by the plaintiff for the rent payable from February to July 2009 were fabricated documents because they all had a print date of 21 October 2010. He had criticised the plaintiff for failing to produce both the signed and the unsigned copies of the statements of accounts that it allegedly left with him. G The admission portrayed him as an untruthful witness. In the result, I was satisfied that Kuwana was a credible witness. I discerned from his testimony that he verbally conducted most of the business communications between the plaintiff and the defendant with Mhlanga. He represented the plaintiff in 28 different leases involving workshops and service stations. The probabilities show that the plaintiff, being in the business of making an income from the H

Kudya J

A lease of workshops and service stations, would naturally have demanded a specific sum of monthly rent from the defendant in foreign currency. In my view, the defendant scuttled the meetings of 5 and 15 May 2009 because it had prior knowledge of the amount of monthly rent demanded by the plaintif. The letter from the defendant's then legal practitioners demanded that the plaintiff stop all direct communications with the defendant and requested B that all future meetings be arranged with it. It revealed that the plaintiff had, in the past, arranged for similar meetings which had failed to take place. I was satisfied from the tone and timing of that letter that the defendant was unwilling to agree to the amount of rent payable because it was already aware of the figure demanded by the plaintiff. I hold that the term "rent" as used C in the letter of 15 May 2009 demonstrated that the defendant was aware of the sum of money demanded by the plaintiff as monthly rent payable. It was unwilling to pay that amount until the issues it had raised of parking space, *pro rata* sharing of utility charges and sole tenancy were incorporated in a new written lease agreement.

At the pre-trial conference that was held on 5 July 2010 the following two D issues were referred to trial:

1. Whether or not the defendant breached the lease agreement by not paying rent from February 2009 to date
2. If the breach is established, whether the plaintiff is entitled to an order for ejectment and the payment of arrear rents and holding over damages.

E Mr *Zhou* based his submissions that the defendant had breached the lease agreement on *Parkside Holdings (Pvt) Ltd v Londoner Sports Bar* 2005 (2) ZLR 68 (H) and *Negowac Services (Pvt) Ltd v 3D Holdings (Pvt) Ltd & Anor* 2009 (2) ZLR 446 (H), while Mr *Mpofu* relied on the sentiments expressed by Makarau JP, as she then was, in *Local Authorities Pension Fund v F & F R Travel Tours & Car Sales (Pvt) Ltd* HH-90-10 and the views expressed in Cooper's *Landlord and Tenant 2* ed.

Mr *Mpofu* submitted that the claim should be dismissed. He argued that the plaintiff grounded its claim on the wrong cause of action. He forcefully contended that the lease agreement relied upon as the cause of action expired G by the effluxion of time on 31 July 2002. He relied on the *Local Authorities Pension Fund* case, *supra,* where at pp 2-3 of the judgment the learned Judge President stated:

> "In moving for the granting of the order sought in the draft, the applicant urged me to find that the parties had a written lease agreement, that in terms of that lease agreement, the first respondent was obliged to pay rentals and operating H costs monthly and in advance and that in breach of that agreement, the first

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> respondent failed to pay any rent or operating costs from January 2009 to the A date of filing of the application.
>
> As indicated above, the applicant's argument is flawed in one or two respects and does not flow from the facts that are common cause. Firstly, the written lease agreement terminated in July 2007. As from that date, the first respondent became a statutory tenant and the expired lease agreement can no longer found a cause of action between the parties. The first respondent, in my view, can B only be competently evicted in terms of the provisions of the Rent Regulations. It is common cause that the applicant is not proceeding in terms of the Rent Regulations but is proceeding *ex contractu,* alleging breach of the written agreement. Secondly, and assuming that the written lease agreement between the parties is still subsisting, then, in that event, the first respondent's obligation is to pay rent monthly in advance in local currency. The obligation to pay rent C monthly in advance must have been imposed by some other agreement, which has not been pleaded."

While the case before the Judge President was an application and the present matter is an action, I find that the causes of action in both cases are similar. The views of Makarau JP would have applied with equal force in the present matter, but for one issue that was not argued before her. It does not appear D in Her Ladyship's judgment that the meaning and effect of statutory tenancy was fully explored. Had that been done, she may have come to a different conclusion. The meaning of statutory tenancy is provided in s 22 of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) ("the Rent Regulations"). Statutory tenancy is the legal relationship born out of a lease that has expired either by the effluxion of time or in consequence of notice E duly given by the lessor, in which the lessee, however, continues to pay the rent due, within seven days of due date; and

performs the other conditions of the lease. This definition of statutory tenancy was adopted in such cases as *Chibanda v Musumhiri & Anor* 1999 (2) ZLR 50 (H); *Irvine v HM The Queen In Right of Canada* 1998 (1) ZLR 328 (S) at 328B; *and Mungadze* v F *Murambiwa* 1997 (2) ZLR 44 (S) at 45E.

The effect is further provided in s 23 of the Regulations, which reads:

> **"23. Rights and duties of statutory tenant**
>
> A lessee who, by virtue of section 22, retains possession of any commercial premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of lease, so far G as the same are consistent with the provisions of these regulations, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the contract of lease or, if no notice would have been so required, on giving reasonable notice:
>
> Provided that, notwithstanding anything contained in the contract of lease a lessor who obtains an order for recovery of possession of the premises or for H

Kudya J

> A the ejectment of a lessee retaining possession as aforesaid shall not be required to give any notice to vacate to the lessee."

The effect of s 23, as read with s 22(2)(b), of the Rent Regulations is that the original lease is renewed to the extent that it is consistent with the Regulations. This view was confirmed by Gubbay CJ in *Jackson v Unity Insurance Co* B *Ltd* 1999 (1) ZLR 381 (S) at 381G-382A, where he stated that:

> "On 29 November 1996, the appellant entered into a contract with the respondent in terms of which the latter leased Flat No. 24 (hereafter referred to as "the premises") for the period 1 December 1996 to 30 November 1997. Upon the expiration of the lease, the appellant retained possession of the premises. Under s 31 of the Rent Regulations 1982 (' the Regulations') he became a statutory tenant with occupation of the premises governed by the terms and conditions of the C original contract of lease in so far as such were consistent with the Regulations."

In Chibanda v Hewlett 1991 (2) ZLR 211 (H) at 216B-218D, SANDURA JP Ras he then was, dealt with the concept of tacit relocation of a lease. At 217B the learned Judge President affirmed the views of Rams bottom J in *Doll House Refreshments (Pty) Ltd v O'Shea & Ors* 1957 (1) SA 345 (T) at 348F-H that:

> D "A relocation after a lease has expired is a new contract which may be express or tacit. If the reletting is express the question which of the terms of the expired lease form part of the new contract is a question of interpretation, as explained in *Webb v Hipkin* 1944 AD 95. Where the relocation is tacit, there is a presumption that the property is relet at the same rent and that those provisions that are incidental to the relationship of landlord and tenant are renewed. But provisions that are collateral, independent of and not incidental to that relationship are not E presumed to be incorporated in the new letting."

Cooper *op cit* at p 350 defines a tacit relocation in these terms:

> "A tacit relocation is an implied agreement to relet and is concluded by the lessor permitting the lessee to remain in occupation after the termination of the lease and accepting rent from the lessee for the use and enjoyment of the property."

F In my view, there does not appear to be much of a difference between a statutory tenancy and a tacit relocation. Like in a tacit relocation, the terms and conditions of the original lease that are incidental to the relationship of landlord and tenant and consistent with the provisions of the Rent Regulations, as opposed to those that are collateral and independent, are renewed. See *Chibanda v Hewlett supra at 220E. I* find that the plaintiff pleaded the renewed G agreement by making reference to the original agreement in the declaration.

It seems to me that the submission by Mr *Mpofu* that the plaintiff pleaded the wrong cause of action must fail. Even if I am wrong in finding that the plaintiff correctly pleaded the original lease agreement, I would have dismissed Mr *Mpofu*'s submission on this aspect on the basis that I have a H wide discretion to determine the real issues between the parties, especially

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Kudya J

in circumstances such as this where the parties have fully ventilated the A issue in dispute during trial. See *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H) at 719B-G and the cases there cited.

Mr *Zhou* submitted that the defendant breached the lease agreement by failing to pay the rent communicated to it by the plaintiff. In the alternative, he submitted that it breached the lease agreement by failing to pay an B amount which the defendant itself would have considered reasonable. He relied on the sentiments of Mtshiya J in the *Negowac Services* case, *supra,* at455E-456A that:

> "My view is that as long as the defendants wanted the tenancy to continue, they had an obligation to continue paying rent. They should have continued to pay what they believed was a reasonable rent. ... The defendants were therefore in C clear breach of the lease agreement for non-payment of rent."

In the *Local Authorities Pension Authority Fund case, supra,* at p 5 Makarau JP found the reasoning in the *Negowac* case *supra* very attractive. I agree. After all, one of the essential elements of a lease is the payment of rent. The defendant did not pay any rent. It was aware of the amount of rent that D the plaintif had unilaterally set. It did not dispute the amount but was only willing to pay it once the plaintiff agreed to the three new conditions that it had raised. I find that the defendant breached the lease agreement by failing to pay the rent that was unilaterally imposed by the plaintiff. The plaintiff was entitled to cancel the lease for such breach.

I answer the second issue referred to trial in the plaintiff's favour. In E argument, Mr *Zhou* prayed for judgment in the sum of US$350 per month for both arrear rent and holding over damages. He abandoned the purported increase to US$402.50 that had been claimed by the plaintiff from 1 May 2009. The evidence of Mhlanga demonstrated that the rent of US$350 per month demanded by the plaintiff was fair and reasonable for the premises F that are situated in the Central Business District of Harare. In any event, in his testimony Mhlanga expressed a willingness to pay the rent demanded by the plaintiff, provided the cancelled lease was restored. He did not challenge the reasonableness of the rent claimed. The plaintiff rejected the offer and persisted with its claim.

The plaintiff is entitled to the order it seeks, together with costs of suit. I G would order that interest at the prescribed rate starts to run from the date of the service of summons for both the arrear rent and holding over damages.

Accordingly, it is ordered that:

1. The cancellation of the agreement of lease entered into between the parties for the leased premises be and is hereby confirmed. H

Kudya J

2. The defendant A and all its subtenants, assignees, invitees and all those claiming occupation through it be and are hereby evicted from the leased premises.
3. The defendant shall pay arrear rent to the plaintiff in the sum of US$2 100 together with interest at the rate of 5 per cent per annum from 9 September 2009 to the date of payment in full B
4. The defendant shall pay holding over damages at the rate of US$350 per month from 1 August 2009 to the date of ejectment together with interest at the rate of 5 per cent per annum from 9 September 2009 to the date of payment in full. C
5. The defendant shall pay the plaintiff's costs of suit.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

D *Manase & Manase,* defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2010/Volume 2/VAN HOOGSTRATEN v JAMES & ORS 2010 (2) ZLR 608 (H)

VAN HOOGSTRATEN v JAMES & ORS 2010 (2) ZLR 608 (H)

Citation	2010 (2) ZLR 608 (H)
Case No	Judgment No. HH-272-10
Court	High Court, Harare
Judge	Makoni J
Heard	21 January 2010; 16 September 2010; *CAV*
Judgment	8 December 2010
Counsel	*S Zingondo*, for the applicant *A Bangidza*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure *-judgment - summary judgment - when may be granted - what defendant must show to avoid summary judgment - multiple claims in summons - summary judgment may only be granted in respect of all claims - not permissible to sever claim to seek summary* D *judgment for part of claim*

Headnote

The summary judgment procedure is meant to be simple and straightforward and if parties were allowed to amend or sever claims at summary judgment it would defeat the whole purpose thereof. It can only be granted in respect of all that a plaintiff claims in his summons, not only such as E he selected as the separate subject of summary judgment.

The summary judgment procedure is a drastic remedy in which a plaintiff, whose belief is that the defence is not *bona fide* and entered solely for dilatory purposes, should be granted immediate relief without the expense and delay of a trial. It has far reaching consequences, as it effectively F denies the defendant the benefits of the fundamental principle of the *audi alteram partem* rule. It can only be granted to the plaintiff when all proposed defences to the claim are clearly unarguable, both in fact and in law. The defendant does not have to establish his defence on the probabilities. All he needs to do is to allege facts which disclose G a defence. These facts, if pleaded and accepted at the trial, must be sufficient to establish a defence.

Legislation considered

High Court Rules 1971 (RGN 1074 of 1971), r 259 H

Cases referred to A

Chiadzwa v Paulkner 1991 (2) ZLR 33 (S)

Chrismar (Pvt) Ltd v Stutchbury & Anor 1973 (1) RLR 277 (G)

Cold Storage Commission of Rhodesia v Gey van Pittius GB-21-73

Coleman v Sanhanga S-132-91

Garlicks Wholesale v Davis 1927 CPD 185

B *Hugo Franco (Pvt) Ltd v Gordon* 1956 R & N 448; 1956 (4) SA 482(SR)

Jena v Nechipote 1986 (1) ZLR 29 (S)

Maparanyanga v Sheriff of the High Court & Ors 2003 (1) ZLR 325 (S)

Nedlaw Invstms & Trust Corp Ltd v Zimbabwe Development Bank S-5-00

Case information

C *S Zingondo,* for the applicant

A Bangidza, for the respondent

Judgment

Makoni J: Some time in August 2005 and at a sale in execution the applicant purchased the first respondent's rights title and interest in Stand 124, The Grange Township of the Grange, commonly known as number 4 D Wroxham Road, the Grange Harare (the property). On 7 September 2005, the second respondent confirmed the sale. The first respondent then filed an objection to the sale in terms of r 259 of the High Court Rules 1971. The second respondent dismissed the objection on 4 October 2005.

The first respondent proceeded to file an application to this court for the sale E to be set aside. The application was dismissed with costs on 1 June 2006. The first respondent appealed against the decision to the Supreme Court. The appeal was struck off the roll for want of compliance with Supreme Court Rules. An attempt to have the matter reinstated was dismissed by the Supreme Court on 4 June 2008.

F In the meantime, the second respondent, in a letter dated 4 January 2006, but only delivered to the applicant on 4 February 2009, advised that he had recommended that the sale be aborted as the creditor had paid in full. He also returned the applicant's cheque which he advised was now stale.

On 11 May 2009, the applicant instituted an action whereby he claims an order directing the second defendant to transfer the first defendant's right G title and interest in the property to him, ejectment of the first defendant and all those claiming through her from the property and costs of suit. The first respondent entered appearance to defend. The applicant then filed the present proceedings for summary judgment.

It was contended by the applicant that all issues raised by the first respondent H in her defence are *res judicata.* The first respondent in effect seeks to impugn

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the validity of the sale of the property. This issue has been adjudicated upon A by this court and the Supreme Court.

The first respondent opposes the application on two main grounds. She contends that the applicant claims damages, which are not liquidated, through summary judgment procedure. In the summons and declaration, the applicant claims holding over damages in the sum of $1000. In the application for B summary judgment the amount of $ 1 per month is mentioned. No application to amend the summons and declaration was made.

Secondly, she contends that the applicant did not pay the purchase price. He made a payment by a cheque which cheque was not deposited. The cheque became stale and was later returned to him.

The procedure of summary judgment is not available in a claim for damages C which are not liquidated. *In casu* the first respondent puts in issue the question of liability and obviously the *quantum.* It does not assist the applicant to reduce the claim to a nominal amount of US1, as he still has to prove the basis for claiming the amount. In any event, the applicant cannot use the affidavit in summary judgment proceedings to amend the summons and D declaration. It is merely supposed to verify the cause of action. In actual fact, there is no room for amendment of the summons in an application of summary judgment. See *Cold Storage Commission of Rhodesia v Gey van Pittius* GB-21-73 (not reported).

The applicant submitted that, if the court were not inclined to grant to damages E, it can still grant the other relief claimed. His application is three pronged and severable. Each claim should be considered separately.

In *Garlicks Wholesale v Davis* 1927 CPD 185, as quoted in *Hugo Franco (Pty) Ltd v Gordon* 1956 (4) SA 482 (SR) at 484D-F, Gardner JP remarks:

> "Summary judgment could only be granted in respect of all the plaintiff's claims F in his summons, not only such as he selected as the separate subject of summary judgment"

Murray CJ in the *Hugo Franco* case *supra* continued:

> "*Prima facie,* the plaintiff could have avoided those difficulties if, prior to making its application for summary judgment, it had amended its summons abandoning G its alternative claim for the payment of damages and its claim for interests".

I share the view as expressed above. Summary judgment procedure is meant to be simple and straightforward. If parties are allowed to amend or sever claims at summary judgment, it defeats the whole purpose of having the procedure in place. It is no wonder that an applicant is not allowed to file an answering affidavit in summary judgment proceedings. H

2010 (2) ZLR p611

Makoni J

A *In casu,* the plaintiff could have amended its summons abandoning the claim for damages before filing the present application. The applicant cannot succeed in its quest to have the order severed.

Assuming I am wrong on the point, I will proceed to determine the other issues.

The law of summary judgment is settled in our jurisdiction. It is a drastic B remedy in which the plaintiff, whose belief is that the defence is not *bona fide* and entered solely for dilatory purposes, should be granted immediate relief without the expense, and delay of trial. *See Chiadzwa v Paulkner* 1991 (2) ZLR 33 (S) and *Coleman v Sanhanga* S-132-91. It has far reaching consequences as it effectively denies the defendant the benefits of the fundamental principle of the *audi alterem partem* rule. See *Nedlaw Investments and Trust Corp* C *Ltd v Zimbabwe Development Bank S-5-00.*

It can only be granted to the plaintiff when all proposed defences to the plaintiff's claim are clearly inarguable both in fact and in law. See *Chrismar (Pvt) Ltd v Stutchbury and Anor* 1973 (1) RLR 277 (G) at 279.

The defence does not have to establish its defence on the probabilities. All D she need allege are facts which disclose a defence. These facts, if pleaded and accepted at the trial, must be sufficient to establish their defence. See *Jena v Nechipote* 1986 (1) ZLR 29 (S) at 30.

The first respondent's defence to the applicant's claim of specific performance is that the applicant did not pay the purchase price. It is common cause that E the applicant made payment to the second respondent through a cheque. The cheque was not deposited. The cheque was later returned to the applicant as it had become stale. It is also common cause that the first respondent paid the judgment creditor through other means.

The issue of whether the applicant paid the purchase price of the property, F is, in my view, not *res judicata.* It only came to light in February 2009 when the applicant received the letter from the second respondent advising that the sale had been aborted. The matter before Musakwa J was concluded in June 2006.

The applicant is suing for specific performance. He has not performed his obligations in terms of a contract of sale, neither has he tendered performance. G Although he tendered a cheque to the second respondent, his estate was not diminished by the amount of the cheque as it was not deposited: What the applicant is asking the court to do is to order specific performance when he has not paid a cent for the property. In effect, he will get the property for free. There is also the issue of when a payment by cheque becomes a payment in H terms of the purchaser's obligations.

2010 (2) ZLR p612

Makoni J

In any event, the first respondent paid to the judgment creditor through A other means and not from the proceeds of the sale. In sales in execution the responsibility of officers of execution is, first, to the judgment creditor and, secondly, to the debtor. See *Maparanyanga v Sheriff of the High Court & Ors* 2003 (1) ZLR 325 (S) at 335C. If the first respondent paid the judgment creditor, could the second respondent still proceed with the sale?

Having considered the above, it is my view that the first respondent has alleged B facts which disclose a defence. In the result I will make the following order.

The application is dismissed with costs.

Ziumbe & Mtambanengwe, applicant's legal practitioners C

Manase & Manase, first respondent's legal practitioners

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Source:
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S v NKOMO 2010 (2) ZLR 613 (H)

Citation	2010 (2) ZLR 613 (H)
Case No	Judgment No. HB-160-10
Court	High Court, Bulawayo
Judge	Cheda J
Heard	1 December 2010; *CAV*
Judgment	9 December 2010
Counsel	*M Ncube*, for the applicant *T Hove*, for the respondent
Case Type	Bail application
Annotations	No case annotations to date

Flynote

Evidence - *identity - identification parade - proper conduct of- need for parade to be so conducted that the witness is not given any clue as to the identity of the suspect*

Headnote

D The applicant, who was seeking bail pending trial, was identified as the culprit by the complainant. The circumstances in which the identification took place were that the applicant was brought to the charge office barefooted and was asked to put on his shoes in the presence of the complainant, a procedure which was unusual as it exposed him to the complainant who no doubt regarded him as the culprit and therefore proceeded to E identify him as such.

Held, that the identification parade that was conducted in this manner was a mockery of justice. An identification parade is a procedure where a complainant or witness should independently identify the suspect or the wrongdoer without being given a clue which is designed to expedite F police investigations. Identification parades should be conducted in a manner that excludes the possibility of any suspicion of bias or unfairness. Where an identification of a suspect has been

made easier by a police officer's conduct, conscious or otherwise, the courts should be ready to condemn such proceedings without more ado. What occurred in this case could not pass the test of an identification parade. There should be G fairness in the process. The probative value of personal identification at a parade conducted in a manner which does not guarantee fairness carries less weight as it would have been calculated to prejudice the accused.

Legislation considered

H Criminal Procedure and Evidence Act [*Chapter 9:07*], s 117(3)(b)

Cases referred to A

Aitken & Anor v Attorney-General 1992 (1) ZLR 249 (S)

Liebman v A-G 1950 (1) SA 607 (W)

S v Jongwe 2002 (2) ZLR 209 (H)

R v Masemang 1950 (2) SA 488 (A)

R v Mtatsala & Anor 1948 (2) SA 585 (E) B

S v Ndhlovu & Ors 1985 (2) ZLR 261 (S)

S v Nichas 1977 (1) SA 257 (C)

R v Y & Anor 1959 (2) SA 116 (W)

Case information

M Ncube, for the applicant

T Hove, for the respondent C

Judgment

Cheda J: This is an application for bail.

The applicant is being charged with armed robbery that allegedly occurred on 13 February 2009 at the 60 km peg along Beitbridge-Masvingo highway. It is alleged that with the use of violence he induced the complainant to part D with his property being:

(1) 1100 Nokia mobile phone;
(2) Motorola C157 phone;
(3) Net*One sim card; and
(4) cash amounting to R14 600. E

The respondent has opposed this application on the ground that the applicant is likely to abscond. The respondent relied on the provisions of s 117(3)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Under the said section the following factors have to be considered in the determination of bail:

(i) the ties of the accused to the place of trial; F
(ii) the accused's means of travel and his or her possession of or access to travel documents;
(iii) the nature and gravity of the likely penalty therefore.

To buttress this, Mr *Hove,* for the respondent, has argued that the applicant resides and works in South Africa and has been there for the past 12 years. G In addition thereto, he is a holder of a valid passport. Above all, he is facing a serious charge.

The applicant, on the other hand, has argued that he is innocent of the charge being levelled against him in that he has never used the Beitbridge-Masvingo road on any of the occasions he visited Zimbabwe. He further pointed out two major discrepancies in the whole matter in that, firstly, the State outline H

Cheda J

A refers to a VW Jetta, red in colour, yet the complainant refers to a VW Golf, red in colour. The question is, what is the exact car the applicant was allegedly using? These are distinctively two different makes of motor vehicles except for the colour. Therefore, there is a material discrepancy in this description.

Secondly, he contends that the identity parade which was conducted was not B properly carried out as he was brought to the charge office barefooted and was asked to put on his shoes in the presence of the complainant, a procedure which is unusual as it exposed him to the complainant who no doubt regarded him as the accused and therefore proceeded to identify him as such.

These allegations and arguments were not controverted by Mr *Hove,* who stated that he had been unable to verify them with the investigating officer. He did C not even ask for indulgence to verify them. If it is true that the identification parade was conducted in the manner described, it is but a mockery of justice. It should be noted that an identification parade is a procedure where a complainant or witness should independently identify the suspect or the wrong doer without being given a clue which is designed to expedite police D investigations. I am not saying that it was the case *in casu,* but my emphasis is that identification parades should be conducted in a manner that exclude the possibility of any suspicion of bias or unfairness. Where an identification of a suspect has been made easier by a police officer's conduct, conscious or otherwise, our courts should be ready to condemn such proceedings. *In casu,* what occurred in this case cannot pass the test of an identification E parade. There should be fairness in the process; where fairness is absent the possibility of bias can not be excluded, see *R v Masemang* 1950 (2) SA 488 (A) and *R v Y & Anor* 1959 (2) SA 116 (W).

Great care should be employed when identifying a suspect. In S v *Ndhlovu & Ors* 1985 (2) ZLR 261 (S), Gubbay JA (as he then was) stated at 263 G:

> F "Confidence and sincerity are not enough. The possibility of a mistake occurring in the identification, especially where the witness has not known the person previously, demands that the greatest circumspection should be employed."

The probative value of personal identification at a parade conducted in a manner which does not guarantee fairness required by the standard form of procedure for such proceedings carries less weight as it would have been G calculated to prejudice the applicant. See *R v Masemang supra.*

The other factor relied on by the respondent is that the applicant is likely to abscond as he is a South African resident. While this may be a possibility, the question of abscondment should be looked at very carefully as it can result in a suspect failing to attend court, which can no doubt frustrate the H otherwise proper administration of justice.

2010 (2) ZLR p616

Cheda J

Where a suspect is facing a serious charge, and upon conviction is likely A to be sentenced to a lengthy prison term, the temptation to abscond is quite high. This is the general approach: see *S v Nichas* 1977 (1) SA 257 (C). This, however, does not mean that bail should not be granted in a serious case: *R v Mtatsala & Anor* 1948 (2) SA 585 (E). The seriousness of the charge must be taken into account with regards to other factors. The strength B or weakness of the State case is one such factor. Where the State case is weak, bail should be considered, as failure to do so will be prejudicial to the accused. *In casu,* as already pointed out, the identification parade is alleged to have been irregular. If this is proved to be true, that will dent the State case. Therefore, if it is correct, the possibility of the applicant absconding to avoid trial is remote as he will be eager to clear his name. In an application C for bail, the applicant must prove on a balance of probabilities that there are facts rendering it unlikely that he will abscond or otherwise interfere with the proper administration of justice: see *Liebman v A-G* 1950 (1) SA 607 (W). The factors to be considered in the determination of bail where a question of abscondment arises were succinctly dealt with in *Aitken & Anor v Attorney-General* D 1992 (1) ZLR 249 (S), quoted with approval in *S v Jongwe* 2002 (2) ZLR 209 (H) at 215B-D, where Chidyausiku CJ stated:

> "(d) That in judging the risk that an accused person would abscond the court should be guided by the following factors:
>
> (i) the nature of the charge and the severity of the punishment likely to E be imposed on the accused upon conviction;
>
> (ii) the apparent strength or weaknesses of the State case;

(iii) the accused's ability to reach another country and the absence of extradition facilities from the other countries;

(iv) the accused's previous behaviour;

(v) the credibility of the accused's own assurance of his intention and F motivation to remain and stand trial;

(e) That the risk of interference with investigation if alleged must be well founded and not based on unsubstantiated allegation and suspicion."

The applicant's averments that he has never used the Beitbridge-Masvingo road and that the identification parade was irregular, which has not been G controverted, render the state's case weak, thereby eliminating the incentive for him to abscond from the court's jurisdiction. The applicant is a Zimbabwean based in South Africa, and has a good and responsible job. In addition to this, the applicant voluntarily went to the police station to seek clarification as to why his car had been embargoed; this, to me, is not the behaviour of a guilty mind. This factor cannot be ignored: *S v Jongwe supra.* H .

2010 (2) ZLR p617

Cheda J

A It is a fact that there exists an extradition order between Zimbabwe and South Africa which makes it possible to bring the applicant back to the country should he decide to abscond.

I am, therefore, of the view that the applicant has made a good case for himself for bail and accordingly the following order is made:

B **Order**

The applicant be and is hereby granted bail on the following conditions:

(i) he deposits US$200 with the office of the Registrar, High Court, Bulawayo.

(ii) he surrenders his travel documents to the Registrar's Office, High Court, Bulawayo.

C (iii) he reports three times a week on Mondays, Wednesdays and Fridays at Zimbabwe Republic Police, Nkulumane, Bulawayo between the hours of 6 am and 6 pm.

(iv) he resides at house number 108 Nkulumane, Bulawayo, until the trial is finalised.

D (v) he does not interfere with State witnesses, and

(vi) he surrenders the title deeds of house number 1378 Mbizo Township, Kwekwe, being title deed number 1546/87, to the office of the Registrar, High Court, Bulawayo.

E *Cheda and Partners,* applicant's legal practitioners

Criminal Division, Attorney-General's Office, respondent's legal practitioners

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Source:
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GONDO & ORS v REPUBLIC OF ZIMBABWE 2010 (2) ZLR 618 (SADC)

2010 (2) ZLR p618

Citation	2010 (2) ZLR 618 (SADC)
Case No	Judgment No, SADC(T) 05/2008
Court	SADC Tribunal, Windhoek

Judge Pillay P, Mtambo J & Mondlane J

Heard 9 December 2010

Judgment 9 December 2010

Counsel *J J Gauntlett SC,* with him *F B Pelser,* for the applicants
No appearance for the respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

International law - *treaties - SADC Treaty - arts 4(c) and 6(1) -protection of the rule of law - right to an effective remedy -State refusing to pay judgment debts - a breach of obligation to uphold the rule of law - State Liabilities Act [Chapter 8:14] - s 5(2) -provision that state property may not be executed against in satisfaction of judgment debt - such provision discriminatory - provision also breach of right to equality* D *before the law and right to equal protection of the law*

Statutes - *State Liabilities Act [Chapter 8:14] - s 5(2) -provision that state property may not be executed against in satisfaction of judgment debt - such provision discriminatory-provision also breach of right to equality before the law and right to equal protection of the law* E

Headnote

The applicants had all, in various actions in the High Court *, been awarded damages against the Minister of Defence following acts of violence perpetrated on them by members of the army and police. In spite of the judgments, the awards of damages were not paid. The government relied F on the provisions of s 5(2) of the State Liabilities Act [*Chapter 8:14*], which provides that State property may not be executed against to satisfy a judgment debt. The applicants brought proceedings before the SADC Tribunal, seeking an order that the government was in breach of the SADC Treaty by failing to obey the orders of the courts and that s 5(2) of the Act, by immunizing the State against enforcement of judgment G debts, was also a breach of the Treaty. The applicants also contended that the respondent's failure to ensure the availability of effective remedies amounted to a breach of the principles of human rights provided for in articles 4(c) and 6(1) of the Treaty. The applicants also requested H

A that the amounts of damages (which had been awarded in Zimbabwe currency) be revalorised, following the hyper-inflation that had affected the value of the currency.

Held, that that arts 4(c) and 6(1) of the Treaty created an obligation on member states to respect, protect and promote human rights, democracy and the rule of law. The right to an effective remedy was a fundamental right B embraced by the concept of the rule of law. Where a state failed to provide effective remedies, it breached its obligation to uphold the rule of law.

Held, further, that on the issue of s 5(2) of the Act, a similar provision in South Africa had been held to be unconstitutional, in that it elevated the state above the law. The section was also discriminatory, because it C treated judgment creditors who had obtained judgments against the state differently from creditors who had obtained judgment against private litigants. This breached the right to equality before the law and the right to equal protection of the law. The section was thus in breach of the respondents' obligation under arts 4(c) and 6(1) of the Treaty, and that granting the state immunity from the execution of judgment debt had D an adverse effect on the rule of law.

Held, further, that art 12(h) of the SADC Charter of Fundamental Social Rights provided for revalorisation, in that it allowed for adequate inflation-adjusted compensation. As such, the Tribunal found that the damages awarded the applicants needed to be revalorised in the interests E of justice, to ensure that the real or actual value of the compensation orders is received by each

applicant. The agents of both sides should meet, under the supervision of the registrar of the Tribunal, to agree to a mutually satisfactory adjustment of the amounts of the damages.

Legislation considered

F State Liabilities Act [*Chapter 8:14*], s 5(2)

International instruments considered:

African Charter on Human and People's Rights, arts 3(1), 7(1)(a) & 26

European Covenant on Human Rights, art 13

International Covenant on Civil and Political Rights, arts 2(3) & 5(1)

G SADC Charter of Fundamental Social Rights, art 12(h)

SADC Treaty, arts 4(c) & 6(1)

Vienna Declaration and Programme of Action, arts 27 & 60

Cases referred to

H *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006)

Eden & Anor v Pienaar 2000 (1) SA 158 (W) A

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

Nyathi v MEC for Dept of Health, Gauteng, & Anor 2008 (5) SA 94 (CC)

Ramirez Sanchez v France Application 59450/00 (ECHR Judgment delivered 4 July 2006) B

ZLHR & Anor (of behalf of Meldrum) Zimbabwe 294/04 (African Commission)

Case information

J J Gauntlett SC, with him *F B Pelser,* for the applicants

No appearance for the respondent C

Judgment

Pillay P: The applicants are victims of violence inflicted upon them by the national police and/or the national army of the Republic of Zimbabwe (the respondent). Consequent upon the acts of violence, the applicants instituted proceedings against the Government of Zimbabwe in various courts in Zimbabwe. They were successful and judgments were entered as follows: D

Applicant's Name Amount Awarded Date of Judgment

1.	Barry L. T Gondo	Z$ 5 650 000	17 May 2006
2.	Kerina Gweshe	Z$ 810 000	1 March 2006
3.	Nyaradzai Katsande	Z$ 133 144	20 February 2003 E
4.	Peter Chirinda	Z$ 3 264 000	17 August 2003
5.	Phanuel Mapingure	Z$ 950 000	16November2005
6.	Ruth Manika	Z$ 8 552	1 July 2005
7.	Sophia Matasva	Z$ 4 850 000	29 March 2006
8.	Trust Shumba	Z$ 1 085 000	4 October 2004 F
9.	Mercy Magunje	Z$ 9 030	January 2007

The courts also made orders for interest in respect of each award and gave costs to the applicants. The judgment debts have not been paid. It is upon the non-compliance with the judgments or orders of the courts that this application has been brought. G

The applicants' case is that the respondent has violated arts 4(c) and 6(1) of the Treaty of the Southern African Development Community SADC (the Treaty) by:

(a) failing to ensure that effective remedies are available to them, and thus failing to act in accordance with the principles of human rights; and H

Pillay P

A (b) implementing measures likely to jeopardise the principles of human rights provided for in the Treaty.

Article 4(c) provides:

> "SADC and its Member States shall act in accordance with the following principles ... human rights, democracy, and the rule of law."

B Article 6(1) states as follows:

> "Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measures likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty."

In the circumstances, the applicants seek, the following reliefs:

C (a) a declaration that the respondent is in breach of the Treaty by failing to comply with orders of the High Court of that country;

(b) a declaration that s 5(2) of the State Liabilities Act [*Chapter 8:14*] of the respondent is in breach of the Treaty, in so far as it provides that property of the State may not form the subject-matter of execution, attachment D or process to satisfy a judgment debt;

(c) such further and/or alternative reliefs as the Tribunal may deem fit.

They also claim costs of the proceedings.

We note at the outset that, while the application is indeed chiefly about the respondent's non-compliance with the orders or judgments of its own courts E of law, it also raises the issue whether s 5(2) of the State Liabilities Act of the respondent is compatible with the obligations of the respondent under the Treaty, in so far as it immunises the respondent from enforcement of judgment debts against it, thereby removing any incentive for it to comply with the orders of the court and, ultimately, the observance of the rule of F law. Section 5(2), in the relevant part, reads:

> "Subject to this section, no execution, or attachment, or process in the nature thereof shall be issued against the defendant or respondent in any action or proceedings... against any property of the State, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant or petitioner, as the case may be."

G Such are the facts before us to which we must now apply the law. We must also mention here that the respondent has left default and not opposed the application on the merits.

As held by this Tribunal *in Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* 2008 (2) ZLR 343 (SADC T), art 4 (c) of the Treaty obliges Member States H of SADC to respect principles of "human rights, democracy and the rule

Pillay P

of law" and to undertake in terms of art 6(1) of the Treaty "to refrain from A taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty". Consequently, member states of SADC, including

the respondent, are under a legal obligation to respect, protect and promote human rights, democracy and the rule of law. B

It is settled law that the concept of the rule of law embraces at least four fundamental rights, namely, the right to have an effective remedy, the right to have access to an independent and impartial Court or tribunal, the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation, the right to equality before the law and the right to equal protection of the law. C

Article 2(3) of the International Covenant on Civil and Political Rights (the Covenant), which the respondent has ratified, states as follows :

> "Each State Party to the present Covenant undertakes:
>
> (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have *an effective remedy, notwithstanding that the violation* D *has been committed by persons acting in an official capacity*;
>
> (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, *and to develop the possibilities of judicial remedy;*
>
> (c) to ensure that the competent authorities *shall enforce such remedies –when* E *granted"*(the emphasis is ours).

Article 5(1) of the Covenant states that the provisions of art 2(3) above may not be impaired or limited through governmental acts, legislative or otherwise. It provides as follows:

> "Nothing in the present Covenant may be interpreted as implying for any State, F group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

Article 2(3) of the Covenant, when read in conjunction with art 5, thus forbids, in our view, any legislation or conduct which may render remedies ineffective or may obstruct the implementation of judicial remedies or may G provide state immunity from enforcement of court orders.

Furthermore, arts 27 and 60 of the Vienna Declaration and Programme of Action provide as follows:

> "*Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary* H

Pillay P

> A *and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non- discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development..."(the emphasis is ours).*

Article 13 of the European Convention on Human Rights provides as follows:

> "Everyone whose rights and freedoms as set forth in the Convention are violated B shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

In *Ramirez Sanchez v France* Application 59450/00 (ECHR Judgment delivered 4 July 2006), the European Court of Human Rights held that the absence of a remedy constitutes a violation of the Convention.

C Where a remedy exists, *it must be both effective in practice as well as in law.*

In the *Campbell* case, cited above, reference was made by this Tribunal to the pronouncement of the Inter-American Court of Human Rights on art 27(2) of the American Convention of Human Rights which requires American States to respect effective remedies before Courts of law or competent tribunals as follows:

> D "... the absence of an effective remedy to violations of the rights recognized by the Convention *is itself a violation of the Convention by the State Party in which the remedy is lacking.* In that sense, it should be emphasized that, for such a remedy to exist, *it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A* E *remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective"*(emphasis is ours).

Vide para 41 of the Advisory Opinion OC-9-87 of October, 1987, Judicial Guarantees in States of Emergency (arts 27(2), 25 and 8 of the American Convention on Human Rights).

F The African Charter on Human and Peoples' Rights (the Charter) which the respondent has ratified, for its part, provides in art 7(1)(a) as follows:

> "Every individual shall have the right to have his case heard. This comprises:
>
> (a) the right to an appeal to competent national organs against acts of violating his fundamental rights…."

G In *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006), the African Commission, in dealing with the State's refusal to pay a judgment debt, stated at paras75 and 77 as follows:

> "... Article 7 includes the right to the execution of judgment. It would therefore be inconceivable for this article to grant the right for an individual to bring an appeal before all the national courts in relation to any act violating the fundamental H rights without guaranteeing the execution of judicial rulings... as a result, the

---

> execution of a final judgment passed by a tribunal or legal court should be A considered as an integral part of the right to be heard which is protected in art 7.
>
> The African Commission remains conscious of the fact that without a system of effective execution, other forms of private justice can spring up and have negative consequences on the confidence and credibility of the public in the justice system."

Article 26 of the Charter provides as follows: B

> "States Parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

In *Zimbabwe Lawyers for Human Rights and Anor (on behalf of Andrew* C *Barclay Meldrum)* Zimbabwe 294/04 (African Commission), the African Commission held that Zimbabwe had violated art 26 and stated in paras 118 to 120 as follows:

> "It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative D to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute. *Without the rule of law and the assurance that comes from an independent judiciary, it is obvious that equality before the law will not exist.*
>
> *It is a vital requirement in a state governed by law that court decisions be* E *respected by the State, as well as individuals. The courts need the trust of the people in order to maintain their authority and legitimacy. The credibility of the courts must not be weakened by the perception that courts can be influenced by any external pressure.*
>
> *Thus, by refusing to comply with the High Court orders staying the deportation* F *of Mr Meldrum and requiring the respondent state to produce him before the court, the respondent state undermined the independence of the courts. This was a violation of art 26 of the African Charter"* (the emphasis is ours).

Finally, reference may be made to a decision of one of the courts in the SADC region, the Constitutional Court of South Africa, which has underlined the importance of states complying with court orders. In *Nyathi v MEC* G *for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) the Constitutional Court stated at para 80 as follows:

> "... In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That... means at the very least that there should be strict compliance with court orders." H

A We hold, therefore, in the light of the authorities quoted above, that the respondent is in breach of arts 4(c) and 6(1) of the Treaty in that it has acted in contravention of various fundamental human rights, namely the right to an effective remedy, the right to have access to an independent and impartial Court or tribunal and the right to a fair hearing.

B We now turn to examine the effect of s 5(2) of the State Liabilities Act [*Chapter 8:14*] of the respondent which has already been reproduced.

Section 5(2) is similar to s 3 of the State Liabilities Act 20 of 1957 of South Africa which was declared unconstitutional by the Constitutional Court in *Nyathi,* already cited above. The court held that s 3 placed the State above the law since it did not oblige the State to comply with court orders. The C court stated, *inter alia,* that s 3 infringed -

(a) the right to equality, since it disallows a judgment creditor who obtains judgment against the State the same protection and benefit that a judgment creditor who obtains judgment against a private litigant enjoys;

(b) the right of access to courts since "deliberate non-compliance with, or D disobedience of, a court order by the State detracts from the dignity, accessibility and effectiveness of the courts". Indeed, the right of access to courts obliges the State to ensure the enforceability of court orders - vide paras 40 and 43.

The court stated at para 18 that the State Liabilities Act "is a relic of a legal E regime which was pre-constitutional and placed the state above the law: a state that operated *from the premise* that 'the king can do no wrong'. That state of affairs ensured that the state and, by parity of reasoning, *its officials could not be held accountable for their actions"*(the emphasis is ours).

The Constitutional Court also considered at para 50 that these violations constituted unreasonable and unjustifiable limitations to the human rights F involved and that "the more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be..." The court then explained at paras 51 and 52 that

> "Section 3 serves to protect the state interests by disallowing attachment as it has the potential to disrupt service delivery and interfere with the state's accounting G procedures. The Act does purport to make the state liable for judgment debts that accrue against it. However, the processes involved in gaining satisfaction of such debts are not in place. The doors are closed before compliance has been achieved."

The court went on to remark at para 79 on the practical effect of s 3 as follows:

> "The practical effect of s 3 is that the state cannot be forced to honour court orders H as there is no manner in which compliance can be enforced. In the result, the

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> ordinary citizen has no effective remedy available in a situation where the state A and its officials fail to comply with a court order."

The court tellingly rejected, at paras 75 and 79, an argument to the effect that since a judgment creditor could seek a *mandamus* or, for that matter, initiate contempt of court proceedings, the restriction or execution against state assets was justified. The court stated that such an argument ignored the B harsh realities of litigation with its risks and expenses.

We would also refer to art 26 of the Covenant which states as follows:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political C or other opinion, national or social origin, property, birth or other status."

The Human Rights Committee has explained the provisions of art 26 in its *General Comment No. 18 on Non-Discrimination: 1989/11/10, CCPR* at paras 7 and 12 as follows:

> "The Committee believes that the term 'discrimination' as used in the Covenant D should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.
>
> ... Article 26 provides that *all persons are equal before the law and are entitled* E *to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds*. In the view of the Committee, art 26 does not merely duplicate the guarantee already provided for in art 2 but provides in itself an autonomous right. *It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore* F *concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of art 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in art 26 is not limited to those rights which are provided for in the Covenant*" (the emphasis is ours). G

It follows, therefore, that the list of grounds of discrimination in art 26 is non-exhaustive and that s 5(2) of the State Liabilities Act of the respondent is discriminatory in its content under art 26 of the Covenant, since it treats judgment creditors unequally, in that a judgment creditor who obtains judgment against the State is not given the same protection and benefit that a judgment creditor who obtains judgment against a private litigant is accorded. H

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A Article 3(1) of the Charter states as follows:

> "Every individual shall be equal before the law."

In the *Zimbabwe Lawyers* case, cited above, the African Commission has interpreted this article as follows at para 96:

> "The most fundamental meaning of equality before the law under art 3 (1) of the Charter is the right by all to equal treatment under similar conditions. The right B to equality before the law means that individuals legally within the jurisdiction of a State should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. Its meaning is the right to have the same procedures and principles applied under the same conditions. The principle that all persons are equal before the law means that existing laws must be applied C in the same manner to those subject to them. The right to equality before the law does not refer to the content of legislation, but rather exclusively to its enforcement. It means that judges and administration officials may not act arbitrarily in enforcing laws."

We consider that, although the African Commission has restricted its meaning of the right to equality before the law to the enforcement of the law as such, D if the content of the law itself does not allow the law to be enforced equally, as in the case of s 5(2) of the State Liabilities Act of the respondent, then art 3 (1) would be infringed, as the Human Rights Committee has demonstrated in its *General Comment No. 18,* quoted earlier.

We consider that s 5(2) of the State Liabilities Act of the respondent is also E in contravention of art 3(2) of the Charter which lays down that "every individual shall be entitled to equal protection of the law". The African Commission has interpreted art 3(2) in the *Zimbabwe Lawyers* case, already quoted, at paras 99-101 as follows:

> "Equal protection of the law under art 3(2), on the other hand, means that no person or class of persons shall be denied the same protection of the laws which F is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property and in their pursuit of happiness. It simply means that *similarly situated persons must receive similar treatment under the law.*
>
> In its decision in *Zimbabwe Lawyers for Human Rights and Anor* Zimbabwe (293/04) this Commission relied on the Supreme Court decision in *Brown v Board of Education of Topeka,* in which Chief Justice Earl Warren of the United G States of America argued that 'equal protection of the law refers to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness'.
>
> In order for a party therefore to establish a successful claim under art 3(2) of the H Charter, it should show that the respondent State had not given the complainant

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> the same treatment it accorded to the others. Or that the respondent State had A accorded favourable treatment to others in the same position as the complainant."

We hold, therefore, that, in the light of all the authorities already quoted by us, s 5(2) of the State Liabilities Act of the respondent is not only in breach of the right to an effective remedy, the right to have access to an independent and impartial court or tribunal and the right to a fair hearing but also in B contravention of the right to equality before the law and the right to equal protection of the law, and, therefore, is incompatible with the respondent's obligations under arts 4(c) and 6(1) of the Treaty.

We can only reiterate at this stage what the Inter-American Court of Human Rights stated at para 35 of its *Advisory Opinion* given in 1987, quoted in *Campbell,* already cited, namely that the rule of law, representative democracy C and personal liberty are essential for the protection of human rights and that "in a democratic society, the rights and freedoms inherent in the human person, the

guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning". D

In this regard, we draw the attention of any member State of SADC to the adverse effect which its existing State immunity or State liability legislation has on the principles of human rights, democracy and the rule of law, in so far as such legislation provides that State property cannot be the subject- matter of execution, attachment or process in satisfaction of a judgment debt.

We turn now to the issue of the damages awarded to the applicants which, E according to counsel for the applicants, should be revalorised, given that the currency of the respondent has suffered excessive depreciation over the years.

In *Eden and Another v Pienaar* 2000 (1) SA 158 (W) at 159B, the court explained the process of revalorisation as follows:

> "This process by which the law seeks to reflect and (counteract) the influence of F inflation on the amount of a claim is known as 'revalorisation'. Its effect is that the depreciation of currency does not redound to the benefit of the judgment debtor, and to ensure the that judgment creditor is protected against the ravages of inflation by receiving the actual value of the amount awarded in judgment, as on the day on which he is paid - no less and certainly no more. Although the face value of the debt increases once revalorisation is applied, its real value G does not: the purchasing power of the currency in which it is expressed remains constant. Accordingly, revalorisation has nothing to do with interest, nor does it increase the real value of a debt."

In this connection, reference may also be usefully made to art 12(h) of the SADC Charter of Fundamental Social Rights where the process of revalorisation is also mentioned and which states as follows: H

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> A "Workers have the right to services, that provide for the prevention, recognition, detection and compensation work related illness or injury, including emergency care, with rehabilitation and reasonable job security after injury and *adequate inflation-adjusted compensation"*(the emphasis is ours).

The amount of damages awarded to the applicants must, in our opinion, be revalorised, in the interests of justice, in order to ensure that the real B or actual value of the compensation awarded in the various court orders is received by each applicant on the date of full and final payment, after taking into account the adverse effects of runaway inflation. In other words, the damages awarded to the applicants must be inflation-adjusted.

We therefore hold and declare that -

C (a) s 5(2) of the State Liabilities Act [*Chapter 8:14*] of the respondent is in contravention of the fundamental rights to have an effective remedy; to have access to the courts; to be entitled to a fair hearing, to equality before the law and to equal protection of the law; in so far as it provides that property of the State may not form the subject-matter of execution, attachment or process to satisfy a judgment debt;

D (b) the respondent has acted in contravention of art 4(c) and 6(1) of the Treaty by:

(i) failing to comply with the orders of the High Court of Zimbabwe regarding the applicants;

E (ii) persisting in its non-compliance with the court orders referred to in subpara (i) above.

We further order the respondent's agents to meet with the agents of the applicants, under the supervision of the Registrar, to agree to a mutually satisfactory adjustment to the damages awarded in the court orders referred to in para (b)(i) above.

F In the event of non-compliance with the order made above by the Tribunal, the applicants may revert to this Tribunal on the same papers, appropriately amplified if necessary, in terms of art 32(4) of the Protocol on Tribunal, on written notice to the respondent's agents, for further relief regarding enforcement.

G With regard to the issue of costs, we shall first refer to r 78 of the Rules of Procedure of SADC Tribunal (the Rules).

Rule 78 provides as follows:

> "1. Each party to the proceedings shall pay its own legal costs.

2. The Tribunal may, in exceptional circumstances, order a party to the H proceedings to pay costs incurred by the other party."

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In terms of r 78, each party bears its own costs except where there are A exceptional circumstances warranting the grant of costs, in the interests of justice, against a party.

We consider that there are exceptional circumstances on the particular facts of the present case justifying the award of costs to the applicants in the interests of justice. We need only to highlight in this regard the fact that the respondent B persistently flouted the orders of its own High Court and that the applicants have not yet been paid the compensation to which they are entitled since the court orders were made in their favour in 2006 (in respect of the first and second applicants), 2003 (in respect of the third and fourth applicants), 2005 (in respect of the fifth and sixth applicants), 2006 (in respect of the seventh applicant), 2004 (in respect of the eighth applicant) and 2007 (in respect of C the ninth applicant). We accordingly award costs to the applicants, under r 78(2) of the Rules. The costs are to be taxed by the Registrar.

MTAMBO J and MONDLANE J concurred. D

* See, for example, *Gweshe* v *Min of Defence* 2006 (1) 189 (H) - Editor.

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Source:
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TRUSTEES, LEONARD CHESHIRE HOMES ZIMBABWE CENTRAL TRUST v CHITE & ORS 2010 (2) ZLR 631 (H)

Citation	2010 (2) ZLR 631 (H)
Case No	Judgment No. HH-267-10
Court	High Court, Harare
Judge	Uchena J
Heard	19 February 2010; 20 February2010; 13 March 2010; 27 May 2008; 29 May 2008; 30 May 2008; 25 February 2010; 26 February 2010; 11 March 2010; 7 September 2010; 21 September 2010; 28 October 2009; 29 October 2009; 16 February 2010; 26 February 2010; 2 March 2010; 5 March 2010; 6 April 2010; 7 April 2010; 10 May 2010; 11 May 2010; 2 September 2010; *CAV*
Judgment	15 December 2010
Counsel	*T Magwaliba*, for the plaintiffs *D S Mehta*, for the defendants (from 19 February 2009 to 11 March 2009) *N Mapanzure*, for the defendants (from 21 September to 29 October 2009) Defendants in person (from 15 February to 5 March 2010) *L Chimuriwo*, for the defendants (from 6 April to 15 December 2010)
Case Type	Civil trial

Annotations No case annotations to date

Flynote

Practice and procedure *-parties - locus standi - trustees of a trust - need for such trustee to aver his capacity - trustee not validly appointed or exercising powers after term of office has expired - no capacity to act*

E **Practice and procedure** *-point of law - when may be raised-may be raised at any time if it goes to root of the matter, provided no unfairness to other party results*

Trust *- trustee - appointment of- validity - need for trustee to hold office in accordance with trust deed - trustee staying on after expiry of term of office - actions and decisions by such trustee invalid - appointment of trustees by court- when court may appoint* F *trustees to ensure continuation of trust - court not entitled to assist trustees in disregard of trust deed*

Headnote

"Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be G raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed"*(dicta per* Korsah JA in *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) at 157 followed).

In protracted proceedings, the plaintiffs, who were, had been or claimed to be, members of a trust established to provide homes with the necessary H facilities and staff to care for the permanently disabled, sought the

eviction of the defendants from its home. It was the plaintiffs' case that A the defendants, who had been long term residents at that home, were no longer in need of rehabilitation. In terms of a resolution of the trustees of 30 November 1999, it was decided that the home should be closed "so as to enable it to make a fresh beginning." This was followed by a second resolution of July 2004 in which it was decided that the defendants B must be evicted from the home and the present litigation, to bring this about, was authorized.

When the matter came to trial, it was revealed that C, one of the plaintiffs' witnesses who had been appointed a trustee, as at 30 November 1999, had held that position for a period in excess of five years. This was in conflict with the trust deed which provided for tenure of office of C no more than five years. The resolution of 30 November 1999 was unimpeachable because the tenure of office of three of the five trustees, who had authorized the resolution on that date, had not been trustees in excess of the permitted five years. That resolution complied with a provision of the trust deed which stated that the trust should consist D of not less than two nor more than five trustees. Further difficulties, however, arose in regard to the subsequent, and crucial, resolution of 26 July 2004. In regard thereto, while new trustees had been appointed, many of the trustees had conducted trust business after their tenure of office had expired and, at one point, there were eight trustees instead of the permitted five. E

Faced with all this confusion and the difficulties arising therefrom, the plaintiffs submitted that the trust deed should not be construed strictly and that the court had jurisdiction to appoint new trustees in terms of ss 7 and 9 of the Companies and Association Trustees Act [*Chapter 24:04*].

Held, that a point of law which goes to the root of the matter may be raised at any time, even for the first time on appeal, if its consideration involves F no unfairness to the party against whom it is directed. The over-staying of the trustees was a point of law which went to the root of the case. Here, if all the trustees had over-stayed and while thus incapacitated had resolved to evict the defendants, their resolution would be invalid as they were at the time of making it not validly appointed trustees. The G issue of the validity of the trustees appointments was thus crucial to the resolution of the case. Proceeding without resolving it would have been a fruitless exercise divorced from reality and would have led to a wrong decision. No unfairness to the plaintiffs was involved and the issue had to be resolved before going into the merits of the dispute between the parties. It was an appropriate case for the court to raise *mero motu.* H

A *Held,* further, on the facts, that in July 2004 the trust business was being conducted in contravention of the trust deed and that there was a real danger that the defendants' evictions and this litigation were authorised by persons who were not authorized to make decisions for the trust

Held, further, that the power of assumption could only be exercised by existing trustees of the trust. It could not be exercised by a former trustee whose B term of office had expired.

Held, further, that while the provisions of a trust must be interpreted purposively to give effect to the objectives of the trust, that must be done without disregarding some provisions of the trust instrument. The purpose for which the trust was created could be gleaned from the whole C scheme of the deed of trust and the construction must be in agreement with all the provisions of the deed of trust. Sections 7 and 9 of the Companies and Association Trustees Act did not assist the plaintiffs. Those provisions provided for the appointment of trustees by the High Court so as to ensure the continuance in existence of the trust. *In casu,* one was concerned with the objectives of the trust and the manner in D which the trustees must hold office. The court could not disregard the trustees' failure to comply with the terms of their appointment in order to keep the trust in existence.

Quaere, whether in any event the trustees had *locus standi* to institute these proceedings. The general principle is that a person who is *de facto* E administering a trust as trustee has *locus standi* in any matter relating to the trust; so has a person who claims to be the rightful trustee and seeks confirmation of his status. However, a trustee bringing an action or application should aver his capacity, and that he was properly appointed by a given instrument, or by order of court.

Held, further, that the defendants' evictions were invalid and that the plaintiffs' F case must be dismissed with costs.

Legislation considered

Civil Evidence Act [*Chapter 8:01*], s 27

Companies and Associations Trustees Act [*Chapter 24:04*], ss 7 & 9

Cases referred to G

Bonsma NO v Meaker NO & Ors 1973 (2) RLR 16 (G); 1973 (4) SA 526 (R)

Barker McCormac (Pvt) Ltd v Govt of Kenya 1983 (1) ZLR 137 (H)

Ex p *Davenport & Mills* 1962 R & N 805 (SR)

Holness & Anor v Pietermaritzburg City Council 1975 (2) SA 713 (N)

H Exp *Exors Est Kemp* 1940 WLD 26

MacFoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC) A

Muchakata v Netherburn Mine 1996 (1) ZLR 153 (S)

Osman v Jhavary 1939 AD 351

Nissan Zimbabwe (Pvt) Ltd v Hopitt (Pvt) Ltd 1997 (1) ZLR 569 (S)

Exp Weir 1940 SR40

Zambezi Proteins (Pvt) Ltd & Ors v Minister of Environment & Tourism & Anor 1996 (1) ZLR 378 (H) B

Zesa v Bopoto 1997 (1) ZLR 126 (S)

Case information

T Magwaliba, for the plaintiffs

D S Mehta, for the defendants (from 19 February 2009 to 11 March 2009)

N Mapanzure, for the defendants (from 21 September to 29 October 2009) C

Defendants in person (from 15 February to 5 March 2010)

L Chimuriwo, for the defendants (from 6 April to 15 December 2010)

Judgment

Uchena J: The plaintiffs are trustees of the Leonard Cheshire Homes Trust, a trust established in terms of the trust laws of Zimbabwe. The Trust was established in 1981. The trustees, were appointed at different stages, as D will be clarified in the judgment. The main objective of the trust as provided in clause 3 (i) (a) of the Deed of Trust is,

> "(a) To provide Homes with the necessary facilities and staff for the care of permanently disabled people, irrespective of race or creed. The Homes shall be a place of shelter physically and a place of encouragement spiritually, a place in which residents and staff can acquire a sense of belonging and E of ownership by contributing in any way within their capabilities to its functioning and development, a place to share with others and from which to help others less fortunate; a place in which to gain confidence and develop independence and interests; a place of hopeful endeavour and not of passive disinterest. Persons admitted to the Homes must be able either to contribute to or benefit from the life of the Homes and must not suffer F from infectious disease".

The eight defendants are beneficiaries of the trust. They were admitted and housed at Masterson Cheshire Home situated at No 85 Baines Avenue in Harare. They have been residents of this home for considerable periods, most of them having been admitted into the home from the early to the late 1990s. G

The trustees served them with notices requiring them to vacate the home by a date specified in the notices. They challenged the ejectment, leading to a protracted trial which raged on for close to three years. The defendants are permanently disabled, with varying degrees of disabilities. Some have difficulties in speaking because of their disabilities. Most of them are wheelchair bound. They have difficulties in moving about. Their wheelchairs H

A enable them to move about, but that mobility needs the assistance of ramps to enable them to access buildings. During the trial we could only use courts on the ground floor and in the eastern part of the High Court, where they could access the court in their wheelchairs, through a particular door. Their trial could not be held in any other courtrooms. Whenever the user-friendly courts were not available the trial had to be postponed. Most of them are of B negligible to limited financial means. Two of them seem to be of reasonable to substantial means. On several occasions the trial had to be postponed because they could not raise legal fees and their legal practitioners had renounced agency. They, at some stages of the trial, had to represent themselves. The wheels of justice had to grind at their pace, to afford them a fair hearing.

C The notices to vacate were preceded by the deterioration of relations between the trustees and the defendants. The relationship deteriorated, to the extent that the trustees abandoned most of their responsibilities at Masterson Home, and the defendants would, on the other hand, deny the plaintiffs access to the home. The situation became desperate, leading the defendants to rent out D parts of the home to raise funds for their own sustenance, and the payment of rates, water and electricity bills for the home. The home's employees who should have been assisting the defendants were no longer available. The home was clearly not being run as was expected in terms of clause 3(i)(a) of the Deed of Trust. The trustees had abandoned their responsibilities and lost control of the home, while the defendants had exceeded the bounds of E the terms on which they were admitted into the home.

The defendants' main and arguable defence to the plaintiff's claim for their eviction was that they had been admitted into the home with a promise from the trustees that they would stay in the home for life or for as long as they wanted. During the trial a new defence arouse from the evidence of Mr F Chikwanha, who had been a trustee of Leonard Cheshire Homes since the early eighties. He, while testifying, revealed that he had been a trustee for more than the five years provided for in s 5(c) of the Deed of Trust which provides as follows;

> "A trustee shall serve for a term of five years unless he sooner becomes unfit or unwilling to serve or is removed, In the event that for reasons, set out above, any G trustee does not serve for a term of five

> years, then the Leonard Cheshire Homes Zimbabwe shall appoint a trustee by majority decision to serve the remainder of the term of the former trustee who left office under this section".

In the event of a trustee having served his five year term, as Mr Chikwanha had done, the procedure laid down in s 5(b) had to be followed in appointing H another trustee. Section 5(b) provides as follows:

Uchena J

> "Other than the founding trustee Anthony Alven Upfill-Brown the remaining A trustees shall be nominated and appointed by a majority decision of the Leonard Cheshire Homes Zimbabwe".

The point of law

The revelation of Mr Chikwanha's overstaying as a trustee attracted Mr *Mehta's* attention and he sought to cross-examine him on that issue. Mr B *Magwaliba* objected on the ground that that defence had not been raised in the defendant's plea. I overruled him, holding that a point of law can be raised at any time during the proceedings and even on appeal. Mr *Mehta* cross-examined Mr Chikwanha and other witnesses for the plaintiff on this issue, revealing that not only Mr Chikwana had overstayed as a trustee. I assumed *Mr Magwaliba* had accepted my overruling him, as it is trite that C a point of law can be raised at any time during the trial and can be raised by the court *mero motu.* I assumed wrongly, as he raised the issue again in his closing address. The issue must therefore be addressed in detail.

Apart from Mr Chikwanha admitting in his evidence in chief that he had overstayed as a trustee, this fact was unknown to the defendants. The D defendants in their evidence said this was detected by their legal practitioner when he read the deed of trust. In my view, the overstaying of trustees is a point of law which goes to the root of the case. Assuming that all trustees of the plaintiff had overstayed and they, while thus incapacited, resolved to evict the defendants, their resolution would be invalid as they were at the time of making it not validly appointed trustees. They may also have E no *locus standi in judicio* to prosecute the claim for eviction. These being points of law that go to the root of the case, in that the resolution to evict may be a nullity, and plaintiff's may have no *locus standi* to prosecute this case, I am satisfied that I was entitled to overrule *Mr Magwaliba's* objection. I find support for my decision in *Zambezi Proteins (Pvt) Ltd & Others v Minister of Environment & Tourism & Anor* 1996 (1) ZLR 378 (H) at 391B-C, F *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S), *Nissan Zimbabwe (Pvt) Ltd v Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (S), *Zesa v Bopoto* 1997 (1) ZLR 126 (S) and *Barker McCormac (Pvt) Ltd v Goverment of Kenya* 1983 (1) ZLR 137 (H).

In *Zambezi Proteins supra* at 391B-C Garwe J (as he then was) said: G

> "I accept that a point of law which goes to the root of the matter may be raised at any time, even for the first time on appeal if its consideration involves no unfairness to the party against whom it is directed: *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S). But this is not the position in this matter."

He did not rely on that procedure because the point of law had been raised during argument. In this case, it was raised during the cross-examination of H

Uchena J

A the plaintiff's first witness. Its being raised at that stage would not be unfair to the plaintiff which could re-examine its first witness on that issue and would lead its other witnesses on it in chief.

In *Muchakata v Netherburn Mine supra,* the Supreme Court held that, it was proper to raise a point of law, which went to the root of the matter, at any time, even for the first time on appeal, if its consideration involved no B unfairness to the party against whom it was directed. If the order was void *ab initio,* it was void at all times and for all purposes and the question of its validity could be raised at any time. The appellant's willful disobedience to an unlawful order gave the respondent no right to dismiss him. Korsah JA at p 157A-C said,

> C "Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed: *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G.

If the order was void *ab initio* it was void at all times and for all purposes. It D does not matter when and by whom the issue of its validity is raised; nothing can depend on it. As Lord Denning MR so exquisitely put it in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1405 at 1409:

> ' If an act is void, then it is in law a nullity. It is not only bad, but incurably bad... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'"

E In this case, the issue of the validity of the plaintiff's resolution to evict the defendants arose in circumstances which could not cause unfairness to the plaintiff. It would have been wrong for the court to ignore the legal issue and pursue the trial on the pleaded issues. I was satisfied that no definitive law requires the issue of the validity of the plaintiff's resolution to be specially F pleaded.

In *Nissan Zimbabwe supra* at 572C-E Korsah JA, again dealing with the issue of the raising of a point of law at any stage of a trial, said:

> "See also *Cole v Govt of the Union of South Africa* 1910 AD 263 *per* Innes J at pp 272-3, cited with approval by Jansen JA in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-H. And I most respectfully agree with the G observation of Jansen JA at p 24B of the report that -
>
> > ' If, for example, the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discussed and stated, the court could hardly be bound to ignore the fundamental problem and only decide the secondary and dependent issues actually mentioned in the special case. This would be a fruitless exercise, H divorced from reality, and may lead to a wrong decision.'"

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In this case, as already said, the raising of the issue of the validity of A the trustees' appointments was crucial to the determination of this case. Proceeding without resolving the validity of the plaintiff's resolution would have been a "fruitless exercise divorced from reality", and would "lead to a wrong decision".

Proceeding without dealing with this issue would have been the adoption of B a supine approach referred to in *Barker McCormac (Pvt) Ltd supra.* If the defendants' counsel had not raised the issue this was an appropriate case for the court to raise it *mero motu.*

In *Zesa v Bopoto supra* at 127 Korsah JA said:

> "Failure to comply with the provisions of the Regulations amounts to an irregularity C which is a point of law that can be raised at any time. It seems that to raise a point of law for the first time on appeal:
>
> > '... it is sufficient to show that the point of law which is the subject of appeal has been brought before the judge's mind. Whether this, is effected by argument or observation of the advocate, or whether the judge's own mind originated the point, makes no difference, so long as the point was before D his mind in the case under appeal':
>
> *per* Avory J in *Kimpson v Markham* [1921] 2 KB 157 at 161."

In this case, failure to comply with the terms of trusteeship by the plaintiff's trustees is a point of law which must be resolved, before going into the merits of the dispute between the parties. E

Validity, of the resolution, to evict and plaintiff's *locus standi*

As already stated, the deed of trust provides for five year terms of office for its trustees. If a trustee exceeds his term of office, he cannot make valid decisions for the trust. It is common cause that Mr Chikwanha, who was a trustee and chairman for many years, had exceeded his mandate in two respects for the periods he was the trust's chairman. Section 7(a) of the Deed F of trust provides as follows:

> "The Board of Trustees shall at their first meeting elect a Chairperson who shall hold office for one calendar year. At the end of that first calendar year from the date of creation of the Trust and at the end of each calendar year thereafter, the Board of Trustees shall at the first meeting in that year similarly elect a G Chairperson for that year."

In terms of s 7(c) of the Deed of Trust, the decision of the trustees shall be by simple majority, and where there is an equal number of trustees, the Chairman of the Board of Trustees shall have a casting vote.

This means Mr Chikwanha could, where there was a simple majority, have cast one invalid vote but where there was equality of numbers, he cast two H

Uchena J

A invalid votes. This has to be considered throughout the period when the eviction of the defendants was discussed and resolved.

The first decision requiring the defendants to leave the home was made at the meeting of 30 November 1999, were it was recorded that:

> "The Trustees were unanimously agreed that it was essential that the Home be closed to enable it to make a fresh beginning".

B This was preceded by a general discussion where it was "stressed that there were residents at Masterson who should move on as they had obviously been adequately rehabilitated. It was agreed that it was necessary to have each resident assessed medically and a planned rehabilitation program installed".

C The Trustees, who, attended this meeting, were Messers Chikwanha (Chairman), G Mills, C. Gomwe, A Hungwe. and C. Dengedza. As they unanimously agreed on the closure of the home, there was no need for Mr Chikwanha to use his then invalid casting vote. I say his vote and casting vote was invalid because, according to Exhibit 3, minutes of the trustees meeting held on 10 March 1983, Mr Chikwanha was already a trustee. D Assuming his term started at that meeting, it must have expired by 10 March 1988. He therefore could not, without being re-elected, have been a validly appointed trustee or chairman by 10 March 1999. Mr Chikwanha conceded the invalidity of his holding office after his five year term.

Mr G Mills's tenure was not properly ventilated. Under cross-examination E Mr Chikwanha said he does not know when it was suggested he had been a trustee since 1980. The onus to prove the validity of his participation in 1999 was on the plaintiff. I therefore hold that he too cannot be said to have validly participated in the decision made on 10 March 1999.

Mr C Gomwe, according to the minutes of 12 March 1998, became a trustee F from 12 March 1998. Subject to the validity of his appointment, he was therefore within his term when the decision to close the home was made on 10 March 1999.

Mr A Hungwe in his evidence told the court that he became a trustee in 1998 and that his five-year term expired in 2002. His evidence on this aspect G was not challenged. He was therefore a validly appointed trustee when the decision to close the home was made on 10 March 1999.

Mr Chikwanha told the court that Mr Dengedza had not overstayed when the meeting of 10 March 1999 was held. The defendants did not lead any evidence to contradict Mr Chikwanha's evidence. I am therefore satisfied H he was entitled to act as a trustee at that meeting.

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The fact that there were three trustees still within their five-year terms at this A meeting means the decision arrived at by that meeting is valid. In terms of clause 5(a) of the Deed of Trust, the trust shall consist of not less than two and not more than six trustees. The fact that more than two validly appointed trustees decided on some of the defendants moving on at that meeting settles the issue of the validity of that decision. B

Thereafter other trustees were appointed from time to time, leading to Messers C Gomwe, B Chikwanha, G Mills, C Muzondo, A Hungwe and W Choto attending the meeting of 26 July 2004, which authorised the eviction of the defendants and the institution of this litigation. It is common cause that Messers Gomwe, Chikwanha, Mills and Hungwe had overstayed as trustees. Mr Choto testified and told the court that he was appointed as a C trustee in 2004. The minutes of the meeting of 26 July 2004 indicates that he was appointed a trustee at that meeting. He was therefore appointed by Messers C Gomwe, B Chikwanha, G Mills and A Hungwe, whose terms of office had expired. He also told the court that Mr Muzondo told him that he had been a trustee for three years, when he was appointed a trustee. D That evidence was not contradicted by the defendants. Mr Muzondo was not called to testify for the plaintiff. Mr Choto's evidence on the statement made to him by Mr Muzondo is therefore hearsay. In terms of s 27(1) of the Civil Evidence Act [*Chapter 8:01*], such first hand hearsay evidence is admissible, subject to its satisfying the requirements of s 27(4) of the Act. Section 27(1) and (4) provide as follows; E

"27 (1) Subject to this section, evidence of a statement made by any person, whether orally or in writing or other wise, 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.

(2) ...

(3) ... F

(4) In estimating the weight, if any, to be given to evidence of a statement that has been admitted in terms of subsection (1), the court shall have regard to all the circumstances affecting its accuracy or otherwise and, in particular, to —

(a) whether or not the statement was made at a time when the facts contained in it were or may reasonably be supposed to have been fresh in the mind G of the person who made the statement; and

(b) whether or not the person who made the statement had any incentive, or might have been affected by the circumstances, to conceal or misrepresent any fact."

There is no doubt that Mr Muzondo made the statement to Mr Choto on a memorable occasion which must have triggered the event in his memory. H

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A He was telling a person close to him of when he had joined the trust. There was then no pending litigation or reason why he would have wanted to conceal or misrepresent facts. I would therefore accept that Mr Choto and Mr Muzondo were, subject to the validity of their appointments, still within their five year terms of office.

B Mr *Chimuriwo,* for the defendants, relying on *Osman v Jhavary* 1939 AD 351 at 358-9, Ex p *Kemp's Executor* 1940 WLD 26 and *MacFoy v United Africa Co. Ltd* [1961] 3 All ER 1169 at 1172, raised the issue of the validity of the appointment of these trustees by persons who were no longer validly holding office as trustees. He argued that those who held office invalidly C could not make valid decisions therefore the two were not validly appointed. In *Osman's* case *supra* Tindall JA said at p 358:

"The first ground on which the exception was supported by Mr *Shaw* on behalf of the defendants, is that there is an implication in clause 11 of the trust deed that the rest of the trustees, though their authority in other respects has ceased, have the power to convene a general meeting to elect trustees afresh. The language D of the trust deed is not capable of such a construction"

In this case, the language of the deed of trust is clear on a trustee's term of office. It is limited to a period of five years. One cannot therefore continue to be a trustee when one's term of office comes to an end. Mr *Chimuriwo* therefore argued that the trustees whose terms of office had expired could E not validly appoint new trustees.

In Ex parte *Kemp's Executor supra* it was held that:

"for there can be no obligation where there is no person with a right to enforce it".

In *MacFoy supra* it was held that:

F "if an act is void then it is in law a nullity. It is not only bad but incurably bad ... You cannot place something on nothing and expect it to stay there. It will collapse".

Mr *Chimuriwo's* submissions may be valid if terms of office of all the trustees who sat at the meetings which appointed Messers Choto and Muzondo's G had expired. It is common cause that Messers C Gomwe, B Chikwanha, G Mills, and A Hungwe's terms of office had exceeded the five year limit. They could not have validly appointed Mr Choto on 26 July 2004.

Section 5(b) of the Deed of Trust provides that a trustee shall "be nominated and appointed by a majority decision of The Leonard Cheshire Homes H Zimbabwe".

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The trustees were therefore given the power of assumption referred to by A Cameron and Ors *Honoré's South African Law of Trusts* 4 ed at p 131, where the learned authors said:

"It is common practice for the founder of a trust to give the trustees the power of assuming additional trustees to act with them. A power of this sort is called a power of assumption. Assumption is that species

> of appointment which results from nomination by one or more of the existing trustees together with the other B requirements, including acceptance by the appointee."

It is important to note that assumption can only be exercised by existing trustees of a trust. It cannot be exercised by a former trustee whose term of office has expired.

The lawful quorum of the trust is two trustees. Mr Muzondo, sitting alone, C could therefore not have validly appointed Mr Choto. One trustee cannot validly sit and make decisions on his own, because the minimum number of trustees required by the deed of trust is two. Similarly, Mr Muzondo could not, on his own, have authorised the institution of litigation to evict the defendants. Even in a case where one trustee of the two appoints a new trustee, or makes a decision, his decision can not prevail as it cannot D constitute a majority decision required by s 5(b) of the Deed of Trust. The Deed provides that were there is equality of numbers the chairmen can exercise his casting vote. The chairman at this meeting was Dr Hungwe, whose term of office had expired. I am therefore satisfied that Mr Choto was not validly appointed a trustee of the plaintiff. There is also no evidence E of how and when Mr Muzondo was appointed a trustee of the plaintiff. Mr Choto told the court that he was appointed three years before him. That does not reveal the names of the trustees who appointed him to enable this court to determine whether or not his appointers still lawfully held the offices of trustee, and therefore whether Mr Muzondo was validly appointed. This could easily have been established by calling F Mr Muzondo, as the plaintiff's witness, or by producing minutes, of the meeting at which he was appointed.

The trust's business was being conducted in contravention of the provisions of the deed of trust, to an extent that it would be dangerous to assume that Mr Muzondo was properly appointed. Many trustees conducted the business of the trust when their terms of office had expired. The trust at one point G had eight trustees, instead of the maximum of six. The various chairmen of the trust exceeded their one-year terms. There is a real danger that the defendant's eviction and this litigation were authorised by persons who were not entitled to make decisions for the trust, as many trustees whose terms had expired participated at the meeting of 26 July 2004. The lack of clarity on Mr Muzondo's appointment, and his having been the only one, H

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A who if he was validly appointed, had been within his term of office when Mr Choto was appointed, invalidates the decision to evict made by those who purported to be the trust's trustees on 26 July 2004.

Mr *Magwaliba* submitted that the court should uphold the decision of the trustees, in spite of the above mentioned irregularities in their holding office B as trustees, as a trust must not fail for want of trustees. He urged the court to interpret the deed of trust purposively in order to give it meaning rather than defeating, its objectives. He referred to *Holness & Anor v Pietermaritzburg City Countil* 1975 (2) SA 713 (N) at 719G-H where Shearer J said:

> "Clearly one would expect the administrators to be given notice of expropriation as they are the persons who would decide whether to contest its validity, to decide C on the claim for compensation and generally to order the affairs of the trust. If they die the trust does not fail for want of administrators or administrator. The court will appoint new administrators and thus recognise the continuation of the trust and the endorsement remains unaltered. If no new administrators have been appointed the local authority may apply for the appointment of new administrators just as it may for the appointment of a curator of an 'owner' of D unsound mind."

Mr *Magwaliba* thus submitted that the court, in furtherance of the continuation of a trust, is at common law given a wide discretion to appoint a trustee or additional trustees. I agree that the provisions of a trust must be interpreted purposively to give effect to the objectives of the trust. That, however, must be done, without disregarding some provisions of the trust instrument. The E purpose for which the trust was created is gleaned from the whole scheme of the deed of trust. Therefore the purposive construction must be in agreement with all the provisions of the deed of trust. *Mr Magwaliba* sought to persuade the court not to strictly interpret the deed of trust's provisions on the trustees' terms of office, arguing that that is why the court has jurisdiction to appoint F trustees. He referred to Ex p *Weir* 1940 SR 40, *Bonsma NO v Meaker NO* 1973 (2) RLR 16 (G); 1973 (4) SA 526 (R), Ex p *Davenport & Mills* 1962 R & N 805 (SR), where the court appointed trustees. He also referred to *Honoré's South African Law of Trusts* 4 ed (1992) at 140 where the learned authors say:

"It is a fundamental principle of trust law that a trust will not be allowed to fail G for want of a trustee. Hence the court has a wide jurisdiction and indeed a duty to appoint trustees when there are none and when necessary to appoint additional and substitute trustees. The jurisdiction is given in order that the objects of the trust may be fulfilled. The jurisdiction is derived from the common law, not from the terms of the trust instrument. Hence it may be exercised in a sense contrary to that of the trust instrument, as when the court removes a trustee in whom the H founder has confidence, or appoints more trustees than the founder prescribed."

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In our law the common law position has been altered by ss 7 and 9 of the A Companies and Associations Trustees Act [*Chapter 24:04*], hereinafter called "the Act", which provides for the appointment of trustees by the High Court on the application by petition of persons there mentioned. Sections 7 and 9 of the Act provides as follows:

"(7) As often as by death, unsoundness of mind, resignation, failure to elect, B absence from Zimbabwe or other cause, the trustees or any of them of any such company or the office-bearers or other trustees of any association, or of any association which under section five is placed under this Act, become incapable of acting in the execution of the trusts for such company or association, it shall be lawful for any person who is a member of or interested in such company or association to apply by petition to the High Court for such order as he conceives C himself entitled to, and he may by affidavit give such evidence in support of such petition as he thinks fit, and may serve notice of such petition upon such person or persons as he may think it needful or expedient to serve with such notice:

Provided that upon or before the hearing of such petition the court in which it is pending may order service of notice of such petition upon any person or persons whom the court thinks fit, and may order such notice to be published D in the *Gazette.*

(9) If in any case it happens that any immovable property has been granted or transferred to any unincorporated society or body established for religious, charitable or educational purposes by the name borne by such society or body, E and not through the instrumentality or intervention of office-bearers or other trustees acting for and representing such society or body, it shall be lawful for any person who is a member of, or interested in, such society or body, to apply by petition in manner and form as in section *seven* mentioned for the appointment of trustees for such society or body; and the court to which such petition is presented, proceeding in manner and form as in sections *seven* and F *eight* mentioned, may if satisfied that the appointment of trustees to act for and represent such society or body is expedient, appoint such trustees; and section *eight* shall in substance apply to the appointment of such trustees, and to the power of providing how new trustees shall be afterwards appointed, and to all other matters in section *eight* contained."

Sections 7 and 9 provide for the appointment of trustees by the High Court G to ensure the continuation in existence of a trust. It is the trust that the law is interested in sustaining, and not decisions of trustees whose terms of office have expired or trustees appointed by persons who had no mandate to act for the trust. Section 7 covers the trustees' inability to act because of "death, unsoundness of mind, resignation, failure to elect, absence from Zimbabwe or other cause". In this case, other causes would cover the trustees' exceeding H

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A their terms of office and failure to elect would cover the trustees who had exceeded their terms of office and failure to validly appoint new trustees.

In this case, the objectives of the trust and the manner in which trustees must hold office are clear. It is also clear that the trustees exceeded their terms of office. This court cannot therefore, in order to give effect to the objectives of the trust, interpret the deed of trust in a manner inconsistent with the B limitation of the trustees' terms of office. The objective of the trust is for it to be managed, in favour of disabled people, by people holding office in compliance with its provisions. That is consistent with the law which gives the court authority to appoint trustees to enable a trust's existence to continue if there are no trustees or those holding office are doing so contrary to the C provisions of the deed of trust. It is therefore my view that the court cannot disregard the trustees' failure to comply with the terms of their appointment in order to keep the trust in existence. The court would, if there are no lawfully appointed trustees, on application by interested parties, appoint new trustees who would continue to uphold the objectives of the trust and decide the way forward concerning the eviction of the defendants. I cannot uphold invalid D decisions made by trustees who

no longer had the mandate to manage the affairs of the trust. Failure to uphold the trustees' decision of 26 July 2004 does not bring the existence of the trust to an end. It merely invalidates a decision made by persons who were no longer the trust's trustees, and those who had been improperly appointed by persons who were no longer the trust's trustees.

E On the issue of *locus standi,* according to *Honoré op cit* p 290, the general principle is that "a person who is *de facto* administering a trust as trustee has *locus standi* in any matter relating to the trust; so has a person who claims to be the rightful trustee and seeks confirmation of his status". This tends to show that the plaintiff might have had *locus standi* to institute these F proceedings. However at p 291 the learned authors say:

> "A trustee bringing an action or application should aver his capacity, and that he was properly appointed by a given instrument, or order of court."

In view of most of the plaintiffs' trustees having conceded that they had exceeded their terms of office, and others having been appointed by those G who had by lapse of time lost their mandate to appoint new trustees for the trust, it is inconceivable how these trustees can aver their capacity, and that they were properly appointed in terms of the deed of trust. The law requires the trustee to bring the action in his capacity as a trustee and not in his private capacity. It seems to me that once a person loses his capacity as a trustee, he may also lose his *locus standi.* The general rule, referred to above, may H if the facts reveal lack of capacity, yield to the need for a trustee to aver his

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capacity and the propriety of his appointment. As this point has not been A argued by the parties, I will not make a definitive finding on it.

In the result, I find that the decision made by the plaintiffs on 26 July 2004 to evict the defendants is invalid. The plaintiff's case is therefore dismissed with costs. B

Magwaliba & Kwirira, plaintiff's legal practitioners *Maja & Associates,* defendant's legal practitioners C

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