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DUDKA & ORS v CHENI INVESTMENTS (PVT) LTD & ORS 2011 (1) ZLR 1 (H)

Citation	2011 (1) ZLR 1 (H)
Case No	Judgment No. HH-124-11
Court	High Court, Harare
Judge	Makoni J
Heard	6 May 2010
Judgment	15 June 2010*
Counsel	*T Mpofu,* for the first applicant *L Uriri,* for the second and third applicants *L Mazonde,* for the fourth applicant *S Tsaurayi,* for the third, fourth and fifth respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Arbitration – *award – when becomes effective – takes effect when granted – not necessary for award to be registered to become binding – registration of award – only necessary for execution of award*

D **Property and real rights** – *Deeds Registry – caveat – failure of Deeds Registry to register a caveat – has no effect on the prior claim of the purchaser to the property*

Property and real rights – *res litigiosa – when res can be said to become litigiosa – interim arbitral award barring transfer of property – property res litigiosa – alienation of property which is res litigiosa – may be* E *alienated as long as the rights of the non alienating litigant are protected – sale valid inter partes only – right of recovery of such property by litigant*

Headnote

In a consolidation of three cases, the evidence disclosed that the applicants had bought residential units from the first respondent in a cluster housing F scheme being developed by the second respondent on land owned by the first respondent. The applicants had then entered into building contracts with the second respondent. In one of the three cases, D, one of the applicants, made due payment of the purchase price. A dispute, however, arose due to the failure of the second respondent to fulfill his obligations in terms of the building contract. This resulted in the matter G being referred to arbitration. The arbitral award was to the effect that the agreement of sale was valid and, as the second respondent was in breach of his obligations in terms of the building contract, D was entitled to take

Makoni J

over the construction of the house. She was entitled to her share in the A first respondent which would confer on her ownership and possession of the house. The new building contractor, however, was unable to complete the house because other persons were claiming ownership of the house. A search of the Deeds Registry revealed that the unit had been transferred to one of the respondents. Further disputes arose between B two other applicants and the second respondent.

During the course of the resulting arbitration, they obtained an interim order that, pending the finalization of the matter, the first and second respondents were interdicted from selling or otherwise disposing by way of share transfer of the property in issue. Although this interim order was served on the Registrar of Deeds (the sixth respondent), transfer C of the property by way of share transfers in defiance of or in negligent disregard of the order were effected by him to various other respondents. All three applicants, together with a fourth, who was a victim of similar irregularities, sought orders against these other respondents setting aside the share transfers. The applicants argued that the transfers were D effected in spite of a caveat placed against the property and, in any event, the property was *res litigiosa* and incapable of being alienated to their prejudice. It was the case of the various respondents, who had purchased the property, that they were unaware of the arbitral proceedings and were innocent purchasers for value of their respective units.

Held, that in terms of art 17 of the Schedule, an arbitrator has power to order E interim measures which include, *inter alia*, an interdict. In terms of art 35 an arbitral award shall be recognised as binding and upon application in writing to the High Court shall be enforced. Article 35 brings out two distinctive features of an arbitral award. The first one is its binding nature and the second one its enforceability. An award takes effect upon F its grant. Its execution has no effect on whether it is binding or not. A party can chose to obey an award, in which event there would not be need for the award to be registered. Registration allows for execution. The respondents could not, therefore, succeed in their argument that when registration of transfer was effected to them, the award had not G yet been registered with the High Court.

Held, further, that although the negligence or incompetence of the Deeds Office in failing to register the caveat resulted in the property in issue being transferred to the respondents, it would not be fair and just to rule that the failure by the Deeds Registry to register the caveat had the effect of nullifying the applicants' prior claim to the property. H

Makoni J

A *Held*, further, that it was not necessary to decide the stage at which a subject matter becomes *res litigiosa* in arbitration proceedings. However, at the time that the property was sold and transferred, there was an interim arbitral award barring the transfer of the property pending the determination of the dispute between the applicant and the first and second respondents. The property was therefore *res litigiosa*. The first B and second respondents thus had no authority to deal with the property the manner they did. The fact that a thing is *res litigiosa* does not preclude or prevent it from being alienated or similarly dealt with, as long as the rights of the non-alienating litigant in the *res* are protected. The agreement of sale of the *res litigiosa* between the litigating party C and a third party is valid *inter partes*. The purchaser is bound by the judgment in the action and the successful party can recover the *res* from the new possessor by execution and without fresh proceedings. The sale between the third, fourth and fifth respondents and the first and second respondents, while valid *inter partes* only, was to the prejudice of the applicants, who should therefore, recover their respective units from D them without the need for fresh proceedings.

Cases cited

Gardner v Dampier Development & Ors 2010 (1) ZLR 306 (H)

Mwayipaida Family Trust v Madoroba & Ors 2004 (1) ZLR 439 (S)

Supa Plant Invstms (Pvt) Ltd v Chidavaenzi 2009 (2) ZLR 132 (H)

E *Zimbank Ltd & Anor v Consol Pipe Fittings (Pvt) Ltd & Anor* 2000 (1) ZLR 672 (H)

Legislation considered

Arbitration Act [*Chapter 7:15*], Schedule: arts 17 and 35

Case information

F *T Mpofu,* for the first applicant

L Uriri, for the second and third applicants

L Mazonde, for the fourth applicant

S Tsaurayi, for the third, fourth and fifth respondents

Judgment

G **MAKONI J:** The above matters were filed as case numbers HC 3855/09, HC 3846/09 and HC 3891/09. At the hearing of the matter, the parties agreed that the matters be consolidated as all the matters raised the same issues. I consolidated all three matters.

The background to the matters is that the applicants bought residential units H from the first respondent in a cluster housing scheme being developed by the

second respondent on land owned by the first respondent. They also entered A into building contracts with the second respondent.

The first applicant (Dr Dudka) bought share number 9. She paid the full purchase price. A dispute arose due to failure of the second respondent to fulfil his obligations in terms of the agreement. By mutual agreement, the dispute was referred to arbitration. The arbitral award was to the effect that B the agreement of sale was valid. Since the second respondent had failed to comply with his obligations in the terms of the building contract, Dr Dudka was entitled to take over the construction of the house. The respondents were to transfer to Dr Dudka her share in the first respondent which would confer ownership and right to possession of unit 9.

Following the award, Dr Dudka engaged building contractors to complete C the house. The contractors were confronted by certain persons who claimed ownership of the unit. A deeds search was done and it revealed that the unit had been transferred to the first respondent (Khan).

The second applicant (Russell) bought share number 5 from the first respondent. He also entered into a building contract with the second D respondent. The third applicant (Fair Coat) bought shares number 6 and 12 from the first respondent. It also entered into a building contract with the second respondent. A dispute arose between the parties and was referred to arbitration. On 23 October 2008, Russell obtained an interim order to the effect that pending the finalisation of his matter and that of Fair Coat, the E first and second respondents were interdicted from selling, disposing of or transferring in whole or in part, by way of share transfer or any one method, the property in issue which is the remaining extent of lot 3 Lewisam of Lot E of Colne Valley of Rietfontein situate in the district of Salisbury and measuring 2.6638 hectares. It was also ordered that the copy of the award be served on the Registrar of Deeds, Registrar of Companies and Messrs Ernst & F Young. The order was served on the Registrar of Deeds on 23 October 2008.

The dispute was finally resolved by an award in favour of Russell and Fair Coat. This award was registered with this court on 21 May 2009. The order provided, *inter alia*, for the issue to Russell of share number 5 of Cheni Estates (Pvt) Ltd giving Russell right of ownership of unit 5. It also ordered G the issue of share number 4 and 12 of Cheni Investments (Pvt) Ltd to Fair Coat giving it the right of ownership over unit 4 and 12. It further ordered the Deputy Sheriff to give effect to the order by signing necessary documents to effect transfer to Russell and Fair Coat.

The fourth applicant ("John") bought share number 3 from the first respondent and also entered into a building contract with the second respondent. The H

A respondents failed to comply with their obligations in terms of the building contract. John took over the construction. Around June 2009, he discovered that the first respondent had transferred his unit to Khan. The applicants then filed the present proceedings seeking the setting aside of the transfer

of their units to the third, fourth and fifth respondents and an order to have the units transferred into their names.

B The first and second respondents did not file heads of argument and they were automatically barred. They did not appear on the day of hearing.

The applicants seek their orders based on three main grounds. First, they contend that when transfer was effected, the same proceeded in defiance of a judicial caveat placed against the property. Secondly, the property transferred C was *res litigiosa* and incapable of being alienated to the prejudice of the applicant. Thirdly, they contend that the third, fourth and fifth respondents are not innocent third parties as they were or ought to have been aware of the dispute between the applicants and the first and second respondents.

The third, fourth and fifth respondents contend that they were not party to the arbitration proceedings and could not have known of the arbitration D award and could not be bound by it. They also contend that they are innocent purchasers who purchased their units for value.

The caveat

It is common cause that on 23 October 2008 the arbitrator granted an interim arbitral award which, *inter alia*, interdicted the transfer of the property and E that the order be served on the Registrar of Deeds. The order was served on the same day. Although the award was made in respect of the second and third applicants, it barred the selling or disposing of the whole property which included the units of the other applicants.

It was submitted on behalf of the applicants that the interim award constituted F the caveat and is a judgment *in rem*. It stands on the same footing as an order of court and it must be obeyed unless it is set aside. The arbitral award took effect upon its grant.

It was submitted on behalf of the third, fourth and fifth respondents that an award, standing on its own, does not have the force of a judicial order. It has G to be registered with the appropriate court for purposes of execution. If the court were to find that the caveat was in the form of the award, then the fraud or negligence on the part of the Registrar of Deeds cannot be attributed to the respondents. The balance of convenience favoured that the application be dismissed as the respondents purchased the properties for value. The applicants had not established a basis for averring that the respondents had H knowledge of the sale from the first and second respondents to them.

2011 (1) ZLR p6

Makoni J

In terms of art 17 of the Schedule to the Arbitration Act [*Chapter 7*:*15*], an A arbitrator has power to order interim measures which, *inter alia,* include an interdict. In terms of art 35 an arbitral award shall be recognised as binding and upon application, in writing to the High Court, shall be enforced.

Article 35 brings out two distinctive features of an arbitral award. The first one is its binding nature and the second one its enforceability. I agree with the B submissions made on behalf of the applicants that an award takes effect upon its grant. Its execution has no effect on whether it is binding or not. A party can chose to obey an award, such that there would not be need for the award to be registered. Registration allows for execution. The respondents cannot therefore succeed in their argument that when registration of transfer was effected to them, the award had not yet been registered with the High Court. C

It is common cause that the award was served on the Registrar of Deeds. What is not clear is whether it was endorsed on the title deeds. The respondents argue that the negligence or fraud on the part of the Registrar of Deeds in registering the transfers when the caveat was in place, cannot be attributed to them. D

A case which is almost on all fours with the present matter is that of *Mwayipaida Family Trust* v *Madoroba & Ors* 2004 (1) ZLR 439 (S). The brief facts of the matter were that the appellant was an innocent second purchaser of an immovable property. The first purchaser had obtained an interdict against the seller, restraining her from transferring the property to anyone else. He E served a copy of the order on the Registrar of Deeds who was instructed to endorse a caveat upon the deeds of the property. The Registrar failed to do so. A search of the register revealing no caveat, the

property was transferred to the appellant. The aggrieved first purchaser obtained a High Court order setting aside the transfer with costs.

On appeal, it was held that the circumstances of the case placed it somewhere F in between the two extremes (the traditional approach to double sales) because, even though the appellant was ignorant of the respondent's prior claim to the property at the time transfer into its name was effected, such ignorance was due solely to the oversight or incompetence of a public official. It would not be fair and just to rule that the failure by the Deeds Office to register the G caveat had the effect of nullifying the respondent's prior claim to the property.

The same can be said in the present matter. The negligence or incompetence of the Deeds Office by failing to register the caveat resulted in the property in issue being transferred to the respondents. I agree entirely with the findings expressed in the *Mwayipaida Family Trust* case *supra* that it would not be fair and just to rule that the failure by the Deeds Office to register the caveat H

2011 (1) ZLR p7

Makoni J

A had the effect of nullifying the applicants' prior claim to the property.

The other point taken by the applicant is that the property in dispute was *res litigiosa* at the time it was sold and transfer effected.

The question that exercised my mind is whether the principle of *res litigiosa* can be extended to arbitration proceedings and if so at what stage does the B subject matter become *res litigiosa*. In action proceedings there are two schools of thought. One is that the subject matter of litigation becomes *res litigiosa* at *litis contestatio* and the other is that the subject matter becomes *res litigosa* from the time that the citation is issued and notice is given to the defendants. See *Zimbank Ltd & Anor* v *Consolidated Pipe Fittings (Pvt) Ltd & Anor* 2000 (1) ZLR 672 (H) at 677B-C.

C The parties did not present argument regarding the stage at which a subject matter becomes *res litigiosa* in arbitration proceedings. I will therefore leave the issue open and not make a determination. However the applicant's argued that there was an interim arbitral award at the time that the property was sold and transferred. The property was therefore *res litigiosa*. I agree with D the position taken by the applicants. At the time the property was sold and transferred, there was an interim order bearing on how it was to be dealt with. The first and second respondents had no authority to deal with the property in the manner they did. I can conclude that in the circumstances of this matter, the property must be *res litigiosa* as there was an interim award barring the transfer of the property pending the determination of the dispute E between the applicant and the first and second respondents.

It is settled in our law that the fact that a thing is *res litigiosa* does not preclude or prevent it from being alienated or similarly dealt with, as long as the rights of the non-alienating litigant in the *res* are protected. See *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H) at 139 and F *Gardner* v *Dampier Development & Ors* 2010 (1) ZLR 306 (H).

In the *Gardner* case *supra* at p 310, in dealing with the issue of *res litigiosa* I made the following remarks:

> "silberberg and Shoeman [*Law of Property* 3 ed] at p 304 made the point that the agreement of sale of the *res litigiosa* between the litigating party and a third party is valid *inter partes*. They go further to say that the purchaser is bound by G the judgment in the action and the successful party can recover it from the new possessor by execution and without fresh proceedings".

The respondents find themselves in the position of the purchaser referred to in the above quotation. The sale between them and the first and second respondents is valid *inter partes* only. The applicants can recover the property H from them.

2011 (1) ZLR p8

Makoni J

The other point taken by the applicants is that the respondents were aware A or ought to have known the applicants' interest in the property.

The applicants contend that the respondents must have been aware by diligent enquiry, through their conveyancer, of the caveat, which was clearly endorsed over the property by the fourth respondent. John did not file an answering affidavit but his heads of argument make reference to

caveat B number 189/08 having been noted on the title deed. The other applicants did not mention the caveat by number but state, in their answering papers, that a caveat was endorsed on the title deed. They also contend that the proper procedure would have been for the respondents to acquire shares in the first respondent until the completion of the project where sectional title will be issued to each owner. Had they made a diligent enquiry with the first C respondent's transfer secretaries Messrs Enerst and Young, they would have noted the applicants' interest.

The respondents' position is that they were not aware of the disputes between the applicants and the first and second respondents. If they had been made aware, they would not have parted with their money with full knowledge D of such disputes.

As I have already alluded to earlier on in the judgment, it is not clear whether the caveat was endorsed on the title deed. The fourth applicant mentions the caveat number in its heads of argument. The other applicants do not, and none of them filed a copy for the benefit of the court. I cannot therefore made a finding that the respondents were aware that there was a caveat when it is E not clear from the papers.

It is common cause that the transfers to the respondents were not done in terms of the proper procedure. The respondents did not acquire shares in the first respondent.

Again, in my view, this does not establish that the respondents ought to have F been aware of the applicants' interest in the property.

In my view, the present case does not turn on whether the respondents were or ought to have been aware of the applicants' interest or not. As I have already alluded to, it turns on the failure of the Deeds Office to register the caveat and if they did, transferring the property when the title deeds is G endorsed with a caveat.

The other point taken by the applicant was that the transfer to the respondents is invalid as there was no valid cause. The properties could only be acquired by acquisition of shares they being properties held under sectional title. None of the respondents hold the relevant class B shares. This point has not been contested by the respondents in their heads of argument. H

Makoni J

A In view of the above, the application must succeed.

In the result I will make the following order:

1. The transfer of unit/share 9 of certain piece of land called the Remainder of Lot 3 Lewisam of Lot E of Colne Valley of Reitfontein to Pervaz Khan under Deed of Transfer number 8952/08 be and is hereby set aside. B
2. The first respondent be and is hereby ordered to transfer to the first applicant shares in Cheni Investments (Pvt) Ltd which will confer on her ownership and the right to possession of unit 9.
3. The transfer of unit/share number 5 of certain piece of land called the remainder of Lot 3 Lewisam of Lot E of Colne Valley of Reitfontein to Brighton Matikiti be and is hereby set aside. C
4. The transfer of units/shares 4 and 12 in certain piece of land called the Remainder of Lot 3 of Lewisam of Lot E of Colne Valley of Reitfontein to Ian Khumalo be and is hereby set aside.
5. The first respondent be and is hereby ordered to transfer: D
   (a) Shares in Cheni Investments (Pvt) Ltd which will confer ownership of unit 5 to Allan Tilling Russell or his nominees.
   (b) Shares in Cheni Investments (Pvt) Ltd which will confer ownership of units 4 and 12 to Fair Coat Investments (Pvt) Ltd or its nominees.
6. The transfer of Unit/Share 3 of certain piece of land called the remainder of Lot 3 Lewisam of Lot E of Colne Valley of Reitfontein to Pervaz E Khan under Deed of Transfer No. 8950/08 be and is hereby set aside.
7. The first respondent be and is hereby ordered to transfer to the fourth applicant shares in Cheni Investments (Pvt) Ltd which will confer ownership of unit 3 to the fourth applicant.
8. In the event of the first respondent failing to effect transfer in terms of F para 2, 4 and 5, the Deputy Sheriff be and is hereby authorised to sign the necessary papers to effect transfer.
9. The first, second, third, fourth and fifth respondents, are hereby ordered to pay costs of suit.

G *Mutumbwa Mugabe & Partners*, applicant's legal practitioners

Matipano & Associates, first & second respondents' legal practitioners

H *Chiganga & Co*, third respondent's legal practitioners

* *Editor's note:* although the judgment number is HH-124-11, the judgment is dated 15 June 2010. The judgment was received too late to be included in either of the two volumes of Law Reports for the year 2010.

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WAKATAMA & ORS v MADAMOMBE 2011 (1) ZLR 10 (S)

Citation	2011 (1) ZLR 10 (S)
Case No	Judgment No. S-10-12
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Cheda JA
Heard	8 November 2010*
Judgment	8 November 2010**
Counsel	*T Mpofu*, for the appellants *L Uriri*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Local government – *mayor – election and removal of – procedure – not possible for council to remove mayor by a mere resolution – when a new mayor may be elected*

Practice and procedure – *parties – joinder – failure to join interested party – not fatal*

Headnote

The respondent was one of several candidates who were elected in 2008 as D councillors of the Bindura Municipality. At the council's first meeting after the election, the respondent and the second appellant were elected mayor and deputy mayor respectively. About two months later, a councillor drafted a motion for the rescission of the resolution in terms of which the respondent had been elected mayor. The councillor made it clear that the E intention was to move a motion to pass a vote of no confidence on the respondent as mayor. He made a number of allegations of impropriety on the part of the respondent as justification for the motion. The motion, having been

seconded by other councillors, was referred to the acting chamber secretary who in turn referred the same to the third appellant who was the town clerk. The town clerk convened a council meeting to F deliberate on the motion. The respondent queried the correctness of the procedure that had been followed. When it became clear that some of the councillors supported the procedure adopted, the respondent declared the meeting closed and left the chamber in the company of three other councillors. The remaining councillors continued with the motion under the chairmanship of the second appellant, the deputy mayor. Following G those deliberations, the resolution in question was rescinded and the

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Garwe JA

A appointment of the respondent and the second appellant as mayor and deputy mayor was rescinded. Immediately thereafter the first and second appellants were elected mayor and deputy mayor respectively.

The respondent obtained an order from the High Court declaring the election of the first and second appellants to be null and void and further declaring the respondent as the lawfully elected mayor. The court was of the view B that s 89 of the Urban Councils Act [*Chapter 29:15*], on which the appellants sought to rely, related to general resolutions of council in ordinary meetings and did not apply to the situation where council sought to remove a duly elected mayor from office. In particular, the court held that a councillor elected as mayor cannot be lawfully removed from the C position by a resolution passed by councillors in a meeting in the absence of the seat of the mayor falling vacant as provided for under s 103 of the Act. On appeal, one of the ancillary issues raised was whether the application should have been dismissed because the Minister of Local Government was not cited.

Held, that the non-joinder of the Minister was not fatal. The provisions of r D 87 of the High Court Rules 1971 were clear and allowed of no ambiguity.

Held, further, that while it is correct that s 28 of the Interpretation Act [*Chapter 1:01*] provides that the power to appoint a person to an office necessarily includes the power to remove or suspend him, this power must, in terms of s 2 of the Act, be read against the specific provisions of E a particular enactment. In s 103 of the Urban Councils Act, the process of electing a mayor is set out. The meeting at which the mayor is elected must be chaired by the district administrator. The person elected holds office until the election or appointment of a successor. A successor can only be appointed if the seat of the councillor who is mayor or deputy mayor becomes vacant by virtue of s 103 as read with s 78(2) of the Act.

F *Held*, further, that s 89, which sets out how resolutions of councils may be rescinded or altered, is a general provision which relates to resolutions passed at ordinary meetings of the council. The meeting at which a mayor is elected is not an ordinary meeting which ends in a resolution. There is no need for a resolution before the person elected as mayor assumes the position. If the appellants' submission that a mere council G resolution would suffice to remove a mayor from office were to be taken to its logical conclusion, a situation could arise where there could be a motion by one councillor removing a mayor and another motion re-electing the same mayor by another councillor. This surely could not H have been the intention of the legislature.

Garwe JA

Legislation considered A

Interpretation Act [*Chapter 1:01*], ss 2 & 28

Urban Councils Act [*Chapter 29:15*], ss 78, 89 & 103

Case information

T Mpofu, for the appellants

L Uriri, for the respondent B

Judgment

GARWE JA: At the conclusion of the hearing of this appeal, this court dismissed the appeal with costs and indicated that the reasons for that decision would follow in due course. These are the reasons.

This is an appeal against the judgment of Gowora J in which she set aside a council resolution rescinding the election of the respondent and the C second appellant as mayor and deputy mayor of the Bindura Municipality respectively and declaring the first appellant as the duly elected mayor of the Bindura Municipality ***.

The background to this matter is as follows. The respondent was one of several candidates who were elected in 2008 as councillors of the Bindura D Municipality. On 1 August 2008, the council of the Bindura Municipality held its first meeting at which the respondent and the second appellant were elected mayor and deputy mayor respectively. On 13 October 2008 one of the councillors, C Mazembe, drafted a motion for the rescission of the resolution in terms of which the respondent had been elected mayor. In the same draft, C Mazembe made it clear that the intention was to move a E motion to pass a vote of no confidence on the respondent as mayor. In the draft a number of allegations of impropriety on the part of the respondent were given as justifying the motion. The motion, having been seconded by other councillors, was referred to the acting chamber secretary who in turn referred the same to the third appellant who was the town clerk.

On 24 October 2008 the town clerk convened a council meeting to deliberate F on the motion. The respondent queried the correctness of the procedure that had been followed. When it became clear that some of the councillors present supported the procedure adopted, the respondent declared the meeting closed and left the chamber in the company of three other councillors. The remaining councillors continued with the motion under the chairmanship G of the second appellant who was the deputy mayor. Following those deliberations the resolution in question was rescinded and the appointment of the respondent and the second appellant as mayor and deputy mayor was rescinded. Immediately thereafter, the first and second appellants were

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A elected mayor and deputy mayor respectively.

In the court *a quo* the respondent sought an order declaring the election of the first and second appellants to be null and void and further declaring the respondent as the lawfully elected mayor of the Bindura Municipality. The court *a quo* was of the view that s 89 of the Urban Councils Act [*Chapter* B *29:15*] ("the Urban Councils Act") on which the appellants sought to rely related to general resolutions of council in ordinary meetings and did not apply to the situation where council sought to remove a duly elected mayor from office. In particular, the court *a quo* was of the view that a councillor elected as mayor cannot be lawfully removed from the position by a resolution passed by councillors in a meeting in the absence of the seat of the mayor C falling vacant as provided for under s 103 of the Act. In the result the court *a quo* granted the declaration sought by the respondent. Against that order the appellants have appealed to this court.

In their notice of appeal and heads of argument the appellants raised several issues. In essence they attacked the decision of the court *a quo* on the D following bases:

(a) that the court erred in failing to understand that all questions, including the election of mayor, arising before a council meeting, are decided by a resolution by a majority and that in terms of the Urban Councils Act the council has the power to rescind or alter all its resolutions. E

(b) as the Minister of Local Government, Rural and Urban Development who administers the Urban Councils Act had not been cited, such non-joinder was fatal and the court a quo should have dismissed the application on that basis alone.

(c) in reviewing the proceedings of a statutory body lawfully vested with F discretion, the jurisdiction of a court of law is limited to the question whether or not that body exercised its discretion and not the correctness of the conclusion arrived at by it.

(d) that since it is the council which appoints a mayor of council, in terms of s 28 of the Interpretation Act [*Chapter 1:01*] ("the Interpretation Act"), council has the power to dis-appoint a mayor and the consequential G power to appoint another person into that vacant post.

It seems to me that there are two basic issues that fall for determination by this court. The first is whether the non-joinder of the Minister of Local Government, Rural and Urban Development was

fatal. The second is whether a duly elected mayor of council can be removed from office by council H through the instrumentality of a resolution passed by that council.

2011 (1) ZLR p14

Garwe JA

The question whether the non-joinder of the Minister is fatal need not detain A this court and can easily be disposed by reference to r 87 of the High Court Rules, which provides:

> "(1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or question in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter. B
>
> (2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application –
>
> (a) ....
>
> (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause C or matter may be effectually and completely determined and adjudicated upon, to be added as a party;
>
> but no person ... "

The above provision is clear and allows of no ambiguity. The non-citation of the Minister is not, in the circumstances, fatal. Indeed, this court restated this position in the recent decision in *Gula-Ndebele* v *Bhunu NO* S-29-11. D

The second issue that falls for determination is one of interpretation and that is whether a duly elected mayor can be removed from office following a resolution of council to that effect. On a careful perusal of the provisions of the Urban Councils Act, it is clear that there is no specific provision dealing with the removal of a mayor from office. In order to determine the E intention of the legislature on this important issue, one must, I think, have regard to the entirety of the provisions of the Urban Councils Act and the Interpretation Act.

It is correct, as submitted by the appellants in their heads of argument, that in terms of s 28 of the Interpretation Act, the power to appoint necessarily includes the power to remove or suspend a person. Section 28 of the F Interpretation Act provides as follows:

> **"28 Appointments**
>
> An enactment which confers power to make an appointment of a person to any office or post shall confer on the appointing authority –
>
> (a) power at the discretion of that authority to remove or suspend him; or G
>
> (b) power exercisable in the like manner and subject to the like consent and conditions, if any, applicable on his appointment –
>
> (i) to reappoint or reinstate him; or
>
> (ii) to appoint another person in his stead or to act in his stead, and to provide for the remuneration of the person so appointed; or
>
> (iii) to fix or vary his remuneration, to withhold his remuneration in whole H

2011 (1) ZLR p15

Garwe JA

> A or in part during any period of suspension from office, and to terminate his remuneration on his removal from office".

However, on a careful reading of the Act, it is clear that such a power is not absolute and that the provision must be read against the specific provisions of a particular enactment. Section 2 of the Interpretation Act provides:

> B **"2 Application of this Act**
>
> (1) The provisions of this Act shall extend and apply to every enactment as defined in this Act, including this Act, which was in force in Zimbabwe immediately before the 1st November, 1962, or thereafter comes into force in Zimbabwe, except in so far as any such provisions –
>
> (a) are inconsistent with the intention or object of such enactment; or C
>
> (b) would give to any word, expression or provision of any such enactment an interpretation inconsistent with the context; or
>
> (c) are in such enactment declared not applicable thereto.

(2) Nothing in this Act shall exclude the application to any enactment of any rule of construction applicable thereto and not inconsistent with this Act."

Whilst there is no doubt that the Interpretation Act empowers an appointing D authority to remove a person from office, that provision is a general provision which is applicable to enactments generally but cannot supercede the specific provision of a particular enactment. For purposes of this appeal, whilst one should not lose sight of the provisions of the Interpretation Act, regard must be had to the pertinent provisions in the Urban Councils Act.

E The Urban Councils Act prescribes how a councillor is elected as mayor or deputy mayor and how such person ceases to hold such office. The relevant section is 103 which provides as follows:

"103 Election of mayor, deputy mayor, chairperson and deputy chairperson

(1) At the first meeting of a council after it has been established and thereafter F at the first meeting held –

(a) after the general election of councillors; or

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

the councillors present at that meeting shall, under the chairmanship of the district administrator or in the case of the Harare and Bulawayo Municipal G Councils the Provincial Administrator within whose province the municipal council lies, elect –

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

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

H (2) A person elected in terms of subsection (1) shall forthwith enter upon his

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or her office and shall hold office until the election or appointment of his or her A successor in office.

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

Provided that –

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

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

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

(iv) if the seat of the councillor who is a mayor, chairperson, deputy mayor or deputy chairperson becomes vacant by virtue of section 78(2)(b), (c), (d), (e), (f) or (g), he or she shall cease to hold office as such with effect from the date that seat becomes vacant." D

It is clear from the above provisions that it is the process of an election that gives rise to the election of a mayor. Indeed subsection (2) makes it clear that a person so elected shall forthwith enter upon his or her office and shall hold office until the election or appointment of a successor. Section 48 of the Act also makes it clear that a person elected as mayor shall take office E on the date on which he is declared or deemed to have been elected a mayor unless his predecessor's term of office has not expired.

The submission by the appellants is that the council can, by ordinary council resolution, remove an elected mayor from office for any reason. In support of this submission they rely on the provisions of ss 84 and 89 of the Urban Councils Act. Section 84 of the Urban Councils Act provides: F

"84 Meetings and special meetings of council

(1) A council shall hold its first meeting on such date and at such place as the Minister may fix and thereafter the council shall, subject to this Act, meet for the dispatch of business and adjourn, close and otherwise regulate its meetings and proceedings as it thinks fit: G

Provided that the council shall hold an ordinary meeting –

(a) as soon as is practicable after each general election; and

(b) at least once in each month.

(2) Save as otherwise provided in this Act, at any meeting of a council –

(a) all the councillors present at that meeting shall vote on every matter which is put to the vote; H

2011 (1) ZLR p17

Garwe JA A

(b) voting shall be by show of hands or by any mechanical means approved by the council;

(c) all the questions coming or arising before that meeting shall be decided by a resolution passed by a majority of the votes cast and, in the event of an equality of votes, the mayor shall have a casting vote in addition to a deliberative vote.

B (3) The mayor may, at any time, and at the request in writing of not less than one-third of the total membership of the council or of six councillors whichever is the less, shall, within fourteen days of such request, call a special meeting of the council.

(4) Written notice of any special meeting called in terms of subsection (3) shall be sent to each councillor at least twenty-four hours before the meeting and shall C specify the object of the meeting, and no matters, other than those specified in that notice, shall be discussed at that special meeting.

(5) …

(6) …".

And s 89 of the Urban Councils Act provides:

D **"89 Rescission or alteration of resolutions of council and committees**

(1) A resolution passed at a meeting of a council shall not be rescinded or altered at a subsequent meeting of the council –

(a) unless –

(i) a committee has recommended that the resolution be rescinded or altered; or E

(ii) a notice of motion to rescind or alter that resolution has been given at least seven days before the subsequent meeting to the chamber secretary and the notice of motion has been signed by not less than one-third of the membership of the council;

and

(b) if the rescission or alteration occurs within six months from the date of the F passing of the original resolution and the number of councillors present at such subsequent meeting does not exceed the number of councillors present when the original resolution was passed, unless at least two-third of the councillors or members, as the case may be, present at the subsequent meeting vote in favour of that rescission or alteration.

(2) The chamber secretary to whom any notice of motion has been given in terms of subsection (1) shall send a copy of the notice to each councillor at least G two days before the subsequent meeting at which the motion is to be moved.

(3) Nothing in subsection (1) shall be construed as precluding a council from rescinding or altering a resolution passed at a previous meeting in a manner other than that recommended by the committee or specified in a notice of motion, as the case may be.

(2) A resolution passed at a meeting of a committee of a council may be H rescinded or altered at any subsequent meeting of that committee".

2011 (1) ZLR p18

Garwe JA

The respondent, on the other hand, submitted that s 89 is a general provision A which relates to meetings of council and does not empower the removal of a sitting mayor. The respondent further argued that it is s103 which provides for the vacation of office of mayor and that that section does not provide for such removal to be done through resolutions passed by council. Instead a successor can only be appointed where the seat of the councillor who is a B mayor or deputy mayor becomes vacant by virtue of the provisions of s 103 as read with the provisions of s 78(2) of the Urban Councils Act.

Section 78(2) in relevant part provides

"subject to subsection (3) if a councillor –

(a) dies; or

(b) resigns his office; or C

(c) ceases to be qualified for election as a councillor or becomes disqualified for such election in terms of section 119 of the Electoral Act [*Chapter 2:13*]; or

(c1) ceases to be a councillor in terms of subsection (7) of section forty-one; or

(d) is absent without leave of the council –

(i) from the ordinary meetings of the council during a period of two D consecutive calendar months; or

(ii) from the meetings of any committee of the council to which he has been appointed during a period of two consecutive calendar months, if the committee has held at least one meeting in each of those calendar months or from two consecutive meetings of the committee which are not held in the same calendar month or consecutive calendar months; E

or

(e) is absent from the ordinary meetings of the council during a period of six consecutive calendar months, whether or not leave of the council has been obtained; or

(f) ceases in terms of paragraph (b) subsection (1) of section 22 of the Provincial F Councils and Administration Act [*Chapter 29:11*], to be a councillor; or

(g) has been suspended in terms of section one hundred and fourteen for a period longer than thirty days;

his seat shall become vacant and such vacancy shall be deemed to be a special vacancy."

An urban council is a creature of statute. It therefore derives its authority G from the Urban Councils Act and other legislative provisions. As a corollary, an urban council therefore can only do that which the law has specifically or impliedly authorised. It has no power to do anything that the law has not authorised.

Having carefully considered the provisions of the Urban Councils Act and the submissions made by both parties to this appeal, I am satisfied, H

Garwe JA

A on a correct reading of the Urban Councils Act, that there is no law that allows a council to remove a sitting mayor on the basis of a mere council resolution. It is clear that s 89 of the Urban Councils Act refers to rescission or alterations of council resolutions. The section cannot possibly apply to the removal of a mayor. The appellants have argued that at the end of the day a mayor is put into office through such a resolution and consequently B that resolution can be rescinded in terms of the Urban Councils Act. I find myself unable to accept this submission. It is clear that it is the electoral process involving the councillors which results in one of them being elected mayor and another as deputy mayor. Such process is chaired by the district administrator, as provided in the Urban Councils Act. The suggestion that C this was an ordinary meeting which ended in a resolution is, in my view, untenable. The law requires that there be an election and that the person so elected enters office forthwith. There is no legal requirement for the passing of a resolution before the incumbent assumes the position.

The above interpretation is reinforced by the provisions of s 103(3) which prescribe how a person who has been elected mayor or deputy mayor shall D cease to hold office. In particular, if the seat of the councillor who is a mayor or deputy mayor becomes vacant by virtue of any of the provisions of s 78(2)(b)(g), he shall cease to hold office as such with effect from the date that seat becomes vacant. If the intention of Parliament was simply that a sitting mayor could be removed pursuant to an ordinary council resolution the Urban Councils Act would not only have said so but would not have gone further E to make provision on how a person ceases to be mayor. To read the Urban Councils Act as making provision for the removal of a person as mayor through a resolution would render the provisions of s 103(3) superfluous.

Regard should also be had to the fact that, prior to the amendment of the Urban Councils Act by Act 1 of 2008, the Minister was empowered by s 54 F to suspend a mayor and the President to dismiss him. Act 1 of 2008 repealed s 54 and substituted it with s 103. It is s 103 that prescribes how a person elected as mayor ceases to hold such office. In doing so, the intention must have been that a mayor would only cease to hold office when his successor is elected or if the seat of a councillor who is a mayor falls vacant.

In any event, the suggestion that a sitting mayor can be removed from office G through a mere resolution can result in an absurdity. In this particular case, it is clear that the councillor who moved the motion did so, on the basis that the mayor had misconducted himself. A list of the grounds of misconduct were cited in the motion. The respondent, who was mayor, was not asked to respond. Neither was there any inquiry. All that happened was that the H councillors who remained behind voted to remove the mayor from office

Garwe JA

without any inquiry at all and without affording him the opportunity to be A heard. If the appellants' submission that a mere council resolution would suffice to remove a mayor from office were to be taken to its logical conclusion, a situation could arise where there could be a motion by one councillor removing a mayor and another motion re-electing the same mayor by another councillor. This surely could not have been the intention of the legislature. B

I am inclined to agree with the remarks by the court *a quo* that:

> "The provisions of s 103(2) are peremptory and in the absence of a cogent argument as to why council should not comply with the said provision I am unable to find that s 89 applies in the removal of a mayor from office".

The appeal must therefore fail.

Before concluding, it seems to me pertinent that I make certain observations C on what are obviously gaps in the Urban Councils Act, not only on the removal of a mayor or deputy from office but also on the appointment of the same.

Prior to 2008, the voters in a council area elected an executive mayor who in terms of s 64 of the Urban Councils Act controlled the activities of the employees of the council and was responsible for the suspervision and D co-ordination of council affairs. As already noted the then s 54 of the Act empowered the Minister to suspend a mayor and the President to dismiss him or her from office.

In 2008, the Act was amended by the Local Government Laws Amendment Act 1 of 2008. That amendment abolished the post of executive mayor in favour E of a ceremonial mayor. That amendment made no provision empowering the Minister to suspend a mayor. It is not clear why no specific provision was made for the removal of a mayor or his deputy but one possible explanation may be that since the mayor was now ceremonial whatever misconduct he committed would be committed in his capacity as a councillor and in terms of s 114 of the Urban Councils Act the Minister could suspend and dismiss F him as a councillor in which case he would automatically cease to be mayor.

Further, the amendment omitted to prescribe the qualifications of the ceremonial mayor. In terms of s 103 (c) the councillors elect one councillor *or other person* to be mayor and thereafter another councillor to be deputy mayor. What this means is that councillors are free to elect any person G as mayor, including one who is not a councillor. Whilst the Minister can suspend a councillor including a councillor who has been elected mayor, he cannot act against a mayor who is not a councillor as no provision for such an eventuality has been made. Moreover, not only are the qualifications of a mayor missing from the Act but also the circumstances under which a person is disqualified from holding such office have not been spelt out. H

Garwe JA

A Consequently a councillor who has been elected mayor but is subsequently suspended and dismissed in terms of s 114 remains mayor.

Further, the amendment added to the confusion by defining "elected councillor" as "a councillor other than an appointed councillor and includes a person elected or appointed as a mayor or deputy mayor in terms of s 103". Such a definition would have made sense if the Urban Councils Act had restricted B the office of mayor to elected councillors.

The above observations clearly suggest that when the Urban Councils Act was amended by Act 1 of 2008, the legislature "forgot" to include a number of important provisions. The result is that there are gaps in the Act which have the potential to create problems such as those exemplified by the present C case. The attention of the relevant government Ministry should be drawn to the contents of this judgment.

Having come to the conclusion that a duly elected mayor cannot be removed from office by ordinary council resolution, this court was of the unanimous view that there was no merit in the appeal and for that reason dismissed the D appeal with costs.

ZIYAMBI JA and CHEDA JA concured.

Mushonaga, Mutsvairo & Associates, appellants' legal practitioners

E *Mbidzo, Muchadehama & Makoni*, respondents' legal practitioners

* Although the judgment is dated 8 November 2010, this was actually the date on which the court announced its decision; the judgment itself, containing the court's reasons for its decision, only became available in 2012, too late to be included in 2010 (2) ZLR, which had already been printed. Hence its inclusion in this volume. – *Editor.*

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*** See *Madamombe* v *Bindura Municipal Council & Ors* 2010 (1) ZLR 1 (H) – *Editor*

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CORE MINING & MINERALS RESOURCES (PVT) LTD v ZIMBABWE MINING DEVELOPMENT CORPORATION & ORS 2011 (1) ZLR 22 (H)

Citation	2011 (1) ZLR 22 (H)
Case No	Judgment No. HH-280-10
Court	High Court, Harare
Judge	Mavangira J
Heard	3 January 2011
Judgment	5 January 2011
Counsel	*G Chikumbirike,* with him *S I Mutumbwa,* Mr *Mufara and T M Kanengoni*, for the applicant *F Mutamangira*, with him Mr *Moyo*, for the first, second and fifth respondents *M Hogwe*, with him Miss *T Mberi,* for the third respondent
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

Legal practitioner – *conduct and ethics – duty of legal practitioner to court – alignment with client's case going beyond that of a legal practitioner* D *– should not continue to appear in such capacity*

Legal practitioner – *conduct and ethics – representation of clients by the firm of which the legal practitioner is a member – undesirable for such legal practitioner to attest to an affidavit on behalf of such client*

Practice and procedure – *affidavit – attestation of – representation of client* E *by the firm of which the legal practitioner is a member – undesirable for such legal practitioner to attest to an affidavit on behalf of such client*

Headnote

The fifth respondent (the Minister of Mines) directed that the board of the first respondent should investigate and establish, amongst other issues, the applicant's shareholding as well as the "standing" of its current F shareholders. The Minister wanted a professionally compiled report and a "suitable person" to be identified to undertake the investigation. The person then appointed was a legal practitioner who later appeared as counsel for the first, second and fifth respondents. He had, before the litigation, attended a meeting of the first respondent's board and given G advice there. He was involved in the investigations that were conducted and which led to the prosecution of the deponent to the applicant's founding affidavit.

The applicant urgently sought an order preventing the respondent's counsel or his firm from appearing for the respondents.. The applicant argued that where a legal practitioner gives legal advice to a board of directors, H

Mavangira J

A such legal practitioner cannot thereafter represent the same client as a legal practitioner. It also argued that the firm should not to be allowed to represent the first and second respondents in the proceedings as the affidavits that they filed on behalf of those respondents were prepared and commissioned by the same firm. This, it was argued, was unethical conduct which the court should not countenance.

B *Held*, that counsel's and his firm's involvement could not for the purposes of the proceedings be said to be merely that of a legal practitioner. He had participated in the pertinent affairs at a level that precluded him from appearing for the respondents as a legal practitioner in the proceedings. He had aligned himself so closely with his client's case that he had displayed C an interest in the case going beyond that of a legal practitioner. It is not the function of the legal practitioner to step into the shoes of the client and to perform acts that are materially related to the dispute before the court in an endeavour to buttress the case of his client.

Held, further, that an affidavit should be sworn before a commissioner of oaths who is independent of the office in which it is drawn. It should D not be taken before a member of the firm who is acting in the case and such an affidavit will not be admitted.

Cases cited

Bozimo Trade and Development Co (Pvt) Ltd v First Merchant Bank of Zimbabwe & Ors 2000 (1) ZLR 1 (H)

E *Central African Building Construction Co (Pvt) Ltd v Construction Resources Africa (Pvt) Ltd* 2010 (1) ZLR 464 (H)

Chafanza v Edgars Stores Ltd & Anor 2005 (1) ZLR 299 (H)

Hersman v Angilley 1936 CPD 386

Case information

F *G Chikumbirike,* with him *S I Mutumbwa,* Mr *Mufara and T M Kanengoni*, for the applicant

F Mutamangira, with him Mr *Moyo*, for the first, second and fifth respondents

M Hogwe, with him Miss *T Mberi,* for the third respondent

Judgment

MAVANGIRA J. This is an urgent chamber application in which the G applicant's legal practitioner raised a preliminary point which needs to be determined before the court can proceed to hear the preliminary points that the respondents raise.

Mr *Chikumbirike,* for the applicant, submitted that Mr *Mutamangira* should not appear in these proceedings as a legal practitioner for the first and H second respondents and that he can only appear as their agent. The basis

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Mavangira J

for this is that Mr *Mutamangira* is intimately and emotionally interested A in matters involving the applicant and the respondents and generally in the affairs that have developed and culminated in the institution of these proceedings. Amongst other things, he was involved in the investigations that were conducted and which led to the prosecution of the deponent to the applicant's founding affidavit. He also submitted that the legal firm B Mutamangira and Associates ought not to be allowed to represent the first and second respondents in these proceedings as the affidavits that they filed on behalf of these respondents were prepared and commissioned by the same firm. This, he submitted, is unethical conduct which this court should not countenance beyond this stage.

It is contended that Mr *Mutamangira* and/or the firm ought to have realised the C impropriety of their participation in these proceedings as legal practitioners for the first and second respondents. They should have advised their clients accordingly and consequently of the need for a different firm to represent them as their legal practitioners. Mutamangira and Associates would then only act or appear as agents for the said respondents. D

It was further submitted that Mr *Mutamangira,* and/or his firm, cannot properly represent the fifth respondent, as he is being sued in his official capacity and should thus be represented only by the Attorney-General as the principal legal advisor to the Government.

The documents which Mr *Chikumbirike* referred the court to in support of E his submissions are mostly attachments to the first respondent's opposing affidavit which was deposed to by one Godwills Masimirembwa, the chairman of the first respondent's board of directors. One such document is a letter dated 20 September 2010 authored by the fifth respondent and addressed to Mr Masimirembwa. Therein the fifth respondent directs that the board investigates and establishes, amongst other issues, the applicant's shareholding F as well as the "standing" of its current shareholders. Specific reference was made to para 4 of this letter. The paragraph states, *inter alia*, that the fifth respondent expected a professionally compiled report and that a suitable person must be identified to undertake the investigation or enquiry on the directions given by the fifth respondent in the letter. It was contended that, G from the events that ensued, Mr *Mutamangira* turned out to be the suitable person that was needed.

Reference was made to Annexure GM3 to Mr Masimirembwa's affidavit. This is a copy of the minutes of the meeting of the Mining Development Board members with the applicant's members held at the first respondent's head office boardroom on 19 October 2010. Amongst those recorded as being H

Mavangira J

A in attendance at the meeting is Advocate *F Mutamangira*. Mr *Chikumbirike* specifically referred to para (e) of the minutes at p 100 where the following decision, amongst others, was made or recorded: "That the Core Mining shares in Canadile be transferred to Marange Resources". He submitted that this shows that this was a meeting where the dismemberment of a duly registered company was being done or discussed and that this was in the B presence of Mr *Mutamangira*. He submitted that in these circumstances Mr *Mutamangira* cannot deny the level of involvement that is being alleged against him as the minutes are an indication of his intricate involvement in the affairs referred to.

It was Mr *Chikumbirike's* submission that, in the scenario postulated by Mr C *Mutamangira*, in which a legal practitioner gives legal advice to a board of directors, the clear answer is that such legal practitioner cannot thereafter represent the same client as a legal practitioner.

It was also submitted that it would not have been proper for the applicant to refrain from raising this preliminary issue on the basis of expediency. To D do so would be to allow an extremely bad precedent to be set.

Mr *Mutamangira* in response, submitted that no evidence was placed before the court to enable it to determine the depth of his alleged involvement in the matters referred to. He submitted that the allegations made were based on speculation. As regards the investigation into the affairs of the fourth respondent, which investigation was conducted at the behest of the fifth E respondent, he submitted that the investigation was conducted by the first respondent and not by him or his firm. They only provided legal advice and he cannot thus be said to be or to have been intimately

involved in the affairs that have developed for some time, eventually culminating in the filing of the instant urgent chamber application.

F Regarding the affidavits said to have been prepared and commissioned or attested by his firm, he submitted that the affidavits were prepared by the deponents and not by his firm. He also submitted that, when the legal practitioner from his firm commissioned the affidavits, it was not in contemplation of any legal proceedings and on the basis of that distinction the case authorities cited by Mr *Chikumbirike* were thus inapplicable. G Furthermore, the affidavits were attested about a month before the institution of this urgent chamber application.

Mr *Mutamangira* also submitted that had Mr *Chikumbirike* sought clarification before raising the point *in limine*, he would have been advised and shown proof that Mr *Mutamangira* had properly been briefed by the Attorney-General. H He would have realised that he had the requisite authority to represent the

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fifth respondent in these proceedings. He submitted that this is not the first A matter in which he has been briefed by the Attorney General to represent various other clients or parties.

Mr *Mutamangira* posed what he appeared to intend to sound as a rhetoric question. He asked whether Mr *Chikumbirike* meant by his submission that he would be disqualified from acting as a legal practitioner in circumstances B where he had given legal advice to a board of directors.

On a perusal of the documents which are attached to the first respondent's opposing affidavits and which were referred to by Mr *Chikumbirike*, it appears clear to me that Mr *Mutamangira's* and his firm's involvement cannot for the purposes of these proceedings be said to be merely that of a C legal practitioner. He has participated in the pertinent affairs at a level that precludes him from appearing for the respondents as a legal practitioner in these proceedings. One clear instance is the attendance at the meeting of 19 October 2010 already referred to above. Whilst in *Central African Building Construction Company (Pvt) Ltd* v *Construction Resources Africa (Pvt) Ltd* 2010 (1) ZLR 464 (H) Gowora J was faced with a different scenario, D it appears to me that the observation that she made can be made with the same aptness *in casu*. She said at 469F:

> "… He [a legal practitioner] has aligned himself so closely with his client's case that this court can be forgiven for stating that he has displayed an interest in the case going beyond that of a legal practitioner."

Similarly, the reference by Mr *Chikumbirike* to *Bozimo Trade and Development* E *Co (Pvt) Ltd* v *First Merchant Bank of Zimbabwe & Ors* 2000 (1) ZLR 1 (H) is also apposite. The headnote reads in part:

> "*Held*, that the legal practitioner should be allowed to represent the company as agent of the company instead of its legal practitioner. He was entitled to represent the company as its agent as he was its *alter ego*, although he was not the sole F or majority shareholder in the company. However, he had such a deep-seated perception of unfair play on the part of the respondents that he might end up prejudicing the applicant's case by representing the company. It would be better for him to hand over the case to legal counsel."

Chatikobo J at p 4 stated:

> ".... Although Mr *Kara* is neither the sole nor the majority shareholder in applicant, G his association with and the extent of his interest in the applicant is such that he should be permitted to represent the applicant. Although he appeared before me robed as counsel, I ruled that he could only represent the applicant as its agent and he did so on that basis."

In the *Central African Building Construction Co (Pvt) Ltd* case (*supra*), Gowora J stated at p 468D: H

> A "In *Bozimo Trade and Development Co P/L* v *First Merchant Bank of Zimbabwe and Ors*, 2000 (1) ZLR 1 Chatikobo J in considering an objection to the appearance as counsel in the matter before him by a chairman of the applicant opined that due to the relationship of the legal practitioner of applicant with the myriad affairs of the companies that he was chairman of and with whose legal brief the legal practitioner was seized he would not permit him to appear for the same counsel but would allow him to appear as an agent of the applicants."

B She proceeded at 468H-496B:

> "… A legal practitioner's duty is to protect the interests of his client and to give legal advice. It is not the function of the legal practitioner to then step into the shoes of the client and to perform acts that are *materially related to the dispute before the court* in an endeavour to buttress the case of his client …" (emphasis added).

C With regards to the affidavits attached to Mr Masimirembwa's opposing affidavit, in Herbstein and van Winsen *Civil Practice of the Superior Courts in South Africa* 3 Ed at p 443 the following is stated:

> "An affidavit should be sworn to before a commissioner of oaths who is independent of the office in which it is drawn. The court will not admit affidavits sworn to D before *an attorney or employee or partner of an attorney acting for the deponent,* or a person having an interest in such affidavit" (emphasis added).

The authors refer to a number of case authorities in support of the highlighted portion of the above quotation, including *Hersman* v *Angilley* 1936 CPD 386 wherein Davis J stated at p 387:

> E "I said nothing about this affidavit yesterday because I wished to say nothing in a hurry and desired to have an opportunity to think it over and to consult my brother judges.
>
> This affidavit is objectionable from every point of view. In the first place it was taken before one of the partners of the firm of attorneys acting for the plaintiff. It has been stated in this court time and again that that is an improper practice. F I notice that as recently as the 11th November last, in the matter of *Whyte's Stores* v *Bridle NO and Others* 1936 TPD 72, Pittman J had occasion to go into the matter somewhat fully, and came to the conclusion that an affidavit taken under these circumstances is not receivable as evidence. However that may be, clearly an affidavit should not be taken before a member of the firm who is acting in the case."

The fact that the affidavits may have been commissioned at a time when G no litigation was contemplated does not, in my view, detract from the undesirability of the firm representing the respondents in these proceedings. If this had not been realised or appreciated when the defence of the respondents was assumed for purposes of this urgent chamber application, one would have expected that, as soon as the issue was raised by Mr *Chikumbirike*, a H concession would have been readily made.

2011 (1) ZLR p28

Mavangira J

In *Central African Building Construction Company (Pvt) Ltd supra* the A following is stated at 470B-C:

> "It is important that a legal practitioner should at all times retain his independence in relation to his client and the litigation which is being conducted …"

It was also stated in *Chafanza* v *Edgars Stores Ltd and Anor* 2005 (1) ZLR 299 (H) at 300G: B

> "To my mind, it is highly undesirable to either attest to an affidavit or sign an urgent certificate for and on behalf of a client who is being represented by his firm as such lawyer clearly has an interest in the matter at hand".

In my view, to the above statements may be added the age old saying that justice must not only be done, it must be seen to be done.

With regard to the representation of the fifth respondent, Mr *Mutamangira* C said that he has the Attorney-General's authority to so represent him. Mr *Chikumbirike* objected to the production of the said authority by Mr *Mutamangira* on the basis that the authenticity of the document would now be suspect as it was sought to be produced at a very late stage of the proceedings. In my view, this particular aspect was not fully ventilated and D insufficient information was placed before the court such as to enable it to make any pronouncement on it.

In conclusion, in relation to the other aspects discussed above it seems clear to me that Mr *Mutamangira* and the legal firm Messrs Mutamangira & Associates cannot properly be allowed to continue appearing as legal practitioners for and on behalf of the first and second respondents. E

I therefore uphold the preliminary point raised by the applicant's legal practitioner to the extent stated above.

Chikumbirike & Associates, applicant's legal practitioners

Mutamangira & Associates, first, second and fifth respondents' legal F practitioners

Hogwe, Dzimirai & Partners, third respondent's legal practitioners G

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/BIRRIA INVESTMENTS (PVT) LTD v ART DEAL (PVT) LTD & ANOR 2011 (1) ZLR 29 (H)

BIRRIA INVESTMENTS (PVT) LTD v ART DEAL (PVT) LTD & ANOR 2011 (1) ZLR 29 (H)

Citation	2011 (1) ZLR 29 (H)
Case No	Judgment No. HH-266-10
Court	High Court, Harare
Judge	Gowora J
Heard	28 September 2010
Judgment	12 January 2011
Counsel	*H Nkomo,* for the plaintiff *N Bvekwa,* for the defendant
Case Type	Summary judgment
Annotations	No case annotations to date

Flynote

Practice and procedure – *summary judgment – defence to – need to show facts which would amount to a defence – facts alleged not constituting a defence – defendant raising unliquidated counter-claim – need for* D *defendant to aver sufficient facts to disclose cause of action – quantum of claim – need to establish quantum*

Headnote

The plaintiff sought summary judgment against the defendants seeking an order declaring that a lease agreement was invalid, alternatively, that E the lease agreement be cancelled, together with the refund of various sums paid to the defendants in terms of the lease. The plaintiff claimed that there had been a mistake as to the identity of the premises to be leased, in that it was expecting to lease a whole floor of the building in question, not just the portion which it was allowed access to. The defendants resisted the application, claiming that, despite the mistake F in the contract about the address of the premises, a contract came into being. They also alleged facts which amounted to a counter-claim against the plaintiff, on several different grounds. The total sum claimed from the plaintiff exceeded that which the plaintiff was demanding.

Held, that it is an essential term of a contract of lease that the property G that is the subject matter of the agreement be described with sufficient clarity for the contract not to be found void for vagueness. The improper description of the area that the plaintiff was to occupy was a unilateral mistake which could be attributed solely to the defendants. The parties were clearly not in agreement. There therefore existed a fundamental mistake as to the description of the premises being let. Due to the lack H of clarity as to what was being leased, no contract came into being.

Gowora J

Thus the facts alleged by the defendants as the basis of their defence to A the claim would not entitle them to succeed at trial and were thus not a sufficient basis for this defence to the application for summary judgment.

Held, further, that a defendant who admits the claim is entitled to raise an unliquidated counter-claim as a defence. In order to succeed in the counter-claim as a defence to the application for summary judgment, B the defendant must aver sufficient facts as to disclose a cause of action in the counter-claim. If the counter-claim exceeds the main claim, it constitutes a defence in respect of the whole claim; and if the counter-claim is less than the main claim, the defendant may pay the balance into court and in this way raise a valid defence to whole main claim. On the other hand, if the defendant raises an unliquidated counter-claim C without in any way establishing its *quantum* or indeed making an effort to establish it, and where it appears that, in all probability, the counter-claim will be appreciably less than the main claim, and no payment into court was made, such counter-claim does not disclose a *bona fide* defence for the purpose of summary judgment. *In casu*, the facts alleged D by the defendants were not sufficient to disclose a cause of action, and summary judgment would therefore be granted.

Cases cited

Anglo-African Shipping Company (CA) Pvt Ltd v Trinity Engineering (Pvt) Ltd & Anor 1984 (2) ZLR 199 (H) E

Hales v Doverick Invstms (Pvt) Ltd 1998 (2) ZLR 235 (H)

Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd 1970 (1) SA 674 (C)

Stassen v Stolberg 1973 (3) SA 725 (C) F

Case information

H Nkomo, for the plaintiff

N Bvekwa, for the defendant

Judgment

GOWORA J: On 28 September 2010 I granted an order for summary judgment in favour of the plaintiff. An appeal has now been filed and reasons for my judgment have been requested and these are they. G

In this application, the plaintiff seeks summary judgment for an order in the following terms:

(a) A declaration that the lease agreement is null, void and of no effect;

(b) Alternatively that the agreement of lease is duly cancelled

(c) Payment of the sum of US$75 000 together with interest thereon at the H

A prescribed rate with effect from 27 January to day of payment;

(d) Payment of the sum of $13 500 together with interest thereon at the prescribed rate with effect from the 29th January 2010 to date of payment; and

(e) Costs of suit.

The background to this dispute is in relation to a shop which the second B defendant supposedly let to the plaintiff. On 26 January 2010 one Richard Jie, representing the plaintiff, paid the sum of US75 800 to the second defendant as good tenancy deposit/goodwill for Shop 2 Cameron Street, Harare. On 28 January 2010 the said Jie paid an additional sum of US$13 500 being rentals for February, March and April in respect of No. 2 Shop Cameron Street, C Harare. The receipt reflects the rental as "$4 500 x 3". A lease agreement was then concluded between the first defendant and the plaintiff in terms of which the former let to the latter "certain No. 2 Cameron Street, Harare" for retail purposes.

The lease was to commence on 1 February 2010 and was to continue for three years up to 31 February 2013 (*sic*). The rental was reflected as US$4 500 D payable in advance on the first day of the month and the seventh day of every month at Harare. The lease further provided for its renewal

after three years at a monthly rate of USD4 500. The lease was signed by the second defendant representing the lessor and one Richard Jie representing the lessee.

The plaintiff alleges that it has not been given vacant possession and further E that it has discovered that the premises were occupied by other tenants who expressed surprise when Jie indicated that the plaintiff had a lease agreement to occupy the premises. The plaintiff's representative, Jie, who has acted for plaintiff throughout the transactions relating to the lease deposed to the affidavit. In it, he avers that the keys he had been given for the premises were not the correct keys as they did not work. In effect, he states that he F was unable to gain access to the premises using the said keys. He concluded that the second defendant had defrauded the plaintiff as he did not have the owner's authority to purport to lease the premises.

Jie therefore demanded a refund of all the sums paid by the plaintiff. The second defendant allegedly agreed to refund the money but thereafter Jie G would find it difficult to get hold of him. The money has not been refunded leaving the plaintiff with no option except to approach the court for relief.

It is trite that where a defendant raises a defence to an application for summary judgment, he has an onus to satisfy the court that he has a good *prima facie* defence. [1] He, the defendant, is required to allege facts, which, if proved at

trial would entitle him to succeed in his defence. It is not necessary that the A defendant set out all the facts he relies on but it is necessary that he allege material facts upon which he relies on with sufficient clarity and in some detail to enable the court to determine if the facts would constitute a good defence if they were proved at trial.

In casu, the second defendant has set out in detail the facts that he seeks to B rely on a defence to the claim by the plaintiff. The second defendant contends that the plaintiff's representative, Jie, was shown the correct premises but the address on the lease is incorrect. The second defendant is of the opinion that despite the error on the written agreement as it relates to the leased premises a contract in fact came into being. The plaintiff, on the other, hand argues that the mistake as to the identity of the leased premises is a fundamental C and material factor that constitutes a material mistake which vitiates the contract. In effect, the plaintiff contends that there is no binding contract.

Lease is the most common form of hiring and letting of property. The contract can be oral or written, depending on the election of the parties to the agreement. Where the parties elect to have a written agreement of lease, D the object of the written lease is to avoid subsequent disputes as to what the parties contracted on. This is to obviate the need for the parties to advert to oral evidence in establishing the material elements in the agreement. As the contract is one for the letting and hiring of things, it is an essential term of the contract that the thing, or property that is the subject matter of the agreement be described with sufficient clarity for the contract not be E found void for vagueness. The description of the property being leased must, therefore, be such that it will enable the property to be indentified and that the description must not consist of a reference to and depend upon the evidence of the parties to the agreement. This is not to mean that evidence on the description of the property will not be permitted, nevertheless there must be sufficient clarity in the description as not to lead to a conclusion that F due to the vague description of the same, no contract was in fact concluded.

In casu, there are a number of challenges as regards what in fact was being leased out to the plaintiff. The first is the actual address of the leased premises. Whilst the documents speak of number 2 Cameron St the defendants refer to the property as number 6. According to the plaintiff, there then exists a G unilateral mistake such as to warrant the court to conclude that no contract came into effect. In the opposing affidavit filed on behalf of the defendants, the point is taken that the plaintiff's representative was advised, when viewing the premises, that there were tenants occupying the butchery who were not going to be moved out. This statement then leads one to conclude that the plaintiff would not, in terms of the lease, occupy the premises on H

A its own. It would presumably be entitled to occupy a specified area or floor space. An examination of the lease agreement does not show this, as it does not qualify the floor space that the plaintiff is entitled to occupy. There is no clause excluding the butchery for occupation by the other tenants and not the plaintiff.

The improper description of the area that the plaintiff was to occupy is a B unilateral mistake which can be attributed solely to the defendants. The parties were clearly not in agreement, as the plaintiff understood that it would occupy the entire floor space, whereas the defendants sought to exclude part of it. There therefore existed a fundamental mistake as to the description of the premises being let. It is not necessary, in my view, to decide whether or C not the mistake was unilateral or common to both parties. The manner in which the premises were described on the written agreement of lease and the divergent views of the parties as to what was being leased manifests a lack of consensus on the part of the lessor and the lessee. It is clear that due to the lack of clarity as to what was being lease no contract came into being. Thus the facts alleged by the defendants as the basis of their defence D to the claim would not entitle them to succeed at trial. In the event, the facts have not provided a sufficient basis for this defence to the application for summary judgment.

In addition to resisting the claim, the defendants have also adverted to facts alleging a counter-claim against the plaintiff. The second defendant has E alleged in the opposing affidavit that he is owed damages by the plaintiff under various heads. The first is for alleged trauma suffered by himself and his wife. The second defendant alleges that the plaintiff's representative constantly harassed and threatened him at the office and at home. On one of the occasions, the plaintiff's representative had pointed a gun at the defendant, threatening to shoot him. The threat to kill him had been repeated on another F occasion when the plaintiff's representative "camped" at the defendant's offices and, later that day, the defendant had received threatening phone calls from people who claimed to be members of CIO. On 19 February 2010 the plaintiff's representative had arrived at the defendant's residence with "hordes" of people. They threatened to break down the gate and kidnap the G second defendant and his entire family. The noise they made attracted the other residents in the neighbourhood. They only left after three hours. They returned on 26 and 27 of February 2010. As a result the second defendant's wife, who was expecting a child, collapsed on both occasions. On the second occasion, she started vomiting without letting up. The result of this was that she delivered a premature baby on 3 March 2010. On 28 February they H returned and this time they entered the yard and the defendant was pushed

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around and shoved. The police had to be called. The plaintiff's representative A and his aides were arrested as a result.

The upshot of this is that the second defendant intends to claim US$40 000 for alleged trauma. The premature delivery of the baby has resulted in him paying US$5 000, which amount he expects will get to US $7 000. He was also suspended from employment with the first defendant and, as a result of B the plaintiff's representative going to the immigration department, his permit was suspended and he had to pay US $1 000. As a result of his suspension, he has lost a monthly income of US$4 500 and, at the time of filing the affidavit, he had been prejudiced to the tune of US$13 500. He also states that the first defendant has lost an amount of $6 000 in lost revenue as a result of the actions of the plaintiff. C

The second defendant was arraigned before the court on certain charges and the newspapers reported the matter. He intends to claim an amount of US$15 000 for defamation. It is not clear if this claim is intended against the newspaper or the plaintiff's representative. He further states that, in view of the antics of the plaintiff's representative and those of his aides, D he is now viewed by the community in which he resides as a con artist. In addition, the plaintiff's representative had delivered a letter at his house in which he attacked members of the Indian community at large. In the letter it was also claimed that the defendant was having extra marital affairs. This letter was seen by his wife and almost ruined his marriage. He has therefore particularised the claims he intends to bring against the plaintiff as follows: E

Rent	US$ 13 500
Patrimonial loss	US$ 40 000

Medication actual and future	US$ 7 000
Loss of income (for himself)	US$ 13 500
Immigration	US$ 1 000 F
Loss of income (first defendant)	US$ 6 000
Defamation	US$ 15 000
Patrimonial loss (letter to his wife)	US$ 2 000
Total	US$ 98 000

He prays that in the event that the court finds that he is liable to pay the G plaintiff's claim he be excused as his claim is higher than that of the plaintiff. He intends therefore to file a counter-claim against the plaintiff.

It is not in dispute that the plaintiff's representative went to the defendant's residence accompanied by other people. The letter annexed to his opposing affidavit did not state the number of occasions when this occurred. It is also common cause that when the plaintiff's legal practitioners were appraised of H

A his conduct they indicated that they had spoken to him and advised him to desist. I must consider therefore whether the defendants can escape liability on the basis of the alleged counter-claim being raised by the second defendant.

The leading authority in our jurisdiction on the issue is *Anglo-African Shipping Company (CA) Pvt Ltd* v *Trinity Engineering (Pvt) Ltd & Anor* B 1984 (2) ZLR 199 (H). At p 206 Smith J stated:

> "Where a defendant has raised a claim in reconvention and the claim is unliquidated, the law to be applied has been stated by Corbett J (as he then was) in *Stassen* v *Stofberg* 1973 (3) SA 725 (C) at 728-9. I quote from the official English translation as follows:
>
> > 'If it is accepted therefore that the defendant can hold plaintiff liable for C damages in respect of the alleged defects in the house, the question arises whether defendant's affidavit discloses a valid defence on this ground. Defendant alleges that he is entitled to a "substantial counter-claim" against the plaintiff for damages caused by the latter's "defective work". Although the various defects are fully described, the quantum of this alleged counter-claim is not fully set out. Indeed there is no indication whatsoever of e.g to what extent the value of the property was reduced by the defects or of D how much it would cost to repair them. Whatever the amount may be, it is probably less than the balance of the purchase price and the other amounts claimed by the plaintiff. I will accept that in terms of the uniform Rules of Court – particularly r 22(4) – a defendant who admits the claim is entitled to raise an unliquidated counter-claim as a defence; that if the counter-claim exceeds the main claim, it constitutes a defence in respect of the whole E claim (see *Spilous & Co Ltd* v *Coreejees* 1966 (1) SA 525 (C)); and if the counter-claim is less than the main claim, the defendant may pay the balance into court and in this way raise a valid defence to whole main claim (see *Koornklip Beleggings (Edms) Bkp* v *Allied Minerals Ltd* 1970 (1) SA 674 (C)). On the other hand, if a defendant raises an unliquidated counter-claim without in any way establishing its quantum – or indeed making an effort to F establish it – and where it appears that, in all probability, the counter-claim will be appreciably less than the main claim, and no payment into court was made, such "counter-claim" in my opinion does not disclose a *bona fide* defence for the purpose of summary judgment.'"

It is the contention of the plaintiff that the second defendant's alleged counter-claim is vague, embarrassing, unsubstantiated and that it clearly does not G disclose a *bona fide* defence for the amounts claimed by the plaintiff in the application for summary judgment. The second defendant claims an amount of rent equal to what the plaintiff paid as part of the lease agreement. An amount

of $40 000 claimed as patrimonial loss has not been justified under any legal head for damages. The medication, referred to as special medication, is not specified and has not been linked with the supposed premature birth H of a child, which event has itself not been linked to any event to do with the

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Gowora J

plaintiff instead of a medical condition. The loss of income by the defendant A has not been justified. If his actions in leasing the property were on behalf of his employer, he has then not explained how his actions in letting the property could have led to his suspension for employment. The claim for loss of salary on the part of the defendant as a result of being suspended defies logic when the second defendant supposedly deposed to an affidavit on behalf of the B first defendant. If he was suspended, on what basis then is he deposing to an affidavit on its behalf? Even if he was suspended, it would be a tenuous link for that suspension to be premised on the actions of the plaintiff's agent. The claims for money paid to immigration, the defamation claim and the patrimonial claim in favour of his wife can only have been included to beef up the sums to constitute a counter-claim for purposes of evading the claim C for summary judgment. As for the loss of income for the first defendant, that would be a claim properly brought by the first defendant and not the second defendant. As for defamation claim arising out of the article in the *Herald*, it would be difficult, if not impossible, to link the plaintiff with the publication of the article. Granted, there is a letter of complaint to the *Herald*, but there is not letter of complaint to the plaintiff over its publication. There D is no suggestion that the plaintiff gave a story to the newspaper which then published the article. As suggested by the plaintiff's counsel, the *Herald* is not under the control of the plaintiff and the cause of action, if any, is against the newspaper and not the plaintiff.

In order to succeed in the counter-claim as a defence to the application for E summary, a defendant must aver sufficient facts as to disclose a cause of action in the counter-claim. See *Koornklip Beleggings* v *Allied Minerals Ltd (supra*). The averments in the opposing affidavit do not, in my view, disclose a cause of action under any of the heads on which the second defendant purportedly seeks to raise a counter-claim. It is incumbent upon a defendant raising an unliquidated counter-claim as a defence to a claim for F summary judgment to establish the counter-claim. See *Stassen v Stofberg (supra*) at 730. In my view, the counter-claim raised by the defendant in this application does not disclose a *bona fide* defence and the plaintiff is entitled to judgment as prayed.

In the premises, there will be an order for summary judgment in terms of G the summons against both defendants jointly and severally, the one paying the other to be absolved, together with costs of suit.

Mtetwa & Nyambirai, plaintiff's legal practitioners

Bvekwa Legal Practice, defendants' legal practitioners H

1 See *Hales* v *Daverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at 253E-F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/MUROWA DIAMONDS v COMMISSIONER-GENERAL, ZIMBABWE REVENUE AUTHORITY 2011 (1) ZLR 37 (H)

MUROWA DIAMONDS v COMMISSIONER-GENERAL, ZIMBABWE REVENUE AUTHORITY 2011 (1) ZLR 37 (H)

Citation 2011 (1) ZLR 37 (H)

Case No	Judgment No. HH-1-11
Court	High Court, Harare
Judge	Gowora J
Heard	25 October 2010
Judgment	12 January 2011
Counsel	*E W W Morris SC*, for the applicant *A B Chinake*, for the respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Revenue and public finance – *tax – payment of – tax due to revenue authority in US dollars – overpayment previously made – previous overpayment made in US dollars to Reserve Bank and monies paid to revenue authority* D *in local currency – not a payment to revenue authority in US dollars – not permissible to set off payment to Reserve Bank against debt due to revenue authority*

Set-off – debt – debt due to taxpayer by an organ of the State – *when can be set off against tax owed by taxpayer to revenue authority – money paid* E *to Reserve Bank – not a payment to revenue authority*

Headnote

The applicant owed the revenue authority certain sums of money in the form of withholding tax. The sums were payable in US currency, the tax obligation having been incurred since the introduction of the multi-currency system in Zimbabwe. When the revenue authority proposed to F make the applicant's bank its agent for the collection of the sums due, the applicant sought an order preventing it from doing so. It averred that in the two years before the introduction of the multi-currency system, it had overpaid withholding tax. Accordingly, it sought to set off the overpayment against the tax that was due. When the earlier tax was paid, G the applicant had, for reasons that were not fully explained, paid certain sums in foreign currency to the Reserve Bank, and the Reserve Bank had paid the revenue authority in local currency. At the time, there was no obligation to pay withholding tax in foreign currency. The revenue authority argued that any payment made to the Reserve Bank in foreign currency was not in terms of any legal obligation. Any withholding tax H paid in local currency was not an overpayment in foreign currency. The

Gowora J

applicant argued that, as both the Reserve Bank and the revenue authority A fell under the umbrella of the *fiscus*, the payment made by the applicant should be recognized as having been received by the State; and that as long as it can be shown that the government benefited from the payment, then the set-off should be implemented in favour of the applicant.

Held, that set-off is a process whereby debts which are mutually owed between B the same parties are extinguished. In order that one debt may be set off against another, it is a prerequisite that both debts be liquid. In addition, the debts must clearly be between the same parties. However, in respect of government departments, a debt owed by one department cannot be off set against one owed to a different department. *In casu,* the entities in respect of which set-off was being claimed were not *strictu sensu* C government departments. They existed in terms of enabling statutes and were completely separate legal *personae* in their own right, with their own boards of directors.

Held, further, that it could not argued that the exercise by the revenue authority of its powers was improper where monies were admitted to be due and owing. The authority could be barred from exercising those powers only D if it was acting improperly or if there was some irregularity in the manner in which the powers are being exercised, or that the sums sought to be collected from the exercise are not in fact owed to the *fiscus. In casu*, there was no allegation that the respondent was improperly seeking to appoint an agent. There was also no suggestion that the withholding tax E was not due. What the applicant sought to rely on was a payment made to a party, not then appointed as agent for the respondent, and which payment did not sound in US dollars when it was apparently credited to an account of the revenue authority. The US dollar payment remained in the account of the Reserve Bank. F

Case cited

CoT v First Merchant Bank Ltd 1997 (1) ZLR 350 (S)

Case information

E W W Morris SC, for the applicant

A B Chinake, for the respondent G

Judgment

GOWORA J: This matter was argued before me on 25 October 2010. Counsel for both the applicant and the respondent undertook to furnish me with authorities for the arguments advanced on behalf of both litigants. Unhappily counsel did not act on their undertaking with the result that the authorities filed by counsel for the respondent was only made available on H

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A 11 November 2010. To date I have not received any from the applicant's counsel and as a result this judgment will be prepared without the benefit of those authorities.

The applicant has filed a founding affidavit in which the facts surrounding the application are alleged to be the following. The applicant carries on business B as a diamond miner at Murowa, with its registered office being in Harare. In June or July 2009 officials of the Zimbabwe Revenue Authority (commonly referred to as ZIMRA) of which the respondent is, in terms of the Revenue Authority Act [*Chapter 23:11*] responsible for the supervision, management of staff and activities, funds and property, carried out an audit of the applicant. Arising from that audit was a determination that the applicant had overpaid C an amount of $215 878.54 in respect of withholding tax between January 2007 and October 2008. It was then agreed between the applicant and the officials of the respondent's office that the overpayment could be offset against payments due in the future. On 8 July 2009 the applicant addressed a letter to the respondent seeking confirmation that the overpayments would be used to offset outstanding taxes. In a letter dated 24 July 2009 the applicant sought D confirmation of the amount of the overpayment and further, information as to when a refund would be made, alternatively, whether there would be an offset against other taxes due by the applicant to the respondent. This letter was received and signed for on the same day by an official of ZIMRA.

The applicant avers that the overpayments were amounts which had been E paid to the Reserve Bank in foreign currency which were credited to an account held in the name of the ZIMRA. The applicant avers that, because of the policy of the Reserve Bank at the time, the foreign currency was itself taken by the Reserve Bank and an equivalent value in Zimbabwe dollars was credited to ZIMRA's account.

F The applicant avers that on 25 January 2010 the respondent addressed a letter to the applicant stating that there was only a possible overpayment and that no payments had been made. A follow up letter dated 29 September 2010 was addressed to the applicant's legal practitioners stating that the withholding tax had not been paid in foreign currency and therefore no payments had been made. It was also suggested that the Reserve Bank was not authorized G to accept payments on behalf of ZIMRA and that ZIMRA's foreign currency (FCA) account was held at CBZ Bank and not at the Reserve Bank.

It is averred by the applicant that the alleged overpayments took place during January 2007 and September 2008 and that during that period there was no obligation to pay withholding tax in foreign currency. The obligation was only H introduced by s 4A(1)(f) of the Finance Act which was brought into force

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through s 3 of the Finance Act of 2009, which was promulgated sometime in A 2009. The applicant therefore contends that in as much as the respondent was not entitled to receive foreign currency for withholding tax, the amount which was received by the Reserve Bank was converted by the bank to Zimbabwe dollars and posted to the ZIMRA account. The applicant contends that the respondent is obliged to recognize the payments and give full credit for them B as it derived benefit from the funds between January 2007 and September 2009. An amount of $178 961.07 was set off and $37 208.07 was paid to ZIMRA as cash. However, despite receiving payments mentioned above, the respondent has threatened to institute recovery proceedings against the applicant. If this action were allowed to be executed the applicant would be crippled in the conduct of its business activity. The respondent has no basis C to fear that the applicant would be unable to pay any amount that is legally due to it as the applicant has considerable assets.

The respondent is opposed to the granting of the relief being sought. The opposing affidavit has been deposed by Grasia Garuso who is an investigating officer within ZIMRA. A point *in limine* has been raised in the affidavit to the effect that the matter is not urgent. The deponent avers that indeed the D respondent has made demand of certain amounts due to ZIMRA but is of the opinion that, even if the respondent were to garnishee the amount from the applicant's accounts, this would not result in the applicant suffering irreparable harm.

As to the merits, the respondent avers as follows. It is admitted that the E respondent is demanding payment of US $215 878.54 which amount represents withholding tax for the tax years 2009 and 2010. The respondent emphasizes that these amounts are due and payable. The respondent denies, however, that there was overpayment and denies further that the audit revealed such overpayment for withholding tax in respect of the period January 2007 to October 2008. It is the position of the respondent that the issue of overpayment F was raised by an employee of the applicant after the audit was finalized. The respondent states further that it was then agreed that if there was an overpayment, then such overpayment could be offset against payments in future if the original payment was paid to the respondent in foreign currency. The applicant had assured the respondent that it had paid in foreign currency G but the respondent had only received Zimbabwe dollars.

The respondent admitted that it had received a letter from the applicant but denies that there was an overpayment of US$215 878.54 for the period January 2007 to October 2008. The respondent confirmed that all payments made by the applicant for the period in question were in Zimbabwe dollars into a Zimbabwe dollar account. The respondent's view is that a payment H

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A to the Reserve Bank in foreign currency was not payment to ZIMRA for withholding tax. The respondent further states that the applicant had been advised by letter dated 25 January 2010 that the respondent had verified that there had been no overpayment towards withholding tax in United States dollars for the period January 2007 to October 2008. A further letter, dated 29 September 2010, addressed to the applicant's legal practitioners, had B confirmed that there was no overpayment and that the applicant was being put on terms to pay the amounts due by it. The respondent contends that, prior to the amendment of s 4 of the Finance Act [*Chapter 23*:*04*] and the introduction of s 4A which came into force on 23 April 2009, there was no obligation on a taxpayer to pay withholding tax in foreign currency and that C any payment by the applicant to the Reserve Bank of any amount prior to the promulgation of the new section was not in terms of a legal obligation. The respondent accepts that the applicant has paid withholding tax for January 2007 to October 2008 but contends that the payment was in Zimbabwe dollars and not foreign currency. What the respondent denies is that the applicant made an overpayment of withholding taxes in foreign currency.

D The applicant has annexed to its papers a letter from the Reserve Bank of Zimbabwe dated 9 September 2009 confirming that the applicant had on certain specified dates made payments to the

Reserve Bank and that the amounts paid on the said dates had been credited into the Federal Reserve Bank account of the Reserve Bank of Zimbabwe held in New York. The letter E in the final paragraph states that the funds received by the Reserve Bank were converted to Zimbabwe dollars and posted to account number 20-11109 in accordance with instructions on the credit confirmation. The respondent's position is that the applicant owes withholding tax for January 2009 to 2010 and, although the applicant admits that withholding tax for the period is due, it, the applicant, has not proved that it has paid such withholding tax. Instead F the applicant is alleging a set-off.

The respondent disputes that he has appointed anyone to recover monies due to it by the applicant. The respondent further states that the applicant was advised on 25 January to pay the withholding tax and that this constitutes a reasonable period. Some of the tax was due since 2009 and nothing has been paid. The respondent prays for the dismissal of the application and a G corresponding award for costs on the higher scale.

In argument, Mr *Morris* contended that, in so far as urgency was concerned, there was a sword of Damocles hanging over the applicant, given the peremptory powers that the respondent enjoys under the Act. These powers include the power to appoint a bank as agent for purposes of collecting money H on behalf of ZIMRA. The existence of a dispute between the applicant and the

respondent pointed to a strong possibility that the respondent would A exercise one of his peremptory powers under the Act.

As regards the issue of urgency, it was contended on behalf of the respondent that this matter has been conducted by the parties in a professional manner through the exchange of correspondence since March 2010.

The first letter on record from the office of the Commissioner General B indicating that withholding taxes for 2009 were outstanding is actually dated 25 January 2010. This was responded to by the applicant's legal practitioners on 4 March 2010. The record reflects that a further letter was written by the legal practitioners on 24 August 2010, which the Commissioner General responded to on 29 September 2010. It is in the penultimate paragraph of this letter where the applicant is put on terms to pay the outstanding taxes by 5 C October 2010, failing which recovery measures would be instituted against the applicant. This application was filed on 19 October 2010 and by that date there had been no recovery measures put in place by the Commissioner-General.

In order to decide whether or not this matter can be considered urgent, it is necessary to scrutinize the relief being sought. The applicant seeks a D provisional order which is framed as follows:

> TERMS OF FINAL ORDER SOUGHT
>
> That the respondent show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. That the respondent be and is hereby prohibited from appointing E agents in terms of s 48 of [*Cap 23*:*12*] until such time as the applicant's indebtedness, if any, to the respondent has been determined in accordance with the procedure relating to the Declaratory Order to be instituted by the applicant against the respondent.
> 2. The cost of this application will be borne by the respondent on the F scale of costs as recommended by the Law Society as between legal practitioner and own client.
>
> TEMPORARY RELIEF GRANTED
>
> The applicant is granted the following relief:
>
> 1. That the respondent be and is hereby prohibited from appointing G agents in terms of s 48 of [*Chapter 23*:*12*] pending the return date of this order
> 2. A copy of this application will be served on the respondent by the applicant's legal practitioners

The applicant has not denied that the withholding tax is due and owing. As far back as July 2009, the applicant had concluded that it had overpaid the H

A respondent by US$215 878.54. It sought to engage the respondent in dialogue to have the issue resolved. By January 2010, the respondent had put his position clearly to the applicant that there

had been no overpayment. Given the attitude of the respondent, in the event that the applicant felt strongly, as it seems to do, that there had been overpayment, it would have been prudent for the applicant to then have instituted proceedings for the dispute to be B settled. It has not done so.

The respondent has the power under s 58 of the Income Tax Act [*Chapter 23*:*06*] to appoint an agent for the collection of tax due by a person. The applicant accepts that this power has been bestowed on the respondent by the legislature to enable the respondent to comply with his obligations under C the Act.

It cannot be argued by the applicant that the exercise by the respondent of his powers under the empowering legislation is improper where monies are admitted to be due and owing. It seems to me that this court can only be enjoined by a litigant to bar the respondent from exercising those powers on the basis that the respondent is acting improperly or that there exists some D irregularity in the manner in which the powers are being exercised, or that the sums sought to be collected from the exercise are not in fact owed to the *fiscus. In casu*, there is no allegation that the respondent is improperly seeking to appoint an agent. There is also no suggestion that withholding tax is not due. What the applicant seeks to rely on is a payment made to a E party, not then appointed as agent for the respondent, and which payment did not sound in United States dollars when it was apparently credited to an account of ZIMRA. The United States dollar payment remained in the account of the Reserve Bank of Zimbabwe.

The applicant's case is premised on a set-off which is disputed by the respondent. In terms of s 58 of the Act, the respondent is empowered to F appoint any person, including a bank, as his agent for the purpose of collecting withholding tax. The payment by the applicant in 2007 to 2008 of the foreign currency which is now the reason of this dispute was made to the Reserve Bank of Zimbabwe which only made payment to the respondent in local currency. The respondent did not have a foreign currency account with the G Reserve Bank. In seeking to deny receipt of the monies in question during the relevant period, the respondent has stated that the Reserve Bank was not its agent in terms of the Act for the due collection of tax. The applicant does not dispute this. Rather, the position taken by the applicant is that as both the Reserve Bank and ZIMRA fall under the umbrella of the *fiscus* and that the payment made by the applicant should be recognized as having been H received by the State. The argument advanced by the applicant is that, as

long as it can be shown that the government benefitted from the payment, A then the set-off should be implemented in favour of the applicant.

In 2007 the tax due from the applicant was in local currency; this much is admitted. The applicant however chose, in a transaction agreed between itself and the Reserve Bank, to pay an amount to the latter in foreign currency and ZIMRA was then credited with an amount in local currency. The applicant B has not taken this court into its confidence as to the circumstances under which the payment to the Reserve Bank was made. It cannot, however, state that it was paying its tax under the arrangement with RBZ.

This state of affairs between the applicant and the respondent has been existing for the better part of 2009 and 2010, and one would assume that the applicant, C in order to seek a resolution to the impasse, would have approached the court for a *declaratur*. Even when it became obvious that the respondent might act to recover the disputed tax, the applicant has not brought the dispute to court for clarity on whether or not the monies it paid to RBZ can be set off against what it now owes the respondent. In my view, the applicant has to establish that, in the circumstances of this case, it would be entitled to claim C a right of set-off against the respondent.

Set-off is a process whereby debts which are mutually owed between the same parties are extinguished. In order that one debt be set-off for another, it is a prerequisite that both debts be liquid. In addition, the debts must clearly be between the same parties. Mr *Chinake* referred me to *CoT* v *First* E *Merchant Bank* 1997 (1) ZLR 350 (S) in which the Supreme Court made it clear that where debts are due by government departments, a debt owed by one department cannot be set off against one owed by a different department. At 353C-F Gubbay CJ stated:

> "At common law, set-off or *compensatio* is a method by which mutual debts, being liquidated and due, may be extinguished. It takes place *ipso jure*. If the debts F are equal, both are extinguished; if unequal, the smaller is discharged and the larger is proportionally reduced. There are, however, two important exceptions to the operation of the rule. A debt owed by one department of the State cannot be set off

against a debt owed to another department. And set-off cannot be raised against taxes due to the *fiscus* or where goods are sold for the benefit of the State. See *Schierhout* v *Union Government* 1926 AD 286 at 291; *Pentecost* G *& Co* v *Cape Meat Supply Co* 1933 CPD 472 at 479; Voet *Commentarius ad Pandectas* 16.2.16 (Gane's translation, Vol 3 at 166); van Leeuwen *Censura Forensis* 1.4.36.11 and 13 (Barber and Macfayden's translation); Wessels *The Law of Contract in South Africa* 2 ed vol II at paras 2567 and 2568; *Wille's Principles of South African Law* 8 ed at 483. Both these exceptions are grounded in public policy and utility. The first is designed to avoid confusion in State accounts; the second is to ensure the uninterrupted flow of tax revenues to the H

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A Treasury in the interests of good governance. In each instance, it is for the State to decide whether or not set-off should apply, even though the debts co-exist."

In casu, the entities in respect of which set-off is being claimed are not *strictu sensu* government departments. They exist in terms of enabling statutes and are completely separate *personae* in their own right. They each have boards of directors, which boards are responsible for the management of each. In B addition, set-off is being claimed in respect of taxes owed to the *fiscus*. In my view, the exceptions which operate against the right of set-off as they relate to debts owed and owing by government departments are pertinent to this dispute. The applicant is clearly not in a position to legally claim set-off in the circumstances and it is therefore my view that the applicant has not C established a *prima facie* right for the grant of an interim interdict.

It was contended that, if the relief sought was not granted, the applicant would suffer loss. What that loss constitutes has not been stated. Indeed, it would be contradictory for the applicant to seek to establish irreparable harm. In para 17 of the founding affidavit, it is stated that the applicant is a company with considerable assets and that the respondent would not be D at risk in failing to recover any amount that is found to be properly due. How, then, can a company with considerable assets be at risk if its account were to be deprived of the sums sought by the respondent as withholding tax? The least the applicant could have done was to present to the court a financial statement that would confirm its allegation that the exercise by the E respondent of his power under the Act concerned would leave the applicant with a cash deficit. This it has not done. Indeed, it was submitted on its behalf that the Commissioner would not know how the applicant's business is run and how a shortfall of US$250 000 would affect that business. The applicant would expect this court to accept its mere say so that an appropriation by the respondent of an amount of US$250 000 which is admittedly owing, F would leave it impecunious. The court does not know how the applicant runs its business and would therefore require evidence of the effect of the deprivation of these funds, especially when one takes into account the fact that these sums are admittedly owed to the *fiscus.*

The applicant has said that it will suffer damage that cannot be compensated in any other way than the grant of an interdict. It does not specify what G specific harm it will suffer and in the circumstances I am unable to find that any action on the part of the respondent would cause harm to the applicant.

As for the balance of equities, in my view this favours ZIMRA which is owed money by the applicant and which money, in terms of the Act the respondent is obliged to collect. I am unable to agree with the submission H that the State benefited from the foreign currency paid to the RBZ in 2007

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because the circumstances surrounding such payment have not been explained A by the applicant.

In the premises, it is my view that the application is devoid of merit and it is hereby dismissed with costs.

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

Kantor & Immerman, respondent's legal practitioners C

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MAHLANGU v DOWA & ORS 2011 (1) ZLR 47 (H)

Citation	2011 (1) ZLR 47 (H)
Case No	Judgment No. HH-4-11
Court	High Court, Harare
Judge	Chatukuta J
Heard	24 February 2010
Judgment	12 January 2011
Counsel	*H Zhou,* for the applicant Ms *F Chimbaru,* for the first respondent
Case Type	Application for recusal
Annotations	No case annotations to date

Flynote

Court – *judicial officer – recusal – grounds for – apprehension of bias – test – matter in which police officers were respondents – judge married to senior police officer – marriage not in itself ground for apprehending bias – more information required to warrant apprehension of bias*

Headnote

The applicant, a senior legal practitioner, had been arrested and detained. An urgent application was made for his release on bail and a declaration that his arrest and detention were unlawful. The first three respondents were police officers, cited in their official capacities. Before the E application could be heard he was granted bail by a magistrate. The urgent proceedings were converted to an ordinary application. At the hearing, the applicant's counsel sought the recusal of the presiding judge on the grounds that she was married to a senior officer in the police force and that she would be biased in favour of the respondents on the basis that the application related to some of her husband's subordinates or F superiors. The applicant also argued that, because of her marriage, the judge may have had prior knowledge of facts that, would influence her in ruling in favour of the respondents.

Held, that the test to be adopted in determining whether or not a judicial officer should recuse himself or herself is well settled. The test is a G two-fold, objective test: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed H that they can disabuse their minds of any irrelevant personal beliefs or

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predispositions. They must take into account the fact that they have a A duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for B whatever reasons, was not or will not be impartial. Where an applicant makes an application of this nature, the court should not take it as an affront. What defines the reasonableness of the application and the apprehension itself is the nature of the link or association between the judicial officer and the parties in the litigation. No reasonable person would entertain an apprehension that a judicial officer would be biased C in favour of the police simply by virtue of a marriage to a police officer. A litigant must advance more information to warrant the apprehension. A sizeable number of matters before the court, both criminal and civil, relate to the police. There was no distinction between the present matter and those other matters where the police are litigants. The apprehension D expressed by the applicant would mean that the judicial officer would have to recuse himself or herself from almost all the cases where the police and its officers are litigants. Such an apprehension would be unreasonable.

Cases cited E

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

Austin & Anor v Chrmn, Detainees' Review Tribunal & Anor 1988 (1) ZLR 21 (S)

Coop & Ors v SA Broadcasting Corp & Ors 2006 (2) SA 212 (W)

Govt of Republic of South Africa & Ors v N & Ors 2006 (6) SA 566 (D)

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

Masedza & Ors v Magistrate, Rusape & Anor 1998 (1) ZLR 36 (H)

President of Republic of South Africa & Ors v S A Rugby Football Union & Ors 1994 (4) SA 147 (CC)

S v Collier 1995 (2) SACR 648 (C) G

S v Mutizwa 2006 (1) ZLR 78 (H)

S v Shackell 2001 (4) SA 1 (SCA)

Sager v Smith 2001 (3) SA 1004 (SCA)

S A Commercial Catering & Allied Workers Union & Ors v Irvin & Johnson Ltd 2000 (3) SA 705 (CC) H

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Case information

A *H Zhou,* for the applicant

Ms *F Chimbaru,* for the first respondent

Judgment

CHATUKUTA J: On 2 November 2009, the applicant was arrested by the first respondent on allegations of contravening s 184(1)(c) of the Criminal B Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations were that he was obstructing the course of justice by attempting to interfere with the Attorney-General of Zimbabwe in the discharge of his duties. On 3 November 2009, the applicant filed an urgent chamber application seeking, in the interim, his release from police custody. In the final relief, he sought a declarator that his arrest and detention were unlawful. The application C was, on my instructions, set down for hearing on 4 November 2009 at 8.30 am. The applicant however appeared before the magistrates court and was granted bail before the date of hearing of the urgent chamber application. The interim relief had therefore been overtaken by events. Despite the fact that I could no longer grant the interim relief sought, I directed the conversion of the urgent chamber application into an ordinary court application and that D the respondent file its opposing papers to the final relief sought in terms of the rules applicable to court applications. The application is now before me pursuant to that order.

The court application was set down for hearing on the opposed roll of 24 February 2010. Before the parties addressed the court on the merits E of the matter, Mr *Zhou*, the applicant's lawyer, requested audience in my chambers. It was then that he applied, on behalf of the applicant, for me to recuse myself from hearing the matter. The basis for the application is that my husband is a senior officer in the police force. The applicant expressed an apprehension that I would be biased in favour of the respondents on the F basis that the application relates to my husband's subordinate and superiors respectively. The applicant assumed that, because of my marriage, I may have had prior knowledge of facts that would influence me in ruling in favour of the respondents.

Ms *Chimbaru*, for the respondents, opposed the application on the basis that my husband is not a party to the proceedings, directly or indirectly. G Although he is the chief police spokesperson, he does not interact with the first respondent who is in the Criminal Investigation Department. He also does not have an interest in the outcome of the proceedings. The apprehension of bias was therefore far-fetched and unreasonable.

The test to be adopted in determining whether or not a judicial officer H should recuse himself or herself is well settled and is set out in *Leopard*

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Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd 1994 (1) ZLR 255 (S). A The test is a two-fold objective test (double reasonableness): that the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Masedza & Ors* v *Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H), *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* v *Diamond* B *Insurance Co (Pvt) Ltd* 2001 (1) ZLR 226 (H), *S* v *Mutizwa* 2006 (1) ZLR 78 (H), *Austin & Anor* v *Chairman, Detainees' Review Tribunal & Anor* 1988 (1) ZLR 21 (S), *Coop & Ors* v *S A Broadcasting Corporation and Ors* 2006 (2) SA 212 (W), *S A Commercial Catering & Allied Workers Union & Ors* v *Irvin & Johnson Ltd* 2000 (3) SA 705 (CC), *President of Republic of S A and Others* v *S A Rugby Football Union & Ors* 1999 (4) SA 147 (CC), C *S* v *Shackell* 2001 (4) SA 1 (SCA), *Sager* v *Smith* 2001 (3) SA 1004 (SCA), *Govt of Republic of S A & Ors* v *N & Ors* 2006 (6) SA 566 (D).

The test is, in my view, aptly stated in *President of Republic of S A & Ors* v *S A Rugby Football Union & Ors (supra*, at 177D-E, para 48) where it was held that:

> "The question is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that E they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of litigant for apprehending that the F judicial officer, for whatever reasons, was not or will not be impartial."

In considering this application, I have taken heed of the warning in the plethora of cases cited above that the applicant has a right to have confidence in the judiciary. Where an applicant makes an application of this nature, the court should not take it as an affront. G

As stated in *Associated Newspapers of Zimbabwe supra* at 239E-F, what defines the reasonableness of the applicant and the apprehension itself is the nature of the link or association between the judicial officer and the parties in the litigation. There is no direct link whatsoever between the respondents and myself. The alleged link is through my husband, who is not a party to the proceedings directly. The indirect link that has been referred to between H

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A my husband and the respondents arises from an employment relationship with the respondents.

Can a marriage of a judicial officer to a police officer be elevated to an indirect link to the respondents? Put differently, it appears to me that the question is, therefore, whether or not a reasonable person would have apprehension of bias arising from such a marriage and whether the

apprehension would be B reasonable under the circumstances. The link is, in my view, so far removed to even be considered as an indirect link between the respondents and the judicial officer. Whilst my husband may be a senior officer in the police force, he does not, as rightly submitted by Ms *Chimbaru*, have any involvement in the first respondent's day to day discharge of his responsibilities. The fact C that he is a junior to the second and third respondents again, in my view, has no bearing on this matter.

I do not believe that any reasonable person would entertain an apprehension that a judicial officer would be biased in favour of the police simply by virtue of a marriage to a police officer. A litigant must, in my view, advance D more information to warrant the apprehension. A sizeable number of matters before the court, both criminal and civil, relate to the police. I do not see any distinction between the present matter and any of those matters where the police are litigants. The apprehension expressed by the applicant would mean that the judicial officer would have to recuse himself or herself from almost, if not all, the cases where the police and its officers are litigants. E Such an apprehension would be unreasonable.

The apprehension is even more unreasonable, given that the court was seized with the initial urgent chamber application. It appears to me that all the facts required to determine the application were already in the urgent chamber application. The court had already considered those facts when F it determined the matter and converted the urgent chamber application to an ordinary court application. The nature of the facts that the judge would have been privy to by the virtue of her marriage were not apparent from the applicant's submission.

A case in point is that of *Government of the Republic of S A & Ors* v *N & Ors* 2006 (6) SA 566 (D). In an application for the recusal of the presiding G judge on the ground that his daughter was in the employ of the correspondent attorneys of one of the parties, the judge refused to recuse himself on the basis that his daughter's role was far removed from the actual litigation (at 567E and 568B-C).

Another case is that of *S* v *Collier* 1995 (2) SACR 648 (C). In dismissing an H appeal against a decision in a lower court in which an accused insisted that

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he be tried by a black magistrate, alleging that a white magistrate would be A biased against him, Hlope J is quoted in *President of Republic of S A supra* at 174, para 43 as having said:

> "Equally, the apparent prejudice argument must not be taken too far; it must relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision … Professor Baxter gives a commonly cited example, namely the mere fact that a decision-maker is a member of the B SPCA does not necessarily disqualify him from adjudicating upon a matter involving alleged cruelty to animals. By the same token, the mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true. Otherwise no black magistrate or judge could ever administer justice fairly and evenhandedly in a matter involving a white accused." C

As stated in the cases that I have referred to above, an applicant, on raising the question of bias, should take into consideration that a judicial officer takes an oath of office to uphold the law impartially and without fear or favour. I took the oath seriously. This should be weighed against any apprehension of bias. Whatever decision I would take in the main matter would be based on the law supported by the facts filed of record, and not those that the applicant D may perceive the court is aware of. I consider that the applicant has not discharged the onus placed on him of rebutting the weighty presumption of judicial impartiality.

It is my view that the ground upon which the application for recusal is premised does not give rise to a reasonable apprehension of bias by a reasonable E applicant. I am satisfied that, despite my marriage to a senior police officer, I will be able to deal with the matter in an impartial and unbiased manner.

Accordingly, the application is dismissed.

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

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/S v NYABEZA & ANOR 2011 (1) ZLR 53 (H)

S v NYABEZA & ANOR 2011 (1) ZLR 53 (H)

Citation	2011 (1) ZLR 53 (H)
Case No	Judgment No. HB-1-11
Court	High Court, Bulawayo
Judge	Cheda J
Heard	1 November 2010
Judgment	13 January 2011
Counsel	*B Dube,* for the appellants *T Makoni,* for the State
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law (statutory offences) – *Children's Act [Chapter 5:06] – s 7(1) – ill-treatment of children – forcing children whose parents had not paid fees to stand during lessons – failure to pay school fees – pupils barred from school premises and forced to do manual work because of* D *the failure of parents to pay school fees – such constituting ill-treatment*

Education – *school fees – failure by parents to pay school fees – pupils barred from school premises and forced to do manual work – children being forced to stand in class – such constituting ill-treatment and an offence under s 7(1) of Children's Act [Chapter 5:06]*

E **Family law** – *child – ill-treatment of – school teachers – forcing children whose parents had not paid fees to stand during lessons – such constituting ill-treatment and an offence under s 7(1) of Children's Act [Chapter 5:06] – lack of means as a defence – irrelevance of*

Headnote

The appellants, the headmistress and deputy headmaster of a junior school, F were charged with contravening s 7(1) of the Children's Act [*Chapter 5:06*], the allegation being that they ill-treated school children at the school by making all those children whose parents had not paid the fees and levies stand while receiving their lessons. This occurred whether or not chairs and desks were actually available. Where chairs were available, they were removed from the classroom. The appellants argued G the reason why pupils were standing was because there were inadequate resources; and lack of adequate resources due to no fault of the offender is excusable under s 7(4) of the Act.

Held, that the appellants' actions showed a clear intention to punish those who had not paid. The process was very selective, with a desire to ill H treat those who had not paid.

Cheda J

Held, further, that the issue of fees directly relates to the law of contract. A When a parent secures a place for a child at a school, a contract is entered between the school and the parent with regards to the payment of fees. The contract can either be express or implied. The parent undertakes to pay all fees which the school levies against the student from time to time. Failure by a parent to pay results in the institution of legal B proceedings against the parent to recover the fees. No legal steps or proceedings can be taken against a minor, who has no contract with the school to pay fees. To do so is an abuse of authority on the part of the school and constitutes an undue pressure to enforce payment of fees, using the pupil as a pawn. Institutions may not shut out pupils from school premises, force them to do manual work and have their school C results withheld in order to force their parents to pay outstanding school fees. Such action by the school authorities is illegal as it contravenes s 7(1) of the Children's Act [*Chapter 5:06*]. While school authorities are entitled to their fees, they should resort to a legal way of recovering them from the pupils, through their parents. D

Legislation considered

Children's Act [*Chapter 5:06*], ss 7(1) and 7(4)

Case information

B Dube, for the appellants

T Makoni, for the State E

Judgment

CHEDA J: This is an appeal against both conviction and sentence of the magistrates court which sat at Gweru on 20 May 2009.

The appellants are employed as headmistress and deputy headmaster of Cecil John Rhodes Primary School (hereinafter referred to as "the school") F at Gweru. They were charged with contravening s 7(1) of the Children's Act [*Chapter 5:06*] (hereinafter referred to as "the Act") which reads:

> **"7. Ill-treatment or neglect of children and young persons**
>
> (1) Subject to subsection (4), if any parent or guardian of a child or young person assaults, ill-treats, neglects, abandons or exposes him or allows, causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed in G a manner likely to cause him unnecessary suffering or to injure or detrimentally to affect his health or morals or any part or function of his mind or body, he shall be guilty of an offence."

The allegations against them are that on 6 March 2009 at 0800 hours, all pupils, teachers and the headmistress (first appellant) were at the assembly when the first appellant announced that all pupils who had not paid levy H

Cheda J

A fees (herein after referred to as "fees") were going to learn whilst standing. She went further and declared that a pupil was only going to be allowed to sit on a chair after paying fees.

On that day, pupils started their lessons sitting on chairs. However, at about 1100 hours, the second appellant moved around classrooms enquiring as to B how many pupils had not paid their fees. He then adopted a slogan "no levy no chair". He ferreted out a total of 239 pupils from grades 1-7 classrooms and ordered them to stand in front of their classrooms, whilst those who had paid fees were sitting on chairs at the back.

On the following day, the second appellant came back again in all classrooms of grades 1-7 and ordered all those who were in default of payment of fees to C take their chairs outside the classrooms. The pupils complied and the chairs were indeed taken out by the caretaker.

All the 239 pupils spent the whole day attending their lessons whilst standing.

The second appellant further instructed the class teachers to only allow pupils to sit on chairs upon production of a receipt to the caretaker who would then D issue out a chair. This practice continued up to 13 March 2009, when the police received information about the unlawful conduct of the appellants and this led to their arrest.

In attacking the magistrate's decision, the appellants have made various allegations which, in my view, are a hybrid of one issue, being whether or not E conducting lessons whilst standing by some pupils qualifies as ill treatment. Through their legal practitioner, they have argued that the court *a quo* erred in convicting them as there was no evidence to support the conviction and consequently the conviction should be set aside. It is their further argument that in the event of the appeal being upheld, the sentence should be set aside F and substituted with a fine not exceeding level 7.

Mr *Makoni,* for the respondent, agrees with them as he does not support the conviction. He is of the opinion that the conviction is not supported by the evidence on record.

At the trial the State led evidence from three pupils, namely Vuyo Ndlula (grade 7), Patience Zvomusekwa (grade 4) and Emmanuel Mpofu (grade 5 G blue). All these witnesses are pupils at the school and their evidence was that first appellant made an announcement that those who had not paid fees were going to have their chairs withdrawn from them. After this declaration, the second appellant went around the classrooms withdrawing chairs, resulting in them learning whilst standing from 7.30 am to 1.00 pm. They corroborated H each other on the material facts being:

Cheda J

(1) that the first appellant announced that all those who had not paid fees A would learn while standing;

(2) that the second appellant carried out this order immediately thereafter; and

(3) that they endured pain as a result of this action by both appellants.

I find that the trial magistrate's finding that appellants' defence could not be B sustained in view of the overwhelming evidence led, proper. I am surprised that the respondent finds fault in his finding while all the essential elements have been proved and they are there for everyone to see. In fact the facts are so clear that even he who runs can read them. The State witnesses corroborated each other in all material respects, namely that: C

(1) the first appellant made the relevant announcement at the assembly;

(2) the second appellant followed up this order by visiting each and every classroom looking for defaulters;

(3) those who subsequently paid fees were given chairs; and

(4) it is only those who had not paid fees that were made to stand in front C of the class from 7.30 am to 1.00 pm.

I find no fault on the part of the magistrate in making this finding of fact. In my view, it would have been a misdirection to find otherwise.

The appellants argued that they were wrongly convicted as they had a defence, being that the reason why pupils were standing was because there were E inadequate resources. Inadequate resources due to no fault of the offender is excusable as *per* s 7(4) of the Act.

Subsection (4) reads:

> "Proof that any failure which is the subject of a charge in terms of subsection (1) was due to lack of means and that such lack of means was due to none of the following – F
>
> (a) unwillingness to work;
>
> (b) misconduct;
>
> (c) the incurring of debts or obligations which, in all the circumstances of the case, are unreasonable;
>
> (d) omission to take reasonable steps to obtain relief from any other person legally liable to maintain the child or young person concerned or from any association, authority or institution whose purpose is the relief of indigency;
>
> shall be a good defence to the charge."

The facts proved during the trial are that first appellant desired to collect fees expeditiously and announced that chairs would be withdrawn from those pupils whose parents had not paid fees. The second appellant moved H

Cheda J

A from classroom to classroom enforcing that order. Those pupils who had paid fees but were in a classroom where the chairs were inadequate were made to attend lessons sitting on desks and not standing like those who had not paid. The appellants and their witnesses were found not to have been truthful, as they did all they could to protect their superiors.

B In my mind, this was a clear intention to punish those who had not paid. The process was very selective with a desire to ill treat those who had not paid. This was by no means coincidental but deliberate.

For that reason alone, the respondent had proved its case beyond reasonable doubt.

The issue of tuition or levy fees has been a topical issue for a number of C years. It is, therefore, necessary to deal with it at this point once and for all. In my opinion the issue of fees directly relates to the law of contract.

When a parent or guardian (hereinafter referred to as "parent") secures a place for a child at a school or tertiary institution (hereinafter referred to as "institution") a contract is entered into between the said institution and the D parent with regard to the payment of fees. The said contract can either be express or implied. The parent undertakes to pay all fees which the institution levies against the student from time to time. Failure by a parent to do so can result in the institution of legal proceedings against the parent to recover the said fees. No valid legal steps or proceedings can be taken against a minor who has no contract with the institution to pay fees. To do so is an abuse of E authority on the part of the institution which is an undue pressure to enforce payment of fees using pupils as pawns. This is, therefore, unlawful.

There, however, exists an implied contract that the student or pupil will abide by all rules and regulations of the institution. Any breach of such rules is punishable by the institution, more often than not, directly on the pupil, for F example, caning where permissible.

The court takes judicial notice that for a long time now, pupils continue to be shut out of school premises, forced to do manual work and have their school results withheld in order to force parents to pay outstanding fees. Such action by institutions is illegal as it contravenes s 7(1) of the Children's Act [*Chapter 5:06*]. While the authorities are entitled to their fees, they should G resort to a legal way of recovering fees from the pupils or students, through their parents.

The locking of school gates for latecomers is also a contravention of the said section. Surely, a civilized way of enforcing discipline can be employed, thus avoiding that which is likely to cause suffering so as to injure or H detrimentally affect a pupil's health or morals. A minor child attending

school, many a time has no urgent, reliable and efficient means of taking A himself or herself to school as he or she is entirely depends on his or her parent. There is, therefore, no logic in punishing the minor child by locking him or her outside the school gate.

In this regard, the Ministry of Education has been on record, advising school heads and heads of institutions not to expel, suspend or withhold pupils or B students' school results on the basis of non-payment of fees.

Those who have been acting in the said manner should cease this unlawful practice as they are committing an offence under the Act, *supra* and parents whose children are subjected to this type of punishment should report such practice to the police. C

For the above reasons I am of the view that the conviction was proper.

As far as sentence is concerned, I agree with both counsels that it was on the harsh side in the circumstances. It has, therefore, to be interfered with.

The following order is made:

(1) The conviction is confirmed; D

(2) The sentence is set aside and is substituted by the following:

Each accused is fined $250 or six months' imprisonment.

NDOU J concurred E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/ZIMBABWE ELECTRICITY TRANSMISSION AND DISTRIBUTION COMPANY v TECPAL CREATIVE INTERNATIONAL (PVT) LTD 2011 (1) ZLR 59 (H)

ZIMBABWE ELECTRICITY TRANSMISSION AND DISTRIBUTION COMPANY v TECPAL CREATIVE INTERNATIONAL (PVT) LTD 2011 (1) ZLR 59 (H)

Citation	2011 (1) ZLR 59 (H)
Case No	Judgment No. HH-34-11
Court	High Court, Harare
Judge	Gowora J
Heard	14 January 2011
Judgment	14 January 2011
Counsel	*S A Tawona,* for the applicant *C Damiso,* for the respondent
Case Type	Opposed court application
Annotations	No case annotations to date

Flynote

Contract – *breach – remedies – specific performance – when appropriate – time of essence – not appropriate to order specific performance*

Contract – *cancellation – breach by one party of its obligations – when other party entitled to cancel contract – time of essence of performance* D *– failure to perform in time entitling innocent party to cancel*

Headnote

The applicant contracted with the respondent for the supply of diaries for the following calendar year, 2010. The respondent delivered just over a fifth of the number ordered. The applicant cancelled the contract and E applied to court for an order for restitution of the balance of the purchase price paid to the respondent for the outstanding balance on the diaries. The respondent opposed the granting of the application, contending that it was not in breach and that further it had offered to deliver diaries to the applicant for 2011, which offer the applicant rejected. The applicant did not seek specific performance, on the basis that time was of the F essence. The contract contained no specific forfeiture clause. The issue was whether the breach was a serious one, entitling the applicant to cancel the contract.

Held, that rescission of a contract is only permissible if a breach has occurred of a term which goes to the root of the contract. The materiality of the G breach is also a relevant factor in the determination of whether rescission should be ordered or not. A debtor can commit a breach of contract by delaying or retarding performance of his duties under the contract, in which case he is held to be in breach at the expiry of the time fixed for the rendering of the performance. When

the time for performance arrives and the debtor has neither performed nor tendered performance, H then he is said to be *in mora*. Where no time for performance is fixed in

Gowora J

the contract, the creditor may fix the time for performance by making A demand upon the debtor for performance (*interpellatio*). In order to be effective, such demand should fix the time for performance. The time fixed must be reasonable in all the circumstances.

Held, that the failure to deliver the diaries, especially after the respondent had been placed *in mora,* constituted breach of a vital term, going to the B root of the contract, and entitling the applicant to cancel the contract. The respondent failed to deliver the diaries for use in 2010 and thus time was of the essence in this contract. Time is of the essence in what is usually described as a "mercantile transaction", that is to say, a contract in a fluctuating market or a market in which prompt delivery or payment is necessary to keep the wheels of commerce or industry turning. Here, the C applicant required the diaries for use in 2010 and by implication time was of the essence, even if no specific date for delivery had been set.

Held, that the court has a discretion on whether or not to grant specific performance. The court will not grant an order for specific performance where such order would create a disadvantage or hardship on one of D the parties, or where it would result in an unfair advantage to one of the parties. The court will also not attempt to force parties against their will to maintain a continued relationship. An order compelling the respondent to effect specific performance would produce an unjust result, in that the applicant would end up with a large number of diaries for 2010, when it no longer had use for them. E

Held, that a party seeking restitution asks the court to place him in the same position that he would be if the contract had not come into being. Cancellation effectively puts a stop to further performance of the contract by both parties. By cancelling, the injured party is intimating that he is not prepared to accept performance on the contract by the debtor. The applicant, in view of the non-performance by the respondent of F its obligations, was no longer bound by the contract, so it was entitled to be placed financially in the position it would have occupied had the contract not been concluded. As it had accepted the partial delivery, it was entitled to the restitution of the value of the balance of the order.

Cases cited G

Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A)

Erasmus v Pienaar 1984 (4) SA 9 (T)

Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering Ltd 1976 (2) SA 565 (A)

Nel v Cloete 1972 (2) SA 150 (A) H

Gowora J

A *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A)

Case information

S A Tawona, for the applicant

C Damiso, for the respondent

Judgment

B **GOWORA J**: On 18 December 2009 the applicant herein issued a purchase order in favour of the respondent for the supply by the latter of 2 500 diaries at the total price of US$25 242.50. The diaries were for the year 2010 and it is common cause that the respondent has delivered to the applicant a total of 566 diaries valued at US$4 213.83. The respondent has not delivered the balance and the applicant has cancelled the contract and has now approached C this court for an order for restitution of the balance of the purchase price paid to the respondent for the outstanding balance on the diaries. The respondent opposes the granting of the application and contends that it is not in

breach and that further it has offered to deliver diaries to the applicant for the year 2011, which offer the applicant has rejected.

D The crux of the matter to the resolution of this dispute therefore hinges on what constitutes serious breach as alleged by the applicant and whether or not the conduct of the respondent in delivering only a portion of the order would justify the applicant cancelling the contract on the basis of serious breach on the part of the respondent. The respondent, in opposing the application, has denied that it was in breach and claims that it is still in a position to perform E its obligations in terms of the contract.

A contract may contain a forfeiture clause expressly stating that if one of the parties fails to perform a particular obligation by a certain date or period the other party would be entitled to cancel the contract. However, the contract may not contain a forfeiture clause, in which event it becomes pertinent to F determine whether or not the breach is of such a nature as to entitle the other party to the contract to cancel the contract or whether some other relief other than cancellation is the appropriate remedy.

It is generally accepted that the serious breach of a "sufficiently" important term of the contract will justify cancellation at the instance of the wronged G party without the need to prove an intention to repudiate the contract on the part of the defaulter. It is therefore trite that the breach of a material term of the contract, or a breach that goes to the root of the contract, or a fundamental breach, or breach of a vital or essential term of the contract justifies cancellation. In *Oatorian Properties (Pty) Ltd* v *Maroun* 1973 (3) SA 779 (A) Potgieter JA enunciated at 784F-G the principle justifying H cancellation based on breach in the following terms:

Gowora J

> "According to the well-known principles there enunciated, rescission of a contract A is only permissible if a breach occurred of a term which goes to the root of the contract and the materiality of the breach is according to those authorities also a relevant factor in the determination of whether rescission should be ordered or not (*cf Spies* v *Lombard* 1950 (3) SA 469 (A) at p 488)."

In casu, the applicant has contended that the respondent not only failed to deliver the diaries but that it failed to do so within an agreed time frame. The B respondent, however, argues that according to the agreement between the parties time was not of the essence and that it is willing to deliver diaries to the applicant for the year 2011. According to the applicant, ordering specific performance in this instance would not be appropriate as time for performance on the part of the respondent was of the essence.

In order to succeed in its claim for cancellation of the contract based on C alleged breach of a material term, the applicant has to establish that the breach is of a vital term but for which it would not have entered into the agreement in the first place. The court may also have to consider whether the failure by the respondent to perform its obligations in terms of the particular term would render the performance of the rest of the contract a thing different in D substance from what had been stipulated for.

A debtor can in fact commit a breach of contract by delaying or retarding performance of his duties under the contract, in which case the debtor is held to be in breach at the expiry of the time fixed for the rendering of the performance. When the time for performance arrives and the debtor has E neither performed nor tendered performance, then he is said to be *in mora*. Where no time for performance is fixed in the contract, the creditor may fix the time for performance by making demand upon the debtor for performance (*interpellatio*). In order to be effective such demand should fix the time for performance and the time fixed must be reasonable in all the circumstances. See *Nel* v *Cloete* 1972 (2) SA 150 (AD) at 160. F

In casu, the respondent admits that there was a delay in the delivery of the diaries. The applicant has averred that there were numerous attempts made to follow up with the respondent regarding the delay in the delivery of the diaries. This is admitted by the respondent, the only dispute being whether or not the respondent acknowledged breach, which it denies. I find that there is G breach on the part of the respondent, the only question being whether or not the breach is such as would justify cancellation on the part of the applicant.

The diaries ordered by the applicant were meant for use in the year 2010. Of the order of 2 500 the respondent delivered 566, leaving a balance of 1 934. The applicant filed the application for

restitutio in integrum on 28 June 2010, by which time the respondent had not been able to deliver the outstanding H

2011 (1) ZLR p63

Gowora J

A diaries. The opposing affidavit was filed on 12 July 2010, at which juncture the respondent was suggesting that it could instead be given the opportunity to supply the balance for the year 2011. The applicant intended the diaries for use in 2010.

In my view, the failure to deliver the diaries for use in 2010, especially after the respondent had been placed *in mora,* constituted breach of a vital term. In B my view, the delay in delivery was a breach going to the root of the contract. It cannot be gainsaid that the respondent failed to deliver the diaries for use in 2010 and that therefore time was of the essence in this contract. The breach is, in my view, sufficiently serious to warrant cancellation of the contract.

The question now for determination is whether cancellation is the appropriate C remedy or should the applicant have sought specific performance instead of cancellation of the agreement. The applicant contends that specific performance as a remedy is no longer appropriate in view of the fact that the parties contracted for delivery of the diaries for the year 2010. When it became clear that the respondent could not deliver the diaries, the applicant took steps to mitigate its loss and sourced for the diaries from other suppliers.

D It is a principle of our law that the court has a discretion on whether or not to grant specific performance, and further that the court will not grant an order for specific performance where such order would create a disadvantage or hardship on one of the parties, or where it would result in an unfair advantage to one of the parties. The court will also not attempt to force parties against E their will to maintain a continued relationship. In *Benson* v *SA Mutual Life Insurance Society* 1986 (1) SA 776 (A) Hefer JA, in discussing the court's discretion to grant specific performance, had this to say at 783C-F:

> "… It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle is that the order which the court makes should not produce an unjust result which F will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy (*cf* De Wet and Yeats *Kontraktereg en Handelsreg* 4 ed at 189). Furthermore, the court will not decree specific performance where performance has become impossible. Here a distinction must be drawn between the case where impossibility extinguishes the obligation and the case where performance G is impossible but the debtor is still contractually bound."

In this case, the debtor is still contractually bound but the applicant's position is that an order compelling the respondent to effect specific performance would produce an unjust result, in that the applicant would end up with a total of 1 934 diaries for the year 2010 which it no longer has use for. I agree. I am not H persuaded by the argument advanced on behalf of the respondent that it is

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2011 (1) ZLR p64

Gowora J

able to supply diaries to the applicant for the year 2011. The function of the A court is to give effect to the agreement concluded by the parties, and it is not the function of the court to conclude contracts for the benefit of the parties. The contract before me is for the supply and provision by the respondent to the applicant of 2 500 diaries of differing sizes for the year 2010. The respondent has supplied 566, leaving a balance of 1 934 diaries undelivered. B It is clearly *in mora* and it is not, in my view, within the discretion of this court to order the applicant to accept delivery from the respondent of diaries for 2011. This court cannot know what the requirements of the applicant are as relates to diaries for the year 2011 and to be seen to be acceding to that request from the respondent would be for this court in effect to impose conditions on one of the parties. The respondent clearly has been unable to C perform its obligations in terms of the agreement. The applicant is therefore entitled to relief.

It is contended by the applicant that in the circumstances the only available form of relief in the circumstances is cancellation and restitution. A court order is not necessary for the cancellation of a contract. In this instance, the applicant has already cancelled the contract, the only query being whether D such cancellation was justified in the circumstances. I have already found that the

respondent had breached a fundamental term of the contract, thus the applicant was justified in cancelling the contract. The only issue remaining is whether the applicant has made out a case for restitution.

The applicant is seeking no more than the refund of the value of the E outstanding diaries. A party seeking restitution asks the court to place him in the same position that he would be in if the contract had not come into being. Effectively, cancellation puts a stop to further performance of the contract by both parties thereto. The injured party is by cancellation intimating that he is not prepared to accept performance on the contract by the debtor. I have already found that in this case time was of the essence in the performance F of the contract due to the need by the applicant to utilise the diaries during the year 2010 and that therefore a failure to deliver within a reasonable period in 2010 went to the root of the contract. It is an accepted principle that, where time is of the essence, a breach is of sufficient magnitude to justify the creditor in cancelling even without prior demand made to the G debtor to perform or rectify the breach. The applicant contends that this was a mercantile transaction in which time is always of the essence as both parties were dealing in the course of business.

Whether or not a transaction is considered a mercantile transaction depends on the circumstances surrounding the contract. In this instance, the applicant required the diaries for use in 2010 and by implication time was of the essence, H

Gowora J

A even if no specific date for delivery had been set between the parties. It is accepted that in mercantile transactions the time for performance is intended to be a vital term of the contract. Thus a failure by one of the parties to the contract entitles the other to cancel. It has frequently been held that time is of the essence in what is usually described as a mercantile transaction, that is to say a contract in a fluctuating market or a market in which prompt B delivery or payment is necessary to keep the wheels of commerce or industry turning [1]. In *Greenfield Manufacturers (Temba) (Pty) Ltd* v *Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A), Wessels JA stressed that the inquiry into the question of whether or not time is of the essence is focused on the existence of a tacit term and the nature of that tacit term. At 569B-E C the learned judge of appeal commented thus:

> "In effect, the trial court held that it had been proved by a preponderance of probability that the parties had agreed (1) expressly, that delivery was to be effected within 8 weeks from 19 June 1973 (ie, by not later than 14 August 1973) and (2) tacitly, that respondent would be entitled, at its election, to repudiate the contract in the event of a failure by appellant to effect delivery within the D stipulated time. I say tacitly, because it was not averred in the pleadings that such a term had been expressly agreed upon between the two parties. Whether such a tacit term is part of an agreement is a question of fact, and where it is in issue, that issue is to be resolved in the same way as issues of fact are ordinarily resolved, ie, by a consideration of the relevant evidence. In *Goldstein & Wollf* v *Maison Blanc (Pty) Ltd* 1948 (4) SA 446 (C) it was stated (at p 453), that there E is
>
> > 'a strong presumption that time is of the essence in a "mercantile transaction proper". I understand this to mean no more than that the circumstances in which a "mercantile transaction proper" is concluded and the terms thereof might afford cogent evidence that the parties had in fact agreed that "time is of the essence'."

F The respondent in the tender document indicated that delivery would be effected to ZETDC Head Office within weeks. Although the precise date and time of delivery were not fixed it seems to me that there was a time frame for delivery which was agreed between the parties. The applicant contends that the order was confirmed on or before 18 December 2009, but even if I were to accept that confirmation of the order was not effective by this date G as the respondent suggests, from the opposing affidavit it is clear that by the end of December the respondent had been given the order to deliver the diaries in terms of the tender. This is evident from the statements to the effect that the respondent's supplier in South Africa had closed for the festive season, making delivery before the New Year impossible. Notwithstanding

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Gowora J

the acceptance of the order and the undertaking to deliver within weeks, A there has been insufficient delivery. The facts as pleaded by both parties confirm, in my view, that time was of the

essence, and I would go further and suggest that it was tacitly accepted by both parties that in order to comply with its obligations the respondent had to deliver before the New Year or as early as possible thereafter. There was, however, no delivery before the B New Year. There was partial delivery, well after the year had started. Thus there was a fundamental breach of the contract which went to the root of the contract entitling the applicant to cancellation. See *Erasmus* v *Pienaar* 1984 (4) SA 9 (T).

I would find that the failure by the respondent to deliver within a reasonable time amounts to a repudiation of the contract, entitling the applicant to C cancellation of the contract. The applicant, in view of the non-performance by the respondent of its obligations, is also no longer bound by the contract, in which case it would demand and be entitled to be placed financially in the position it would have occupied had the contract not been concluded. It is implicit in a claim for restitution that each party must restore whatever he has received under the contract. The applicant, in order to comply with this D requirement, has accepted the 566 diaries delivered to it and only demands the value of the balance of the order.

In the premises the applicant is entitled to the order as prayed for and I will issue an order as follows:

1. The respondent be and is hereby ordered to pay the applicant the sum of E USD $21 028.67, being the cost of one thousand nine hundred and thirty four diaries, together with interest on the said sum at the prescribed rate with effect from 26 May 2010,
2. The respondent is ordered to pay the costs of this application. F

Muza & Nyapadi, applicant's legal practitioners

Hogwe Dzimirai & Associates, respondent's legal practitioners G

1 R H Christie *The Law of Contract in South Africa* 3 ed

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Source:
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RADIATOR AND TINNING (PVT) LTD v RADIATOR AND TINNING (PVT) LTD WORKERS' COMMITTEE & ORS 2011 (1) ZLR 67 (H)

Citation	2011 (1) ZLR 67 (H)
Case No	Judgment No. HH-278-10
Court	High Court, Harare
Judge	Mtshiya J
Heard	25 October 2010
Judgment	19 January 2011
Counsel	*D Ochieng*, for the applicant *A Marara*, for the respondents
Case Type	Opposed application

Annotations No case annotations to date

Flynote

Company – *winding up – voluntary winding up – procedure to be adopted – requirement to given notice of resolution to workers' committee – failure* D *to do so making presentation of petition to court fatally irregular*

Headnote

The applicant had obtained a provisional order for the winding up of the company and sought confirmation of the order. A special meeting of the shareholders had passed a resolution for the "member's voluntary liquidation" of the company on the grounds that it was unable to meet E its obligations. The respondents, being the workers' committee of the applicant and various employees of the applicant, opposed the application on the grounds that, because the winding up was voluntary, the workers' committee should, in terms of s 25A(5)(c) of the Labour Act [*Chapter 28:01*], have been consulted.

Held, that since this was a voluntary winding up, the provisions of ss 242 F and 243 of the Companies Act [*Chapter 24:03*] applied. Under s 243, a resolution for the voluntary winding up of a company shall not be deemed to have been passed unless the company has given not less than four weeks' notice of the resolution to the Registrar of Labour Relations and to the company's workers' committee (or, where there is G none, to the company's employees). This requirement does not apply where all the employees are members of the company, which was not the case here. Consequently, the applicant should have given notice to the respondents. Because the winding up was voluntary, the proceedings under s 207, under which the applicant presented its original petition, H were fatally irregular.

2011 (1) ZLR p68

Mtshiya J

Legislation considered A

Companies Act [*Chapter 24:03*], ss 242 & 243

Labour Act [*Chapter 28:01*], s 25A(5)(c)

Case information

D Ochieng, for the applicant

A Marara, for the respondents B

Judgment

MTSHIYA J: This is an opposed application where the applicant seeks confirmation of a provisional liquidation order granted on 24 March 2010, which order read as follows:-

"1. The applicant, Radiator & Tinning (Pvt) Ltd, is provisionally would up, pending the grant of an order in terms of para 3 of the discharge of this C order.

2. Subject to subs (1) of s 274 of the Companies Act. [*Chapter 24:03*], Theresa Grimmel is appointed as provisional liquidator of the above company with the powers set out in s 221(2)(a)-(g) of the Act.

3. Any interested party may appear before the court sitting at Harare on 5 May 2010, to show cause why a final order should not be made placing D the applicant company in liquidation and ordering that the costs of these proceedings shall be costs of liquidation.

4. A copy of this order shall be served on the applicant at its registered office.

5. This order shall be published once in the Government *Gazette*, once in the *Herald* and once in the *Chronicle* newspapers in a Friday edition. Publication E shall be in the short form annexed to this order.

6. Any person intending to oppose or support the application on the return day of this order shall:

(a) give due notice to the applicant at Coghlan Welsh & Guest, Legal Practitioners, 3rd Floor Executive Chambers, 16 George Silundika Avenue, Harare, ref N. Moyo;

(b) serve on the applicant a copy of any affidavit which he files with the Registrar of the High Court."

The applicant, in its application filed on 9 March 2010, has, in terms of s 207 of the Companies Act [*Chapter 24:03*], ("the Act") petitioned this court for the above relief because, as *per* the founding affidavit:

"(i) the company is unable to pay its debts;

(ii) the company has resolved, by special resolution, to wind up;

(iii) I believe that it is just and equitable that the company be wound up, so that the assets of the company can be liquidated to provide for some equitable distribution to creditors".

In its founding affidavit the applicant also states the following:

"Applicant has 102 employees, and its outstanding wage bill is US103 215. The company has no prospect of generating enough money to settle this bill".

Indeed, on 22 February 2010, at a special meeting of shareholders held at St Helier, Jersey, the directors of the applicant had passed the following resolutions:

- It was resolved that the notice period required for the holding of a special general meeting be waived.
- It was resolved that Radiator & Tinning (Pvt) Ltd be put into "Members Voluntary Liquidation", due to the inability of the company to continue to meet it's obligations.
- It was resolved that Jeremy Hodgskin, ID No. 08-051413K, be empowered to do all things and sign all documents in regard to effecting and facilitating this liquidation.
- It was resolved that Robert Charles Jenkinson, ID No. 63-010327K, be empowered to do all things and sign all documents in regard to effecting and facilitating this liquidation.
- It was resolved that Theresa Grimmel be appointed liquidator."

The second resolution above, relating to members' voluntary liquidation, is the one to occupy us in this judgment. It is on the basis of that resolution that the applicant then approached this court for the relief it seeks.

The provisional order, quoted in full at the beginning of this judgment, was published in both the *Herald* and the *Chronicle* on 9 April 2010 and 30 April 2010 respectively.

On 10 May 2010 the respondents filed a court application (i.e case no. HC 3093/10) for joinder in terms of Order 13 r 85 of the High Court Rules 1971. In the founding affidavit in support of that application, the second respondent, representing the view of all other respondents, stated the following as the basis of their application to be joined to the proceedings:

"4. The respondent through its legal practitioners filed a court application being a petition for its winding up on 9 March 2010 without consulting the workers committee since it is an interested party which is directly affected as one of the applicants' creditors.

5. On 22 April 2010, upon arrival at the workplace with other workers, we saw that the gate was locked. Upon enquiring that is when I was given a letter by the liquidator to the effect that a court application for liquidation had been made by the respondents.

6. On 30 April 2010, we had a meeting as the workers committee and resolved to duly appoint Messrs Matsikidze & Mucheche as our legal practitioners to act on our behalf. A copy of the extract of minutes has been attached

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herein as Annexure 'A'.

7. Being representatives of employees and the application in question being one which affects the welfare of such, with respect I submit that we should be joined to the application so as to give us an opportunity to be heard as an interested party. The applicants have a direct and substantial interest in the matter for which the joinder is being sought herein.

8. With respect I humbly submit that an order of this Honourable Court allowing B the joinder will enable the respondents to be heard by this Honourable Court during the proceedings of the petition."

The record does not show how that application was handled.

However, it appears that upon the respondents' application having been opposed by the applicant, this court, on 26 May 2010, issued the following C order:

"1. The matter is referred to the opposed roll.

2. The provisional order be and is hereby extended until the matter is resolved on the opposed roll.

3. The applicants in Case No. 3093/10 shall file their notices of opposition within 10 days of service of this order". D

On 8 June 2010 and in terms of the above order the respondents (applicants in case no. 3093/10) filed their notice of opposition in which they raised the following points *in limine*:

"NON COMPLIANCE WITH THE PROCEDURE

With respect, I am reliably advised by my esteemed counsel, which advice E I embrace that the procedure as laid down in s 25A(4)(a) and (5)(c) of the Labour Act [*Chapter 28:01*] was not followed before the matter was filed in this Honourable Court. It is respectively submitted that the applicant should have conducted a works council meeting with the workers in order to discuss its financial status and the way forward but this was not done. at the same time nothing was attached to the petition to the effect that such communication had been done to the workers. I will leave my legal counsel to deal with the legal F issues in the heads of arguments to be filed with this Honourable Court.

EXISTENCE OF MATERIAL DISPUTE OF FACTS

This matter if full of material disputes of facts which can only be cured by leading evidence from witnesses as will be elaborated from para 3 downwards. I therefore pray that the Honourable Court allows oral evidence to be led during the hearing." G

At the hearing of this matter and after listening to addresses on the points *in limine*, I allowed the parties to also address me on the merits of the application. I indicated then that my finding on the points *in limine* would dictate whether or not I should proceed to determine the application on the merits.

In making submissions on the points *in limine,* Mr *Marara* for the respondents H

Mtshiya J

A pointed out that, in view of the fact that this was a voluntary winding up of the applicant company, the procedure adopted was flawed. He said that in terms of the law and since this was a voluntary winding up, the employees (herein represented by the respondents) were supposed to have been consulted. He correctly pointed out that in its answering affidavit the applicant clearly admitted that this was a members' voluntary winding up. This was indeed B in line with the shareholders' second resolution which specifically made reference to "Members Voluntary Liquidation". Mr *Marara* also said that, in the given circumstances, s 25A(5)(c) of the Labour Act [*Chapter 28:01*] was clear on the need for workers to be consulted in situations of such a voluntary winding up.

C Mr *Marara* went on to submit that the fact that the applicant had not produced audited accounts and that the respondents disputed what was presented, meant that there were triable issues in the matter (i.e the disputes of fact could not therefore be resolved by way of application). He therefore urged the court to deny the applicant the relief it seeks.

Mr *Ochieng,* for the applicant, submitted that the applicant had properly D proceeded in terms of s 207 of the Act. He said that if the matter was one of voluntary winding up, there would have been no court proceedings. He also said that, although the resolution was "imprecise" the applicant had followed the correct procedure. Mr *Ochieng* submitted that winding up through the court was a public process and to that end the applicant had complied with E the provisions of the Act.

Mr *Ochieng* did not agree that there were material disputes of fact

For reasons I shall give here below, I am persuaded to agree with the respondents that the procedure followed by the applicant is fatally irregular and therefore the provisional order granted by this court on 24 March 2010 F should not be confirmed.

Section 199 of the Act provides for the following two modes of company winding up:

"(a) by the court or

(b) voluntary".

G Sections 206 and 207 of the Act then provide for circumstances under which a company may be wound up by court and how the process may be commenced. Given the import of the resolution that led to this process and the applicant's own admission in the answering affidavit, I shall not concern myself with the provisions of those sections of the Act. The resolution upon which the application is anchored specifically refers to "Members Voluntary H Liquidation". The resolution does not therefore bring us into the ambit of

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2011 (1) ZLR p72

Mtshiya J

ss 206 and 207 of the Act. The members' resolution, in my view, dictates A that we be guided by the provisions of ss 242 and 243 of the Act. The said sections provide as follows:

"242 Circumstances in which company may be wound up voluntarily

A company may be wound up voluntarily –

(a) when the period, if any, fixed for the duration of the company by the articles B expires or the event, if any, occurs on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily; C

(b) if the company resolves by special resolution that the company be wound up voluntarily.

243 Notice of resolution for voluntary winding up

(1) In this section –

'workers' committee' means a workers' committee appointed or elected in terms of Part VI of the Labour Relations Act [*Chapter 28:01*].

(2) A resolution for the voluntary winding up of a company shall not be deemed to have been passed unless the company has given not less than four weeks' D notice of the resolution –

(a) to the Registrar of Labour Relations referred to in s 121 of the Labour Relations Act [*Chapter 28:01*]; and

(b) to the company's workers' committee or, where the company has no worker's committee, to the company's employees:

Provided that this subsection shall not apply in relation to a company all of E whose employees are officers or members of the company.

(3) Where a company has passed a resolution for its voluntary winding up it shall –

(a) within two weeks after passing the resolution, give written notice of it to the master and the Registrar; and F

(b) within one month after passing the resolution –

(i) publish notice of it in the *Gazette*; and

(ii) …

(iii) …

(4) … G

(5) …"

In casu, a special resolution "that the company be wound up voluntarily" was indeed passed. Mr *Ochieng* submitted that the resolution was imprecise. I disagree.

The special resolution quoted earlier in this judgment clearly expresses the wishes of the members and is unambiguous. That position enjoys full H

2011 (1) ZLR p73

Mtshiya J

A support from the applicant's own averments. The applicant admits to the passing of the special resolution and also that it has a work force to which it owes wages and salaries. The affected employees are not members of the applicant. It would, in my view, be highly irregular for this court to amend or indeed to interfere with the applicant's resolution. As I have already said, the applicant's resolution dictates that the procedure it should have followed B is the one provided for in ss 242 and 243 of the Act quoted above.

It is also important to note that s 2A(3) of the Labour Act provides as follows:

"This Act shall prevail over any other enactment inconsistent with it."

Section 243 of the Act removes any possibility of inconsistence between the two pieces of legislation. The said section caters for the interests of the C workers in a situation of a voluntary winding up of a company such as *in casu*. Furthermore, the provisions of s 243 of the Act are in line with the spirit of the law as captured in subss (5) and (6) of s 25A of the Labour Act.

All in all, my finding is that, as per its resolution of 22 February 2010, the applicant should have followed the procedure laid down in ss 242 and 243 D of the Act as read together with subss (5) and (6) of s 25A of the Labour Act. The applicant departed from its resolution and proceeded in terms of s 207 of the Act. That action by the applicant does not enjoy the support of the resolution it claims to be the basis of the relief it seeks. Even without taking into account the fact that there might be disputes of facts, as argued by the respondents, the point *in limine* on the procedure adopted should succeed E on the basis of it being fatally irregular. The application cannot therefore succeed. I therefore order as follows:

The application for the confirmation of the provisional order granted by this court on 24 March 2010 be and is hereby dismissed with costs.

F *Coghlan, Welsh & Guest*, applicant's legal practitioners

Matsikidze & Mucheche, respondents' legal practitioners

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BMG MINING (PVT) LTD v MINING COMMISSIONER, BULAWAYO & ORS 2011 (1) ZLR 74 (H)

Citation	2011 (1) ZLR 74 (H)
Case No	Judgment No. HB-11-05
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	13 January 2011
Judgment	20 January 2011
Counsel	*V Majoko*, for the applicant Miss *T Mashiri,* for the first and second respondents *J R Tsivama*, for the third respondent
Case Type	Application for declaratory order
Annotations	Link to case annotations

Flynote

Administrative law – *procedural requirements – failure to comply with – effect – act done without complying with such requirements ultra vires and void ab initio* D

Mines and minerals – *claim – registered claim – cancellation of registration – grounds for – allegation of "overpegging" of another claim – procedure to follow – cancellation on grounds that area reserved against prospecting – procedure to follow*

Headnote

The applicant had pegged and registered certain mining claims. The third E respondent's holding company complained to the first respondent, the Mining Commissioner for the Bulawayo District, alleging that claims already registered by the third respondent had been over-pegged by the applicant. The first respondent then purported to cancel the applicant's claims. She claimed to be acting in accordance with s 50 of the Mines F and Minerals Act [*Chapter 21:05*], which allows cancellation where the site pegged was reserved against prospecting and pegging. The applicant sought a declaration that it was the lawfully registered owner of the claims.

Held, that if the cancellation was in breach of the Act, such cancellation was void *ab initio* because anything done by an official in excess of G the powers conferred upon him or without following the procedure for such cancellation is null and void. Section 50(2) requires the mining commissioner, *inter alia*, to give at least 30 days' notice to the affected party of the intention to cancel the registration. Even if the section did apply (which was unlikely, given that the area was not reserved against prospecting and pegging under s 31 or 35, and s 258(3) had no bearing H

Mathonsi J

A and the pegging method had not been questioned), the first respondent had not complied with the procedure for cancellation set out in subss (2) and (3) of s 50. This therefore meant that her actions not only offended against the *audi alteram partem* principle but also that failure to comply with the mandatory procedural requirements rendered her decision *ultra vires* s 50. If the first respondent had reason to believe that the registration B of the applicant's claims was questionable or that there might have been a case of overpegging, her duty was to investigate the matter thoroughly and act in accordance with the provisions of the Act. Complaints of overpegging should be dealt with in terms of ss 353 and 354 of the Act, which had not been followed. She appeared to have acted simply on C the basis of the complaint made on behalf of the third respondent and did not conduct any meaningful investigation, let alone commission a survey in terms of s 353. The application would therefore be granted.

Cases cited

Cluff Mineral Exploration (Zim) Ltd v Union Carbide Mgmt Svcs (Pvt) D *Ltd & Ors* 1989 (3) ZLR 338 (S)

Musara v Zinatha 1992 (1) ZLR 9 (H)

Legislation considered

Mines & Minerals Act [*Chapter 21:05*], s 50

Case information

E *V Majoko*, for the applicant

Miss *T Mashiri,* for the first and second respondents

J R Tsivama, for the third respondent

Judgment

MATHONSI J: The applicant seeks a declarator that it is the lawfully F registered holder of the mining claim called Kapata 11, registered number 11769 BM, held under certificate of registration number T30249. All the respondents have opposed the application, mainly on the ground that the applicant's said claims overpeg already existing and registered claims of the third respondent.

Sometime in 2001, Kapata Syndicate hired an approved prospector, Mr G Mguni, to conduct investigations and carry out a due diligence search with a view to establishing whether it was appropriate to prospect, peg and register 3 special base metal block claims in the area. Mguni duly

carried out the work, which cleared the area for pegging, resulting in the three claims being registered and registration certificates numbers 11768 BM, 11769 BM and H 11770 BM being issued to Kapata Syndicate by the Mining Commissioner

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2011 (1) ZLR p76

Mathonsi J

Bulawayo. The claims are located in the Dete area of Hwange. A

Work on the area commenced thereafter to develop it, resulting in boreholes being sunk and equipped, road networks were opened and geological exploration, mining engineering work, metallurgical plant designs and so on were done. In 2002 the claims were transferred from Kapata Syndicate to the applicant. The applicant maintained and paid for the claims throughout B in accordance with the provisions of the Mines and Minerals Act [*Chapter 21:05*] ("the Act"). By letter dated 9 July 2009, the Zimbabwe Mining Development Corporation (ZMDC) complained to the first respondent that the applicant's claims overpegged extant claims belonging to third respondent. The *locus standi in judicio* of ZMDC having been questioned at the hearing, counsel for the third respondent submitted that this entity wholly owns the C third respondent.

It turns out that in 1977 and 1979, the third respondent had pegged and registered certain Kapata claims, some of which may have been encroached by applicant's claim number 11769BM. The position is not clear but what is pretty obvious is that a pegging dispute has therefore arisen. Both the D applicant and the third respondent appear to hold title to conflicting claims.

In response to the complaint made by the third respondent the first respondent addressed a letter to the Secretary for Mines dated 19 August 2009 in which she stated that a survey conducted by the Regional Survey Department had shown that applicant's claims encroached onto third respondent's claims E and should thus be relocated.

Clearly therefore first respondent determined that the applicant should relocate to those of its claims which did not overpeg the third respondent's claims. This was confirmed by the Chief Mining Commissioner, who said applicant's claims must be cancelled.

It is pertinent that first and second respondents have proceeded on the premise F that the applicant's claims have been cancelled and that first respondent's decision to cancel was based on a survey by the Regional Survey Department whose officials, she says, state that third respondent's beacons were in place and that the applicant went to peg its own claims despite the existence of beacons. This conclusion is in sharp contrast with what the Regional Mining G Surveyor says in his letter of 8 December 2009 addressed to the Regional Mining Engineer which reads as follows:

> "'Re: Survey of dispute between Kamativi Tin Mines and BMG Mining claims'
>
> This minute is a reply to your request of the need to see the survey report of the beacons mentioned by the Mining Commissioner concerning the above issue. H

2011 (1) ZLR p77

Mathonsi J

> A It is alleged that the Regional Survey office carried out a survey in the area and it was one of the fact (sic) that the Mining Commissioner used to determine the results of the dispute. The dispute was never ever brought to the attention of the Regional Mining Engineer's Department – Bulawayo.
>
> I categorically state that there was no survey work carried out in connection with the dispute, that is the survey that helps the Mining Commissioner in reaching the B conclusions in the determination of the dispute concerning the blocks of claims.
>
> Mr Alex Saurombe, on or about 20 February 2008, approached the Survey office requesting for a GPS Survey to be carried out in his three special blocks of base metal claims (Kapata 1, Kapata 11 and Kapata 111) for the purpose of producing a general Surface Plan.
>
> Before the Survey was done the Survey office checked the status of the blocks C of claims to verify whether they were current or not, and whether the blocks of claims are marked on the claims plan of the state to a scale of 1:25 000 that is under the custody of the Mining Commissioner. *The BGM claims were found to be in order and marked clearly on the claims plan and there were no Kamativi blocks of claims appearing on the claims plan or plans kept by the Mining Commissioner. The Survey office was satisfied with the search.*
>
> D Therefore, the Mine Surveyor s went out into the field with the full knowledge that they were stepping on and carrying out the requested survey work on BMG Mining claims only" (emphasis added).

It is therefore unlikely that the findings of the first respondent regarding the conflicting claims were informed by a survey conducted by the Survey office as alleged. Having been disowned by the Regional Mining Surveyor, E the first respondent then prevaricated in her opposing affidavit where, at para 8, she says:

> "(a) Applicant is now the registered owner of the claim and it is immaterial who did the pegging.
>
> (b) It was an administrative error that Kapata Syndicate was allowed to register claims over current mining locations.
>
> F (c) The survey was carried out at the instance of the applicant. Officials from the Regional Survey Department informed the first respondent that Kamativi beacons were in place. Contents of Annexure 'L' are factually incorrect and were not relied on in reaching the decision to cancel the said claims."

This, coming from a person who earlier on said she relied upon the same survey, is difficult to understand. The first respondent is definitely not credible G in this aspect and it remains a mystery on what basis she decided to cancel the applicant's claims. What is more, this puts into issue the question whether any beacons belonging to the third respondent existed.

Both the first and second respondents claim that the applicant's claim was cancelled but they are silent as to when and how the cancellation was affected. H In her submissions, Ms *Mashiri* stated that the "claims were cancelled in line

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Mathonsi J

with s 50 of the Mines and Minerals Act [*Chapter 21:05*] which provides for A cancellation of such certificates of registration notwithstanding the provisions of s 58 of the same Act".

The issue which then arises is whether such cancellation was done in accordance with the provisions of the Act. The applicant has vehemently argued that it was not and that because there was no compliance, it remains B the lawful holder of claim number 11769BM. The applicant asks for a declaratory order to that effect.

If a cancellation is done by the first respondent in breach of the Act, such cancellation is void *ab initio* because anything done by an official in excess of the powers conferred upon him or her without following the procedure C for such cancellation is null and void: *Musara* v *Zinatha* 1992 (1) ZLR 9 (H) at 13A. In that case Robinson J went on to state at 13B-C that an interested person should be at liberty and entitled, at any time, to approach this court for an order declaring the act in question to be null and void and that the court should be slow to turn a party away where it seeks a declaratory order about its status. At 13F the learned judge concluded that: D

> "I consider that the same approach should be adopted by the court in a civil case where, on the papers before it – the more so where those papers seek a declaratory order – an act of glaring invalidity is, as in this matter, staring the court straight in the face. For the court to refuse, save in exceptional circumstances justifying such refusal, to declare the act in question null and void *ab initio* on some technical ground would, I agree, be to ignore the court's fundamental duty to E see that justice is done which, after all, is the duty which the layman expects the courts to discharge."

Accordingly, I do not agree with Mr *Tsivama,* for the third respondent, that the application for a declaratory order should not be entertained as it amounts to the court usurping the power of the first respondent to adjudicate and F cancel the registration certificate. To deny the applicant audience in the face of glaring inconsistencies on the part of the first respondent's conduct and clear violations of the provisions of the Act amounts to an abdication of duty.

The first respondent claimed to be acting in terms of s 50 of the Act in cancelling the claims. That section provides:

> "(1) Subject to subsection (2) the mining commissioner may, not withstanding G subsection (1) of section fifty-eight, at any time cancel a certificate of registration issued in respect of a block or site if he is satisfied that –
>
> (a) at the time when such block or site was pegged it was situated on ground reserved against prospecting and pegging under section thirty-one or thirty-five on ground not open to pegging in terms of subsection (3) of section two hundred and fifty-eight; or H

Mathonsi J A

(b) provisions of this Act relating to the method of pegging a block or site were not substantially complied with in respect of such block or site."

In a case which falls under subs (1), the first respondent is required to act in terms of subss (2) and (3) which provide;

"(2) At least thirty days before cancelling a certificate of registration under B subsection (1) the mining commissioner shall give notice to the holder of the block or site of his intention to cancel such certificate and of the grounds for such cancellation and of the proposed date of such cancellation, and shall at the same time inform the holder that he may, at any time before that date, appeal in writing to the Minister against such cancellation.

(3) Such notice shall be given by registered letter addressed to the holder of the block or site at the postal address recorded in the office of the mining commissioner C or, if no such address is recorded, by publication thereof in the *Gazette*."

There has been a signal failure to comply with any of these provisions relating to cancellation of the registration certificate. What the first respondent has done is merely to announce the cancellation, without more. So even assuming that s 50 applied to this case, which is unlikely, given that the area was not D reserved against prospecting and pegging under ss 31 or 35 and s 258(3) has no bearing and the pegging method has not been questioned, the first respondent has not complied with the procedure for cancellation set out in subss (2) and (3) of s 50. This, therefore, means that not only her actions offended the *audi alteram partem* principle but also that failure to comply E with the mandatory procedural requirements renders her decision *ultra vires* s 50. See *Cluff Mineral Exploration (Zimbabwe Ltd* v *Union Carbide Management Services (Pvt) Ltd Ors* 1989 (3) ZLR 338 (S) at 347E-F.

It was half-heartedly argued by Mr *Tsivama* that first respondent has not yet cancelled the registration certificate and as such due process must be F allowed to take its course. Unfortunately that argument directly contradicts the submissions made by Ms *Mashiri* on behalf of the first and second respondents. Ms *Mashiri* unequivocally submitted that applicant's "claims were cancelled in line with s 50 of the Mines and Minerals Act" in para 6 of her heads of argument and maintained that position during the hearing. Accordingly, the cancellation was effected and, in view of the violations G referred to above, it cannot be allowed to stand.

If the first respondent has reason to believe that the registration of the applicant's claims is questionable or that there may be a case of overpegging, she must investigate the matter thoroughly and act in accordance with the provisions of the Act. Complaints of overpegging should be dealt with in H terms of ss 353 and 354 of the Act and this has not been followed in this case.

2011 (1) ZLR p80

Mathonsi J

The first respondent appears to have acted in terms of the complaint made A on behalf of the third respondent and did not conduct any meaningful investigation, let alone commission a survey in terms of s 353 of the Act. This explains why she has found it difficult to explain how she arrived at a decision to cancel the certificate and why she has found herself contradicting the Regional Mining Surveyor. B

In the result, the provisional order made on 15 January 2010 is confirmed in the following terms, namely, that –

1. It be and is hereby declared that applicant is the lawfully registered holder of claims named Kapata 11 registered number 11 769BM as recorded on certificate of registration after transfer number T 30249.
2. If there are any complaints of encroachment such should be dealt with C by the first respondent in compliance with the provisions of the law.
3. The first and second respondents should bear the costs of this application.

Majoko & Majoko, applicant's legal practitioners

Civil Division of the Attorney Generals Office, first and second respondent's D legal practitioners

Sawyer & Mkushi, third respondent's legal practitioners E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/NDLOVU v NDLOVU & ORS 2011 (1) ZLR 81 (H)

NDLOVU v NDLOVU & ORS 2011 (1) ZLR 81 (H)

Citation	2011 (1) ZLR 81 (H)
Case No	Judgment No. HB-10-11
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	18 January 2011
Judgment	20 January 2011
Counsel	*J Tshuma,* for the plaintiff *C P Moyo,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Administration *of estates – intestate succession – widow of deceased – widow married under customary law – second widow married to deceased under civil law – entitlement of each widow to inherit house she occupied at time of deceased's death*

D **Customary law** *– marriage – subsequent marriage under civil law – neither marriage dissolved – death of husband – entitlement of widow under customary law to inherit house she occupied at time of husband's death*

Family law *– husband and wife – marriage – one wife married under customary law and other under civil law – succession to estate and* E *matrimonial home marriage – customary marriage on equal footing with civil marriage*

Headnote

By clear unambiguous language, the legislature, in subss (3) and (4) of s 68 of the Administration of Estates Act [*Chapter 6:01*], has not only recognized a customary marriage as valid for purposes of inheritance, it has also F placed such marriage on an equal footing with one solemnized in terms of the Marriage Act [*Chapter 11*]. In so doing it has unquestionably raised the status of a customary marriage to the same level as a civil marriage.

The provisions of s 68F(2) of the Administration of Estates Act [*Chapter 6:01*] are equally clear and admit of no ambiguity at all. Where the deceased G husband is survived by two wives and those wives live in separate houses formerly belonging to the deceased, each wife is entitled to receive the house that she occupied at the time of the husband's death, together with the household effects therein. Where the wives shared the same house, they are entitled to joint ownership. This is so regardless of the status of the marriage as long as, in the case of a customary marriage, it was H entered into before the civil marriage.

Mathonsi J

The plaintiff and the deceased had been customarily married in 1982 and A that marriage had subsisted until 2002 when the deceased had died. At the time of his death, they were living in Bulawayo in the matrimonial home. The evidence disclosed, however, that in 1987, they had quarrelled as a result of a relationship which the deceased had formed with the first defendant. The plaintiff left the matrimonial home and the deceased and B thereafter married the first defendant in a civil marriage conducted in terms of the Marriage Act [*Chapter 5:11*]. They stayed together only briefly and at the time of the deceased's death, they had long gone their separate ways. The plaintiff, meanwhile, was reunited with the deceased in 1993 and in 1996, upon his transfer back to Bulawayo, they both moved into their former matrimonial home. Upon his death, both wives C laid claim to the deceased's house in Bulawayo. The plaintiff sought a declarator that she was the spouse of the deceased in terms of the Administration of Estates Act [*Chapter 6:01*] and, as such, entitled to inherit the former matrimonial home, in Bulawayo. The first defendant resisted her claim on the basis that she was the civilly married widow of the deceased and, therefore, the heiress of his estate. D

Held, that the plaintiff was a spouse in terms of the Administration Estates Act [*Chapter 6:01*] and entitled to inherit the house in which she had been living at the time of the deceased's death. In the circumstances of the case, the legislature could never have intended otherwise, notwithstanding that the Act is silent as to what happens when a new wife has no house E belonging to a deceased common husband.

Legislation considered

Administration of Estates Act [*Chapter 6:01*], ss 68(3), 68(4) & 68F(2)

Case information

J Tshuma, for the plaintiff F

C P Moyo, for the defendant

Judgment

MATHONSI J: This is a dispute involving the estate of the late Charles Mbunji Ndlovu, who died intestate on the 26th May 2002. The matter was commenced by court application which was opposed only by the first G respondent. By consent order granted by Cheda J on 14 February 2007, the matter was referred to trial with the affidavits filed of record to stand as pleadings. This was presumably because the parties realised the disputes of fact which could not be resolved on the papers.

Charles Mbunji Ndlovu ("the deceased") met the applicant ("the plaintiff") in 1980. At some point they commenced living together and had 2 children H

Mathonsi J

A namely Lebani Ndlovu, born in August 1984 and Wisdom Ndlovu, born in September 1986. The two did not solemnise their relationship in accordance with the marriage laws of this country.

On 10 April 1987 the deceased married the first respondent ("the first defendant") in terms of the Marriage Act [*Chapter 5:11*]. It would appear B that this marriage is still in subsistence, although the plaintiff alleges that divorce proceedings had commenced at the time of the deceased's death. There are no children born of the marriage between the deceased and the first defendant. At the time of the deceased's death on 26 May 2002, he was living with the plaintiff at No. 22 David Carnegie Road, Northend Bulawayo as the first defendant had left him much earlier and was now residing elsewhere.

C The dispute arose after the plaintiff registered the deceased's estate in terms of customary law at the magistrates court (DRB 814/02) where the deceased's children from an earlier relationship, Prince Ndlovu, born on 16 September 1968 and Golden Ndlovu, born on 4 April 1970, were some of the people who deposed to affidavits confirming the plaintiff as the widow and heiress D to the deceased's estate. The first defendant registered the estate with the third defendant (DRB 1168/02), also claiming to be the widow and heiress to the deceased's estate.

In Case No. HC 890/03, the plaintiff unsuccessfully instituted summons action seeking an order nullifying the marriage between the deceased and E the first defendant and barring the first

defendant from laying a claim to the estate. By order of 21 March 2005 Ndou J upheld an exception by first defendant that no lawful grounds had been disclosed in that action for the relief sought, which was dismissed with costs.

The plaintiff then instituted this action seeking a declarator that she is a spouse of the deceased in terms of the Administration of Estates Act [*Chapter 6:01*]; F that she is entitled to enherit house No. 22 David Carnegie Road, Northend, Bulawayo together with household effects therein and that the said house be transferred to her name.

The first defendant filed opposition alleging that the plaintiff was not customarily married to the deceased and is therefore not entitled to inherit G from the estate and that she as the lawful wife of the deceased should instead inherit from the estate.

It is common cause that at the time of the deceased's death, the first defendant and the deceased had long ceased to cohabit as husband and wife and were not in communication whatsoever after the first defendant deserted and pursued H a separate life. It is also common cause that at the time of death, the deceased

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Mathonsi J

and the plaintiff were living together as husband and wife at No. 22 David A Carnegie Road, Northend, Bulawayo which was their matrimonial home.

It is pertinent to point out that at the trial the first defendant defaulted. The matter was stood down for a day to enable *Mr Moyo*, representing the first defendant to locate her and bring her to court. On the following day, 19 January 2011, *Mr Moyo* again appeared without the first defendant and told B the court that she had elected not to come to court. Therefore, I have not had the benefit of the *viva voce* evidence of the first defendant, who elected not to appear and not to lead any such evidence.

The evidence of the plaintiff is to the effect that she met the deceased in 1980 and in 1982, the deceased approached her parents in Filabusi requesting a customary marriage through his go between, one Sikhova Nkomo, who was C the deceased's uncle. When the plaintiff's parents agreed to meet the deceased and his go between, a meeting was arranged at their rural home in Filabusi, which was attended *inter alia* by the deceased and Sikhova Nkomo from the Ndlovu family and the plaintiff (who was in an adjoining room during deliberations), the plaintiff's parents and her brothers Josiah and Joel Nyoni. D

The deceased was asked to pay all the customary dues in the form of the introductory fee (*sivulamlomo)* of $20 and the acceptance fee (*kangaziwe*) in the sum of $200. The deceased requested to be charged the bride price (*lobola*) and was duly charged in the form of four head of cattle (converted to $400) and the usual overcoat; blankets and tin. At a later date the deceased and his go-between returned to pay the *lobola* and deliver the other items that E had been demanded, thereby completing the process of a customary marriage.

The plaintiff testified further that the deceased and herself commenced staying together as husband and wife and had their two children aforesaid. Initially, as the deceased was employed by NRZ he was entitled to a company house, and they stayed at a house belonging to NRZ namely No. 4 Lovemore F Crescent, Northend, Bulawayo. It was not until 1985 that they purchased their own matrimonial home, namely, No. 22 David Carnegie Road, Northend, Bulawayo. They then moved to that house which they were occupying when the deceased passed away.

She had been admitted at Mpilo Hospital in 1987 as she had delivered their G son Wisdom prematurely and this required that she stayed in hospital for some time. When she was eventually discharged, she returned home unexpectedly, only to find that the deceased had been bringing the first defendant to spend nights at the matrimonial home.

As a result, they quarrelled and, because she was nursing a small premature baby, she decided to move out of the matrimonial home and stay with her H

Mathonsi J

A sister in Tshabalala while she concentrated on bringing up her child. During the time that she stayed with her sister, the deceased would come to beg her to return to the matrimonial home but

she would refuse. Sometime in 1987, she heard that the deceased had wedded the first defendant but when she confronted him, he initially denied it but later admitted. He however told her that they had quarrelled on the wedding day and the first defendant soon B left and returned to her home.

According to the plaintiff, she remained at her sister's house until 1993 when the deceased eventually apologised for his aberration. He and his go-between travelled to the plaintiff's rural home to formally apologise customarily. He was penalised for that in the customary way after which he C was allowed to take his family back to his home. She maintained that even as they remained apart they continued to share conjugal rights and therefore remained husband and wife.

When she formally returned to the deceased in 1993, he was then working in Gweru and she and the children joined him there. The matrimonial house D was then being rented out. It was not until 1996 that the deceased transferred to Bulawayo and the family moved back to the matrimonial home where they remained until the deceased passed away. At his funeral, she was the only recognised wife and was made to cover herself with a blanket in the traditional way, which signified that she was the widow mourning her husband. The deceased's family, again in conformity with tradition, requested her to E put on a black mourning dress for a full year. All this was to recognise her as the widow of the deceased and, throughout all this, the first defendant was nowhere to be seen.

The evidence of the plaintiff was corroborated by three witnesses. Josiah Nyoni, the plaintiff's brother, confirmed that he was present when the F customary marriage was contracted and when the deceased came to apologise for his misdeeds in 1993 and was allowed to take his family back to his home. He added that as far as his family was concerned the plaintiff has always been customarily married to the deceased until the latter died.

Joseph Mlobisi is a family friend and was a neighbour of the deceased and the plaintiff when they stayed at the NRZ house. Even after they moved to G their own home their relationship continued as he would visit them. The deceased confided in him and he denied that he and the first defendant stayed together for long as husband and wife.

Gladys Tshuma is a cousin of the deceased who was requested by the deceased to come and stay with him in order to assist with household chores H after the plaintiff had moved out. She testified that the deceased and the first

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defendant quarreled on the day of the wedding and that the first defendant A soon returned to her own home. The two did not cohabit as husband and wife for any meaningful period.

The evidence led on behalf of the plaintiff was given very well and in a simple and straight forward manner. All the witnesses were credible and I have no reason to disbelieve them especially as the first defendant chose B not to testify herself. That evidence is to the effect that the deceased and the plaintiff were customarily married in 1982 and that marriage remained in subsistence until the deceased died in May 2002. Although they once had their problems and lived apart, the marriage was never dissolved. When the deceased died he was living with the plaintiff at the matrimonial home – No. 22 David Carnegie Road, Northend, Bulawayo – a home which they C acquired together.

While the deceased contracted a civil marriage with the first defendant, they did not stay together for long and at the time of the deceased's death they had long gone their separate ways. There was no relationship whatsoever between them, except on paper. There may be other reasons why they did D not have children but one cannot ignore the fact that they did not have much opportunity to do so.

The problem presented by this matter is governed by the provisions of the Administration of Estates Act [*Chapter 6:01*]. Section 68 of that Act provides in subss (3) and (4) as follows:

> "(3) A marriage contracted according to customary law shall be regarded as a E valid marriage for the purposes of this Part not withstanding that it has not been solemnised in terms of the Customary Marriages Act [*Chapter 5:07*] and any reference in this Part to a spouse shall be construed accordingly:
>
> Provided that such a marriage shall not be regarded as valid for the purposes of this Part if when it was contracted either of the parties was married to someone else in accordance with the Marriage Act [*Chapter 5:11*] or the law of a foreign F country under which persons are not permitted to have more than one spouse.
>
> (4) A marriage contracted according to the Marriage Act [*Chapter 5:11*] or the law of a foreign country under which persons are not permitted to have more than one spouse shall be regarded as a valid marriage

for purposes of this Part even if, when it was contracted, either of the parties was married to someone else in accordance with customary law, whether or not that customary law marriage G was solemnised in terms of the Customary Marriages Act [*Chapter 5:07*]:

Provided that, for the purposes of this Part, the first marriage shall be regarded as a customary law marriage."

By clear and unambiguous language, the legislature, in the exercise of its legislative powers, has seen it fit to not only recognise a customary marriage as valid for purposes of inheritance, it has also placed such marriage at par H

2011 (1) ZLR p87

Mathonsi J

A with one solemnised in terms of the Marriage Act. By parity of reasoning, a spouse under a customary marriage stands at the same pedestal as a spouse under the Marriage Act.

In my view, the legislature has unquestionably raised the status of a customary marriage to the same level as a civil marriage. There cannot be any clearer language by which to recognise such a marriage. In my view, this was B borne by a realisation that no matter how you try to "civilise" an African man, he shall forever remain entangled in the web of customary law and invariably shall have a customary wife somewhere in the background, even as he upgrades himself by marrying someone else by civil rites. It is those customary wives which the legislature sought to protect.

C Regarding the respective rights of such "spouses", s 68F of the Administration of Estates Act is equally clear. It provides that where there is a dispute between an executor and a beneficiary the Master shall be guided by the provisions of subss (2), which reads:

"(2) The Master shall be guided by the following principles, to the extent that D they are applicable, when determining any issue between an executor and a beneficiary in terms of paragraph (c) of subsections (3) of section 68E –

(a) …

(b) … E

(c) Where the deceased person was a man and is survived by two or more wives, whether or not there are any children, the wives should receive the following property, in addition to anything they are entitled to under paragraph (b) –

(i) where they lived in separate houses, each wife should get the ownership of or, if that is impracticable, a usufract over, the house she lived in at the time of the deceased person's death, together with all the household goods in that house. F

(ii) where the wives live together in one house at the time of the deceased person's death, they should get joint ownership of or, if that is impracticable, a joint usufruct over, the house and the household goods in that house."

In my view these provisions are so clear as to admit of no ambiguity at all. Where the deceased is survived by two wives, as in the present case, and G those wives live in separate houses, each wife is entitled to receive the house that she occupied at the time of the man's death together with household effects in that house. Where the two wives shared the same house, they are entitled to joint ownership. This is so regardless of the status of the marriage as long as, in the case of a customary marriage, it was entered into before H the civil marriage.

2011 (1) ZLR p88

Mathonsi J

It is only if the wives shared the same house that they can share the house. A This is regardless of the existence of children.

The mischief that the legislature intended to address is not difficult to identify. For some time women married under customary law had faced the ignominy of being chased out of the homes they toiled for with, and at times without, the husband who would have married a younger wife who invariably B insists on a civil marriage. The law as it existed before the amendment of the Administration of Estates Act by of Act No. 16 of 1998 disinherited that customary law wife in favour of the new wife.

In those circumstances, a woman married under the Marriage Act would then take over the house in which the customary law wife resided and which she C toiled for without any contribution from the new wife. The above provisions ensure that the customary law wife benefits from her sweat while

the new wife does the same. The Act is silent as to what happens when the new wife has no house belonging to the deceased common husband.

However, in my view, considering the mischief sought to be addressed, it D was never the intention of the law giver that where the two wives lived in different houses, the one without would be entitled to cross over and share the single house occupied by the other. That would defeat the whole purpose of the enactment.

I come to the conclusion that the plaintiff was a spouse for purposes of E the Administration of Estates Act and is entitled to receive the house, and the household goods in it, which she occupied, to the exclusion of the first defendant. The time has come to declare, in no uncertain terms, that parties cannot invest in a paper marriage only to surface after the death of the other person they had long abandoned to commence a new life. It is an unacceptable F and extremely indecent habit which should be discouraged. If the marriage has failed, it should be terminated to release the parties to start afresh.

Accordingly, I order as follows:

1. The plaintiff, Jennifer Nyoni, be and is hereby declared the spouse of the late Charles Mbunji Ndlovu for purposes of the Administration of G Estates Act [*Chapter 6:01*].
2. The plaintiff, Jennifer Nyoni, be and is hereby declared sole beneficiary of immovable property and improvements thereon known as 22 David Carnegie Road, Northend, Bulawayo together with the household effects therein. H

Mathonsi J A

3. The second and third respondents be and are hereby directed to do everything necessary to effect transfer of the said house and the household effects therein to the plaintiff.
4. The costs of suit shall be borne by the estate late Charles Mbunji Ndlovu. B

Webb, Low & Barry, applicant's legal practitioners C

Majoko & Majoko, first respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/KANOYANGWA v KANOYANGWA 2011 (1) ZLR 90 (H)

KANOYANGWA v KANOYANGWA 2011 (1) ZLR 90 (H)

Citation	2011 (1) ZLR 90 (H)
Case No	Judgment No. HH-23-11
Court	High Court, Harare
Judge	Chitakunye J
Heard	17 March 2011; 18 March 2011
Judgment	27 January 2011
Counsel	*M C Mukome,* for the plaintiff *V Muza,* for the defendant

Case Type Matrimonial trial

Annotations No case annotations to date

Flynote

Family law – *husband and wife – divorce – division of property – immovable property registered in joint names – when division other than a 50:50 split may be ordered*

Headnote

The parties were husband and wife. The husband sued the wife for divorce; D she counter-claimed for a 50:50 division of a house that had been bought and registered in the joint names of the parties. The plaintiff argued that, as the property and the transfer fees were paid for entirely from his retrenchment package, the defendant did not deserve a 50 per cent share.

Held, that where, as in this case, the immovable property is registered in the E joint names of the spouses, this fact must be recognised as a starting point, because where a property is registered in joint names the presumption is that it is held in equal shares unless proved otherwise. In order to take a spouse's share and transfer it to the other, there ought to be some solid ground for so doing. Here, the plaintiff's retrenchment package was not the couple's savings over a period of time. It was not like a loan where F repayments would be needed and whereby during the period of repayment the defendant would take care of some aspects to cushion the plaintiff. This was a case where the defendant's share could be tempered in favour of the plaintiff and a 65:35 split would be appropriate. G

Cases cited

Lafontant v Kennedy 2000 (2) ZLR 280 (S)

Ncube v Ncube 1993 (1) ZLR 39 (S)

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

Takafuma v Takafuma 1994 (2) ZLR 103 (S)

Young v van Rensburg 1991 (2) ZLR 149 (S) H

Chitakunye J

Legislation considered A

Matrimonial Causes Act [*Chapter 5:13*], s 7(4)

Case information

M C Mukome, for the plaintiff

V Muza, for the defendant

Judgment

C **CHITAKUNYE J.** The plaintiff married the defendant on 23 December 2000 at Rusape in terms of the Marriages Act, [*Chapter 5:11*]. The marriage still subsists. They had, however, commenced living together as husband and wife about two or three years before that date. Their union was blessed with one minor child, born on 20 June 1997. At the time the plaintiff and the defendant started staying together the plaintiff had not yet finalized his divorce from a previous marriage.

During the subsistence of the marriage the parties acquired numerous movable properties. In 2005 they acquired an immovable property, namely Stand 104 Rusape Township, also known as house no. 12 Nyanga Drive, Rusape. As fate would have it, their marriage was not to last long thereafter. On 14 April D 2006, the plaintiff sued the defendant for a decree of divorce, alleging that their

marriage had irretrievably broken down, a ground recognized in terms of s 5 of the Matrimonial Causes Act [*Chapter 5:13*].

Apart from seeking a decree of divorce, the plaintiff also prayed for a division of the matrimonial estate and custody of their minor child. On E the immovable property, he claimed a share of 75 per cent with defendant retaining 25 per cent

The defendant in her plea conceded that the marriage had indeed irretrievably broken down to an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them, albeit denying F being responsible for the breakdown. She made a counter-claim for a decree of divorce, a 50:50 share of the immovable property and sharing of the movable properties in terms of her own schedule. She also claimed custody of the minor child.

At the pre-trial conference the parties agreed on a number of issues. They agreed on the sharing of the movable property and on the fact that their G marriage had irretrievably broken down. On 28 May 2007 a consent paper was filed with the court on how the parties had agreed to share the movable properties. That consent paper was duly signed by the parties and their respective legal practitioners and is to form part of the order in this case.

The issues referred to trial were as follows – H

1. Whether the defendant made any direct or indirect contributions to

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Chitakunye J

the acquisition of the matrimonial home Stand No. 12 Nyanga Drive, A Rusape. If so, whether she is entitled to a 50 per cent share of the net value thereof.

2. Which parent shall be the custodian of the minor child and what would be reasonable rights of access for the non-custodian parent.

On the trial date, the issue of custody and access by the non-custodian parent B had been resolved. The parties confirmed that they had agreed that custody be awarded to the plaintiff, with the defendant being granted reasonable rights of access on agreed terms.

Though in their pleadings neither of them had claimed for maintenance in the event of being granted custody, the question of maintenance was raised C as an issue when the parties testified. The plaintiff claimed maintenance for the child from the defendant in the sum of US$100 per month whilst the defendant offered US$30 per month only.

The issues that the court was left seized with were thus on the sharing of the immovable property and the quantum of maintenance that the defendant should contribute towards the child. D

1. Whether the defendant made any direct or indirect contributions to the acquisition of the matrimonial home

From the evidence adduced from both parties it is common cause that the immovable property in question, that is, stand 104 Rusape Township, also E known as 12 Nyanga Drive, Rusape, was bought and registered in the joint names of the parties. The agreement of sale shows the purchasers as Samuel Kanoyangwa and Winifreder Charlie. The Deed of Transfer is also in the joint names of Sarudazayi Samuel Kanoyangwa and Winifreder Charlie. That *per se* shows that the property is jointly owned.

It is common cause that the plaintiff, who was employed by Tel-One, opted F to go on voluntary retirement in the year 2005. As a result he was paid a retrenchment package in the sum of Z$597 285 061.92. It was from this sum that he paid the purchase price of $315 000 000 and the transfer fees in the sum of $24 096 985. This was all in Zimbabwe dollars.

The plaintiff on his part argued that, as the property was paid for entirely from G his retrenchment package, the defendant did not deserve a 50 per cent share. When asked why the defendant's name was included in both the agreement of sale and the deed of transfer, the plaintiff said that, as someone who had divorced before, his experience had taught him that even if a spouse's name is not included on the deed of transfer she will still be entitled to a share. Thus, in this case, when the estate agent advised him that the defendant wanted H

Chitakunye J

A her name to be included on the agreement of sale he agreed, because from his experience, she would still be entitled to a share even if her name was not included. He however emphasized that when he agreed to the inclusion of the defendant's name, it was not that he intended her to be an owner of 50 per cent of the property or even that he was donating to her a 50 per cent share in the property.

B The defendant in her evidence confirmed that both the purchase price and the transfer fees were paid from plaintiff's retrenchment package. None of her earnings went towards the purchase price or transfer fees. The defendant's evidence was more on her indirect contribution. She contended that though she did not make a direct contribution to the purchase price and transfer fees, C as the plaintiff's wife for ten years and as someone who contributed in her own way to other household needs and also as a registered joint owner she was entitled to a 50 per cent share.

The issue of distribution of matrimonial property is dealt with in s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. Section 7(4) provides that –

> D "In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following –
>
> (a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future; E
>
> (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
>
> (d) the age and physical and mental condition of each spouse and child;
>
> (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties; F
>
> (f) the value to either of the spouses or to any child of any benefit , including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
>
> (g) the duration of the marriage;
>
> and in so doing the court shall endeavour as far as is reasonable and practicable G and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses."

It is apparent that the at the end of the inquiry or trial the court must endeavour to distribute the property in such a way as to place the parties and the children in the position they would have been in had a normal marriage relationship H continued. That task, in my view, is not an easy one.

2011 (1) ZLR p94

Chitakunye J

In casu the parties concentrated on the considerations in s 7(4)(e) and (g). A Where, as in this case, the immovable property is registered in the joint names of the spouses, our courts have in a number of cases advocated the need to recognize this fact as a starting point. This is so because where a property is registered in joint names the presumption is that it is held in equal shares unless proved otherwise.

In *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) the court was faced with B a similar situation. In that case the immovable property had been bought using a 100 per cent guarantee provided by the husband's employer. All loan repayments were deducted from the husband's salary. The property was however registered in the parties' joint names. On divorce, the husband contended that the wife did not deserve a 50 per cent share. On appeal against C the lower court's decision by the husband, McNally JA at 105H stated that:

> "The registration of rights in immovable property in terms of the Deed Registries Act [*Chapter 139*] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered."

In *Ncube* v *Ncube* 1993 (1) ZLR 39 (S) at 47, another case where the property D was registered in joint names of the spouses yet the wife was alleged not to have contributed towards the purchase price, Korsah JA had this to say:

> "It is incorrect to say that appellant as a registered joint owner is not entitled to a half share of the value of the Napier Avenue property because she did not contribute money or money's worth towards the

acquisition of the property. As E a registered joint owner she is in law entitled to a half share of the value of that property.

The proper approach is to accord her share of that property and then taking into account all the assets of both spouses to endeavour as far as is reasonable and practicable and is just to do so, to place the spouses in the position they would have been in had a normal marriage relationship continued between them. In the performance of this duty a court is empowered in the exercise of its discretion F to order that any asset be transferred from one spouse to the other."

In order to take a spouse's share and transfer it to the other there ought to be some solid ground for so doing.

In *Lafontant* v *Kennedy* 2000 (2) ZLR 280 (S) the court had occasion to deal with such a scenario. McNally JA stated at 284C-D that: G

"The court cannot move from that position on mere grounds of equity. It cannot give away A's property to B on the mere grounds that it would be fair and reasonable, or just and equitable to do so. There must be a more solid foundation in law than that."

Some of the instances where the court was persuaded to move from the 50:50 share which the court referred to were – H

Chitakunye J A

1. *Nyamweda* v *Georgias* 1988 (2) ZLR 422 (S), where the reason advanced was that Miss Nyamweda was found by the court to have been an agent for her undisclosed principal, Mr. Georgias. She was in effect his nominee at will.
2. *Young* v *van Rensburg* 1991 (2) ZLR 149 (S), where Korsah JA held that van Rensburg created Young a nominee for the respondent (van B Rensburg) and that on demand the appellant would transfer the farm to the respondent.
3. In the *Lafontant* case *supra* where at 285C-D McNally JA said that –

"I think, by claiming and proving that she alone paid for the property, it must necessarily follow, if it was registered in their joint names, that she C effectively gave him the half share as her nominee, for convenience. By instituting action she is terminating that nomination. The cases of *Nyamweda supra* and *Young supra* are appropriate precedents."

In casu it is common cause that the entire purchase price and transfer fees were paid from the plaintiff's retrenchment package. That package was not the couple's savings over a period of time. It was not like a loan where D repayments would be needed and whereby during the period of repayment the defendant would take care of some aspects to cushion the plaintiff. Clearly, in my view, the circumstances show that this is an appropriate case where the defendant's share may be tempered in favor of the plaintiff.

As for her contribution the defendant contended that she operated a video club E and did some interior décor work making curtains. She also was a director of a family company, Samecord. I did not however hear her to seriously say that the ventures brought in substantial income to the family. Indeed the plaintiff said he had to subsidize the defendant in the video club. The video club was more to keep the defendant occupied than anything viable. The interior décor business, even from the defendant's evidence, was not a F big income generating venture. It was more of a hobby or pastime activity than a serious business. As for the family company, Samecord, not much could be gathered on its operations and contributions to the family estate. What is unquestionable is that no income from that venture went towards the purchase of the immovable property in question. Its insignificance can also be discerned from the fact that both spouses never brought it up in their G pleadings. It is something that came up as they testified. Had it been a serious venture with substantial income I am of the view that either of the spouses would have mentioned it in their pleadings.

This must not, however, be taken to demean the defendant's contribution to the matrimonial estate. She did contribute in her own way for those ten H years they were married by doing the usual household chores expected of a

Chitakunye J

wife and providing moral support to the plaintiff. Financially she contributed A in her own way.

I am however of the view that a proper foundation has been laid for the reduction of defendant's share from 50 per cent. A reduction by 15 per cent would in my view meet the justice of the case. B

2. Maintenance

The issue of maintenance was never raised in the pleadings. It only arose after the parties had agreed that the plaintiff should be awarded custody of the minor child. As a result of this neither party seemed prepared to properly testify on this issue. The plaintiff said he required a sum of $100 from the defendant as part of her contribution towards the upbringing of their minor C child. When asked to justify the figure the plaintiff had to literally think on his feet as to how to arrive at that figure. In that regard he gave his list of expenses as follows –

Accommodation…… $40,

Food……..$20, D

Clothing ……..$20, and

School fees ……$20.

He conceded that he had not discussed the issue of maintenance with the defendant. He also had not attempted to ascertain the defendant's income and whether the defendant could afford such a sum. The plaintiff said he was E not employed but somehow did not disclose how he is surviving and how he had been able to provide for the child so far. When the defendant's dire financial situation was put to him, he had no ready answers, save to say that he knows that she is working at a certain school. The plaintiff was unaware of the nature of engagement the defendant was involved in at the school. He thus could not deny that the defendant was doing voluntary work. He was F equally unaware of her income from that voluntary work and other activities she engaged in. The plaintiff could not rebut the defendant's contention that she cannot afford $100 per month, as her monthly income averages between $80 and $120 dollars per month.

The defendant's evidence on this issue was to the effect that she is working G on a voluntary basis at a private school. The school has provided her with accommodation. She also does some odd jobs. From all these activities she realizes $80 to $120 per month. It is from this income that she survives. She thus offered a sum of $30 maintenance for their minor child.

It is my view that in the absence of better evidence from which a higher sum may be derived, the defendant's offer has to stand. An order for maintenance H

Chitakunye J

A must be within the means of the non-custodian parent. In the circumstances a maintenance order in the sum of $30 per month will be granted.

Accordingly it is hereby ordered that –

1. A decree of divorce be and is hereby granted.
2. Custody of the minor child Kundai Nesbert Kanoyangwa (born 20 June B 1997) is hereby awarded to the plaintiff.
3. The defendant shall enjoy reasonable access to the minor child every fortnight during weekends. During school holidays the child shall be with the defendant for two weeks of the holiday.
4. The consent paper signed by the parties and filed of record and annexed to C this order shall regulate the distribution of the parties' movable property.
5. The plaintiff is hereby awarded a 65 per cent share in the matrimonial home being Stand 104 Rusape Township, also known as House No. 12 Nyanga Drive, Rusape.
6. The defendant is awarded 35 per cent of the said matrimonial property. D
7. The parties shall agree on the value of the property within seven days of the date of this order, failing which they shall appoint a mutually agreed evaluator to evaluate the property within 14 days of the date of this order.

   Should the parties fail to agree on an evaluator, the Registrar of the High Court shall be and is hereby directed to appoint an independent E evaluator from his panel of evaluators to evaluate the property.

The plaintiff shall meet the costs of such evaluation.

8. The plaintiff shall pay off the defendant her 35 per cent share of the value of the property within 120 days from the date of receipt of the evaluation report unless the parties agree otherwise.

F Should the plaintiff fail to pay the defendant's share in full within the stipulated period the property shall be sold to best advantage by a mutually agreed estate agent or one appointed by the Registrar of the High Court and the net proceeds thereof shall be shared in the ratio 65:35.

9. Each party shall pay their own costs.

G *Muvingi Mugadza & Mukome*, plaintiff's legal practitioners

Muza and Nyapadi, defendant's legal practitioners

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CHIRONGOMA v TDG LOGISTICS & ANOR 2011 (1) ZLR 98 (H)

Citation	2011 (1) ZLR 98 (H)
Case No	Judgment No. HB-6-11
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	13 January 2011
Judgment	27 January 2011
Counsel	*S Nkiwane*, for the plaintiff (respondent) *N Mazibuko*, for the first defendant (excipients)
Case Type	Exception
Annotations	Link to case annotations

Flynote

Practice and procedure – *attachment – to found or confirm jurisdiction – attachment a pre-condition to issue of process against foreign defendant – leave of court required*

Headnote

The plaintiff, an *incola* of Zimbabwe issued summons against the first D defendant, a South African company, and the second defendant, its South African insurer, claiming the replacement of its motor vehicle and a trailer damaged as a result of a collision with the first defendant's haulage truck in 2007. He also claimed certain damages which arose as a result of the same accident. At

the time the summons was issued the plaintiff F had not obtained a court order for attachment of the first defendant's property to confirm or found jurisdiction against the defendants. About a month and a half after the summons was issued, the plaintiff filed an application seeking an order for attachment of property to found jurisdiction and exactly two months after the summons had been issued F the order of attachment of property was granted. The order authorised the Deputy Sheriff to impound any of the first defendant's vehicles crossing the border into Zimbabwe or already in Zimbabwe in order to found jurisdiction. This the Deputy Sheriff duly did; the impounded vehicle was released when the first defendant paid a deposit of money to confirm jurisdiction. Thereafter the first defendant excepted to the G summons and declaration as being null and void, in that the summons was issued and sent for service against the first defendant before the plaintiff had obtained an order of attachment to found or confirm jurisdiction. It also averred that the attachment order did not validate the summons and declaration as the granting of the attachment order was a condition precedent to the issue of process; and that the order was invalid because H

Mathonsi J

A as it ordered the attachment of the first defendant's property which was not within the jurisdiction of the courts of Zimbabwe at the time that the order was granted.

Held, that in terms of s 15 of the High Court Act [*Chapter 7:06*], the plaintiff had the burden of having to satisfy the court, before the issue of process, that the *peregrinus* was present within Zimbabwe for arrest B or has property within the country capable of attachment. At the time the summons was issued, neither the first defendant nor its property was located in Zimbabwe. In addition, no authority or permission had been obtained from the court to issue the process. The argument that the word "court" included the Registrar and that, by issuing the process, C the registrar had permitted and directed its issue without an order for attachment could not be accepted. The attachment order has been issued in error, as the court's permission had not been obtained for the summons to be issued. Permission could not be granted in retrospect: attachment or the existence of the defendant or his property within Zimbabwe was a condition precedent to the issue of process. The attachment order was D a nullity and no legal rights flowed from it.

Cases referred to

Clan Tpt Co (Pvt) Ltd v Govt of Mocambique 1993 (3) SA 795 (Z)

Heating Elements Eng (Pvt) Ltd v Eastern & Southern Africa Trade & Development Bank 2002 (1) ZLR 351 (S)

E *Monarch Steel (1991) (Pvt) Ltd v Four way Haulage (Pty) Ltd* 1997 (2) ZLR 342 (H)

Ngani v Mbanje & Anor 1987 (2) ZLR 111 (S)

Stanmarker Mining (Pvt) Ltd v Metallon Corp Ltd & Ors 2003 (1) ZLR 389 (H)

Legislation considered F

High Court Act [*Chapter 7:06*], s 15

Case information

S Nkiwane, for the plaintiff (respondent)

G *N Mazibuko*, for the first defendant (excipients)

Judgment

MATHONSI J: The first defendant is a *peregrinus* whose address is given in the summons as Bracken Gardens, Alrode, Johannesburg, South Africa. The company does not have property located within the jurisdiction of Zimbabwe but has haulage trucks which ply Zimbabwean routes on commercial H deliveries in Zambia.

Mathonsi J

On 30 April 2009, the plaintiff instituted summons action out of this court A against the first defendant and the second defendant, which is also a *peregrinus* of South Africa origins. The plaintiff claimed the replacement of its Toyota Hilux motor vehicle and a trailer damaged as a result of a collision with first defendant's haulage truck on 18 August 2007. He also claimed certain damages which arose as a result of the same accident. B

At the time the summons was issued, the plaintiff had not obtained a court order for attachment of first defendant's property to confirm or found jurisdiction against the *peregrini* defendants. It was not until 9 June 2009, almost 1½months after the summons was issued, that the plaintiff filed an application in this court seeking an order for attachment of property to found jurisdiction and it was not until 30 June 2009, exactly two months after the summons C had been issued, that the order of attachment of property was granted by Ndou J under case No. HC 879/09. The said order reads in part as follows:

"IT IS ORDERED:

1. That the Deputy Sheriff be and is hereby authorised and directed to impound any of the first respondent's vehicles crossing the border into Zimbabwe or already in Zimbabwe in order to found jurisdiction. D
2. That the Deputy Sheriff shall retain the vehicle so impounded until litigation in the matter No. HC 672/09 is finalised.
3. That first and second respondents pay the storage charges for the vehicle jointly and severally the one paying the other to be absolved.
4. That first and second respondents pay the costs of this application on an E ordinary scale jointly and severally the one paying the other to be absolved.
5. That first and second respondents pay the costs of this application on an ordinary scale jointly and severally the one paying the other be absolved."

The deputy sheriff for Beitbridge effected service of the summons on the first defendant's driver at Beitbridge Border Post on 12 July 2009 and, in pursuance of the order for attachment, he attached an International Truck F registration number LRP 232 GP and a trailer registration number TXL 411 GP belonging to the first defendant. This was for purposes of founding jurisdiction when the summons in the matter had already been issued out.

The attachment of the vehicle and trailer forced the first defendant to file an urgent chamber application (HC 1169/09) on 24 July 2009 seeking an G order for the release of the vehicle. The matter was later amicably resolved and an order granted by consent on 31 July 2009 for the release of the truck and trailer against a payment of $3 000 to plaintiff's legal practitioners in order to confirm jurisdiction.

On 17 November 2009 the first defendant excepted to the summons and declaration on the following grounds: H

Mathonsi J

A "1. The plaintiff's summons and declaration under case No. HC 672/2009 is an invalid process and therefore null and void in that the summons was issued and sent for service against the first defendant, who is a *peregrinus*before the plaintiff had obtained anorder of attachment to found or confirm jurisdiction.

2. It is submitted that the order of attachment granted by the Honourable Mr Justice Ndou on 30tJune 2009 to found jurisdiction did not serve to validate the B summons and declaration issued earlier on under case No. HC 672/2009 as the granting of the attachment order is a condition precedent to the issue of process.

3. Further, and in any event, the order for attachment granted by the Honourable Mr Justice Ndou as above stated is invalid as it ordered the attachment of the first defendant's property which was not within the jurisdiction of the courts of Zimbabwe at the time that the order was granted."

C The first defendant, as excipient, prays that the summons be struck down by reason of invalidity and that the money paid to the plaintiff's legal practitioners for security be refunded.

In response to the exception, the plaintiff stated that the exception is without merit because: D

1. The cause of action arose within the jurisdiction of this court;
2. The summons could not be served on first respondent because it and its assets are located outside the jurisdiction of this court;

3. An application for attachment was made to facilitate service of summons which attachment "found and confirmed" jurisdiction and therefore the E order for attachment was not validating the summons which was already valid.

Mr *Mazibuko,* for the excipient, has argued that, to the extent that the summons was issued before an order for attachment was sought and obtained, such summons is invalid and of no legal effect. He has cited the persuasive F authority of Herbstein and van Winsen *Civil Practice of the Superior Courts of South Africa* 3 ed (1979) which reads at p 782:

> "An attachment *ad fundandam jurisdictionem* is an attachment of the person or property of one who is domiciled and resident in a foreign country in order to make him amenable to the jurisdiction of the court. His person or property can only be attached while he or it is within the jurisdiction of the court out of G which the attachment order is issued, and the effect of the attachment order is either to confirm the jurisdiction which the court already has in the suit between the parties, or in certain cases, to afford it a jurisdiction in the matter which it would not otherwise have had."

At 788 the learned authors state:

> "Where an *incola* wishes to sue a *peregrinus* and none of the usual grounds upon H which the court might have jurisdiction is present, attachment is a condition

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Mathonsi J

> precedent to the action, for it is upon the attachment that the court's jurisdiction A is founded."

They go on at 789:

> "In addition to the grounds mentioned by de Villiers CJ, quoted above, a court will have jurisdiction to try a suit arising out of a delict committed within the area of its jurisdiction, whether the suit be between an *incola* and a *peregrinus*or between two *peregrini*. *But in this case, too, attachment is a condition precedent* B *to an action*. But in an action *ex delicto* a *peregrinus* cannot obtain an attachment where none of the ordinary grounds of jurisdiction exists" (emphasis added).

Mr *Nkiwane* for the plaintiff has argued that these authorities should be ignored as they are archaic and that the position of our law is governed by s 15 of the High Court Act [*Chapter 7:06*]. I agree with Mr *Nkiwane* C that the position in regard to attachment to found or confirm jurisdiction in Zimbabwe is now clearly governed by statute. I however disagree that the issue of summons must precede the authority to be granted by the court to sue a *peregrinus* either by edict or by attachment. Section 15 of the Act, relied upon by Mr *Nkiwane,* provides:

> "In any case in which the High Court may exercise jurisdiction founded on or D confirmed by the arrest of any person or the attachment of any property the *High Court may permit or direct the issue of process, within such period, as the court may specify, for service either in or outside Zimbabwe without ordering such arrest or attachment if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached and the jurisdiction of the High Court in this matter shall be founded or confirmed* E *as the case may be, by the issue of such process*" (emphasis added).

That provision did not discharge the plaintiff from the burden of having to satisfy the court before the issue of process, that the *peregrinus* was present within Zimbabwe for arrest or had property within the country capable of attachment: *Monarch Steel (1991) (Pvt) Ltd* v *Fourway Haulage (Pty) Ltd* 1997 (2) ZLR 342 (H) at 345C and *Clan Transport Co (Pvt) Ltd* v *Govt of* F *the Republic of Mozambique* 1993 (3) SA 795 (Z) at 797F.

In *Stanmarker Mining (Pvt) Ltd* v *Metallon Corp Ltd & Ors* 2003 (1) ZLR 389 at 393C Chinhengo J stated:

> "It must be clear from the above remarks that s 15 of the High Court Act does not dispense with the need to show that the court has jurisdiction which may G be founded or confirmed by the attachment of property or the arrest of the defendant. That is the single issue which the applicant had to deal with before he could obtain other associated relief."

At the time the summons was issued on 30 April 2009, neither the first defendant nor its property were located in Zimbabwe. In addition, no authority or permission had been obtained from the court to issue the process. Perhaps H

Mathonsi J

A it was upon a realisation of that glaring omission that Mr *Nkiwane* desperately tried to stretch the meaning of the word "court" as used in s 15 to include the registrar of the High Court, who issues the process, and sought to argue that, by issuing the process, the registrar had permitted and directed its issue without an order for attachment.

There is no way the word "court" in that section can be interpreted to include B the registrar. There is no way a summons can be lawfully sued out against a peregrine defendant without the leave of the court. Where such summons is issued, it is clearly invalid and of no legal effect.

I now turn to deal with the effect of the attachment order issued by Ndou J on 30 June 2009. In his application for an attachment order the applicant C disclosed that he had issued summons against the defendants under case No. HC 672/09 for damages and that he wanted "an order for the impoundment of first respondent's truck when it comes into Zimbabwe to found jurisdiction". The court was persuaded by the application and granted the order cited above. Clearly that order was granted in error as the plaintiff (applicant in HC 879/09) had not discharged the onus of showing that either the first D defendant or its property was present within the territorial jurisdiction of Zimbabwe and therefore capable of attachment on arrest.

In addition, no permission had been sought and granted as provided for in s 15 of the High Court Act to issue summons, the said summons having been issued without leave. It is significant that Ndou J's order of 30 June E 2009 did not grant such permission, even in retrospect, which could not be done as attachment or the existence of the defendant or his property within Zimbabwe is a condition precedent to the issue of process.

In the absence of the defendant and/or its property within Zimbabwe, the order made on 30 June 2010 was a nullity. In *Ngani* v *Mbanje & Anor* 1987 (2) ZLR 111 (S) the Supreme Court, *per* Korsah JA, pronounced categorically F that if legal process is instituted, based on a cause of action which has not yet accrued, it is a nullity and a default judgment granted on the non-existent cause of action is void and of no effect. At 114G-H and 115A the learned Judge of Appeal said:

> "If at the time action was instituted, a right of action had not accrued to the plaintiff or applicant, as the case may be, then no cause of action is established by the initiating process. Put another way, the plaintiff or applicant should at or before filing the initiating process, have a complete cause of action against the defendant or respondent."

The court went on at 115D-F to state:

> "This objection *in limine* is, in my view, not a mere technical point affecting H some provision of odjectival law; it strikes at the very root of the action. It is

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> so fundamental as to render the initiating process a nullity. *If there is no cause* A *of action then a judgment pronouncing that a non-existent cause exists is void and of no effect.* As Lord Denning observed 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 the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have B 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. So will this judgment collapse if the statement of claim was a nullity.'"

See also *Heating Elements Engineering (Pvt) Ltd* v *Eastern & Southern Africa Trade & Development Bank* 2002 (1) ZLR 351 (S) at 355E. C

In light of the fact that there was no property belonging to the peregrine defendant located in Zimbabwe at the time the order for attachment was made, that order was a nullity. To that extent, everything which flowed from it, including the service of the summons and the purported attachment of the first defendant's property, was a nullity. To the extent that the settlement of the parties confirmed by order of Cheda J dated 31 July 2009 was D predicated on a nullity, it was also a nullity and no legal rights arose from that adventure. I therefore intend to set aside that order in terms of r 449(1) of the High Court Rules.

In the result I make the following order, to wit, that:

1. The exception by the first defendant be and is hereby upheld. E
2. The plaintiff's summons and declaration be and are hereby struck down as invalid.

3. The order for attachment issued on 30 June 2009 under case No. HC 879/2009 was issued in error in the absence of the first defendant or its property within the jurisdiction of the court and is therefore null and F void.
4. The plaintiff should refund the sum of US$3 000 to the first defendant which was paid as security to his legal practitioners in pursuance of the settlement reached in case No. HC 1169/2009.
5. The plaintiff shall bear the costs of suit. G

Calderwood, Bryce Hendrie & Partners, first defendant's legal practitioners

Samp Mlaudzi & Partners, plaintiff's legal practitioners H

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Source:
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AFRICAN RESOURCES LTD & ORS v GWARADZIMBA NO & ORS 2011 (1) ZLR 105 (S)

Citation	2011 (1) ZLR 105 (S)
Case No	Judgment S-2-11
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Sandura JA, Garwe JA & Cheda AJA
Heard	17 June 2010
Judgment	1 February 2011
Counsel	*A P de Bourbon SC,* for the applicants *E I Manikai,* for the first, second and third respondents No appearance for the fourth respondent *G Mhlanga,* for the fifth respondent *T Tandi,* for the sixth respondent *M Mahlangu,* for the seventh respondent
Case Type	Constitutional application for redress
Annotations	Link to case annotations

Flynote

Constitutional law – *Constitution of Zimbabwe – Declaration of Rights – s 16 (provision against compulsory acquisition of property without* D *compensation) – reconstruction order under Reconstruction of State-Indebted Insolvent Companies Act [Chapter 24:27] – appointment of administrator and effect of powers given to administrator of affected company – such not amounting to acquisition of company or any of its assets or any share issued by company*

E **Constitutional law** – *Constitution of Zimbabwe – Declaration of Rights – s 18(9) – right to protection of the law – reconstruction order under Reconstruction of State-Indebted Insolvent Companies Act [Chapter 24:27] – need for such order to be confirmed by a judge – s 18(9) not contravened*

Constitutional law – *Constitution of Zimbabwe – Declaration of Rights – s 24 – application for redress – allegation that Minister did not observe audi alteram partem requirement – not a constitutional matter – should be dealt with on review*

Constitutional law – *Constitution of Zimbabwe – Declaration of Rights – s 24 – application for redress – need to itemise what provisions of* G *legislation are being challenged – not enough to allege that entire statute is in contravention of Declaration of Rights*

Constitutional law – *Constitution of Zimbabwe – Declaration of Rights – s 24 – application for redress – when may be brought – pending matter in another court – unless constitutional question in issue in other court,* H *application under s 24(1) permissible*

2011 (1) ZLR p106

Chidyausiku CJ

Practice and procedure – *affidavit – founding affidavit – contents and purpose* A *of – should set out facts succinctly – voluminous and argumentative affidavits not in compliance with rules of court*

Practice and procedure – *affidavit – validity – affidavit deposed to by a person under a legal disability – such affidavit void*

Statutes – *Reconstruction of State-Indebted Insolvent Companies Act* B *[Chapter 24:27] – ss 4, 6, 12, 13, 18, 21, 22, 23, 25, 29, 30 and 31 not in contravention of ss 16 and 18 of the Constitution*

Headnote

The first applicant, a company incorporated in the British Virgin Islands, was the sole shareholder of the second applicant, which in turn was the C sole beneficial shareholder of SMM Holdings (Pvt) Ltd ("SMMZ"), a company incorporated in Zimbabwe. All these companies were under the sole beneficial shareholding and control of Mr Mutumwa Mawere. In July 2004 Mr Mawere was declared a specified person in terms of s 6(1) of the Prevention of Corruption Act [*Chapter 9:16*]; the second applicant was specified a month later. The effect of the specification order, D as provided under s 10(1) of the Act, was that Mr Mawere could not perform any act as a director of the applicants or as their agent without the approval of the investigator assigned to him in terms of s 7 of the Act.

In September 2004 a reconstruction order was issued in respect of SMMZ by the third respondent, the Minister of Justice, initially in terms of temporary legislation; the order was confirmed by the Reconstruction E of State-Indebted Insolvent Companies Act [*Chapter 24:27*] ("the Act"). The purpose of the legislation was to make provision for placing under reconstruction a company and its associates which, whilst indebted to the State, was unable, or unlikely to be able, to make repayment of the credit made to it from public funds on a date when repayment was due F by reason of fraud, mismanagement or for any other reason. It had to further appear to the Minister that the State-indebted company had not become, or was prevented from becoming, a successful concern and that there was a reasonable probability that if the company was placed under reconstruction, it would be enabled to pay its debts or meet its obligations and become a successful concern and that it would be just G and equitable to place the company under reconstruction. By reason of the definition of "associate" in the legislation, all three applicants were deemed to have been placed under reconstruction in terms of the order issued in relation to SMMZ. The effect of the reconstruction order was to divest any other person vested with the management of the company's affairs from the date of its commencement and vesting such control and H

2011 (1) ZLR p107

Chidyausiku CJ

A management of the company in an administrator appointed by the Minister.

The applicants brought an application under s 24(1) of the Constitution, alleging that the Act violated ss 16(1)(b), (c) and (d) and 18(9) of the Constitution, in that it permitted the State to expropriate property without notice, payment of fair compensation or judicial oversight and denied persons subject to it access to the courts.

B *In limine*, the respondents argued that the same questions forming the subject-matter of the application arose in proceedings in the High Court. Accordingly, the applicants ought to have requested the judge, in terms of s 24(2) of the Constitution, to refer the questions to the Supreme Court for determination. It was argued that, as no reference of the questions C was made, the application in terms of s 24(1) was prohibited by s 24(3).

The applicants did not specify the impugned sections of the Act in the founding affidavit or in the draft order but in argument it was alleged that ss 4, 6, 12, 13, 18, 21, 22, 23, 25, 29, 30 and 31 of the Act contravened the Declaration of Rights. The main thrust of their case was that the Act was intended to enable the State to acquire compulsorily property D belonging to companies indebted to the State or the shareholders of such companies. They also complained of the failure by the respondents to observe the *audi alteram partem* principle.

The applicants' affidavits were voluminous and replete with argumentative and irrelevant matters. The founding affidavit and its annexures ran into E some 400 pages, while the whole application ran into some 1000 pages.

Held, that in each of the cases in the High Court the affidavits which averred that the relevant provisions of the Act contravened ss 16 and 18(9) of the Constitution were deposed to by Mr Mawere. As Mr Mawere was a specified person with no legal capacity to litigate in matters involving the affairs of the companies under reconstruction without the approval F of his investigator (which approval he had not obtained), the affidavits were null and void and accordingly the constitutional questions raised in them fell away. Accordingly, it was still competent for the applicants to proceed in terms of s 24(1).

Held, further, that the purpose of founding affidavits is to set out succinctly the facts that form the basis of the cause of action. The litigant's legal G practitioner should ensure that affidavits filed of record comply with the Rules. It is irresponsible and unprofessional for a legal practitioner simply to reproduce as affidavits the statements the litigant makes to his legal practitioner. Persistence with this type of pleading may lead to the court awarding costs *de bonis propriis* against the offending legal H practitioner.

2011 (1) ZLR p108

Chidyausiku CJ

Held, further, that, when the Supreme Court sits as a constitutional court, it A only considers constitutional issues. The alleged failure by the respondents to observe the *audi alteram partem* principle was an issue for review. It had no relevance to the constitutional issue.

Held, further, that the purpose and intent of the Act is to prevent loss of public funds through fraudulent, grossly negligent or reckless management B of companies indebted to the State. Essentially, the Act is about the replacement of failed management of a State-indebted company with new management capable of turning around the fortunes of the company and enabling the State-indebted company to meet its obligations. Such legislation is not unique to Zimbabwe. In relation to companies, the word "reconstruction" has a fairly precise meaning: it denotes the transfer of C the undertaking or part of the undertaking of an existing company to a new company with substantially the same persons as members as were members of the old company. Substantially, the business and the persons interested must be the same.

Held, further, that s 4 of the Act sets out the juristic facts that have to be in existence before the Minister can issue an order for reconstruction. Unless D those facts exist, an order may not be issued. The section does not provide for compulsory acquisition of property, even bearing in mind the very wide meaning of "property" in s 16 of the Constitution. The Act provides a scheme, not to provide for the temporary or permanent acquisition of property, but rather to provide for the change of management of a company E by providing for the removal of management that has failed to manage the company successfully in order to enable it to discharge its liabilities. Section 4 provides for the appointment of the administrator to manage the affairs of the company placed under reconstruction. Management of a company is not an asset or property of a company or the shareholders; it is a mode or method of running the affairs of a company. All the assets F of the company remain the assets of the company. The shares remain the property of the shareholders. Nothing is acquired, either temporarily or permanently. All that happens as a result of a reconstruction order being issued is that there is a change in the management of the company. The confirmation proceedings stipulated in s 4 provide for both judicial G oversight and an opportunity for the interested parties to be heard. This adequately meets the requirements of ss 16 and 18(9) of the Constitution.

Held, further, that s 6 of the Act confers on the administrator the control and management of the company and authority to take or recover possession of all the assets of the company. It also authorises the administrator, as the new manager of the company, to litigate on behalf of the company H

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A and to defend actions on behalf of the company. Acquiring the authority to sue or be sued as a representative of a company does not constitute compulsory acquisition of property of the company at all or as envisaged by s 16 of the Constitution.

Held, further, that s 12 of the Act empowers the administrator to deal with the property of "culpable persons", who are, in terms of s 10 of the Act, B persons who were knowingly a party to the carrying on of the business of the company (a) recklessly; or (b) with gross negligence; or (c) with intent to defraud any person or for any fraudulent purpose. Section 12(1) authorises the administrator to cancel a share or nullify any share, right or interest in or claim upon a company under reconstruction held C by a culpable person obtained as a result of fraud committed by that person. Property acquired by fraud is unlawfully owned and s 16 of the Constitution was not intended to promote fraud and protect property acquired through fraud. The issuing of shares and the offering of such shares by the manager of a company to a creditor of a company in settlement of the debt owed to the recipient of the shares in an effort to D turn around a company is not compulsory acquisition. It is essentially a settlement of a debt by the issuance of shares that are not owned by any shareholder.

Held, further, that the general powers conferred on the administrator in terms of s 18 of the Act are conferred on the administrator for the purpose of E acting for and on behalf of the company under reconstruction, to enable the administrator to run the affairs of the company, with a view to turning it around. The section does not compulsorily acquire any asset of the company from the company and allocate it either to the State or to any other person. Whatever is sold in terms of the section is done for and on behalf of the company and for the benefit of the company. Administering F the company does not constitute acquiring that company.

Held, further, that s 23 of the Act empowers the administrator to issue shares or securities in the company under reconstruction in satisfaction of any credit owed to the State or any payment by the State in terms of a guarantee on behalf of the company under reconstruction. The issuing of those shares does not involve the acquisition of the shares G from anybody. They are shares issued by the administrator as a set off to what the State would have paid on behalf of the company. The rest of the powers outlined in the section are incidental to the management of a company for the purposes of turning it around, a process similar to the provisions relating to judicial management in the Companies Act H [*Chapter 24:03*].

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Held, further, that s 25 of the Act merely provides that where the intended A object of the reconstruction is not achievable, that is to say, if it becomes apparent that it is not possible to turn around the company without advancing additional public funds to it and such funds are not available or the reconstruction scheme has been rejected by creditors and members, the provisions of the Companies Act shall apply. In other B words, the company is forced into liquidation and is liquidated in terms of the Companies Act.

Cases cited

Brooklands Selangor Hldgs Ltd v Inland Revenue Commissioners [1970] 1 WLR 429 C

Chrmn, PSC & Ors v Zimbabwe Teachers Assoc & Ors 1996 (1) ZLR 91 (H); 1997 (1) SA 209 (Z)

Hewlett v Minister of Finance and Another 1981 ZLR 571 (S); 1982 (1) SA 490 (ZS)

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

Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1983 (2) ZLR 376 (S); 1984 (2) SA 778 (ZS) D

Legislation considered

Constitution of Zimbabwe 1980, ss 16, 18 (9) and 24

Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*], ss 4, 6, 12, 13, 18, 21, 22, 23, 25, 29, 30 & 31 E

Case information

A P de Bourbon SC, for the applicants

E I Manikai, for the first, second and third respondents

No appearance for the fourth respondent

G Mhlanga, for the fifth respondent F

T Tandi, for the sixth respondent

M Mahlangu, for the seventh respondent

Judgment

CHIDYAUSIKU CJ: This is an application for redress in terms of s 24(1) of the Constitution of Zimbabwe (hereinafter referred to as "the Constitution") on the allegation that the Reconstruction of State-Indebted Insolvent Companies G Act [*Chapter 24:27*] (hereinafter referred to as "the Act"), which came into operation on 25 February 2005, violated the fundamental rights guaranteed to the applicants under ss 16(1) (b), (c) and (d) and 18(9) of the Constitution, in that it "permits the State to expropriate property without notice, payment of fair compensation or judicial oversight" and "denies persons subject to it access to courts". H

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A The relevant provisions of the Constitution allegedly contravened by the enactment of the Act are in the following terms:

> **"16 Protection from deprivation of property**
>
> (1) Subject to section *sixteen A*, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that – B
>
> (a) …; and
>
> (b) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition; and C
>
> (c) … requires the acquiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property, interest or right; and
>
> (d) requires the acquiring authority, if the acquisition is contested, to apply to the High Court or some other court before, or not later than thirty days after, the acquisition for an order confirming the acquisition; …".

D Section 18(9) provides as follows:

> **"18 Provisions to secure protection of law**
>
> (9) Subject to the provisions of this Constitution, 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."

E The redress sought was in the way of an order declaring the Act and the actions of the respondents in terms of the Act void for violating the rights of the applicants guaranteed by ss 16 and 18(9) of the Constitution.

All three applicants are foreign companies. The first applicant is registered in the British Virgin Islands, whilst the second and third applicants are F registered in England. The first applicant was the holder of all shares in the second applicant, which company was the sole beneficial shareholder in SMM Holdings (Pvt) Ltd (hereinafter referred to as "SMMZ"), a company registered in Zimbabwe operating Shabanie and Mashaba asbestos mines through its division African Associated Mines. All these companies were under the sole beneficial shareholding and control of Mutumwa Mawere. G Mr Mawere was born in Zimbabwe but has since taken up the citizenship of South Africa. He served on the Boards of Directors of all the applicants.

On 9 July 2004 Mr Mawere was declared a specified person in terms of s 6(1) of the Prevention of Corruption Act [*Chapter 9:16*]. The second applicant was specified on 26 August 2004. The effect of the specification H order, as provided under s 10(1) of the Prevention of Corruption Act, was

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that Mr Mawere could not perform any act as a director of the applicants A or as their agent without the approval of the investigator assigned to him in terms of s 7 of the Prevention of Corruption Act.

On 3 September 2004 the President of Zimbabwe, acting in terms of s 2 of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] made the Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted B Insolvent Companies) Regulations 2004 ("the Regulations"), the purpose of which was to make provision for placing under reconstruction a company and its associates which, whilst indebted to the State, was unable, or unlikely to be able, to make repayment of the credit made to it from public funds on a date when repayment was due by reason of fraud or mismanagement or for any other reason. It had to further appear to the Minister responsible C for issuing reconstruction orders in terms of s 4 of the Regulations that the State-indebted company had not become, or was prevented from becoming, a successful concern and that there was a reasonable probability that if the company was placed under reconstruction it would be enabled to pay its debts or meet its obligations and become a successful concern and that it D would be just and equitable to place the company under reconstruction.

On 6 September 2004 a reconstruction order was issued by the third respondent in relation to SMMZ in terms of s 4(1) of the Regulations. The reconstruction order was deemed, under s 4(3) of the Regulations, to have been issued in relation to all the associate companies of SMMZ. By reason of the definition of "associate" in relation to a company under s 3(1) of the Regulations, all E the three applicants were deemed to have been placed under reconstruction in terms of the order issued in relation to SMMZ.

The effect of the reconstruction order was to divest any other person vested with the management of the company's affairs from the date of its commencement and to vest such control and management of the company in an administrator F appointed by the Minister in terms of s 5(1)(b) of the Regulations.

On 25 February 2005 the Act came into operation to replace the Regulations. Section 38 of the Act provides that every order made and action or decision taken or thing done by the Minister of Justice, Legal and Parliamentary Affairs or any administrator or assistant administrator in the valid exercise of any G power in terms of the Regulations was to be deemed to have been validly made, taken or done, as the case might be, in terms of the Act.

In addition to denying that the provisions of the Act violate the fundamental rights guaranteed to the applicants under ss 16(1) (b), (c) and (d) and 18(9) of the Constitution, the first, second and third respondents raised a point *in limine*. It was that the same questions as to the contravention of the fundamental H

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A rights forming the subject-matter of this application arose in proceedings in the High Court in cases HC 1206/04, HC 498/06 and HC 6684/06. The contention was that the applicants ought to have requested the persons who presided in those proceedings in the High Court in terms of s 24(2) of the Constitution to refer the questions to the Supreme Court for determination. It was argued that, as no reference of the questions as to the contravention of B the fundamental rights guaranteed under ss 16 and 18(9) of the Constitution was made, the application to the Supreme Court in terms of s 24(1) for the relief sought by the applicants is prohibited by s 24(3) of the Constitution. It was contended that the applicants had no right to apply to the Supreme Court.

The relevant provisions of s 24 of the Constitution read as follows:

> C **"24 Enforcement of protective provisions**
>
> (1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) D may, *subject to the provisions of subsection (3)*, apply to the Supreme Court for redress.
>
> (2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his E opinion, the raising of the question is merely frivolous or vexatious.

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

F The facts show that the questions as to the contravention of the fundamental rights guaranteed under ss 16 and 18(9) of the Constitution alleged by the applicants to be contravened by the Act in this application arose in the proceedings in the High Court in cases HC 1206/04, HC 498/06 and HC 6684/06.

G In HC 1206/04, instituted on 16 November 2004, the second applicant challenged the validity of the reconstruction order and sought to have it set aside. In HC 498/06 the first and third applicants made the application to the High Court on 27 January 2006 to rescind an order made by a judge in chambers confirming the reconstruction order. In the founding affidavit filed in support of each application the allegation was made that the provisions H of the Act which authorised the Minister to issue reconstruction orders

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contravened the fundamental rights guaranteed under ss 16 and 18(9) of A the Constitution. The respondents denied the alleged contravention of the fundamental rights guaranteed under ss 16 and 18(9) of the Constitution.

In HC 6684/06 the first applicant filed an affidavit opposing an application by the first respondent for an order confirming the identification of its former directors as culpable personsX in terms of s 9(1)(b) of the Act. It was alleged B in the opposing affidavit that the provisions of the Act in terms of which the identification of culpable persons was authorised were in contravention of the fundamental rights guaranteed under ss 16 and 18(9) of the Constitution. C The first respondent denied in the answering affidavit the allegations as to the contravention of the fundamental rights guaranteed under ss 16 and 18(9) of the Constitution.

In each of these cases in the High Court the founding affidavit or the opposing affidavit which contained the statement that the relevant provisions of the Act contravened the fundamental rights guaranteed under ss 16 and 18(9) of the Constitution and the denial of the truth of which gave rise to the question as to the contravention of the fundamental rights guaranteed under ss 16 and D 18(9) of the Constitution was deposed to by Mr Mawere. Preliminary points were taken in each case against the validity of the founding affidavit or the opposing affidavit deposed to by Mr Mawere on the ground that he was a specified person with no legal capacity to litigate in matters involving the affairs of the companies under reconstruction without the approval of his E investigator. The preliminary points were upheld because Mr Mawere had, as a matter of fact, not sought and obtained the approval of the investigator assigned to him as a specified person.

The effect of the declaration that Mr Mawere was under a legal disability to depose to the founding affidavits in cases HC 1206/04 and HC 498/06 and F the opposing affidavit in case HC 6684/06 was to render those affidavits null and void. The declaration in the preliminary proceedings meant that the basis on which the questions as to the contravention of the fundamental rights guaranteed under ss 16 and 18(9) of the Constitution had arisen in the main proceedings in the High Court was removed. There was no longer any matter as to the contravention of the fundamental rights guaranteed under G ss 16 and 18(9) of the Constitution giving rise to a question for determination.

There was, therefore, no question as to the contravention of fundamental rights guaranteed under ss 16 and 18(9) of the Constitution which any of the persons presiding in the proceedings in the High Court could on his or her own motion refer to the Supreme Court or which any of the applicants could H

A request the persons presiding to refer to the Supreme Court for determination in terms of s 24(2) of the Constitution.

It is a requirement of s 24(2) of the Constitution that the question which would have arisen in the proceedings should still concern the subject matter for argument and determination at the time the person presiding in the proceedings may refer it to the Supreme Court on his or her own B motion or

the applicant request that it be referred to the Supreme Court. The resolution of the subject-matter to which the question relates must still be a necessity in the determination by the court of the cause of action for which the proceedings were commenced. See *Tsvangirai* v *Mugabe* 2006 (1) ZLR 148 (S) at 158A-159F.

Where, as was the situation in cases HC 1206/04, HC 498/06 and HC 6684/06, proceedings are determined on the basis of the fact that no question as to the contravention of the fundamental rights guaranteed under ss 16 and 18(9) of the Constitution has arisen, s 24(3) of the Constitution is no bar to an application to the Supreme Court in terms of s 24(1) of the Constitution.

The preliminary point raised by the first, second and third respondents must therefore fail.

Having concluded that the applicants have *locus standi* to approach this court in terms of s 24(1) of the Constitution, I now turn to deal with the merits of the application.

The applicants contend that the Act is invalid by reason that it contravenes ss 16 and 18(9) of the Constitution. The cause of action is very poorly defined in this application. The applicants do not set out the impugned sections of the Act in the founding affidavit. It would be nonsensical to allege that all the thirty-seven sections of the Act contravene ss 16 and 18(9) of the Constitution. For instance, s 1 of the Act simply sets out the title of the Act. How can that section contravene ss 16 and 18(9) of the Constitution? The draft order does very little to clarify the issues either. It reads as follows:

> "IT IS ORDERED THAT
>
> 1. The Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*] be and is hereby declared to be in contravention of the provisions of sections 16 and 18 of the Constitution of Zimbabwe and is therefore void.
> 2. All actions taken, acts done and decisions made by the first respondent and the third respondent in terms of the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*] in respect of SMM Holdings (Private) Limited, the fourth respondent, the fifth respondent and the sixth respondent be and are hereby set aside and declared to be void.
> 3. The representation of the first respondent and the third respondent by the

> second respondent be and is hereby declared to be in contravention of section 18, and it is ordered that the second respondent shall cease to act for or represent those respondents.
> 4. The first, second and third respondents shall, jointly and severally, the one paying the other to be absolved, pay the costs of this application."

The way the applicants' cause of action is pleaded in this case is simply appalling. The affidavits of the applicants are voluminous and replete with argumentative and irrelevant matters. The founding affidavit and its annexures run into some four hundred pages while the whole application runs into some one thousand pages. Instead of the founding affidavit setting out succinctly the facts that form the basis of the cause of action, it tells the life story of the applicants. That is not the purpose of founding affidavits. The litigant's legal practitioner should ensure that affidavits filed of record comply with the Rules. It is irresponsible and unprofessional for the legal practitioner simply to reproduce as affidavits the statements the litigant makes to his legal practitioner. Persistence with this type of pleading may lead to the court awarding costs *de bonis propriis* against the offending legal practitioners.

Mr *de Bourbon* attempted to clarify the issues in the following submission:

> "3. The Reconstruction Act violates sections 16 and 18 of the Constitution to the extent that it:
>
> 3.1 permits the State to expropriate property without notice, payment of fair compensation or judicial oversight in contravention of sections 16 (b), (c) and (d) of the Constitution; and
>
> 3.2 denies persons subject to it access to courts in violation of section 18(9) of the Constitution."

While Mr *de Bourbon's* submission clarifies the manner in which it is alleged the Act contravenes ss 16 and 18(9) of the Constitution, it does not identify which of the thirty-seven sections of the Act contravene ss 16 and 18(9) of the Constitution. At the conclusion of his oral submissions, and at the instance of the court, Mr *de Bourbon* indicated that the applicants were challenging the following sections of the Act: ss 4, 6, 12, 13, 18, 21, 22, 23, 25, 29, 30 and 31. I will therefore proceed on the basis that the applicants are challenging the cited sections of the Act and conceding that the other sections of the Act are *intra vires* the Constitution.

I shall therefore proceed on the basis that this court is required to determine whether the above impugned sections contravene ss 16 and 18(9) of the Constitution. But before doing that, I wish to deal with the following submission of the applicants:

> "4. In addition, the applicants contend that in their implementation and H

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> A administration of the Reconstruction Act, the Minister of Justice, Legal and Parliamentary Affairs (hereinafter referred to as "the Minister") and the administrator have acted in breach of the *audi alteram partem* principle."

When this court sits, as it did *in casu*, as a constitutional court, it only considers constitutional issues. The applicants, in their affidavits and in the submissions made on their behalf, raise a number of issues which have nothing B to do with the constitutional validity of the impugned sections of the Act. In this submission the applicants complain of the failure by the respondents to observe the *audi alteram partem* principle. This is an issue for review. It has no relevance to the constitutional issue of whether the impugned sections of the Act contravene the Constitution.

C I will only deal with the constitutional issue. Whether the Minister observed the *audi alteram partem* rule is an issue for review. The constitutional issue that falls for determination is whether the impugned sections of the Act violate ss 16 and 18(9) of the Constitution. The impugned sections of the Act cannot be set aside because an official has acted *ultra vires* those sections.

D Before dealing specifically with the impugned sections of the Act, it is necessary to set out the general conditions and purposes of placing a company which is unable to pay its due debts and meet its obligations under reconstruction and control of different management thereof.

In this regard Mr *de Bourbon* made the following submission in para 34 of E his heads of argument:

> "34. At the heart of the Reconstruction Act is a scheme which provides for some temporary taking of possession of property by the State and some permanent taking of possession of property by the State. Neither the temporary taking of possession, nor the permanent takings of possession satisfy the compensation requirements of s 16."

F This submission, and indeed the main thrust of the applicants' case, is predicated on the proposition that the Act is intended to enable the State to compulsorily acquire property belonging to companies indebted to the State and the shareholders of such companies.

I do not agree with this contention. The purpose and intent of the Act, as G can be gathered from its explicit language, is to prevent loss of public funds through fraudulent, grossly negligent or reckless management of companies indebted to the State. Essentially, the Act is about the replacement of failed management of a State-indebted company with new management capable of turning around the fortunes of the company and enabling the State-indebted H company to meet its obligations.

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The preamble to the Act is very explicit in this regard. It sets out the purpose A of the Act in the following terms:

> "AN ACT to provide for the reconstruction of State-indebted companies and associate companies that are unable to repay credits made to them from public funds, or in respect of whose liabilities the State has issued any guarantee that has become due; to provide for appointment and functions of administrators of companies under reconstruction; to provide for formulation and implementation B of schemes of reconstruction in respect of such companies; …"

Thus, the main purpose of the Act is to prevent loss of public funds through mismanagement by instituting turn-around schemes.

Legislation providing for the reconstruction of failed companies is not unique to Zimbabwe. It is to be found in other jurisdictions. In this regard, judgments C from other jurisdictions on the purpose and meaning of the reconstruction of companies are instructive.

In *Brooklands Selangor Holdings Ltd* v *Inland Revenue Commissioners* [1970] 1 WLR 429 Pennycuick J reviewed earlier cases on the meaning and purposes of a "reconstruction". He said at pp 444-445: D

"In ordinary speech the word 'reconstruction' is, I think, used to described the refashioning of any object in such a way as to leave the basic character of the object unchanged. In relation to companies the word 'reconstruction' has a fairly precise meaning which corresponds, so far as the subject-matter allows, to its meaning in ordinary speech. It denotes the transfer of the undertaking or part of the undertaking of an existing company to a new company with substantially the same persons as members as were members of the old company. On this E point I was referred in particular to two cases, the first being *Hooper* v *Western Counties and South Wales Telephone Co Ltd* (1892) 68 LT 78. The question in that case was concerned with the meaning of reconstruction in a debenture issue. Chitty J said at p 80: 'What is included in "reconstruction" by persons conversant with company law? There is one mode of reconstruction which may, perhaps, be said to be within the strict sense of the term'. He gave a particular F instance of what would be called reconstruction where a company continues to exist and then he went on:

> 'The usual mode of reconstruction is when a company resolves to wind itself up, and proposes the formation of a new company, which is to consist of the old shareholders, and to take over the old undertaking, the old shareholders receiving shares in the new company. In that case the old company ceases G to exist in point of law, and there is in form a sale to the members of a new corporation. But the company is in substance, and may be fairly said to be, reconstructed.'

Then a little lower down he quoted Lord Lindley on the *Law of Companies* in this passage: 'reconstruction differs from amalgamation in that, as a rule, there is only one transferring company and the company to which the property in question is transferred is practically the same company with some alterations H

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A in its constitution'. Then he said '… that appears to me to afford a clue to the meaning of the word as used in a clause like the present'. In that passage Chitty J put a very restricted meaning on the word 'reconstruction'. He said in terms that the new company is to consist of the old shareholders. No one, I think, now would put quite such a restricted meaning on the term as that.

The other case was In re *South African Supply and Cold Storage Co Ltd* [1904] B 2 Ch 268 where, again in a different context from the present case, Buckley J had to consider the meaning of the term 'reconstruction'. He said at p 286:

> 'Then it remains to consider whether what was done was done for the purpose of "reconstruction or amalgamation". What does reconstruction mean? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to C kill that undertaking but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on – that would be a mere sale – but in some altered form to continue the undertaking in such a manner as that the persons now carrying on it will substantially continue to carry it on. It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on. D But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company. Substantially the business and the persons interested must be the same.'"

Pennycuick J goes on at p 445:

> E " So in that passage Buckley J repeated in effect what was said by Chitty J in the earlier case but he repeatedly inserted the qualification 'substantial'. I respectfully adopt that passage as an accurate statement of what is meant by the word 'reconstruction', always, of course, in the absence of any controlling factor leading to some other meaning. To quote again the last sentence: 'substantially the business and the persons interested must be the same.'"

F I will now set out the challenged provisions of the Act and determine the question whether they contravene the fundamental rights guaranteed to the applicants under ss 16 and 18(9) of the Constitution, bearing in mind the meaning and purposes of "reconstruction" as defined under the Act and the authorities cited, which show that the main object of a reconstruction would be to put the company in a position in which it is able to discharge its obligations to its creditors.

Section 4

The applicants contend that s 4 of the Act contravenes ss 16 and 18(9) of the Constitution.

H Section 4 of the Act provides as follows:

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"4 Requirements for and scope of reconstruction order A

(1) If it appears to the Minister that, by reason of fraud, mismanagement or for any other cause –

(a) a State-indebted company is unable or is unlikely to be able to make any repayment of a credit made to it from public funds on a date when the repayment is due; or

(b) the State has become or is likely to become liable to make any payment from B public funds in terms of a guarantee issued in favour of a State-indebted company;

and it further appears to the Minister that –

(c) the State-indebted company has not become or is prevented from becoming a successful concern; and

(d) there is a reasonable probability that if the company is placed under C reconstruction it will be enabled to pay its debts or meets its obligations and become a successful concern; and

(e) it would be just and equitable to do so;

the Minister may, after affording the company an adequate opportunity to make representations in the matter, issue a reconstruction order in relation to the company and publish the order by notice in the *Gazette*: D

Provided that, where the Minister considers that immediate action is necessary to prevent irreparable harm to the company or its creditors, members or employees, the Minister may take such action before affording the company an opportunity to make representations in terms of this subsection.

(2) The appropriate Minister may issue a single reconstruction order in relation E to two or more companies that are not apparently associated with each other where –

(a) they benefited from the same credit or guarantee payable from public funds; or

(b) they carry on any business or activity in partnership or conjunction with each other and one or more of them benefited from any credit or guarantee payable from public funds. F

…"

Section 4 of the Act sets out the juristic facts that have to be in existence before the Minister can issue an order for reconstruction. The juristic facts that are the prerequisites to the issuance of an order for reconstruction are –

(1) the company the subject of a reconstruction order has to be indebted to G the State, that is, it has borrowed money from the State or has created a liability for the State by failure to pay a debt which the State has guaranteed;

(2) the company has not become viable or is being prevented from becoming a viable company by fraudulent, reckless or grossly negligent management; H

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A (3) the company has prospects of becoming viable and able to discharge its liabilities and obligations through change of management; and

(4) that issuing the order is just and equitable.

Unless the juristic facts are in existence, the Minister cannot issue a reconstruction order. Associate companies and companies that have benefited B from the funds borrowed from the State are also affected by the order.

It is the applicants' contention that s 4 of the Act amounts to an acquisition of property without notice, payment of fair compensation or judicial oversight. The issue that falls for determination therefore is whether s 4 of the Act provides for acquisition. If s 4, and indeed any of the impugned sections of the Act, constitutes acquisition then the provisions of s 16 of the Constitution C apply and the section has to be saved by one of the provisos from invalidity. If, however, s 4 does not provide for the compulsory acquisition of property the question of compliance with ss 16 or 18(9) of the Constitution does not arise. I do not accept the applicants' contention that s 4 of the Act provides for compulsory acquisition of property.

D Section 16(1) of the Constitution provides in relevant part as follows:

"16 Protection from deprivation of property

(1) Subject to section *sixteen A*, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that –

(a) requires –

E …".

This court has had occasion to comment on the meaning of the word "property" as it appears in s 16 of the Constitution in *Hewlett v Minister of Finance and Another* 1981 ZLR 571 (S) at 583G; 1982 (1) SA 490 (ZS) at 497F, as follows:

> "Although there is no definition of the word the section refers to 'property of any description or interest or right therein'. This seems to embrace the widest F possible range of property and to include at least any money debt due, including such a debt due by the State. It would require very strong indications, particularly having regard to the principles of interpretation which have to be applied to a provision of this nature, to limit these very wide words. After all, the purpose of s 16 is to afford protection to property …".

See also *Zimbabwe Township Developers (Pvt) Ltd* v *Lou's Shoes (Pvt) Ltd* G 1983 (2) ZLR 376 (S) at 384, wherein this court had this to say:

> "… property is the most comprehensive of all terms which can be used and … is … indicative and descriptive of every possible interest which a party can have."

Mr *de Bourbon* argued that the term "acquire" in s 16 of the Constitution connotes the transfer of a thing from one party to another who receives H it, even if such transfer be only passive or symbolic. For this submission

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he relied on *Chairman, Public Service Commission & Ors* v *Zimbabwe* A *Teachers' Association & Ors* 1996 (1) ZLR 91 (H); 1997 (1) SA 209 (Z) at 223J-224C. I accept the definition of the word "property" as set out in the above authorities.

Mr *de Bourbon*, as I have already stated, submitted that at the heart of the Act is a scheme which provides for some temporary takings of possession of B property by the State and some permanent takings of possession of property by the State. He argued that neither the temporary takings of possession of property, nor the permanent takings of possession of property satisfy the compensation requirements of s 16 of the Constitution. He thereafter set out what in his submission constitutes temporary takings of possession in para 35 of his Heads of Argument, which reads as follows: C

> "35 The temporary takings of possession include the following –
>
> 35.1 Upon the issue of a reconstruction order, in terms of section 6(a) of the Reconstruction Act (as) read with section 18(1) (of the Constitution), the administrator assumes control and management of the company. This power includes the power to exercise all rights of ownership of the assets of a company. The Reconstruction Act provides for the temporary D acquisition of these rights by the State through the appointment of an administrator.
>
> 35.2 Section 6(a) (of the Reconstruction Act) specifically provides for the administrator to recover and take possession of all the assets of the company. Thus the possession of the company's property is transferred from the company itself to the administrator. E
>
> 35.3 These transfers of the property of the company to the State, *through the imposition of an administrator*, also amount to a transfer of '*rights and interests in property*' within the expansive meaning accorded by this court to section 16(1) in *Hewlett's* and *Lou's Shoes* (cases *supra*) from shareholders to the State. The right of management and control of a company and its assets is ordinarily a right which is exercised F by shareholders of the company through the directors whom they appoint. The Reconstruction Act deprives shareholders of these rights and interests in the company and its property and transfers them to the State who (which?) appoints the administrator who usurps the powers of the directors."

I am not persuaded by these submissions. G

At the heart of the Act – in particular s 4 of the Act – is a scheme, not to provide for the temporary or permanent acquisition of property, but rather to provide for the change of management of a company by providing for the removal of management that has failed to successfully manage the company to enable it to discharge its liabilities. Section 4 of the Act provides for the appointment of the administrator to manage the affairs of the company H

Chidyausiku CJ

A placed under reconstruction. Management of a company is not an asset or property of a company or the shareholders. It is a mode or method of running the affairs of a company. Management of a

company is not an asset of the company in the same way that property registered in the name of the company is. Management of a company is not an asset of a shareholder. It is a *modus operandi* of a company which is incapable, by reason of the nature B of its *persona*, of managing itself.

When a reconstruction order is issued in terms of s 4 of the Act, all the assets of the company remain the assets of the company. The shares in a company remain the property of the shareholders. Nothing is acquired either temporarily or permanently. All that happens as a result of a reconstruction order being C issued in terms of s 4 of the Act is that there is a change in the management of the company. It provides for the removal of failed management and its replacement by an administrator. Management of a company is not property envisaged in s 16 of the Constitution.

The proposition that a company, as a *non persona*, cannot run its own affairs requires no authority. The affairs of a company are run by the management. D In doing so or in managing the affairs of the company, assets of a company are bought and sold for the benefit of the company. Whenever an asset of the company is sold by the management for and on behalf of the company there is no compulsory acquisition. Such activity does not amount to compulsory acquisition of property belonging to the company. It is part of management. E The shareholders' right to vote for management is not property envisaged in terms of s 16 of the Constitution. The shares in a company are property in terms of s 16 of the Constitution. Section 4 of the Act provides for no compulsory acquisition of company shares from the holders of such shares.

Section 4 of the Act also provides that before the Minister issues a F reconstruction order he affords the company an adequate opportunity to make representations in the matter. In case of emergency the Minister can issue the order without hearing the company first. In both respects, the Minister is required by the Act to submit the order to a judge in chambers for confirmation. Confirmation proceedings provide for both judicial oversight and an opportunity to the interested parties to be heard.

G As I have already stated, s 4 of the Act does not provide for compulsory acquisition, but even if it did, an opportunity for the company to be heard and judicial oversight in the form of confirmation by a judge, adequately meets the requirements of ss 16 and 18(9) of the Constitution.

Accordingly, s 4 of the Act does not contravene ss 16 and 18(9) of the H Constitution.

Chidyausiku CJ

Section 6 A

I now turn to deal with s 6 of the Act.

Section 6 of the Act provides as follows:

> **"6 Effect of reconstruction order**
>
> A reconstruction order shall have the following effect, namely that –
>
> (a) the administrator shall assume the control and management of the company B and recover and take possession of all the assets of the company; or
>
> (b) no action or proceeding shall be proceeded with or commenced against the company except by leave of the administrator and subject to such terms as the administrator may impose; and
>
> (c) any attachment or execution put in force against the assets of the company after the commencement of the reconstruction shall be void; and C
>
> (d) every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the reconstruction, shall, unless the administrator otherwise orders, be void."

Section 6 of the Act confers on the administrator the control and management of the company and to take or recover possession of all the assets of the D company. It also authorises the administrator as the new manager of the company to litigate on behalf of the company and to defend actions on behalf of the company. Acquiring authority to sue or be sued as a representative of a company does not constitute compulsory acquisition of property of a company at all or as envisaged by s 16 of the Constitution. The failed management's authority to manage a company placed under reconstruction E is not property as envisaged by s 16 of the Constitution.

There is nothing in s 6 of the Act that contravenes s 16 or s 18 of the Constitution.

Section 12

Section 12 of the Act is the next section that is impugned by the applicants. F It provides as follows:

> **"12 Forfeiture or vesting in State of rights held by culpable persons**
>
> (1) The administrator shall cancel or nullify any share, right or interest in or claim upon a company under reconstruction purportedly held by a culpable person which was obtained by or resulted from any fraud committed by the G culpable person.
>
> (2) Any share, right or interest in or claim upon a company under reconstruction held by a culpable person that is not a share, right or interest in or claim upon the company referred to in subsection (1) and which properly vests in a culpable person shall, with effect from the date he or she becomes a culpable person in terms of section 9(8), vest in the State, which, in consideration therefor, shall apply the same by way of set-off towards discharging the culpable person's H

Chidyausiku CJ

> A liability for any or all of the debts and liabilities of the company.
>
> (3) The administrator may, in accordance with a scheme of reconstruction –
>
> (a) consolidate or redivide any shares referred to in subsection (2) into any number of shares of any denomination equivalent to the true or fair value of the shares previously held by the culpable person;
>
> (b) convert any right, interest or claim referred to in subsection (2) into shares B equal in value to the true or fair value of the right, claim or interest previously held by the culpable person;
>
> and the shares resulting from the exercise of the administrator's powers under paragraph (a) or (b) shall be issued to the State."

Section 12 of the Act empowers the administrator to deal with the property of people who have been identified as culpable persons. Culpable persons, C in terms of s 10 of the Act, are persons who were knowingly a party to the carrying on of the business of the company (a) recklessly; (b) with gross negligence; or (c) with intent to defraud any person or for any fraudulent purpose. Subsection (1) of s 12 of the Act authorises the administrator to cancel a share, nullify any share, right or interest in or claim upon a company under reconstruction held by a culpable person obtained as a result of fraud D committed by the culpable person.

The issue that arises here for determination is whether s 16 of the Constitution protects shares of, or interests in, a company fraudulently acquired. Fraud is essentially theft and theft does not confer ownership on the thief. In my view, s 16 of the Constitution was never intended to protect property E acquired by fraud. Property acquired by fraud is unlawfully owned and s 16 of the Constitution was not intended to promote fraud and protect property acquired through fraud.

The Act also empowers the Minister to allocate shares to the State, as an entity owed money by a company under reconstruction for the purpose of F discharging the debt the company owes to the State. The issue of shares and the offering of such shares by the manager of a company to a creditor of a company in settlement of the debt owed to the recipient of the shares in an effort to turn around a company is not compulsory acquisition. It is essentially a settlement of a debt by the issuing of shares that are not owned by any shareholder.

G **Section 13**

I now turn to s 13 of the Act, which provides as follows:

> **"13 Attachment of assets of culpable persons in satisfaction of their liabilities to company under reconstruction**
>
> (1) If a judge issues an order in terms of section 9(7) confirming the extent, H whether limited or unlimited, to which a culpable person is liable for the debts

Chidyausiku CJ

> and liabilities of a company under reconstruction, such order shall have the A effect, for purposes of enforcement, of a civil judgment in favour of the company under reconstruction for the satisfaction of –
>
> (a) such of its debts and liabilities as have been attributed to the culpable person by the order; and
>
> (b) the reconstruction expenses referred to in section 34(2).

(2) The administrator may submit for registration the copy of the order B referred to in subsection (1) to the court of any magistrate which would have had jurisdiction to make the order had the matter been determined by it, or, if the decision, order or determination exceeds the jurisdiction of any magistrate's court, the High Court.

(3) If any statement in terms of section 9(1) –

(a) specifies the extent, whether limited or unlimited, to which a culpable person C is liable for the debts and liabilities of a company under reconstruction; and

(b) such statement has not been confirmed by a judge because the culpable person did not object to it in terms of section 9(7);

the administrator may, within a period of six months from the date when the statement was first notified to the culpable person in terms of section 9(3), and D on not less than fourteen days' written notice to the culpable person, apply to a judge in chambers for an order confirming the statement, and subsections (1) and (2) shall, if the judge confirms the statement, apply to the order of the judge confirming it."

In my view, s 13 of the Act simply provides for quasi-judicial execution, in that the order will have been given by a judge and its purpose is to enforce E a civil judgment in favour of a company under reconstruction. Enforcement of civil judgments is provided for in terms of s 16 of the Constitution.

Section 18

Section 18 of the Act provides as follows:

"18 General powers of administrator in relation to company under F reconstruction

(1) The administrator in reconstruction shall have the following powers, which he or she may exercise without the authority of the directors or shareholders of the company under reconstruction –

(a) to carry on or discontinue any part of the business of the company in so far as may be necessary for the reconstruction thereof; G

(b) to operate every account with a financial institution operated by the company immediately before the commencement of its reconstruction;

(c) to draw, accept, make and endorse any cheque, bill of exchange or promissory note in the name and on behalf of the company, and, for the purpose of carrying on the business of the company in terms of paragraph (a), to impose any additional liability upon the company; H

Chidyausiku CJ A

(d) to raise money in any way;

(e) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature and, subject to any law relating to criminal procedure, any criminal proceeding; …"

The powers conferred on the administrator in terms of s 18 of the Act are conferred on the administrator for the purpose of acting for and on behalf B of the company under reconstruction. They are powers that enable the administrator to run the affairs of the company, with a view to turning it around. Section 18 of the Act does not compulsorily acquire any asset of the company from the company and allocate it either to the State or to any other person. Whatever is sold in terms of s 18 of the Act is done for and on C behalf of the company and for the benefit of the company. Administering the company does not constitute acquiring that company.

Again, I see no basis for holding that s 18 of the Act contravenes ss 16 and 18 of the Constitution.

Sections 21 and 22

D I now turn to ss 21 and 22 of the Act. They simply empower the administrator to hold, as soon as possible after completion of a statement of the affairs of the company, meetings with creditors and members of the company under reconstruction, that is, with creditors, to discuss his or her proposals. Section 22 provides for meetings to discuss the reconstruction programme.

E Again I see nothing in ss 21 and 22 of the Act that constitutes compulsory acquisition.

Section 23

I now turn to 23 of the Act which provides as follows:

"23 Powers of administrator with respect to scheme of reconstruction

F (1) Subject to section 25, the administrator shall have powers to formulate and implement a scheme of reconstruction of the company under reconstruction, for which purpose the administrator may do any one or more of the following things –

(a) issue to the State shares or other securities in a reconstructed company in satisfaction of any credit owed to the State by, or payment by the State of G any guarantee on behalf of, the company under reconstruction;

(b) consolidate or redivide the shares of the same or different classes held by a member in a company under reconstruction into any number of shares (whether of the same or different classes) of any denomination equivalent to the true or fair value of the shares previously held by the member;

(c) cancel any shares held by a member in a company under reconstruction H and issue to such member any number of shares of any denomination in a

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2011 (1) ZLR p128

Chidyausiku CJ

reconstructed company that are equivalent to the true or fair value of the A shares previously held by the member;

(d) convert any right, interest or claim held by a creditor in relation to a company under reconstruction into shares equal in value to the true or fair value of the right, claim or interest previously held by the creditor and issue the shares to the creditor as fully paid up shares;

(e) issue to any creditor of the company under reconstruction any debentures or B other securities not being shares in a reconstructed company in satisfaction of any claim, right or interest held by the creditor in relation to the company under reconstruction; C

(f) amend the memorandum and articles of association of the company under reconstruction;

(g) amalgamate the company under reconstruction with any of its associate companies;

(h) where two or more companies are under reconstruction together, amalgamate both or any of them;

(i) dissolve the company under reconstruction or any of its associate companies and secure the formation of one or more companies limited by shares, D which shall be the successor company or companies to the company under reconstruction or any of its associate companies;

(j) redistribute the assets and liabilities of the company under reconstruction and E any of its associate companies between them or between its successor company or companies formed pursuant to paragraph (i);

(k) dissolve the board of directors of the company under reconstruction and substitute therefor any assistant administrator;

(l) confirm in office any director of the company under reconstruction;

(m) appoint and vest the management of any reconstructed company in an interim board of directors of any reconstructed company which shall hold office until the next annual general meeting of the members of the company F following its reconstruction.

(2) Subject to subsection (3), the administrator may issue debentures referred to in subsection (1)(e) –

…."

This section empowers the administrator to issue shares or securities in G the company under reconstruction in satisfaction of any credit owed to the State or any payment by the State in terms of a guarantee on behalf of the company under reconstruction. The issuing of the shares does not involve acquisition of the shares so issued from anybody. They are shares issued by the administrator as a set off to what the State would have paid on behalf of the company. H

2011 (1) ZLR p129

Chidyausiku CJ

A The rest of the powers outlined in this section are incidental to the management of a company for the purposes of turning it around. If anything, this section mirrors the provisions of judicial management in the Companies Act [*Chapter 24:03*]. Judicial management is a judicial process of managing a company for the benefit of creditors. Similarly, the administrator manages a company under reconstruction for the benefit of its creditors, one of whom B happens to be the State. If a company does not wish to risk being placed under reconstruction then it should not borrow money from the State or seek State guarantees. The Act seeks to protect public funds from loss through fraud, gross negligence or recklessness. It is not intended to acquire compulsorily private property.

C **Section 25**

I now turn to deal with s 25 of the Act, which provides as follows:

> **"25 Consequences where reconstruction not possible or scheme therefor unapproved**
>
> If – D
>
> (a) after representations made to him or her by the administrator, the Minister –
>
> (i) is of the opinion that, in the circumstances pertaining to the company under reconstruction, no feasible scheme for its reconstruction can be formulated except by advancing additional public funds to it; and
>
> (ii) such funds are unavailable;
>
> or E
>
> (b) a scheme of reconstruction is not approved under section 24;
>
> the appropriate Minister shall cancel the reconstruction order in terms of section 35 and thereupon Part V or VI of the Act shall apply to such company."

This section merely provides that where the intended object of the reconstruction is not achievable, that is to say, if it becomes apparent that it is not possible to turn around the company without advancing additional public F funds to it and such funds are not available or the reconstruction scheme has been rejected by creditors and members, the provisions of the Companies Act shall apply. In other words, the company is forced into liquidation and is liquidated in terms of the Companies Act.

Section 29

G I now turn to s 29 of the Act. In my view, it does not constitute compulsory acquisition. It merely directs the administrator on how to apply funds of the company.

Section 30

I now turn to s 30 of the Act. It simply provides that the administrator and his H or her assistants should be remunerated by the company. The administrator

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is a manager of the company and as such remuneration should come from A the company. Where an employer is obliged to pay an employee for services rendered, that is not the kind of expropriation envisaged in s 16 of the Constitution.

Section 31

The above principle also applies to s 31 of the Act. Liabilities of the company B under reconstruction have to be paid by the company. Section 31 simply provides how those liabilities should be paid. There is no compulsory acquisition of assets as such, but merely a method for payment of company liabilities.

In the result, this application has no merit and is accordingly dismissed C with costs.

MALABA DCJ, GARWE, JA, CHEDA AJA concurred

SANDURA JA: *

Costa & Madzonga, applicants' legal practitioners D

Dube, Manikai & Hwacha, first, second and third respondents' legal practitioners

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

Chihambakwe, Mutizwa & Partners, fifth respondent's legal practitioners

Kantor & Immerman, sixth respondent's legal practitioners E

Gill, Godlonton & Gerrans, seventh respondent's legal practitioners F

* The judgment of Sandura JA had not been received by the time this volume went to print (June 2013). – *Editor*.

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MADZIYIRE v MAKWABARARA & ORS 2011 (1) ZLR 131 (H)

Citation	2011 (1) ZLR 131 (H)
Case No	Judgment No. HH-46-11
Court	High Court, Harare
Judge	Gowora J
Heard	17 August 2010
Judgment	2 February 2011
Counsel	*O Takaendesa*, for the applicant *J Mambara*, for the first and second respondents No appearance for the third respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Contract – *illegality – contract entered into with aim of evading tax – such contract void ab initio – not enforceable in any way – par delictum rule – when may be relaxed – party not seeking such remedy – court not able to order restitution*

Headnote

D The applicant entered into an agreement with the first respondent, the sole shareholder in the second respondent, under which he would acquire all the shares in the second respondent and thereby acquire two pieces of land owned by the second respondent. Two written agreements were E entered into. The first one reflected a price, a portion of which was to be paid as a deposit. The second, signed about two weeks later, showed the price as being half of that shown in the first contract, and without any requirement to pay a deposit. The applicant paid the higher price. The respondents alleged that the second agreement was drawn up in order to reduce the costs of transfer fees and stamp duties; the applicant alleged F that the second agreement was intended to avoid problems with the first respondent's family about the purchase price. In any event, it was the second agreement that was submitted to the conveyancers; stamp duties, capital gains tax and conveyancing fees were calculated on the lesser sum. The applicant sought an order for specific performance.

G *Held*, that the second agreement was a continuation of the first and if the purpose was to defeat the *fiscus* then the whole transaction was tainted by illegality. While under s 44 of the Stamp Duties Act [*Chapter 23*:*09*], an agreement made for the purpose of defeating the object of the Act

is declared void, in this situation no stamp duty was payable. The properties were not being transferred to the applicant; he was acquiring the second H respondent, which owned the properties. However, under the Capital

Gowora J

Gains Tax Act [*Chapter 23*:*01*] the sale of shares is subject to capital A gains tax on any amount remaining after the deduction of any amounts permitted by law. The first and second respondents were not persons entitled to exemptions in respect of such a sale. The conclusion of a second agreement on which the transfer or submission to the Revenue Authority for the assessment of capital gains would have resulted in a B lesser sum being levied for payment. Although the Act does not specifically declare that agreements whose effect is to deprive the *fiscus* of tax are illegal, s 29 of the Act, as read with s 98 of the Income Tax Act [*Chapter 23*:*06*] makes it clear that such contracts fall foul of statutes providing for the collection of revenue. The fact that the Capital Gains Tax Act itself, unlike the Stamp Duties Act, does not declare that agreements C for the avoidance of capital gains tax are void does not in itself detract from the illegal nature of the transaction. In any event, it is a universal principle of common law that any agreement whose aim is to deprive the *fiscus* of revenue is illegal and therefore void *ab initio* and incapable of being enforced.

Held, further, that the second agreement being a continuation of the first D agreement, in that the first reflected the real contract between the parties and the second being intended to facilitate the underpayment by either one or both of parties of stamp duties and capital gains tax, the first agreement itself was an illegal agreement. An illegal agreement is void of legal effect. The effect of an agreement being illegal is that neither E party can bring an action founded on the agreement. The fact that the applicant paid the full sum of the purchase price did not validate the agreement. Although in suitable cases the courts will relax the *par delictum* rule and order restitution to be made, the applicant had not sought that remedy. He only sought specific performance, which could not be granted. F

Cases referred to

Chipunza v Zangaza 2004 (1) ZLR 377 (W)

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

Kennedy v Steenkamp 1936 CPD 113 G

Legislation considered

Capital Gains Tax Act [*Chapter 23:01*], s 29

Income Tax Act [*Chapter 23:06*], s 98

Stamp Duties Act [*Chapter 23:09*], s 44 H

Gowora J

Case information

A *O Takaendesa*, for the applicant

J Mambara, for the first and second respondents

No appearance for the third respondent

Judgment

GOWORA J: This matter was initially set down for hearing on 28 May B 2010. When the matter was called I requested counsel to address the issue of the legality of the transaction between the parties, given the existence of two agreements with differing purchase prices. Counsel duly furnished supplementary heads of argument on the issue and I am grateful to both for their diligence.

On 16 October 2006 this court issued a provisional order in favour of the C applicant. The terms of the final order sought which the applicant now seeks to have confirmed are in the following terms:

TERMS OF FINAL ORDER SOUGHT

1. That the agreement of sale between the applicant and the first respondent be and is hereby declared to be binding between the D parties.
2. That pending transfer of the first respondent's 100 per cent shares in second respondent to the applicant, the first, second and third respondents be and are hereby barred and interdicted from selling, leasing, hypothecating or in any way encumbering Lot 38 portion of E Subdivision A and B portion of Lochnivar measuring 2145 square metres and Lot 39 portion of Subdivision A and B of Lochnivar measuring 2806 square metres and improvements thereon.
3. That the fourth respondent be and is hereby barred and interdicted from registering or in any way approving or consenting to the transfer of the 100 per cent shares in second respondent to any person or F third party other than the applicant.
4. That the fourth respondent be and is hereby directed and authorized to endorse the title deeds of the said Lot 38 portion of Subdivision A and B portion of Lochnivar measuring 2145 square metres and Lot 39 portion of subdivision A and B of Lochnivar measuring 2806 G square metres and improvements thereon with a caveat giving effect to the interdict and only remove such caveat upon the finalization of transfer of the first respondent's 100 per cent shares in second respondent to applicant.
5. The first and second respondents be and are hereby ordered and H directed to effect the transfer of 100 per cent shares in second

respondent to the applicant and failing them the Deputy Sheriff be A and is hereby authorized to sign, endorse and do all things necessary to transfer the said 100 per cent share holding in second respondent to applicant.

The background to this application is as follows. The second respondent is a company that is duly incorporated in terms of the laws of Zimbabwe. The B second respondent is also the registered owner of the immovable properties known as Lot 38 of Subdivision A and B portion of Lochnivar and Lot 39 portion of Subdivision A and B of Lochnivar. These properties constitute the only assets of the second respondent. The first respondent is the sole shareholder in the second respondent.

On 22 February 2005 the first respondent concluded an agreement with the C applicant in terms of which he "sold" his entire shareholding in the second respondent "together with two pieces of land situate in the district of Salisbury called Lot 38 portion of Subdivision A and B portion of Lochnivar measuring 2145 square metres and Lot 39 portion of Subdivision A and B of Lochnivar measuring 2806 square metres and improvements thereon otherwise known D as Lochnivar Properties". The purchase price in terms of the agreement was recorded as Z$1 800 000 000. A deposit of Z$200 000 was payable against the signature of the document. On 9 March 2005 the parties again concluded a written agreement in respect of the same subject matter. The only difference with the first agreement is that the purchase price was recorded as Z$900 E million. Under the second agreement no deposit was provided for.

The applicant filed this application on 19 October 2009 under a certificate of urgency and the only agreement mentioned in his papers was the first one in which the purchase price was reflected as Z$1 800 000 000. The provisional order in terms of which he seeks an order of confirmation was granted on 16 October 2006. The court was at that stage not aware of the existence of the F second agreement, which only came to light after the respondents had filed papers opposing the confirmation of the provisional order.

Both sides admit the existence of the two agreements. It is common cause that the operational agreement is the first one, reflecting the higher purchase price. There is conflict between the parties regarding the reasons why it was G concluded. The respondents, who brought the agreement to light, aver that the applicant had intimated that he had insufficient funds to pay towards the costs of transfer and stamp duty and the respondents, in an endeavour to assist him, then entered into an agreement reflecting a lesser sum as the purchase price. The applicant on the other hand, states that the first respondent had intimated that he would have problems with his family on the proceeds H

Gowora J

A of the sale and he therefore requested that the parties enter into a second agreement with a reduced price. It is not important for present purposes that I decide or determine which of the two initiated the conclusion of the second agreement. What is pertinent is that when the parties sought to have transfer effected into the applicant's name, it was the second agreement that was referred to the conveyancers, and stamp duties, capital gains tax B and conveyancing fees were calculated on the lesser sum. That there was intent, in so doing, to defraud the *fiscus* out of stamp duty and capital gains accruing on the sum of Z$1 800 000 000 is not in dispute. This agreement is therefore illegal and cannot be enforced at the instance of either party.

The applicant has, however, in heads of argument, suggested that the second C agreement reflects the actual position between the parties and it is that agreement that he has always sought to have enforced. Although, in heads of argument, Mr *Takaindisa* seemed to be suggesting that the agreement could be enforced in argument he accepted that the second agreement was a continuation of the first and that if the purpose was to defeat the *fiscus* then the whole transaction was tainted by illegality. In *Chipunza* v *Zangaza* D 2004 (1) ZLR 377 (H) at 379B-D Uchena J stated:

> "… the first agreement was entered into for the purpose of enabling the seller to avoid paying capital gains. It had a false purchase price and it had a false declaration on improvements. It was on this agreement that both seller and purchaser made their declarations using incorrect information, when each of them was aware of the correct position as per second agreement dated 25 June E 2000. They both concealed the existence of the second agreement from the conveyancers. The two agreements would, if the parties had succeeded in this deception, enabled them to cheat the Treasury and benefit themselves by paying lower stamp duty fees and not paying capital gains tax. To achieve this both agreements were required: the first for registration purposes and to deceive the Treasury, the second as security for the deceiving parties in case one of them F was tempted to turn against the other and enforce the first agreement to the disadvantage of the other".

The remarks by Uchena J are apposite in this matter and I respectfully associate myself with them. The parties herein concluded a second agreement which was the enabling agreement for purposes of transfer from the second G respondent to the applicant. The stamp duties and capital gains tax were calculated on the purchase price of Z$800 million and both parties concealed the existence of the first agreement to the conveyancers. As in *Chipunza*'s case, the parties would have benefited two fold; first, through the payment of lower duties and taxes to the *fiscus* and, secondly, in that they would have the security of the second agreement with the higher price which would hedge H each of them against deceiving the other.

2011 (1) ZLR p136

Gowora J

The Stamp Duties Act [*Chapter 23*:*09*] provides in s 44 as follows: A

> "Every contract, agreement or undertaking made for the purpose of evading, defeating or frustrating the requirements of this Act as to the stamping of instruments, or with the view to precluding objection or inquiry relative to the due stamping of any instrument shall be void."

The parties herein assumed, incorrectly, that the first respondent had to B conclude an agreement in order to sell to the applicant the immovable properties registered in the name of the second respondent by virtue of the former being the sole shareholder in the second respondent. It is clear that the disposal by the first respondent of his sole shareholding to the applicant is all that was required in order for an effective sale to come into effect in respect of the immovable properties. The first respondent did not own them C and even if he sold them he could not pass transfer except as an authorized representative of the second respondent. In the event, no stamp duties would be due on the agreement to dispose of the shares. Thus the agreement to dispose of the shares does not fall foul of the Stamp Duties Act.

In terms of the Capital Gains Tax Act [*Chapter 23*:*01*] shares are defined as a D marketable security which fall under the broader definition of specified assets the sale of which is subject to capital gains tax on any amount remaining after the deduction of any amounts permitted by law. The first and second respondents are not persons entitled to exemptions in respect of the disposal of specified assets. It goes without saying that the conclusion by the parties of a second agreement on which the transfer or submission to the Revenue E Authority for the assessment of capital gains would have resulted in a lesser sum being levied for payment. Although the Act does not specifically declare that agreements whose effect is to deprive the *fiscus* of tax are illegal, there is provision in

the Act for such contracts to be found as falling foul of statutes providing for the collection of revenue. Section 29 of the Act provides:

> "The provisions of s 98 of the Taxes Act relating to tax avoidance shall apply, F *mutatis mutandis*, in relation to this act, for the purposes of providing for and giving effect to the matters concerned in relation to this Act."

In turn s 98 of the Income Tax Act [*Chapter 23*:*06*] provides:

> "Where any transaction, operation or scheme (including a transaction, operation or scheme involving the alienation of property) has been entered into or carried out, G which has the effect of avoiding or postponing liability for any tax or of reducing the amount of such liability, and which in the opinion of the Commissioner, having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out –
>
> (a) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme H

> A in question;
>
> (b) has created rights or obligations which would not normally be created between persons dealing at arms length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question;
>
> and the Commissioner is of the opinion that the avoidance or postponement of such liability or the reduction of the amount of such liability was the sole B purpose or one of the main purposes of the transaction, operation or scheme, the Commissioner shall determine the liability for any tax and the amount thereof as if the transaction, operation or scheme has been entered into or carried out, in such manner as in the circumstances of the case he considers appropriate for the prevention of diminution of such avoidance, postponement or reduction."

By parity of reasoning, the second agreement would run foul of the section. C Indeed the applicant accepts that the second agreement would run foul of the section as its intended purpose was to reduce the stamp duty or capital gains tax payable by the purchaser on the one hand and the seller on the other. In my view, the fact that the Capital Gains Tax Act itself, unlike the Stamp Duties Act, does not declare that agreements for the avoidance of capital gains tax are void does not in itself detract from the illegal nature D of the transaction. In any event, it is a universal principle of common law that any agreement whose aim is to deprive the *fiscus* of revenue is illegal and therefore void *ab initio* and incapable of being enforced. To this end, it is a general policy of the public law that all agreements seriously made should be enforced. However, public policy requires that freedom of contract E should not be completely unfettered and consequently contracts tending to harm the State or the public will not be enforced. Agreements contrary to law, public policy or good morals cannot be enforced through the courts as they considered not to be founded on a *justa causa* but upon a *turpis causa*, an illegal or immoral cause. There is a clear infringement of the doctrine of public policy where it is apparent, either directly from the terms of a contract F or, indirectly from other circumstances that the design of one or both of the parties is to defraud the revenue, whether national or local.

> "In general it can be stated that an apparently lawful promise if knowingly made for an illegal purpose will not be enforced, a promise illegal in itself will not be enforced, and a promise made in return for an unlawful consideration will not be enforced".

G See *Kennedy* v *Steenkamp* 1936 CPD 113 at 116.

The question that cries for an answer is whether or not the applicant can succeed in applying for specific performance in respect of the agreement that reflects the correct purchase price. In view of the *dicta* in *Chipunza's* case, it is my view that the whole transaction has been tainted by illegality and H the two agreements cannot be separated or divided. The second agreement

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was a continuation of the first agreement, in that in so far as the first was A meant to protect the interests of both parties as seller and buyer and reflected the real contract between the parties, the second was meant to facilitate the underpayment by either one or both of parties of stamp duties

and capital gains tax. As a consequence, the first agreement is itself an illegal agreement. An illegal agreement is void of legal effect. The effect of the agreement being B illegal is that neither party can bring an action founded on the agreement. Such a contract, being void *ab initio*, does not create obligations and therefore no claim can be brought to enforce what was promised in the agreement: *ex turpi vel iniusta causa non oritur actio*. The court will not enforce an illegal agreement, thus the court cannot grant specific performance by one party even though such party has undertaken to perform an obligation in terms of C the illegal agreement. The other party can also not claim damages as none can flow from an illegal contract.

In this instance, the applicant has paid the full sum of the purchase price. This does not, however, validate the agreement, which remains illegal. This point was emphasized in *Dube* v *Khumalo* 1986 (2) ZLR 103 (S) at 109D D where Gubbay JA (as he then was) stated:

> "There are two rules which are of general application: the first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute and admits no exception. See *Mathews* v *Rabinowitz* 1948 (2) SA 876 (W) at 878; *York Estates Ltd* v *Wareham* 1949 SR 197; 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim *ex turpi* E *causa non oritur actio*".

The second is expressed in another maxim: *in pari delicto melior 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 F by denying judicial assistance to persons who part with money, incorporeal rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the *par delictum* rule and order restitution to be made.

They will do so in order to prevent injustice, on the basis that public policy "should properly take into account the doing of simple justice between man G and man".

The applicant has not, however, invited the court to relax the *par delictum* rule in order to achieve justice between himself and the first and second respondents. The applicant has invited the court to order specific performance, thus enforcing the illegal agreement. This the court cannot do and the application must fail. H

2011 (1) ZLR p139

Gowora J

A As to costs, it was accepted by counsel for both the applicants and the respondents that there should be no order of costs as each party participated in the illegality that has tainted the transaction. I agree. In the premises the court cannot give effect to an illegal transaction and the application therefore fails.

The provisional order issued by this court on 16 October 2006 be and is hereby discharged. Accordingly, the application is dismissed and each party B is ordered to pay its own costs.

T H Chitapi, legal practitioners for the applicants

C *J Mambara & Partners*, legal practitioners for the respondents

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/NYAMANDE v MINISTER OF HOME AFFAIRS & ORS 2011 (1) ZLR 140 (H)

NYAMANDE v MINISTER OF HOME AFFAIRS & ORS 2011 (1) ZLR 140 (H)

2011 (1) ZLR p140

Citation 2011 (1) ZLR 140 (H)

Case No Judgment No. HB-14-11

Court	High Court, Bulawayo
Judge	Kamocha J
Heard	21 January 2011
Judgment	3 February 2011
Counsel	*H Shenje,* for the applicant Ms *Murefu,* for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Criminal procedure – *charge – alternative charge – intention by prosecutor to charge an accused with a main charge as well as an alternative – need for prosecutor to charge accused with both the main and the alternative charge so that the accused can properly respond thereto – exceptions* D *to this general rule*

Police – *discipline – trial of a member by a single officer – member so charged has no right to elect to be tried in the magistrates court*

Headnote

A member of the Zimbabwe Republic Police who is to be tried by a court E consisting of one officer is not entitled to elect that he be tried by the magistrates court. The provisions of s 32 of the Police Act [*Chapter 11:10*], which refer to the right to make such an election, expressly relate to trials before a board of officers

Where it is intended to charge an accused person with an alternative charge, that alternative charge ought to be charged together with the main charge F so that he can prepare his defence in respect of both charges. Failure to do so falls foul of the *audi alteram partem* rule. Unless an alternative charge has been brought, it would not be competent for a court or reviewing authority to record a conviction on a charge which that court or authority considers more appropriate, unless the essential elements G of the substituted charge are encompassed within the essential elements of the offence actually charged. *

2011 (1) ZLR p141

Kamocha J

Legislation considered A

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 274 and 279

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 145

Police Act [*Chapter 11:10*], s 32; Schedule paras 34 & 39

Case information

B *H Shenje,* for the applicant

Ms *Murefu,* for the respondents

Judgment

KAMOCHA J: The applicant was a member of the Zimbabwe Republic Police who had attained the rank of assistant inspector at the time he was discharged from the police force. The circumstances which led to his dismissal C were as follows:

He was alleged to have contravened the provisions of para 34 of the schedule to the Police Act [*Chapter 11:10*] (hereinafter called "the Act"), in that he had allegedly performed "any duty in any improper manner" on two occasions during the period extending from 1 April 2008 to 31 December 2008.

D On the first occasion he was alleged to have withdrawn an unknown number of bags of maize and exchanged them for four cattle and four goats without permission from the officer-in-charge. He had not entered the beasts in the official records known as bin cards. He had allegedly slaughtered one goat for his personal use. The four cattle and three goats were recovered.

E Secondly, on 20 December 2008, he had been assigned to purchase maize from GMB Gweru for the ZRP Gweru town mess. He purchased 7 tonnes of maize but only delivered 6 tonnes to the mess. He, without authority, took 18 x 50 kg bags of maize to a grinding mill for reasons only known to him.

He was served with notice to appear before a court presided over by an officer, to be held at 0900 hours at CID provincial headquarters, Gweru, on F 3 February 2009 to answer the above allegations.

On 29 January 2009 he addressed a letter to the prosecutor wherein he elected in terms of s 32 of the Act, that he wished his matter to be tried in the magistrates' court. Section 32 of the Act is couched in the following terms:

> "If notice is given, in the manner and time prescribed, by a member whom it is G proposed to try before a board of officers in terms of paragraph (c) of subsection (1) of section twenty-nine that he wishes that the charge against him be tried by a magistrates' court and not by a board of officers, the charge shall be tried by a magistrates' court."

The above provisions relate only to a member who is to be tried by a board of officers. A member whose trial is before a court consisting of one officer H is excluded from having recourse to the above provisions. The provisions

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expressly mention trials before a board of officers which has the effect of A excluding trials before one officer according to the maxim *expressio unius est exclusio alterius.* See *Craies on Statute Law* 7 ed by S G G Edgar at pp 259 and 260. It therefore follows that applicant was not entitled to be tried by the magistrates' court. The correct forum for the trial of his case was before one officer.

After the hearing, the applicant was convicted of the first count but was found B not guilty and was acquitted on the second count. He was sentenced to undergo 14 days' imprisonment at Fairbridge Support Unit detention barracks. He appealed to the Commissioner-General of the Zimbabwe Republic Police.

On appeal the Commissioner-General, after examining the evidence which C was on record, concluded that the applicant had been wrongly charged with performing any duty in any improper manner breaching the provisions of para 34 of the schedule to the Act. The Commissioner-General held that the applicant should have been charged with contravening para 39 of the schedule to the Act, *ie* "improperly using position as a member for private advantage".

The Commissioner-General, sitting as an appeal court, then proceeded to D substitute the conviction of the trial court with one for "improperly using position as a member for private advantage".

The applicant complained that the Commissioner-General, sitting as a court of appeal, fell into error by substituting a conviction for a charge that was not put to him so that he could respond to it. E

The attitude of the respondents to the applicant's complaint is summarised in their heads of argument was as follows:

> "It is common cause that when a person is being charged for having committed an offence, there is an alternative charge that may be preferred against the accused person. This is an elementary rule of procedure which applicant should be aware of as he left the Zimbabwe Republic Police after having attained the rank of F assistant inspector. The case of alternative charges is taught to recruits in depot and should not be an issue to a person facing a main charge but being convicted on the alternative charge; the *audi alteram partem* rule he cites recognizes this simple issue.
>
> The respondents are at a loss as to what applicant is trying to put forward with this statement that 'accused must also be charged with an offence that is an offence G at the time of its commission and which

is recognized as such by law.' When one is being charged for any offence at any particular time, there is the possibility that he may face alternative charges; there is nothing peculiar about this".

The above submissions by the respondents are without foundation. Where it is felt that the accused must be charged with a main charge and an alternative charge both charges ought to be put to him. He ought to be charged with both H

2011 (1) ZLR p143

Kamocha J

A the main and alternative charge so that he prepares his defence in respect of both charges. He must be heard in respect of each charge. He may elect to plead not guilty to the main charge but guilty to the alternative charge. He is entitled to make that election. He may plead not guilty to both the main and alternative charge, in which case the court may convict him of the charge that is supported by the evidence adduced before it. The court must find B him not guilty of the charge which is not supported by the evidence before it. It is not competent for the court to convict the accused of both the main and alternative charge.

Alternative charges are provided for by s 145 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] where it is doubtful which offence has been C committed. Section 145 reads thus:

> "If by reason of the nature of an act or series of acts, or of any uncertainty as to the facts which can be proved, or if for any other reason whatever it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with having committed all or any of those offences, and any of such charges may be tried at one time, or *the accused may be charged in* D *the alternative with having committed some or one of those offences"* (emphasis added).

These provisions become clearer when read with s 279(b)(ii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], which recites as follows:

> **"279.Concurrent and alternative charges**
>
> E In this **Code** the use of the word –
>
> (a) …
>
> (b) 'alternatively' whether in the phrase 'concurrently or alternatively' or on its own in relation to the charging of a person with two or more crimes, means that the person may be charged –
>
> (i) … F
>
> (ii) with both or all those crimes in the alternative, if for any reason whatsoever it is doubtful which of them he or she can be proved to have committed."

What these provisions mean is that the accused ought to be charged with both the main charge and the alternative before the court commences to hear G evidence in order to determine which of the crimes he or she committed.

In casu, the accused was not charged with the alternative charge which was substituted for the one the trial court had convicted him. That was a serious irregularity entitling the accused to bring the proceedings on review as he was not heard in respect of the charge. That was contrary to the rules of H natural justice, in particular the *audi alteram partem rule.*

2011 (1) ZLR p144

Kamocha J

An accused person may be convicted for a crime other than the one he was A charged with where the essential elements of such crime include the essential elements of the other crime, as provided for in s 274 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Section 274 recites that:

> "Where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of B such other crime, if such are the facts proved and if it is not proved that he/she committed the crime charged."

In casu, the elements of the crime that the accused was charged with and those of the substituted conviction are completely different. Paragraph 34 of the schedule to the Police Act reads thus:

> "Omitting or neglecting to perform any duty or performing any duty in any C improper manner".

Paragraph 39 on the other hand recites as follows:

> "Improperly using his/her position as a member for his/her private advantage".

The essential elements of the offences constituted by these two paragraphs are completely different. It was therefore, not proper for the appeal court to D substitute the conviction of the offence charged with one that was not charged.

Summary

(1) A member to be tried by a court consisting of one officer is not entitled to elect that his case be tried by the magistrates court as the provisions of section 32 of the Act expressly relate to trials before a board of officers. E

(2) Where it is intended to charge an accused person with an alternative charge that alternative charge ought to be charged together with the main charge so that he can respond to it too, as failure to do so falls foul of the *audi alteram partem rule*.

In conclusion the application for review succeeds. The applicant did not seek for an order for costs. The order of this court is as follows. F

It is ordered that the conviction of the applicant which had been substituted for that of the court *a quo* be and is hereby set aside.

Gundu & Mawarire Co, applicant's legal practitioners

Civil Division of the Attorney General's Office, respondent's legal practitioners G

* *Editor's note*: it is also competent to convict of an offence other than that charged if the charge is one for which a competent verdict is provided by the Fourth Schedule to the Criminal Law Code [*Chapter* 9:23].

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Source:
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S v WAIROSI (1) 2011 (1) ZLR 145 (H)

Citation	2011 (1) ZLR 145 (H)
Case No	Judgment No HH-29-11
Court	High Court, Harare
Judge	Uchena J (with Assessors E N Barwe and C T Gonzo)
Heard	14 January 2010; 15 January 2010; 30 March 2010;3 May 2010; 4 May 2010
Judgment	4 February 2011
Counsel	*M Mbanje,* for the State *M Nkomo,* for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal procedure – *trial – outline of State case – discrepancies between State outline and witness's evidence – need for discrepancy to be explained*

Evidence – *vulnerable witness – appointment of intermediary or support person – need for court to consider possible effect of appointment on* D *mind of vulnerable witness*

Headnote

Any serious difference between the State's outline and a complainant's or witness's evidence during the trial cannot be held against the complainant or the witness, as they do not take part in the preparation of the State's E outline. The difference must, however, be satisfactorily explained, as it will be fatal to the State's case if it remains unexplained when the State closes its case. The reason for drawing an adverse conclusion is that, because of the conflict between the two, a doubt is raised as to whether the State witnesses are being truthful. Such a conflict may easily be explained by the production of the witness's statement to the police. But F if this is not done, so long as that conflict is unresolved at the end of the hearing, the benefit of the doubt must be accorded to the accused; for it would not be possible to say that the State has proved the case which it undertook from the onset to prove, and has therefore proved its case beyond a reasonable doubt.

G The intention of s 319H of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is to guard against the effect which the appointment of an intermediary or support person will have on a vulnerable witness's evidence, in the sense that, in the case of the appointment of an intermediary, the questions are put in the manner deemed appropriate by the intermediary. Taking out the sting from the questions may bring H out answers not consistent with the question asked. If that happens, the

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Uchena J

prosecutor or defence counsel should point that out, or ask the question A in a different manner. The section is also meant to allow the court to assess the effect of the appointment of an intermediary or support person on the mind of the vulnerable witness and the resultant effect of that frame of mind on the witness's evidence. The appointment of a support person does not, in terms of s 319H(3), include the receiving B and answering of questions through the support person, but merely the rendering of moral support. The court should also consider the effect which the appointment will have on the mind and subsequent conduct of the vulnerable witness. In the case of the appointment of an intermediary, and the use of a separate room, the witness could, due to the relaxed atmosphere from which he will be testifying, lose the effect of the oath C or admonition to tell the truth, and drift away into the world of play, losing the need to tell the truth.

Cases cited

S v Chigova 1992 (2) ZLR 206 (S) D

S v Manyika 2002 (2) ZLR 103 (H)

S v Musasa 2002 (1) ZLR 280 (H)

S v Nicolle 1991 (1) ZLR 211 (S)

Take & Save Trading CC & Ors v Standard Bank of South Africa Ltd 2004 (4) SA 1 (SCA)

Legislation considered E

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 232(b), 314(1), 319B, 319C(1), 319G(3) & 319H

High Court Act [*Chapter 7:06*], s 10(2)

Case information

M Mbanje, for the State F

M Nkomo, for the accused

Judgment

UCHENA J: The accused was charged with the murder of his own son in contravention of s 47(1) of the Criminal Law (Codification and Reform) Act [*Cha*pter *9:23*]. He pleaded not guilty. G

It is common cause that on 12 June 2007 the accused left his parents' home in Chivakanenyama village, Karoi. He left in the company of his two sons Ronald and Tawanda. He had told his mother Eneresi Siamkonde that he was taking his sons to the Registrar General's office in Karoi to obtain birth certificates for them. He ended up boarding a lift to Ceresi farm. His son Ronald was found dead in the bushy paddock of Sandara farm. His head had H

2011 (1) ZLR p147

Uchena J

A two wounds, and his right ear lobe had been cut off. The accused's younger son Tawanda was found wandering in the same bushy paddock at Sandara farm.

The State alleged that the accused took his sons from his mother, who was staying with them, on the pretext that he was going to obtain birth certificates for them. He then boarded a motor vehicle driven by one of his three B accomplices. He had arranged with them the murder of his son Ronald. His accomplices were dressed in black attire. After travelling for a long distance the motor vehicle was stopped by the road side in a bushy area. Two of the men dressed in black ordered Tawanda to disembark from the motor vehicle. They asked the accused to also disembark from the vehicle. One of the men dressed in black remained in the vehicle holding the deceased's hand. The C driver handed an iron bar to the accused, who struck the deceased with it twice on the head. The deceased collapsed. On seeing this Tawanda escaped and disappeared into the bush. The accused then cut the deceased's right ear with a scissors, and drained blood oozing from the deceased's head into a lunch box. The accused and his accomplices then dumped the deceased's body in the grazing area of Sandara farm. The accused then crushed the D deceased's head with a stone.

At about 1800 hours on the same day Munyaradzi Kondo found Tawanda wandering in Sandara farm. He took him to his house where he bathed, fed and accommodated him. The next day he took Tawanda to his employer with whom he took him to Karoi Police Station.

E In his defence outline the accused said he intended to take his children to Ceresi farm where he had secured employment. He boarded a blue pick-up truck at Madiro Supermarket. The driver of the truck was in the company of two other man who were seated at the back of the truck. The truck was driven along Nyamapidze road which passes through Ceresi farm. When the motor vehicle got to Murereshi River one of the men at the back of the F truck pulled out a gun and ordered Tawanda to disembark. The accused also attempted to disembark, but was ordered to remain seated. He was threatened with death if he moved or made any noise. The other man firmly held Ronald. The motor vehicle moved for about 200 metres and stopped again. The driver of the motor vehicle (Everson Major) disembarked with an iron bar which he handed over to Mazheke. Mazheke struck Ronald twice on G the head with the iron bar, and he collapsed to the floor of the truck. While Mazheke was striking Ronald with the iron bar Masunda was pointing a gun at the accused. Mazheke covered Ronald's body with a blanket. The motor vehicle was then driven along Sandara road. The motor vehicle stopped at Renlock farm, where Masunda ordered the accused to disembark, threatening H him with death if he made any noise.

2011 (1) ZLR p148

Uchena J

The accused went to Ceresi farm where he narrated the ordeal to his sister A Lillian Wairosi, and her husband. Early in the morning of 13 June 2007 the accused went to Karoi police to report the incident. He arrived at Karoi Police Station at 0700 hours, and made a report to Nyamadzawo who was the officer on duty. He thereafter went back to Ceresi farm. On 14 June 2007, he went back to Karoi police station, where he was advised that Tawanda B had been found. He took Tawanda to his mother in Chivakanenyama Village, and reported the incident to her.

On his way back from Chivakanenyama to Karoi the accused passed through Magunje police station where he was advised that his other son had been found dead at Sandara Farm. The deceased's body was brought to Magunje police, after which the accused and his maternal uncle, and the deceased's C body were taken to Karoi.

The accused was put in cells at Karoi police station, where he was thereafter interrogated. He alleges that police officers beat him on the soles of his feet and on the back with wooden planks. he alleged that they also denied him food, as they were forcing him to confess that he had participated in the D deceased's murder. He initially refused to make the confession. The torture and starvation continued for three days without an end in sight, leading to his making the statement in the confirmed warned and cautioned statement.

He was thereafter taken to the scene of the murder, where he was tied to a tree trunk and assaulted with sticks for him to confess that he had crushed E his son's head with a stone. He was later locked up and taken to court on 28 June 2007, together with the other three suspects, who had by then been arrested by the Police.

The accused therefore denies causing Ronald's death, nor in any way participating in causing it. E

The State led evidence through admissions in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (hereinafter called the CP&E Act), the production of exhibits and *viva voce* evidence.

Admissions

The evidence of Munyaradzi Kondo, Japhet Mauzeni, Inspector Chaguta, G Annah Muringayi and Dr J Mangunda was admitted by the accused's legal practitioner, in terms of s 314 (1) of the CP&E Act. Section 314 provides as follows:

> "(1) In any criminal proceedings the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact." H

Uchena J

A The evidence of these witnesses is therefore not in dispute and calls for no further assessment. It is accepted as it appears in the State's summary of evidence.

Munyaradzi Kondo's evidence establishes that towards sunset on 12 June 2007, he found the then 7-year-old Tawanda wandering alone in the bush of Sandara farm. He took him to his house where he bathed, fed and accommodated him B for the night. The following day he took him to his employer with whom he took Tawanda to Karoi Police Station.

Japhet Mauzeni is employed at Sandara farm. He on 16 June 2007 found Ronald's dead body in the farm's grazing area. The deceased's body was close to an anthill. It was partially clothed. The deceased's male organs were C exposed. The deceased's short trousers were lowered to knee level. He on 17 June 2007 reported what he had seen to Karoi Police Station.

Inspector Chaguta received Mauzeni's report, and led a team of police officers to the scene of crime. He went with Sgt Mugauri, Detective Sgt Nhari, and Detective Cst Katsvere. They were led to the scene by Mauzeni. He observed D that the deceased's body was at an advanced stage of decomposition. He observed that the right ear had been cut off and the deceased's clothes were blood stained. The deceased's short trousers were lowered to knee level. They took the deceased's body to Karoi hospital mortuary. He said no further injuries were caused to the deceased's body while it was being transported to Karoi hospital mortuary.

E Anna Muringayi is Karoi police's victim friendly unit's coordinator. She on 26 June 2007 recorded a statement from Tawanda Wairosi. She observed he had difficulties in identifying colours, but was able to identify a motor vehicle which was involved in this case.

Dr Mangunda is a holder of an MB, ChB degree, and is the doctor who F performed an autopsy on the deceased's body. He observed a parietal bone fracture measuring 3 cm, a temporal bone fracturemeasuring 4 cm, and a partially amputed right ear. He concluded that the deceased died of head injuries. The fractured parietal and temporal bones confirm that two blows were delivered to the deceased's head.

The admitted evidence of Kondo and Mauzeni establishes that Ronald was G killed at or near Sandara farm. His body was found there and Tawanda, his young brother with whom he and the accused were traveling, was also found wandering in the bush at Sandara farm. This proves the accused, deceased and Tawanda parted ways at Sandara farm.

Inspector Chaguta's and Dr Mangunda's evidence establishes that the deceased H died a violent death. They both observed injuries on his head and a cut right

Uchena J

ear. Inspector Chaguta observed that the deceased's short trousers had been A lowered to knee level. The cutting of the ear and lowering of the trousers suggest a ritual murder.

The evidence of Anna Muringayi establishes that Tawanda is a vulnerable witness. It guides the court as to how his evidence should be adduced.

Exhibits B

The following exhibits were produced by consent: the postmortem report as exh 1, photographs taken during the postmortem examination as exh 2 (a) to (h), the stone recovered near the deceased's body as exh 3, a report on the weight of the stone as exh 4, and the accused's warned and cautioned statement as exh 5. C

Exhibit 1 confirms that the deceased died of head injuries. It specifies where the injuries were inflicted. It confirms that the deceased's right ear was partially amputed. It confirms the evidence of Sgts Nhari and Katsvere, on their observations of the deceased's injuries.

Exhibits 2 (a) to (h) confirm the undisputed findings of Dr Mangunda, and Sgts Nhari and Katsvere's observations on the deceased's injuries. D

Exhibit 3, the stone, was produced but its evidential value was challenged by the accused's counsel. Sgts Nhari and Katsvere said they found it near the deceased's body, and it had a patch of human hair on it. When it was produced in court the patch of hair was no longer on it. Sgts Nhari and Katsvere who testified *viva voce* said it must have fallen from the stone due to the lapse E of time. This issue will be considered in detail under disputed evidence.

Exhibit 4, the report on the weight of the stone, was produced by consent. It establishes that the stone weighed 7.18 kg. The stone's weight reveals its potential to cause serious injuries on a human head, especially that of a nine-year-old child. G

Exhibit 5, the accused's confirmed warned and cautioned statement, was produced by the State in terms of s 256 (2) of the Criminal Procedure and Evidence Act. It was, however, challenged by the accused who alleged that he was tortured and starved by the police who were forcing him to admit the offence in the manner narrated in that statement. It will be dealt with in detail when I consider disputed evidence.

Viva voce **evidence**

The State called *viva voce* evidence from, Eneresi Siamkonde, Tawanda Wairosi, Sgt Nhari and Sgt Katsvere.

Eneresi Siamkonde is the accused's mother. She told the court that on 11 June 2007 the accused came to take the deceased and Tawanda to Karoi H

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A to obtain birth certificates for them. She dissuaded him from taking the children because a mobile birth registration unit was to soon visit their area for purposes of issuing birth certificates. She further pointed out to him that he could not obtain birth certificates for the children in the absence of their mother, whom he had divorced. Despite her objections, the accused on 12 June 2007 took away the deceased and Tawanda. He came back with B Tawanda on 14 June 2007, and told her that he and the children had boarded a motor vehicle intending to go to Ceresi farm, but were attacked by the driver and his two accomplices. He fought them, and in the process threw Tawanda from the motor vehicle. He eventually ran away from the motor vehicle leaving Ronald ("the deceased") C in the motor vehicle. He told her that when they boarded the motor vehicle there were many other passengers in the motor vehicle.

Eneresi gave her evidence convincingly. She said that, though the accused is her son, she had to tell the court what she knew. There is no known bad blood between the accused and his mother. There is nothing in her evidence to suggest a motive to lie. The accused in his evidence does not dispute that D she strenuously resisted his taking the children away. He admitted that she questioned him

about how he could obtain the birth certificates without the children's mother. He admitted that she told him not to disturb the children's education as he was taking them away without seeking permission from the school authorities. We are satisfied that she told the truth.

E Tawanda Wairosi is the accused's son. He was seven years old when he and Ronald, his nine year old deceased elder brother, were taken from Chivakanenyama village where they were staying with Eneresi, their paternal grandmother. He was nine years old when he testified in March 2010. He testified through closed circuit television in a victim friendly court at Harare magistrates court. The accused's trial had started at the High Court in Harare, F but had to be adjourned, to await the gazetting of the court's sitting at Harare magistrates court for purposes of adducing Tawanda's evidence in a victim friendly court.

The need to use victim friendly court facilities arose when counsel for the State and the accused advised the court that Tawanda was a vulnerable witness, who had collapsed at the entrance of the High Court on seeing his G father's relatives. It became apparent that measures to protect a vulnerable witiness as provided in s 319B of the Criminal Procedure and Evidence Act had to be invoked. Section 319B provides as follows:

> "If it appears to a court in any criminal proceedings that a person who is giving or will give evidence in the proceedings is likely –
>
> H (*a*) to suffer substantial emotional stress from giving evidence; or

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> (*b*) to be intimidated, whether by the accused or any other person or by the A nature of the proceedings or by the place where they are being conducted, so as not to be able to give evidence fully and truthfully;
>
> the court may, subject to this Part, do any one or more of the following, either *mero motu* or on the application of a party to the proceedings –
>
> (i) appoint an intermediary for the person; B
>
> (ii) appoint a support person for the person;
>
> (iii) direct that the person shall give evidence in a position or place, whether in or out of the accused's presence, that the court considers will reduce the likelihood of the person suffering stress or being intimidated:
>
> Provided that, where the person is to give evidence out of the accused's presence, the court shall ensure that the accused and his legal representative C are able to see and hear the person giving evidence, whether through a screen or by means of closed-circuit television or by some other appropriate means;
>
> (iv) adjourn the proceedings to some other place, where the court considers the person will be less likely to be subjected to stress or intimidation;
>
> (v) subject to s 18 of the Constitution, make an order in terms of the Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7*:*04*] D excluding all persons or any class of persons from the proceedings while the person is giving evidence."

It was obvious that Tawanda was already showing signs of being stressed by the environment and intimidated by the prospect of facing his father and persons connected to him in open court. I had no hesitation in directing that, E the case be adjourned while we waited for the invocation of procedures which would enable the court to use victim friendly court facilities at Harare magistrates court.

The factors to be considered in protecting a vulnerable witness as provided in s 319C(1)(a) to (c) and (e) to (f) are present in this case. Tawanda was seven years old when the offence was committed. He is now nine years old. He F was to testify against his father, who he says he saw crushing Ronald's head with a stone. The nature of the proceedings call for the careful adduction of evidence from this witness of tender age. The parties had already sought an order that Tawanda's evidence be adduced in the victim friendly court. The interests of justice, called for the use of such facilities. G

The feasibility of our sitting in a victim friendly court was, however, a challenge, as this court does not have such facilities. We adjourned the proceedings to await the gazetting of Harare magistrates court as a sitting place for the High Court for this case to enable us to use its victim friendly court facilities. We only sat at Harare magistrates court for purposes of hearing Tawanda's evidence. If the High Court had such facilities this H

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A would not have been necessary. I recommend that victim friendly facilities be installed at the High Court. They are necessary as vulnerable witnesses testify in this court, under circumstances which affect their testimonies or leave them traumatized. The gazetting of Harare magistrates court on a case to case basis causes delays in the finalization of cases, as the case has to be adjourned until the gazetting takes place.

B When the gazetting had taken place, we sat in the victim friendly court at Harare magistrates court. An intermediary, who is a trained court interpreter, was appointed to be with Tawanda in the separate room from which he was to testify. We could only see them on closed circuit television. They could not see us. Tawanda had toys to play with. The intermediary was gentle with C him. She allowed him to play with the toys as he testified. In terms of s 319G, she removed the sting from the questions put to him, but she conveyed to him their substance and effect. As required by s 319G she repeated to the court the witness's precise words. She performed her duties well to the satisfaction of the court and counsel for the State and the defence.

Tawanda is the State's key witness. He is the only eye witness to Ronald's D murder. He traveled with the accused and deceased from their village in Chivakanenyama to the scene of the deceased's murder. He told the court of how their father, the accused, took them from their grandmother on the pretext that he wanted to obtain birth certificates for them. He told the court that from Karoi they boarded a motor vehicle in which was the driver and E two other men. They traveled for a long distance. The motor vehicle stopped at a bushy area. He initially said his father and the other men left him by the motor vehicle when they took the deceased to the bush where his father crushed Ronald's head with a stone. He however said he was close to them. He later affirmed his evidence on the version that, he, the accused, and the deceased walked into the bush where the accused crushed the deceased's F head with a stone. When he saw the deceased being struck with a stone he ran away into the bush. He later met Munyaradzi Kondo in the bush. Munyaradzi took him to his house where he fed him and accommodated him. The next day Munyaradzi took him to Karoi police station. He eventually met the accused, his father, at the police station. His father thereafter took him back to his grandmother in Chivakanenyama village. He did not report G to his grandmother that his father had murdered Ronald. He was later called by the police whom, he says, he told what he told this court.

Towards the end of his examination-in-chief he said the motor vehicle traveled for a long time and that is when he was left by the motor vehicle. He thus told a single story up to the time they got to the vicinity of the scene of H murder. From there on his story seemed to have developed into two versions.

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The first was that he was left by the motor vehicle when the deceased was A walked into the bush by his father and his accomplices. The second was that he, his father and the deceased walked into the bushy area where his father crushed the deceased's head. An examination of his evidence reveals that he was emphatic about walking into the bush with his father and the deceased.

These versions emerged when the prosecutor had the following exchange B with Tawanda:

"Q. Where were you when your father attacked your brother?

A. They left me by the motor vehicle, and I then ran away

Q. How far did your father take your brother from the motor vehicle?

A. I was close to them."

The impression created is that he remained by the motor vehicle but the C deceased was killed near the motor vehicle, as he remained close to them, and saw his father attacking the deceased. A later exchange with the prosecutor reveals that Tawanda did not remain by the motor vehicle, but walked on foot into the bushy area.

"Q. When you went to the bushy area where were you seated in the motor D vehicle?

A. We walked on foot when we went to the bushy area.

Q. You said you were in the motor vehicle with your father and other people?

A. That's correct but after traveling for a long distance we got off the motor vehicle and traveled on foot

Q. What about the motor vehicle E

A. My grandmother had said we would board a bus but we did not

Q. When you got off the motor vehicle did it wait for you or it left?

A We had been promised to board a bus but boarded a motor vehicle. It traveled for a long time. That is when I was left by the motor vehicle."

The impression that Tawanda remained by the motor vehicle was therefore created by his two statements about, "their leaving him by the motor F vehicle", and his later saying, "that is when I was left by the motor vehicle". His later statement emerged from his apparent confusion about how his grandmother had said they were to travel, and their subsequent traveling by a private motor vehicle. The confusion is apparent, and is consistent with his age. His evidence should at the end of the day be considered in light of G corroborative evidence from Munyaradzi, where the deceased's body was found, the presence of a stone near the deceased's body and the accused's admission that they traveled in such a motor vehicle, and the deceased was killed during that journey.

Tawanda persisted with these versions under cross-examination, as demonstrated by the following exchanges between him and defence counsel: H

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"Q. You told court that after traveling for a long distance you were told to disembark?

A. Correct

Q. Who ordered you to disembark?

A. I do not know the person

Q. Who was ordered to disembark? B

A. We only disembarked when we had reached the bushy area

Q. Who we?

A. The three of us

Q. It was only you and your father who disembarked?

A. My brother also disembarked

Q. Can you recall what you told the Police? C

A. That's what I told them

Q. According to the Police you and your father disembarked and another man remained holding your brother

A. That is not correct, in fact when we were going home they instructed me to say my brother had been killed by some strange men.

Q. You told the court that you were left at the motor vehicle is that correct?

A. When I saw my brother was being killed I ran away D

Q. Was he killed in the car at the car or in the bush?

A. In the bush

Q. Apart from you who else was present when your brother was killed?

A. I do not know the other people who were present E

Q. During the killing of your brother were other people present?

A. No

Q. Did you see your father striking your brother?

A. Yes

Q. How far were you from them?

A. Very close to them."

F Tawanda therefore admitted that he was told to disembark from the motor vehicle, but insisted that he walked into the bush with the deceased and his father. The admission that he was ordered to disembark from the motor vehicle supports the accused's claim that at some point in the journey Tawanda was ordered to disembark from the motor vehicle. If this is considered in the context of his having been left by the motor vehicle it has the effect G of placing Tawanda away from the scene of murder which Sgt Nhari said was 800 m from the road. The majority of the court however believes he obviously made a mistake or was misunderstood, when he said he was left by the motor vehicle. That statement is in fact ambiguous as it can mean the motor vehicle left him, or that he

was left positioned near the motor vehicle. H When the court sought to clarify this issue Tawanda said the motor vehicle

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had left when the deceased was struck with a stone and he ran away. A

After re-examination by the prosecutor the court sought clarification from Tawanda, and had the following exchange with him.

"Q Do you go to school?
A. No I have not started going to school
Q. When did you start staying at the children's home? B
A. Some time back
Q. Before or after your brother was killed.?
A. After his death
Q. What happened when the motor vehicle stopped?
A. We alighted, my father took us to a bushy area, that's when he killed my brother C
Q. Where was the motor vehicle you had alighted from?
A. It had parked by the side of the road, when we walked into the bushy area
Q. Where was it when you ran away?
A. It was no longer present
Q. How many were you in the bush?
A. Three of us, myself, my father and my brother." D

The above demonstrates that the motor vehicle was parked by the side of the road when he, the deceased and their father walked into the bush. When he ran away the motor vehicle was no longer present. These events occurred when the witness was seven years old. He says he has not yet attended any school. That is, however, contradicted by Eneresi Siamkonde E his grandmother who said he was in grade 1 while Ronald ("the deceased") was in grade 3. He is now nine years old. He impressed the majority of the court as a fairly honest and truthful witness who is simply telling the story as it happened but only as a nine year old who has been to school for half a year can. His evidence is not perfect. It is embellished on whether or not he F remained by the motor vehicle or was left by the motor vehicle. The majority of the court are of the view that minor contradictions or inconsistencies in the evidence of a child on events verified by credible evidence from other witnesses, should not led to the rejection of the child's evidence. After all, a child should not be expected to testify with the clarity of an adult. A child's evidence must be assessed as that of a child, but the court must ascertain its G truthfulness by comparing it with corroborative evidence, and other evidence led on the incident in question. I agree with them on how a child's evidence must be assessed but do not agree that Tawanda's evidence is sufficiently corroborated on whether or not he walked into the bush with the deceased and the accused, and saw the accused crushing the deceased's head with a stone. His statement that he was left by the motor vehicle tends to support the H

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A accused's version of what happened before the deceased's murder. It makes his evidence questionable on whether or not he witnessed the deceased's murder. Hoffman & Zeffertt *South African Law of Evidence* 3 ed, dealing with the assessment of the evidence of a child at p 456 say:

> "the court is entitled to take into account any other features which show that the child's evidence is unquestionably true, and the defence story false, but it should B not ordinarily convict unless there is corroborative evidence which implicates the accused".

In this case, I am of the view that the corroborative evidence of Japhet Maunzeni and Munyaradzi does not implicate the accused but merely proves that the deceased and Tawanda must have been together at or near Sandara farm.

C Mr *Nkomo* for the defence argued that the evidence of this witness must be treated with caution, because of his age, as witnesses of this age are suggestible, imaginative and can fantasize events. Tawanda demonstrated that he is not suggestible when he said the police told him to say his brother

was killed by strange people. He said they told him to tell that story when they were taking him home. He told the court that what they suggested is D not what happened. The possibility of that being true is strengthened by his refusing to endorse the version appearing in the State's summary of his evidence, and the accused's confirmed warned and cautioned statement which must have been used to inform the State's case. He seems to us a child bent on telling the truth even if it goes against the State case and his father. The E police must have sought to produce a coherent story, but Tawanda refused to perjure himself but told a story which incriminates his own father in a manner different from that narrated in the State's summary of his evidence. If he can not take the suggestion of the police he cannot therefore be giving evidence suggested to him by anyone. His story is not a product of fantasy F or imagination. It is corroborated by common cause evidence. Ronald's head had two wounds and he died of head injuries. He died in the bush Tawanda says their father walked them into. Tawanda himself was found in that bush. A stone was found near the deceased's body. Recent case law has established that children do not have fantasies about things they do not know. They fantasize on things they encounter on a daily basis. Murder must surely be G a strange concept in the mind of a seven year old. He cannot conjure up images of a murder and tell a story which accurately explains the death of his own brother which is generally supported by witnesses whose evidence was admitted by the defence.

In *S* v *Musasa* 2002 (1) ZLR 280 (H) at 285E to 287 Hlatshwayo J, dealing H with issues similar to those raised by Mr *Nkomo,* said:

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> "Many judgments of this court and the Supreme Court have underlined the fact A that it is highly unlikely for very young complainants to make serious allegations without any basis at all. See, for example, the *dicta* of Muchechetere JA in *S* v *Muchowe* S-14-99 at p 9 and Chinhengo J (with the concurrence of Garwe J) in *S* v *Madzomba* 1999 (2) ZLR 214 (H) at 222, where it was said in respect of rape allegations made by a five year old twenty months after the abuse:
>
> > 'It is of course, quite possible that a child of so tender an age can make B without much thought, generalized and damaging allegations against the only person at the place she is to be removed. That must, however, be balanced against the consideration why and whether a girl of so tender an age could make so serious an allegation against the appellant and Abias if nothing of the sort had taken place. The fact of the matter is that her hymen was found missing which tended to confirm her evidence that she C had been sexually abused.'
>
> Furthermore, psychological research has established that young children do not fantasize about being raped and other unusual, horrific occurrences but that their fantasies and play are characterized by their daily experiences. In this regard; J R Spencer and Rona Flin *The Evidence of Children; The Law and the Psychology* 2 ed (Blackstone Press Ltd 1993) at pp 317- 318 made the following observation: D
>
> > 'There is certainly no psychological research or medical case study material which suggests that children are in the habit of fantasizing about the sort of incidents that might result in court proceedings; for example, observing road accidents or being indecently assaulted. Children's fantasies and play are characterized by their daily experience and personal knowledge, and unusual fantasies are seen by psychiatrists as highly suspicious: "The cognitive and imaginative capacities of three-year olds do not enable them E to describe anal intercourse and spitting out ejaculate, for instance. Such detailed descriptions from small children in the absence of other factors, should be seen as stemming from the reality of the past abuse rather than from the imagination": Vizard, E Bentovim, A and Tranter, M (1987) *Interviewing sexually abused children.*'"

While I agree with the majority that Tawanda did not give evidence suggested F to him or out of fantasies, his evidence remains unsatisfactory. I would therefore agree with Mr *Nkomo,* but for different reasons, that his evidence should be treated with caution. He, for instance, said he has never been to school, whereas Eneresi his grandmother said he was in grade one when his father took him away from her. He can in my view similarly be incorrect or G untruthful on other aspects of his evidence.

The State's summary of Tawanda's evidence is at variance with Tawanda's evidence. He is there said to have seen the accused's accomplices wearing black clothes, and the accused receiving money from the accomplices. It is there alleged that he heard the driver and the accused conversing about cutting the ear and the head as they pointed at the deceased. The State's H

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A outline also alleges that the deceased remained in the truck held by one of the men, while he and his father were ordered to disembark. He is alleged to have seen the driver coming out of the motor vehicle holding three knives, and the accused going to the motor vehicle where the deceased was being held. He is alleged to have thereafter witnessed a violent scene at the motor vehicle after which he ran away. The State did not ask Tawanda about these B details. The defence did not cross-examine him on them, but put it to him that his evidence in court was different to what was recorded in his statement to the police. Tawanda's statement to the police was not produced. The court can not determine whether or not he would have confirmed what is alleged in the State's summary of his evidence if he had been asked about C it or given an opportunity to comment on it. A witness's credibility can not be affected by his not mentioning something, if he was not asked about it, or if he has anything else to say relevant to the case. In a trial where a lot is involved, as was the case in this case, the prosecutor should have taken the witness through what was alleged in the State's summary which he had not covered in his evidence. The defence, too, could have cross-examined D him on the omitted evidence if it believed that would assist the accused's case. Mr *Nkomo* for the defence merely asked about there being a difference between the witness's evidence and his statement to the police. I have already commented on Tawanda's response to that and found that he refused to succumb to the police's suggestions.

E The difference between the State's outline and a complainant's or witness's evidence during the trial cannot be held against the complainant or the witness, as they do not take part in the preparation of the State's outline. The difference must, however, be satisfactorily explained as it will be fatal to the State's case if it remains unexplained when the State closes its case. F In *S* v *Nicolle* 1991 (1) ZLR 211 (S) at 214B-G Korsah JA, commenting on the functions of the State's and defence's outlines, and the effect of the complainant's departure from the State's outline, said:

> "Commenting on the importance of the part played by the respective outlines of cases in a criminal trial, Squires J said in *S* v *Seda* 1980 ZLR 109 (G) at 110H-111A:
>
> > G 'They perform a similar function to the pleadings in a civil trial, and serve not only to identify what may be in issue between the State and the accused, but to advise each of the substance of the matters that are in issue, with the obvious advantages this affords of avoiding delay in completing the trial. In addition, it must always be appreciated that just as any significant and unexplained departure by the accused in his evidence from the outline H of the defence which he makes, may be a matter for comment or even

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> adverse conclusions, so does such a consequence affect what is said by A the State witnesses.'
>
> While citing the above *dictum* of Squires J with approval, I hasten to point out that, whereas the outline of defence is prepared, from what the accused person, tells counsel, and is tendered in evidence with his approval, the outline of State case is not prepared on the instructions of the complainant and is certainly not approved by the complainant before it is tendered in evidence, and does not B constitute part of the complainant's testimony. I would suggest that the reason for drawing an adverse conclusion when the outline of State case is seriously at variance with the evidence of the prosecution witnesses is that because of the conflict between the two a doubt is raised as to whether the State witnesses are being truthful. Such a conflict may easily be explained by the production of the complainant's statement to the police. But if this is not done, so long as that conflict is unresolved at the end of the hearing, the benefit of the doubt must be C accorded to the accused; for it would not be possible to say that the State has proved the case which it undertook from the onset to prove, and has therefore proved its case beyond a reasonable doubt."

In *S* v *Chigova* 1992 (2) ZLR 206 (S) at 213C-F, Korsah JA, again commenting on discrepancies between the complainant's evidence and the State's outline, said: D

> "While I agree that the State is bound to prove the ingredients of the offence it alleges, a précis of a case by the State is not to be given equal weight with the outline of defence on behalf of the accused. The reason for this is simple. The complainant has no control over what a policeman may find relevant enough to include in a precis. The précis is not her word and deed. She is not to be taken as having made categorical statements on matters which, though relevant, are E not essential to establish the offence alleged. The complainant's credibility is not to be assessed on apparent conflicts between her *viva voce* testimony and a summary of the case prepared by someone else.
>
> The 'defence outline', however, is prepared at the behest of the accused and usually read over by, or to, him and then signed by him or on his behalf. A complainant cannot be discredited because of discrepancies between a summary F of the State case and her testimony, in the same way as an accused who, having made categorical statements in his 'defence outline', testifies to something other than that which he has put his hand to or stated in his outline of defence, which may tend to underscore the veracity or otherwise

> of the accused. To discredit a complainant because of discrepancies between the State outline and her testimony, the divergence between the two, must be so gross as to be utterly irreconcilable, or her testimony patently false." G

The weight to be attached to Tawanda's evidence must, in my view, in view of the irreconcilable variance between his evidence in court and what the State outline said he was going to tell the court, be carefully considered. `

In terms of s 319H of the Criminal Procedure & Evidence Act, the effect of the appointment of an intermediary for a vulnerable witness must be H

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A considered. Tawanda was treated as a vulnerable witness. He gave evidence through closed circuit television. Could that have had the effect of causing him to depart from what he had previously told the police? An examination of s 319H is called for to ascertain the legislature's intention on the weight to be given to evidence of a vulnerable witness. Section 319H provides as B follows:

> "When determining what weight, if any, should be given to the evidence of a vulnerable witness for whom an intermediary or a support person has been appointed, the court shall pay due regard to the effect of the appointment on the witness's evidence and on any cross-examination of the witness."

The apparent intention is to guard against the effect the appointment of an C intermediary or support person will have on the witness's evidence in the sense that, in the case of the appointment of an intermediary, the questions are put in the manner deemed appropriate by the intermediary. The taking out of the sting from the questions may bring out answers not consistent with the question asked. If that happens, the prosecutor or defence counsel would point that out, or ask the question in a different manner. That did not D happen in this case. Counsel for the State and the defence did not question the professionalism of the intermediary. She therefore did not adversely affect Tawanda's evidence.

Section 319H is also meant to assess the effect of the appointment of an intermediary or support person on the mind of the vulnerable witness, and E the resultant effect of that mind frame on the vulnerable witness's evidence. This is so because the appointment of a support person does not in terms of s 319G(3) include the receiving and answering of questions through the support person, but merely the rendering of moral support. This means the effect of the appointment should include the effect which the appointment will have on the mind and subsequent conduct of the vulnerable witness. F In the case of the appointment of an intermediary, and the use of a separate room, the witness could, due to the relaxed atmosphere from which he will be testifying, lose the effect of the oath or admonition to tell the truth, and drift away into the world of play, loosing the need to tell the truth. In our view, Tawanda did not, because of the comfort of the separate room, drift away from the need to tell the truth. He gave answers to the questions which G were put to him. He did so to the best of his ability, regard being had to his age and lack of education. He did not drift away from the need to tell the truth. His evidence was generally corroborated by Munyaradzi's evidence, and the place where the deceased's body was found.

The variance between the State's outline and Tawanda's evidence cannot H be blamed on his testifying through an intermediary from a separate room.

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The explanation should have come from other State witnesses. Tawanda's A explanation for the variance is, in my view, not enough to dispel the doubt created by the wide gap between his testimony in court and what the State in its summary of his evidence said he was going to tell the court.

In my view, the major part of the variance remained unexplained at the end of the State case. This in my view leaves a reasonable doubt in the State's B case, which if not resolved through other evidence must be resolved in the accused's favour. The doubt is strengthened by Tawanda's prevarications on whether or not he was left by the motor vehicle when the deceased was taken into the bush where he was murdered. This determines whether or not he witnessed the murder. Sgt Nhari said the deceased's body and the stone alleged to have been used were found 800 m from the road. If the deceased C was murdered 800 m from the road, how could Tawanda, who in one of his

versions said he observed the murder from where he had been left by the motor vehicle, parked by the side of the road, have witnessed what happened far away from where he had been left?

The assessors are, however, satisfied that Tawanda's refusal to go along with D the police's suggestion that the deceased was murdered by strange people, is sufficient to explain the variance between the State's outline and his evidence. They are of the view that, as explained by Tawanda, the difference is because the police wanted him to tell a story as per the State's outline. In my view the police should have been called to testify on the variances. The variance been the State's outline and Tawanda's evidence is too wide to be E satisfactorily explained through the alleged suggestion by the police. It is, in my view, not safe to rely on Tawanda's explanation for the variance. At the very least, Tawanda's statement should have been produced for the court to test the reliability of his explanation of the variance. However, as this is a decision based on the assessment of evidence, and therefore a factual issue, the assessors' view must, in terms of s 10(2) of the High Court Act F [*Chapter 7*:*06*], prevail. Section 10(2) of the Act provides that the decision of the majority shall prevail on any question of fact arising at a criminal trial in the High Court.

Sgt Elias Katsvere testified for the State. He told the court that on 18 June 2007 they received a report of a dead body having been seen in the paddock of Sandara farm. He proceeded to Sandara farm in the company of other police officers. They were led to the scene by Japhet Mauzeni who had discovered the deceased's body. He observed that the deceased's body was partially undressed with his short trousers lowered to knee level. He noticed a stone with a patch of human hair near the deceased's body. He noticed that the deceased's ear was missing. They put the deceased's body in a

A police coffin, and took the stone. They conducted other investigations and proceeded to Magunje police station, where they met the accused leaving Magunje police and going to Karoi. They arrested the accused and took him and the deceased's body to Karoi police station where the accused was put in police cells.

The next day they took the accused to Karoi CID offices where they B interviewed him in an office used by 22 officers. Officers were coming in and going out during the recording of the statement. They interviewed him at the southern corner of that office. He said the accused made the statement freely and voluntarily without being unduly influenced thereto. He said the accused person was not assaulted by the police during the interviews and C the recording of the warned and cautioned statement. Sgt Nhari recorded the statement and he witnessed its recording. He does not recall when the statement was recorded.

Sgt Katsere identified the stone which he said they saw at the scene. It was produced as exh 3 by consent. The document on which the weight of the D stone was recorded by Fredy Kawanza of Karoi Zim Post was produced through him as exh 4 by consent. It records that the stone weighed 7.18 kg.

Under cross-examination, he said he saw one injury on the deceased's head, and a stone near the deceased's body. He said the stone had a patch of human hair, which he suspected was the deceased's as the injured part had no hair. He told the court that he did not manage to have the hair scientifically E matched to the deceased because the Forensic Science Laboratory did not then have the required chemicals for the examination. When questioned about the absence of the hair from exh 3 he said it could have fallen from the stone due to the lapse of time. He said they could not uplift finger prints from the stone because it has rough surfaces and fingerprints can only be F uplifted from smooth surfaces.

On the recording of the accused's warned and cautioned statement, he said Sgt Nhari recorded the accused's statement after they had interviewed the accused for four hours. They had interviewed him and stopped to await instructions from their seniors. There were four officers in the investigating team. They all took turns to interview the accused person. They interviewed G him in the big office and in the Officer-In-Charge Crime's office. Other officers who used the big office would come to where the accused was being interviewed, but only after they had finished interviewing him. He said the warned and cautioned statement was not recorded on the same day because Everson Major, Takaedza Masunda and Samuel Mazheke whom the H accused person had mentioned as his accomplices had to be picked up. They

subsequently arrested the accomplices. When asked where the accomplices A are he said Samuel Mazheke had died, but Takaedza is in Karoi and Everson in Magunje. He does not know why the accomplices were not prosecuted. The accused's statement was recorded on 20 June 2007. He denied the accused's allegation that he was assaulted in the Officer inCharge Crime's office. He said the accused was cooperating and they were writing what he B was saying. When asked whether the accused had had breakfast when they took him for interviewing, he at first said he did not know but later changed and said his relatives were bringing him food.

Under re-examination, he said they did not continuously interrogate him for four hours, but had left him alone when the accused called him and said he C now wanted to tell the truth.

Sgt Katsvere's evidence on the deceased's injuries, where the deceased was found and the state of his clothing is corroborated by other witnesses whose evidence was admitted in terms of s 314 of the CP&E Act. It is therefore accepted. His evidence on their finding a stone at the scene of the murder is D supported by the production of exhibits three, and four by consent. There is no doubt in our minds that a stone was found at the scene. What has to be determined is whether or not there was human hair on the stone, as alleged by this witness and Sgt Nhari.

His evidence on the recording of the accused's confirmed warned and cautioned statement is embellished by the contradictions between him and E Sgt Nhari on the following: That the accused was interviewed in the big office and the Officer in Charge Crime's office when Sgt Nhari said he was only interviewed in the big office. He also said other officers were coming in and going out during the interview, while Sgt Nhari at first said they were not. He also said other officers not involved in the investigation would come and ask F the accused questions. On whether or not the accused was being given food during the time he recorded the confirmed warned and cautioned statement he said he does not recall, but thereafter said his relatives were bringing him food. It seems he was tailoring his evidence to give credit to the recording process. He generally seemed to have given more credible evidence than G Sgt Nhari. His evidence also differed with Sgt Nhari's on how the statement was recorded. He said the accused gave his statement while they recorded what he was saying. Sgt Nhari said the accused wrote his own statement on a piece of paper. Sgt Katsvere's evidence agrees with the accused's who says the police recorded the statement. Again Sgt Katsvere's evidence seems more truthful on this aspect than Sgt Nhari's. H

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A The recording of the statement in an office where several other officers could come in and ask the accused questions, takes credibility from the recording process. The possibility of the accused being denied food also takes credit from the recording process. These tend to support the accused's allegations against the recording of his confirmed warned and cautioned statement. The contradiction between the recording officer's evidence on whether the B accused wrote his own statement or the police recorded what he said, leaves one officer supporting the accused while the other is being contradicted by his own colleague's evidence. This takes credence from the statement which was accepted in evidence by consent as exh 5. It destroys the statement's evidential value.

C Detective Sgt Nhari also testified for the State. His evidence on how they responded to the report of the deceased's body being found in the paddock of Sandara farm, and what they observed at the scene, is similar to that of Inspector Chaguta and Sgt Katsvere. He is the investigating officer of this case. He noticed an injury on the deceased's head and that the deceased's ear had been cut. He saw a stone near the deceased's body which had a patch D of human hair on it.

They put the deceased's body in a police coffin and proceeded to Magunje where they found the accused at Magunje police station. The accused was on his way to Karoi police station to report that his child had been found dead at Sandara farm. They took the deceased to Karoi hospital mortuary, E and the accused to Karoi police cells.

Testifying on how he and Sgt Katsvere recorded the confirmed warned and cautioned statement from the accused, he said the next day they took the accused to their offices for interrogation.

They interviewed the accused for four hours, after which he opted to tell Sgt F Katsvere the truth. He later warned and cautioned the accused, who wrote his own statement on a piece of paper. The statement was translated into English at Karoi court. He read the typed statement to the accused, who agreed with it and signed it. He said they took the accused to court within the stipulated 48

hours. He however later said they took him to court after three days on 22 June 2007. He said the accused person was not assaulted G as he was cooperating with them.

Under cross-examination, he said they found the deceased's body about 800 m from Chiumburukwe road. He observed two wounds on the deceased's body, including the cut ear. He however does not dispute that the doctor found two wounds on the deceased's head. He said a doctor does a thorough examination, H therefore the doctor's findings should prevail over his observation. He said

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while they were at Magunje the accused's uncle rushed to them and said he A was with the deceased's father.

On the issue of the hair he said he saw on the stone, he indicated the part of the stone where he said the hair was. He could not answer when he was asked how the court would know that that was where the hair was. He also gave no answer when he was asked why the hair was not on the stone, or B placed before the court. When the court asked him if he was going to answer the questions he then said the hair was no longer on the stone as the stone and hair were taken to the Forensic Science Laboratory for examination, but the examination did not take place due to the non availability of facilities.

On what happened before and during the interrogation of the accused person C he said the accused had been given supper by his uncle. He admitted that 22 officers use the office they used. He initially said no one was allowed to come in during interrogations. When Mr *Nkomo* put it to him that Sgt Katsvere said investigating officers would come in to take dockets he conceded that they were coming in to take their dockets. He disputed Sgt Katsvere's evidence that the accused was interrogated in the big room and D in the Officer in Charge Crime's office. He said the accused was interrogated on 19 June 2007. He confessed his involvement on the same day after four hours. They however did not record the statement on the same day because they had to take it to Karoi for translation by the prosecutor. When it was put to him that the accused was only taken to court for the confirmation of E his statement he said he does not recall. When asked to show the court the accused's hand-written statement he perused the docket and told the court he could not find it.

When asked why the accused's alleged accomplices were not in court he said they were facing the same charge but he had been instructed by the Officer in Charge Crime to proceed with the case in the manner he did. When asked F whether they kept the accused at their offices after he had confessed, he said they kept him so that they could record his finger prints. When it was put to him that finger prints are recorded before interviews, he conceded and then said they kept him at the offices because their office is not close to the holding cells. He denied spearheading an assault on the accused to force G him to give the confirmed warned and cautioned statement.

On being re-examined by the prosecutor, Sgt Nhari said the accused was not present when he took his statement to court for translation. When the prosecutor asked him which version the court should believe as he had earlier said he took the accused to court for the translation of the statement, he said he only took the accused to court for the confirmation of his statement. H

A When asked if he ascertained what had happened to the hair which was on the stone before coming to court he said he did not open the plastic with the stone and hair after it had been retrieved from the exhibit room.

Sgt Nhari's evidence on the recording of the statement cannot be relied upon. He is contradicted on material aspects by Sgt Katsvere who witnessed the recording of the statement. Sgt Katsvere said the accused gave an oral B statement which they recorded. Nhari on the other hand said the accused wrote his own statement, but could not produce such a statement. He was obviously not telling the truth, because if the accused had written his own statement Sgt Katsvere would have seen that and testified to that effect and the written statement could have been found in the docket. He also tried to C conceal the truth when he said the interrogation of the accused only took place in the big office, and in the presence of the four interrogating officers. His attempts to mislead the court were exposed by Sgt Katsvere who said other officers would come in and go out during the interrogations, and would also come to the accused and ask him questions. When Nhari was

confronted with Katsvere's evidence he admitted that other officers would come in D during the interrogations. This confirms that his evidence must be treated with caution as he has shown a propensity towards misleading the court. Where his evidence conflicts with that of Sgt Katsvere we will accept Sgt Katsvere's. Sgt Nhari also tried to mislead the court when he said the accused was taken to court within the stipulated 48 hours. He later conceded that E he only took him to court for the confirmation of the warned and cautioned statement. According to exh 5, that was on 28 June 2007, when the accused had been arrested on 18 June 2007.

The delay in taking the accused to court lends credence to the accused's allegation that he was brutally assaulted by the police who were forcing him to admit the charge. He said he was severely assaulted on the soles F of his feet so that he could not walk. If the police had taken him to court within the stipulated period the court would have noticed it and *mero moto* inquired as to why he was having difficulties in walking. An explanation by the accused that he had been assaulted would have been readily accepted because of his condition. The police's failure to comply with the law as to G when an accused person should be taken to court, when placed against an accused's allegation of assault leading to visible signs of assault, confirms the accused's allegations, and renders the admitted confirmed warned and cautioned statement of no evidential value. It has the effect of helping the accused to discharge his onus on the challenge he will have mounted against the reliability of the confirmed warned and cautioned statement. Sgt Nhari H also attempted to mislead the court when he said they kept the accused at their

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CID offices after he had confessed, because they wanted to take his A finger prints. When Mr *Nkomo* put it to him that finger prints are taken before an accused is interviewed, he agreed that that is the correct procedure and changed his story and said they kept the accused at their offices because the police cells are far away from their offices. This demonstrates that Sgt Nhari's evidence can not be relied upon unless it is corroborated by that of B credible witnesses or common cause evidence.

The accused person testified on his own behalf. He in the main maintained what he had said in his defence outline. He however added the following in his evidence-in-chief: that he does not know how his son Ronald died, but was told by police that he died on 12 June 2007; that is obviously a lie as in his evidence helater contradicted himself, when he said he saw Mazheke C striking the deceased with a metal bar; that when he left home with his children he wanted to obtain birth certificates for them and that he had their health cards; on how they sat at the back of the pick-up truck he said he and Tawanda sat towards the back while Ronald sat further in; one of the two men who were with the driver but riding at the back of the truck sat near Ronald D and the other who later pointed a firearm at them sat on the accused's left. He said after Ronald was struck twice with an iron bar and covered with a blanket the motor vehicle was driven on the road that leads to Rain Lock farm. After some distance the motor vehicle stopped and he was ordered to disembark without causing trouble, as they were leaving. It was now after sunset. He remained seated in the motor vehicle and tears started coming E out as he looked at his dead child. He was pushed off the motor vehicle and he fell to the ground, as the motor vehicle drove off. He went to a nearby home where he reported his ordeal. The people of that homestead escorted him to where he had been pushed off the motor vehicle, but later told him to go and report the incident to his employer. He walked to Ceresi farm and reported the incident to his sister, her husband and his employer's children. F His employer was not at home.

The next day he reported the incident to Magunje police station, and returned to Ceresi farm. On 14 June 2007 he went to Karoi police to report the incident. He was advised that one of his children had been brought to Karoi police. He was there reunited with his son Tawanda. He took him to his mother in G Chivakanenyama village. He explained the incident to his mother. On 18 June 2007 he went to Magunje to follow up about his other son. He received information that Ronald's body had been found in the bush at Sandara farm, and that a police vehicle had gone to Sandara farm to collect Ronald's body. The police vehicle arrived with the deceased's body. He and his uncle with whom he was traveling got into the motor vehicle and went to Karoi. They H

A left the deceased's body at Karoi Hospital's mortuary. He was then handcuffed and taken to Karoi police cells.

The next day he was taken from police cells and taken to CID offices, where he was questioned about the deceased's death. He said he gave them the explanation he gave in his defence outline, but the police said he was B lying. He was handcuffed and leg-ironed, and assaulted on the soles of his feet and his back. As a result he could not walk. The officers told him if he kept on denying he would not be given food which his relatives would bring for him. He was interrogated by about 12 officers, and other officers were coming in and going out. When the officers left for lunch they left him handcuffed, with one of his legs in leg-irons, chained to a table. On their C return they assaulted him and thereafter took him to police cells at 3.00 pm. He did not have anything to eat before he was locked up. He said among the officers who assaulted him were Malvern Nhari and Elias Katsvere. He said he was tortured and denied food for four days resulting in his giving the confirmed warned and cautioned statement which was produced by the State as exh 5 in terms of s 256 (2) of the CP&E Act. He said he made the D statement on 22 June 2007.

He described the statement as one the police forced him to tell, as they put words into his mouth. He said Sgt Malvern Nhari supplied the details. He said they forced him to say he struck the deceased with an iron bar, and accept that he knew the three men who were in the truck. He said at that time the E three men had been arrested. He said he did not know their names but only knew them by sight. He said he gave in because of assaults and starvation. He added that they assaulted him daily for four days. They would take him from cells and assault him before asking him questions.

On the confirmation of the statement he said he understood what was going F on at the time the statement was confirmed. He however later said he did not appreciate the implications of the confirmation of the statement. He denied receiving $40 000 000, from the driver, and said Samuel Muzheke is the one who struck Ronald with an iron bar, but denied speaking to Takaedza Masunda or knowing him.

The accused maintained his story under cross-examination but added the G following. He was staying near his children's mother and could go and take her to the Registrar General's Karoi office if she was required. He further said he had been given a letter by his employer, who is the Member of Parliament for the area, through which he could get birth certificates without the children's mother. He admitted that his mother had asked him H about the children's mother being required, and said he told her he would

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get the children's mother if he failed to get the birth certificates through his A employer's letter. He said he could not rely on the mobile unit referred to by his mother, as it visited places after a long time, and he could not rely on it as he was employed away from home. He said his mother could not obtain birth certificates for them in his absence. On further cross examination he said he was afraid to approach his children's mother as she had remarried. He B conceded that his mother asked him if he was going to use his current wife to obtain the birth certificates, and he told her he could not as she was too young for presentation as the children's mother. When it was put to him that his mother said he did not answer when she asked him, he said he answered, but his mother did not hear as she was mourning. When he was told that no one had died yet, he merely said he told her he would get the children's C mother if the letter from his employer did not assist. On the number of people who boarded the pick-up truck he said he told his mother that besides him and his children there were only the driver and two other men.

On Tawanda's evidence, he disputed being seen striking the deceased with a stone and said Tawanda had disembarked a distance away from the place D where Ronald was struck on the head with an iron bar by Muzheke. He said he does not know why Tawanda his own son would lie against him, but said the police took him away and could have coached him on what to say. It is true that tawanda was taken away from the accused's home and is staying at a children's home.

On the recording of the statement he conceded that it was recorded on 20 E June 2007, after he had been arrested on 18 June 2007. He said his alleged accomplices were arrested four days after the date of his arrest. He had merely described them to the police as he did not know their names. He said he does not know how the police could have given him their names for inclusion in his statement. He further said when he went to court for the confirmation F of the statement the police had threatened to take him back and assault him if he did not cooperate. He later said he had

previously been taken to court and had told the court that he was denying the charge and was taken back to CID offices.

The accused person's challenge to the confirmed warned and cautioned G statement must succeed for the reasons already given under the assessment of the State's evidence, even though his own evidence on how he recorded it is not convincing on some aspects. I will therefore not revisit that aspect. I will now proceed to analyse his evidence against that of Siamkonde his mother, Tawanda, Sgts Katsvere and Nhari and the other witnesses whose evidence was admitted in terms of s 314 of the CP&E Act. H

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A We are satisfied that the accused took his children from his mother against her protestations. He did so in circumstances which raised suspicion as to why he was taking them and which clearly show that he was not likely to obtain birth certificates for them in the absence of their mother. Indeed he did not obtain the birth certificates, for the reason his mother had warned him about. That however does not prove intent to murder but merely raises B questions as to why he was adamant in taking away the children who were supposed to be going to school. We are also satisfied that he told his mother that he was attacked by people whose motor vehicle he had boarded, resulting in his fighting them and throwing Tawanda out of the motor vehicle, and jumping out of it, leaving Ronald in the motor vehicle, which drove away C with him. The accused's version in court is different from the one he gave to his mother. His mother gave her evidence well. There is no reason why she would lie against her own son. This shows the accused was not being truthful about what had happened. His changing from the version he gave to his mother proves that he realised the weakness of that version as it is contradicted by Tawanda's evidence. He then tried to remove Tawanda from D the scene, by saying he had been ordered to disembark when the deceased was struck by Mazheke. If Tawanda had not prevaricated on whether or not he was left by the motor vehicle, we could have easily dismissed the accused's version of events as a lie.

Tawanda said the deceased was not struck with an iron bar as alleged by E the accused, but was struck by a stone on the head by the accused after the accused had walked him and the deceased into the bush. That leaves the accused's word against Tawanda's. The evidence tilts towards Tawanda's version if the places where Tawanda and the deceased's body were found is put into consideration. Munyaradzi said he found Tawanda wandering in the bush of Sandara farm where the deceased's body was also found. The F imperfections in Tawanda's evidence, in particular, that he says he was left by the motor vehicle, swings the scale back to neutral ground. If that means he was left by the motor vehicle before the deceased was attacked, as it is capable of meaning, then the accused's version gains ground. If it means Tawanda remained at the motor vehicle as the deceased was walked to the place where he was attacked within Tawanda's view, that again swings the G scales of justice towards the accused's version., as the deceased's body was found 800m from the road. Tawanda could not have seen the murder which he says occurred in the bushy area, from 800 m away

On comparison, Tawanda's evidence is more credible than the accused's, for the following reasons. The accused lied when he told his mother that there H where other passengers in the motor vehicle. He lied to his mother about

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fighting their alleged assailants. In his evidence in court, he gave a different A version which does not say he fought their assailants. He does not say he threw Tawanda out of the motor vehicle. He does not say he himself jumped out of the motor vehicle and ran away. This, plus the general credibility of Tawanda as a witness, satisfied the majority. It however did not remove the doubt I entertained on the reliability of his evidence. B

It seemed to me that this case would be justly decided if Dr Mangunda and Japhet Mauzeni were to be called as the court's witnesses. Their evidence was admitted in terms of s 314 of the CP&E Act. The court would have wanted to clarify from Mauzeni, who led the police to the scene, whether or not there was human hair on the stone exh 3, and from Dr Mangunda whether there was an injury on the deceased's head from which hair had been removed by C the object which caused the injury. The doctor could also clarify whether the head injuries he saw were caused by a stone or a metal

bar. This was necessitated by the need to arrive at a just decision, as provided by s 232 (b) of the CP&E Act. In my view, accepting Tawanda's evidence without further corroboration, as the majority of the court did, may lead to an unjust D decision if the doctor who conducted the postmortem did not see an injury from which hair had been removed, or if the injuries he saw are not consistent with the deceased's head being crushed with a stone. Justice may also not be done if the doctor's examination proves that the injuries were caused by a metal bar, which would corroborate the accused's version. On the other hand, justice may also not be done if the accused is given the benefit of the E doubt in circumstances where the grey area may be clarified by the doctor and Mauzeni confirming that indeed the deceased's head was crushed with a stone. Section 232 (b) was intended to clarify situations where the available evidence, if relied upon without subpoenaing or recalling the witness whose evidence is essential for the court to arrive at a just decision, would lead to F an unjust result. The section should be resorted to in circumstances were the available evidence leaves a grey area which can be easily clarified by the calling of the person whose evidence appears essential to the just decision of the case.

Section 232 (b) provides as follows:

> "The court G
>
> (a) …
>
> (b) shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case."

The section enables the court or a judicial officer in a criminal trial to achieve justice in circumstances where, if he plays the role of an umpire, H

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A justice would not be done. In the case of *Take & Save Trading CC* & *Ors* v *Standard Bank of South Africa Ltd* 2004 (4) SA 1 (SCA) Harms JA, quoting from *R* v *Hepworth* 1928 AD 265 at 277, at p 4 said:

> "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are B 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".

Dr Mangunda and Mauzeni's evidence was admitted in terms of s 314, thereby denying the court an opportunity to clarify the points now necessitating their being called by the court.

C The court reconvened and agreed to call Dr Mangunda and Japhet Mauzeni. The case was then postponed for the witnesses to be subpoenaed. On the date when the witnesses should have been heard, the prosecutor advised the court that Japhet Mauzeni is now deceased, and Dr Mangunda had left the country in search for greener pastures. Attempts by the State to trace Dr D Mangunda have failed.

In view of the above, the case had to be resolved without further evidence. The assessors are of the view that there is sufficient evidence to convict the accused of murder with actual intent. They are satisfied by Tawanda's evidence that the accused crushed Ronald's head with a stone. I am however hesitant to agree with that finding because of the glaring difference between E Tawanda's evidence and what the State said in its outline he was going to tell the court. I am also not quite satisfied by Tawanda's prevarications on whether or not he was left by the motor vehicle. These unsatisfactory aspects of the State's case raise a reasonable doubt which, in my view, should be resolved in the accused's favour. In the case of doubt it is better to let a guilty F man go free than to convict an innocent man.

In *S* v *Manyika* 2002 (2) ZLR 103 (H) at 109 Makarau J (as she then was), commenting on the need for the State to prove an accused guilty beyond reasonable doubt, said:

> "On the basis of the foregoing, and being guided by the principle that it is better to let a few guilty persons go free than to convict even a single innocent person, G I would allow the appeal"…

The doubt I entertain would have been dispelled if Dr Mangunda or Mauzeni had confirmed that the deceased's head had an injury consistent with Sgts Katsvere's and Nhari's evidence, that he found a patch of hair on the stone, which he believed got to the stone when it was used to crush the deceased's H head.

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However, in terms of s 10(2) of the High Court Act, "any question of fact A arising at a criminal trial in the High Court shall be decided by the majority of the members of the court". In this case, the assessors are of the view that there is sufficient evidence to prove the accused guilty of murder with actual intent.

In the result the decision of the assessors must prevail, as this is a finding B of fact, which must be determined by the majority.

The accused is therefore found guilty of murder with actual intent.

Donsa-Nkomo & Mutengi Legal Practitioners, accused's legal practitioners C

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RICK'S UPHOLSTERY (PVT) LTD v BIDDULPHS REMOVALS & STORAGE (PVT) LTD 2011 (1) ZLR 175 (S)

Citation	2011 (1) ZLR 175 (S)
Case No	Judgment No. S-32-10
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Ziyambi JA
Heard	22 March 2010
Judgment	8 February 2011
Counsel	*R M Fitches*, for the appellant Mrs *J B Wood*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Contract – *depositum – loss of goods deposited – when bailee liable – "owner's risk" clause in contract – effect of – no need for bailee to prove he was not negligent*

Headnote

D The appellant left certain of his goods in storage at the respondent's premises. He signed, but did not read, a document which stated that the defendant "shall not be responsible for any loss or damage of any nature whatsoever sustained or suffered by the customer and however and from whatever E cause arising even if the customer (*sic*) and/or their servants and /or agents are

negligent, the basis of this quotation being that work and storage will be effected entirely and solely at the customer's risk." He indicated that he wanted insurance, but did not pay for any insurance. Some persons, who might have included an employee of the respondent, broke into the warehouse where the appellant's goods were stored and stole some of the F appellant's goods. The appellant claimed a sum representing the value of the stolen goods. It was common cause that the stolen goods were deposited with the respondent under a contract of bailment or deposit.

Held, that, under a contract of bailment, the bailee must take the goods into his custody and must return the goods unscathed to the bailor when called G upon to do so or at the conclusion of the contract. The bailee is not an insurer of the goods and is therefore not liable for the results of a *casus fortuitus*. The bailee avoids liability if he can prove that the loss of or damage to the goods was not caused by his negligence. An "owner's risk" clause, appropriately worded, could therefore serve not only to free the bailee from the *onus* of disproving negligence but also to absolve H him from responsibility for his own or his servants' negligence. The

bailee for reward is not liable for failure to restore the property bailed A if its loss or destruction occurs without negligence on the part of the bailee or on the part of his servant to whom he has entrusted the task of looking after the property. While the appellant was not shown the quotation on which the terms and conditions of storage were endorsed, he nevertheless signed the contract, specifically accepting the importation B of those terms and conditions into the contract he signed. That did not make the terms and conditions invalid and inapplicable. The terms and conditions as endorsed on the reverse side of the respondent's quotation were binding on the parties. There was thus no need for the respondent to prove that he was not negligent. In any case, no negligence on the part of the respondent was established on the evidence. Nor was it C established that an employee of the respondent stole the goods or that that employee had been entrusted by the respondent with the care and safekeeping of the goods.

Judgment of Makarau JP in *Rix Upholstery (Pvt) Ltd* v *Biddulphs (Pvt) Ltd* 2008 (2) ZLR 210 (H) upheld. D

Cases referred to

Essa v Divaris 1947 (1) SA 753 (A)

Fawcett Security Ops (Pvt) Ltd v Omar Enters (Pvt) Ltd 1991 (2) ZLR 291 (S); 1992 (4) SA 425 (ZS)

Govt of the Republic of SA v Fibre Spinners & Weavers (Pty) Ltd 1978 (2) SA 794 (A) E

Rosenthal v Marks 1944 TPD 172

Case information

R M Fitches, for the appellant

Mrs *J B Wood*, for the respondent F

Judgment

ZIYAMBI JA: This is an appeal from a decision of the High Court (Makarau JP). The issue to be determined is whether the respondent is liable for the theft of goods left in its care by the appellant under a contract of bailment between the parties.

It is common cause that, sometime in December 2006, the appellant G represented by Alwyn Richard Pahla, its managing director ("Pahla"), left certain goods including 31 rolls of leather fabric ("the goods") in storage with the respondent. The respondent carries on the business of removals and storage of goods from its premises at 15 Craster Road, Southerton. At the time of leaving the goods in storage Pahla signed a contract of which the following clauses are significant: H

A **"2. Insurance:**

All goods are transported and stored at owner's risk. You are advised to effect insurance for your goods whilst in our care by completing the insurance proposal form and paying the relevant premium. Please confirm you require insurance cover*".*

On the next line he was required to confirm his requirement of insurance cover B by ticking the "Yes" box, which he did. The next paragraph of Clause 2 read:

"Insurance Waiver

I acknowledge that I have received the insurance proposal form and have been advised of its merits…

3. PaymentC

(i) …

(ii) …

Please note that our normal terms and conditions of carriage apply. These can be seen on the back of our quotation form.

I hereby acknowledge and accept the above Terms and Conditions."

D The contract was signed by Mr Pahla on 7 December 2006. He was not shown a quotation with the terms endorsed thereon and he did not ask to see one. Further, although he indicated on the face of the contract form that he required insurance for the goods, he neither completed the insurance proposal form nor paid the relevant premium. The goods were therefore not insured.

Clause 7 of the terms and conditions accepted by Mr Pahla (in clause 3 E *supra)* reads:

"The Contractors shall not be responsible for any loss or damage of any nature whatsoever sustained or suffered by the customer and from whatever cause arising even if the customer (*sic*) and/or their servants and/or agents are negligent, the basis of this quotation being that the work and storage will be effected entirely F and solely at the customer's risk."

Sometime in October 2007, the respondent telephoned Pahla and advised him that some of the appellant's goods had been stolen. Upon checking, Pahla ascertained that 31 rolls of leather fabric were missing. A report of theft was made to the police and subsequent investigations pointed to the fact that the fabric might have been stolen by persons who included one Alexio Chinzara, a G former employee of the respondent. The appellant thereupon issued summons in the High Court for the return of the goods or, in the alternative, payment of the value thereof. Dissatisfied with the dismissal of its claim by the High Court, the appellant has appealed to this court.

It was common cause, both in the court *a quo* and in this court, that the fabric H was deposited with the respondent under a contract of bailment or deposit.

Ziyambi JA

The principles applicable to such a contract were stated by Wessels ACJ in A *Government of the Republic of South Africa* v *Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 802, as follows:

"I am of the opinion that, in so far as the contract created the relationship of bailor and bailee between the parties, the following principles are applicable thereto. They were summarised as follows by Murray J in *Rosenthal* v *Marks* 1944 TPD 172 at 176: B

'The principles of our law in connection with the obligations of a bailee in the case of an ordinary bailment for reward are, I think, reasonably clear. The bailee is not an insurer of the article deposited for safekeeping and is consequently not liable for the effects of a *casus fortuitus*. On the other hand, he must display ordinary diligence and is liable for the consequences of *culpa levis* on his part; if the article is lost or damaged while in his custody, C he must make compensation unless he can show that such loss or damage was occasioned despite the exercise by him of the care which a reasonably prudent and careful man might be expected to have taken in the particular circumstances. The onus rests on him and, even if the loss be shown to be the result of theft by a third person, he does not avoid liability unless he proves that such theft occurred despite the observance by him of the D precautions expected to be taken (*vide, inter alia*, *Lutuli* v *Omar* 1909 TS 192; *Fruhauf* v *Morrison* 1911 TPD 963; *Melrose Steam Laundry* v *Power* 1918 TPD 314). It is, however, clear, both on principle and authority, that (subject to certain limitations when public policy is in issue) it is competent for a bailor to waive rights created for his protection and to agree to rest content with recourse of less extent against the bailee.'

In this regard, see, too, *Essa* v *Divaris* 1947 (1) SA 753 (A) at 767." E

Thus, under a contract of bailment, the bailee must take the goods into his custody and must return the goods unscathed to the bailor when called upon to do so or at the conclusion of the contract. The bailee is not an insurer of the goods and is therefore not liable for the results of a casus fortuitus. The bailee avoids liability if he can prove that the loss of or damage to the goods was not caused by his negligence. An "owner's risk" clause appropriately worded F could therefore serve not only to free the bailee from the onus of disproving negligence but also to absolve him from responsibility for his own or his servants' negligence. The bailee for reward is not liable for failure to restore the property bailed if its loss or destruction occurs without negligence on the part of the bailee or on the part of his servant to whom he has entrusted the G task of looking after the property. See *Government of the Republic of South Africa* v *Fibre Spinners & Weavers (Pty) Ltd supra*; *Rosenthal* v *Marks* 1944 TPD 172 at 176; *Essa* v *Divaris* 1947 (1) SA 753 (A) at 767.

The court *a quo* found that the owner's risk clause, which was part of the contract signed by the appellant, exempted the respondent from negligence whether of itself or its servants. H

Ziyambi JA

A In so finding the learned judge said:

> "It may be pertinent for me to note at this stage that while the witness testified that he was not shown the quotation on which the terms and conditions of storage were endorsed, he nevertheless signed the contract, specifically **accepting** the importation of those terms and conditions into the contract he signed. That he accepted the terms and conditions blindly does not in my view make the terms and conditions invalid and inapplicable. *Caveat subscriptor*. On the basis of the B foregoing, it is therefore my finding that the terms and conditions as endorsed on the reverse side of the defendant's quotation are binding on the parties."

I can find no fault with this reasoning. It may, in addition, be observed that the fact that the appellant was conscious at the time of signing the agreement of the need to insure the goods indicates, regard being had to the fact that he C had stored his goods with the respondent before, that he understood that the goods were being stored at his own risk. In view of the finding of the court *a quo* as to the binding nature of the owner's risk clause, there was no need on the part of the respondent to prove that he was not negligent. However, it is quite clear that no negligence on the part of the respondent/bailee was established on the evidence.

D The goods were kept in a warehouse secured by a steel door. The respondent's financial manager told the court:

> "We have various security (*sic*) in place including steel doors which are locked from the inside, padlocks and inter-leading doors, key to the main door with a further big padlock on the outside and in addition to that we have three security guards on duty one on each entrance and exit …".

E He said that on the morning of 8October 2007, he received a report that the steel door to the warehouse where the goods were kept had been forced open leaving a gap which could afford a person to get through and, further, that several slats had been removed from the durawall surrounding the premises. On further checking, it was discovered that some of the fabric stored on F behalf of the appellant was missing.

The court *a quo* found that the respondent had taken sufficient precautions to secure the goods. It also found that the goods were stolen consequent to a break-in during October 2007, at the respondent's warehouse where the goods were kept, and by a person unknown. Accordingly, it was established that the goods were stolen without negligence on the part of the respondent.

G It was submitted on behalf of the appellant that the respondent could not, by an owner's risk clause, exempt himself from the *dolus* of his servant. This being a contract of bailment, the submission must necessarily be based on two premises. The first being that it was an employee of the respondent that stole the goods; and the second, that that employee had been entrusted by H the respondent with the care and safekeeping of the goods. Neither premise

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Ziyambi JA

has been established. As I have already said, the court *a quo* found the goods A to have been stolen by a person unknown. That finding is amply supported by the evidence.

Finally, we were referred to the judgment in *Tubb (Pvt) Ltd* v *Mwamuka* 1996 (2) ZLR 27 (S) as authority for the submission by Mr *Fitches* that an employer cannot, by an exemption clause, exempt itself from the *dolus* of B its servant. Mrs *Wood*, in reply, referred us to the judgment of this court in *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* 1991 (2) ZLR 291 (S) at 294; 1992 (4) SA 425 (ZS) at 428.

Since neither of the judgments dealt with contracts of bailment I do not consider it necessary in this judgment to comment on them.

Accordingly, the appellant has established no basis for interference, by this C court, with the judgment of the court *a quo.*

The appeal is therefore dismissed with costs.

CHIDYAUSIKU CJ and SANDURA JA concurred.

Mushangwe & Co, appellant's legal practitioners D

Venturas & Samukange, respondent's legal practitioners E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/GULA-NDEBELE v BHUNU NO 2011 (1) ZLR 181 (S)

GULA-NDEBELE v BHUNU NO 2011 (1) ZLR 181 (S)

Citation	2011 (1) ZLR 181 (S)
Case No	Judgment No. S-34-10
Court	Supreme Court, Harare
Judge	Malaba DCJ, Ziyambi JA and Garwe JA
Heard	6 September 2010
Judgment	7 February 2011
Counsel	*H Zhou*, for the appellant *W R Chingeya,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal – *notice – validity – sufficient for exact nature of relief sought to be stated – not essential that relief sought must be one which court can grant – court may grant amendment*

Headnote

D The appellant had been removed from his post as Attorney-General, following the recommendation of a tribunal appointed by the President in terms of s 110 of the Constitution. Dissatisfied with the finding and advice of the Tribunal, the appellant took the matter to the High Court on review, alleging that the decision of the Tribunal was such that no reasonable E tribunal, on the evidence before it, would have arrived at such a decision, and praying that the decision of the Tribunal should be set aside. The High Court took the view that the advice of the Tribunal and the removal from office by the President was one juristic act and that the President thus was a necessary party in the review proceedings and ought to have been cited. Accordingly, the court found that the application could not F be decided.

On appeal, the relief sought by the appellant was that the application to the High Court should be granted. The respondent argued that the relief sought could not be granted, as to grant it would necessitate a decision on the merits of the application, when the merits had neither been G determined in the court *a quo* nor made the subject of the grounds of appeal. It was also submitted that the notice of appeal was invalid by reason of the fact that it sought a remedy which the Supreme Court was not competent to grant. No application was filed for amendment but, in his heads of argument, counsel for the appellant indicated that the relief now being sought was a remittal of the matter to the High Court, H before a different judge, for a decision on the merits of the matter. The

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Ziyambi JA

question was whether this fact rendered the notice of appeal fatally A defective because, if it did, the notice of appeal was null and void and could not be saved by an amendment.

Held, that r 29 of the Supreme Court Rules 1964 requires simply that the exact nature of the relief sought be stated in the notice of appeal. Thus, in so far as the prayer was for the appeal to be allowed and the application B to be dismissed with costs, there was *prima facie* compliance with the rule. It is not necessary that the relief sought must be one which the court could grant and that a prayer which the court could not competently grant rendered the notice of appeal null and void. Once the prayer clearly sets out the nature of the relief sought, r 29(1)(e) has been complied with. The court can and may amend the notice of appeal upon application being C made before the hearing, subject to the rules governing applications of such nature.

Legislation considered

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

Case information

H Zhou, for the appellant

W R Chingeya, for the respondent

Judgment

ZIYAMBI JA: At the hearing before us the point arose *in limine* as to the validity of the notice of appeal filed in this matter and, if it is invalid, the E consequences that should flow therefrom. It was considered that the question raised an important question of procedure which required further reflection. Accordingly, judgment in the preliminary matter was reserved pending the judgment of this court determining the matter.

The background to the appeal is as follows. The appellant, formerly the Attorney-General of Zimbabwe, was removed from his post upon the advice F of a Tribunal appointed by the President in terms of s 110 of the Constitution ("the Constitution") to enquire into the issue of his removal from office.

The relevant section of the Constitution of Zimbabwe authorizing this action on the part of the President reads as follows:

> "(3) Such person shall be removed from office by the President if the question of G his removal from office has been referred to a tribunal appointed under subsection (5) and that tribunal has advised the President that he ought to be removed from office for inability to discharge his functions or for misbehaviour."

The removal from office was communicated to the appellant by letter from the Secretary to the President dated 23 May 2008. Dissatisfied with the finding and advice of the Tribunal, the appellant took the matter to the High H

Ziyambi JA

A Court on review, alleging that the decision of the Tribunal was so grossly unreasonable that no reasonable Tribunal on the evidence before it would have arrived at such a decision. It was accordingly prayed that the decision of the Tribunal should be set aside.

The High Court took the view that the advice of the Tribunal and the removal from office by the President was one juristic act and that accordingly the B two were inseparable. The President, it determined, was a necessary party in the review proceedings and ought therefore to have been cited. Accordingly the application could not be decided for this reason and it was dismissed with costs.

The appellant appealed on the following grounds: C

"1. The court *a quo* misdirected itself by determining that it was not possible in the circumstances to set aside the impugned proceedings chaired by the respondent without necessarily setting aside the President's act of removing the appellant from the post of Attorney-General.

2. The court *a quo* erred by failing to address its mind to the argument advanced that the recommendation was voidable, and not void. As a result of that D error the court came to the incorrect conclusion that the process by which the recommendation was reached was inseparable from the implementation of the recommendation by the President of the Republic of Zimbabwe.

3. The court *a quo* erred in its conclusion that once the recommendation was set aside then the implementation by the President became unconstitutional.

4. The court *a quo* erred in its conclusion that the non-citation of the President E was fatal to the application.

Wherefore the appellant prays that the appeal be allowed with costs, and for the judgment of the court *a quo* to be set aside and the following substituted:

'The application be and is hereby granted in terms of the draft'."

In its heads of argument, the respondent took the point that the relief sought F was one which the court could not grant, it being one which necessitated a decision on the merits of the application when the merits had neither been determined in the court *a quo* nor made the subject of the grounds of appeal. It was submitted that the notice of appeal was invalid by reason of the fact that it sought a remedy which this court is not competent to grant. No application was filed for amendment but, in his heads of argument, Mr G *Zhou* indicated that the relief now being sought was a remittal of the matter to the High Court, before a different judge, for a decision on the merits of the matter. He proceeded to move, at the hearing of the appeal, for an amendment of the prayer to that effect should this court find in the appellant's favour.

The respondent, in response, contended that it was procedurally incorrect for H the appellant to pray for a different relief in his heads of argument from the

Ziyambi JA

one in the notice of appeal and that this constituted a fatal non-compliance A with the Rules of this court.

It is common cause that the relief sought in the notice of appeal could not be granted by this court since a decision on the merits had not been made by the court *a quo*. The question is whether this fact renders the notice of appeal fatally defective because if it does, the notice of appeal is null and B void and cannot be saved by an amendment.

Rule 29 (1) of the Supreme Court Rules which sets out the requirements for a valid notice of appeal from the High Court, states as follows:

"29. Entry of appeal

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

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

(b) if leave to appeal was granted, the date of such grant;
(c) whether the whole or part only of the judgment is appealed against;
(d) the ground of appeal in accordance with the provisions of rule 32; D
(e) the exact nature of the relief sought;
(f) the address for service of the appellant or his legal practitioner."

The rule requires simply that the exact nature of the relief sought be stated in the notice of appeal. Thus, in so far as the prayer is for the appeal to be allowed and the application to be dismissed with costs, there is *prima* E *facie* compliance with the rule. However, it was submitted on behalf of the respondent that the relief sought must be one which the court can grant and that a prayer which the court cannot competently grant renders the notice of appeal null and void. I do not agree.

In my view, once the prayer clearly sets out the nature of the relief sought, as it does in this case, r 29(1)(e) has been complied with. That being so, the F court can and may amend the notice of appeal upon application being made before the hearing subject to the rules governing applications of this nature.

Accordingly, the point *in limine* is dismissed. The notice of appeal is valid.

I have shown this judgment to the Chief Justice who has authorized me to say that he agrees with it. G

MALABA DCJ and GARWE JA concurred.

Gula, Ndebele & Partners, appellant's legal practitioners

Chingeya Mandizira Legal Practitioners, respondent's legal practitioners H

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Source:
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S v KUROTWI & ORS (1) 2011 (1) ZLR 185 (H)

Citation	2011 (1) ZLR 185 (H)
Case No	Judgment HH-41-11
Court	High Court, Harare
Judge	Bhunu J
Heard	7 February 2011
Judgment	8 February 2011
Counsel	Mrs *F Ziyambi,* with her *C Mutangadura,* for the State *G Chikumbirike,* for the first accused *L Uriri,* with him *U Sakhe*, for the second accused *J Samukange,* for the third and fourth accused Mrs *M Matshiya,* for the fifth accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe, 1980 – Attorney-General – right to withdraw criminal proceedings – unfettered right to withdraw criminal proceedings at any stage thereof*

Criminal procedure – *charge – withdrawal – Attorney-General's unfettered* D *right to withdraw charge at any time, whether before or after plea*

Headnote

The five accused were charged with fraud and indicted before the High Court. The prosecutor withdrew the charge against three of the accused before plea, with a view to using the three as witnesses against the remaining E two accused. Counsel for the two remaining accused objected to the timing of the withdrawal of charges against the three accused persons. They argued that the case became pending in the court at the moment the charges were given to the registrar. That being the case, the withdrawal entailed an amendment of the original charge.

Held, that s 76(4)(c) of the Constitution, which applies to all courts, clothes F the Attorney General with an unfettered absolute discretion to withdraw criminal proceedings he has instituted at any stage of the proceedings. Once the Attorney General has decided to exercise his discretion under that section, no person or authority, including the courts, can question his decision in this respect. If the prosecutor decides to withdraw the G charge, the court must accept that decision. It does not matter whether or not the withdrawal is before or after plea.

Case cited

H *S v Chari* 1998 (1) ZLR 180 (H)

2011 (1) ZLR p186

Bhunu J

Legislation considered A

Constitution of Zimbabwe, 1980 ss 76 (4), 76 (6) and (7)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 137 and 168.

Case information

Mrs *F Ziyambi,* with her *C Mutangadura,* for the State

G Chikumbirike, for the first accused

L Uriri, with him *U Sakhe*, for the second accused B

J Samukange, for the third and fourth accused

Mrs M Matshiya, for the fifth accused

Judgment

BHUNU J: The five accused persons were jointly indicted for trial in the High Court on 10 January 2011 on a charge of fraud. At the commencement of C their trial the prosecutor advised the court that she was withdrawing charges against the third, fourth and fifth accused before plea. Their respective legal practitioners accepted the withdrawal of charges against their clients before plea.

Counsel for accused one and two, however, vigorously objected to the timing D of the withdrawal of charges against the three accused persons before the charges had been read. Relying on ss 137 and 168 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] they argued that the case became pending in this court at the moment the charges were given to the registrar. That being the case, the withdrawal entailed an amendment of the original charge. Their clients were now required to plead to a charge in which their co-accused now E appeared as witnesses against them. They submitted that the withdrawal be done after the original charge, upon which the accused were

indicted for trial, had been put to all the five accused persons. Doing otherwise will constitute a procedural irregularity.

In response, State counsel pointed to s 76(4)(c) of the Constitution which F provides that:

> " The Attorney General shall have power in any case in which he considers it desirable so to do to discontinue at any stage before judgment is delivered in any criminal proceedings he has instituted…"

Subsection (6) goes on to provide that the powers of the Attorney General G under subs (4) (c) shall be vested in him to the exclusion of any other person or authority. Thereafter subs (7) seeks to protect the Attorney General from interference by any person or authority including the courts. It provides that in the exercise of his powers under subs (4) the Attorney General shall not be subject to the direction of any person or authority.

It is clear that the section clothes the Attorney General with an unfettered H

Bhunu J

A absolute discretion to withdraw criminal proceedings he has instituted at any stage of the proceedings. It thus follows that, once the Attorney General has decided to exercise his discretion, under s 76 (4) (c) of the Constitution no person or authority, including the courts, can question his decision in this respect.

In *S* v *Chari* 1998 (1) ZLR 180 the trial magistrate refused to grant the B prosecutor's bid to withdraw the charge against the accused and proceeded with the trial to the bewilderment of the prosecutor. This prompted Blackie J to remark that:

> " … if the prosecutor persists in the withdrawal of the case, the magistrate must accept that decision. For him to behave as he did in this case is a grave error."

C The above remarks apply to all courts with equal force. It does not matter whether or not the withdrawal is before or after plea. It is trite that the Constitution is the supreme law of the land. It is the mother of all laws. It takes precedence over any other subordinate laws. That being the case, it is not necessary to consider the provisions of ss 137 and 168 of the Criminal Procedure and Evidence Act [*Chapter 9*:*07*], save to observe D that they do not bar the Attorney General from exercising his powers under s 76(4)(c) of the Constitution.

The prosecutor was therefore well within her constitutional rights when she decided to withdraw charges against the third, fourth and fifth accused persons at this point in time. In terms of the Constitution no person, authority E or court can question the exercise of that discretion, nor can any one give directions to the Attorney General or his representative concerning the timing of the exercise of that power.

I therefore find that there is no merit in the objection against the withdrawal of charges against the three accused persons. The objection is overruled and it is accordingly ordered that the application for withdrawal of charges against the third, fourth and fifth accused persons be and is hereby granted.

Attorney General's Office, the State's legal practitioners

Chikumbirike & Associates, first defendant's legal practitioners

Kantor & Immerman, second defendant's legal practitioners

G *Byron Venturas & Samukange,* third and fourth defendant's legal practitioners

Mutetwa & Nyambirai, fifth defendant's legal practitioners

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Source:

S v MPOFU 2011 (1) ZLR 188 (H)

Citation	2011 (1) ZLR 188 (H)
Case No	Judgment No. HB-21-11
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	10 February 2011
Judgment	10 February 2011
Counsel	*T Makoni,* for the State *S Nkiwane,* for the accused
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure – *trial – conduct of – passing of sentence and recording* C *of reasons therefor – need for reasons for sentence to be included in record at time sentence is passed, not reconstructed later after reasons given verbally ex tempore*

Headnote

It is a cardinal principle of our criminal justice system that, before assessing D an appropriate sentence, a judicial officer must seriously engage in a pre-sentencing inquiry in order to gather as much information as possible to enable him or her to humanely and meaningfully assess sentence. Sentencing cannot be left to the caprices and instincts of the judicial officer. A thorough investigation should be carried out by the judicial officer before arriving at an appropriate sentence. Where the E judicial officer gives an *ex tempore* judgment with reasons for sentence contained in his head, only to be inserted in the court record much later, he runs the risk of someone concluding that he did not apply his mind to the case at hand. Indeed, it is a misdirection for the judicial officer not to record the reasons for sentence, a misdirection which entitles the F reviewing judge to interfere with the sentence.

Cases cited

S v Dhliwayo 1999 (1) ZLR 229 (H)

S v Katsaura 1997 (2) ZLR 102 (H) G

Case information

T Makoni, for the State

S Nkiwane, for the accused

Judgment

MATHONSI J: This matter came to me for review in terms of s 57 of the Magistrates Court Act [*Chapter 7:10*] following the conviction and sentence of the accused person by the magistrates court at Western Commonage. There H

Mathonsi J

A has been an extremely inordinate delay in bringing the matter to finality which is unacceptable indeed.

The matter was previously placed before my brother Cheda J and it is not clear why it was set down for argument on 19 November 2010. He later recused himself and it was then placed before me. When I went through the B record I ordered the immediate release of the accused person and said that the reasons will follow. These are the reasons.

The accused was convicted on her own plea of guilt on 19 January 2010 of theft in contravention of s 113 of the Criminal Law Code [*Chapter 9:23*]. She was sentenced to three years' imprisonment of which four months' imprisonment was suspended for five years on condition she does not within C that period commit an offence involving dishonesty and for which upon conviction she is sentenced to imprisonment without the option of a fine. A further six months' imprisonment was suspended on condition of restitution.

The facts are that the accused and the complainant are lovers. She is employed as a hairdresser at Nu Look Hair Salon in Bulawayo while he is employed by D the Veterinary Services Department, also in Bulawayo. On 2 January 2010 the complainant brought the accused to his house and they spent the night together. During the night she woke up as the complainant was sleeping and took the keys to the cupboard which she opened and stole US$700 and ZAR5 000 belonging to her complainant boy friend.

E The following morning, when the complainant discovered that his money was missing, he inquired from the accused if she had taken it but she denied. Instead she quickly left the place. Of the stolen money, only ZAR1 000 was recovered.

In considering sentence, the magistrate converted the US dollars to South F African rands and came up with a total of ZAR12 000 as the value of the prejudice. It is not clear why he saw it fit to make the conversion which must have been at a rate of USD1 to ZAR10.

When counsel for the accused person (she had been unrepresented at the trial), perused the court record for purposes of preparing submissions for review, there were no reasons for sentence, a point that he took up in his G submissions. The matter was referred back to the magistrate for his response to those submissions. His response reads in part as follows:

> " Reasons for sentence were given *ex tempo (sic*) in court in the presence of accused person during the sentence. It could be the legal practitioner has (*sic*) sight of the record before the trial magistrate had placed the same in the record."

H Mr *Nkiwane* for the accused has commented as follows:

Mathonsi J

> " When counsel went to look for the record a considerable time, about two weeks, A had elapsed after the passing of sentence. At that time a review cover had been completed and the record, according to the clerk of court, was ready for dispatch to the Criminal Registrar for his Lordship's attention. It was dispatched on 27 January 2010, sentence having been passed on 13 January. One has difficulty in understanding how a judicial officer could remember, some two weeks later, what he had said orally without writing in open court. One should be forgiven for B taking the view that the learned trial magistrate adopted the reasoning process of Shakespeare's characters – starting with the conclusion and later going back to justify it. Had his worship not adopted the wrong reasoning process, he would probably not have misdirected himself on sentence, for misdirect himself he did, by exaggerating the gravity of the offence."

It is a cardinal principle of our criminal justice system that, before assessing C an appropriate sentence a judicial officer must seriously engage in a presentencing inquiry in order to gather as much information as possible to enable him or her to humanely and meaningfully assess sentence. Sentencing cannot be left to the caprices and instincts of the judicial officer. A thorough investigation should be carried out by the judicial officer before arriving at an appropriate sentence. C

Where the judicial officer gives an *ex tempore* judgment with reasons for sentence contained in his head, only to be inserted in the court record much later, he runs the risk of someone concluding that he did not apply his mind to the case at hand. Indeed, it is a misdirection for the judicial officer

not to record the reasons for sentence, a misdirection which entitles the reviewing E judge to tamper with the sentence.

I agree with Mr *Nkiwane* that the magistrate may have come up with reasons which were added on long after the sentence simply to justify the sentence he had already imposed. I can assign no other reason for the fact that at some stage after sentence the reasons for sentence were missing and he "placed" F them in the record later.

It is for that reason that the trial magistrate gave overdue weight to the fact that the accused was the complainant's girl friend who betrayed the trust bestowed to her by the complainant. There was an over-emphasis on the accused's crime, which translated to an under-estimation of her personal G circumstances.

The accused is a female first offender who was aged 37 at the time of the offence. She is unmarried with four children to look after. She stole from her boyfriend, a factor which should have weighed in her favour but which the magistrate elected to take as aggravation. Surely a person who steals from a stranger has a higher level of blameworthiness than one stealing from a lover. H

Mathonsi J

A She pleaded guilty, showing remorse, and even the State asked the court to have regard to the guilty plea in assessing sentence. The current trend is to give a lot of weight to a guilty plea and an accused person who pleads guilty has to be rewarded by a substantial reduction of sentence in recognition of that. See *S* v *Dhliwayo* 1999 (1) ZLR 229 (H); *S* v *Katsaura* 1997 (2) ZLR 102 (H).

B It is not easy to understand how the magistrate was able to come up with a sentence of three years, if any regard was given to the mitigating factors that exist in this matter. It is even more difficult to comprehend how only four months of that sentence was suspended on condition of good behaviour and only six months was suspended on condition of restitution. The question may be asked why restitute at all if one still remains with such a lengthy term of imprisonment.

Converting the US dollar component of the offence to rands gave the impression that a lot of money was involved. The question may well be asked why the rand component was not converted to US dollars, a more stable currency, so that the value would be reckoned simply as USD1 200.

D In my view the sentence imposed was excessive. An appropriate sentence should have been one which left the accused with an effective sentence of 12 months.

Accordingly, I make the following order that:

1. The conviction of the accused be and is hereby confirmed. E
2. The sentence of three years' imprisonment be and is hereby set aside and in its place is substituted a sentence of 24 months' imprisonment of which 12 months is suspended for five years on condition the accused does not during that period commit an offence involving dishonesty for which she is sentenced to imprisonment without the option of a fine. F
3. Of the remaining 12 months' imprisonment, a further six months' imprisonment is suspended on condition the accused makes restitution to the complainant of the sums of USD700 and ZAR4 000.
4. As the accused has already served the period of 12 months' imprisonment, she is entitled to her immediate release.

G NDOU J concurred.

H *Criminal Division, Attorney General's Office*, respondent's legal practitioners

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Source:

S v NCUBE 2011 (1) ZLR 192 (H)

Citation	2011 (1) ZLR 192 (H)
Case No	Judgment No. HB-20-11
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	10 February 2011
Judgment	10 February 2011
Counsel	Details not Supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure – *trial – delays in bringing case to trial – delay caused* C *by prosecution in order that juvenile offender should be old enough at time of trial to be treated as an adult – such a course unacceptable and likely to bring administration of justice into disrepute*

Headnote

The accused was aged 18 years at the time he was convicted of the rape of D a 12-year-old girl. At the time of the offence, however, he was aged 16. Although he did not deny the act, the case took so long to get to trial that he had turned 18 before the trial. He was, accordingly, treated as an adult for the purposes of sentence.

Held, that the decision of the prosecution, as was so apparent in this case, E to withhold the matter while biding time for the accused to attain the age of 18 and arraigning him before a magistrate thereafter in order to secure a stiffer sentence by virtue of the fact that the accused would not be entitled to a sentence of corporal punishment, was unacceptable. This conduct was extremely undesirable and brought the administration of justice into serious disrepute. The State should not be allowed to benefit F from its own default, as it were, deliberately designed to gain an unfair advantage over young offenders.

Case referred to

S v Chitiki 1986 (1) ZLR 60 (H) G

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 353(1)

Judgment

MATHONSI J: The accused was convicted of rape after pleading guilty before the regional magistrate in Hwange on 26 October 2010. At the time H

Mathonsi J

of conviction and sentence he was aged 18 years. He was born on 7 June 1992 and therefore celebrated his 18th birthday on 7 June 2010.

At the time that he committed the offence for which he stands convicted, on 2 March 2009, he was aged 16 and due to celebrate his 17th birthday on 7 June 2009. The facts are that on that day (2 March 2009) at 1300 hrs, the complainant, a 12-year-old, was in her mother's bedroom when the accused entered. The two are cousins and were staying together at the time.

Once inside the bedroom he tripped the complainant and lay on top of her. He lowered the complainant's underwear to knee level before inserting his erect penis into her vagina and having sexual intercourse with her without her consent. After being released the complainant made a report to a neighbour resulting in the accused's arrest.

The complainant was examined by a doctor on 13 March 2009 in the course of investigations. The doctor compiled a report which concluded that penetration "might have been effected". Meanwhile a crime docket was opened at Lusulu police station under CR No. 02/3/09. There is nothing to suggest that at any one time the accused denied the charges.

For some reason, even though the accused was pleading guilty to the charges, he was not brought for trial until 26 October 2010, some 19 months later. When he was eventually charged he readily pleaded guilty to the charged. Asked by the magistrate why he committed the offence he replied:

> "I am sorry. We thought we were playing."

When the matter was referred back to the trial magistrate for a comment on why she had not treated the accused as a juvenile for purposes of sentence, she commented thus:

> "I do not believe I departed from the usual sentencing policy. If the accused was a juvenile at the date of sentence, I would have imposed a different penalty preferably corporal punishment. While he was a juvenile at the time of committing the offence, he was an adult when he appeared in court."

The magistrate is certainly correct in her interpretation of the relevant provision dealing with sentencing of juveniles, namely s 353(1) of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. It provides:

> "Where a male person under the age of 18 years is convicted of any offence the court which imposes sentence upon him may –
>
> (a) in lieu of any other punishment; or
>
> (b) in addition to a wholly suspended sentence of a fine or imprisonment; or
>
> (c) in addition to making an order in terms of subsection (1) of section 351;
>
> sentence him to receive moderate corporal punishment, not exceeding six strokes."

Mathonsi J

Clearly, therefore, the reckoning of age of the accused person is at the time of conviction and not at the time of commission of the offence. If the accused, through no fault of his own, is not sentenced until he attains 18 years he loses the benefit he would have been entitled to if he had been convicted before attaining that age. This is the interpretation accorded to the predecessor to s 353(1), that is s 330 of *Chapter 59*, by Gibson J in *S* v *Chitiki* 1986 (1) ZLR 60 (H). I am in agreement with that interpretation.

However, it is the decision of the prosecution, as is so apparent in this case, to withhold the matter while biding time for the accused to attain the age of 18 and then arraigning him before a magistrate thereafter in order to secure a stiffer sentence by virtue of the fact that the accused would not be entitled to a sentence of corporal punishment, which is unacceptable.

The accused was pleading guilty to the charge and investigations must have been completed in March 2009 after the complainant had been examined by a doctor. No other reason can be assigned to the failure of the State to bring the accused before a magistrate for a plea recording and sentence other than the fact that the State desired to secure a harsher sentence after the accused had turned 18. This is extremely undesirable and brings the administration of justice into serious disrepute.

These courts should act decisively to stamp out such behaviour and protect the reputation of the justice system of this country. It must be stated in no uncertain terms, for all to hear, that the

courts will not tolerate such reprehensible conduct. The State will not be allowed to benefit from its E own default, as it were, deliberately designed to gain an unfair advantage over young offenders.

This is a matter in which the accused should have been sentenced in March 2009 to corporal punishment when he was still under 17 years old. The sentence imposed induces a sense of shock. There is therefore a need to interfere with F the sentence in order to give effect to the spirit of the law. Considering that the accused has served almost four months' imprisonment, nothing will be served by ordering corporal punishment at this stage. What he has served is enough and an adjustment of sentence recognising that will be made.

Accordingly, I make the following order:

1. The conviction of the accused is confirmed. G
2. The sentence is set aside and in its place is substituted a sentence of 24 months' imprisonment, of which 21 months' imprisonment is suspended for five years on condition he does not during that period commit an offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine. H

2011 (1) ZLR p195

Mathonsi J A

3. As the accused has served more than three months' imprisonment he should be released immediately.

NDOU J concurs.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/BLUMO TRADING (PVT) LTD v NELMAH MILLING CO (PVT) LTD & ANOR 2011 (1) ZLR 196 (H)

BLUMO TRADING (PVT) LTD v NELMAH MILLING CO (PVT) LTD & ANOR 2011 (1) ZLR 196 (H)

2011 (1) ZLR p196

Citation	2011 (1) ZLR 196 (H)
Case No	Judgment No. HH-39-11
Court	High Court, Harare
Judge	Patel J
Heard	26 October 2010; 27 October 2010; 28 October 2010; 29 October 2010; 1 November 2010; 2 November 2010
Judgment	15 February 2011
Counsel	Ms *R Theron*, for the plaintiff *G Machaya*, for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract – *breach – anticipatory breach entitling innocent party to repudiate contract – what is – how such breach may be determined – remedies for breach – right of innocent party to cancel contract – right to claim* D *damages – right to claim restitution*

Headnote

It is a fundamental premiss of every contract that both parties will duly carry out their respective obligations. There is a presumption that in every bilateral contract, *i.e.* one in which each party undertakes obligations towards the other, the common intention is that neither should be entitled E to enforce the contract unless he has performed or is ready to perform his own obligations. Conversely, a party who has caused the other to commit a breach cannot found a claim on the breach. Acquiescence by one party in non-compliance by the other would mean that the first party is estopped from raising the non-compliance as a defence to a claim by the second party. F

The test for determining whether a contract has been repudiated by way of anticipatory breach is not the repudiating party's state of mind, but on what someone in the position of the innocent party would think he intended to do. Repudiation is accordingly not a matter of intention, but one of perception. The perception is that of a reasonable person G placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach. Due to the repudiation, the innocent party is excused from any steps that he must H

Patel J

A take in preparation for his own performance and will not fall into *mora* by failing to tender performance as long as he signifies his willingness to perform.

At common law, an anticipatory breach ordinarily entitles the innocent contractor to cancel the contract. Repudiation before the due date for performance by a party prospectively in default constitutes anticipatory B breach of contract on which the aggrieved party may take action if he so elects.

An aggrieved contractor is entitled to claim damages arising from his co-contractor's breach of contract, including any breach of warranty. Special damages are ordinarily regarded in law as being too remote C to be recoverable unless, in the special circumstances attending the conclusion of the contract, it can be deduced that the parties actually or presumptively foresaw that they would probably flow from its breach (and thus, that it was within their contemplation). To ascertain what the parties actually contemplated, or may be supposed to have contemplated, the court may look to (a) the subject matter and terms of the contract D itself; (b) the special circumstances known to both parties at the time they contracted.

In the event of non-delivery of goods sold under a contract, the right of the aggrieved party to claim restitution from the defaulting party is ordinarily unchallengeable. Whether the wrongful act arises out of contract or tort, E where there has been actual pecuniary loss which is capable of precise quantification, the rule which the law adopts is *restitutio in integrum*: the injured party is entitled to claim to be placed back in the same position as he would have been in had it not been for the defendant's wrongful act.

Cases cited

F *Borrowdale Country Club v Murandu* 1987 (2) ZLR 77 (H)

Chioza v Sawyer 1997 (2) ZLR 178 (S)

Chinyerere v Fraser NO 1994 (2) ZLR 234 (H)

Collective Self Finance Scheme v Asharia 2000 (1) ZLR 472 (S)

Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (1) SA 581 (A)

G *ESE Financial Svcs (Pty) Ltd v Cramer* 1975 (2) SA 805 (C)

Evans & Plows v Willis & Co 1923 CPD 496

Green v Lutz 1966 RLR 633 (G)

Nissan Zim (Pvt) Ltd v Hopitt (Pvt) Ltd 1997 (1) ZLR 569 (S)

NUST v NUST Academic Staff & Ors 2006 (1) ZLR 107 (H)

H *Ross T Smyth & Co Ltd v T D Bailey, Son & Co* [1940] 3 All ER 60 (HL)

2011 (1) ZLR p198

Patel J

United Air Charters (Pvt) Ltd v Jarman 1994 (2) ZLR 341 (S) A

Case information

Ms *R Theron*, for the plaintiff

G Machaya, for the defendants

Judgment

PATEL J: The plaintiff in this matter claims the sum of US$24 100 as special B damages, being loss of profits arising from an alleged breach of contract by the defendants. It also claims restitution of US$10 000 paid as a deposit to the first defendant under the same contract. The defendants deny any breach on their part and allege that it was in fact the plaintiff that acted in breach of contract.

Evidence for the plaintiff C

Wayne Moss is the chief executive officer of the plaintiff company which, together with CCC Pigs (Pvt) Ltd, is a subsidiary of Colcom Foods Ltd. He testified as follows. On 18 January 2010 he signed the agreement *in casu* with the defendants. In essence, the agreement was for the sale of 500 tons of maize (at US$235 per ton) for a total purchase price of US$117 500. The D maize was to be sourced by the first defendant from the Grain Marketing Board (the GMB). On the same date, the second defendant signed a contract of suretyship guaranteeing the delivery of maize in terms of the agreement. He said that the first defendant had a credit facility with the GMB for 2 000 tons.

On 21 January he withdrew a total of US$100 000 from the bank. He paid E the agreed deposit of US$10 000 to the second defendant and then proceeded with him to the GMB with US$90 000 in cash. The GMB was not aware of the transaction and had no release orders in the name of the first defendant. He was told by the GMB's credit controller (Mawanza) that he could obtain only 300 tons of maize at a higher price of US$300 per ton if he paid the US$90 000 into the first defendant's account with the GMB. This was F because the first defendant's facility was for a maximum of 300 tons and because its account with the GMB was in debit at that time. The second defendant then undertook to resolve the matter the following day. The witness subsequently visited the GMB on four consecutive days and was given the same explanations by Mawanza. He then met the GMB marketing manager (Mandizvidza) who cautioned him against dealing with the first defendant. Mandizvidza later furnished a letter confirming the first defendant's credit standing with the GMB at the relevant time.

The plaintiff did not proceed with the transaction as it became evident that the first defendant did not have the capacity to deliver as agreed. The agreement was cancelled on 2 February and this was confirmed by the plaintiff's lawyers H

2011 (1) ZLR p199

Patel J

A in their letter of 4 March to the first defendant. The defendants offered to restitute the US$10 000 deposit in January and October 2010, but have not made any payment to date.

The plaintiff had a contract with CCC Pigs, signed immediately after the agreement with the defendants, for the onward supply of 500 tons of maize at a price of US$290 per ton. This represented a profit margin of US$55 per B ton, equating to a total profit of US$22 500. The plaintiff had arranged for the transportation of the maize at a cost of US$200 per truck. In order to meet its

contract with CCC Pigs, the plaintiff had to order 508 tons of maize from South Africa at a price of US$317 per ton.

Under cross-examination, the witness conceded that the deposit of US$10 000 C was not paid on signature of the agreement but on 21 January and that the sum of US$90 000 was not deposited into the GMB's bank account as agreed. The payments were a few days late and not strictly in accordance with the terms of the agreement. However, this was not unreasonable in the circumstances of the transaction and the second defendant had accepted the D delays. Moreover, the witness did not have the GMB's bank account details.

Odson Dzanga is the plaintiff's financial manager. He accompanied Moss to the GMB on 22 January 2010. He confirmed that the GMB would only have released 300 tons of maize upon payment of the US$90 000 in cash. He added that the first defendant's account with the GMB was in arrears standing at about US$54 000 as at 8 January 2010.

E Mandizvidza has been employed by the GMB as its marketing manager since 2003. His duties include checking the credit facilities of customers and, in conjunction with the credit controller, authorising release orders on credit sales. He corroborated the testimony of Moss and Dzanga regarding their visit to the GMB on 22 January and his discussion with Moss in the presence F of the second defendant. He also confirmed the contents of his letter of 13 May 2010 concerning GMB prices and the first defendant's credit status. Between 18 and 22 January 2010, the first defendant's credit facility was on hold because of its outstanding arrears of US$54 000 and, in any event, that facility did not enable it to buy 500 tons of maize from the GMB. At that time, the first defendant's credit facility was limited to 300 tons per month. G In practice, a credit customer wishing to increase its credit limit would have to apply in writing and the application would then be assessed by the risk management committee (the RMC) which meets once a week. In December 2009, the first defendant applied to increase its credit limit to 2000 tons per month. This application was turned down by the RMC before 18 January. H As at that date, there was no application from the first defendant to increase

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its credit limit. Even if it had lodged an application, this would only have A been processed the following week and it would not have been possible to approve any increase on 22 January. The GMB sued the first defendant for the outstanding US$54 000 in April 2010 in case No. HC 2191/10. At the present time, the first defendant is no longer a credit client of the GMB.

Wanda van den Bergh is a grain broker. Her evidence was that she introduced B Moss to the second defendant in January 2010. The agreement between them was for the first defendant to supply maize to the plaintiff for onward sale to CCC Pigs. She was not aware of the first defendant's credit facility with the GMB.

Evidence for the defendants C

Nelson Mahupete, the second defendant, is the chairman and managing director of the first defendant. His evidence was that in December 2009 he applied to the GMB's credit controllers (Mawanza and Pfumbidza) to increase the first defendant's credit facility from 300 tons to 2 000 tons per month. They agreed to increase the facility to 1 500 tons, provided the outstanding debt of US$54 000 due to the GMB was cleared. After the agreement was D concluded with the plaintiff, Moss only paid the deposit of US$10 000 after three days. Moreover, he did not effect transfer of the US$90 000 into the GMB's account but arrived at the GMB offices with the cash equivalent. He then declined to pay that amount towards the first defendant's account with the GMB. If he had done so, the first defendant would have fulfilled E the contract to deliver 500 tons of maize. As regards the debt of US$54 000 owed to the GMB, the first defendant has already paid US$33 250 towards this and the balance is to be cleared as per an agreed payment plan.

Under cross-examination, the second defendant conceded that the 500 tons of maize in question was for pig feed but denied that it was intended for CCC Pigs. He disputed the averment to that effect made by Mandizvidza F in his statement to the CID Serious Fraud Squad on 12 February 2010. As regards the release orders for 500 tons of maize, he admitted that he did not have them in his possession on signature of the agreement on 18 January or at the GMB offices on 21 January. He

has been charged with fraud in respect of the present contract. The criminal trial has commenced and is yet to be completed. G

Mawanza has been the GMB's Credit Controller since January 1999. His evidence was that GMB release orders are first signed by him and then by the Marketing Manager before they are issued. In August 2009 the first defendant applied for a credit facility and in September it was granted a facility for 150 tons per fortnight or 300 tons per month. In December H

Patel J

A 2009 the GMB released a total of 268 tons of maize to the first defendant. The latter then applied for a facility of 2 000 tons per month. On 18 or 19 December he verbally advised the second defendant that he could only approve a facility of 1 500 tons on condition that the first defendant paid an additional US$200 000 towards its account with the GMB. As at 8 January 2010, the first defendant's account was in debit of about US$54 000. On 22 B January 2010, Moss came to the GMB wanting to pay US$90 000 into the first defendant's account. The witness refused his request and said that the first defendant should make the payment itself. Moreover, it would not have been possible for Moss to have paid the GMB through its own bank account. In his statement to the CID Serious Fraud Squad dated 15 February 2010, he declared that "The accused (second defendant) has a buying limit of 150 C tonnes at a time". There was no mention of an increased limit of 1,500 tons having been conditionally approved.

Pfumbidza is an assistant credit controller with the GMB. He confirmed that an existing credit client must apply in writing for any increase in its credit facility and that, if its application is approved, the marketing department and D the client must be advised of the increased limit in writing. When the first defendant applied for an increased limit of 2 000 tons in December 2000, it was told to make an additional payment of "more than US$100 000" towards its account with the GMB. This application was not approved because the additional payment was not made. In February 2010, the second defendant approached him for a credit reference. He then wrote two reference letters E dated 5 and 8 February. He conceded that the letters were silent as to the conditions of release and the tonnage that could be released to the first defendant. Moreover, he accepted that the letters were not addressed to the plaintiff or to Moss and that they were written after the events giving rise to the plaintiff's action *in casu*.

F **Breach of agreement by plaintiff**

It is a fundamental premise of every contract that both parties will duly carry out their respective obligations. See *Green* v *Lutz* 1966 RLR 633; *ESE Financial Services (Pty) Ltd* v *Cramer* 1975 (2) SA 805 (C) at 808-809. As is explained by Christie *Business Law in Zimbabwe* at pp 106 & 119:

> "There is a presumption that in every bilateral or synallagmatic contract, *i.e.* one in which each party undertakes obligations towards the other, the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations. …
>
> … Conversely, a party who has caused the other to commit a breach cannot found a claim on the breach …."

H In terms of clause 3 of the agreement in this case, the plaintiff undertook to

Patel J

pay a deposit of US$100 000 "upon the signing of this agreement", US$90 000 A into the bank account of the GMB and US$10 000 in cash to the defendants. It is common cause that Moss did not pay the deposit of US$10 000 and did not transfer the sum of US$90 000 into the GMB's bank account upon signature of the agreement. Instead, he paid the US$10 000 deposit only on 21 January and on the same date tendered US$90 000 in cash to the GMB. B

It is therefore clear that the plaintiff did not perform its obligations strictly in accordance with clause 3 of the agreement. However, it is equally clear that the defendants accepted the late payment of the US$10 000 and, furthermore, they actively attempted to pressurise Moss to pay the US$90 000 in cash to the GMB, particularly as it was not practically possible for him to make that payment into the GMB's bank account. At that stage, he was obviously C willing and able to make

both payments in performance of the plaintiff's obligations. Given the attitude and conduct of the parties, the delay of three days in tendering the payments and the departure in the mode of payment to the GMB were not material to the plaintiff's undertakings under the agreement. And although the plaintiff did not strictly comply with its payment D obligations, such non-compliance was accepted by the defendants. In short, they positively acquiesced in that non-compliance and are therefore estopped from raising it as a defence to the plaintiff's claim.

Breach of agreement by defendants

Turning to the defendants' undertakings, these were spelt out in clauses 4 E to 7 of the agreement. Firstly, once the plaintiff had paid the deposit, the first defendant was obliged under clause 4 to cede its release orders for 500 tons of maize "which it has already received or will shortly receive from GMB". Secondly, after paying the deposit, the plaintiff was authorised by clause 5 "to immediately upload the maize from GMB". Thirdly, by virtue of clause 6.1, the first defendant warranted that "it does currently, or it will by F Tuesday 19 January 2010, have a release order or release orders in its name from GMB for 500 tons of maize". Finally, clause 7.1 entitled the plaintiff to cancel the contract "should the seller not have a release offer [*sic*] or release offers [*sic*] in its name by Friday 22 January 2010".

It was submitted for the defendants that the undertakings stipulated in the G agreement are dubious in their meaning. Consequently, inasmuch as the agreement was drafted by the plaintiff's lawyers, its provisions must be construed strictly as against the plaintiff on the one hand and leniently as against the defendants on the other. While this may be the general purport of the so-called *contra proferentem* or *contra stipulatorem* rule of interpretation, it is trite that this rule may only be invoked where the provision to be applied H

Patel J

A is ambiguous in its meaning or effect. See Christie *op cit* at pp 72 & 238.

In the instant case, I do not perceive any such ambiguity in the terms of the agreement. In my view, the combined effect of clauses 4 to 7 of the agreement was this: the defendants warranted that they either had the requisite release orders or would have them in their possession by 19 January; they undertook B to cede the release orders to the plaintiff upon payment of the stipulated deposit; the plaintiff would then take delivery of 500 tons of maize; and, in the event that the defendants did not have the release orders by 22 January at the latest, the plaintiff was entitled to cancel the agreement.

The test for determining the repudiation of a contract by way of anticipatory breach was expounded by Nienabar JA in *Datacolor International (Pty) Ltd* C v *Intamarket (Pty) Ltd* 2001 (1) SA 581 (A) at 591, as follows:

> "…the emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional D reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.
>
> … due to the co-contractant's repudiation, the innocent contractant is excused from any steps that he must take in preparation for his own performance …. In E these circumstances the purchaser will not fall into *mora* by failing to tender performance … as long as he signifies his willingness to perform."

Similarly, Lord Wright (cited with approval in *Chinyerere* v *Fraser NO* 1994 (2) ZLR 234 (H) at 250) observed as follows in *Ross T Smyth & Co Ltd* v *T D Bailey Son & Co* [1940] 3 All ER 60 (HL) at 73:

> "I do not say that it is necessary to show that the party alleged to have repudiated F should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so only in a manner substantially inconsistent with his obligations, and in no other way."

The evidence before the court shows that the first defendant did not have the requisite release orders from the GMB, either by 19 or 22 January, G nor did it hold a credit facility with the GMB for 500 tons of maize at that time. Conversely, on 21 January, the plaintiff had paid the cash deposit of US$10 000 to the defendants and was prepared to pay the remaining deposit of $90 000 in cash to

the GMB. It follows that the defendants were patently in breach of the warranty contained in clause 6.1 and, because of their evident inability to fulfil the contract timeously, they were in anticipatory breach of H their obligations under clauses 4 and 5 to cede the release orders and deliver

Patel J

500 tons of maize. Consequently, the plaintiff was entitled to withhold any A further payment under the agreement.

Cancellation of agreement

At common law, an anticipatory breach ordinarily entitles the innocent contractor to cancel the contract. As is observed by Kerr *The Principles of Contract Law* 6 ed at p 592: B

> "… repudiation before the due date for performance by a party prospectively in default constitutes anticipatory B breach of contract on which the aggrieved party may take action if he so elects."

In the instant case, clause 7.1 of the agreement expressly allowed the plaintiff to cancel the contract in the event of the first defendant's failure to have C the requisite release orders in its name by 22 January 2010. Thus, as at that date, the plaintiff was entitled to cancel on two separate grounds, *viz.* the defendants' actual breach of warranty as well as their anticipated failure to cede the release orders and deliver the stipulated tonnage of maize in breach of clauses 4 and 5 of the agreement. In the event, the plaintiff lawfully cancelled the agreement on 2 February 2010, as was confirmed by its lawyers in their D letter of 4 March 2010 to the defendants.

Claim for special damages

Clause 7 of the agreement stipulates the plaintiff's remedies in the event of cancellation. Both Ms *Theron* and Mr *Macheyo* have opted not to proffer any enlightenment on what was intended by the parties, presumably because that E intention is not easily discernible from the vague and seemingly contradictory elections set out in this clause. It then becomes necessary to consider the plaintiff's rights and remedies at common law.

It is trite that an aggrieved contractor is entitled to claim damages arising from his co-contractor's breach of contract, including any breach of warranty. As was stated in *Evans & Plows* v *Willis & Co* 1923 CPD 496 at 502: F

> "In our law if an express warranty … has been given by the seller and this turns out to be untrue an action for damages for breach of contract lies."

The plaintiff *in casu* has elected not to claim the expenses actually incurred by it in replacing the 500 tons of maize at US$317 per ton from the alternative source in South Africa. The difference in prices alone would derive a net G loss of US158 500 less US$117 500, amounting to US$ 41 000. Instead, the plaintiff claims a lesser sum of US$24 100 as special damages, based on its anticipated loss of profits consequential upon the defendants' breach of contract. This amount is calculated as follows: the gross profit of US$145 000 that the plaintiff would have received from its contract with CCC Pigs less US$120 900, being the contract price of US$117 500 under the agreement H

Patel J

A plus the notional cost of transport totalling US$3 400.

In *United Air Charters (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 341 (S) at 344, cited with approval in *Collective Self Finance Scheme* v *Asharia* 2000 (1) ZLR 472 (S) at 475, Gubbay JA (as he then was) described special damages as follows:

> B "special damages …are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, it can be deduced that the parties actually or presumptively foresaw that they would probably flow from its breach (and thus, that it was within their contemplation) ….To ascertain what the parties actually contemplated , or may be supposed to have contemplated, it is of assistance to look to: (a) the subject C matter and terms of the contract itself; (b) the special circumstances known to both parties at the time they contracted."

The evidence in this case shows that the defendants were aware of the plaintiff's onward contract with CCC Pigs and the contemplated profit that the plaintiff would accrue from that contract. They

therefore foresaw, either D actually or presumptively, that the plaintiff would suffer loss of profits in the event of their breaching their undertakings in terms of the agreement. They are accordingly liable for the special damages claimed by the plaintiff.

Claim for restitution

In the event of non-delivery of the goods sold under a contract, the right of E the aggrieved party to claim restitution from the defaulting party is ordinarily unchallengeable. As was held by Korsah JA in *Nissan Zimbabwe (Pvt) Ltd* v *Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (S) at 572-573:

> "Whether the wrongful act arises out of contract or tort, where there has been actual pecuniary loss which is capable of precise quantification, the rule which the law adopts is *restitutio in integrum* – the injured party is entitled to claim to F be placed back in the same position as he would have been in had it not been for the defendant's wrongful act."

In the present matter, the plaintiff's right to recover the deposit paid in the event of cancellation is also affirmed in clause 7 of the agreement, notwithstanding the ambiguities in that clause that I have earlier referred to. G The evidence clearly shows that the plaintiff paid US$10 000 as a deposit to the defendants and that the latter gave nothing in return for that amount. Indeed, the defendants specifically acknowledged their liability to refund the deposit in the subsequent dealings between the parties and their respective lawyers. It follows that there is no defence to the plaintiff's right to restitution H and that this claim must also be upheld.

Patel J

Suretyship and joint and several liability A

The contract of suretyship attached to the agreement, which contract was admittedly signed by the second defendant, binds him "as surety and co-principal debtor … for the due performance by the first defendant of all its obligations under the agreement". Again, "in the event of [the first defendant] failing to perform any of its obligations under the said agreement", the second B defendant explicitly accepted "liability for the balance of its indebtedness and for all interest, costs, damages, losses and expenses which [the first defendant] might be liable for in terms of the said agreement".

Having regard to these unambiguous provisions, I am unable to comprehend why it is necessary to determine the second defendant's status as surety under C the agreement or the joint and several liability of both defendants thereunder. It is undeniably clear that the second defendant stood as surety for the first defendant and thereby rendered himself liable for the full performance of the first defendant's obligations under the agreement. It is also unquestionable that the first and second defendants are jointly and severally liable for the damages and legal costs incurred by the plaintiff. D

Costs

As a rule, the courts are loath to accede to a prayer for an award of costs beyond the ordinary scale. However, this rule may properly be departed from where the unsuccessful party's conduct has been particularly unreasonable and reprehensible, for instance, by obstinately refusing to resolve the dispute E amicably and inexpensively. Such vexatious conduct fully justifies an award of costs on a higher scale in favour of the successful party. See *Borrowdale Country Club* v *Murandu* 1987 (2) ZLR 77 (H); *Chioza* v *Sawyer* 1997 (2) ZLR 178 (S); *NUST* v *NUST Academic Staff & Ors* 2006 (1) ZLR 107 (H).

The evidence before the court shows that this matter could and should have F been resolved in January or soon thereafter. It was obvious at that stage that the defendants were unable to fulfil the terms of the agreement, largely because of their own default in sustaining their credit account with the GMB. In light of their failure to deliver under the agreement, there should have been no question of their liability to refund the deposit of US$10 000 G to the plaintiff. Their exposure to an additional claim for damages might also have been averted had they restored that deposit or demonstrated their preparedness to restitute. Their recalcitrance was simply designed to delay and frustrate the plaintiff and compel it to seek recourse before this court at considerable legal expense. I am amply satisfied that they should recompense the plaintiff through a punitive award of costs. H

Patel J

A **Disposition**

Before spelling out the order of this court, I am constrained to register my deep concern about the quality of Mr *Macheyo's* legal representation of the defendants. Quite apart from his unhelpful and shabby performance in court, his closing submissions qualify as the most appalling that I have seen hitherto. They comprise almost 20 pages of ungrammatical and repetitive B drivel, punctuated with occasional forays into the irrelevant and riddled with patent falsities as to the actual testimony presented at the trial. They are as singularly unpersuasive as they are obtusely unhelpful to the court. For his gross disservice to his clients, Mr *Macheyo* ought to be penalised with an award of costs on a higher scale *de bonis propriis*. However, I am reluctant C to make such an award because it has not been sought by any of the parties. What I will do instead is to direct the Registrar to forward a copy of his submissions to the Secretary of the Law Society for its Council to be regaled by their content and to consider such disciplinary measures as it deems fit in the circumstances.

Order

D In the result, it is ordered that judgment be entered in favour of the plaintiff as against the defendants jointly and severally, the one paying the other to be absolved, for:

(i) payment of the sum of US$24 100 as special damages for loss of profits;

(ii) payment of the sum of US$10 000 as restitution;

(iii) interest on the aforesaid amounts at the prescribed rate calculated from the date of judgment to the date of full and final payment;

(iv) costs of suit on a legal practitioner and client scale.

F *Scanlen & Holderness*, plaintiff's legal practitioners

G *Macheyo Law Chambers*, defendants' legal practitioners

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Source:
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S v KUROTWI & ANOR (2) 2011 (1) ZLR 208 (H)

Citation	2011 (1) ZLR 208 (H)
Case No	Judgment No. HH-49-11
Court	High Court, Harare
Judge	Bhunu J
Heard	11 February 2011
Judgment	15 February 2011
Counsel	Mrs *F Ziyambi*, with her *C Mutangadura*, for the State *G Chikumbirike*, for the first accused *L Puriri* and *U Sakhe*, for the second accused

Case Type Criminal trial

Annotations No case annotations to date

Flynote

Criminal procedure – *charge – amendment of – accused indicted to High Court – accused not having pleaded – courses open to prosecutor wishing to amend charge*

Headnote

The two accused, along with three other persons, were indicted for trial D before the High Court on a charge of fraud. The charges against the other three persons were withdrawn before plea. The accused were then served with a fresh charge and summary of the State case, different from those served on them by the magistrate at the time they were indicted to the High Court for trial. They objected to pleading to the fresh charge, E arguing that it was improper and irregular for the prosecutor to prefer charges different from those upon which they were committed for trial without first seeking the leave of the court to do so. They argued that they had prepared their defence on the basis of the original charge, and it was therefore prejudicial for them to plead to the fresh charge which was based on a different set of facts, although the charge remained one of F fraud. It was further argued that the original charge was framed in such a way as to omit an essential element which had since been incorporated into the fresh charge. Finally, it was argued that, after the indictment, it was incompetent for the State to unilaterally amend, substitute or vary the charge and summary of the State case without the leave of the court G at a time when the trial was already "pending:" before the court.

Held, that in terms of s 202 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], where a need arises to amend the charge in the course of a trial, it is only the court which can authorize the amendment, after considering the question of prejudice. Here, the amendment was unilaterally made by the State before plea but after committal for trial H

2011 (1) ZLR p209

Bhunu J

A in terms of s 168 of the Act. Once the accused had been indicted, the High Court was seized with the matter and all procedures relating to the trial of the accused were firmly under the direction and control of the court. The accused is entitled as of right to demand that he be tried on that charge. The State is not at large at that stage to alter, amend or substitute the charge without the court's permission.

B *Held*, further, that while, in terms of s 320 of the Act, the Attorney-General has a right to withdraw a charge before plea and prefer new charges against an accused person, the condition precedent is that he must first withdraw the original charges against the accused before he can proceed to prefer fresh charges against the accused. *In casu*, a new charge could C not be brought because the original one had not been withdrawn. If the prosecutor in a High Court trial wants to amend the charge, then he must apply to the court and the court will make a determination. If he wants to prefer new charges against the accused, then he must first withdraw the original charge before plea. It is up to the prosecutor which way to proceed.

Cases referred to D

Mukuze & Anor v A-G 2005 (1) ZLR 6 (H)

R v Magiya 1959 (2) R & N 272 (FS)

Legislation considered

E Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 65, 137, 202 & 320

Case information

Mrs *F Ziyambi*, with her *C Mutangadura*, for the State

G Chikumbirike, for the first accused

F *L Puriri* and *U Sakhe*, for the second accused

Judgment

BHUNU J: The two accused persons were jointly indicted for trial in the High Court on 10 January 2011 on a charge of fraud. They were initially charged with three others whose charges have since been withdrawn before plea with a view to turning them into State witnesses.

G Following the withdrawal of charges against their co-accused, the two accused persons were served with a fresh charge and summary of the State case, different from those served on them by the magistrate at the time they were indicted to the High Court for trial.

Both accused have now objected to pleading to the fresh charge, arguing that it H was improper and irregular for the prosecutor to prefer charges different from

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Bhunu J

those upon which they were committed to this court for trial on 10 January A 2011 without first seeking the leave of the court to do so. They argued that they had prepared their defence on the basis of the original charge. It was therefore prejudicial for them to plead to the fresh charge which is based on a different set of facts although the charge remains fraud. It was further argued that the original charge was framed in such a way as to omit an B essential element which has since been incorporated into the fresh charge.

Finally, it was submitted that after the indictment it was incompetent for the State to unilaterally amend, substitute or vary the charge and summary of the State case without the leave of the court at a time when the trial was already pending before this court.

It was then proposed that the State had two choices, either to withdraw the C original charge before plea and re-indict the accused on the fresh charge or put the original charge and thereafter seek the leave of the court to amend the same in terms of s 202 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Both counsel for the defence complained that they had been given inadequate D notice to respond to the amended or substituted charge and summary of the State case as these documents had been served on then shortly before the trial had started.

In response, State counsel submitted that the purported amendment or substitution of the indictment papers was necessitated by the withdrawal E of charges against the accused's three co-accused. She submitted that the charge essentially remains the same, save for the minor amendments made to incorporate the withdrawal of charges against the accused's co-accused as well as the prospect calling them as accomplice witnesses for the State.

Section 202 of the Criminal Procedure and Evidence Act provides for the amendment of a charge. It reads: F

> **"202 Certain discrepancies between indictment and evidence may be corrected**
>
> (1) When on the trial of any indictment, summons or charge there appears to be any variance between the statement therein and the evidence offered in proof of such statement, or if it appears that any words or particulars that ought to have G been inserted in the indictment, summons or charge have been omitted, or that any words or particulars that ought to have been omitted have been inserted, or that there is any other error in the indictment, summons or charge, *the court may at any time before judgment, if it considers that the making of the necessary amendment in the indictment, summons or charge will not prejudice the accused in his defence, order that the indictment, summons or charge, whether or not it discloses an offence, be amended, so far as is necessary, by some officer of the* H

Bhunu J

> A *court or other person,* both in that part thereof where the variance, omission, insertion or error occurs and in every other part thereof which it may become necessary to amend.
>
> (2) The amendment may be made on such terms, if any, as to postponing the trial as the court thinks reasonable and the indictment, summons or charge shall thereupon be amended in accordance with the

order of the court, and B after any such amendment the trial shall proceed at the appointed time upon the amended indictment, summons or charge in the same manner and with the same consequences in all respects as if it had been originally in its amended form.

(3) The fact that an indictment, summons or charge has not been amended as provided in this section shall not, unless the court has refused to allow the amendment, affect the validity of the proceedings thereunder" (my italics).

C It is self evident that where the need to amend the charge in the course of a trial it is only the court which can authorize the amendment after considering the question of prejudice. In this case, the amendment was unilaterally done by the State before plea but after committal for trial in terms of s 65 of the Act, which provides that:

"65 Accused to be committed for trial by magistrates before the D High Court

No person shall be tried in the High Court for any offence unless he or she has been previously committed for trial by a magistrate for or in respect of the offence charged in the indictment:"

The indictment procedure is carried out in open court before a magistrate. It E therefore, constitutes notice to the accused, the court and the public that the accused shall appear for trial in the High Court for trial on charges specified at the time of committal.

The main object of the committal proceedings is to enable the accused person to prepare for his defence with regard to that charge. Of course Uchena J is correct when he held in the case of *Mukuze & Anor* v *Attorney-General* F 2005 (1) ZLR 6 (H) that once the indictment has been served on the accused and lodged with the registrar, the case becomes "pending" before the High Court in terms of s 137, which provides that:

"137 When a case is pending

As soon as the indictment in any criminal case brought in the High Court has been duly lodged with the registrar of that court, such case shall be deemed to G be pending in that court."

The natural effect of s 137 is that, once the High Court is seized with the matter pending before it, all procedures relating to the trial of the accused are firmly under the direction and control of the court. This explains why, although the State is *dominus litis,* it had to apply for an order for the withdrawal of H charges against the accused's co-accused before plea. It would have been

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grossly irregular for the State to simply drop charges against the accused's A co-accused without first obtaining a court order to that effect.

The situation cannot be different when it comes to the amendment of the charge before plea. Once an accused person has been served with an indictment and committed to the High Court for trial he is entitled as of right to demand that he be tried on that charge. The State is not at large at that stage to alter, B amend or substitute the charge without the court's permission.

A casual survey of the cases cited by counsel including *R* v *Magiya* 1959 (2) R & N 272 (FS) clearly establishes the fundamental cardinal rule that an amendment cannot be granted if it has the effect of causing prejudice to the other party. In *Magiya supra* Clayden FJ was at pains to demonstrate C that the court must ensure that the element of prejudice has been eliminated before it can allow an amendment of the charge. He observed at p 275 that:

"section 234 (1) deals with the position where there is variance between the statement of facts in the indictment and the evidence offered in proof thereof, and *allows the court to amend the indictment. at any time before judgment if there is no prejudice to the accused.* Subsection 3, which has to be considered, in D this case reads 'The fact that an indictment … has not been amended as provided in this section shall not, unless the *court* has refused to allow the amendment, affect the proceedings thereunder.'… In *R* v *Alexander* 1936 AD 445, the *court* held that subs (3) of s 225 of the Union Act only comes into play where there is a slight variance *but no prejudice whatsoever to the accused,* and that it cannot apply to a case where the variance is of importance nor can it apply to a case E where the accused is or may be prejudiced by an amendment not having been made, discussed and decided on (my italics)."

What emerges quite clearly from the above case is that it is the court and not the State which regulates the amendment of a charge once the court is seized with the matter. I could find no authority to the effect that the State is at large to amend a charge at any time after committal but before plea. F Undoubtedly this could cause severe prejudice to the accused if it were so and make nonsense of the indictment and committal proceedings. All the accused's preparations for the charge

as framed at the time of committal will count for nothing. The accused will lose his entitlement to the due protection of the law as the State could amend the charge regardless of whether or not G the amendment could cause prejudice to the accused in his defence.

In this case, the proposed amendment has been prompted by the withdrawal of charges against the accused's alleged associates in crime turned State witnesses. In my view, this is no minor amendment. This turn of events substantially alters the *status quo ante* as at the time of committal. The accused could not reasonably be expected to have prepared their defence H

Bhunu J

A with this development in mind. They thus at the very least require adequate notice to deal with this new development.

The *audi alteram partem* rule and all the rules of justice and fair play require that the accused must have a say as to whether or not the proposed amendment will cause them prejudice. The court as an independent and B impartial judicial body will then make its determination after listening to both sides of the argument.

The State belatedly sought to relay on s 320 of the Criminal Procedure and Evidence Act. In support of its proposition that the State is at large to prefer fresh charges against the accused at any time before plea. The section reads:

> C **"320 Dismissal of charge in default of prosecution**
>
> (1) If the prosecutor, whether public or private, does not appear on the court day appointed for the trial, the accused may move the court to discharge him, and the indictment, summons or charge may be dismissed and, when the accused or any other person on his behalf has been bound by recognizance for the appearance of the accused so to take his trial, may further move the court that such recognizance D be discharged, and such recognizance may thereupon be discharged.
>
> (2) Where the indictment is at the instance of a private party, the accused may move the court that the private prosecutor and his sureties shall be called on their recognizance and, in default of his appearance, that the same be estreated and the accused may also apply for an order directing the private prosecutor to pay the costs incurred by the accused in preparing his defence.
>
> E (3) *Nothing in this section shall be construed as depriving the Attorney-General, or public prosecutor with his authority or on his behalf, of the right of withdrawing any indictment, summons or charge at any time before the accused has pleaded, and lodging a fresh indictment or charge or issuing and serving a fresh summons for hearing before the same or any other competent court"* (my italics).

It is correct to say that, in terms of the above section, the Attorney-General F has a right to withdraw and prefer new charges against an accused person. It must, however, be noted that the condition precedent is that he must first withdraw the original charges against the accused before he can proceed to prefer fresh charges against the accused.

In this case, State counsel cannot prefer new charges against the accused G because she has not withdrawn the original charge.

In the final analysis, the ball is squarely in the prosecutor's court. She must decide what she wants to do. If she wants to amend the charge, then she must apply to court and the court will make a determination. If she wants to prefer new charges against the accused then, she must first withdraw the H original charge before plea.

Bhunu J

Whatever the prosecutor chooses to do, she must give notice to the other A party in terms of the prescribed time limits.

For the foregoing reasons, I consider it inappropriate and prejudicial that the accused must plead to the amended or substituted charge at this stage. The accused's objection is accordingly sustained. B

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

Chikumbirike & Associates, firstdefendant's legal practitioners

Kantor & Immerman, second defendant's legal practitioners C

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S v WAIROSI (2) 2011 (1) ZLR 215 (H)

Citation	2011 (1) ZLR 215 (H)
Case No	Judgment No. HH-53-11
Court	High Court, Harare
Judge	Uchena J and Assessors
Heard	11 February 2011
Judgment	15 February 2011
Counsel	*M Mbanje,* for the State *M Nkomo,* for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *general principles – death sentence – allocutus before passing of sentence – purpose of – courses open to court if doubts raised about extenuating circumstances or verdict*

Criminal procedure (sentence) – *offences under Criminal Law Code – murder – allocutus – purpose of – accused may state matters bearing on extenuation or guilt — right of trial court as a result thereof to recall its finding on extenuation or its verdict*

Criminal procedure (sentence) – *offences under Criminal Law Code – murder – extenuating circumstances – general principles – relevance of maturity of accused – aspects of immaturity which can be considered for the purpose of extenuation*

Headnote

"Extenuating circumstances have … been defined... as any facts bearing on the commission of the crime which reduce the moral blameworthiness of the accused as distinct from his legal culpability. In this regard a trial court has to consider:

(a) Whether there are any facts which may be relevant to extenuation such as immaturity, intoxication or provocation, (the list is not exhaustive);

(b) whether such facts in their cumulative effect had a bearing on the accused's state of mind in doing what he did;

(c) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

In deciding (c) the court exercises a moral judgment.

If its answer is yes, it expresses its opinion that there are extenuating circumstances" (*dicta per* Holmes JA in *S* v *Letsolo* 1970 (3) SA 476 (A) at 476 applied).

Uchena J

Where it is necessary for a court to consider the question of extenuation, A s 47(2)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] gives a guide to the issue of maturity. It sets the age for which capital punishment cannot be imposed at 18 years and below. This means any other aspects of immaturity which can be considered for purposes of extenuation must be those touching of the impairment of B the convicted person's mental development as opposed to his actual age. The court would thus be guided by signs of the convicted person's lack of mental development or mental illness, short of that entitling an accused to a special verdict, in determining whether or not extenuating circumstances exist in a given case.

The opportunity which is provided by r 49 (1) of the High Court (Criminal C Procedure) Rules 1964 to the accused to inform the court if he has any reason or anything to say on why the death sentence should not be imposed on him, is an important stage of a murder trial, during which the convicted person may inform the court if any of the statutory reasons for avoiding the death sentence are applicable to his case. He can, for example, tell the court that he is now over seventy years old, or was D below eighteen years at the time he committed the offence. His being allowed to say anything which will result in his not being sentenced to death enables him to raise other issues, including facts which may touch on the propriety of the conviction. He may at this stage say things which prove that there are extenuating circumstances or that he did not commit E the offence which, if believed by the court, may lead to its recalling its finding that there are no extenuating circumstances, or even the recalling of the verdict of guilt.

Cases cited

S v Chingaona S-105-02 F

S v Letsolo 1970 (3) SA 476 (A)

S v Woods & Ors 1993 (2) ZLR 258 (S)

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 47(2) G

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 337

High Court Act [*Chapter 7:06*], ss 10(2) and 10(3)

High Court (Criminal Procedure) Rules, 1964 (RGN 452 of 1964), r 49(1)

Case information

M Mbanje, for the State

M Nkomo, for the accused H

Uchena J

Judgment

A **UCHENA J**: The convicted person was convicted on the findings of fact by the majority of the court.

The majority of the court found that the convicted person took his two sons from his mother who was staying with them in Chivakanenyama village in Karoi. He had arranged with his accomplices to murder his son Ronald. He, B while traveling with the accomplices and his two sons, disembarked from the motor vehicle and walked his two sons into the bush where he struck his elder son's head with a stone. His younger son, on seeing this gruesome murder, ran away from the scene and was on the evening of the same day found wondering in the paddock of Sandara farm. A few days later the deceased's body was found in the paddock of Sandara farm. The court found C the convicted person guilty of murder with actual intent. As the trial judge I dissented, but must now consider whether or not there are extenuating circumstances, and sentence the convicted person on the facts found proved by the majority. This is because s 10(2) provides that the decision of the majority is the decision of the court. The minority decision is not relevant and must be disregarded in considering the appropriate sentence, even though D it might be the decision of the judge who must

in terms, of s 10(3) of the High Court Act [*Chapter 7*:*06*], determine the issue of sentence. Section 10 (2) and (3) of the High Court Act provides as follows:

> "(2) Any question of fact arising at a criminal trial in the High Court shall be decided by the majority of the members of the court.
>
> E (3) At any criminal trial in the High Court the judge shall have the sole responsibility for fixing the sentence, but he may consult the assessors if he thinks fit."

Extenuating circumstances

In terms of s 47(2)(b) of the Criminal Law (Codification and Reform) Act [*Cha*pter *9*:*23*], when an accused person is convicted of murder he must F be sentenced to death, unless the court finds that there are extenuating circumstances in his commission of the crime. Extenuating circumstances were, in *S* v *Woods & Ors* 1993 (2) ZLR 258 (S) as 283G, described as "any facts bearing upon the commission of the murder which reduce the moral blameworthiness of the offender as distinct from his legal culpability".

G Mr *Nkomo* for the convicted person submitted that there are extenuating circumstances in this case and based his submission on the following:

1. That the convicted person was an immature and uneducated rural man aged 27, who was influenced by his accomplices. The convicted person attended school up to grade seven. H
2. That he was most likely duped into murdering his son by his accomplices.

Uchena J

3. That he could have acted under delusions without appreciating what he A was doing.
4. That he did not benefit from the commission of the ritual murder.
5 That the convicted person's accomplices were not brought to court.

Mr *Mbanje* for the State submitted that there are no extenuating circumstances in the convicted person's case. He correctly submitted that extenuating B circumstances are circumstances in the commission of the offence which reduce the convicted person's moral blameworthiness rather than his legal guilt. He referred us to *S* v *Letsolo* 1970 (3) SA 476 (A) at 476F-H where Holmes JA said:

> "Extenuating circumstances have more than once been defined by this court C as any facts bearing on the commission of the crime which reduce the moral blameworthiness of the accused as distinct from his legal culpability. In this regard a trial court has to consider;
>
> (a) Whether there are any facts which may be relevant to extenuation such as immaturity, intoxication or provocation, (the list is not exhaustive).
>
> (b) Whether such facts in their cumulative effect had a bearing on the accused's D state of mind in doing what he did.
>
> (c) Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.
>
> In deciding (c) the trial court exercises a moral judgment. If its answer is yes it expresses its opinion that there are extenuating circumstances."

See also John Reid Rowland's *Criminal Procedure in Zimbabwe* at p 25-35. E

On the convicted person's immaturity, Mr *Mbanje* referred the court to the case of *S* v *Chingaona* S-105-02, where a 20-year-old with four years of secondary school education was held not to be immature for purposes of extenuation. In my view s 47(2)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9*:*23*], gives a guide to the issue of maturity. It sets the age for which capital punishment cannot be imposed at 18 years and F below. This means any other aspects of immaturity which can be considered for purposes of extenuation must be those touching on the impairment of the convicted person's mental development as opposed to his actual age. The court would thus be guided by signs of the convicted person's lack of mental development or mental illness short of that entitling an accused to G a special verdict, in determining whether or not extenuating circumstances exist in a given case.

The convicted person's rural background and limited education cannot *per se* be extenuating unless his conduct in the commission of the offence shows signs of immaturity. On the contrary, the convicted person's conduct proves that he was conscious of what he was doing and determined to achieve what H

Uchena J

A he had set out to do. He went to his parent's home in Chivakanenyama village in Karoi, where his mother strenuously discouraged him from taking the children away. He resisted her and gave reasonable arguments for doing so. He argued that he had his employer's letter, which he could use to influence his obtaining the birth certificates in the absence of his former wife. This, demonstrates, his ability to strategize and manipulate systems B to his advantage using the status of his employer, who was the Member of Parliament for the area, whom he must have asked to write such a letter for him. If he lied to his mother or the court about the letter it again shows an orderly evasion of his mother's inquiry, consistent with a developed mind. His repeated visits to the police about a child he had murdered again reveals C a clear attempt to divert attention from himself, consistent with a properly developed mind. If he had been manipulated by people he blames for the murder he would have said so instead of strenuously denying that he was involved. The accomplices were not present when he strenuously resisted his mother's attempts at discouragement. If he was of undeveloped mind, he would not have outwitted his mother towards the achievement of his D intended purpose. This means he was not duped by his accomplices, nor did he act under delusions.

The fact that the convicted person may not have benefited from the ritual murder, was not canvassed during the trial. The State's allegation that he was to be paid Z$40 million was not proved. Tawanda, who was said to be the E source of that information, did not testify to that effect. That, however, is not an issue for extenuation as it happened after the murder. What is of interest to this court is the convicted person's moral blameworthiness at the time he committed the offence. Once it is proved that he struck the deceased with a stone causing his death then the existence of his moral blameworthiness would have been satisfied, whether or not his accomplices eventually paid F him the agreed price for his effort in committing the crime.

The fact that his accomplices were not brought to court does not have a part in deciding whether or not he committed the crime in extenuating circumstances. It is an event which took place after the commission of the crime. They may well be tried separately for their part in the crime. What is relevant is the role each of them played in the commission of the crime. Each participant's acts G determines his moral blameworthiness. The convicted person's acts, described above, confirm that there are no extenuating circumstances in this case.

This was a clearly planned murder from which the convicted person refused to be dissuaded by his mother's strenuous effort to stop him from taking the children away. He therefore was determined to commit the offence. We are H therefore satisfied that there are no extenuating circumstances in this case.

Uchena J

The sentence A

After the court found that there were no extenuating circumstances, the Registrar in terms of s 49(1) of the High Court (Criminal Procedure) Rules 1964, asked the convicted person if he knew of any reason, or had anything to say, as to why the death sentence should not be passed on him. The accused said his counsel should make submissions on his behalf. Mr *Nkomo* sought B leave to approach his client which was granted. After a brief conversation with the convicted person, he informed the court that the accused was to address the court in person.

The convicted person then asked the court to consider that he was married and had an extended family to look after. He submitted that he did not commit C the offence, as he only wanted to obtain birth certificates for his children. He summed up by asking the court to pass a lenient sentence.

Mr *Mbanje,* for the State, submitted that what the convicted person said was merely mitigatory and does not entitle the court to pass any sentence other than that of death. Mr *Nkomo* said he had no comments on the submissions D made by his client.

The opportunity given to the convicted person to inform the court of any reason, or say anything on why the death sentence should not be imposed on him, is an important stage of a murder trial, during which the convicted person may inform the court if any of the statutory reasons for avoiding the death sentence are applicable to his case. He can, for example, tell the E court that he is now

over 70 years old, or was below 18 years at the time he committed the offence. See s 337 of the Criminal Procedure and Evidence Act [*Chapter 9*: *07*] and s 47(2)(a) of the Code. His being allowed to say anything which will result in his not being sentenced to death, enables him to raise other issues, including facts which may touch on the propriety of F the conviction. He may at this stage say things which prove that there are extenuating circumstances, or that he did not commit the offence which, if believed by the court, may lead to its recalling its finding that there are no extenuating circumstances, or even the recalling of the verdict of guilt. See John Reid Rowland *Criminal Procedure in Zimbabwe* at p 25-39.

The convicted person in this case did not advance any statutory reason why the G death sentence should not be imposed on him. He did not advance anything warranting the recalling of the court's findings on extenuating circumstances or the conviction. He merely repeated what he had said in his defence which was not believed by the court. There is therefore no basis on which this court can pass a sentence other than the death sentence. H

2011 (1) ZLR p221

Uchena J

A The convicted person is therefore returned to custody for the sentence of death to be executed according to law.

D *Donsa-Nkomo & Mutengi,* accused's legal practitioners

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Source:
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MORTEN v MORTEN & ORS 2011 (1) ZLR 222 (H)

2011 (1) ZLR p222

Citation	2011 (1) ZLR 222 (H)
Case No	Judgment No. HH-51-11
Court	High Court, Harare
Judge	Mawadze J
Heard	27 January 2011; 1 February 2011; 4 February 2011
Judgment	15 February 2011
Counsel	*C Chinyama,* for the applicant *B Diza,* for the first respondent *J C J Lewis*, for the second and third respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Administration of estates – *family of deceased person – right of spouse and children of deceased person to occupy immovable property occupied by deceased immediately before death – limitations on such right – rights of other persons in the property not affected* D

Headnote

The applicant was the widow of a man who owned a home in a retirement village. The village was run in terms of the constitution of the association which administered the village, as well as a notarial deed of servitude registered with the Deeds Office regulating the rights and affairs of the members of the village. Under the constitution of the association, E the applicant was below the minimum age for residence in the village. Because of the applicant's age, and for other reasons, the association sought to remove the applicant from the village. At first the second and third respondents locked her out of her house, but she was restored with the help of the police. However, her application for an interdict to prevent the respondents from removing her failed on the grounds that F she had not established a right to be in the house. The first respondent, the administrator of the applicant's late husband's estate, was issued letters of administration in respect of the estate and together with the second and third respondents ejected the applicant from the house. The applicant sought an urgent spoliation order. The application was G resisted on various grounds, including the argument that the application was bad in law.

Held, that under s 10 of the Deceased Persons Family Maintenance Act [*Chapter 6:03*], the spouse of a deceased person has the right to occupy any immovable property which the deceased had the right to occupy and which the surviving spouse was ordinarily occupying immediately H

Mawadze J

A before the death of the deceased. However, under s 11, this right does not derogate from or prejudice in any way the rights of "any other person whomsoever which existed prior to the date of the death of the deceased person". Under the constitution of the association, the applicant had no right to occupy the house. This did not mean, though, that the B respondents were entitled to eject her from the flat without following due process of the law. The provisions of the constitution and the notarial deed of servitude dealt with the applicant's right to *habitatio* and could not be elevated to the status of a court order authorising the eviction of the applicant. The respondents should seek to enforce their rights C through the courts.

Cases cited

CFU & Ors v Min of Lands & Ors 2010 (2) ZLR 576 (S)

Chisveto v Min of Local Govt 1984 (1) ZLR 248 (H)

Legislation considered D

Deceased Persons Family Maintenance Act [*Chapter 6:03*], ss 10(1), 10(2) & 11

High Court Rules 1971 (RGN 1047 of 1971) , r 248(1)

Case information

E *C Chinyama,* for the applicant

B Diza, for the first respondent

J C J Lewis, for the second and third respondents

Judgment

MAWADZE J: This is an urgent chamber application for a provisional order F whose interim relief sought is couched as follows:

> "Interim Relief Granted
>
> That pending the return date respondent be and are hereby ordered to restore vacant possession and occupation of Flat 112 Dandaro Village, Borrowdale, Harare to the applicant with immediate effect".

G The terms of the final order are construed as follows:

> "1. That the first and second and third respondents be and are hereby ordered not to resort to self help and in so doing evict the applicant or lock her out or deny her access to Flat 112 Dandaro Village

Borrowdale, Harare without an order of the court authorising them to do so.

2. That the first and second respondents jointly and severally with one paying H the other to be absolved, pay costs of suit on attorney client scale".

2011 (1) ZLR p224

Mawadze J

Background facts A

It is unfortunate and perhaps deliberate that the applicant did not seek in her founding affidavit to disclose all the relevant background information related to the history and facts of this matter. Mr *Chinyama* for the applicant profusely apologised for the omission but was unable to give a plausible explanation for that, considering that he had handled divorce proceedings B and three other urgent applications in this court involving the applicant, her late husband and virtually the same respondents. The need to state relevant and obvious background facts of the matter in any proceedings, moreso in an urgent chamber application, cannot be over-emphasised.

The brief facts of the matter which I discerned after a full hearing can be summarised as follows: C

The applicant married one Baker Eddy Morten at Harare on 16 February 2000 in terms of the Marriages Act [*Chapter 5:11*]. Mr Baker Eddy Morten owned among other properties two residential flats, numbers 112 and 243 at Dandaro Village, Borrowdale, Harare. Mr Baker Eddy Morten died in Florida USA on 9 August 2010 and his daughter, the first respondent Marlene D Denise Kemi Morten, a practising lawyer in the USA was on 20 January 2011 appointed executrix testamentary of Baker Eddy Morten's estate.

The second respondent is the manager of the third respondent, an association of home owners at Dandaro Village governed by the Dandaro Home Owners Association constitution and also by a notarial deed of servitude registered E with the Deeds Office regulating the rights and affairs of the members of Dandaro Village.

In August 2009 the late Baker Eddy Morten was in the USA receiving treatment after a road traffic accident. The applicant had returned to Zimbabwe from the USA, leaving Baker Eddy Morten in the USA after being refused a residence permit by the USA authorities. The applicant on 12 November F 2009 filed for divorce in this court, but the divorce proceedings were not brought to finality as Baker Eddy Morten died when the divorce proceedings were at pre-trial conference stage. Apparently when the late Baker Eddy Morten was in the USA for treatment the applicant moved into Flat No. 112 Dandaro Village, Borrowdale, Harare on 31 July 2010. This was after one G M Pisani who had been occupying that flat had been removed by the first respondent, who had been given power by Baker Eddy Morten to administer his affairs in Zimbabwe.

On 10 December 2010 (Baker Eddy Morten had died on 9 August 2010), the Dandaro Home Owners Association, through the second respondent, wrote a letter to the applicant "ordering her" to vacate Flat 112 Dandaro Village H

2011 (1) ZLR p225

Mawadze J

A forthwith. Two reasons were given in that letter. First, that the applicant was under age to be resident at Dandaro Village in terms of the third respondent's constitution. Second, that the applicant had been, over an extended period of time since taking occupation of Flat 112, proved to be a nuisance to other residents and that the third respondent could no longer tolerate her.

The applicant responded to this ultimatum to vacate Flat 112 through her B legal practitioners by stating that the second and third respondents could not resort to self-help by seeking to unlawfully kick her out from Flat 112 without a proper court order. The applicant made it clear that she was staying put at Flat112 on the basis of being the surviving spouse of Baker Eddy Morten.

The second and third respondents disregarded the applicant's protests and C on 14 December 2010 the applicant wrote through her legal practitioners to the first respondent's legal practitioners, raising the issue that the first respondent, acting in concert with the second and third respondents, had evicted the applicant on 13 December 2010 from Flat 112 by locking her out without a valid court order. The applicant approached the police at Borrowdale D station for help as she argued that the conduct of the first, second and third respondents amounted to spoliation. It would appear the

applicant, with the help of the police, was able to re-occupy Flat 112 Dandaro. However the applicant's joy was short-lived as she was advised by the respondents to vacate Flat 112. This prompted the applicant to file an urgent chamber application on 15 December 2010 case No. HC 9293/10 seeking an interdict E against the first, second and third respondents on the basis of her right as a surviving spouse to stay in Flat112 Dandaro and not to be evicted without a valid court order.

On 15 January 2011 Hungwe J, who dealt with the urgent chamber application HC 9293/10, dismissed the application with costs on the basis that the F applicant had failed to establish a *prima facie* right to reside at Dandaro Village, taking into account the constitutional restrictions imposed relating to age, and absence of written permission by the third respondent. Hungwe J did find that the balance of convenience was in favour of the refusal of the interim interdict. In short, therefore Hungwe J in HC 9293/10 declined to grant the applicant an interdict against the first, second and third respondents.

G On 20 January 2011 the first respondent, who was appointed executrix testamentary, was issued with letters of administration by the Master of the High Court DR 1718/10. On the same day, armed with the letters of administration, the first respondent, with the assistance and indulgence of the second and third respondents, now buoyed by this outcome of the case H HC 9293/10 by Hungwe J, proceeded to eject the applicant from Flat112

Mawadze J

Dandaro Village. This then prompted the applicant on 24 January 2011 to A again approach this court on an urgent basis seeking the provisional order referred to *supra*, which is now the subject matter of this judgment.

The basis of the applicant's case can be summed up as follows:

1. that,by evicting her from Flat112, the respondents have committed an act of self-help which is unlawful and have therefore illegally removed the B applicant and her belongings from Flat112 in her absence and without her consent;
2. that by removing the applicant's property from Flat112 and kicking her out, thus barring her from entering the Flat, the first, second and third respondents committed an act of spoliation which entitles the applicant C to the remedy of *mandamentum van spolie.*
3. that if the interim relief is not granted irreparable harm would be occasioned as applicant's property is unsecured, the applicant has no other place to stay and that she has no other remedy.

The application is opposed.

At the commencement of the hearing the first, second and third respondents D raised points *in limine*, which they submitted, if properly considered, dispose of the matter without consideration of the merits of the case.

Mr *Diza* and Mr *Lewis* for the respondents basically raised three issues as preliminary points which are:

(a) that the application is fatally defective as the applicant failed to cite the E first respondent in her official capacity/representative capacity and failed to comply with the peremptory requirements of r 248 of the court.

(b) the principle of *res judicata:* that the same issues raised by the applicant in this urgent application were dealt with and pronounced upon by Hungwe J in HC 9293/10 hence this court cannot be asked to revisit F the same issues as it were.

(c) that the application is bad at law, moreso in light of recent a Supreme Court judgment *Commercial Farmers Union & Ors* v *Minister of Lands and Rural Resettlement and Ors* 2010 (2) ZLR 576 (S) which clearly stated that spoliation cannot confer jurisdiction where none exists and G that the common law remedy cannot override an Act of Parliament nor can a court protect a party defying the law. The contention by the second and third respondents is that the notarial deed of servitude registered in the Deeds Office under MA 406/2004 under the Deeds Registry Act, which is an Act of Parliament, cannot be rendered nugatory by the relief sought by the applicant. H

Mawadze J

A Let me deal with the points *in limine* raised by the respondents *seriatim.*

Points *in limine*

(a) **Is the application fatally defective?**

The issues raised by the respondents in this respect, as already said ,are two-fold.

B I am however not persuaded by the submission that the non-citing of the first respondent in her capacity as executrix testamentary of the estate is fatal to the application. The first respondent concedes that she evicted the applicant from Flat112 on 20 January 2011. In my view, the fact as to whether she did so in her personal or representative capacity is neither here nor there and C should not distract from the conduct complained of which is not in issue. In any case, Mr *Chinyama's* contention that the applicant was unaware that the first respondent had been issued with letters of administration has not been controverted.

The second aspect relates to non compliance with r 248(1) of the High Court D Rules, which provides:

> **"Applications involving Deceased Estates, Liquidators or Trustees**
>
> (1) In the case of any application in connection with –
>
> (a) the estate of a deceased person; or
>
> (b) …….
>
> E a copy of the application *shall be served on the Master not less than ten days before the set down for his consideration,* and for report by him if he considers it necessary or the court requires such a report" (emphasis mine).

It is clear that the requirements of r 248(1) are mandatory. It is also common cause that Flat 112 now forms part of the deceased estate of the late Baker Eddy Morten. It is not in issue that the applicant has not cited the Master in F this application and has not complied with r 248(1).

In my considered view, r 248(1) deals with applications in connection with an estate of a deceased person. *In casu* the application is not in connection with the estate of the deceased but relates to the alleged unlawful conduct of the respondents. The nature of the relief sought is not by any stretch of imagination related to the deceased estate nor can it be argued that if granted G that would adversely affect the proper administration of the estate of the late Baker Eddy Morten. In my considered view, the non-citation of the Master in this application is not an issue at all. In view of the nature of the relief sought, citing the Master would serve no purpose. In fact, I am satisfied, after a careful consideration of r 248(1), that it is inapplicable in the instant H case, hence I find no merit in this argument.

Mawadze J

(b) **Res judicata** A

As already explained this relates to the judgment by Hungwe J in HC 9293/10. Hungwe J's judgment was delivered on 20 January 2011 and this urgent chamber application was filed on 24 January 2011. However, during the course of the hearing of this application and on 1 February 2011 Mr Chinyama filed an appeal with the Supreme Court against the judgment by Hungwe J in HC B 9293/10 (appeal No. 23/11). The effect of such an appeal, albeit noted during the hearing of this matter and most probably for purposes of countering the point in limine (res judicata) raised by the respondents, remains self evident in that it suspends the operation of the judgment HC 9293/10.

My view is that, even if no such an appeal had been noted, the plea of res judicata would not be available to the respondents. It is clear that Hungwe J in C HC 9293/10 states that the applicant had no right to stay in Flat 112 Dandaro Village. To that extent, the issue of whether the applicant has a right to stay in that Flat can be said to have been adjudicated upon and settled. However, the issue before Hungwe J, though involving the same parties and the same flat related to an interdict which is different from the relief being sought by D the applicant in casu. For those reasons I find no merit on the issue relating to the principle of res judicata raised by the respondents.

(c) **Whether that application is bad at law**

My view is that this argument cannot be dealt with as a point in limine but rather relates to the merits of the application. E

I now proceed to deal with the merits of the matter.

Merits

From the background facts of the matter I have outlined it is clear to my mind that the relevant facts to this application are largely common cause. These facts are: F

(i) that the applicant is the surviving spouse of the late Baker Eddie Morten. When Baker Eddie Morten passed on 9 August 2010 the marriage between the parties had not been dissolved by any competent court.

(ii) that the applicant had been residing in Flat 112 Dandaro Village from 31 July 2010 and was only "evicted" from the Flaton 20 January 2011 after a period of six months.

(iii) that the applicant did not consent to vacate Flat 112 Dandaro Village but was locked out by the first, second and third respondents in her absence.

(iv) that the first, second and third respondents did not seek and obtain an eviction order from the court before ejecting the applicant from Flat 112 Dandaro Village. H

Mawadze J

A It is incorrect to submit that Hungwe J in HC 9293/10 ordered the eviction of the applicant. It follows, therefore, that it would not be tenable to argue that the applicant was lawfully evicted in accordance with an order by Hungwe J in HC 9293/10. The fact of the matter is that Hungwe J in HC 9293/10 merely pronounced on the rights of the parties in relation to Flat 112 Dandaro Village. Hungwe J did not issue an order to evict the applicant and no such B order was sought before him but the relief sought was an interdict.

The fact of the matter is that the judgment by Hungwe J in HC 9293/10 did not, in my view, allow the respondents to evict the applicant without a valid court order to that effect.

The next issue to consider therefore is whether the respondents acted upon C any other lawful basis when they evicted the applicant on 20 January 2011.

Section 10 of the Deceased Persons Family Maintenance Act [*Chapter 6:03*] provides as follows:

> **"10 Protection of deceased person's family and property.**
>
> (1) Notwithstanding any law, including customary law, when any person dies, any surviving spouse or child of such person shall, subject to section eleven D have the following rights –
>
> (a) the right to occupy any immovable property which the deceased had the right to occupy and which such surviving spouse or child was ordinarily occupying immediately before the death of the deceased.
>
> (b) … E
>
> (c) …
>
> (d) …"

In terms of s 10(2) non-compliance with the provisions of s 10(1) invites criminal sanctions.

As already stated, the applicant is Baker Eddy Morten's surviving spouse and Baker Eddy Morten owned Flat 112 Dandaro Village Borrowdale, Harare. F It is common cause the applicant was occupying Flat 112 Dandaro Village immediately before the death of the deceased. The applicant therefore is protected in terms of s 10 of the Deceased Person's Family Maintenance Act subject to s 11 of the same Act.

Section 11 of the Deceased Person's Family Maintenance Act states:

> G **"11 Restrictions on exercise of the rights conferred by section ten.**
>
> The rights conferred by section ten shall –
>
> (a) not derogate from or prejudice in any way the rights of the mortgagor, landlord, creditor *or any other person whomsoever which existed prior to the date of the death of the deceased person.* (emphasis mine).

(b) terminate upon completion of the administration of that portion of the H deceased estate to which those rights relates.

2011 (1) ZLR p230

Mawadze J

(c) be subject to the requirement that the surviving spouse or child concerned A shall occupy or use the property in question without detriment or neglect, reasonable wear and tear being excepted".

Mr *Lewis* in argument submitted that the applicant's right to occupy Flat 112 Dandaro Village is subject to the exception in s 11(a). I associate myself with that view and I believe the effect of the Dandaro constitution and the B notarial deed of servitude on applicant's right to occupy Flat 112 Dandaro were issues ably dealt with by Hungwe J in HC 9293/10.

The gravamen of the matter is whether the respondents acted within the confines of the law when they ejected the applicant.

The legal requirements for the relief sought by the applicant are well laid out C in the case of *Chisveto* v *Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H) at 250A-E:

> "It is a well recognised principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing …. that *spoliatus ante omnia restituendus est* … Lawfulness of possession does not enter into it. The purpose of the *mandament van spolie* is to preserve law and order and to D discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of claims of each party. Thus it is my view that the lawfulness or otherwise of the applicant's possession of the property in question does not fall for consideration at all".

I am satisfied that the applicant has proved both factual possession and E wrongful dispossession in respect of Flat 112 Dandaro Village. Even if one were to assume that the applicant's right to occupation of the Flat 112 is as per Hungwe J's judgment (I share similar views) in HC 9293/10, I do not believe that the respondents were entitled to eject her from the Flat without following the due process of the law. The provisions of the Dandaro constitution and the notarial deed of servitude deal with the applicant's right F to *habitatio* and cannot be elevated to the status of a court order authorising the eviction of the applicant. I associate myself with the incisive views expressed by Chidyausiku CJ in the matter of *Commercial Farmers Union & Ors* v *Minister of Lands and Rural Resettlement & Ors* 2010 (2) ZLR 576 (S) at 596F: G

> "The holders of offer letters, permits or land settlement leases [one may read to include Dandaro Constitution, the notarial deed of servitude and letters of administration] are not entitled as a matter of law to self help. They should seek to enforce their right of occupation through the courts …"

I am therefore satisfied that the applicant is entitled *prima facie* to the interim order she seeks. H

2011 (1) ZLR p231

Mawadze J

A Accordingly, I make the following order:

1. That pending the return date the respondents be and are hereby ordered to restore vacant possession and occupation of Flat112 Dandaro Village, Borrowdale, Harare to the applicant with immediate effect.
2. This provisional order shall be served on all respondents in terms of the B rules of this Honourable Court.

Chinyama & Partners, applicant's legal practitioners

Musunga & Associates, first respondent's legal practitioners

C *Advocate J C J Lewis*, counsel for second & third respondents

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/WELLCROFT INVESTMENTS (PVT) LTD v MODERN CARPETS (PVT) LTD 2011 (1) ZLR 232 (H)

WELLCROFT INVESTMENTS (PVT) LTD v MODERN CARPETS (PVT) LTD 2011 (1) ZLR 232 (H)

Citation	2011 (1) ZLR 232 (H)
Case No	Judgment No. HH-38-11
Court	High Court, Harare
Judge	Hlatshwayo J & Kudya J
Heard	27 January 2011
Judgment	16 February 2013
Counsel	*I Ahmed*, for the appellant *R M Fitches*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal – *notice – validity – failure to state date of judgment appealed against or court from which judgment emanated – purpose of such requirements – appellant stating name of magistrate and relevant dates ascertainable from record – failure condoned* D

Landlord and tenant – *lease – termination – notice – grounds for ejectment – "good and sufficient grounds" – what landlord must show – what tenant must show in order to resist claim for ejectment*

Landlord and tenant – *lease – notice of termination – validity – notice in respect of commercial premises wrongly citing regulations applicable to* E *dwelling houses – main purpose of notice otherwise clear – notice valid*

Headnote

An eviction order had been granted against the appellant following notice of termination of lease of commercial premises, which the respondent wanted for its own use. The respondent had given notice, purportedly F in terms of the Rent Regulations 2007 (which regulate the lease of dwellings) instead of the Commercial Premises (Rent) Regulations 1983. The appellant argued that the notice of termination was invalid and that the respondent failed to establish good and sufficient grounds to justify the eviction of the appellant. The respondent raised two points *in limine*, one of which it abandoned, the other being that the notice of appeal was G invalid, in that it did not, as required by r 29(1) of the Supreme Court Rules 1964, set out in its preamble the date of the judgment appealed against nor the court from which the judgment emanated. The notice stated the name of the magistrate and the date on which the appellant became aware of the judgment, which was the day after it was delivered.

Held, that the purpose of requiring the date when the decision appealed H

Kudya J

A against to be stated in a notice of appeal is to enable the respondent and the court to determine *ex facie* the notice of appeal whether the provisions of the rules prescribing the time limit in

which the appeal should be instituted and the notice of appeal filed delivered and filed, were complied with. Where the notice of appeal did not state the date on which the judgments was given, but where the date could be ascertained B from the record and it was clear that the appeal was noted timeously, it would not have been in the interests of justice to strike off the appeal for the appellant to apply for extension of time to comply with the rule and condonation for non-compliance. Similarly, where the notice of appeal did not state the court from the judgment emanated but did state C the name of the magistrate, there was substantial compliance with the rules and no prejudice resulted to the respondent.

Held, further, that it was not necessary for the lessor to state in the notice the statute under which he was giving the lessee notice to vacate. The main apparent purpose of the notice was to advise the lessee of the termination of the lease at the expiration of three months. An objective assessment D of the lessee's behaviour showed that it perfectly understood that it was being requested to leave the premises at the end of the notice period.

Held, further, that for the court to find that the lessor had good and sufficient grounds to order the ejectment of the tenant, the court is enjoined to predominantly look at the needs and circumstances advanced by the E lessor, to the exclusion of the needs and circumstances of the lessee. All that the respondent was required to do in the court *a quo* was to bring some small measure of evidence to demonstrate the genuineness of its assertion that it required the premises for its own use. For the appellant to defeat the claim, it would have had to show that the respondent did not genuinely desire the use the premises but wanted to evict the appellant, F firstly, because it had declined to pay a higher rental and, secondly, in order to lease the premises to a tenant who was willing to pay a higher rental. In the absence of such evidence the appeal must fail.

Cases referred to

Bestafoam (Pvt) Ltd v Tynedale (Pvt) Ltd S-54-88

G *Boerne v Harris* 1949 (1) SA 793 (A)

Boka Enterprises (Pvt) Ltd v Joowalay & Anor 1988 (1) ZLR 107 (S)

Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd 1986 (2) ZLR 246 (S)

Film & Video Trust v Mahovo Enterprises (Pvt) Ltd 1993 (2) ZLR 191 (H)

H *Johannesburg City Council v Feinstein & Anor* 1953 (3) SA 576 (W)

2011 (1) ZLR p234

Kudya J

Matanhire v BP & Shell Mktg Svcs (Pvt) Ltd 2004 (2) ZLR 147 (S) A

Moffat Outfitters (Pvt) Ltd v Hoosein & Ors 1986 (2) ZLR 148 (S)

Newman v Biggs 1945 EDL 51

Legislation considered

Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), s 22(2) B

Supreme Court Rules 1964 (RGN 380 of 1964), r 29(1)

Case information

I Ahmed, for the appellant

R M Fitches, for the respondent

Judgment

KUDYA J: This is an appeal from the judgment of a magistrate sitting at C Harare on 5 August 2010 in which she granted an order of eviction in favour of the respondent against the appellant.

On 1 July 2010 the respondent filed a court application for the eviction of the appellant. The appellant opposed the application. The matter was determined on the basis of the averments made in the affidavits filed of record by the D parties. On 23 March 2010, the respondent wrote to Mr

Ameet Hargovan at the leased premises, giving the appellant three calendar months' notice, from 1 April to 30 June 2010, purportedly in terms of the Rent Regulations SI 32 of 2007 to vacate the premises. In that letter it was indicated that the parties executed the lease in 2007. The sole reason advanced therein was that the respondent wanted to take full occupation of the premises. The letter E was responded to by Hargovan on the appellant's letterhead on 10 May 2010. The appellant refused to vacate the property, alleging that it was being victimized for declining to accede to a rental increase. It did not disclose the date on which the rental increase had been proposed, but in its reply of 14 May the respondent disclosed that the letter declining the increase had been written by the respondent on 12 October 2009. It denied that the notice was F actuated by the refusal to pay higher rentals but by the desire to fully utilize and occupy the property in line with the respondent's board resolution of 4 January 2010. It averred that the appellant was aware at the time the lease was executed that the respondent could not fully use the property. On 17 May the appellant responded and remained adamant that it would not be G vacating the premises come 30 June.

The founding and opposing affidavits captured the essence of the above mentioned correspondence. In the answering affidavit, in response to an averment that the respondent sought to evict the appellant in order to lease out the property to another tenant at a higher rental, the respondent denied the existence of a rent dispute. It also disputed that it intended to sublet the H

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A property to a third party. It maintained that the premises were required for its own use. It emphasised that it initially used the premises before its business sufferred a down turn during the hyperinflationary era, which caused it to lease them to the defendant, but with the new economic dispensation its business had improved prompting it to seek repossession of the premises. In oral argument in the court *a quo*, the respondent's counsel made the B following submission:

> "The reason for the application is that the applicant now wants the premises for its own use. The applicant had leased the premises to the tenant when it was not viable for it to use the premises in issue. Things have changed for the better; it wants to use the premises for its expanding business. The applicant's current business is being carried out from the back office of the premises and now the C applicant wants her front office."

The appellant maintained its stance that the respondent did not require the premises for its own use but wanted it evicted in order to lease the premises at a higher rental to a new tenant.

The court *a quo* was satisfied on the papers that the respondent genuinely sought the eviction so that it would utilize the premises. In its notice of appeal, the appellant attacked the judgment on two broad grounds: firstly, that the notice to terminate the lease was invalid and, secondly, that the respondent failed to establish good and sufficient grounds for the repossession of the premises. The respondent, however, raised two preliminary issues against E the validity of the appeal.

The first was that the notice of appeal was invalid for want of compliance with r 29(1) of the Supreme Court Rules which was incorporated for appeals from the magistrates court to the High Court by the Magistrates Court Amendment Act No. 9 of 1997. It sets out six mandatory requirements which must be stated in a notice of appeal. In the instant case, the notice of appeal fell short F of the requirements of r 29(1)(a) in that it did not set out in its preamble the date on which the judgment appealed against was granted, nor the court from which such judgment emanated. All it did was state the name of the magistrate who delivered the judgment and the date of 6 August 2010, that being when the appellant became aware of the judgment. It will be recalled that the judgment was granted on 5 August 2010 by the magistrate sitting G at Harare magistrates court. Mr *Fitches*, for the respondent, submitted on the authority of *Matanhire* v *BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S) that the notice of appeal was a nullity. It is correct that the failure to adhere to the strict requirements of r 29 fatally affected the validity of the notice of appeal in that case. The rationale for requiring the date of H judgment was spelt out by Malaba JA, as he then was, at 150A in these terms:

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> "The purpose of requiring the date when the decision appealed against to be stated A in a notice of appeal is to enable the respondent and the court to determine *ex facie* the notice of appeal whether the provisions of r 5 of the [Supreme Court (Miscellaneous Appeals and Offences)] Rules prescribing the time limit in

which the appeal should be instituted and the notice of appeal filed delivered and filed, were complied with."

In the present matter, I decided to condone the failure to rigidly follow the B said rule, for two reasons. The first was that, while on the record cover the trial magistrate endorsed that she granted the order of eviction on 5 August and the handwritten reasons for judgment and the typed judgment was dated 5 August, the typed order has the date stamp of 6 August. Order 31 r 1(a) provides that a notice of appeal should be filed within 21 days of the date of judgment. *In casu* the notice of appeal was filed on 11 August. I did not C believe it would have been in the interests of justice to strike off the appeal for the appellant to apply for extension of time to comply with the rule and condonation for non-compliance. As regards the failure to indicate the name of the court, I believe that the presence of the trial magistrate's name is in substantial compliance. The second was that such a failure did not prejudice D either party, the court or the due process.

The second preliminary point raised by the respondent was that the appeal lapsed for failure to furnish security in terms of Order 32 r 2 of the Magistrates Court (Civil) Rules. Mr *Fitches* abandoned this submission when the letter filed with the clerk of court on 11 August 2010, which was always part of E the appeal record, was brought to his attention. In that letter the appellant undertook to pay the costs of the preparation of the appeal record. The rule in question reads:

"(2) An appeal shall be noted by –

(a) the delivery of notice; and

(b) unless the court of appeal otherwise directs, giving security for – F

(i) the respondent's costs of appeal to the amount of one hundred dollars;

(ii) the costs of the preparation of a copy of the record to the amount estimated by the clerk of the court:

Provided that a clerk of the court may, in his discretion, accept a written undertaking from the appellant to pay for the costs of the preparation of G the record.

It seems to me that the in the absence of a dispensation from the appeal court against the provision of security of the respondent's costs of appeal and the cost of the record, it is mandatory that the appellant makes provision for the security of costs under both heads. The wording and positioning of the proviso indicates that it applies to the costs of the preparation of the H

A record only and not to the provision of the security of the respondent's costs of appeal. The undertaking given by the appellant was for the costs of the security of the preparation of the appeal record. The appellant did not provide for the security of the respondent's costs of appeal. Thus, had Mr *Fitches* not abandoned his second preliminary issue, I would have dismissed the appeal for failing to comply with Order 31 r 2(b)(i) of the Magistrates B Court (Civil) Rules.

I proceed to deal with the merits of the appeal. The first ground raised by the appellant was that the notice to terminate the lease was invalid for two reasons. Firstly, it was addressed to an individual and not to the appellant, a corporate body. Secondly, it was based on the wrong subsidiary legislation. C The appellant did not provide authority for the first aspect, but relied on *Johannesburg City Council* v *Feinstein & Anor* 1953 (3) SA 576 (W) for the second. In regards to the first aspect, it is clear that the notice to vacate was addressed to "Mr Hargovan, House of Sandals, Newlands Shopping Centre" and was entitled "Vacation from property sublet to you: House of Sandals." The response of Hargovan of 10 May in which he refused to vacate D the property after the expiration of three months, was on the appellant's letter head bearing the name "Wellcroft Investments t/a House of Sandals", as was the response he subsequently made to another letter on the proposed eviction on 17 June. In his oral submissions Mr *Ahmed,* for the appellant, conceded that Hargovan was not only a director but the human face of the E appellant corporation. In my view, by virtue of his position as an executive officer of the appellant and by his conduct, Hargovan demonstrated that the notice was properly served on the appellant through him.

Johannesburg City Council v *Feinstein & Anor* involved an application by the city council for the eviction of the respondent from its premises under s 22(1) of the Rent Act of 1950 for use of the premises in the public interest. F It gave the respondents 12 months' notice to vacate but after 12 months the respondents declined to do so. The respondents' occupation was protected under s 22 as long as they continued to pay rent and perform the other conditions of their tenancy unless the landlord ("applicant") established additional grounds set out in sub-paras (a) to (e) of s 22(1). The

applicant G desired the premises used as a restaurant by the respondents for itself to cater for its expanding electrical showroom business. It relied on subparas (c) and (e). The latter allowed repossession if the premises were reasonably required by the local authority in connection with any scheme for town improvement or for any other public work which the local authority was by law entitled to undertake and gave twelve months' notice. It was held that the purpose of H expanding its show room business was not in connection with any scheme

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of town improvement or any other public work which involved the physical A scheme of constructing buildings, roads or other amenities to improve a town and not an electricity display warehouse or anything ancillary thereto. Subparagraph (c) permitted repossession if the lessor reasonably required the premises for personal use and gave six months' notice, as long as the notice was not given prior to 1 July 1951. The municipality had given 12 B months' notice on 28 September 1950 which was to expire on 27 September 1951. The notice was held to have been a bad notice as it fell foul of the provisions of subpara (e).

The notice given in *Johannesburg City Council* was invalidated because it fell foul of the statutory provisions of the Rent Act No. 43 of 1950. In the present case, the respondent premised its notice in terms of s 30(2)(c) of the C Rent Regulations 2007. The premises were commercial premise and not a dwelling. The requisite notice to vacate was instead governed by s 23 of the Commercial Premises (Rent) Regulations SI 676 of 1983. Mr *Ahmed* submitted that the citation in the notice of the wrong statute invalidated the notice. In the *Johannesburg City Council* case, Blackwell J at 579B-C stated that:

> "I have been referred to authorities, both in the English courts and in our own, D the effect of which is as follows: If a notice can be given by a lessor to a lessee or by a lessee to a lessor under the terms of a lease, or, as in this particular case, under the terms of a statute, that notice is unilateral in character – it has a binding effect. Irrespective of the will of the recipient, it creates legal rights and imposes legal obligations. That being so, a notice of this sought must be in the terms of the power to give it which is created by the instrument or by the Act. E The law to this effect was laid down in England in *Hankey* v *Clavering* [1942] 2 All ER 311 and followed in our courts in *Boerne* v *Harris* 1949 (1) SA 793 (A). In both of those cases notices were sent between landlord and tenant which on the face of them were wrong, which on the face of them did not conform to the instrument under the force of which they were given, and therefore were held to be not appropriate, and the recipient of them might treat them as worthless, F as casting upon him no legal obligation."

I have read the case of *Boerne* v *Harris, supra*. In that case the lessee purported to exercise the option to renew the lease for another five years. The lease which would expire on 15 April 1947 provided in clause 10 for the option to be exercised at least six months before that date. Boerne's attorneys wrote a letter to the lessor, Harris, which stated that: G

> "We refer to the lease in respect of the Savoy Hotel, Somerset West between our client Mr A L M Boerne and yourself, and advise that our client intends to renew the lease for a further period of five years from 15 October 1946, in terms thereof".

Blackwell J correctly captured the majority decision of Greenberg JA with which Watermeyer CJ, van den Heever JA and Hoexter AJA concurred. H

A The essence of the majority decision was that a notice from a landlord to a tenant to vacate leased premises that did not conform to the instrument under which it was issued was invalid. I was, however, persuaded by the force of reasoning in the dissenting judgment of Schreiner JA who held at p 814 that the notice had to be construed objectively, that is, "as it would be understood by a lessor having the lease before him or her". He summarised B his reasoning thus:

> "The 'main apparent purpose' of the renewal letter was obviously and beyond doubt to exercise the lessee's right to renew the lease; the specific mention of the date was in the nature of a false description of the right of renewal which he was manifestly seeking to exercise. No reasonable reader in the position of the lessor could, in my view, imagine that the lessee was making a mistake as to C his legal rights, for under clause 10 it is perfectly clear that the renewal period can only run from the middle of April. The reasonable lessor could not fail to appreciate that somehow or other the date by which notice of renewal had had to be given had been substituted for the date from which the renewal had to run, and that since there was no

> need for the letter to have mentioned any date at all the reference to an obviously wrong date could not invalidate the notice. Such a D lessor would not only suspect, he would know, that the mistake did not consist in an intention to renew from 15 October 1946, the lessee having misunderstood his legal rights, but that it consisted of an erroneous setting out of an intention to renew as from 15 April 1946."

In the present matter, I hold the view that it was not necessary for the lessor to state in the notice the statute under which he was giving the lessee notice E to vacate. The main apparent purpose of the notice was to advise the lessee of the termination of the lease at the expiration of three months. An objective assessment of the lessee's behaviour reveals that it perfectly understood that it was being requested to leave the premises at the end of the notice period.

It is for these reasons that I hold that the notice to vacate that was given by F the lessor was valid. The trial magistrate's decision upholding its efficacy cannot be faulted.

The second broad ground of appeal was that the respondent failed to establish good and sufficient grounds to justify the eviction of the appellant. The provisions of s 22 of the Commercial Premises (Rent) Regulations have been set out and interpreted in many cases in this country both in the High G and Supreme Courts.

In *Moffat Outfitters (Pvt) Ltd* v *Hoosein & Ors* 1986 (2) ZLR 148 (S) at 154C-D Gubbay JA, as he then was, found it undesirable to define the phrase "good and sufficient grounds." He held that the burden lay on the lessor to establish those grounds. The duty of the trial court was to exercise a value H judgment, without caprice or bias or the application of wrong principle, by

considering the particular circumstances of the case as presented by the lessor A and lessee and weighing them against the purpose behind the promulgation of the Regulations. He emphasised that the purpose served by the Regulations was to "prevent unscrupulous landlords from taking advantage of the shortage of commercial premises by increasing their tenants' rents unjustifiably."

In the present case, the respondent, as the lessor, sought to repossess the leased B premises for its own use. It found itself treading in the footsteps of other landlords who had to come to court to reclaim possession from recalcitrant tenants in such cases as *Checkers Motors (Pvt) Ltd* v *Karoi Farmtech (Pvt) Ltd* 1986 (2) ZLR 246 (S); *Boka Enterprises (Pvt) Ltd* v *Joowalay & Anor,* 1988 (1) ZLR 107 (S) and *Bestafoam (Pvt) Ltd* v *Tynedale (Pvt) Ltd* S-54-88.

In *Boka Enterprises (Pvt) Ltd* v *Joowalay supra* at 115H-116A, it was held C that s 22(2) is worded in such a way that the court is enjoined to predominantly look at the needs and circumstances advanced by the lessor to the exclusion of the needs and circumstances of the lessee. In *Film & Video Trust v Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191 (H) at 209E-F, Robinson J cited with approval the remarks of Pittman JP in *Newman* v *Biggs* 1945 EDL 51 D at 54 and 55 which were approved in *Boka's* case, *supra,* that:

> "so far as proof of *bona fides* was requisite, it is difficult to see what more can ordinarily be required of a claimant, than that he should assert his good faith, and bring some small measure of evidence to demonstrate the genuineness of his assertion. He can normally scarcely do more, and it rests with the lessee resisting ejectment to bring forward circumstances casting doubt upon the genuineness E of his claim."

Both Mr *Ahmed* and Mr *Fitches* agreed that all that the respondent was required to do in the court *a quo* was to bring "some small measure of evidence to demonstrate the genuiness of (its) assertion". Mr *Ahmed* reluctantly conceded that that small measure of evidence had to be establish at the date of hearing and not, as he had initially submitted, in the notice to vacate. See F *Film & Video Trust supra* at 205A-B and 210B.

In his oral submissions, Mr *Ahmed* conceded that para 4 of the respondent's answering affidavit to the effect that it had leased the premises which it initially fully utilized to the appellant when its business took a battering from hyperinflation but required them for its booming business sufficed G to establish the small measure of evidence required to establish good and sufficient grounds for the termination of the lease. He, however, argued that the respondent did not genuinely desire the use the premises but wanted to evict the appellant, firstly, because it had declined to pay a higher rental and, secondly, in order to lease the premises to a tenant who was willing to pay a higher rental. The two grounds advanced by Mr *Ahmed* are a restatement of H

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A the grounds set out in s 22(2) of the Regulations which would deny a lessor the right to evict the lessee. The defendant did not substantiate these averments. It did not produce any evidence to show, on a balance of probabilities, that the respondent requested it to pay a higher rental and it declined to do so. In fact, the documentation it used to establish its refusal was the letter it wrote to the respondent on 27 October 2008 in which it agreed to pay US$550 B per month. It was paying that amount in March 2010 when it was given three months' notice to vacate and it continued to pay that amount after the cancellation of the lease. Other than its mere say-so, there was no evidence led to show that the respondent wished to lease the premises to a third party.

The finding by the trial magistrate that the respondent genuinely desired to C utilize the premises for its expanding business operations cannot be faulted.

Accordingly, the appeal is dismissed with costs.

HLATSHWAYO J concurred.

Ahmed & Ziyambi, appellant's legal practitioners

D *Jarvis Palframan*, respondent's legal practitioners

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MATSHAZI v MLOTSHWA & ANOR 2011 (1) ZLR 242 (H)

Citation	2011 (1) ZLR 242 (H)
Case No	Judgment No. HB-25-11
Court	High Court, Bulawayo
Judge	Ndou J
Heard	2 July 2010
Judgment	17 February 2011
Counsel	*T Khumalo,* for the plaintiff *K Lubimbi,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Property and real rights – *possessor – improvements effected by – compensation for – entitlement to – useful expenses and necessary expenses – distinction between – compensation to which possessor entitled*

Headnote

A possessor's right to compensation for improvements to the property of D another is determined according to his status as a possessor *i.e*. whether he is a *bona fide* possessor, a *mala fide* possessor, a lawful occupier, a *bona fide* occupier or a *mala fide* occupier. A *mala fide* possessor is a person who holds a thing *animo domini*, but who is fully aware of the fact that he is not the owner there. Such a person is entitled to claim E necessary expenses (*impensae necessariae*) which were incurred for the preservation or protection of the property. Necessary expenses may be recovered in full. The right to compensation for useful expenses has not yet been authoritatively settled in our law, though the weight of authority seems to be in favour of the view that he is so entitled. It is not sufficient that there is an increase in the market value of the property, but the expenditure must result in an actual tangible improvement of the land. In respect of useful expenses, the possessor is entitled to recover either an amount equal to the value by which the property has been enhanced or the actual expenditure incurred, whichever is the lesser. The owner may be released from liability to compensate if the improvements were G not useful to him and the expenditure excessive, regard being had to his means and position.

Cases cited

de Beers Consolidated Mines v London and SA Exploration Co (1893) 10 SC 359 H

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A *Fletcher & Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636

Lechoana v Cloete 1925 AD 536

Nortje v Pool 1966 (3) SA 96 (A)

Quarrying Enterprises (Pvt) Ltd v John Viol (Pvt) Ltd & Ors 1985 (1) ZLR 77 (H)

Raba v Ngoma 1913 EDL 469

B *Rademeyer v Rademeyer* 1967 (2) SA 702 (C)

Spencer v Gostelow 1920 AD 636

Standard Kredietkorporasie Bpk v JOT Motors (Edms) Bpk t/a Vaal Motors 1986 (1) SA 223 (A)

Case information

C *T Khumalo,* for the plaintiff

K Lubimbi, for the defendant

Judgment

NDOU J: The first respondent, aged 88 years (hereinafter referred to as "Mlotshwa"), is the maternal uncle of the plaintiff (hereinafter referred to as "Matshazi"). After the death of Matshazi's parents, Mlotshwa became his D custodian. Mlotshwa was neither married nor blessed with children of his own. When Matshazi attained the age of majority, he weaned himself off of his dependence on Mlotshwa. By some verbal agreement in 1991, Matshazi relocated from Bulawayo and went to stay on Mlotshwa's farm, being number 127 Gwatemba Purchase Area. Matshazi commenced farming operations and E also looked after the farm. According to Matshazi he understood Mlotshwa's position to be that he was going to surrender this farm back to the State if there was none of his relatives who was prepared to go and reside thereon. It is for that reason that he agreed to go to stay on the farm. It is common cause or at least beyond dispute that Matshazi made some necessary improvements on the farm. These included setting up a homestead, an orchard, contour F ridges, a garden, a watering well and roads. At the time of these proceedings, the improvements on the farm were, *inter alia*:

- one two-bedroomed homestead with a kitchen comprised of brick wall under zinc sheets;
- five round huts; G
- an open well;
- seven hectares arable land
- orchard;
- three granary huts; and H

- toilet and fowl run.

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Mlotshwa sold this farm to one Pardon Mbondia for US$8 500 on 26 May A 2009. Matshazi, in his wisdom, did not cite the said Mbondia as a party in these proceedings. There are three main issues for determination *i.e.*

(a) did Mlotshwa verbally grant Matshazi a lifelong usufruct in respect of the farm?

(b) whether or not Mlotshwa gave a right of first refusal to Matshazi; and B

(c) whether or not Matshazi made any necessary and *bona fide* improvements and, if any, what compensation should accrue to him.

I propose to consider the testimony of the witnesses in turn, focusing on these issues.

Ranoth Matshazi (the plaintiff): He said Mlotshwa neither married nor C bore children. Mlotshwa brought him up. He said after Mlotshwa discussed the issue of the farm with other family members he approached him with a proposal. At that time he was no longer staying with Mlotshwa. He had his own family at Old Lobengula, Bulawayo. He discussed the proposal with his wife and she agreed to go to stay on the farm. He said Mlotshwa proposed D that he (and his family) stay on the farm until his (Mlotshwa's) death. He proceeded to the farm in 1991. It was a bushy area. He cleared the area and built the homestead. He first constructed two huts. He thereafter constructed a further three huts. One hut is pole and dagga and the rest are made of moulded bricks. These are all grass thatched. There is also a four-roomed grass thatched house. He also built a flat asbestos-roofed house comprising E two bedrooms and a living room. He said he was responsible for the resources for the construction of these dwellings. He also erected contour ridges. He also cleared the bushes and established two fields. He also created an orchard wherein he planted oranges, mangoes and peach trees. He disputed Mlotshwa's assertion that when he got to the farm in 1991 there were improvements. He, however, testified that he is unable to place value on the improvements F until he is given time to do so. Under cross-examination he conceded that there was no agreement between him and the defendant entitling to a right of first refusal in the event that the farm is sold. He however stated that he should have been offered the farm first in recognition of his labour since he moved onto the farm in 1991 and the above-mentioned improvements were G made even in the absence of a specific agreement of right of first refusal. He further said that his agreement with the defendant was that he (plaintiff) builds a hut for the defendant and thereafter build other huts for use by family members when they visited the farm. He conceded that the defendant built the toilet on the farm and rectified another house which was built by another builder. He said the life usufruct arrangement was witnessed by his H

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A wife when the defendant approached him at his house in Lobengula. He conceded that the defendant gave him two cows in 1996 but disputed that this was a compensation for his effort in looking after the farm. He said for his labour in looking after the farm he expected forty head of cattle. The plaintiff was adamant that he was given the two head of cattle as a token of B appreciation by the defendant and not as compensation for looking after the farm. He said after he started staying on the farm he took a scotch cart there in 1992. There was already another scotch cart on the farm belonging to the defendant. He said the two cows that the defendant gave him multiplied. He said he used the same earmark as the defendant's for his cattle. He said he was not paying lease fees for staying on the defendant's farm because the C defendant asked him to stay there as a member of the family. It was for that reason that he went on to build dwellings on the farm. He said he is prepared to pay US$10 000 for the farm if it is sold to him.

Sibekiwe Matshazi: She is the plaintiff's wife. She basically confirmed what the plaintiff said – that the defendant approached them. He invited them to go D and reside on his farm until he passes on or they pass on whichever occurred first. She said the defendant told them that he had already had a meeting with the Mlotshwas and it was agreed that the plaintiff should go and stay on the farm to prevent it from being sold. She then went to the farm and started the improvements referred to by the plaintiff using resources from the plaintiff. She assigned her nephew Nkululeko to build the huts. The latter built two E huts. Thereafter, the defendant introduced her to one Philip Nxumalo who constructed three dwellings. One of the houses had a defect and she asked the

defendant (who is a builder) to correct the defect. He did that. She described a total of seven structures built on the farm. She said she stayed on the farm whilst the defendant would visit occasionally as he was ordinarily resident F in Bulawayo. She said the reason why they invested so many resources on the farm was because the defendant said they could stay there as long as he lived. It was her understanding that the defendant and plaintiff agreed that the farm would not be sold until such time that they died. When asked what they agreed in the event that the defendant pre-deceased the plaintiff, she said it was agreed that the farm would not be sold but would remain G the property of the Mlotshwa family. About the two cows referred to by her husband, she said the defendant in fact gave the two cows to her as a token as she was his daughter-in-law. She said the defendant was not supposed to sell the farm without consulting other members of the Mlotshwa family. She concedes that the farm belonged to the defendant. She did not give any H basis why he had to consult other relatives before selling his farm. In her

testimony nothing is said about the right of first refusal that the plaintiff is A claiming to have.

Nkululeko Mhlanga: He is related to the parties. He used to stay on the farm with his late father and other members of his immediate family. He remained on the farm after the death of his father until 1991 when the defendant evicted him and the rest of his family. Thereafter, the plaintiff's wife came to the B farm and started clearing the land. She thereafter put up structures already described above. He confirmed what the last witness said about the erection of structures. He built two huts at the behest of the plaintiff for free. He said the defendant inspected the huts when he was busy constructing them. He has no knowledge about the alleged agreement between the plaintiff and the defendant in terms of which the latter took occupation of the farm. C

Leonard Mlotshwa: He is the plaintiff's cousin and they grew up together. The defendant is his paternal uncle. The little that he knows about the matter is that the plaintiff was staying on the defendant's farm as per their agreement. He was not privy to the agreement. His testimony does not take the matter any further. D

Raymond Mlotshwa: He gave a brief history of how the defendant became the owner of the farm in question. He was not 100 percent sure of the dispute between the parties. He said he was, however, involved in certain processes by the family to try and ensure that there was accommodation between the parties. He had been approached by his cousin Absalom Mlotshwa to try and settle the dispute. He had occasion to discuss the issue with the parties. He E called a family meeting for that purpose. These meetings and the resolutions therein have no legal consequences. They were held when the dispute had already arisen and in any event, do not confer any legal rights on the plaintiff.

For the defendant's case the following witnesses testified.

Joel Mlotshwa (the defendant): He claimed ownership of the homestead F on the farm. He said that the plaintiff built some of the structures without his consent. He said had the plaintiff and his wife treated him well he would have let them stay on the farm until his death. He decided to sell the farm on account of the plaintiff's behaviour of failing to properly look after it and the above-mentioned ill-treatment. He said that there was no need to G compensate the plaintiff for the improvements on the farm as he had stayed on the farm for years without contributing anything.

His version of how the plaintiff ended up settling on his farm can be summarized as follows. The plaintiff owned a house in Lobengula. He later got married and decided to have a rural home as well. He sought a rural homestead in Emaguswini without success. He (*i.e.* defendant) had a farm H

A but had no wife nor children so a relative suggested that he let the plaintiff and his family settle on the farm until such time that they get their own rural homestead. He agreed to the suggestion as his farm would not remain vacant as he had just evicted members of the Mhlanga family. When the plaintiff moved onto the farm he moved into his (defendant's) homestead. He said when the plaintiff pegged a new homestead away from the Mhlanga B homestead he and the plaintiff's family were staying together. He said he built the homestead the with assistance of the plaintiff. He said the plaintiff built a big dwelling structure outside the homestead. Except for this latter structure, the

defendant claims all the other huts in the homestead. Under cross-examination he said when he told the plaintiff to go and settle on the C farm the agreement was the following:

"A When I told him to go and settle, I was anticipating that when I got old I would proceed to stay on the farm with them (plaintiff and his family). They were going to look after me and the farm. But on the contrary they did not look after me well as a result I sold the farm.

Q If they had treated you well and lived with you well you wouldn't have D sold the farm?

A I would not have sold it. …

Q Your explanations are consistent with a set-up whereby you and the plaintiff did not anticipate the farm would ever be sold.

A Yes, I did not anticipate that and neither did I have anyone to sell the farm to. The reason I sold it was due to ill-treatment."

E **Headman Mlotshwa:** The plaintiff is his cousin and the defendant his paternal uncle. He said that he knows as a fact that the defendant built a four-roomed structure and a kitchen hut. The defendant approached him to fit doors onto these structures. The doors were carved by his (the witness's) father at the behest of the defendant. He, however, said he does not know F who built the rest of the structures on the farm.

Priscillah Dax Moyo: The plaintiff is her cousin. There was a time that the defendant asked her and another relative to accompany him to the farm to collect his farm title deeds. At the farm they found the plaintiff present. At that meeting the defendant requested that he be given back the title deeds G of the farm. The plaintiff declined to hand over the title deeds alleging that they were not in his custody. He said they were in the custody of his wife and undertook to bring them to Bulawayo. The plaintiff did honour his promise. There was a meeting of the Mlotshwa family occasioned by the parties' dispute. The meeting was in Mzilikazi and she attended. The defendant informed the meeting of his intention to sell his farm. There was H no resolution to whom he should sell the farm.

Ndou J

I am satisfied that the plaintiff constructed some of the structures on the farm A and the defendant others. As the plaintiff had his family in occupation it is without doubt that he built most of the structures for their benefit. As the defendant did not have a wife or children he would have no reason to build many structures. The two structures mentioned by Headman Mlotshwa were on a balance of probability, built by the defendant. That explains why he had B doors made for them and contracted Headman to fit them. Mr *Khumalo*, for the plaintiff, has rightly conceded that the plaintiff has not adduced evidence on the existence of the right of first refusal. It is unlikely that the parties on their own would have negotiated and concluded a verbal right of first refusal. In any event, the parties are close relatives and were accommodating each other in that context. Even the plaintiff's wife, Sibekiwe, who was privy C to most of the meetings never mentioned the existence of a right of first refusal. All she said was that the family agreed that the farm would remain a Mlotshwa property (and not Matshazi property). She said it was agreed that the defendant would not sell the farm without consulting the rest of the Mlotshwa family. D

There is no evidence of an agreement of life usufruct either. In any event, if the plaintiff seriously wanted to exercise such right he would have to cite and involve the purchaser Mbondia in these proceedings. The latter seems to be a *bona fide* third party purchaser. If the plaintiff believed otherwise, he would have joined him in these proceedings. The only issue left is the one of the improvements. There is evidence, as alluded to above, that the E plaintiff built structures on the farm which enhanced the value of the farm, as evinced by the valuation report that the defendant obtained and used to sell the farm to Mbondia. Mr *Khumalo* has suggested that I use this evaluation to determine the damages suffered by the plaintiff. I think this is a fair approach considering that it is the defendant who obtained this evaluation and indeed F used it to determine the value of the farm at the time he sold it to Mbondia. When determining the value of damages sight will not be lost of the fact that the plaintiff was staying on the farm without paying any lease rentals. Further, the defendant also gave the plaintiff two cows during the period he was in occupation of the farm.

In his submissions, Mr *Lubimbi,* for the defendant, conceded that the G plaintiff should be compensated for some of the structures that he built and the orchard. It is just and equitable that the plaintiff be compensated for the following improvements:

(a) brick wall under zinc homestead;

(b) the orchard; H

Ndou J A

(c) 50 per cent of the open well (with no casing);

(d) four round huts;

(e) granary, and

(f) road.

These improvements enhanced the value of the property. It is trite that the B possessor's right to compensation for improvements to the property of another is determined according to his status as a possessor *i.e.* whether he is a *bona fide* possessor, *mala fide* possessor, lawful occupier, *bona fide* occupier or *mala fide* occupier.

In casu, the plaintiff is a *mala fide* possessor *i.e.* a person who holds a thing C *animo domini*, but who is fully aware of the fact that he is not the owner there – *Silberberg and Schoeman's The Law of Property* (3 ed) by D G Kleyn and A Boraine at 149-153. The plaintiff is therefore entitled to claim necessary expenses (*impensae necessariae*) which were incurred for the preservation or protection of property: Voet 5.3.21, 23. The right to compensation for useful expenses has not yet been authoritatively settled in our law though the weight D of authority seems to be in favour of the view that he is so entitled: *Spencer* v *Gostelow* 1920 AD 636; *Lechoana* v *Cloete* 1925 AD 536 at 547-548; *Raba* v *Ngoma* 1913 EDL 469 and *Standard Kredietkorporasie Bpk* v *JOT Motors (Edms) Bpk t/a Vaal Motors* 1986 (1) SA 223 (A) at 235. I hold the view that the plaintiff is entitled to useful expenses (*impensae utiles*). In this E regard it is not sufficient that there is an increase in the market value of the property, but the F expenditure must result in an actual tangible improvement of the land: *Quarrying Enterprises (Pvt) Ltd v John Viol (Pvt) Ltd & Ors* 1985 (1) ZLR 77 (H). The above listed improvements fall in the category of necessary expenses and useful expenses: *de Beers Consolidated Mines* v *London and SA Exploration Co* (1893) 10 SC 359. H

F As alluded to above, the plaintiff did not pay rent or any consideration for the occupation of the farm. Necessary expenses may be recovered in full. The necessary expenses *in casu* are the road and the well which were incurred for the preservation or protection of the farm. It is beyond dispute that the plaintiff was successful in the preservation and protection of the farm: *Nortje* G v *Pool* 1966 (3) SA 96 (A) at 131F. As far as the rest of the improvements are concerned, these are useful expenses. In the circumstances the plaintiff is entitled to recover either an amount equal to the value by which the farm has been enhanced or the actual expenditures incurred whichever is lesser: *Fletcher & Fletcher* v *Bulawayo Waterworks Co Ltd* 1915 AD 636 at 648; *Nortje* v *Pool supra* at 131G and *Rademeyer* v *Rademeyer* 1967 (2) SA 702 H (C) at 706 H. The defendant may be released from liability to compensate

Ndou J

if the improvements were not useful to him and the expenditure excessive, A regard being had to his means and position. Using these principles and the evaluation obtained by the defendant when he sold the property, I consider an amount of US$2 500 to be a fair and reasonable amount for the compensation for the above necessary and useful expenses incurred by the plaintiff.

Accordingly, it is ordered that: B

1. The defendant pays the plaintiff the sum of US2 500 as compensation for the improvements together with interest thereon at the prescribed rate of 5 per cent from the date of this order to date of payment in full.
2. Each party to bear its own costs.

Khumalo & Co, plaintiff's legal practitioners

Kenneth Lubimbi & Partners, defendant's legal practitioners D

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Source:
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S v KUROTWI & ANOR (3) 2011 (1) ZLR 251 (H)

Citation	2011 (1) ZLR 251 (H)
Case No	Judgment No. HH-56-11
Court	High Court, Harare
Judge	Bhunu J
Heard	16 February 2011
Judgment	17 February 2011
Counsel	Mrs *F Ziyambi* and *C Mutangadura,* for the State *G C Chikumbirike,* for the first accused *L Uriri* and *U Sakhe,* for the second accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal procedure – *charge – amendment or withdrawal of – prosecutor's right to amend or withdraw charge after accused has been committed for trial – leave of court required*

Headnote

D The accused were committed for trial along with three others, the charges against whom had been withdrawn before plea. The State intended to use the three others as State witnesses against the accused and applied to amend the original charge before plea to incorporate this development.

Held, that the effect of s 137 of the Criminal Procedure and Evidence Act E [*Chapter 9:07*] is that, once the High Court is seized with the matter pending before it, all procedures relating to the trial of the accused are firmly under the direction and control of the court. Accordingly, although the State is *dominus litis,* it would have to apply for an order for the withdrawal of charges against the accused's co-accused before plea. It would be grossly irregular for the State to simply drop charges against F the accused's co-accused without first obtaining a court order to that effect. The situation cannot be different when it comes to the amendment of the charge before plea. Once an accused person has been served with an indictment and committed to the High Court for trial he is entitled, as of right, to demand that he be tried on that charge. The State is not at large, at that stage, to alter, amend or substitute the charge without the G court's permission.

Held, further, that generally speaking, a party is entitled to make an amendment at any time before judgment, provided there is no prejudice to the other party. Here there was no prejudice to the accused which could not be cured by an adjournment to enable them to prepare their defence in light H of the intended application.

Bhunu J

Case cited

Mukuze & Anor v A-G 2005 (1) ZLR 6 (H)

Legislation considered

Criminal Procedure & Evidence Act [*Chapter 9:07*], s 137

Case information

Mrs *F Ziyambi* and *C Mutangadura,* for the State B

G C Chikumbirike, for the first accused

L Uriri and *U Sakhe,* for the second accused

Judgment

BHUNU J: The accused were indicted to the High Court for trial on a charge of fraud on 10 January 2011. They were initially jointly charged with 3 others C whose charges have since been withdrawn before plea. The State intends to use them as State witnesses against their erstwhile co-accused persons. It has now applied to amend the original charge before plea to incorporate this development.

The defence has, however, vigorously objected to the application being made D before plea. They insisted that the application can only be made after plea. They argued that the original charge can only be said to be formally before the court after the charge has been put and the accused have pleaded to the charge. It was their argument that the court cannot amend a charge which is not formerly before it.

On 15 February 2011, relying on the *dictum* in the case of *Mukuze & Anor* v E *A-G* 2005 (1) ZLR 6 (H), I held that this matter is pending before this court in terms of s 137 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In that judgment I had occasion to remark:

> "The natural effect of s 137 is that once the High Court is seized with the matter pending before it, all procedures relating to the trial of the accused are firmly under the direction and control of the court. This explains why, although the F State is *dominus litis,* it had to apply for an order for the withdrawal of charges against the accused's co-accused before plea. It would have been grossly irregular for the State to simply drop charges against the accused's co-accused without first obtaining a court order to that effect.
>
> *The situation cannot be different when it comes to the amendment of the charge before plea.* Once an accused person has been served with an indictment and G committed to the High Court for trial he is entitled as of right to demand that he be tried on that charge. The State is not at large at that stage to alter, amend or substitute the charge without the court's permission" (emphasis added).

In my view, it would be pretentious and devious for this court to turn a blind eye and hold that the original charge is not before it when, at the committal proceedings, both the court and the accused received formal notice of the H

A charge and the court formally took possession of the charge sheet once it was lodged with the Registrar.

It is trite and a matter of elementary law that, generally speaking, a party is entitled to make an amendment at any time before judgment provided there is no prejudice to the other party. In this case, the defence has not been able to point to any prejudice and indeed, I am unable to perceive any prejudice B to the accused which cannot be cured by an adjournment to enable them to prepare their defence in light of the intended application.

In any case, having already ruled that the State can apply to court for the amendment of the charge before plea, I am bound by that ruling. The court is *functus officio,* it cannot revisit that issue.

C In the final analysis the objection is unsustainable. It is accordingly ordered:

1. That the objection be and is hereby overruled.
2. That the matter be and is hereby postponed for 10 days to enable the defence to prepare their response to the application for amendment of the charge before plea.

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

Chikumbirike and Associates, firstdefendant's legal practitioners

E *Kantor and Immerman,* second defendant's legal practitioners

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Source:
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S v CHIREYI & ORS 2011 (1) ZLR 254 (H)

Citation	2011 (1) ZLR 254 (H)
Case No	Judgment No. HH-63-11
Court	High Court, Harare
Judge	Mawadze J
Heard	22 February 2011
Judgment	22 February 2011
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *general principles – punishment –* C *imprisonment not to be regarded as the only appropriate sentence for retributive and deterrent purposes – need to consider community service as an available alternative*

Criminal procedure (sentence) – *offences under the Criminal Law Code – s 89(3) – assault – assessment of appropriate sentence – useful guidelines* D

Criminal procedure (sentence) – *general principles – community service – need for court to inquire into community service – where community service appropriate*

Headnote

Section 89 (3) of the Criminal Law (Codification and Reform) Act [*Chapter* E *9:23*] provides useful guidelines in how to assess an appropriate sentence in cases of assault. While the list set out is not exhaustive, each of the factors mentioned therein should be carefully weighed by the court in deciding whether to impose a custodial sentence or not.

Magistrates are required to carry out a meaningful inquiry prior to sentence and it is wrong to regard imprisonment as the only punishment which F is appropriate for retributive and deterrent purposes. With the advent of the concept of community service, our courts have long since departed from this notion.

Where an effective term of imprisonment of 24 months or less is appropriate, a sentencing court should inquire into the suitability of community service. G

Cases cited

S v Antonio 1998 (2) ZLR 64 (H)

S v Chinzenze & Ors 1998 (1) ZLR 470 (H)

S v Dube 1991 (1) ZLR 218 (S)

S v Gweshe HH-191-98 H

Mawadze J

A *S v Melrose* 1984 (2) ZLR 217 (S)

S v Mugwenhe & *Anor* 1991 (2) ZLR 66 (S)

S v Myakuna HH-87-86

S v Ngulube 2002 (1) ZLR 316 (H)

S v Reze & *Anor* HH-2-04

S v Santana HH-110-94

B *S v Scheepers* 1977 (2) SA 154 (A)

S v Shariwa 2003 (1) ZLR 314 (H)

S v Sindura & Anor HH-104-04

S v Usavi HH-182-10

Legislation considered C

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 89(3)

Judgment

MAWADZE J: All the three matters were dealt with by the same senior magistrate at Chiredzi magistrates court, after which they were referred to this court for automatic review.

D I have decided to deal with all the three matters in a single review judgment in view of the fact that the charge involved in all the matters is the same, and the misdirection on the part of the trial magistrate is evident and common to all the three matters.

In all the three matters the accused persons were duly convicted after pleading E guilty to contravening s 89 (1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9*:*23*] (hereinafter the Code) which provides:

> **"89 Assault**
>
> (1) Any person who –
>
> (a) commits an assault upon another intending to cause that other person bodily harm or realising that there is a real risk or possibility that bodily harm may F result; or
>
> (b) …
>
> shall be guilty of assault and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding ten years or both".

The convictions of all the accused persons in all the three matters is in order and raises no issues. Accordingly the convictions are confirmed in all the G three matters.

It is the sentences imposed by the trial magistrate upon all the accused persons in all the three matters that has exercised my mind. It is disheartening to note that the senior magistrate, who should be fairly experienced on the bench, disregarded all the basic principles of sentencing and imposed custodial H sentences which in all respects induce a serious sense of shock.

Mawadze J

The first misdirection I noted in all the three matters is the failure by the A trial magistrate to fully inquire into and understand the facts of each case in relation to circumstances surrounding the commission of the offences. The need for such a prudent approach was aptly captured by Smith J in *S* v *Myakuna* HH-87-86 on p 2 of the judgment as follows:

> "In addition the magistrate should have investigated the cause of the altercation B between the accused and the complainant, whether either or both of the parties were intoxicated, whether or not there was any provocation and the precise circumstances in which the blow was struck. All these factors would have been relevant in determining the intention of the accused *and for the purpose of assessing sentence.*
>
> Furthermore, the magistrate should ascertain all the circumstances of the case in order to be able to impose an appropriate sentence" (emphasis is mine). C

Let me briefly revert to the summary of the proceedings in each case to illustrate this point and other issues I shall refer to later.

1. THE STATE v 1) CLETO CHIREYI CRB 772-5/10

2) SHADRECK CHADIDA CRB 772-5/10

3) PEDZISAI DUBE CRB 772-5/10 D

4) JAISON ZVINOIRA CRB 772-5/10

The material facts in their case are that all the four accused persons were employed by Arda Nandi Estates in Chiredzi as security guards. On 30 July 2010 all the accused assaulted the complainant with a baton stick below the feet. The reason for the assault is unclear but it is said this was after E the complainant was allegedly accusing them of violence and fights within the compound. The complainant reported the matter to the police leading to the arrest of the accused. It is not clear as to when the report was made. Apparently the complainant was not medically examined, hence no medical evidence was placed before the court. It is however said the complainant did not sustain visible injuries. All the four accused are first offenders. F

After entering a verdict of guilty in respect of all the four accused the following mitigation was recorded in respect of each of the accused.

> "Accused 1: 40 years, married with 2 children, earns $43 per month. US$10 saving. No assets. Erred.
>
> Accused 2: 35 years, married with 2 children, earns $43 per month. US$10 savings. No assets. Erred. G
>
> Accused 3: 30 years, married with 2 children. US$40 salary, US$9 on person**,** no assets. Erred.
>
> Accused 4: 38 years, married with 4 children. US$50 per month, US$10 on person, no assets, erred."

The brief reasons for sentence given by the trial magistrate are in note form in all the three matters. After noting that all the four accused persons are H

Mawadze J

A first offenders and pleaded guilty to the charge, the trial magistrate indicated that the offence was serious as it was a gang assault and that offences of that nature, wherein game scouts and security guards assault suspects in their custody, are very prevalent in Chiredzi (the magistrate puts it at three cases daily dealt with in court). However, it is not clear why the complainant in this case could be deemed to have been a suspect in the custody of the B accused(s). No such facts were disclosed.

Each of the accused was on 18 August 2010 sentenced to 18 months' imprisonment, of which six months' imprisonment were suspended on the usual conditions of good behaviour, leaving each accused with an effective sentence of 12 months' imprisonment.

C In this case the statement of agreed facts is unhelpful in outlining the circumstances relevant to the assault. In fact the reason for the assault is unclear and incomprehensible. The trial magistrate

did not seek to inquire from the accused persons the reasons for their conduct. This, in my view, should have been obvious to the mind of the trial court. The manner of the assault is not explained. Did the accused take turns to assault the complainant? D Did they use one baton stick? What was the degree of force used and the possible number of blows inflicted by each or all of the accused. No attempt was made to deal with these pertinent issues. I shall revert to the importance of such issues in relation to sentence later.

2. THE STATE v EDSON MUNAKI CRB C810/10

E In the absence of a proper inquiry into the circumstances of this case, the facts of this matter remain incomprehensible and bizarre. In fact, one may suspect that the accused is either mentally unstable or was heavily intoxicated.

The complainant is a member of the Neighbourhood Watch Committee and on 18 August 2010 at about 2150 hours he was at Mufakose beer hall in E Triangle when he left the beer hall to buy bread at a nearby tuckshop. The accused was just outside the beer hall and without saying a word struck the complainant with an empty pint beer bottle on the right side of the face near the eye and fled from the scene. The complainant sustained a deep 3 cm long cut below the right eye and a swollen and bruised right cheek. Apparently one blow was delivered. The medical report indicates that severe force was G used and the injuries are described as serious and likely to cause permanent injuries (although it is not explained how). The doctor was not called to explain this aspect, neither was the complainant asked to shed light on his current state of health *vis-à-vis* the injuries he sustained.

The mitigation recorded is very brief.:

H " 23 years old. Married wife pregnant, unemployed. $10 on me, no assets".

Mawadze J

The trial magistrate did not adduce anything further from the accused; not A even the reason why he accused attacked the complainant in such a rather bizarre and unprovoked manner. No attempt was made to ascertain if the accused was intoxicated or had been provoked by the complainant. In other words, the trial magistrate proceeded to assess the appropriate sentence without ascertaining all those issues. B

The reasons for sentence are in note form and equally brief. Two factors were considered in mitigation: that the accused is a first offender and that he pleaded guilty to the charge. In aggravation, the offence was deemed serious as the accused used a bottle to hit the complainant "on the eye" with possibility of inflicting permanent injuries. Community service was deemed inappropriate without giving reasons. The accused was on 25 August 2010 C sentenced to 18 months' imprisonment of which six months' imprisonment was suspended on the usual conditions of good behaviour leaving an effective term of imprisonment of 12 months.

3. THE STATE v STEVEN MAGAISA CRB C 793/10

In this case both the accused and the complainant are employed. On 16 D August 2010 while at their house at about 1700 hours the accused alleged that complainant wanted to leave him for another man. The accused proceeded to assault the complainant with open hands and booted feet all over the body several times. The complainant sustained a swollen left eye, swollen and tender neck and upper chest. The medical report indicates that several blows E were delivered with severe force, inflicting injuries described as serious.

It is not clear why the accused laboured under the impression that a rival suitor was about to snatch his wife away. The trial magistrate did not seek to inquire into this aspect nor even the basis for such a misapprehension. The mitigation recorded is as follows:

"26 years. Married to the complainant, 1 child, earns $120 per month. US$30 F savings, 2 goats".

The reasons for sentence, as per the habit of the trial magistrate, are in note form. The court considered two factors in the accused's favour: pleading guilty and being a first offender. A fine was deemed inappropriate as the offence was viewed as serious as it caused potential danger to life. Community service G was not even considered. On 23 August 2010 the accused was sentenced to 24

months' imprisonment of which six months' imprisonment was suspended on the usual conditions, leaving an effective term of imprisonment of 18 months.

To my mind, it is clear that the trial magistrate did not ascertain at all the circumstances of each of the three cases in order to properly assess and impose an appropriate sentence. H

2011 (1) ZLR p259

Mawadze J

A The trial magistrate did not even seek guidance from the provisions of s 89(3) of the Code, which provides as follows:

> **"89 Assault**
>
> (3) In determining an appropriate sentence to be imposed upon a person convicted of assault, and without derogating from the court's power to have regard to any other relevant considerations, a court shall have regard to the following – B
>
> (a) the age and physical condition of the person assaulted;
>
> (b) the degree of force or violence used in the assault;
>
> (c) whether or not any weapon was used to commit the assault;
>
> (d) whether or not the person carrying out the assault intended to inflict serious bodily harm;
>
> (e) whether or not the person carrying out the assault was in a position of C authority over the person assaulted; and
>
> (f) …"

The above list is not exhaustive but gives useful guidelines in how to assess an appropriate sentence in an assault case. This is in addition to a plethora of case law on the assessment of sentence in such cases, even before the promulgation of the code when the offences were not codified but categorised D as assault (common) and assault with intent to cause grievous bodily harm. See *S* v *Melrose* 1984 (2) ZLR 217 (S), *S* v *Dube* 1991 (1) ZLR 218 (S), *S* v *Sindura & Anor* HH-104-04.

Each of the factors (in addition to others) listed in s 89(3) of the Code should be carefully weighed in deciding whether to impose a custodial or E a non-custodial sentence in cases of assault. This reasoning process should be evident from the trial magistrate's reasons for sentence.

In all these three matters, the trial magistrate failed to first consider whether imprisonment was appropriate. Superior courts have always reminded magistrates that imprisonment is a rigorous form of punishment and should be resorted as the last resort. See *S* v *Mugwenhe & Anor* 1991 (2) ZLR 66 (S), F in which Ebrahim JA at pp 69-70 made reference to *S* v *Scheepers* 1977 (2) SA 154 (A) at 159:

> "Apart from the fact that prisons are overcrowded and that the upkeep of prisons and maintenance of prisoners place a tremendous economic burden on the State, there are also other disadvantages attaching to imprisonment. The convicted person is removed from society, he is deprived of all responsibility and opportunities of G acting independently as a free member of the community, his life is disrupted, manpower is lost and the prisoner comes into contact with elements which are … out of all proportion to that which he possibly deserves. If the same purposes in regard to the nature of the offence and the interest of the public can be attained by means of an alternative punishment to imprisonment, preference should, in the interests of the convicted offender, be given to alternative punishments … H imprisonment is only justified if it is necessary that the offender be removed

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2011 (1) ZLR p260

Mawadze J

> from society … if the objects striven for by the sentencing authority cannot be A attained by any alternative punishment".

In casu, in CRB C772-5/10 and CRB C793/10, the accused persons are family men and were gainfully employed. They have now lost their jobs and the ability to fend for their families. In my view, it is wrong to regard imprisonment as the only punishment which is appropriate for retributive B and deterrent purposes. Our courts have, with the advent of the concept of community service, long departed from this notion.

In all the three matters the trial magistrate failed to carry out any meaningful pre-sentence inquiry. As already shown the mitigation recorded in all the three matters is unhelpful and perfunctory. In *S* v *Usavi* HH-182-10 at p 2 of the judgement I expressed the strong view that such scant pre-sentence C information is unhelpful in arriving at an appropriate and just sentence. See also *S* v

Shariwa 2003 (1) ZLR 314 (H); *S* v *Ngulube* 2002 (1) ZLR 316 (H). The sentences imposed by the trial magistrate are therefore difficult to justify.

Even if one was to take the robust view that imprisonment was appropriate in all the three matters, the trial magistrate still fell short of the need to D consider the suitability of community service as all the sentences imposed are within the general limit of effective 24 months' imprisonment. In all the three cases no inquiry is made into the suitability of community service and no cogent and sound reasons are given as to why community service is inappropriate in each case. This constitutes a serious misdirection See *S* v *Antonio & Ors* 1998 (2) ZLR 64 (H); *S* v *Chinzenze & Ors* 1998 (1) ZLR 470 (H), E *S* v *Santana* HH-110-94 and *S* v *Shariwa supra*. The sentences imposed by the trial magistrate in all the three matters cannot be said to be in accordance with real and substantial justice.

The difficulty I have encountered in all the three matters is that there is insufficient relevant information to assist this court to assess in a deserving F manner the appropriate sentence. There was no inquiry into the circumstances of the assault in each case; that is the reason and at times the manner of the assault. The medical evidence placed before the court is again not helpful. See *S* v *Reze & Anor* HH-2-04 in which Chinhengo J emphasised the value of medical evidence in assessing sentence. It would be prejudicial to all the accused in all the three matters to refer the matters back to the trial magistrate G for purposes of carrying out a proper pre-sentence inquiry and assessment of appropriate sentences. In all the three cases the accused were sentenced in August 2010 and all have served at least six months of their sentences. At most, I do not believe that any of the accused in the three matters under review should have been sentenced to a period in excess of six months' imprisonment. Again, my view is that none of the accused, even after having H

A been sentenced to six months' imprisonment, should have served an effective term of imprisonment, but I would have suspended part of the six months' imprisonment on condition of good behaviour and the remainder on condition of community service (unless good cause was shown).

In my view, in the case of *S* v *Chireyi & 3 Ors* CRB C 772-5/10, a sentence B of four months' imprisonment, of which two months' imprisonment are suspended on condition of good behaviour and the balance of two months on condition each accused performs community service, would be appropriate.

In *S* v *Munaki* CRB C 810/10 it is extremely difficult to assess the appropriate sentence, given the lack of useful information. Be that as it may, a sentence of C six months' imprisonment with three months suspended on condition of good behaviour and the balance of three months on performance of community service would be in order.

Lastly, in *S* v *Magaisa* CRB C 793/10, a sentence of six months' imprisonment with two months suspended on condition of good behaviour and the D remainder of four months on condition of community service would have been appropriate.

To my mind, it is clear that the magistrate in all these three matters fell into the same temptation highlighted by Bartlett J in *S* v *Gweshe* HH-191-98 in which the learned judge at p 2 of the judgment said:

> "Unfortunately the magistrate's main concern seems to have been to complete E the proceedings as quickly as possible. By doing so he was unfair to the accused and very probably unfair to the complainant as well. In addition he was neither doing justice nor doing his job properly".

On the basis of the foregoing, it is my view that the sentences imposed upon all the accused persons in all the three matters cannot be said to be in F accordance with real and substantial justice. The sentences are unduly severe and induce a sense of shock.

All the accused persons were sentenced on 18 August 2010, 25 August 2010 and 26 August 2010. They have all now been in prison for more than the period they could have deserved to be in prison. I am unable to confirm the G sentences imposed as in accordance with real and substantial justice in all three matters.

Accordingly, all the accused persons in all the three matters cited herein, that is CRB C 772-5/10; CRB C 810/10 and CRB C 793/10 are entitled to their immediate release and warrants for their

liberation should be issued.

H MUSAKWA J concurred

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/MCGREGOR v SABURI & ORS 2011 (1) ZLR 262 (H)

MCGREGOR v SABURI & ORS 2011 (1) ZLR 262 (H)

Citation	2011 (1) ZLR 262 (H)
Case No	Judgment No. HH-33-11
Court	High Court, Harare
Judge	Chiweshe JP
Heard	8 November 2010
Judgment	23 February 2011
Counsel	*A N B Masterson,* for the applicant No appearance for the first respondent *T Zvekare,* for the second respondent *J Mumbengegwi,* for the third and fourth respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Land – *acquisition – land acquired by State – holder of "offer letter" in respect of such land – right to seek relief against former owner of land who remains thereon*

The applicant was the owner of a farm which was compulsorily acquired by D the State in terms of the Land Acquisition Act [*Chapter 20:10*]. He failed to vacate the farm within the prescribed period and was charged with and convicted of contravening s 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. The sentence imposed included, as required by law, an order for the applicant's eviction from this farm. E He filed a notice of appeal against both conviction and sentence. When the applicant returned to the farm, he found the first respondent and others in possession of the farm. As they would not leave, he brought an application for a spoliation order.

Held, that while the applicant had been in "peaceful and undisturbed occupation" of the land and therefore entitled to a spoliation order F under the common law, statutory provisions override the common law. Following the acquisition by the State of the land and the provisions in terms of s 3 of the Gazetted Lands (Consequential Provisions) Act that the applicant should vacate the land within the prescribed period, he could not at law claim possession of the land he was required to G have vacated, nor, if he had not vacated such land, could he claim to be in peaceful and

undisturbed possession. Such an interpretation of the provisions of that Act would lead to an absurdity and subvert the clear intention of the legislature. The intention of the legislature was to create vacant possession on acquired land in order that the beneficiaries of the land reform programme may benefit through resettlement thereon. If the H

A State did not secure vacant possession, the intention of the legislature would obviously be frustrated. The former owner or occupier of gazetted land loses all rights over such land. Ownership vests in the State and continued occupation after the prescribed period without authority is illegal and renders such owner or occupier subject to prosecution.

Held, further, that the holder of an offer letter has authority granted by the B owner of the land, that is, the State, to occupy and utilize the land in question. He has a right and a legitimate interest to access the property. That right is enforceable against any other person who may seek to deprive him of it or frustrate his enjoyment of the same. The holder of an offer letter is perfectly entitled to seek an eviction order against C persons who may illegally be in occupation of such property. He may not, however, take the law into his own hands and act without a court order. The offer letter confers upon its holder the *locus standi* to approach the courts for appropriate relief.

Cases cited

D *CFU & Ors v Min Lands & Ors* 2010 (2) ZLR 576 (S)

Legislation considered

Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], s 3

Case information

A N B Masterson, for the applicant

E No appearance for the first respondent

T Zvekare, for the second respondent

J Mumbengegwi, for the third and fourth respondents

Judgment

CHIWESHE JP: In this urgent chamber application the applicant sought a F provisional order in the following terms:

"TERMS OF THE FINAL ORDER SOUGHT

1. The provisional order is herein confirmed.
2. The first respondent shall produce to this court the offer letter upon which he relies for his claim to be entitled to occupy any part of Nyamakari Farm in the Burma Valley area of the Mutare District and shall satisfy this court G that it has been lawfully secured before he again seeks to secure occupation of any part of that farm.
3. The second respondent is directed forthwith to inform the third and fourth respondents that any appeal against an eviction order issued by a magistrate's court consequent upon convicting any person of contravening subsection (3) of section 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter* H *20:28*] has the automatic effect of suspending the eviction order until that

appeal is finally dismissed and the validity of the eviction order has been A confirmed.

4. The third respondent shall issue instructions to all members of the Zimbabwe Republic Police which:
   (a) inform them that an appeal against any eviction order issued by a magistrates court following a conviction of contravening subsection (3) of section 3 of the Gazetted Land (Consequential Provisions) Act B has the effect of suspending the order of eviction and entitling the subjects of the eviction order to retain or resume occupation of the land in question until the appeal is finally determined so as to uphold the validity of the eviction order;

(b) direct them to afford all protection reasonably required by the convicted person and all those using and occupying the farm under his authority C to retain and resume the use and occupation of the land in question pending the final outcome of the appeal; and

(c) direct them that, upon conclusion of the appeal, any eviction is to be effected by the Deputy Sheriff and not by the police save where their support is required by the Deputy Sheriff and that any variation of the terms of the eviction order ordered by the appeal court shall be D observed and obeyed.

5. The fourth respondent shall issue instructions to all persons who hold offer letters and to all officials in the Ministry of Lands, Land Reform and Rural Resettlement that:

(a) an offer letter does not itself constitute authority to occupy land or any part of any land referred to in the offer letter if the land in question E is already occupied by any third persons, including a former owner, user or occupier of that land unless and until the fourth respondent has secured vacant possession of the land in question either by virtue of an order of court or departure of third persons from the land in circumstances which are free of all duress.

(b) consequently such officials shall not encourage, support or assist the holders of offer letters to take occupation of land referred to in the F offer letter unless and until:

(i) the fourth respondent has secured a final binding eviction against an existing occupier that is, free of the consequences of any appeal;

(ii) the eviction of the previous owner, user or occupier has been effected by the Deputy Sheriff. G

INTERIM RELIEF HEREBY GRANTED

Pending the finalization of this application and pending the finalization of the Criminal Appeal No CA 1143/10 filed by the applicant on 18 October against the conviction and sentence imposed upon him by the Provincial Magistrate, Mutare on 15 October 2010 in Case CRB 1042/09 for contravening section 3 of the Gazetted Land (Consequential Provisions) Act: H

Chiweshe JP

A **IT IS ORDERED THAT:-**

1. First respondent and all those claiming authority under him are prohibited from occupying Nyamakari Farm or any part thereof and, insofar as such persons have already taken occupation of any part of that farm, they shall forthwith vacate that land together with their wives, families and all belongings. B
2. Such vacation of Nyamakari shall be effected within 48 hours of the issue of this order failing which they shall be removed by the Deputy Sheriff with such police support as he may require.
3. Applicant is authorized to re-occupy that portion of the farm that he was using and occupying prior to 15 October 2010 and to resume his farming operations thereon. C
4. Second, third and fourth respondents are directed to note the terms of this order and to issue all orders and instructions as may be necessary to ensure that first respondent does vacate the farm and that applicant is enabled to resume occupation and use of those parts of the farm that he and the workers employed through applicant are able to resume their occupation of, and farming operations, on the farm."

The parties presented their arguments in chambers on 8 November 2010. D On 3 December 2010 I dismissed the application with costs and indicated that my reasons would follow. These are they.

The applicant was the owner or occupier of Nyamakari Farm, Burma Valley, Mutare District. It is common cause that this farm was subsequently acquired by the State in terms of the Land Acquisition Act [*Chapter 20:10*]. E Consequent upon the applicant's failure to vacate this gazetted land within the prescribed period, he was on 15 October 2010 arraigned before a magistrate at Mutare charged with contravening s 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. He was duly convicted as he had no offer letter, permit or lease which constitutes lawful authority to occupy or utilize gazetted land. The sentence imposed included, as required F by law, an order for the applicant's eviction from this farm. On 17 October 2010, the applicant filed a notice of appeal against both conviction and sentence. The next day, 18 October 2010, the applicant lodged an urgent application under case number 6722/10 in which he sought confirmation that as the appeal suspends the conviction and sentence of the court *a quo*, G he would be entitled in the interim and pending disposal of the appeal to occupy the land he was occupying at the time of his conviction. My brother Hlatshwayo J handled the matter and I am advised that he dismissed the application on the grounds that an order such as that which was being sought was unnecessary as the natural and

proper consequence of noting the appeal would be to suspend the operation of the decision of the trial court. I am H informed that the Attorney-General had agreed with that position indicating

Chiweshe JP

that the State would accordingly seek leave from the trial court to execute A the eviction order pending appeal. Application for such leave is pending in the magistrates court.

On 24 October 2010 the applicant returned to the farm. He was met there by the first respondent, his son and half a dozen other persons. The first respondent advised the applicant that he had an offer letter issued in 2006 B and that he had come to take occupation of the farm. It was clear that the first respondent and others would not leave the farm as they took occupation of various parts of the land and buildings. The applicant says he reported the matter to the police but to no avail. He then approached this court seeking the relief set out above.

In his heads of argument in support of this application, the applicant has raised C a number of legal issues and cited several judgments of this court tending to lend credence to his interpretation of those issues. The applicant gives the impression that this court has been consistent in its pronouncements in various land cases and that the court has generally granted applications of this nature. The correct position, however, is that there have been a number of D conflicting judgments emanating from this court with some judges favouring the approach that the applicant advocates to be the correct one and other judges begging to differ. I belong to the latter group whose interpretation of the land laws of the country has since been vindicated by the Supreme Court.

The first legal point that the applicant raises in its submission is that prior to the actions of the first respondent, the applicant had been in "peaceful and E undisturbed occupation" of the land and therefore entitled to a spoliation order against the first respondent. That position is correct at common law. However, it is trite that statutory provisions override the common law. Following the acquisition by the State of the piece of land in question and the provisions in terms of s 3 of the Gazetted Lands (Consequential Provisions) Act [*Chapter* F *20:28*] that the applicant vacates this land within the prescribed period, he cannot at law claim possession of the land he is required to have vacated, nor, if he has not vacated such land, can he claim to be in peaceful and undisturbed possession. Such an interpretation of the provisions of that Act would lead to an absurdity and subvert the clear intention of the legislature. I agree with Mr *Zvekare,* for the second respondent, when he argues that the G intention of the legislature is to address colonial injustice by creating vacant possession on acquired land in order that the beneficiaries of the land reform programme may benefit through resettlement thereon. If the State does not secure vacant possession, the intention of the legislature would obviously be frustrated. Further, it is clear to me that the former owner or occupier of gazetted land loses all rights over such land. Ownership vests in the State and H

Chiweshe JP

A continued occupation after the prescribed period without authority is illegal and renders such owner or occupier subject to prosecution. Mr *Zvekare*'s further contention is that such an owner or occupier who refuses to vacate such land in clear violation of the law cannot seek recourse in this court. His hands are dirty and for that reason he should not be entertained. I agree with that contention

B The applicant has argued that an offer letter does not give authority to evict a person already in occupation. Nothing could be further from the truth. The holder of an offer letter has authority granted by the owner of the land, that is the State, to occupy and utilize the land in question. He has a right and a legitimate interest to access the property. That right is enforceable against any C other person who may seek to deprive him of it or frustrate his enjoyment of the same. The holder of an offer letter is perfectly entitled to seek an eviction order against persons who may illegally be in occupation of such property. He may not however take the law into his own hands and act without a court order. The offer letter confers upon its holder the *locus standi* to approach D the courts for appropriate relief, contrary to the applicant's assertions. In my view, the right to evict illegal occupiers is not limited exclusively to the State or the responsible Minister as the applicant would have us believe; it extends to the beneficiaries as well.

The applicant also submitted that he had substantial prospects of success in his appeal against the decision of the magistrate in which he was convicted E for occupying gazetted land without authority and sentenced, *inter alia,* to be evicted from the farm. At the time of hearing the present application the State had lodged an application with the magistrate for leave to execute that eviction pending appeal. That application was yet to be disposed of. One of the grounds of appeal appeared to be centered on the issue whether the F offence created under s 3 of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] was one that required strict liability. My view is that the wording of the section is clear – a party must have an offer letter, a lease or a permit issued by the appropriate authority in order to lawfully occupy gazetted land. The provisions of the Act do not admit of any other form of authority, actual or implied. This view has since been confirmed by the Supreme Court. G Clearly the offence is one of strict liability. The provision is clear and straight forward. The applicant raises a number of purely administrative issues to do with his dealings with Ministry of Lands officials and his expectations. These are of no legal relevance to the present application or the appeal that he has lodged. On the whole I did not see any merit in the applicant's assertion that H there are substantial prospects of success in his appeal, be it on the merits

of the conviction or sentence imposed by the magistrate, or, on those issues A that he asked the magistrate to refer to the constitutional court.

The Supreme Court, in *Commercial Farmers Union and Others vs The Minister of Lands and Rural Resettlement and Others* 2010 (2) ZLR 576 (S), has dealt with virtually all the legal issues pertaining to land in this country. This landmark judgment provides clear direction to this court with regards B the interpretation of various land laws and the constitutional issues raised in connection with the land reform programme in Zimbabwe. The constitutional issues raised by the applicant for referral to the Supreme Court are similar to those raised, adjudicated upon and dismissed in the *Commercial Farmers Union* case *supra*.

The learned Chief Justice at p 596 summarized the legal position as regards C land matters as follows:

> "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 challenge the legality of such acquisition in a court of law. The jurisdiction D 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 *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 E 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). See subsections 3(2)(a) and (b) of the Act and s16B 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. F
>
> (4) 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 jurisdiction to authorize the continued use or possession of the acquired land.
>
> (5) Litigants who are acting outside the law, that is, in contravention of s 3 G of the Act, cannot approach the courts for relief until they have complied with the law. See *Associated Newspapers of Zimbabwe Limited* v *Minister of State for Information and Publicity and Others supra*.
>
> (6) A permit, an offer letter and a land resettlement 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 H

> A 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 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 other provisions of that Act.

(8) While s 3(5) of the Act confers on a criminal court the power to issue B 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 from an Act of Parliament, to take occupation of acquired land allocated to him or her in terms of an offer letter, permit or land settlement lease. No doubt the C 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 D 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."

I am convinced therefore that to grant the applicant the relief he seeks would E be tantamount to aiding and abetting an illegality.

It was for these reasons that I dismissed the application with costs.

Coghlan, Welsh & Guest, applicant's legal practitioners

Attorney-General's office, second respondent's legal practitioners

F *Civil Division of the Attorney-General's Office,* third and fourth respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/ASHANTI GOLDFIELDS ZIMBABWE LTD v MATIMURA & ORS 2011 (1) ZLR 270 (H)

ASHANTI GOLDFIELDS ZIMBABWE LTD v MATIMURA & ORS 2011 (1) ZLR 270 (H)

Citation	2011 (1) ZLR 270 (H)
Case No	Judgment No. HH-54-11
Court	High Court, Harare
Judge	Gowora J
Heard	17 August 2010
Judgment	23 February 2011
Counsel	*T Magwaliba*, for the plaintiff *G C Manyurureni*, for the defendants
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *summary judgment – defendant raising triable issue – what defendant needs to allege – what facts should be placed before court – what opposing affidavit must aver* D

Headnote

The plaintiff sued the various defendants, who were its former employees, for eviction from the houses they occupied and sought summary judgment against the defendants. The plaintiff's case was that the defendants were occupying the houses in terms of leases and that, as the defendants had not paid the rent, they should be evicted. The defendants' case was that E they were not tenants, having purchased the properties in terms of the so-called lease agreements. The plaintiff contended that the court had to determine whether or not the parties entered into an agreement of sale in respect of the houses in question and whether or not the respondents were entitled to an order for the transfer of the stands into their names; and, lastly, whether or not the plaintiff had any grounds for the ejectment F of the defendants from the houses they were occupying. In arguing for an order for summary judgment the plaintiff contended that the Supreme Court had already, in an earlier case involving the plaintiff and other employees, determined that the lease signed by the plaintiff and each of the employees did not constitute an agreement for the sale of the houses, G as contended by the defendants. The defendants argued that the facts in their cases were different.

Held, that the only issue for determination at this stage was whether the plaintiff had any grounds for seeking ejectment. The other matters were for determination at the trial. At the stage of the summary judgment, it was enough for the court to decide whether the defendants had raised a H

Gowora J

A *prima facie* defence to escape summary judgment. It was not necessary to make a decision as to whether or not the contract executed by the parties was a lease agreement or an agreement for the sale to the employees of the properties they were occupying.

Held, further, that to show that he has a *prima facie* defence, a defendant only needs to allege facts which, if he can succeed in establishing at the B trial, would entitle him to succeed in his defence at the trial. It is not necessary for the defendant to make out a case for the probable success of his defence at this stage. The onus on him at this stage is much lighter than at the trial stage. What is required, therefore, of a defendant is that he should place before the court such facts as would show a *prima facie* C defence to the application for summary judgment. The facts must be sufficiently detailed, to the extent that the court hearing the application can be satisfied that the defence being proffered is a plausible one. The affidavit must not just contain the facts that he seeks to rely upon: the facts themselves must be such that they reveal a defence that can be sustained at trial. There is need, therefore, for the opposing affidavit D to go beyond what is contained in the plea. In addition, the averments in the affidavit must themselves lead to a plausible defence or be such that the court hearing the application will conclude that an injustice is likely to occur if summary judgment were to be granted in favour of the plaintiff. In effect, the defendant has to allege facts which convince the E court that there are triable issues between the parties and that an order for summary judgment would result in an injustice to one if not both parties.

Held, further, that based on the documents submitted by the defendants, it appeared that the parties might well have gone beyond a simple lease agreement in respect of the residences that the employees were occupying F and summary judgment would therefore not be appropriate.

Cases referred to

Ashanti Goldfields Zimbabwe Ltd v Kovi S-7-09

Hales v Doverick Invstms (Pvt) Ltd 1998 (2) ZLR 235 (H)

Jena v Nechipote 1986 (1) ZLR 29 (S)

G *Rex v Rhodian Invstms Trust (Pvt) Ltd* 1957 R & N 723; 1957 (4) SA 631 (SR)

Case information

T Magwaliba, for the plaintiff

H *G C Manyurureni*, for the defendants

2011 (1) ZLR p272

Gowora J

Judgment

GOWORA J: The plaintiff has sued the defendants for eviction under separate A case numbers. The defendants filed their respective pleas and, subsequent to their having entered appearance to defend, the plaintiff has filed individual applications for summary judgment against all of the defendants. The applications are vigorously defended. At the instance of the parties, the matters have been consolidated as the basic facts surrounding the dispute and the B issues are identical. The facts surrounding the applications are as follows.

The first defendant is in occupation of an immovable property called 1433 Muhacha Drive, Chiwaridzo Township, Bindura. The second defendant is in occupation of an immovable known as Stand 1439 Chiwaridzo Township, Bindura. The third defendant is in occupation of an immovable known as Stand 484 Oval Road, Bindura. The fourth defendant is in occupation of an C immovable property known as 1278 Mukuyu Roa, Chiwaridzo Township, Bindura. The fifth defendant is in occupation of an immovable property known as 1606 Chiwaridzo Township, Bindura and the sixth defendant is in occupation of 1491 Mushamba Road, Chiwaridzo Township, Bindura.

All the defendants are former employees of the plaintiff. In 2003 the board D of directors of the plaintiff made a resolution to dispose of the properties that the employees were occupying. Subsequent to this resolution a contract was signed between the representatives of the management of the plaintiff and representatives of the employees called the Housing Committee. The document is dated 1 December 2003 and is in the following terms:

> "MEMORANDUM OF AGREEMENT E
>
> BETWEEN
>
> Ashanti Goldfields Management
>
> And
>
> Employees
>
> Ashanti Goldfields Zimbabwe agrees to dispose of its housing units situated in F Chiwaridzo, Grey Line Flats and Low Density to its employees who are sitting tenants effective 01 December 2003. Find the agreed prices attached.
>
> For and on behalf of Ashanti Goldfields Zimbabwe
>
> Signed by management representatives
>
> For and on behalf of the employees
>
> Signed by the employees representatives" G

Those employees who wished to participate in the scheme signed lease agreements with the plaintiff, which agreements are identical in the operational terms with the exception of the description of the property, the rent payable and the occupant of the stand in question. The plaintiff has claimed that the defendants have defaulted in paying rentals for the properties each of them is occupying and that it is therefore entitled to an order for their eviction H

2011 (1) ZLR p273

Gowora J

A therefrom. The defendants, on the other hand, contend that they are not tenants, having purchased the properties in terms of the so-called lease agreements and that the plaintiff is not entitled to an order for their eviction.

The substance of the defence proffered by the defendants in their individual pleas is as follows:

> B " The so-called agreement of lease was never meant to operate as a lease. It was a vehicle through which payment of the purchase price in respect of the said property was to be made. It was meant to give practical effect to the agreement of sale entered into between the plaintiff and the defendant in this case. The plaintiff has since sold the property in question to the defendant herein although it is yet to register to

transfer its rights, title and interest in the said property in favour of the defendant. The terms of the so-called lease were never meant to C be implemented in the spirit of a lease agreement."

The first defendant has alleged that his occupation of the immovable property is in terms of an agreement of sale concluded with the plaintiff. He further alleges that he has paid full value for it and has attached a copy of his payslip and a copy of a schedule generated by the plaintiff headed "Housing Fund". D The first document indicates that on 25 January 2005 an amount of Z$20 000 was deducted from his salary or wages under the heading "rent to buy". The same document has underneath the income and deductions for the same month a portion headed "statistical data". An amount of Z$960 000 is reflected as "balance rent to buy". Turning to the other document, captioned "Housing Fund", the portion referring to the first defendant shows that an amount of E Z$1 427 was deducted from his salary or wages on 6 July 2005 under the caption "rent to buy".

Turning to the second defendant, his defence to the application is that he has paid full value for the property in question in terms of an agreement concluded between the parties. He has attached to his affidavit a copy of F a schedule showing that on nineteen different occasions from 28 February 2004 to 30 September 2005 various amounts were deducted from his salary or wages under the caption rent to buy.

Whilst the first two defendants have attached "proof" of payment of what they say is the purchase price to their documents, the third defendant was content with merely stating that he had also purchased the property from the G plaintiff and it was not entitled to eject him from the same.

The fourth defendant has also said that she paid full value for the house that the plaintiff is seeking to evict her from. She has produced with her opposing papers a receipt issued by the plaintiff on 21 June 2004 for an amount of Z$6 million and a second one issued on 31 January 2005 for the H sum of Z$1 800 000.

Gowora J

In respect of the fifth defendant, it is clear on the papers that the defendant's A deceased wife was the former employee of the plaintiff. The defendant's wife died on 19 August 2008, which demise predated the issue of the summons against the defendant herein. It seems to me that once the defendant raised the issue of the property having been purchased by his late wife, the plaintiff should not have proceeded with an application for summary judgment. It B is not competent for this court to deal with the matter in the absence of an executor who would advance the basis of the defence against the eviction. In my view, unless cited as an executor to his late wife, the fifth defendant cannot really mount a defence, as any averments or allegations by him would amount to hearsay, unless he did so in the capacity of executor of the deceased estate. The defendant has, however, attached to his opposing papers C documents which suggest that there was an agreement wherein payments were made monthly and that as at 25 February 2004 the balance owing on the alleged agreement of rent to buy was Z$1 180 000. The balance as at 24 May of the same year is reflected as Z$1 120 000.

The case for the sixth defendant is also on the basis that he alleges that he D has paid full value for the immovable property in question. In proof that he has paid value for the property he has attached a copy of the payslip issued by the plaintiff on 24 January 2005 showing an amount of Z$20 000 being deducted from his wages as "rent to buy". The same payslip reflects an amount of Z$960 000 as owing for rent to buy. The defendant has also attached a E copy of a receipt issued out to him by the plaintiff showing an amount of Z$1 000 000 as having been paid on 1 July 2005 for "payment of house".

The plaintiff contends that this court has to determine whether or not the parties herein entered into an agreement of sale in respect of the houses in question and whether or not the respondents are entitled to an order for the transfer of the stands into their names and lastly whether or not the plaintiff F has any grounds for the ejectment of the defendants from the houses they are occupying. It seems to me that only the last issue has been properly captured by the legal practitioners as being before me for adjudication. The issues that arise from the declaration and the pleas are for determination by the court which hears the trial. At the stage of the summary judgment it G is enough for the court to decide if the defendant has raised a *prima facie* defence to escape summary judgment. I am not enjoined at this stage of the proceedings to make a decision as to whether or not the contract executed by the parties is a lease agreement or an agreement for the sale to the

employees of the properties they are occupying. I am in fact pre-empting the trial. There would be nothing for that court to adjudicate on. H

2011 (1) ZLR p275

Gowora J

A The plaintiff has decided to approach this court for order for summary judgment against all the defendants. In arguing for an order for summary judgment the plaintiff has contended that the Supreme Court in *Ashanti Goldfields Zimbabwe Ltd* v *Kovi* S-7-09 has already determined that the lease signed by the plaintiff and each of the employees does not constitute an agreement for the sale of the houses as contended by the defendants. It B is correct, as submitted by Mr *Magwaliba,* that in the *Kovi* case the court found that what had been agreed between the parties was an agreement for the lease of the house and that there was nothing to show that in fact the respondent before them, Kovi, had exercised the option to purchase the property as provided for in the agreement. The court also found that there C was nothing to show that he had paid for the purchase price and found that the lump sum payments made were arrear rentals.

The defendants herein have not disputed the court's findings in the *Kovi* case. They have, however, sought to distinguish that authority from their own cases. Firstly, they argue that the facts in *Kovi*'s case were materially different to their own. They point to the fact that they were in fact paying monthly rentals D which were reflected on their payslips as rent to buy payments. They have also produced to the court minutes of board meetings held by the plaintiff's board of directors prior to the agreements having been concluded. On 8 May 2003, the minutes record that the process of the sale of the residential properties was progressing well and that the plaintiff's finance director and E a workers' representative had gone to consult a legal practitioner on how to resolve the outstanding issues. Again, on 24 August 2003 the minutes record that there was a lot of progress on the sale of the residential properties to the employees. The houses had been re-evaluated by one Kwaku Akosa Bempah when he visited the mine in the second quarter of 2003. It was further recorded that the finance director and a workers' representative had F been to the lawyer with the final draft and that the lawyer's comments would be discussed in a subsequent meeting. Finally, on 16 December 2003, it was minuted that there had been a lot of progress on the sale of the residential properties and that management had approved and concluded the sale. The employees were reportedly filling in the contract forms.

G Each of the defendants has annexed to the opposing affidavit the agreement signed by the plaintiff and the workers' representative. To this document is attached a schedule with the names of the employees, the stand number of the house in question, its initial value, the revalued price and the monthly repayment. Each of the parties has annexed a copy of the lease agreement to its papers. I note that there is an annexure A which forms part of the H agreement. It reads as follows:

2011 (1) ZLR p276

Gowora J

> "The value of the property will be revalued each time the employee is awarded A the annual salary increment. The outstanding balance as at the effective date of the increment is what is revalued.
>
> The revaluation will be calculated as follows;
>
> 50% of the salary increment (%) multiplied by the outstanding balance (as at that date).
>
> The revalued outstanding balance will then be divided by the remaining period B to get the monthly payment".

It is trite that in opposing an application for summary judgment a defendant must show that he has a prima facie defence to the plaintiff's claim. The test to be applied in determining what constitutes a *prima facie* defence was clearly set out by Murray CJ in *Rex* v *Rhodian Investments Trust (Pvt) Ltd* C 1957 R & N 723; 1957 (4) SA 631 (SR), where it is stated that the defendant only needs to allege facts which, if he can succeed in establishing at the trial, would entitle him to succeed in his defence at the trial. It is not necessary, therefore, that the defendant make out a case for the probable success of his defence at this stage. The onus on him at this stage is much lighter than would be required of him at the trial stage. D

In *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) Gubbay JA (as he then was) stated the onus facing the defendant facing an application for summary judgment in the following terms:

> "All the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that 'there is a mere possibility of success'; E 'he has a plausible case'; 'there is a triable issue';

or, 'there is a reasonable possibility that an injustice may be done if summary judgment is granted'.

In determining whether or not summary judgment should then be granted in respect of all the defendants I am guided by requirements that have been set by the authorities which entitle a defendant to escape an order for summary judgment sought against him. I think that, based on the documents submitted F by the defendants, it appears that the parties may well have gone beyond a simple lease agreement in respect of the residences that the employees were occupying. In *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at 238-9 Malaba J (as he then was) in considering the burden of proof that rests on a defendant in a summary judgment had this to say:

> "The defendant's affidavit should not only disclose the nature of the defence relied G upon to resist the plaintiff's claim for ejectment, but must set out the material facts on which that defence is based in a manner that is not inherently or seriously unconvincing. In *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* S-139-86 at pp 4-5 of the judgment McNally JA referred to the degree of particularity and completeness which the facts averred by the defendant in its affidavit filed in opposition to an application for summary judgment must achieve as being that: H

> A '…while the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence and material facts upon which it is based, with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence *(Maharaj* v *Barclays National Bank Limited* 1976 (1) SA 418 (A) at 426D)
>
> B … the statement of material facts [must] be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial will constitute a defence to the plaintiff's claim … if the defence is averred in such a manner which appears in all the circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirements of *bona fides (Breitenbach* v *Fiat SA (Edms) Bpk* 1976 (2) SA 226 at 228D-E).
>
> C … he must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts (*District Bank Ltd* v *Hoosain & Ors* 1984 (4) SA 544 at 547G-H).'"

What is required, therefore, of a defendant is that he place before the court D such facts as would show a *prima facie* defence to the application for summary judgment. The facts must be sufficiently detailed, to the extent that the court hearing the application can be satisfied that the defence being proffered is a plausible one. The affidavit must not just contain facts that he seeks to rely upon; the facts themselves must be such that they reveal a defence that can E be sustained at trial. There is need, therefore, for the opposing affidavit to go beyond what is contained in the plea. In addition, the averments in the affidavit must themselves lead to a plausible defence or be such that the court hearing the application concludes that an injustice is likely to occur if summary judgment were to be granted in favour of the plaintiff. In effect, the defendant has to allege facts which convince the court that there are triable F issues between the parties and that an order for summary judgment would result in an injustice to one if not both parties. All the defendants have alleged the necessary facts. All of them, with the exception of the third defendant, have annexed to their opposing papers receipts showing payments of amounts other than rentals. He, like the others, has alleged that he purchased the G property he is in occupation of. Despite this, I cannot say that his affidavit falls short of the requirement that a defendant allege facts which if proved at the trial may result in him defeating the claim by the plaintiff. See *Jena* v *Nechipote (supra*). At p 30F-G Gubbay JA said:

> "Although the relevant allegations in the defendant's affidavit are somewhat bald – particulars should have been given of when, where and in what amounts, the H debt was repaid – I am nevertheless satisfied that, upon an application of any

> of the tests I have referred to, the defendant's affidavit reveals a *prima facie* A defence. Consequently summary judgment ought not to have been granted."

The submissions on behalf of the plaintiff are that annexure C, which is the agreement signed by the plaintiff's representatives and the employees' representative, was designedly incomplete and partial and that it lacked the usual clauses associated with an agreement of sale in commercial practice B and that it would not be reasonable to expect a corporation in the position of the applicant to have sold in excess of three hundred houses in such a perfunctory document. It is further argued that the

document does not provide for the payment of the purchase price or the time when it should be paid.

Each of the defendants herein filed a plea before the plaintiff embarked on the application for summary judgment for the eviction of the same from the C immovable properties. Each of the defendants pleaded that not only had they concluded agreements with the plaintiff in terms of which they purchased the properties, but that they had paid in full for the properties in question. Each went on to allege that the lease agreement was a vehicle through which the sale of the properties could be facilitated. The plaintiff clearly, in applying for summary judgment, should have anticipated that the defendants would D allege payment in respect of the properties and that the receipts issued to them reflecting payments as being for the purchases of these houses would be produced. The plaintiff did not see it fit to address this aspect of the dispute, contenting itself with the submission that the Supreme Court had already ruled that the memorandum did not constitute an agreement of sale. The E plaintiff has not addressed itself to the import of the statements from the board of directors in three meetings, where reference is made to progress having been made in selling houses to the employees. The plaintiff has not sought to explain the receipt by its housing fund of payments from the employees for the purchase of houses. The plaintiff has not explained to the court the annexure to the lease agreement which provides for the re-evaluation of the F purchase price in the event of the tenant who is an employee is awarded an annual increase in his or her salary.

It is not for me to decide at this stage whether in fact what the parties concluded was a lease as suggested by the plaintiff or whether the lease agreement was in fact a vehicle devised by the parties to facilitate the purchase and payment G by the employees of the houses they were occupying. That is a task, I believe, for the trial court. For my part, I am restricted to determining whether on the papers before me the defendants have established a *prima facie* defence. The lease agreements were all signed in early December 2003 and, when the board met on 16 December 2003, it was minuted that the management had approved and concluded the sale and that the employees were "filling H

A in the contract forms". The defendants in the pleas filed by them alleged that the plaintiff had authorised anticipation of the payment of the purchase prices. Indeed there are receipts for amounts reflected as purchase prices which go way beyond the stipulated rentals that the plaintiff insists were the only payments due under the lease agreements. There are references in the payslips to balances due on "rent to buy". All these factors, in my view, B go towards the establishment of a *prima facie* defence on the part of the defendants to the claim for summary judgment.

In the premises, the defendants have discharged the onus upon them and the applications for summary judgment cannot succeed.

Each of the parties has asked for costs. The plaintiff had prayed for an order C for punitive costs on the basis of the judgment in *Kovi* on the basis that these proceedings were an abuse of court process. I do not agree, as the facts in *Kovi*'s case were distinguishable from the present set of facts. It is also not clear to what extent Kovi went in an effort to prove the agreement of sale. As far as the defendants are concerned, the prayer by them was for an order for costs on the ordinary scale and I will order accordingly.

D In the premises, the applications are without merit and the applications against all the defendants are therefore dismissed with costs on the ordinary scale.

Magwaliba & Kwirira, legal practitioners for the plaintiff

E *Manyurureni & Co*, legal practitioners for the defendants

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Source:
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FORRESTER EST (PVT) LTD v CHIRUME 2011 (1) ZLR 280 (H)

Citation	2011 (1) ZLR 280 (H)
Case No	Judgment No. HH-40-11
Court	High Court, Harare
Judge	Chiweshe JP
Heard	9 November 2010
Judgment	23 February 2011
Counsel	*P C Paul*, for the applicant
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Land – *acquisition – land acquired by State – land subject to bilateral investment agreement – such land subject to acquisition – right of owner of land to challenge acquisition – such right removed by s 16B of Constitution* D

Headnote

The applicant was the owner of a farm. The applicant's majority shareholders were German nationals whose investment was protected by a "Bilateral Investments Promotion and Protection Agreement (BIPPA), which was signed by the Governments of Zimbabwe and Germany in 1995. A portion of the farm was gazetted for acquisition for resettlement and allocated E to the respondent. He was given an "offer letter" and forcibly occupied the portion of the farm. Prior to the occupation the applicant was in peaceful and undisturbed possession of the property. The applicant argued that the property had not been acquired by the State. In so arguing, it has relied on various judgments of the High Court in which it has been consistently held that the purported acquisition of the property through F a notice issued in terms of s 5 and orders issued in terms of s 8 of the Land Acquisition Act [*Chapter 20:10*] were in contravention of the BIPPA signed between Zimbabwe and Germany and therefore were of no legal force or effect.

Held, that the piece of land was identified in the *Gazette* and therefore was G acquired by the State in terms of s 16B(2)(a) of the Constitution.

Held, further, that s 16B(3)(a) of the Constitution provides that a person having any right or interest in land that has been acquired shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge. This meant that the applicant was precluded from challenging the acquisition of the property in court and the H

Chiweshe JP

A court was in turn precluded from entertaining any such challenge. In any event, even though the property was subject to a BIPPA, it was capable of proper and lawful acquisition in terms of s

16B of the Constitution.

Cases referred to

CFU & Ors v Min of Lands & Ors 2010 (2) ZLR 576 (S)

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

Legislation considered

Constitution of Zimbabwe 1980, s 16B(2)(a), 16B(3)(a)

Case information

C *P C Paul*, for the applicant

Judgment

CHIWESHE JP: In this urgent chamber application the applicant seeks a provisional order in the following terms:

"1. TERMS OF FINAL ORDER SOUGHT

D 1.1. The provisional order be and is hereby confirmed

1.2. That the respondent shall pay costs of suit.

2.INTERIM RELIEF GRANTED

A "*mandament van spolie*" be and is hereby granted restoring the "*status quo ante*" which prevailed prior to the 1st October 2010 to the respondent's occupation of a piece of land known as Elsinora, situate in the district of Mazowe, and that E such restoration be achieved by the eviction of the respondent, his possessions and all persons holding through him from the property in question.

3. SERVICE OF ORDER

That service of this order be effected by the applicant's legal practitioners or the Deputy Sheriff / Messenger of Court on the respondent."

F The founding affidavit is sworn to by Duncan Hamilton, a director of the applicant company. The affidavit is to the following effect.

The applicant is a company duly incorporated and registered in terms of the laws of Zimbabwe. It carries out its farming operations at Forrester Farm, Mvurwi. The farm is demarcated into several sections. The applicant's majority shareholders are German nationals whose investment is protected G by a "Bilateral Investments Promotion and Protection Agreement (BIPPA), which was signed by the Governments of Zimbabwe and Germany on 29 September 1995.

On 1 October 2010, the respondent forcibly occupied the D section of Forrester Farm on the strength of an offer letter. D section is also referred to as H Elsinora. This occupation took place without the applicant's consent or court

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order. Prior to the occupation, the applicant was in peaceful and undisturbed A possession of the property. The applicant informed the respondent that the property had not been acquired by the Government, a fact which had been confirmed by several judgments of this court between 2002 and 2009. The applicant reported this matter to the police who, acting on the instructions of the District Administrator, declined to intervene. For that reason, there B was no remedy readily available to the applicant hence this application for a spoliation order. The applicant says that, assuming the respondent has an offer letter, such does not entitle him to take the law into his own hands and occupy its property without its consent or court order.

It is necessary to resolve three issues that are central to this application. The first issue is whether the property in question has been acquired by the C State. The applicant is adamant that the property has not been acquired by the State. In this regard the applicant has relied on various judgments of this court in which it has been consistently held that the purported acquisition of the property through a notice issued in terms of s 5 and orders issued in terms of s 8 of the Land Acquisition Act [*Chapter 20:10*] are in contravention of the BIPPA signed between Zimbabwe and

Germany on 29 September D 1995 and therefore of no legal force or effect. See *Forrester Estate & Ors* v *Minister of Lands & Ors* HC 8592/02, *Forrester Estate* v *Mufandaedza & Ors* HC 7030/06, *Forrester Estate* v *Mereki* HC 6116/07 and *Forrester Estate* v *Makunun'unu* HC 6586/07.

I invited the Minister of Lands and his officials to make submissions on this E issue (in any event the Minister should have been cited as a party to this application on account of his obvious interest). Miss Mnangagwa, a law officer in that ministry, submitted a written response dated 2 November 2010, stating that the property was acquired in terms of the Constitution of Zimbabwe Amendment (No. 17) Act 2005. This amendment created s 16B of the Constitution, subsection (2)(a) of which provides: F

"(a) all agricultural land –

(i) that was identified on or before the 8th July, 2005, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], and which is itemized in schedule 7, being agricultural land required for resettlement purposes, or

(ii) that is identified after the 8th July 2005, but before the appointed day, in G the *Gazette* or *Gazette Extraordinary* under section 5 (1) of the Land Acquisition Act [*Chapter 20:10*], being agricultural land required for resettlement purposes; or

(iii) that is identified in terms of this section by the acquiring authority after the appointed day in the *Gazette* or *Gazette Extraordinary* for whatever purpose, including, but not limited to – H

Chiweshe JP A

A. settlement for agricultural or other purposes; or

B. the purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or

C. the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in subparagraph A or B;

B is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii), with effect from the date it is identified in the manner specified in that paragraph; and

(b) …"

Ms *Mnangagwa* has indicated that Elsinora Farm of Umvukwe Estate appears C in schedule 7 under General Notice Number 50A of 2001. A perusal of the General Notice Number 50A of 2001 will show the present property described at entry number 41 of the schedule thereto as follows:

"41 Deed of Transfer 1828/42, registered in the name of Forrester Estate Limited in respect of certain piece of land situate in the district of Mazowe, being Elsinora of Umvukwe Estate, measuring one thousand six hundred and eighty-seven D comma one three five (1687,135) morgen."

I am satisfied that this description refers to the property under consideration. I conclude therefore that this property is "gazetted land" acquired in terms of 16B of the Constitution.

The second issue is whether the acquisition is in breach of the BIPPA and, E if so, whether it is of no legal force or effect by virtue of such breach? I am precluded from making any determination in this regard by virtue of the provisions of s 16B(3)(a) of the Constitution which provide in part as follows:

"(3) … 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 F State, and no court shall entertain any such challenge."

The intention of the legislature has been expressed in such clear and unambiguous language. The jurisdiction of the courts in this regard has been ousted by the provisions of s 16B(3)(a) of the Constitution. The applicants are precluded from challenging the acquisition of the property in court and the court is in turn precluded from entertaining any such challenge. See *Mike* G *Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor* 2008 (1) ZLR 17 (S) at 43F-G where MALABA JA (as he then was) said:

"By the clear and unambiguous language of s 16B(3) of the Constitution, the Legislature, in the proper exercise of its powers has ousted the jurisdiction of courts of law from any of the cases in which a challenge to the acquisition of agricultural land secured in terms of s 16B(2)(a) of the Constitution could have H been sought."

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In addition s 16B contains a "*non abstante*" clause. In *Commercial Farmers* A *Union & Ors* v *Minister of Lands & Rural Resettlement & Ors* 2010 (2) ZLR 576 (S) at 585 Chidyausiku CJ had this to say:

> "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 other words, any rights conferred on anybody in terms of the Declaration of B 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 it violates a right conferred on the litigant in terms of the Declaration of Rights contained in Chapter III of the Constitution." C

And at p 589 the learned Chief Justice went on to say:

> "The effect of s 16B of the Constitution is that it renders agricultural land occupied under Bilateral Investment Protection Agreements (BIPAs) liable to compulsory acquisition if the acquiring authority considers that it is required for resettlement purpose as prescribed under s 16B(2)(a)(iii)."

It is clear to me that the present property is subject to a BIPA but capable of D proper and lawful acquisition in terms of s 16B of the Constitution. I hold that the State has duly acquired this property and that the applicants no longer have any rights to it.

I conclude with the third issue, that is, what is the legal import of an offer letter? An offer letter confers on its holder the authority to occupy and utilize E the piece of State land that it refers to. In the *Commercial Farmers Union* case *supra* it was stated at p 596 as follows:

> "(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 F terms of the permit, offer letter or land settlement lease."

It follows, therefore, that the right to occupy and utilize gazetted land vests in the holder of the offer letter, permit or lease. A former owner or occupier who does not hold such offer letter, permit or lease ceases to have any such right at the expiration of the prescribed period. The applicant thus no longer G has any right to occupy this property. The applicant must vacate the farm to give vacant possession to the respondent who holds an offer letter in respect of that piece of land. Failure to vacate renders the applicant liable to prosecution and, upon conviction, to eviction. The respondent and or the Acquiring Authority may also sue for the eviction of the applicant. In the *Commercial Farmers Union* case *supra* it was said at p 596 under subheading (8) that H

Chiweshe JP

> A "(8) 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 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, B permit or land settlement lease. 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."

In the same judgment it was stated that the holder of an offer letter cannot take the law into his or her hands and resort to self help. He or she has to obtain C a court order for the eviction of any illegal occupier who refuses to vacate the land allocated to him or her in terms of an offer letter, permit or lease.

Clearly the applicant is in defiance of the law by its continued occupation of land it is required to vacate. Its claim to possession is vitiated by the law. It is liable to prosecution for illegally occupying State land. Until and unless it D has complied with the law its hands are dirty. It cannot approach the courts for relief. In any event, to grant the relief that the applicant seeks would be tantamount to aiding and abetting an illegality.

It was for these reasons that I dismissed the application with costs.

E *Wintertons,* applicant's legal practitioners

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ELGATE INVESTMENTS (PVT) LTD v MASTER & ORS 2011 (1) ZLR 286 (H)

2011 (1) ZLR p286

Citation	2011 (1) ZLR 286 (H)
Case No	Judgment No. HH-57-11
Court	High Court, Harare
Judge	Mtshiya J
Heard	2 February 2011; 7 February 2011; 8 February 2011; 10 February 2011; 11 February 2011; 14 February 2011
Judgment	23 February 2011
Counsel	*L Uriri*, for thefirst applicant *T Muchineripi,* for the second and third applicants *N Mpumelo,* for the fourth applicant *G N Mlotshwa,* for the second and sixth respondents *P Ranchhod,* for the third and fourth respondents *A Rutanhera,* for the fifth respondent
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Company – *judicial management – purpose of – distinction from liquidation – rights of owners and shareholders of company under judicial management – right to be involved in matters relating to operation of their company*

Headnote

A company placed under judicial management does not automatically lose D its ownership or shareholding. It is the management that changes, for the sole reason that, if properly managed, the company might move out of the problems that led to judicial management. The purposes of a liquidation order are entirely different from those of judicial management. In the former situation, the object is to wind up the affairs of a company E and effect its dissolution; in the latter, the object is just the opposite, namely, to avoid liquidation, where there is a chance of the company surmounting its difficulties by proper management, namely, management by a person appointed as judicial manager to conduct the affairs of the company, subject to the supervision of the court.

Held, that there is, accordingly, a fundamental difference between the function F and powers of a liquidator and those of a judicial manager. There are also material differences between the rights of creditors. The owners and shareholders of a company under judicial management should never be ignored in any court which have a direct bearing on the operations of the companies under

judicial management. The owners or shareholders have, G through a court process, only divested management to the provisional judicial manager. They remain the owners or shareholders of the company under provisional judicial management, and that alone entitles them to involvement in any matter related to the operations of their judicially managed companies. Judicial management means that the court, through the Master of the High Court, is managing the affairs of the entities H

Mtshiya J

A placed under judicial management, whether provisional or final. The provisional judicial manager only operates under the directions of the Master. It is therefore important and reasonable that any party wishing to vary the original directions of the court must seek leave to do so.

Cases cited

B *Core Mining & Mineral Resources (Pvt) Ltd v Zimbabwe Mining Development Corp & Ors* 2011 (1) ZLR 22 (H)

Central African Building Construction Co (Pvt) Ltd v Construction Resources Africa (Pvt) Ltd 2010 (1) ZLR 464 (H)

Feigenbaum & Anor v Germanis & Ors 1998 (1) ZLR 286 (H)

C *S Cohen Ltd v Johnston & Johnston* 1970 (4) SA 332 (SWA)

Legislation considered

Companies Act [*Chapter 24:03*], ss 301 & 303

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

Case information

D *L Uriri*, for thefirst applicant

T Muchineripi, for the second and third applicants

N Mpumelo, for the fourth applicant

G N Mlotshwa, for the second and sixth respondents

P Ranchhod, for the third and fourth respondents

E *A Rutanhera,* for the fifth respondent

Judgment

MTSHIYA J: This is an urgent application filed on 2 February 2011 and the applicants seek the following relief:

"Final Order

1. That the first respondent revokes the appointment of Wesley Militala as F Provisional Judicial Manager of David Whitehead Textiles Limited for failure to give security for the proper performance of his duties in terms s 302(1)(b)(i) of the Companies Act [*Chapter 24:03*] and appoints in his place a suitable person as the Provisional Judicial Manager of David Whitehead Textiles Limited.
2. That the first and second respondents pay the costs of suit at an attorney – client scale

G Interim Order

1. That pending the finalization of this matter the first respondent forthwith suspends his appointment of Wesley Militala as Provisional Judicial Manager of David Whitehead Textiles Limited and that in his place he appoints an interim Provisional Judicial Manger with the same powers as granted to the Provisional Judicial Manager by the order of BHUNU J of [*sic*] the 1st H December 2010.

Mtshiya J

2. That the first and second respondent [*sic*] pay the costs of suit at an attorney A -client scale".

On 1 December 2010 this court granted a consent order (i.e. the provisional order yet to be discharged) in the following terms:

"A. Respondents and an (*sic*) interested party shall show cause to this Court sitting at Harare on the 2nd day of March 2011 why an order should not be made in the following terms. B

1. The first, second, third, fourth, fifth and sixth respondents are hereby placed under Judicial Management for an indefinite period.
2. Subject to the provisions of s 299 of the Companies Act [*Chapter 24:03*] the Master shall appoint Winsley Militala of Petwin Executor and Trust Co (Private) Limited as Judicial Manager of first, second, third, fourth, fifth and sixth respondent companies with the powers C and duties set out in s 302 and 303 of that Act, and subject to the supervision of this court.
3. From the date of that appointment and upon completion of a bond of security in accordance with s 274 of the Companies Act, the Judicial Manager shall forthwith take over the management of the first, second, third, fourth, fifth and sixth respondent companies and shall prepare D and submit reports in accordance with s 303 (c) of the Act.
4. The Judicial Manager shall have the powers set out in sub-paras (a) to (m) of s 306 of the Companies Act and, without the consent of creditors or the shareholders, may raise money on the security of the first, second, third, fourth, fifth and sixth respondent companies assets, or with the consent of the creditors and shareholders dispose off [*sic*] E part of the assets of the respondent companies to raise working capital or to enter into a scheme of arrangement to resuscitate the companies.
5. All actions and applications and the execution of all writs, summonses and other process against the first, second, third, fourth, fifth and sixth respondent companies shall be stayed and not proceeded with without the leave of this Court.
6. The Judicial Manager shall be entitled from the assets of the respondent F companies, to the payment of remuneration at a rate to be determined by the Master of the High Court and to reimbursements for all out-of-pocket expense [*sic*] incurred by him in the course of his duties.
7. The Judicial Manager shall pay both applicant's and respondents' costs of thee proceedings out of the assets of the Company.

B. Pending the grant of an order in terms of para (A) or the discharge of this G order.

1. The first, second, third, fourth, fifth and sixth respondents companies are hereby placed under Provisional Judicial Management and subject to the supervision to [*sic*] this court, shall be under the management of a Provisional Judicial Manager appointed in terms of s 299 of the Companies Act [*Chapter 24:03*] subject to s 300 of this Act. [*sic*] H

Mtshiya J A

2. The Master of High Court is hereby directed to appoint Winsley Militala of Petwin Executor and Trust Co (Private) Limited who is a suitably qualified and experienced person, as Provisional Judicial Manager of the first, second, third, fourth, fifth and sixth respondents.
3. Sub-paragraph 2-7 of para (a) of the draft order shall apply *mutatis mutandis* in relation to first, second, third, fourth, fifth and sixth B respondents have been finally placed under Judicial Management.
4. This order shall be published one [*sic*] in the Government Gazette and once in the Herald newspaper. Publication shall be the short form annexed to this order.
5. Any person intending to support or oppose the application on the return day of this order shall: C
   (a) give due notice to the applicants at Gasa Nyamadzawo & Associates.
   (b) serve on the applicant (and on the respondent) a copy of any affidavit which he files with the Registrar of the High Court".

The parties to the above consent order were:

Zimbabwe Textile Workers Union	Applicant
D and	
David Whitehead Textiles Limited	First Respondent (hereinafter referred to as "DWT")
DWT Holdings (Pvt) Ltd	Second Respondent

DWT Spinning (Pvt) Ltd	Third Respondent
DWT Cotton Wools (Pvt) Ltd E	Fourth Respondent & 4 Ors

In line with clause B(2) of the interim order, the second respondent, Winsley Militala, (Mr Militala) was duly appointed Provisional Judicial Manager of:-

1. DWT
2. DWT Holdings (Pvt) Ltd F
3. DWT Spinning (Pvt) Ltd
4. DWT Cotton Wools (Pvt) Ltd and 2 other companies (only referred to as fifth and sixth respondents in the consent order)

According to the founding affidavit filed with this application, Mr Militala was G appointed as provisional judicial manager on 21 December 2010. Prior to his appointment the first respondent herein had requested him to provide security to cover an amount of US$12 000 000. This request, according to the founding affidavit, was made in terms of s 302 of the Companies Act [*Chapter 24:03*] ("the Act"). In order to satisfy that requirement, Mr Militala obtained a bond of security from Allied Insurance Company. However, after H he was already appointed, it transpired that Allied Insurance Company did

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not have the capacity to cover the full risk (i.e. US$12 000 000). The said A insurance company subsequently withdrew its bond of security. That left Mr Militala without any form of security at all.

In addition to the absence of security, it was averred in the founding affidavit that Mr Militala. as provisional judicial manager, had proceeded to allow a disputed claim of US$3 000 000. It was stated that the confirmation of B that claim between Eastway Agritech Investments Ltd exhibited gross negligence on the part of Mr Militala. The disputed claim was still subject to determination by this court in case No. HC 705/10

Furthermore, the first applicant alleged that Mr Militala had proceeded to sign a lease agreement between DWT and Kithra for no compensation (rental) C except for a management fee of US$15000 payable to Mr Militala himself. The first applicant had advised the first respondent of his concerns about Mr Militala but no action had been taken. The first applicant also alleged that a break-in had occurred at the industrial property of DWT resulting in a loss of property.

Due to the foregoing it was therefore the first applicant's view that speedy D action was required to remove Mr Militala from the position of provisional judicial manager. It was argued that to allow him to continue without cover of a security bond would endanger the interests of DWT and all stakeholders. In order to deal with that situation the first applicant deemed it necessary to file this urgent application. E

The application first came before me on 3 February 2011. At the first hearing I urged the parties to seek a practical and amicable settlement. To allow for discussions, I postponed the matter to 7 February 2011. On 7 February 2011 the parties reported that no progress had been made towards a settlement and Mr *Mlotshwa,* for the second respondent, then applied for a day's postponement, indicating Mr Militala was travelling from South Africa and F would be in the country on 8 February 2011. I allowed the postponement to 8 February 2011.

On 8 February 2011 Mr *Ranchhod,* representing the third respondent, also appeared before me and indicated that the third respondent had an interest in the matter. Mr *Mlotshwa* also indicated that there were many creditors G interested in the matter. He said those creditors would like to be heard. Mr *Nhemwa,* for the applicant, had no objection to the matter being postponed so that interested creditors could be served with the application. In order to allow for other interested parties to be served with the application, I postponed the matter to 10 February 2011 and directed the first applicant to serve the application on all creditors appearing on the Provisional Judicial Management H

Mtshiya J

A Report, including Parrogate Zimbabwe (Pvt) Ltd (i.e. third respondent).

On 10 February 2011, having been served with this application, the following companies/entities applied to be joined to the proceedings either as applicants or respondents

(a) Zimbabwe Electricity Transmission and Distribution Company B

(b) National Social Security Authority

(c) Zimbabwe Textiles Workers Union

(d) City of Harare

(e) Mespic Trading

(f) Zimbabwe Revenue Authority C

(g) Parrogate Zimbabwe (Pvt) Ltd

(h) David Whitehead Retrenchees

(i) Commercial Bank of Zimbabwe

(j) Current Employees of David Whitehead.

D I granted the joinder applications in respect of the above applicants in the capacities in which they are now cited in this judgment. However, on 11 February 2011, upon realising that some of the people who had made applications for joinder had no right of audience before me, I quickly corrected/altered my decision by determining that the following would not be joined to the proceedings: E

(a) Zimbabwe Textile Workers Union

(b) City of Harare

(c) Mespic Trading.

At the commencement of the hearing, Mr *Mlotshwa* raised the following F preliminary issues (points *in limine*):

> "1. The non-appearance of the Master of the High Court as a cited respondent rendered his reports inadmissible since they were not in affidavit form.
>
> 2. The citing of the Provisional Judicial Manager in his 'individual' capacity was irregular.
>
> 3. The representation of the first applicant by Messrs Nhemwa and Associates G (who *in casu* are instructing Mr *Uriri),* when they had previously represented DWT, created a conflict of interest and thus disqualifying the said legal practitioners to represent the first applicant *in casu*.
>
> 4. The form of the certificate of urgency prepared by Mr *Nhemwa* of Nhemwa and Associates did not clearly spell out the urgency in the matter.
>
> 5. The issue of urgency (i.e. is the matter urgent); and H
>
> 6. The issue of non-joinder."

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In addition to the above preliminary issues, Mr *Ranchhod* also raised the A following preliminary issue (i.e this shall be the 7thpoint *in limine*).

> "7. The provisions of ss 302 and 305 precluded the application from being determined as applicants have not sought to anticipate the return day of the provisional order."

After hearing detailed arguments on the preliminary issues, I asked the parties B to also address me on the merits and indicated that my determination on the points *in limine* would, however, dictate whether or not there was need for me to proceed to the merits.

Noting the manner in which I wanted to proceed, Mr *Mlotshwa* correctly pointed out that it would be prudent for me to commence by making a determination of those points *in limine* which dealt with the issue of whether C on not the applicants are properly before the court. Indeed, that is the correct approach to be taken because it would certainly be improper to proceed to address the other issues when the applicants are ruled to be out of court. That being the case, the issues that quickly fall for

determination are the representation of the applicants by Messrs Nhemwa and Associates (issue D 3) and non-joinder (issue 6). I shall therefore consider those issues in the following manner:

1. Whether nor not the representation of the first applicant by Messrs Nhemwa and Associates when they had previously represented DWT created a conflict of interest capable of disqualifying the said legal E practitioners from representing the first applicant *in casu***.**

In addition to submitting that the preparation of the certificate of urgency by Mr *Nhemwa* was undesirable, Mr *Mlotshwa* went on to point out that Messrs Nhemwa and Associates were, in fact, close to the issues for determination. He said present and retrenched employees of DWT had raised concerns of conflict of interest. This was so, he argued, because Mr *Nhemwa* had F previously represented both current and retrenched employees of DWT. That being the case, Mr *Mlotshwa* submitted it would be improper for Mr *Nhemwa's* firm to represent Mr Militala who is now the provisional judicial manager of DWT, because that would compromise the rights of employees.

In response to Mr *Mlotshwa's* submissions Mr *Uriri* pointed out that Mr G *Nhemwa* had represented a legal entity called Zimbabwe Textile Workers Union. This was in respect of retrenchment packages. He said the said entity shared the same views as the applicant and therefore there was no conflict of interest. He said unlike the situation in *Core Mining and Minerals Resources (Pvt) Ltd* v *The Zimbabwe Mining Development Corporation & Ors* 2011 (1) ZLR 22 (H), where it was ruled that the legal practitioner in question H

Mtshiya J

A had participated in the pertinent affairs of his client at a level that precluded him from appearing for the same client as a legal practitioner, there was no sufficient evidence *in casu* to justify a finding of conflict of interest.

I now proceed to determine the point *in limine*.

In *Central African Building Construction Co (Pvt) Ltd* v *Construction* B *Resources Africa (Pvt) Ltd* 2010 (1) ZLR 464 (W), Gowora J made the following pertinent comments:

> "It is important that a legal practitioner should at all times retain his independence in relation to his client and the litigation which is being conducted …
>
> … A legal practitioner's duty is to protect the interests of his client and to give legal advice. It is not the function of the legal practitioner to then step into the C shoes of the client and to perform acts that are materially related to the dispute before the court in an endeavour to buttress the case of his client …"

I agree with the above principles relating to the conduct of legal practitioners and also wish to point out that, in addition to the above important principles, it should always be remembered that a legal practitioner executes his duties as an officer of court. It would therefore be unfortunate if the independent D mind of the legal practitioner is lost because of the need to win the case of his/her client at any cost. Such a legal practitioner would, in my view, have ceased to behave as an officer of court and consequently would render no assistance to the court.

In casu, in the absence of detailed evidence showing active involvement by E Mr *Nhemwa* in the affairs of his client, I am not persuaded to accept that his representation of the Zimbabwe Textile Workers Union calls upon him to distance himself from any participation in this case as the first applicant's legal practitioner. The case cited above, namely *Core Mining supra*, clearly demonstrate the need for clear evidence of activities/actions on the part of a legal practitioner that would disqualify him/her from representing a litigant. F The facts alluded to should, indeed, clearly point to the conflict of interest. Admittedly the Union represented workers but that alone, in my view, is not enough to establish conflict of interest. More evidence is required to show that the legal practitioner's independence faced the danger of compromise.

In view of what I have said above, I am unable to uphold this preliminary G issue. Nhemwa and Company are not barred from representing the first applicant and therefore had the legal capacity to file this application.

2. Whether or not the failure to cite the other parties to the provisional order granted on 1 December 2010 is fatal (i.e Non-Joinder)

Supported by Mr *Ranchhod,* Mr *Mlotshwa* submitted that this application H was not properly before the court because it was not filed in terms of s 301(2)

2011 (1) ZLR p294

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of the Companies Act which provides as follows: A

> "(2) The court or a judge may at any time and in any manner, on the application of a creditor, a member, the provisional judicial manager, the Master or any person who would have been entitled to apply for the provisional judicial management order concerned, vary the terms of a provisional judicial management order, including the date of the return day, or discharge it.

Mr *Mlotshwa* submitted that since the court was already seized with the B matter with respect to the provisional order granted on 1 December 2010, with a return date of 2 March 2011, the effect of the current application was to duplicate proceedings. He said the current application could not be determined in the absence of the companies under provisional judicial management. Those companies, he said, have an interest in this matter. C Furthermore, Mr *Mlotshwa* submitted, leave of this court had not been obtained for the application to be filed as required in terms of para A(5) as read with para B(3) of the provisional order of 1 December 2010.

With the support of Mr *Muchineripi* and Ms *Mpumelo,* Mr *Uriri* disagreed with Mr *Mlotshwa's* submissions, arguing that it was not necessary to involve or cite the companies under provisional judicial management. He said that D those companies were already under the management and control of the provisional judicial manager, namely Mr Militala who is cited as the second respondent. The only interested parties, he argued, would be the Master of the High Court and creditors. These, he said, had been cited. He said there was therefore no question of non-joinder. Without seeking to have the parties E to the provisional order of 1 December 2010, joined to the application, Mr *Uriri* went on to submit that this court could still proceed in terms of r 87 of the High Court Rules, 1971, which provides as follows:

> "(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons F who are parties to the cause or matter.
>
> (2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application –
>
> (a) …….
>
> (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause G or matter may be effectually and completely determined and adjudicated upon, to be added as party;
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.
>
> (3) …"

However, in order to fall within the ambit of s 301(2) of the Companies Act H

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Mtshiya J

A and also to avoid duplicity of orders, Mr *Uriri* moved for an amendment of the provisional order prayed for in this application. The proposed amendment would result in the substitution of a provisional order with a final order.

The proposed amendment was given as follows:

> "That it be and is hereby ordered that the order of provisional judicial management B issued out of this court on 1 December 2010 be and is hereby altered in para B(2) as follows:
>
> 1. The appointment of Winsley Militala of Petwin Executor and Trust Co. (Private) Limited as Provisional Judicial Manager of the first to sixth respondents be and is hereby set aside.
> 2. The Master of the High Court shall forthwith appoint a suitably qualified C person as Provisional Judicial Manager of the first to sixth respondents.
> 3. The second respondent shall personally bear the costs of this application".

I view the proposed amendment as a clear admission that the provisions of s 301(2) of the Companies Act were never at the fore when this application was filed.

D Mr *Mlotshwa* opposed the application, arguing that critical parties had been excluded in this application. He said the companies under provisional judicial management still existed and were entitled to be heard. Mr *Ranchhod* also opposed the application, stating that the provisional order of 1 December 2010 was obtained through the consent of all the parties to it. There was therefore need for all parties to the existing provisional order to be heard.

E In determining this point *in limine*, I shall start by stating that I agree with Mr *Mlotshwa* that the companies under judicial management still exist and retain their identies. They have only been placed under a provisional judicial manager in terms of s 303 of the Companies Act which provides follows:

> "A provisional judicial manager shall – F
>
> (a) assume the management of the company concerned and recover and take possession of all the assets of the company."

I believe that a company placed under provisional judicial management does not automatically shed off its ownership or shareholding. It is the management that changes for the sole reason that, if properly managed, the company might move out of the problems that led to judicial management. G That brings us to the purposes of judicial management.

In *Feigenbaum & Anor* v *Germanis & Ors* 1998 (1) ZLR 286 (H), where all parties were cited, Malaba J, as he then was, in considering the distinction between liquidation and judicial management, quoted, with approval, from *S. Cohen Ltd* v *Johnston & Johnston* 1970 (4) SA 332 (SWA) where Muller H J said:

Mtshiya J

> "The purposes of a liquidation order are entirely different from those sought A to be achieved by an order for judicial management. In the one case, the very object is to wind up the affairs of a company and effect its dissolution; in the other *the object is just the opposite, namely, to avoid liquidation where there is a chance of the company surmounting its difficulties by proper management, namely, management by a person appointed as judicial manager to conduct the affairs of the company subject to the supervision of the court*. B
>
> There is accordingly a fundamental difference between the function and powers of a liquidator and those of a judicial manager and also material differences between the rights of creditors of a company in liquidation and those of a company under judicial management" (my own emphasis).

In agreeing with the above, I also take the view that the owners/shareholders of a company under judicial management should never be ignored in C court proceedings such as these. The proceedings have a direct bearing on the operations of the company under judicial management. The owners/shareholders have, through a court process, only divested management to the provisional judicial manager. They remain the owners/shareholders of the company under provisional judicial management and that alone sends a loud call for their involvement in any matter related to the operations of D their judicially managed company.

In view of the above, I find merit in the submission that all the parties to the provisional order that the applicants want to amend/vary as permitted under s 301(2) of the Companies Act, ought to have been cited. Failure to cite the companies under provisional judicial management, in my view, is a fatal E irregularity which cannot be rectified by merely amending the provisional order prayed for in this application. Indeed, the amendment proposed would have avoided a situation of having two provisional orders with different return dates on the same subject.

It in also correct that in terms of r 87 of the High Court Rules, quoted earlier F in this judgment, I can proceed to determine the real issues between the parties. I, however, believe that *in casu* such a move would be a betrayal of the need to follow laid down procedures. Our courts have always insisted that laid down procedure should be adhered to.

In casu, not only has the applicant failed to make a proper application as is its right under s 301(2) of the Companies Act and also failed to cite the G relevant parties, the applicant has further proceeded to ignore the directions given in the provisional order that it seeks to vary. Paragraph A(5) of the provisional order, as read with para B(3) thereof, reads as follows:

> "All actions and applications and the execution of all writs, summons and other process against the first, second, third, fourth, fifth and sixth respondent companies shall be stayed and not proceeded with without the leave of this Court". H

Mtshiya J

A The above direction was given in terms of s 301(1) of the Companies Act which states:

> "A provisional judicial management order shall contain:
>
> (a) …….
>
> (b) ……. B
>
> (c) such other directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, as the court may consider necessary;
>
> and *may contain directions that while the company is under judicial management, all actions and proceedings and the execution of all writs, summonses and other* C *processes against the company be stayed and be not proceeded with without the leave of the court*" (own emphasis).

The above direction is contained in the provisional order that the applicants seek to vary.

A variation of the provisional order of 1 December 2010 in the manner D proposed would certainly, in different ways, affect the parties to it, namely the companies under provisional judicial management. There was therefore need to seek leave of court to proceed with an application that would certainly have an impact on the management of the companies under judicial management. There would also still be a need to re-advertise the varied provisional order reflecting the varied terms. The original parties ought, therefore, to be cited. E It is those same parties who remain entitled to be heard on the return date.

It is further important to understand that judicial management means that the court, through the Master of the High Court, is managing the affairs of the entities placed under judicial management – whether provisional or final. The provisional judicial manager only operates under the direction(s) of the F Master of the High Court. Given this scenario, it is therefore important and reasonable that any party wishing to vary the original directions of the court to the extent suggested *in casu,* must seek leave to do so. Accordingly, in the absence of such leave being granted, any attempt to proceed in terms of r 87 of the High Court Rules, 1971 would be improper. I am therefore not persuaded to proceed in terms of r 87 of the High Court Rules. I believe such G a move would amount to me assisting the applicants to properly reconstruct their case and yet there is no leave of court for them to proceed with the application. This also means that the proposed amendment would be of no consequence since it would not cure that irregularity.

All in all, my finding, based on the issue of non-joinder as considered together H with the provisions of s 301(2) of the Companies Act, is that the applicants are

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not properly before the court. That point *in limine* is therefore upheld. Having A upheld that point *in limine,* it means that I am disabled from considering all the other preliminary issues raised, including the merits of the case. I cannot proceed to do that in the absence of a proper application before me.

I therefore order as follows:

> The application be and is hereby dismissed with costs. B

C Nhemwa & Associates, first applicant's legal practitioners

Muchineripi & Associates, second & third applicants' legal practitioners

Mlotshwa & Co, second & sixth respondents' legal practitioners

Hussein Ranchhod & Co, third & fourth respondents' legal practitioners C

Scanlen & Holderness, fifth respondent's legal practitioners

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ZVAVAMWE v MPOFU & ORS 2011 (1) ZLR 299 (H)

Citation	2011 (1) ZLR 299 (H)
Case No	Judgment No. HB-32-11
Court	High Court, Bulawayo
Judge	Kamocha J & Mathonsi J
Heard	21 February 2011
Judgment	24 February 2011
Counsel	Miss *M Bhunu*, for the appellant Ms *C Nunu*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Customary law – *application – courts having latitude to apply either customary or general law – courts should not apply customary law if injustice would result.*

Customary law – *application – succession – right of eldest son to inherit* D *entire estate – inherently unjust – justice of case demanding that general law should be applied*

Headnote

E, a widow, died in 1986; her husband had died in 1967. There were five children of the marriage; by the time of the current action, the three sons E had themselves died. The two daughters were the first two respondents. At the death of her husband, E had inherited the family home in Bulawayo. That inheritance was not in accordance with customary law as an African woman was then regarded as a perpetual minor, incapable of owning or inheriting her husband's immovable property. After E's death, her eldest son A, his wife (the appellant) and his family remained in the house.

F A distribution plan in respect of the estate was drawn up, in which the magistrate ruled that all E's children were entitled to inherit in equal shares. The appellant argued that A was, as the eldest son, entitled under customary law to inherit E's estate, to the exclusion of the other children. It was further argued that the estate could not devolve according to the inheritance regime provided for in the Administration of Estates Act G [*Chapter 6:01*], the relevant provisions of which came into effect through Act No. 16 of 1998, which did not have a retroactive effect.

Held, that the matter could be resolved by reference to s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*] which sets out the choice of law principles to be applied in a situation of this nature. Where the H legislature has given the courts the latitude to apply either customary

Mathonsi J

law or general law, having regard to the nature of the case and the A surrounding circumstances, the courts should purposely refrain from applying customary law if its application would lead to an injustice. It is absurd for a first born son to seek to inherit the entire estate of his parent to the complete exclusion of his siblings. Other than the historical accident of being born ahead of others, there is no other justification for B such a situation. The law must be used to protect the other members of that family against the acquisitive tendencies of the first born son, as clearly all of them are entitled to benefit from the estate. E had inherited the house from her husband by virtue of general law, which meant that the family elected to be governed by general law, in so far as inheritance was concerned. The estate should therefore be distributed in accordance C with the Administration of Estates Act.

Cases cited

Chapeyama v Matende & Anor 1999 (1) ZLR 534 (H)

Jengwa v Jengwa 1999 (2) ZLR 121 (H) D

Mtuda v Ndudzo 2000 (1) ZLR 710 (H)

Legislation considered

Customary Law and Local Courts Act [*Chapter 7:05*], s 3

Case information

Miss *M Bhunu*, for the appellant E

Ms *C Nunu*, for the respondent

Judgment

MATHONSI J: The late Elina Nyoni died on 14 July 1986 at Bulawayo. She was a widow whose husband died in 1967 and their marriage had been blessed with 5 children namely Abias Zvavamwe, born on 21 November F 1957, Anna Mpofu, born on 7 April 1959, Never Mpofu, born on 10 May 1961, Albert Mpofu, born on 5 November 1963 and Alice Mpofu, born on 3 June 1967.

All the male children of the late Elina Nyoni are now deceased but are survived by their own children who are the grandchildren of the late Elina Nyoni.

At the time of the death of her husband, the late Elina Nyoni had inherited G stand No. 63816 Tshabalala Township, Bulawayo which is also known as house No. 7547/8 Tshabalala Bulawayo. Clearly, that inheritance was not in accordance with customary law as an African woman was then regarded as a perpetual minor incapable of owning or inheriting her husband's immovable property. Therefore the late Elina Nyoni inherited the house from her husband H

Mathonsi J

A by virtue of general law which means that the family elected to be governed by general law, in so far as inheritance was concerned.

When Elina Nyoni died, her estate was not registered and nothing was done to wind up her estate until the year 2001. The first born son Abias Zvavamwe remained in occupation of house No. 7547/8 Tshabalala Bulawayo along with his family which included his wife Winfilda Zvavamwe, the appellant B in this matter. Trouble started when the late Elina's children, the first and second respondents, wanted to perform the traditional ceremony known as "*umbuyiso*" in Sindebele in 2007, which had not been performed from the time their mother died.

The appellant, whose husband Abias Zvavamwe had died leaving her in C occupation of the house, refused to let them perform the ceremony at the house arguing that she had since inherited the house from her husband. Prior to that the estate of the late Elina Nyoni had been registered with the additional master as DRB No. 1135/2001 with Annah Sibanda, the daughter who is the second Respondent in this matter being appointed executrix.

D A distribution plan in terms of which the only asset of the estate, house No. 7547/8 Tshabalala Bulawayo, was to devolve to the surviving children and grandchildren of the late Elina Nyoni, was drawn up and submitted to the additional master. It is that distribution plan which the appellant

contested and when the matter was heard by the court *a quo* it found in favour of the Respondents and directed that the winding up of the estate must proceed in E terms of that plan.

Aggrieved by that decision the appellant noted an appeal to this court on the following grounds:

> "1. The learned magistrate erred in law in making an order that all children of the deceased were entitled to inherit in equal shares in terms of Amendment 6 of F 1997 of the Deceased Estates Act (sic) when in fact the deceased died in 1986 and the Amendment does not have retrospective effect.
>
> 2. The learned magistrate erred in evicting the appellant upon 4 days notice of the order. Even if the order was correct the appellant was still entitled to a reasonable notice period.
>
> 3. The appellant therefore seeks an order declaring that second and third G respondent(s) are not entitled to inherit from the deceased estate and the deceased son Abias Zvavamwe was the heir of the deceased estate in terms of the law at the time of her death and that as such the appellant as the surviving spouse of Abias Zvavamwe is his heir and as such should inherit his estate."

At the commencement of hearing of this appeal, Ms *Nunu* for the first and second respondents took a point *in limine* that the notice of appeal was fatally H defective in that it did not identify the part of the judgment being attacked

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Mathonsi J

and did not contain a prayer. The parties however agreed that the merits of A the matter be determined once and for all in order to give the parties direction as to how to proceed hereafter.

The import of the appellant's argument is that her late husband Abias Zvavamwe was the first born son of the late Elina Nyoni and as such he was entitled, according to customary law, to inherit her estate in his individual B capacity and to the exclusion of the other children, at the time of her death in 1986. Ms *Bhunu* for the appellant further argued that the estate could not devolve according to the inheritance regime provided for in the Administration of Estates Act [*Chapter 6:01*], the relevant provisions of which came into effect through Act No. 16 of 1998 which did not have a retroactive effect.

Ms *Nunu* strongly argued that even if customary law was applied, the late C Abias Zvavanwe was not entitled to inherit the estate on his own because, according to traditional Shona customary law, whatever property a woman acquired was regarded as her personal property which was distributed upon her death to all her children. It was only the property of the man which was inherited by the first born son. D

I am of the view that this matter is capable of resolution by reference to s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*], which sets out the choice of law principles to be applied in a situation of this nature. That provision reads as follows:

> **"3. Application of Customary Law**
>
> (1) Subject to this Act and any other enactment, unless the justice of the case E otherwise requires –
>
> (a) customary law shall apply in any civil case where –
>
> (i) the parties have expressly agreed that it should apply; or F
>
> (ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed that it should apply; or
>
> (iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;
>
> (b) the general law of Zimbabwe shall apply in all other cases.
>
> (2) For the purposes of paragraph (a) of subsection (1) –
>
> 'surrounding circumstances', in relation to a case, shall, without limiting the expression, include – G
>
> (a) the mode of life of the parties;
>
> (b) the subject matter of the case;
>
> (c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which apply to the case.
>
> (d) the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe, as the case may be." H

Mathonsi J

A In *Chapeyama* v *Matende & Anor* 1999 (1) ZLR 534 (H) at 536E-F, Chinhengo J stated:

> "The recognition and exhortation that the law must adapt and be deliberately adapted to changing social and economic conditions is indeed a fundamental premise on which our jurisdiction in the area of customary law will develop as well as being a basis on which justice will be done and be seen to be done. B The correct balance must, however, be struck between judicial law making and legislation. Where the law requires to be revolutionised, the function is largely that of Parliament to change it. But where, within the framework and spirit of the existing law, it is possible for the courts to interpret it in a purposive manner and render it more useful in changed circumstances, the courts will by such purposive and progressive interpretation achieve the same goal. The purpose C of the law is to serve the people and meet their expectations."

I find myself totally in agreement with that pronouncement. In a case such as the present, where the legislature has legislated to give the courts the latitude to apply either customary law or general law having regard to the nature of the case and the surrounding circumstances, the courts should in D my view purposely refrain from applying customary law, if its application would lead to an injustice. See *Jengwa* v *Jengwa* 1999 (2) ZLR 121 (H) at 128E; *Mtuda* v *Ndudzo* 2000 (1) ZLR 710 (H) at 715D-E.

In my view, it is absurd for a first born son to seek to inherit the entire estate of his parent to the complete exclusion of his siblings. Other than the historical E accident of being born ahead of others, there is no other justification for such a situation. The law must be used to protect the other members of that family against the acquisitive tendancies of the first born son as clearly all of them are entitled to benefit from the estate. It was probably with that mischief in mind that the legislature introduced the amendments to the Administration of Estates Act [*Chapter 6:01*].

F Happily though, in this case the issue is resolved by the fact that the late Elina Nyoni herself inherited the house from her late husband. She could not have inherited the house and taken transfer, as the papers show, on 1 February 1969 if the parties were applying customary law. The concept of the wife inheriting from her husband then only existed in general law. It must G follow therefore that the family long agreed to apply general law principles of inheritance and not customary law.

The late Abias Zvavamwe therefore was not entitled to inherit the house in his own right and did not so inherit. The house should devolve to all the children of the late Elina Nyoni including the grandchildren born of those H children who have since passed away.

2011 (1) ZLR p304

Mathonsi J

The executrix of the estate had already submitted a distribution plan approved A by all concerned except the appellant. It is in accordance with that distribution plan that the estate should be wound up.

Accordingly, I make the following order; that

1. The appeal be and is hereby dismissed.
2. All the children of the late Elina Nyoni are entitled to inherit house No. B 7547/8 Tshabalala Bulawayo in equal shares with the shares of those that are now deceased going to their respective children, the grandchildren of the late Elina Nyoni.
3. The matter is remitted to the magistrates court for purposes of the completion of the winding up of the estate in terms of the distribution C plan already prepared.
4. The costs of the appeal shall be borne by the estate pf the late Elina Nyoni.

KAMOCHA J concurred.

Zimbabwe Women Lawyers' Association, appellant's legal practitioners D

Calderwood Bryce Hendrie & Partners, respondent's legal practitioners E

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CENTRAL AFRICAN BUILDING CONSTRUCTION v CONSTRUCTION RESOURCES AFRICA (PVT) LTD 2011 (1) ZLR 305 (H)

Citation	2011 (1) ZLR 305 (H)
Case No	Judgment No. HH-47-11
Court	High Court, Harare
Judge	Gowora J
Heard	14 July 2010; 17 July 2010; 28 July 2010; 29 June 2010; 1 June 2010; 26 July 2010
Judgment	2 March 2011
Counsel	*E Jori,* for the plaintiff *L Uriri,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Company – *director – change of – proof – returns from Registrar of Companies showing change of directors – extent to which such returns can be taken as evidence*

D **Company** – *legal proceedings – institution of – whether such proceedings authorized – what party alleging lack of authority must show*

Practice and procedure – *parties – company – right of director to bring action on behalf of company – allegation that director not authorized to bring action – what party making such allegation must show*

Headnote

E In 2004 the parties concluded a written agreement in relation to three immovable properties registered in the name of the plaintiff. This followed an earlier agreement in terms of which certain equipment was sold to the defendant. In terms of the agreement of sale, transfer of the properties would be effected after full payment of the purchase price. A F rift developed between the parties on the implementation of the terms of the conditions of the two agreements and as a result the plaintiff notified the defendant that it had cancelled both agreements. It sought the eviction of the defendant from all three immovable premises on the grounds that it remained the registered owner of the properties. In G seeking absolution from the instance, the defendant raised the issue of whether the action had been instituted by persons properly authorised to do so. The plaintiff argued that the real issue was whether or not the original directors had resigned and appointed two other persons as the only directors in the company. The plaintiff put in issue the form from the companies registry showing that the directorship had changed. The H defendant argued that under s 12 of the Companies Act [*Chapter 24:03*]

Gowora J

returns filed in the registry are *prima facie* proof of A the correctness of the contents thereof.

Held, that the presumption provided for in the section would operate against the company in favour of any third parties doing business with the company, but not against its directors and shareholders where documents that have been lodged are disputed by the parties who are themselves B supposed to lodge the documents. Further, in terms of the proviso to the section, the presumption is not available to a person who has knowledge to the contrary or is supposed to have such knowledge.

Held, further, that in order for the defendant to successfully argue that the institution of proceedings on behalf of the plaintiff had not been authorized by the company, it was necessary that the defendant place C before the court a minimum of evidence suggesting that there was no such authority. Previous cases dealing with this particular point were matters brought either as petitions or on notice of motion, and the parties would have filed affidavits in which evidence was given as to the lack of authority or to its existence. The present case was an action and only one party had so far given evidence. It would cause an injustice if at D this stage of the proceedings the court were to find that the suit before it had not been authorized, based on an application by a defendant who was yet to give evidence. As the existence of authority on the part of the persons purporting to act for the plaintiff or lack thereof depended on facts, it was necessary that the defendant should lead evidence that E would assist in resolving the dispute.

Held, further, that the form from the registry, which should be the best evidence, was disputed. As the defendant placed reliance on it, the defendant should explain how and when the document was originated and filed with the Registrar of Companies. This evidence was particularly F necessary where the parties were in conflict as to whether or not ownership in the company had passed, which would lead to a change in directors as a result of the change in shareholding.

Cases cited

Chetty v Naidoo 1974 (3) SA 13 (A) G

Ex p *Deputy Sheriff, Salisbury:*In re *Doyle v Salgo* 1957 (3) SA 740 (SR)

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

Munhuwa v Mhukahuru Bus Services (Pvt) Ltd 1994 (2) ZLR 382 (H)

R v Halpin [1975] QB 907; [1975] 2 All ER 1124 (CA)

Siziba v Dankwerts & Anor HH-108-08

Smith v Kwanonqubela Town Council 1999 (4) SA 947 (SCA)

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

Taunton Entprs (Pvt) Ltd & Anor v Marais 1996 (2) ZLR 303 (H)

Uitenhage Municipality v Uys 1974 (3) SA 800 (E)

Legislation considered B

Companies Act [*Chapter 24:03*], s 12

Case information

E Jori, for the plaintiff

L Uriri, for the defendant

Judgment

C **GOWORA J**: At the conclusion of the plaintiff's case, Mr *Uriri* indicated that the defendant was applying for absolution from the instance and that he had the application ready which would be filed the following day. In the event the application was only filed on 16 September 2010. The response from the plaintiff was in turn filed on 21 October 2010. This has contributed in part to the delay in the determination of the application.

D The plaintiff filed summons on which the particulars of claim were endorsed. The particulars of claim on which the action was based were phrased as follows:

> "The plaintiff's claim is for an order evicting the defendant and all persons holding through it from three properties being 8 Whites Way, Msasa, 8 Loreley Close, Msasa and 8 Comet Close Mt Pleasant, which properties belong to the plaintiff and are in the wrongful and unlawful possession of the defendant, plus E costs of suit."

In answer to the summons, the defendant had, on 15 February 2007 filed a bald plea in which it merely denied the allegation on the summons and put the plaintiff to the proof thereof. On 17 May 2007, however, the defendant filed an amended plea in which it repeated the denial of allegations. It then F amplified its plea with additional averments as follows:

> "The defendant further avers as follows:
>
> 1. That a Mr Vieira who has purported to institute these proceedings has not been authorised by the plaintiff to bring the current proceedings.
> 2. That in any event no resolution has been passed by the plaintiff's current directors to bring a claim against the defendant because the defendant is G not in occupation of the premises in question.
> 3. That the premises in question are lawfully occupied by the current directors and shareholders of the plaintiff and that the plaintiff can not seek its own eviction as there is no cause for such action.
> 4. That the current directors of the plaintiff have not breached the sale agreements between them and Mr Vieira concerning the premises in question upon H which a vindicatory claim has been filed in this matter.

> 5. That all payments due to Mr Vieira were duly remitted and tendered. A
> 6. That in the event that this court finds that Mr Vieira is still owed some money by the current directors and shareholders of the plaintiff, such amount is hereby tendered to Mr Vieira".

The defendant then prays for a dismissal of the claim with costs. The plaintiff, through its legal practitioners, protested to the defendant's legal practitioners B about the defective amendment to the plea but ultimately a replication was filed on behalf of the plaintiff. By the time the matter proceeded for a pre-trial conference it seems pretty evident that the parties had agreed to treat the amended plea as having been properly filed, as no issue was raised at the pre-trial conference or thereafter.

The background to the claim by the plaintiff is the following. On 29 November C 2004 the plaintiff, in terms of a written agreement, sold to the defendant assets listed on a schedule annexed to the agreement. An examination of the list shows that the assets comprised of office furniture, kitchen furniture and utensils, vehicles, workshop assets, generators, water pumps and radios and various other items to do with the plaintiff's business operations. In evidence, D the plaintiff's witness described the items sold under this agreement as plant equipment and goodwill. The purchase price was recorded as US$219 000. The effective date of the agreement was 26 November 2004 and the purchase price was payable free of deductions, against signature of the agreement by the parties. Clause 6 of the agreement provides:

> "That the Zimbabwean dollar equivalent of the United States dollar shall be E calculated at the auction rate prevailing in terms of the Zimbabwe Reserve Bank Auction Scheme as at the effective date."

Clause 7 reads:

> "It is recorded that delivery of the assets hereby sold shall be effected only against payment of the full purchase price".

Again on 29 November 2004 the parties concluded another written agreement F this time in relation to three immovable properties registered in the name of the plaintiff; viz; Stand 272 Beverley East Township of Stand 261 Beverley East Township, Stand 195 Beverley East Township 3 of Stand 218 Beverley East Township and Stand 8 Comet Rise Township 2 of Comet Rise Estate A. The purchase price for the properties was recorded as US$296 000, US$97 000, G and US$88 000 respectively. The effective date of this agreement was the date of signature which was 29 November 2004. This agreement, just like the first, had provision for payment of a portion of the purchase in Zimbabwe dollars converted from United States dollars at the auction rate as at the date of payment. Clause 7 of the agreement provides that transfer of the properties shall be effected within a reasonable period after the purchaser has fully paid H

Gowora J

A the purchase price to the seller. Risk and profit was in terms of clause 10 to vest in the purchaser with effect from the effective date from which the purchaser was entitled to take occupation and be responsible for all rates, taxes, electricity, water, sewerage, refuse removal and other charges and surcharges lawfully rendered or levied in respect of the immovable properties.

B A rift has developed between the parties on the implementation of the terms of the conditions of the two agreements and as a result the plaintiff has notified the defendant that it has cancelled both agreements. It has therefore sought the eviction of the defendant from all three immovable premises on the grounds that it remains the registered owner of the same.

In his submission for an order of absolution in favour of the defendant, Mr C *Uriri* has argued that the issues agreed at the pre-trial conference are not supported by the pleadings and that the real issues are, firstly, whether or not the suit before the court has been instituted by persons properly authorised to do so; and, secondly, whether or not the plaintiff, acting by the hand of those behind the *lis*, is entitled to vindicate any or all of the properties which D are the subject of the *lis*. Mr *Jori* on behalf of the plaintiff has accepted that this is the correct position. A brief cursory perusal of the submissions from counsel for both parties actually seems to dwell on the issues as originally agreed upon and settled at the pre-trial conference.

It is further argued that at the close of the plaintiff's case there was no evidence placed before this court "upon which a court, directing its mind E reasonably to such evidence, could or might (not should or ought to) find for the plaintiff". There exists a plethora of authorities on the test to be applied by a court considering an application by a defendant for an order of absolution from the instance, the leading case being *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5D, where F Beadle CJ stated the test be as follows:

> "The test therefore, boils down to this: is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make – a definition which helps not at all."

G In *Taunton Enterprises (Pvt) Ltd & Anor* v *Marais* 1996 (2) ZLR 303 (H) at 313C Malaba J (as he then was) defined the test thus:

> "The test is whether at the close of the plaintiff's case there is evidence upon which a reasonable man acting carefully might (not should) give judgment for the plaintiff on the issues before the court. The judicial officer is enjoined by law to bring to bear upon the evidence what the judgment of a reasonable man H might be, but not what he thinks the judgment is: *Gascoyne* v *Paul & Hunter*

Gowora J

> 1917 TPD 170 at 173; *Myburgh* v *Kelly* 1942 EDL 202; *Huizenga NO* v *Zvinoira* A 1987 (2) ZLR 276 (H) at 280A-B".

Chatikobo J in *Munhuwa* v *Mhukahuru Bus Services (Pvt) Ltd* 1994 (2) ZLR 382 (H) at p 383F-G described the test thus:

> "… It is axiomatic that an application for absolution from the instance stands much on the same footing as an application for the discharge of an accused at B the end of the State case in a criminal trial. This much is clear from the judgment of Beadle CJ in *Supreme Service Station* (1*969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A)."

In order for an application for discharge at the end of the State case in a criminal trial, an accused person has to convince the court that the State has failed to establish a *prima facie* case against the accused. It is trite that the C onus on the State in a criminal matter is generally higher than required in civil proceedings. It seems to me, therefore, that in order to succeed in an application for absolution from the instance a defendant must convince the court that the plaintiff has not established a *prima facie* case, meaning that there is no evidence before such court which in the opinion of a reasonable person might justify finding for the plaintiff. D

What is the evidence by the plaintiff in this matter? The plaintiff produced copies of original title deeds for the three immovable properties which reflected that the properties were registered in the name of the plaintiff. In terms of the agreement of sale concluded on 29 November 2004 transfer of the properties into the name of the defendant would in terms of clause E 7 of the same be effected

by the seller's conveyancers within a reasonable period after the purchaser had fully paid the purchase price to the seller. Yet on 9 March 2009 the defendant's legal practitioners addressed a letter to the plaintiff's legal practitioners in which the following is stated:

> "Be that as it may, it has also come to our attention through your aforesaid letter and pleadings in Case 708/09 that unbeknown to our Mr Chinawa: F
>
> (a) our clients have sold some of the properties in question to third parties
>
> …
>
> As indicated above, our Mr Chinawa only came to know of the alleged fraudulent transfers of the two properties through your letter. The transfers were not handled by us nor was our advice sought. G
>
> The writer has also ascertained that some time last year, Mr Masukuma approached our conveyancing department with instructions for application for lost deeds. The department proceeded to take all the necessary steps in law for recovery of the deeds as requested by Mr Musukuma."

The letter from the defendant's legal practitioners appears to me at face value to be contrary to what was agreed to by the parties in the agreements H

A of sale in respect of the plant and equipment and the sale of the immovable properties themselves. The day after the two agreements were signed the plaintiff addressed a letter to the defendant for the attention of Mr Musukuma on the implementation of the agreements. The pertinent paragraphs for purposes of this application are the first and second paragraphs which state:

> "Further to the signing of this agreement we wish to confirm the following: B
>
> (a) that on settlement of the full purchase price for the Deed of Sale and Agreement of Sale, we shall deliver to the purchaser all share certificates of the shares of company free from any pledge, cession or encumbrance, together with such transfer forms duly signed and stamped by or on behalf of the seller in such form of law as may be necessary to enable registration of the shares to be effected in the name of the purchase (sic) in the books C of the company.
>
> (b) that upon settlement of the full purchase price for the Deed of Sale and Agreement of Sale, we shall procure the registration of the directors, secretary, public officer and other officers of the Company."

The plaintiff has produced letters from its legal practitioners addressed to the defendant and its legal practitioners, wherein the plaintiff complains that the D defendant had not paid the purchase price in terms of the schedules agreed between the parties and which schedules formed part of the agreement. The plaintiff has also produced letters written on behalf of the defendant regarding the issue of payment of the purchase price. On 5 October 2006 the defendant's legal practitioners addressed a "without prejudice" letter to E the plaintiff's legal practitioners, giving an undertaking by their client to undertake a comprehensive calculation and account on all payments done to date, including any arrears, if any, by 25 October 2006. On 25October the same legal practitioners addressed a letter to the plaintiff's legal practitioners in which a schedule of payments allegedly made to the plaintiff was attached. A letter from the plaintiff's legal practitioners dated 27 October 2006 to those F of the defendant disputed the amounts reflected on the schedule and invited the defendant to furnish proof of the alleged payments. On 7 November 2006 the plaintiff's legal practitioners gave thirty days' written notice to the defendant of their client's intention to cancel the agreements. On 6 December 2006 the defendant's legal practitioners sent a cheque of $2 500 000 to the plaintiff's legal practitioners under cover of a letter. The letter states that G the amount was in full and final settlement of the amount outstanding by the defendant. There is no reference made to the letter of cancellation sent a month earlier to the defendant.

In terms of the agreement of sale, transfer of the properties should have been done after full payment of the purchase price. The plaintiff's evidence H is to the effect that the defendant was in breach, causing it, the plaintiff, to

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cancel the agreements of sale, yet the properties have been transferred to A the defendant. In my view, the letter by the plaintiff of 29 November 2004 was specific that transfer in respect of the shareholding in the plaintiff would only be effected upon full payment of the purchase price relating to the plant and equipment. The evidence from the plaintiff is to the effect that payment has not been effected in full and thus no shares were transferred to B the defendant's directors. The plaintiff

contends that the real issue is whether or not the Vieiras had resigned and appointed the Musukuma brothers as the only directors in the company. I am in agreement with that conclusion.

It seems to me that the issue of authority to institute the proceedings on the part of the Vieiras is interlinked with the issue of who the directors and shareholders of the company were. In other words, the question to be answered C is whether the Vieiras appointed the Musukumas as directors of the company in their stead. This question then puts in issue the CR 14 which was filed at the company registry office, as well as the minutes of the meeting where the appointments were alleged to have been made.

The evidence from the plaintiff was that Vieira Jnr was not in the country on D the date the meeting is supposed to have taken place. The plaintiff has put the validity of the two documents in issue and it is for the defendant to establish that indeed the meeting did take place and that the Musukumas were appointed directors, in which event the Vieiras' authority to institute proceedings on behalf of the plaintiff would not exist. The contention by the defendant is that there should be a valid resolution passed by a board of directors of the E company at a properly constituted meeting in which the proceedings were authorised. Whether or not there was a meeting is a question of fact which should be established by evidence. The contention by the defendant is that once a director has been appointed the appointment must be notified to the Registrar of Companies in the form of a CR14 and that once this form has been filed there is a presumption of regularity. F

Mr *Uriri* contended that returns filed in the companies registry are *prima facie* proof of the correctness of the contents thereof and that such returns can only be set aside by the Registrar if he has reason to believe that they contain false information.

Section 12 of the Companies Act [*Chapter 24:03*], on which the defendant G relies, provides as follows in the pertinent parts:

> "Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving title from it shall be estopped from denying its truth –
>
> (a) … H

> (b) that every person described in the company's register of directors and secretaries, or in any return delivered to the Registrar by the company in terms of section one hundred and eighty-seven, as a director, manager or secretary of the company, has been duly appointed and has authority to exercise the functions customarily exercised by a director, manager or secretary as the case may be, of a company carrying on the business of the B kind being carried on by the company;
>
> (c) ...
>
> (d) …
>
> (e) …
>
> Provided that – C
>
> (i) a person shall not be entitled to make such assumptions if he has actual knowledge to the contrary or if he ought reasonably to know the contrary;
>
> (ii) ..."

Mr *Jori* submits that the section deals with a situation where the company itself has lodged the CR14 and if it does so, then certain presumptions are D made and the company is estopped from denying to third parties the contents of the document. The plaintiff has denied that the document was properly produced and alleges fraud on the part of the defendant and its directors relating to its signature by Mr Vieira senior and its lodgement with the Registrar of Companies. It is, however, safe to assume that the presumption provided for in the section would operate against the company in favour of E any third parties doing business with the company. It would not be logical to interpret the section to provide for a presumption against its directors and shareholders where documents that have been lodged are disputed by the parties who are supposed to lodge the documents themselves. In any event, in terms of the proviso to the section, the presumption is not available to F a person who has knowledge to the contrary or is supposed to have such knowledge. I am not convinced that at this stage the defendant is entitled to hide behind the presumption of regularity without an explanation from its directors as to the manner in which the document was lodged with the companies' registry.

It remains, therefore, that the court will have to enquire into the validity of the G returns, as that is the mast upon which the defendant has nailed its defence to the claim launched by the plaintiff. In *Henochsberg on the Companies Act* at p 261 the statement is made that the annual return is admissible in evidence as *prima facie* proof of the truth of its contents, since the company has the statutory duty to make the return and the Registrar is under a duty H to preserve it and make it available for inspection by the public. See *R* v

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Halpin [1975] QB 907; [1975] 2 All ER 1124 (CA). There is no provision in A the Act which states that the returns can only be set aside by the Registrar, as suggested by Mr *Uriri,* and he has not pointed the court to any section. Since it is an artificial *persona* a company can only act through its directors, sometimes called the human agency. In this case the evidence suggests that those directors are the Vieiras. If any credence is to be placed upon the CR14 B which was filed with the companies registry, that would also include the Musukuma brothers. However, given the evidence of the plaintiff's witness that they were not appointed as directors it is therefore incumbent upon the defendant to place before the court evidence that would confirm that they were indeed appointed as directors.

Mr *Uriri* seems to suggest that in the absence of a resolution from the board C of directors of the plaintiff authorizing the institution of these proceedings I must find that the Vieiras were not duly authorized and accordingly dismiss the claim on that basis. He has placed his reliance on remarks I made in *Siziba* v *Danckwerts & Anor* HH-108-08 to the effect that, in the absence of a resolution, the plaintiff therein had failed to establish that he had the D requisite authority to institute proceedings on behalf of Hawkhope Investments (Pvt) Ltd, which had been cited as the second plaintiff. In my view, the legal position has been correctly summarized by Mr *Jori*. Mr Vieira and his father were directors of the company for some point in time during the existence of the company. A document from the Registrar of Companies has been produced which is seriously challenged by the plaintiff, which denies that the E defendant's representatives were ever appointed as directors for the plaintiff. In the premises, it is my view that the authority cited by the defendant can be distinguished from the present case. In any event my remarks in *Siziba* were premised on the basis of *dicta* in *Mall (Cape) (Pty) Ltd* v *Merino Ko-operasie Bpk* 1957 (2) SA 347 (C), a judgment by Watermeyer J. The learned judge appeared in that case to have placed a burden on both sides, first of all, on F the one party to adduce evidence of authority to institute proceedings; and to challenge evidence to suggest lack of authority on the other. The remarks by the learned judge at 351G-352B were to the following effect:

> "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 G person who makes the petition on behalf of the company is duly authorized by the company to do so (see for example *Lurie Brothers Ltd* v *Arcache* 1927 NPD 139, and other cases mentioned in Herbstein and van Winsen, *Civil Practice of the Superior Courts in South Africa* at pp 37, 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the court to show that the applicant has duly resolved to institute H

Gowora J

> A 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 provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own B 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 *Barkly East Municipality, supra; Thelma Court Flats* C (*Pty) Ltd* v *McSwigin* 1954 (3) SA 457 (C)".

In order for the defendant to successfully argue that the institution of proceedings on behalf of the plaintiff has not been authorized by the company it is necessary, according to the authorities, that the defendant place before the court a minimum of evidence suggesting that there is no such

authority. I am mindful of the fact that most of the authorities that have been cited D which deal with this particular point emanate from matters brought before the court either as petitions or on notice of motion in which event the parties thereto would have filed affidavits in which evidence is given by either side as to the lack of authority or to its existence. This is an action, and only one party has given evidence as yet. Nevertheless, I am of the view that it would E cause an injustice if at this stage of the proceedings I were to find that the suit before me has not been authorized based on an application by a defendant who is yet to give evidence. As the existence of authority on the part of the persons purporting to act for the plaintiff or lack thereof depends on facts, I find it necessary that the defendant assist the court by placing before the court evidence that would assist in resolving the dispute.

F The CR14, which should be the best evidence on this position, is hotly disputed, as the circumstances under which it was filed remain clouded in mystery. The defendant seems to place reliance on it and it would be only just in the circumstances for the defendant to explain to the court how and when the document was originated and filed with the Registrar of Companies. This evidence is particularly necessary where the parties are in conflict as to G whether or not ownership in the company has passed which would lead to a change in directors as a result of the change in shareholding. In my view, the plaintiff filed the CR14 as a response to the allegation by the defendant that the premises in respect of which the plaintiff seeks the eviction of the defendants are now occupied by the plaintiff's current directors and H shareholders. There has been no evidence tendered that would point to the

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shareholding having changed hands. It is trite that directors to a company A are appointed by the shareholders. If the shareholding is still held by the Vieiras then it would be difficult for me to find that the CR14 reflects the correct position as far as the persons responsible for running the affairs of the company are concerned. There are allegations that the CR14 was filed fraudulently, and the papers that have been placed before me, coupled with B the evidence of Mr Vieira Junior, leads me to conclude that the defendant needs to explain to the court the circumstances under which the document was filed when all the correspondence between the parties points to an inability or failure on the part of the defendant to pay the amount agreed as the purchase price for not just the plant and equipment, but the immovable properties as well. C

In any event, as argued by the plaintiff, even if the institution of the proceedings had not been authorized, they can be ratified. See *Smith* v *Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at 952F-G; which quoted with approval *Uitenhage Municipality* v *Uys* 1974 (3) SA 800 (E) at 806H-807H. The question as to whether the Vieiras had the authority to institute proceedings on D behalf of the plaintiff can only be resolved in my view with a determination of the issue of who the directors of the company are. The contested CR14 has not resolved the dispute as it is seriously challenged by Mr Vieira and it would, in my view, be inequitable to the case of the parties for the court to rely on its contents without a proper explanation as to the manner in which it was filed, which information is within the preview of the defendant. I do E not believe that at this juncture I should be asked to determine whether or not the proceedings were properly authorized. It will suffice that there is a minimum of evidence from the plaintiff suggesting that it might have been authorized. It is for the defendant to adduce evidence to show that the action has not been authorized. It has been argued on behalf of the defendant that the plaintiff must establish ownership of the property and unauthorized F occupation by the defendant. Counsel for the defendant has correctly stated the law as relates to the principle of *actio rei vindicatio*, *viz*, that an owner is entitled to claim possession of his property from whomsoever is in possession thereof. In *Chetty* v *Naidoo* 1974 (3) SA 13 (A) the incidence of ownership was framed at 20A-C as follows:

> "… It may be difficult to define *dominium* comprehensively (cf *Johannesburg* G *Municipal Council* v *Rand Townships Registrar & Ors* 1910 TS 1314 at p 1319), but there can be little doubt, (despite some reservation expressed in *Munsamy* v *Gengemma* 1954 (4) SA 468 (N) at 470H-471 E) that one of its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should H

A normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (eg a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* – the onus being on the defendant to allege and establish any right to continue to hold against the owner".

B It seems to me that *in casu* the plaintiff has done just that. It has alleged that it is the owner and the onus is now on the defendant to establish a right to retain the property in the face of the claim by the plaintiff. The plaintiff produced to the court deeds of title in respect of the three immovable properties. At the time of the commencement of the proceedings the defendant was in possession of all the properties. In further pleadings filed subsequent to C the summons being issued, the plaintiff has alleged breach of contract on the part of the defendant leading to a cancellation of the contract and thus being the basis upon which the eviction of the defendant is sought from the properties. Although the defendant conceded that at the time of institution of the *lis* the plaintiff was the owner, it argues that the property has now D been sold to parties who are not before this court. The defendant contends that its managing director became a director of the plaintiff and on that basis occupied the property. I will consider the issue of the Chisipite property first.

The defendant has accepted that it occupies this property through its managing director on the basis that he is a director of the plaintiff. In my view, the defendant has assumed the onus to establish the right to retain possession E of this property. If it is in terms of a contract between the plaintiff and the defendant, it is incumbent then upon the defendant to prove the terms of the contract and that it, the defendant, has since performed its obligations in terms of the same thus justifying its retention of the property.

In so far as the two other properties are concerned, the defendant has F contended that they have been sold to parties who are not before me and that I should not concern myself with the *lis* in which the plaintiff seeks to claim it from third parties, as I am not seized with it. It is pertinent to note that the defendant concedes ownership of the two properties by the plaintiff at the time this *lis* was instituted. The disposal would appear to have happened after the defendant became aware of the *lis*. According to the authorities, where G a property is sold after the defendant has become aware of the plaintiff's claim, the property is *res litigiosa*.

What then is the effect of the property being *res litigiosa?* The authorities are divided as to when such property becomes *res litigiosa*, with some suggesting that it is due to the service of the summons upon the defendant H and others opining that it is after *litis contestatio*. All are agreed, however,

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Gowora J

that the *rei vidicatio* is an action in *rem*. The effect of the property becoming A *res litigiosa* is that the defendant cannot alienate or mortgage the property to the prejudice of the plaintiff: Siberberg & Schoeman *The Law of Property* 2 ed. The defendant has not disputed that the two properties disposed of are *res litigiosae*; all that the defendant argues is that the parties to whom the properties were sold are not before me and therefore I cannot determine B that *lis*. That may be correct, but at this stage of the proceedings I am not determining the rights of the parties as regards the properties being claimed. I am tasked with determining whether or not the plaintiff has mounted a *prima facie* case such as would defeat the application for absolution from the instance. If an item is *res litigiosa,* a defendant in an action *in rem* is not allowed to alienate or mortgage the subject matter of the *lis*. See Ex p C *Deputy Sheriff*, *Salisbury:* In re *Doyle* v *Salgo* 1957 (3) SA 740 (SR) at 741 G-H. According to Silberberg & Schoeman *op cit* the sale of a *res litigiosa* is valid between the parties but the purchaser is bound by the judgment in the action and the successful plaintiff can recover it from the new possessor by execution and without fresh proceedings.

In the premises, it is my finding that the plaintiff has placed sufficient evidence D before me to defeat an application by the defendant for absolution from the instance. The application is accordingly dismissed with costs.

Wintertons, legal practitioners for the plaintiff

Kantor & Immernam, legal practitioners for the defendant E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/MASHOKO v MASHOKO/CHIKOSI FAMILY TRUST & ANOR 2011 (1) ZLR 319 (H)

MASHOKO v MASHOKO/CHIKOSI FAMILY TRUST & ANOR 2011 (1) ZLR 319 (H)

Citation	2011 (1) ZLR 319 (H)
Case No	Judgment No. HH-12-11
Court	High Court, Harare
Judge	Karwi J
Heard	29 November 2005
Judgment	3 March 2011
Counsel	*T Magwiliba*, for the applicant *I E G Musimbe*, for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Trust – *trustee – duties – removal from office by court – grounds for*

Headnote

In deciding whether or nor to dissolve a trust or remove a trustee, the court D has to be satisfied that the continued trusteeship does not endanger the interests of the trust and its beneficiaries.

A trustee must observe fiduciary duties when executing his duties. The three main principles which govern the administration of trusts are:

(1) the trustee must give effect to the trust instrument so far as it is E lawful and effective

(2) the trustee must exercise his or her powers with care, diligence and skill which can be reasonably expected of a person who manages the affairs of another

(3) except as regards questions of law, the trustee is bound to exercise an independent discretion.

F The courts must be guided by the welfare of beneficiaries when faced with the task of dissolving a trust or removing a trustee from office. Some of the commonly accepted grounds for the removal of a trustee from office are:

(1) where, without explanation, a trustee transfers trust funds from a safe investment into a personal account; G

(2) where a trustee deliberately refrains from advising a co-trustee of a decision to be taken on behalf a trust;

(3) where a trustee treats trust property as his own; and

(4) where a trustee allows grave misconduct by a co-trustee in the administration of the property of the trust and thus exercises no H control over trust property.

2011 (1) ZLR p320

Karwi J

Cases referred to A

de Villiers v James 1996 (2) ZLR 597 (S)

Letterstedt v Broers (1884) 9 AC 371; [1881-5] All ER Rep 882

Ex p *Suleman* 1950 (2) SA 373 (C)

Tijmstra NO v Blunt-Mackenzie NO & Ors 2002 (1) SA 459 (T)

Case information

T Magwiliba, for the applicant B

I E G Musimbe, for the second respondent

Judgment

KARWI J: After hearing arguments from both counsel, I ordered as follows:

(a) that the notarial deed of trust executed on the 13 February 2001 establishing the first respondent be and is hereby amended by the deletion of the C second respondent's name as a trustee wherever it appears in the deed of trust.

(b) that an independent estate agent of repute operating in harare be appointed as a trustee by consent of the first and second respondents within seven days of this order, failing which the Master of the High Court shall D appoint an estate agent within seven days of the respondents' deadlock on such an appointment.

(c) each party to pay its own costs.

Reasons for the above order have been requested and here are they.

The facts of this matter are common cause. The applicant and second E respondent were married in terms of customary law up to about 2003 when the union between them was terminated. The union of the parties had been blessed with two minor children, namely, Albert Tariro Mashoko and Albertina Hazvinei Mashoko.

During the subsistence of the customary marriage between the parties, the applicant as a founder established the first respondent (hereinafter referred F to as "the trust"). He appointed the second respondent as a co-trustee.

The applicant instituted the present proceedings for the termination of the trust on the grounds, *inter alia,* that the second respondent was abusing trust property, leased the property donated to the trust by the applicant without his authority and consent and used the proceeds thereof for her own benefit G without accounting to the applicant. The applicant also averred that the second respondent was refusing to hold meetings of the trust and conducted the affairs of the trust on her own while she did not keep any proper records of account in respect of the trust's business. He also alleged that the second respondent was conducting the affairs of the trust in relation to the beneficiaries as well as its property as if it were her own business. H

2011 (1) ZLR p321

Karwi J

A The applicant expressed the view that, owing to irreconcilable differences between the trustees of the first respondent, the first respondent may not be operated to the benefit of the beneficiaries. Given that there are only two trustees, and that the second respondent cannot disclose material information to the other trustee, who happens to be the founder of the trustee and natural father to the beneficiaries, the first respondent becomes incapacitated and B may not make decisions which are required from time to time, pertaining to the utilization of rentals and other related issues. Accordingly, the applicant sought the court's order dissolving the trust or, alternatively, an order

altering the terms of the trust deed to reflect that the second respondent be removed from her office as trustee.

C In her opposing affidavit, the second respondent says that she entered into a lease agreement in respect of the trust property with the full knowledge of the applicant and that the applicant was aware that the proceeds of the lease were applied towards the payment of rent for a property where the second respondent and the children are currently staying. She added that some of the proceeds of the lease were used to erect a durawall and electric fence at D the trust property. The second respondent said, further, that she intended to talk to the applicant upon renewal of the lease so that the proceeds could go into the children's account. She also averred that she had used the balance of the proceeds of the rentals to buy air tickets for the children to go to the United Kingdom on holiday. She denied ever breaching any material or E fundamental conditions of the trust.

The second respondent submitted, however, that she was not opposed to an independent trustee being appointed to govern the trust so long as the applicant pays for their professional fees. She suggested the appointment of an independent firm such as a firm of estate agents, coupled with an order F that the proceeds from the lease be used for the upkeep of the children.

The broad principle which our courts follow in deciding whether or nor to dissolve a trust or remove a trustee was set down many years ago in *Letterstedt* v *Broers* [1881-5] All ER Rep 882; (1884) 9 AC 371. In considering the issue the court has to be satisfied that the continued trusteeship does not endanger the interests of the trust and its beneficiaries. See also *Halsbury's Laws of* G *England* 3 ed vol 38 at p 94.

It is also generally accepted that a trustee must observe fiduciary duties when executing his duties. See *de Villiers* v *James* 1996 (2) ZLR 597 (S) at 603 where Korsah JA spelt out the three main principles which govern the administration of trusts, which are as follows: H

1. the trustee must give effect to the trust instrument so far as it is lawful

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Karwi J

A and effective;

2. the trustee must exercise his or her powers with care, diligence and skill which can be reasonably expected of a person who manages the affairs of another; and
3. except as regards questions of law, the trustee is bound to exercise an independent discretion. B

Honoré's South African Law of Trusts 4 ed at p 190 proposes that the courts must be guided by the welfare of beneficiaries when faced with the delicate task of dissolving or removing a trustee from office. He states that "the court has the same powers of control, appointment and removal with reference to trustees and with reference to guardians and executors". C

In providing guidance, this court is indebted to the applicant's legal practitioners in their research which provided clear illustrations of instances where the courts removed executors or trustees from office for a variety of reasons. In Ex p *Suleman* 1950 (2) SA 373 (C) an executor was removed from office because of hostility to his co-executor and did not facilitate smooth communication by replying to urgent letters from his co-executor D and had made no effort to attend to the financial crisis of the trust which was threatening its existence. The court found the conduct of such trustee wanting in reasonable fidelity and that it endangered the interests of the trust.

In *Tijmstra NO* v *Blunt-Mackenzie NO & Ors* 2002 (1) SA 459 (T) the court enunciated some of the commonly accepted grounds for the removal of a E trustee from office as the following:

1. where without explanation a trustee transfers trust funds from a safe investment into a personal account;
2. where a trustee deliberately refrains from advising a co-trustee of a decision to be taken on behalf a trust;
3. where a trustee treats trust property as his own; and F
4. where a trustee allows grave misconduct by a co-trustee in the administration of the property of the trust and thus exercises no control over trust property.

In considering whether or not the second respondent should be removed from office or alternatively whether or not the trust should be terminated, I G have taken the following facts which are common cause into account. It is a fact that the trustees in this matter were once married, and that the trust

was founded by the applicant during their marriage. It is true that their marriage came to an end in 2003. From there on their severed relationship affected the way they administered the trust. It is not surprising that the second respondent has refused to have meetings of the trustees. This is H

Karwi J

A so notwithstanding a letter demanding such a meeting by the applicant's lawyers dated 21 January 2004. The second respondent sees the meetings as unnecessary. She also says she has always administered the affairs of the trust, with very minimal, if any, role being played by the applicant. In her opposing affidavit she contends that "This is basically a small trust which is for the benefit of our minor children and there is not much which needs B to be discussed if at all there is need to discuss anything". It appears that the second respondent leased the trust property without having agreed on all terms with the applicant, and that she has not accounted for the rentals. In her opposing affidavit she says she hoped to discuss with the applicant on the utilization of the rentals.

C It seems to me that the applicant has succeeded in proving that the second respondent has failed to discharge her fiduciary duties as is required by law. She has failed to attend meetings which are obviously important in planning and administering the affairs of the trust. She has clearly failed to account for the assets of the trust. It would appear normal for her to run the affairs of the trust alone without consultation.

D It also seems to me that the two have developed irreconcilable differences which have rendered the operation of the trust difficult, if not impossible. The second respondent has indicated that she has no problem if the trust was run by an independent trustee and that the trust continue to benefit the two children. I find this to be most constructive and probably the best way E forward in view of the problem cited in the personal circumstances of the two trustees. It is for that reason that I ordered as I did.

Accordingly, it is ordered:

1. That the notarial deed of trust executed on 13 February 2001 establishing the first respondent be and is hereby amended by the deletion of the F second respondent's name as a trustee wherever it appears.
2. An independent estate agent of repute operating in Harare be appointed as a trustee by consent of the first and second respondents within seven days of this order, failing which the Master of the High Court shall appoint an estate agent within seven days of the parties deadlock on such appointment. G
3. The costs of such trusteeship by the appointed estate agent shall be borne by the trust.
4. Each party to pay its own costs.

Magwaliba, *Matutu & Kwirira*, applicant's legal practitioners

H *I E G Musimbe & Partners*, second respondent's legal practitioners

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Source:
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MAKROMED (PVT) LTD v MEDICINES CONTROL AUTHORITY OF ZIMBABWE 2011 (1) ZLR 324 (H)

Citation 2011 (1) ZLR 324 (H)

Case No Judgment No. HB-36-11

Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	24 February 2011
Judgment	3 March 2011
Counsel	Ms *J Gororo*, for the applicant Ms *S N Njerere*, for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Administrative law – *reasonable expectation – when may arise – existence of regular practice – no reasonable expectation arising where practice does not exist* D

Headnote

The applicant had been a wholesale dealer in medicines and pharmaceutical products since 2002. The business was conducted by virtue of a wholesale dealer's permit issued by the respondent in terms of the Medicines and Allied Substances Control Act [*Chapter15:03*], which permit was valid for a period of one year. Accordingly, the applicant was enjoined E to renew that permit annually before it expired. The applicant's last permit expired at the end of March 2009 without an application for renewal being made in the prescribed manner. The following month, the respondent pointed out this failure and, following representations by the applicant, stated that it would allow the permit to be renewed on payment of the required fee. In spite of this indulgence (which was not F sanctioned by the relevant legislation), the applicant failed to submit an application for renewal. Instead, it forged a permit and traded using the forged permit. When this was discovered, the applicant submitted an application on the necessary form and deposited the fee. The application was rejected. The applicant sought an order declaring the respondent's G failure to renew the permit as constituting an unreasonable and unfair administrative action in breach of s 3 of the Administrative Justice Act [*Chapter 10:28*] and directing the respondent to renew forthwith its permit. It was submitted that the applicant had a legitimate expectation that a permit would be issued and accordingly was entitled to the relief provided for in s 4 of the Act. H

2011 (1) ZLR p325

Mathonsi J

A *Held*, that, in terms of both the Medicines and Allied Substances Control Act and the regulations, an application for a renewal of a permit can only be made before the expiration of the permit. Such an application may only be made on the prescribed form, accompanied by the prescribed fee. No such application was made by the applicant before its permit expired. The communication between the parties which came after that B did not constitute an application for renewal which the respondent was required to consider. F

Held, further, that the law does not protect every expectation; it only protects a "legitimate" one. Legitimate or reasonable expectations may arise either from an express promise given on behalf of a public authority or from C the existence of a regular practice which the claimant can reasonably expect to continue. Here, the applicant had been renewing its permit for several years in accordance with the provisions of both the regulations and the Act. At no time was it allowed to renew the permit after it had expired or without submitting the prescribed form. There was thus no general promise that renewal would be made out of time.

Cases cited D

Administrator, Tvl, & Ors v Traub & Ors 1989 (4) SA 731 (A)

Health Professions Council v McGown 1994 (2) ZLR 329 (S)

N & B Ventures (Pvt) Ltd v Min of Home Affairs & Anor 2005 (1) ZLR 27 (H)

E *National DPP v Phillips* 2002 (4) SA 60 (W)

Legislation considered

Administrative Justice Act [*Chapter 10:28*], ss 3 & 4

Medicines & Allied Substances Control Act [*Chapter 15:03*], s 60

F Medicines & Allied Substances Control (General) Regulations 1991 (SI 150 of 1991), ss 23& 24

Case information

Ms *J Gororo*, for the applicant

Ms *S N Njerere*, for the respondent

Judgment

G **MATHONSI J:** After hearing submissions made by counsel in this matter I dismissed the application with costs and said the reasons will follow. These are the reasons.

This is an application in terms of s 4 of the Administrative Justice Act [*Chapter 10:28*]. The applicant seeks an order declaring the respondent's H failure to renew its wholesale dealer's permit as constituting an unreasonable

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Mathonsi J

and unfair administrative action in breach of s 3 of that Act and directing A the respondent to forthwith renew its permit.

The applicant has been conducting business as a wholesale dealer in medicines and pharmaceutical products since 2002. Such business is conducted by virtue of a wholesale dealer's permit issued by the respondent and is valid for a period of one year. Accordingly, the applicant is enjoined to renew that B permit annually before it expires. The applicant's last permit expired on 31 March 2009 without the applicant submitting an application for its renewal.

By letter dated 30 April 2009, the respondent notified the applicant of the expiry of the wholesale dealer's permit. The applicant responded by letter of 6 May 2009, apologising for failure to renew its permit and seeking an indulgence to submit a renewal application and pay the requisite fee out of C time. By letter dated 13 May 2009, the respondent acceded to the request and gave the applicant until 31 May 2009 to submit the application. That letter reads in part as follows:

> "RE: AUTHORISATION TO PAY RENEWAL FEES BY 31ST MAY 2009
>
> We refer to the representations you made to the Authority in your letter dated 6 D May 2009 with respect to the extension of the deadline for payment of renewal fees for wholesale dealer's permits.
>
> The matter was tabled at a meeting of the Legal Committee held on 13 May 2009. The Committee considered it unacceptable that you waited until the Authority had written to you regarding the lapsing of your permit before you came forward with your representations. E
>
> The Committee however noted the compelling reasons you put forward i.e that there would be no prejudice to the Authority should the full renewal fees be paid in full by 31 May 2009. *The committee therefore agreed to extend the period of renewal of your permit to 31 May 2009, on condition that the full renewal fee of US$1 750 subject to the payment of the renewal fees in full by that date (*sic*)*
>
> *Thereafter, the Authority will not entertain any further discussion on this matter.*' F
>
> (emphasis added).

There is need to dispose of the implications of that letter before going further. There is no provision in either the Medicines and Allied Substances Control Act [*Chapter 15:03*] nor the Drugs and Allied Substances Control (General) Regulations 1991 which empower the Authority to extend the renewal

date G of an expired permit. The purported extension was therefore a legal nullity from which nothing flowed.

Be that as it may, the applicant failed to submit an application for renewal even after the extension. Instead, it busied itself with forging a wholesale dealer's permit and traded using the forged permit. Its luck ran out in October 2009 when an inspection was carried out at its premises and it was discovered that H

A the applicant had supplied medicines using that forged permit. The applicant then quickly deposited the renewal fee of US$1 750 into the respondent's account and submitted an application for renewal in Form DC7 dated 26 October 2009 attached to a letter of the same date, in which it argued that it had failed to meet the 31 May 2009 date line because the notification of the extension was only sent by e-mail on 29 May 2009.

B It is pertinent to note that this was the first communication the applicant sent to the respondent since the letter of 13 May 2009 giving the extension of time. Also, it was the first time that a formal renewal application was made since the permit expired on 31 March 2009. The respondent did not entertain the application and requested the applicant's banking details in order to refund C the money paid by the applicant unsolicited.

Section 3(1) of the Administrative Justice Act provides:

> "An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall –
>
> (a) act lawfully, reasonably and in a fair manner; and D
>
> (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take action by the person concerned, and
>
> (c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the E person concerned."

Section 4 of that Act allows any person who is aggrieved by the failure of an administrative authority to comply with s 3 to apply to this court.

Ms *Gororo,* for the applicant, submitted that the respondent has failed to make a decision on the application for a permit since the application was F made in May 2009. She went on to submit that the applicant had a legitimate expectation that a permit would be issued and accordingly it is entitled to the relief provided for in s 4 of the Act. When it was drawn to her attention that no application was made at all until October 2009, she took the view that the representations made by the applicant in the form of letters should be taken as an application. In her view, the applicant should be issued with G a permit. She relied on *N & B Ventures (Pvt) Ltd* v *Minister of Home Affairs & Anor* 2005 (1) ZLR 27 (H) in which Cheda J ordered the release of liquor which had been forfeited to the State for trading without a licence because the licensing authority had taken two years to renew a liquor licence.

In my view, that case is clearly distinguishable from the present, in that the H applicant had submitted a formal application for renewal but the Liquor

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Licensing Board had taken two years to renew the licence. In this case, no A application for renewal of the permit was made at all until the permit expired. To say that representations made by the applicant in May 2009 amounted to an application is simply disingenuous and cannot be taken seriously.

In terms of both the Act and the regulations an application for a renewal of a permit can only be made before the expiration of the permit. Section 60 B of the Medicines and Allied Substances Control Act [*Chapter15:03*] reads:

> "(1) A licence issued in terms of this Part shall, unless cancelled or suspended, be valid for such period as may be prescribed and may be renewed before its expiry.

(2) An application for the renewal of a licence shall be made in such form and manner and within such period as may be prescribed and shall be accompanied C by such fee as may be prescribed."

The spirit of those provisions is also captured in the Regulations. A wholesale dealer's permit is issued in terms of s 23 of the Regulations. Section 24 provides:

"Any permit issued in terms of section 23 or renewed in terms of section 29 shall D be valid for a period of one year from the date of its issue or renewal, as the case may be."

Section 29 reads;

"(1) A permit issued in terms of section 23 may be renewed before its expiry.

(2) Any person who wishes to renew his permit issued in terms of section 23 shall make an application to the Registrar in triplicate in Form DC 7." E

It is apparent that an application for renewal of a permit can only be made in Form DC7 accompanied by the prescribed fee. No such application was made by the applicant before its permit expired on 31 March 2009. The communication between the parties which came after that did not constitute an application for renewal which the respondent was required to consider.

A permit cannot be renewed after it has expired. Can it therefore be said that the applicant had a legitimate expectation that its permit would be renewed in May 2009 or in October 2009 when it submitted form D.C.7 with the renewal fee? The law does not protect every expectation. It only protects a legitimate one. See *National Director of Public Prosecutions* v *Phillips* G
2002 (4) SA 60 (W).

It was stated in *Administrator, Transvaal & Ors* v *Traub & Ors* 1989 (4) SA 731 (A) at 756I that:

"Legitimate or reasonable expectations may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue." H

Mathonsi J

A In *Health Professions Council* v *McGown* 1994 (2) ZLR 329 (S) at 334B-C Gubbay CJ stated:

"In short, the legitimate expectation doctrine, as enunciated in *Traub,* simply extended the principle of natural justice beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body (see at 761 D-F) Fairness B

C is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard (see 758 G-759 A)."

The applicant had been renewing its wholesale dealer's permit from 2002 in accordance with the provisions of both the Regulations and the Act. At no time was it allowed to renew the permit after it had expired or without submitting Form DC7. Therefore there was no general promise that renewal would be made out of time. Even the specific promise to renew the permit if the application was made before 31 May 2009, which I have declared a nullity, was not complied with. There was really nothing the respondent was expected or required to do. For that reason, the remedy provided for in s 4, as read with s 3, of the Administrative Justice Act is not available to D the applicant.

Accordingly, the application is dismissed with costs.

Marondedze, Mukuku, Ndove & Partners, applicant's legal practitioners

E *Honey & Blanckenberg*, respondent's legal practitioners

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Source:
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S v MAKUVAZA 2011 (1) ZLR 330 (H)

Citation	2011 (1) ZLR 330 (H)
Case No	Judgment No. HB-37-11
Court	High Court, Bulawayo
Judge	Kamocha J and Mathonsi J
Heard	14 February 2011
Judgment	3 March 2011
Counsel	*M Ndlovu*, for the appellant *T Makoni,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code [Chapter 9:23] – stock theft (s 114) – what constitutes "livestock" – "equine animal" – whether includes a donkey*

Words and phrases – *"equine" – meaning of – does not include an ass or donkey – only relates to horses – donkey not an equine animal* D

Headnote

"Livestock" is defined by s 114 of the Criminal Law Code [*Chapter 9*:23] as meaning "any sheep, goat, pig, poultry, ostrich, pigeon, rabbit or bovine or equine animal" or "any domesticated game" or the carcass or portion of the carcass of one of those animals. Unlike s 2 of the Stock E Theft Prevention Act [*Chapter 9:18*], s 114 does not include an ass or donkey under the definition of livestock.

A person stealing livestock is guilty of stock theft. A person who is convicted of the theft or attempted theft of any equine or bovine animal is liable to a minimum sentence of nine years' imprisonment.

A horse in Latin is known as *equus.* The word *equus* in zoology means the F genus of ungulates including, horses, asses and zebras. However, the dictionary definition of "equine" is "belonging or relating to, or like, a horse or horses" or, when used as a noun, a horse. The word "equine" does not include an ass or donkey. It only relates to a horse or horses. A donkey is thus not an equine animal. Consequently, the mandatory G minimum sentence is not applicable to the theft of a donkey.

Case cited

S v Ndlovu 2006 (2) ZLR 32 (H) H

Kamocha J

Legislation considered A

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 114(1)

Case information

M Ndlovu, for the appellant

T Makoni, for the respondent

Judgment

B **KAMOCHA J**: The appellant was charged with theft of stock as defined in section 114 of the Criminal Law (Codification and Reform) Act [*Chapter 9:25*] ("the Act"). It was alleged that he stole four donkeys belonging to Charles Shumba on 15 September 2006. He pleaded not guilty but was found guilty of theft of two donkeys despite his protestation. He was sentenced to C undergo nine years' imprisonment as the trial court believed that the appellant was liable to the minimum mandatory sentence for a period of not less than nine years or more than twenty-five years' imprisonment as stipulated by s 114 (2)(e) of the Act.

The appellant had initially appealed against both the conviction and sentence but later abandoned the appeal against conviction. In his sole ground of D appeal against sentence, he complained that the trial court erred by imposing on him a sentence which was meant for theft of a horse or bovine when he was convicted of theft of two donkeys.

The advice to abandon the appeal against conviction was proper, therefore nothing turns on the conviction.

E What needs to be considered is whether or not a donkey is an equine animal. The Stock Theft Act [*Chapter 9:18*] defined "stock" in s 2 as follows:

> "stock" means –
>
> (a) any horse, mule, ass, bovine, sheep, goat, pig, poultry, pigeon or chinchilla; …"

F The Stock Theft Act was amended by the Stock Theft Amendment Act, 6 of 2004, which inserted a new section to the principal Act. That section set out special sentences for offences in respect of certain stock and it reads as follows:

> **"12 Special sentences for offences in respect of certain stock**
>
> (1) Any person who is convicted of the theft or attempted theft of any equine G or bovine animal or receiving knowing it to have been stolen, or inciting or conspiring with any other person to commit any offence shall, if there are no special circumstances on the particular case as provided in subsection (2) be liable to imprisonment for a period of not less than nine years or more than twenty-five years."

The above section was repealed by s 282 of Act 23 of 2004 which we now H know as the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

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Kamocha J

This Act defines, in s 114(1), "livestock" to mean: A

> "(a) any sheep, goat, pig, poultry, ostrich, pigeon, rabbit or bovine or equine animal; or
>
> (b) any domesticated game; …"

Unlike the Stock Theft Act, the above section does not include an ass or donkey as livestock. Could the legislature have regarded a donkey as an B equine animal? Is it an equine animal?

The word "equine" is defined in the *Chambers 21st Century Dictionary* as "belonging or relating to, or like, a horse or horses" – from *equinus*; from *equus* horse. A horse in Latin is known as *equus.* But the word *equus* in zoology means the genus of ungulates including, horses, asses and zebra. C

See the *Collins English Dictionary* which defines equine as pertaining to a horse when used as an adjective. When used as a noun, it also means a horse.

As can be seen from the above definitions, the word equine does not include an ass or donkey. It only relates to a horse or horses. A donkey is not an equine animal.

There is need for the legislature to amend s 114 of the Criminal Law D (Codification and Reform) Act [*Chapter 9:23*] so that it includes an ass, as did the Stock Theft [*Chapter 9:18*].

In *S* v *Ndlovu & Anor* 2006 (2) ZLR 32 (H)this court arrived at the same conclusion. It was therefore not proper *in casu* to impose the minimum mandatory sentence of nine years' imprisonment meant for those convicted E of theft of a bovine or equine animal.

In the result, the appeal succeeds and the sentence of nine years' imprisonment is hereby set aside. This court is therefore at liberty to pass a sentence it deems appropriate in the circumstances.

The accused is a first offender who was aged 35 years at the time he committed F the offence. He is now 40 years old. He is married with five children. The eight days he served before he was released on bail have been taken into account.

The donkeys he stole were fortuitously recovered, therefore, not much weight can be attached to that. Instead what is clear is that he is a greedy man because he himself owns four donkeys. The theft of the complainant's G donkeys was out of sheer greed. He stole for sale not because he was a poor man. He has nine cattle. If he was desperately in need of money he could have sold one of his beasts or one of his donkeys to raise money. Instead he sold the donkeys he stole. This was a mean theft indeed. Depriving a rural dweller of two donkeys is a serious matter since donkeys mean a lot to rural dwellers. They use them for ploughing their lands and as a means of transport. H

Kamocha J

A The aggravating features far outweigh the mitigating ones. No other form of punishment other than a custodial sentence is appropriate in the circumstances. I shall however suspend a portion of the sentence on condition of future good behaviour. In the result, the appellant is sentenced as follows:

> "15 months' imprisonment of which six months' imprisonment is B suspended for three years on condition that he is not convicted of any offence of which theft or dishonesty forms an element committed within that period for which he is sentenced to imprisonment without the option of paying a fine.
>
> Effective: Nine months' imprisonment"

C MATHONSI J concurs.

H Tafa & Associates, c/o Mlweli Ndlovu & Associates, applicant's legal D practitioners

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

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MORRIS v MORRIS & ANOR 2011 (1) ZLR 334 (H)

Citation	2011 (1) ZLR 334 (H)
Case No	Judgment No. HH-71-11
Court	High Court, Harare
Judge	Mawadze J
Heard	28 January 2011
Judgment	10 March 2011
Counsel	*T N Kanengoni,* for the applicant *T Mpofu,* for the first respondent No appearance for the second respondent
Case Type	Opposed application

Annotations No case annotations to date

Flynote

Practice and procedure – *application – use of application procedure – when proper – in event of conflicting evidence, correct course is to proceed by way of action*

Practice and procedure – *rescission of judgment – principles – discovery of* D *new documents – need for documents to have existed at time judgment was given – not permissible to rely on document created subsequently*

Headnote

The applicant was the half-brother of the first respondent. Their deceased mother had made a will in 1981, under which both parties were E beneficiaries. However, in late 2005, two months before her death, she made another will which excluded the applicant. The first respondent was appointed as executrix. The applicant brought an application, which was granted by default (the first respondent being out of the country), for the first will to be declared to be the valid will and for the appointment F of the first respondent to be set aside. The basis of the application was that the second will was a forgery. The applicant then had the house, the principal asset of the estate, transferred into his name. This was done without the permission of the Master. The applicant then sold the house to a third party, although the transfer did not take place.

The first respondent, on learning of these events, obtained a court order G setting aside the order that had been granted in default. Nine months later, the applicant brought the present application, in which he sought the setting aside of the order obtained by the first respondent. In support of his application he sought to adduce evidence from a forensic scientist which purported to show that the two wills were not signed by the same person. He claimed that it had always been his contention that the second H

2011 (1) ZLR p335

Mawadze J

A will was forged but that he had not had counsel nor the funds to obtain a scientific report. The forensic report was a photocopy and without an explanation from the scientist was meaningless.

It was argued on behalf of the first respondent that the matter raised by the applicant was *res judicata*. It was improper and irregular for the applicant to seek a declaratory order by way of court application without B first seeking to rescind or to have set aside the judgment. The dispute surrounding the 2005 will could not be resolved on the papers alone but through a trial where evidence should be led.

Held, that where there is conflicting evidence the correct course is to proceed by way of action rather than by motion proceedings. The consequences C of choosing the wrong procedure are clear. If a litigant has reason to believe that facts essential to the success of his claim will probably be disputed and chooses to proceed by notice of motion, he does so at his peril: the court, in the exercise of its discretion, might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application.

D *Held,* further, that *in casu*, a final and definitive judgment on the matter had been delivered by a competent court. The general rule is that, once a final judgment or order has been given, neither the judge who gave it nor any other judge of parallel jurisdiction has the power to alter, rescind, vary or set it aside except in few instances recognised at common law or E by the rules of court. One of the accepted grounds is discovery of new documents which, had they been available at trial, would have entitled the applicant for relief to judgment in his favour. The person applying to set aside the judgment must not only show that he was ignorant of the existence of the subsequently discovered documents but there must be a *justa causa* for the ignorance. Proof of the clearest possible F description must be presented that it was not the applicant's fault that the document was not discovered before judgment. No document had been discovered which was in existence at the time the judgment was given. The document should have been in existence at that time, so it would have been improper for the applicant subsequently to get a new G document in the form of a forensic report and on that basis to request that the order be revisited. In any

event, the forensic report would not have settled the issue, as it contained the opinion of a scientist and that opinion could be challenged.

Cases cited

H *Chimpondah & Anor v Muvami* 2007 (2) ZLR 326 (H)

Mawadze J

City of Mutare v Mawoyo 1995 (1) ZLR 258 (H) A

Clarkson NO v Gelb & Ors 1981 (1) SA 288 (W)

Cumes v Estate Cumes & Ors 1950 (2) SA 15 (C)

du Toit v Vermeulen 1972 (3) SA 848 (A)

Kethel v Kethel Estate 1949 (3) SA 598 (A)

Masukusa v National Foods Ltd & Anor 1983 (1) ZLR 232 (H)

Min of Mines & Ors v African Consolidated Resources Plc & Ors 2010 (2) ZLR 307 (H) B

Mwanyisa v Jumbo & Ors HH-3-10

Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A)

Towers v Chitapa 1996 (2) ZLR 261 (H)

Wolfenden v Jackson 1985 (2) ZLR 313 (S) C

Case information

T N Kanengoni, for the applicant

T Mpofu, for the first respondent

No appearance for the second respondent

Judgment

MAWADZE J: This is an opposed application wherein the applicant seeks D the following relief:

"IT IS ORDERED THAT:

1. The will dated 21 November 2005, purportedly signed by the late Nellie Helen Morris appointing the respondent (first respondent) the executrix testamentary, and bequeathing the entire estate to the same be and is hereby E null and void and therefore of no force and effect (*sic*).
2. The respondent shall pay costs of suit" (*sic*).

The applicant and the first respondent are the surviving children of the late Nellie Helen Morris who died testate on 19 January 2006. The applicant and the first respondent do not share the same father. The first respondent F resides in the USA and is also known as Adina Adry. The third respondent is the Master of the High Court of Zimbabwe cited in his official capacity.

A point was taken in argument by Mr *Mpofu* that the applicant should have cited the estate of the late Nellie Helen Morris and that for that reason this court should decline to determine the matter. Reliance was placed upon G South African authorities in the following cases: *Kethel* v *Kethel Estate* 1949 (3) SA 598 (A) at 610, *du Toit* v *Vermeulen* 1972 (3) SA 848 (A), *Clarkson NO* v *Gelb & Ors* 1981 (1) SA 288 (W) and *Cumes* v *Estate Cumes & Ors* 1950 (2) SA 15 (C). It is common cause that the first respondent is also the executrix of the estate of the late Nellie Hellen Morris. While it was prudent to cite the first respondent also in her official capacity I am not persuaded H

Mawadze J

A that I should decline to determine this application on that basis alone. I am fortified in this approach in view of the history of the matter.

The applicant and the first respondent have been engaged in a bruising legal battle since 2006 and the battle rages on. Makarau JP (as she then was) made a rather humorous though poignant

observation when she had a matter B placed before her for adjudication wherein the parties had been engaged in a lengthy legal battle, in *Mwanyisa* v *Jumbo & Five Ors* HH-3-10. These are the opening remarks by the learned Judge President on p 1 of the judgment:

> "Judges are public servants and as such they are not to complain about what lands on their plates. They must do justice always no matter the state of the case placed before them. I must, however, confess that the above matter is a dog's breakfast. The parties have been to this court on at least five occasions and have C appeared before the magistrate courts once or twice before".

In casu, after the registration of the estate of the late Nellie Helen Morris, four applications have been made to this court by the same parties (inclusive of this application).

The background facts of the matter are therefore in order.

D After the death of Nellie Helen Morris on 19 January 2006 the first respondent was appointed the executrix of the estate of the late Nellie Helen Morris in accordance with the last will and testament of the late Nellie Helen Morris dated 21 November 2005. It is common cause that the late Nellie Helen Morris had also signed another will dated 13 March 1981. This earlier will E dated 13 March 1981 has never been contentious. The difference between the wills dated 13 March 1981 (hereinafter 1981 will) and the one dated 21 November 2005 (the 2005 will) is that in the earlier will both the applicant and the first respondent were beneficiaries of the estate of the late Nellie Helen Morris, whereas in terms of the 2005 will the first respondent is the sole beneficiary of the estate. Herein lies the basis for this bruising legal battle.

F After her appointment as the executrix the first respondent in 2006 delegated her functions to one Charles Leonard William Anderson of Anderson Executor and Trust (Pvt) Ltd and she returned to the USA. The applicant lodged an application in case number HC 6552/06 with this court seeking an order that the 2005 will be declared null and void and the appointment of the first G respondent as the executrix of the estate of the late Nellie Helen Morris be set aside. The application was granted in default and the net effect was that the 1981 will was deemed valid. Apparently, on the basis of that judgment, the applicant ended up being appointed as the executor of the estate of their late mother. The applicant is alleged to have wrongfully and unlawfully transferred into his name house number 4 Fitch Road, Khumalo, Bulawayo, the only H asset of the estate. Apparently this was also done without the authority of the

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second respondent. Further to that the applicant proceeded to "sell" the A said house to a third party, though title was not transferred to the purchaser for reasons which will follow:

When the first respondent became aware of the developments in case number HC 6552/06 and the applicant's alleged unsavoury conduct she filed an application in case number HC 1057/09 wherein she sought to have B the default judgment in HC 6552/06 set aside. In the interim, she lodged an urgent chamber application in case number HC 2143/09 to prevent the applicant from disposing of the house in issue pending the determination in case number HC 1057/09.

The application in case number HC 1057/09 was opposed and all the relevant pleadings in that case have been filed by the first respondent, attached to the C first respondent's opposing affidavit. The basis for the applicant's case in HC 6552/06 was that the 2005 will was forged and therefore null and void. In case number HC 1057/09 the first respondent wanted the judgment in case number HC 6552/06 rescinded as it was granted in default. Further, the first respondent's case was that the 2005 will was valid as it was authored D by their late mother in her presence and signed before two witnesses who were available to testify to that effect.

On 15 October 2009 Chitakunye J, in case number HC 1057/09, granted an order in the following terms:

> "It is ordered that:
>
> 1. The default judgment entered in case number HC 6552/06 be and is hereby E set aside.
> 2. The last will and testament of the last Nellie Helen Morris dated 21 November 2005 is confirmed as being the valid final will.
> 3. The appointment of the first respondent (now the applicant) as the executor of the estate of the late Nellie Helen Morris is set aside. F
> 4. The appointment of Adina Adry also called Chiquita Morris (now the first respondent) as executrix of the estate of the late Nellie Hellen Morris is reinstated.

5. The registration of transfer of stand 1616 Bulawayo Township of Bulawayo Township lands in the name of the first respondent is hereby set aside and the third respondent (Registrar of Deeds Bulawayo) is ordered to cancel G such registration and reinstate the original Deed of Transfer in the name of Nellie Helen Morris or amend his records accordingly.
6. The costs of this application shall be borne by the first respondent on the basis of the current tariff of the Law Society of Zimbabwe".

The property in issue, stand number 1616 Bulawayo Township of Bulawayo, is also known as house number 4 Fitch Road, Khumalo Bulawayo. H

Mawadze J

A The order by Chitakunye J in HC 1057/09 on 15 October 2009 seemed to have put the matter to rest. However, nine months later the applicant *in casu* lodged this application on 15 July 2010, the subject matter of this judgment.

I now turn to deal with the basis of this application which in effect seeks to have the order by Chitakunye J in HC 1057/09 set aside (although the order B prayed for is not couched on such explicit terms). The applicant's founding affidavit is instructive in that regard. Let me refer to the relevant paragraphs of the applicant's founding affidavit:

"13. Following the judgment in HC 1057/09, I have caused a forensic report to be prepared consequent to an examination of my late mother's signatures on the 21st November 2005 will and one on 13 March 1981 will. The examination C was carried out by L.T. Nhari, a forensic specialist in the employment of Screenlab (Pvt) Ltd. I attach a copy of his report hereto as annexure 'A'
14. As more fully appears in annexure 'A' the examination was carried out by comparing standard uncontested signatures by my mother with the contested [*sic*] signatures on the will of 21 November 2005.
15. Again as more fully appears from annexure 'A' the expert found the design D and construction of the signatures on 21 November 2005 will dissimilar and inconsistent with my mother's standard signatures.
16. Further, the expert concludes that the said differences and inconsistencies in the signatures are not attributable to natural variation of my mother's signature. His final conclusion is that the standard signatures and the contested signatures do not have common authorship. Put differently, the expert concludes that my mother did not sign the will of 21 November E 2005.
11. I am advised, which advice I believe to be true and correct, that the presence of such new evidence of this point in dispute, which had not been at the court's disposal at the original hearing of the matter, places a significantly different complexion on the whole issue.
12. I am further advised that where new evidence which is material to an issue F that has been decided becomes available after such decision, there are grounds, by that fact, warranting the revisiting of the issue by the court. This is my contention in this matter.
15. Such evidence is of immense relevance to this honourable court in this issue and it is highly likely that this court would have reached a materially different conclusion as to the validity of 21 November 2005 will had this G evidence been before it". (I have deliberately not followed the sequence of the paragraphs as they appear in the founding affidavit as the paragraphs are mixed up)

On why such new evidence was not placed before Chitakunye J in case HC 1057/09 the applicant had this to say;

"16 At the time of arguing HC 1057/09 I was unable, due to lack of counsel H and lack of funds, to cause a forensic examination, such as that expounded

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Mawadze J

in Annexure 'A', for purposes of the hearing. My failure to produce such a A report was occasioned by laxity in the handling of my defence in that matter. My averment has consistently been that the signature on the 21 November 2005 will was forged I only did not have the requisite resources and proper counsel (which I have secured) to have the report produced (*sic*).

17. I am advised that in such circumstances, the court can allow a matter to be revisited to allow the inclusion of such evidence". B

To my mind, therefore, it is clear that the applicant, as far back as in case no. HC 6552/06, contended that the will dated 21 November 2005 is not the last will and testament of the late Nellie

Helen Morris but a contrived and forged document which should be disregarded. This is the same argument raised by the applicant (then first respondent) in case No. HC 1057/09 in opposing C the rescission of the default judgment in case No. HC 6552/06 to no avail.

In casu this is the same argument raised, albeit now on the basis of the forensic report.

The forensic report on pp 8-9 of the record is not in original form. The forensic scientist in para 1 of the report lamented that the documents he used in the examination, that is the questioned documents, were in poor quality photocopy D forms. It is not clear how this may have affected the proper examination of the documents, nor are reasons given why original copies were not used. In the same para 1 the forensic scientist refers to an attached chart on p 9 indicating the alleged variations in the signatures of the late Nellie Helen Morris. The said chart is in photocopy form and is divided in two sections E written "Questioned" and "standard". No key is provided for this chart. All I could discern are drawings akin to art work of a child in kindergarten. The patterns are barely legible save for some figures and arrows pointing either upwards or downwards. Mr *Kanengoni* for the applicant could not be helpful in explaining the said chart. He conceded that, in its form, the chart is meaningless and that no probative value can be placed on it without F additional explanation from the forensic scientist. I share the same view. The forensic report creates insurmountable problems for the applicant.

In his oral submissions in court Mr *Kanengoni* in a rather incomprehensible and confusing manner sought to introduce a new dimension to the basis of this application. I was unable to follow the logic of his argument save to G discern that his point was that the applicant was not introducing new evidence but merely providing proof, whatever that means. Strangely, Mr *Kanengoni* was of the view that there is no dispute of fact in this matter and that it can be resolved on the basis of a court application. The controversy generated by the forensic report seems to elude him.

The first respondent's argument can be summed up as follows: H

Mawadze J A

(i) that the judgement by Chitakunye J.in case No. HC 1057/09 was of a definitive nature, hence the matter raised by the applicant is *res judicata*. In terms of procedure the first respondent's contention is that it was improper and irregular for the applicant to seek a declaratory order by way of court application without first seeking to rescind or to have set aside the judgment by Chitakunye J which remains binding and of force and effect. The first respondent's view is that the dispute surrounding the 2005 will has been common between the parties and was dealt with in both HC 2134/09 and HC 1057/09. On that score alone, the applicant should have realised that such a dispute cannot be resolved on the papers filed of record alone but through the process of trial where evidence should be led.

(ii) that there is no legal basis for this court to grant the order sought by the applicant since the common law exception to the principle of *res judicata* is inapplicable in this case.

(iii) that on the merits the first respondent has been able to show that the 2005 will is valid. The first respondent in all the applications referred to D *supra* has maintained that the 2005 will was prepared and executed in her presence and that the two witnesses who also signed in her presence are available to corroborate her version of events. The first respondent in her opposing affidavit states that the differences in signatures which could have been noted by the forensic scientist between the 1981 will E and the 2005 will cannot only lead to the conclusion the forensic scientist arrived at. The first respondent's contention is that the forensic scientist had no relevant background history as regards the nature and extent of the late Nellie Helen Morris's ailment when she signed the 2005 will. The applicant's contention is that her late mother was afflicted with what is called stage 4 cancer and at the material time was very ill. She F was suffering from cancer of the spine and at the relevant time could hardly hold a cup, hence could not have been expected to sign her normal signature in 2005 as she did in 1981. The first respondent said medical evidence is available to corroborate her assertion in the form of a report by an oncologist who attended to her late mother at the material time in 2005, which report (or evidence) may be insightful on how the spinal G cancer had badly affected the late Nellie Helen Morris's limbs. All these issues are not new but were raised by the first respondent in previous applications, save for the comment in relation to the forensic report.

It is therefore clear that there are serious disputes of facts in this mater. In addition to that the forensic report on its own generates further controversy. H The question therefore is whether in view of this the procedure adopted by

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Mawadze J

the applicant is proper in the first place. I do not believe so. I have already A referred to the disputes of facts and the concession made by Mr *Kanengoni* in relation to the forensic report.

It is trite law that where there is conflicting evidence the correct course to take is to proceed by way of action rather than motion proceedings. The consequences of choosing the wrong procedure are clear. See *Masukusa* B v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) at p 234E in which McNally J (as he then was) referred to the dictum of Miller JA in *Tamarillo (Pty) Ltd* v *BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 430 G-H:

> "A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that procedural form at his peril for the court in the exercise of its C discretion, might decide neither to refer matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but dismiss the application".

It is common cause that the judgment by Chitakunye J in case No HC 1057/09 was of a definitive nature – *res judicata*. The requirements for the plea of *res judicata* has been pronounced upon in many authorities by our D courts. The concept is based upon the public interest that there must be an end to litigation. Put differently, the basis for the principle is that where a final and definitive judgment has been delivered by a competent court, the parties to that judgment can not dispute its correctness. The position was aptly put by Makarau JP (as she then was) in *Chipondah & Anor* v *Muvami* 2007 (2) ZLR 326 (H) at 329G-330A as follows: E

> "The requirements for the plea of *res judicata* are settled. Our law recognises that once a dispute between the same parties has been exhausted by a competent court, it cannot be brought up for adjudication again as there is need for finality in litigation. To allow litigants to plough over the same ground hoping for a different result will have the effect of introducing uncertainty into court decisions and will bring the administration of justice into disrepute." F

See also *Towers* v *Chitapa* 1996 (2) ZLR 261 (H) *per* Gillespie J; *Wolfenden* v *Jackson* 1985 (2) ZLR 313 (S) at 316C to E.

In casu it is common cause that the dispute between the parties relating to the validity of the 2005 will have been adjudicated upon in case No. HC 1057/09 by this court. G

Like all general rules or principles there are exceptions to the principle of *res judicata*. Malaba J (as he then was) in *City of Mutare* v *Mawoyo* 1995 (1) ZLR 258 (H) at 263-264 G-H summed up the exceptions in this manner:

> "The question whether or not this court has jurisdiction to alter its final judgments or orders has been previously answered in previous decisions of courts in jurisdictions that follow the common law tradition. The general rule is that once H

Mawadze J

> A a final judgment or order has been given the judge who gave it or any other judge of parallel jurisdiction has no power to alter, rescind, vary or set it aside, except in the few instances recognised at common law or by the Rules of the High Court.
>
> One of the exceptions recognised at common law is when a judgment or order has been obtained through fraudulent misrepresentation. The statutory exception B would in our case include Order 49 r 449(1) and Order 9 r 63(1) of the Rules of the High Court of Zimbabwe 1971".

See also *Minster of Mines & Ors* v *African Consolidated Resources plc & Ors* 2010 (2) ZLR 307 (H). The question which falls for determination in this matter is whether this case falls within the exception already alluded to. Put differently, is the preparation of a forensic report after judgment has C been pronounced a proper basis to revisit the same issue that was in dispute, that is, the validity of 2005 will.

Herbstein and van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed p 460 said:

> "A final judgment being *res judicata* is not easily set aside but court will do D so on various grounds, such as fraud, *discovery of new documents,* error and irregularities in procedure". (emphasis mine).

The learned authors at pp 471 stated as follows:

> "A further ground for seeking to have a judgment set aside is that since the giving of the judgment new documents have come to light which, had they been available at trial, would have entitled the applicant for relief to judgment in his favour. E … It has been held that the person applying to set aside the judgment must not only show that he was ignorant of the existence of the subsequently discovered documents but there must be a *justa causa* for the ignorance. Proof 'of the clearest possible description' must be presented that it was not the applicant's fault that the document was not discovered before judgment".

On pp 471-72 the learned authors gave useful examples, that is F

(a) in testamentary suits where a judgment has been given on a will and subsequently a later will or codicil is discovered or

(b) where as a consequence of fraud on the part of one of the parties the crucial document was not found or produced at trial or

(c) where the failure to produce the document at trial can not be attributed G to the applicant or his counsel or

(d) where the judgment in issue was founded on a presumption of law or expert evidence.

In casu the documents in issue, the 1981 will and the 2005 will, have always been in existence. No document (new or otherwise) has been discovered which H was in existence at the time Chitakunye J granted the order in case No. HC

2011 (1) ZLR p344

Mawadze J

1057/09. To my mind, for the exception to the principle of *res judicata* to be A applicable at common law, the document should have been in existence at the time the judgment is made. It would therefore be improper for the applicant, subsequent to the decision by Chitakunye J in case No. HC 1057/09, to get a new document in the form of a forensic report and on that basis request this court to revisit the order granted in case no. HC 1057/09. The question B which comes to mind is when will this end. There would be no finality in the matter as the other party can also gather such evidence even after my order.

I have already alluded to the fact that the forensic report in issue, even if this court was inclined to revisit its judgment, is not a document which on its own settles the issues in dispute. To the contrary, the forensic report generates controversy as it is based on the opinion of a forensic scientist C which is subject to challenge. Other relevant factors which have a bearing on the findings by the forensic expert relate to the use of photocopy documents which are barely legible, the state of health of the late Nellie Helen Morris at the time she signed the 2005 will and the probative value of the evidence of witnesses to the 2005 will. In short, therefore, the conclusion arrived at by the forensic expert is open to challenge and can be controverted. D

I am therefore satisfied that there is absolutely no merit in this application.

Let me finally deal with the issue of costs. To start with, this application totally lacks merit and I am satisfied that the applicant is simply abusing the court process. The application itself is replete with errors. The wrong procedure was used. The first respondent had to file heads of argument first E and set the matter down for hearing. I had to condone the applicant's late filing of heads of argument in order to bring the matter to finality on the merits. The heads of argument by the applicant are in all respects unhelpful as no case authority is cited for the principles espoused. The submission in court by Mr *Kanengoni* lacked belief and conviction. My considered view, therefore, is that this court should express its displeasure by awarding costs F against the applicant on a higher scale.

In the result, I make the following order:

> It is ordered that the application be and is hereby dismissed with costs on a legal practitioner and client scale. G

Chikumbirike & Associates, applicant's legal practitioners

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

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MOYO & ORS v ZVOMA NO & ANOR 2011 (1) ZLR 345 (S)

Citation	2011 (1) ZLR 345 (S)
Case No	Judgment No. S-28-10
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Sandura JA, Ziyambi JA & Garwe JA
Heard	21 September 2010
Judgment	10 March 2011
Counsel	*T Hussein*, for the appellants Ms *C Damiso*, for the first respondent *M Chaskalson SC*, for the second respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Constitutional law – *Parliament – Speaker – election – requirement for secret ballot – members displaying their ballot papers before placing them in the ballot box – such members' votes invalid – substantial compliance* D *principle not applicable in this situation – election void*

Headnote

The first respondent, the Clerk of Parliament, convened the first meeting of Parliament in August 2008 for the purposes of swearing in the members of Parliament and electing the presiding officers. There were two candidates E for the post of speaker, of whom the second respondent was one. In terms of s 39(2) of the Constitution, the Speaker is elected in accordance with standing orders; and under House of Assembly Standing Order No. 6, if more than one person is proposed as Speaker of Parliament, the Clerk is required to conduct an election of the Speaker by secret ballot. The election took place and the second respondent was declared the winner.

F The appellants, members of Parliament, brought an action to have the second respondent's election as Speaker set aside. Six members of Parliament had, after marking their ballot papers in the booth, displayed their papers before depositing them in the ballot box, making it clear whom they intended to vote for. The appellants argued that Standing Order 6 G was peremptory and enjoined the Clerk to conduct an election of the Speaker by secret ballot. They submitted that the display of the ballot papers before depositing them in the ballot box by some members of Parliament rendered the election of the Speaker null and void.

The respondents argued when an election takes place by secret ballot each voter has the right to have his vote kept secret. This right to secrecy, like H any other right, can freely be waived by a voter who chooses to make

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known how he voted. If a voter chooses to disclose how he voted, that A cannot in itself compromise the secrecy of the ballot. Only when a voter is factually prevented from maintaining the secrecy of his or her vote is there is a violation of the secrecy of the ballot. The display by the six members of their ballot papers before depositing them in the ballot box was not a violation of the principle of a secret ballot. All that was B required of the Clerk was for him to provide the guarantee that members of Parliament voted in secret if they so wished. Those who wished to penetrate the veil of secrecy, as did the six members in this case, were entitled to do so without contaminating the process. This argument was accepted by the High Court. On appeal, several cases from the United States were cited where the same argument found favour. C

Held (per Chidyausiku CJ, Ziyambi and Garwe JJA concurring), that the courts in the cited cases were interpreting statutes in their own jurisdictions; they were not making pronouncements on general jurisprudential principles. When interpreting statutes, courts are guided primarily by the wording and the context of the statutes. A court should not simply translocate D one court's interpretation of a statute in that court's jurisdiction to an interpretation of a statute differently worded in its own jurisdiction.

Held, further, that nonetheless, where a constitutional provision confers on the voter the right to vote by secret ballot that right is intended to protect the voter, who has the right to waive that right without violating the secrecy of the ballot. Public policy requires that the veil of secrecy E shall be impenetrable unless the voter himself voluntarily determines to lift it. However, s 39 of the Constitution, as read with Standing Order 6, is not a provision conferring the right to vote on a voter in the form of the Member of Parliament. These provisions prescribe how a particular officer in Parliament, namely the Speaker, is to be elected. The language is peremptory. It was thus not open to the Clerk or any member of F Parliament to substitute the method of electing a Speaker with another method of his own choice, such as by open ballot. It was not open, for instance, to members to tell the Clerk that they were waiving their right to vote for the Speaker by secret ballot or that they wished to vote for the Speaker by open ballot either individually or as a group. G

Held, further, that voting by secret ballot involves three essential procedures:

(a) each member receives a ballot paper;

(b) each member indicates on that ballot paper the candidate of his choice in private and to the exclusion of the public; and

(c) having done so, the member deposits his ballot paper into the ballot box privately without disclosing the ballot paper to the world. H

2011 (1) ZLR p347

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A Once the ballot paper has been deposited into the ballot box, the process of voting by secret ballot, so far as the voter is concerned, is completed. It would not be a violation of voting by secret ballot if the person discloses whom he has voted for at that stage.

Held, further, that the six members, by displaying their ballot papers before depositing them in the ballot box, violated the secrecy of their ballots, B thereby rendering their votes invalid for the purposes of s 39 of the Constitution, as read with Standing Order 6. This rendered their votes ineligible for counting for the purpose of determining the election of the Speaker. The Clerk proceeded to count these six votes as valid votes in determining the outcome of the election. This contaminated the process.

C *Held*, further, that s 39 of the Constitution, as read with Standing Order 6, has not provided what should be the consequence of the non-compliance with this peremptory direction by Parliament. In this situation, the court needs to decide what consequence should follow from breach of the duty. The language of the relevant section is peremptory, having regard to the use of the word "shall". While the use of the word "shall" D is no longer conclusive of the intention of Parliament to render invalid non-compliance, it certainly remains cogent evidence of such intention. Generally speaking, Parliament, just like an individual, uses the same words or language to evince the same intent and different words or language to evince a different intent is grounded in elementary common E sense. It is permissible for a court to look at the language of another statute on similar or the same subject matter in the exercise to ascertain the intention of Parliament. Section 177 of the Electoral Act [*Chapter 2:13*] deals with the subject of the consequences of non-compliance with the Electoral Act. Under that section, only when non-

compliance with the Act affects the result of the election should the election be set aside. F In effect, the section incorporates into the Electoral Act the doctrine of substantial compliance.

Held, further, that s 39 of the Constitution, as read with Standing Order 6, provides for the election of the Speaker, but does not incorporate this principle. No draconian consequences would flow from a declaration of G invalidity of the election. Parliament consists of a little over 200 members and ordering a re-election of the Speaker would not pose financial or logistical problems of any magnitude. Parliament should lead by example and should scrupulously obey its own laws. It is unacceptable that Parliament should seek to salvage a shambolic and chaotic election of a Speaker through the doctrine of substantial compliance.

H *Held (per* Malaba DCJ, dissenting), that the appellants alleged that the Clerk

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failed to act in accordance with the requirements of the rule against A counting invalid votes as secret ballots and as a result affected their rights or legitimate expectation in the election. The first ground given was that there was "too much noise in the House", which resulted in the Clerk being unable to manage the activities of the members according to the prescribed procedure for the achievement of the purpose of the electoral B law. On the facts, this allegation was not proved. The second ground was that it was unlawful for the members who displayed their ballot papers to do so and for the Clerk not to prevent them from doing what they did. The allegation was that this undermined the process by which the object of the electoral law was to be achieved, thereby violating the rights of the applicants to elect the Speaker by a secret ballot. C

Held, further, that the Clerk is appointed as the official to conduct the election required by s 39(1) where more than one person is proposed as Speaker and to conduct the election by a secret ballot. "Election" means the whole combined and continuous process for bringing about the result of the election. The process consists of a number of material steps prescribed by law, beginning with the call for the election and D ending in the declaration of the result of the election. The right to vote is not affected by the requirement that the election should be conducted by a secret ballot. The statute relates to procedure alone and directs the mode in which the right to vote is to be exercised by the electors. The Legislature chose the secret ballot for its optimum benefits and imposed E on the Clerk the general obligation to provide the mechanisms and procedures for the recording, processing and protection of the secret ballot. The secret ballot means that whilst the caster of the vote remains unknown the secrecy of the ballot is maintained and the vote has been effectively cast in the election of the Speaker. It is the valid vote to be counted to ascertain the result of the election of the Speaker by a secret F ballot. So essential is the secrecy of the ballot to its validity that any departure by the voter from these conditions designed for the purpose of ensuring the maintenance of secrecy must render the vote void.

Held, further, that the Clerk's task was to provide the mechanisms and procedures that enabled the voter to vote by a secret ballot to do so and G to ensure that the vote given in secret was recorded, processed, protected and counted, to bring about the election of the Speaker. The primary object of any act performed by the Clerk was the maintenance of the secrecy of the ballot, unless the voter himself failed to observe strictly the conditions essential to the validity of the vote as a secret ballot. It was the Clerk's duty to detect conduct inconsistent with the exercise H

A by the voter of the right to elect the Speaker in accordance with the procedure prescribed to ensure the maintenance of the secrecy of the ballot. If he detected such conduct, it was his duty to determine that the conduct of the voter had stripped the ballot of secrecy and to declare the vote invalid. Only valid ballots should be counted.

B *Held*, further, that the right to secrecy of the ballot is subject to the principle that everyone has a right to waive an advantage of a law made solely for his benefit and protection in his private capacity, provided he does so without infringing any public right or public policy. The right to vote by a secret ballot includes the right of the voter to disclose to any other person for whom he voted. He can, in the exercise of that freedom, decide C to put a writing or mark on the ballot paper at the time he casts the vote by which he can be identified as the voter and for whom he

voted. He may decide to display to others the ballot paper so as show for whom he voted. A secret ballot is not compulsory insofar as the voter is concerned.

Held, further, that all members, including the six who displayed their ballot papers, had the right to waive the right to the secrecy of their votes. In D displaying the ballot papers to others, those members exercised their right to share with any other person the knowledge for whom they voted. As long as they were not coerced or compelled to expose their ballot papers to others, they acted lawfully. The power conferred on the Clerk to conduct the election of the Speaker by a secret ballot is limited by E the right of the voter not to maintain the secrecy of his or her ballot. The Clerk was not under any duty to stop or prevent the voters from voluntarily displaying their ballot papers to others so as to disclose for whom they had voted. The Clerk's duty to maintain the secrecy of the ballot requires that he should refrain from doing anything that would compel the voter to disclose to any other person how he voted, but he F could not prevent the voter from freely exercising the right to disclose to whomsoever he chooses for whom she voted. The secrecy of the ballot is for the benefit of the voter.

Held, further, that a right to vote must be exercised strictly according to the terms of the statute which confers it. Here, when the six members displayed their ballot papers to others, they voluntarily took their votes G out of the election and rendered their ballots void and of no value in the election of the Speaker. The other votes, however, remained valid. The Clerk complied with the requirements of the legislation and most of the members cast valid votes. Discounting the invalid votes would not change the result of the election. The Clerk could have discounted H the votes at the time; there was no reason why a court should go any

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Chidyausiku CJ

further than the Clerk could have done. To declare the election void A would be wholly disproportionate to the wrong committed. The intention of the Legislature must be that only irregularities which undermined the achievement of the object or purpose of the legislation of ensuring an election of the Speaker based on universal, equal, direct and personal vote freely expressed by a secret ballot should vitiate the election.

Held (per Sandura JA, dissenting): the object of the Standing Order is to B protect the voter, mainly against intimidation and victimisation, by enabling him to vote freely and in secret for the candidate of his choice, without fearing that other people would know for which candidate he has voted. The object of the Standing Order was achieved in the election. None of the members were forced to display their ballot papers and the C vast majority did not. The degree of non-compliance with the Standing Order was insignificant. The principle that an election will not be set aside for non-compliance with the provisions of the electoral law if the election was conducted in accordance with the principles of the electoral law, and the non-compliance did not affect the result of the election, is D well-established and has been part of the electoral law of this country for at least eighty-two years. It is based on common sense, for there would be no good reason for setting aside an election on the basis of an irregularity which did not affect the result of the election. The non-compliance did not affect the result of the election. It was irrelevant that the Standing Order did not re-state the principle of substantial E compliance. The principle is based on common sense, which dictates that if an irregularity does not affect the result of the election, it cannot form a basis for the nullification of the election.

Cases referred to

A-G, Duchy of Lancaster v Simcock [1966] Ch 1; [1965] 2 All ER 32 (ChD) F

A-G, Northern Ireland v Gallagher [1963] AC 349; [1961] 3 All ER 299

B v B & H (L intervening) [1962] 1 All ER 29 (Div)

Boyer v Teague 106 NC 625 (1890)

Irwin v White, Tomkins & Courage Ltd [1964] 1 WLR 387; [1964] 1 All ER 545 (HL) G

Jenkins v State Bd of Electors of North Carolina & Ors 180 NC 169 (1920)

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

Matanhire v BP & Shell Mktg Svcs (Pvt) Ltd 2004 (2) ZLR 147 (S)

Moyo & Ors v Zvoma NO & Ors 2010 (1) ZLR 178 (H)

Re *P (infants)* [1962] 1 WLR 1296; [1962] 3 All ER 789 (ChD) H

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A *Phillips v Goff* (1886) 17 QBD 805

Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

Seabridge v H Cox & Sons (Plant Hire) Ltd [1968] 2 QB 46; [1968] 1 All ER 570 (CA)

Shumba & Anor v ZEC & Anor 2008 (2) ZLR 65 (S)

B *State* ex rel *Hutchins v Tucker at al* 106 Fla 905 (1932)

Steel & Eng Industries Federation & Ors v National Union of Metalworkers of SA (2) 1993 (4) SA 196 (T)

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

Wild v Wild [1968] 3 WLR 1148

C *Woodward v Sarsons* (1875) LR 10 CP 733

Legislation considered

Constitution of Zimbabwe 1980, s 39

Electoral Act [*Chapter 2:13*], s 177

House of Assembly Standing Orders, order 6

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

Case information

T Hussein, for the appellants

Ms *C Damiso*, for the first respondent

M Chaskalson SC, for the second respondent

Judgment

E **CHIDYAUSIKU CJ**: This is an appeal against the judgment of the High Court wherein Patel J dismissed the appellants' application to have set aside the election of the second respondent as the Speaker of Parliament (hereinafter referred to as "the Speaker"). The appellants, as the applicants in the court *a quo*, sought the following relief set out in the draft order:

> F " WHEREUPON after perusing the documents filed of record and hearing counsel, it is hereby declared that:
>
> 1. The election of (the) second respondent as the Speaker of the Parliament of Zimbabwe on 25 August 2008 is null and void and set aside.
> 2. …
> 3. That the respondents jointly and severally pay the costs of suit."

G (The applicants abandoned the relief set out in para 2.)

The appellants' main contention in the court *a quo* and in this court is that the election of the Speaker was null and void because it was not conducted in terms of s 39 of the Constitution of Zimbabwe (hereinafter referred to as "the Constitution"), as read with Standing Order 6 of the Standing Orders of H Parliament of Zimbabwe (hereinafter referred to as "the Standing Orders").

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Patel J dismissed the application. The appellants now appeal against that A judgment.

The grounds of appeal are set out in the notice of appeal, which, in relevant part, reads as follows:

"Grounds of Appeal

1. The learned Judge *a quo* erred in finding that a proper election of Speaker B of Parliament was conducted in terms of the Constitution and the law.
2. The learned judge erred in condoning the first respondent's failure to implement and enforce his own procedures for the election.
3. The learned judge *a quo* erred in finding that the participants' exposure of their completed ballot papers was not a violation of the secret ballot.
4. The learned judge *a quo* erred in finding that a secret ballot took place. C
5. The learned judge *a quo* erred in interpreting s 39(2) of the Constitution as read with Ordinance 6 of the House of Assembly Standing Orders as directory and not peremptory."

The grounds of appeal set out in the notice of appeal, as read with the record and submissions by counsel, raise essentially the following two issues for D determination in this appeal:

(a) whether the exposure of the secret ballot before the depositing of the ballot papers in the ballot box by some Members of Parliament amounts to a violation of the voting by secret ballot and, if so, whether that rendered the election of the Speaker null and void; and

(b) whether the failure by the Clerk of Parliament of Zimbabwe (hereinafter E referred to as "the Clerk") to control the voting process and the consequent chaotic conditions constitute a failure by the Clerk to conduct an election in terms of s 39 of the Constitution, as read with the Standing Orders.

The background facts of this case are as follows. The first respondent is the Clerk of the Parliament of Zimbabwe. Pursuant to Proclamation No. 7 of F 2008, the Clerk convened the first meeting of Parliament on 25 August 2008 for the purposes of swearing in the Members of Parliament and electing the presiding officers. The Clerk's mandate to conduct these elections is derived from the Standing Orders – in the case of the House of Assembly, Standing Order No. 6. Two candidates were nominated for the office of Speaker, G namely Mr Paul Themba Nyathi (hereinafter referred to as "Nyathi") and the second respondent (hereinafter referred to as "Moyo"). Standing Order No. 6 provides that if more than one person is proposed as Speaker of Parliament, the Clerk shall conduct an election of the Speaker by ballot box. The election took place and the Clerk announced that Nyathi had garnered ninety-eight votes and Moyo had garnered one hundred and ten votes. The H

Chidyausiku CJ

A Clerk accordingly declared Moyo the winner. Moyo assumed the office of Speaker. The appellants want the election of Moyo as Speaker set aside.

I now wish to deal with the issue of whether the election was conducted by secret ballot as is required by s 39 of the Constitution, as read with Standing Order No. 6 of the Standing Orders.

B The appellants contend that some Members of Parliament from the MDC-T party, having marked their ballot papers in the secrecy of the polling booths, openly displayed their marked ballot papers before depositing them in the ballot box. The appellants contend that the majority of the Members of Parliament from the MDC-T party did this, while the respondents' position is equivocal.

C The court *a quo*, however, concluded that, of the two hundred and eight Members of Parliament who voted, most probably only six Members of Parliament displayed their votes in the manner alleged by the appellants. The Members of Parliament who are named as having done this are the Hon L T Biti, the Hon Khupe, the Hon Chambati, the Hon Chibaya, the Hon Denga D and the Hon Moyo, the second respondent. In this regard, the court *a quo* concluded as follows (see *Moyo & Ors* v *Zvoma NO & Ors* 2010 (1) ZLR 178 (H) at 189):

> "It is fairly clear that Mr Biti took the lead in brandishing his vote and that several of his colleagues were then emboldened into emulating his possibly impolitic example. However, they did so of their own free will and, more significantly, E they did so after having cast their votes in secret."

The conclusion of the court *a quo* that at least the six Members of Parliament named displayed their ballot papers after marking them but before depositing the ballot papers in the ballot box cannot be faulted. This conclusion is fortified by the following factors. It is specifically alleged by the appellants F that Moyo displayed his ballot paper before depositing it. Moyo filed an affidavit in this case in which he does not deny this allegation. Five other Members of Parliament are named as having displayed their ballot papers before depositing them in the ballot box. None of these five Members of Parliament have deposed to affidavits denying the allegation. In my view, it would have

been easy for Moyo to secure such affidavits from the named G Members of Parliament denying the conduct alleged. Moyo instead filed an affidavit from a Member of Parliament, Mrs Mpariwa, in respect of whom no such allegation was made. Mrs Mpariwa does not deny that the named Members of Parliament had conducted themselves in the manner alleged by the appellants. Indeed, if anything, she appears to concede that that in H fact did occur.

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In the result, I agree with the conclusion of the court *a quo* that at least six A Members of Parliament displayed their ballot papers after marking them but before depositing them in the ballot box.

Having concluded that at least six Members of Parliament displayed their ballot papers before depositing them in the ballot box, the issue that falls for determination is the legal consequences of such conduct. B

Section 39 of the Constitution provides as follows:

> "(2) The Speaker shall be elected in accordance with Standing Orders from among persons who are or have been members of the House of Assembly and who are not members of the Cabinet, Ministers or Deputy Ministers:
>
> Provided that a person who is not a member of the House of Assembly shall not be elected as the Speaker unless he is qualified in accordance with C Schedule 3 for election to the House of Assembly."

Standing Order 6 of the Standing Orders provides as follows:

> "If more than one person is proposed as Speaker, the Clerk *shall conduct the election of Speaker by a secret ballot*. (the emphasis is mine)"

The Clerk issued specific instructions on how the secret ballot was to be D conducted. According to the second respondent, Moses Mliza Ndlovu, the Clerk issued the following instructions:

> "4. The first respondent announced the procedure to the effect that according to the Standing Rules, an election would be held by secret ballot. To this extent, he assured the Hon Members present that all necessary provisions had been made to guarantee the secrecy of the ballot. E
>
> 5. The first respondent then explained that in terms of the procedure, he would issue a ballot paper to each Member present. Thereafter, the Member would put a mark against the name of the candidate the Member would wish to be the Speaker of Parliament.
>
> 6. The ballot paper had two candidates for Speaker of Parliament, namely the second respondent nominated by the Movement for Democratic Change F (Tsvangirai) (MDC-T) and Mr Paul Themba-Nyathi nominated by the Movement for Democratic Change (MDC).
>
> 7. The first respondent then explained that the ballot paper, having been duly marked in secret in a booth, would be folded by the voting Member and deposited in a ballot box.
>
> 8. The first respondent then explained that, having cast the vote, the Hon G Member would then leave the House."

The Clerk does not deny that the above accurately reflects the instructions he gave. From the above, three essential elements of the secret ballot emerge:

(a) each Member of Parliament was to be issued with a ballot paper;

(b) each Member of Parliament was to mark the ballot paper in the privacy H

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A or secrecy of the polling booth; and

(c) having marked the ballot paper in secret, the Member of Parliament was to fold the ballot paper to maintain the secrecy of the vote and deposit it in the ballot box, thus completing the process of secret voting.

It admits of no debate that the Clerk would then be required to count the vote to complete the process. In my view, the counting of the votes cast is B an essential part of the process of the election by secret ballot. I shall revert to this aspect of the matter later.

The appellants' case is that Standing Order 6 is peremptory and enjoins the Clerk to conduct an election of the Speaker by secret ballot. Mr *Hussein*, for the appellants, submitted that the display

of the ballot papers before depositing C them in the ballot box by some Members of Parliament is an aberration from the provisions s 39 of the Constitution, as read with Standing Order 6 of the Standing Orders. He argued that such aberration rendered the election of the Speaker null and void.

Ms *Damiso and* Mr *Chaskalson*, for the respondents, submitted that the appellants' complaint is based on a fundamental misconception relating to the D nature of a secret ballot. They submitted that when an election takes place by secret ballot each voter has the right to have his or her vote kept secret. This right to secrecy, like any other right, can freely be waived by a voter who chooses to make known how he or she voted. The fact that any voter chooses to disclose how he or she voted cannot in itself compromise the secrecy of E the ballot. They submitted that it is only when a voter is factually prevented from maintaining the secrecy of his or her vote that there is a violation of the secrecy of the ballot. On this basis, they argued that the display by six Members of Parliament of their ballot papers before depositing the ballot papers in the ballot box is not a violation of the principle of a secret ballot.

This argument found favour with the learned judge in the court *a quo*. In F this regard he had this to say at p 189 of the report:

> "Having regard to the dictionary definitions and the case authorities cited by counsel, the gravamen of a secret ballot, in my view, is that each voter is enabled to cast his vote privately and in secret, without fear of having his voting choice identified or ascertained by others. In this respect, it is incumbent upon the regulating authority to provide the requisite wherewithal for that purpose. The G courts should not interfere unless it is shown that the objective conditions put in place for the election precluded the possibility of a secret vote. Beyond this, it is then a matter purely for the individual voter if he chooses to divulge, whether publicly or in private, the specific manner in which he has cast his vote. If he does so of his own volition, without any external coercion or intimidation, and howsoever his conduct might influence other voters, this cannot detract from H the secrecy of his vote or vitiate the secrecy of the ballot as a whole."

2011 (1) ZLR p356

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It was further argued that all that was required of the Clerk was for him to A provide the guarantee that Members of Parliament voted in secret if they so wished. Those who wished to penetrate the veil of secrecy, as did the six Members of Parliament, were entitled to do so without contaminating the process.

In support of the above contention, both counsel for the respondents placed B reliance on *Steel and Engineering Industries Federation and Ors* v *National Union of Metalworkers of South Africa (2)* 1993 (4) SA 196 (T) at 200J and on *J Jenkins* v *State Board of Elections of North Carolina & Ors* 180 NC 169 (1920) at 171-172, 104 SE 346. Mr *Chaskalson* in particular submitted that the right to secrecy of the ballot, like any other right, can freely be waived by any voter who chooses to make known how he or she voted. He further C submitted that this point has been made clear by United States judgments dealing with unsuccessful challenges to electoral laws. For this submission he relied on the following remarks of Brown J in the *Jenkins* case *supra* at pp 171-172:

> "… this privilege of voting a secret ballot has been held to be entirely a personal D one. The provision has been generally adopted in this country for the protection of the voter, and for the preservation of his independence, in the exercise of this most important franchise. But he has the right to waive his privilege and testify to the contents of his ballot. The voter has the right at the time of voting voluntarily to make public his ballot, and its contents in such case may be proven by the testimony of those who are present. Public policy requires that the veil of secrecy shall be impenetrable *unless the voter himself voluntarily determines* E *to lift it*."

Mr *Chaskalson* also relied on the following passage from *State* ex rel *Hutchins* v *Tucker et al* 106 Fla 905 (1932) at 908, 143 So 754:

> "… it has been uniformly held that under such provisions as that contained in s 6 of Article VI of our Constitution the elector cannot be compelled to violate F the right of secrecy of his ballot but the great weight of authority is to the effect that such constitutional provision guarantees a personal privilege which might be waived. In *State vs Anderson* 26 Fla 240, 8 So 1, this court, speaking through Mr Chief Justice Rainey, said:
>
> > 'The Constitution provides, section 6, Article VI, that in all elections by the people the vote shall be by ballot, and in those by the Legislature it shall G be *viva voce*. The material guarantee of this constitutional mandate of vote by ballot is inviolable secrecy as to the person for whom an elector shall vote. The distinguishing theory of the ballot system is that every voter shall be permitted to vote for whom he pleases, and that no one else shall be in position (*sic*) to know for whom he has

voted, or shall know *unless the voter shall of his own free will inform him*.' Cooley's *Constitutional Limitations* m.p. 604 *et seq.* (Italics ours)" H

2011 (1) ZLR p357

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A Further reliance was placed on the following passage from Cooley's work *Constitutional Limitations* 7 ed 912:

> "The system of ballot-voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases and that no one is to have the right or be in position (*sic*) to question his independent action, either then or at any subsequent time. The courts have held that a voter, even B in case (*sic*) of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others who may accidentally, or by trick or artifice, have acquired knowledge on the subject should not be allowed to testify to such knowledge, or to give any information in the courts upon the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it; his ballot is absolutely C privileged …"

Mr *Chaskalson* further submitted that the fact that any voter chooses to disclose how he or she voted cannot compromise the secrecy of the ballot. He argued that if this were the case secret ballots would be open to abuse by voters who, fearing that their candidates were at risk of losing the election, could invalidate a vote by merely waving their ballots about. It is only when D a voter is factually prevented from maintaining the secrecy of his vote or her vote that there is a violation of the secrecy of the ballot. He further argued that on the facts of this case there is no suggestion of any such violation of the secrecy of the ballot. Consequently, the primary complaint of the appellants must be rejected.

E The two cases cited by Mr *Chaskalson*, namely the *Jenkins* case *supra* and the *State* ex rel. *Hutchins* case *supra*, were concerned with the constitutionality of statutory provisions that permitted voting by absentee voters such as soldiers serving abroad. The basis of challenging the constitutionality of the Statutes providing for the absentee voters was that they violated the secrecy of the ballot guaranteed by the State Constitution, Article VI section 6. Section 6 F of Article VI *declared that all elections by the people shall be by ballot, and all elections by the General Assembly shall be viva voce* (the emphasis is mine). The contention, which was dismissed in the above American cases in respect of which the above cited passages were made, was that statutes allowing absentee votes would of necessity lead to the identification of the G voter, thereby violating the secrecy of the ballot guaranteed by the Constitution of the State of North Carolina. The *ratio decidendi* of the court in dismissing the challenge was that the impugned statutes, by allowing voters to vote by postal ballot, did not compel voters to disclose their votes leading to a breach of their right to voting in secrecy. The courts held that the impugned statutes simply provided the voter with a choice either to vote secretly by H presenting himself or herself at the polling booth or vote by postal ballot

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if he so wished, thereby compromising the secrecy of his or her vote. The A court held in both cases that a secret ballot is not compulsory so far as the voter is concerned, for the statute provides that the ballot may be deposited for the voter by the registrar or by one of the judges of the election or by the voter himself if he so chooses.

I wish to make the following observations regarding the above cases. The B judgments cited above are judgments of foreign courts. They are not binding but they are persuasive. The higher the courts are in their jurisdictions, the more persuasive are their judgments. The cited judgments are not from the highest courts in North Carolina. The second observation I wish to make is that the courts in the cited cases were interpreting statutes in their jurisdictions. They were not making pronouncements on general jurisprudential principles. C When interpreting statutes, courts are guided primarily by the wording and the context of the statutes. A court should not simply translocate one court's interpretation of a statute in that court's jurisdiction to an interpretation of a statute differently worded in its own jurisdiction. In the above judgments, the courts of North Carolina were interpreting Article VI s 6 of the Constitution D of North Carolina, which provided that "in all elections by the people the vote shall be by ballot, and in those by the Legislature it shall be *viva voce*". The courts in both the *Jenkins* case *supra* and the *State* ex rel *Hutchins* case *supra* interpreted Article VI s 6 as conferring a right to vote in secret, which can be waived. They ascribed

this meaning to Article VI s 6 despite the use of the peremptory word "shall" in the section. I have some doubts about the E correctness of this interpretation.

Be that as it may, I accept the conclusion in those two cases that, where a constitutional provision confers on the voter the right to vote by secret ballot, that right is intended to protect the voter and the voter has the right to waive that right without violating the secrecy of the ballot. I also accept the proposition that public policy requires that the veil of secrecy shall be F impenetrable unless the voter himself voluntarily determines to lift it. See also *Boyer* v *Teague* 106 NC 625 (1890); *McRary on Elections* 3 ed at 305-306; and Cooley's *Constitutional Limitations* 7 ed at 912.

However, s 39 of the Constitution, as read with Standing Order 6, is not a constitutional or statutory provision conferring the right to vote on a voter G in the form of the Member of Parliament. Section 39 of the Constitution, as read with Standing Order 6, prescribes how a particular officer in Parliament, namely the Speaker, is to be elected. It expressly provides that if more than one person is proposed as Speaker the Clerk of Parliament *shall* conduct the election of the Speaker *by a secret ballot*. In other words, the use of the words "by a secret ballot" in the Statute is prescribing the method by which H

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A a Speaker is to be elected. The language is peremptory language. It would be a different story if the wording of Standing Order 6 were to the effect "If more than one Member is proposed Members of Parliament may vote by secret ballot to elect the Speaker".

The golden rule of interpretation is that one has to give the words of a statute B their primary meaning. If that rule is applied to Order 6 of the Standing Orders, then the inescapable inference is that the Order is addressing the Clerk and is dictating to him the manner by which a Speaker should be elected. In view of the explicit language of the statute, it is not open to the Clerk or any Member of Parliament to substitute the method of electing a Speaker with another method of their own choice, such as by open ballot. Put differently, C it was not open, for instance, to Members of Parliament to tell the Clerk that they were waiving their right to vote for the Speaker by secret ballot or that they wished to vote for the Speaker by open ballot either individually or as a group. That option was not open to the Members of Parliament as a whole or to individual Members of Parliament.

D Voting by secret ballot, as I have already stated, involves the following three essential procedures. Firstly, that each Member of Parliament receives a ballot paper. Secondly, that each Member of Parliament indicates on that ballot paper the candidate of his choice in private and to the exclusion of the public. And, thirdly, that, having done so, the Member of Parliament deposits his or her ballot paper into the ballot box privately without disclosing his or her ballot E paper to the world. Once the ballot paper has been deposited into the ballot box the process of voting by secret ballot so far as the voter is concerned is completed. It would not be a violation of voting by secret ballot if the person discloses whom he has voted for at that stage. The voting by secret ballot by the voter is complete. See *Steel and Engineering Industries Federation and* F *Ors* v *National Union of Metalworkers of South Africa (2) supra*.

The next stage to complete the process provided for in terms of s 39 of the Constitution, as read with Standing Order 6, is for the Clerk to count the votes cast to determine the winner. This stage, in my view, is an essential process in the election of the Speaker of Parliament by secret ballot. Because of the peremptory language of s 39 of the Constitution, as read with Standing G Order 6, the Clerk has no discretion over what procedure is to be followed when electing the Speaker. It has to be by secret ballot. The use of any other method to elect the Speaker would be a failure to comply with the provisions of s 39 of the Constitution, as read with Standing Order 6.

In casu, the appellants alleged that some Members of Parliament received H ballot papers, marked the ballot papers in the privacy of the polling booth

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and then, instead of folding the ballot papers to maintain the secrecy of their A vote and before depositing them in the ballot box, they displayed them to fellow Members of Parliament to show them how they voted. Thereafter they deposited the ballot papers in the ballot box. The court *a quo*

concluded that six Members of Parliament conducted themselves in this manner. The conclusion that only six out of the two hundred and eight voters voted in this B manner is supported by the evidence and it cannot be faulted.

The learned judge in the court *a quo* also concluded that the six Members of Parliament who displayed their votes complied with the requirement of a secret ballot because they were entitled to pierce the veil of secrecy without falling foul of s 39 of the Constitution, as read with Standing Order 6. I respectfully disagree with the learned judge in this regard. The six Members C of Parliament, by displaying their ballot papers before depositing them in the ballot box, violated the secrecy of their ballots, thereby rendering their votes invalid for the purposes of s 39 of the Constitution, as read with Standing Order 6. This rendered their votes ineligible for counting for the purpose of determining the election of the Speaker. The Clerk proceeded to count D these six votes as valid votes in determining the outcome of the election. This contaminated the process. Put differently, he counted oranges and apples in a process where the law provides that only oranges be counted. In short, the Clerk failed to act as directed by s 39 of the Constitution, as read with Standing Order 6, namely to conduct an election by secret ballot. He conducted a cross-breed election, in that it was partly secret and partly E open. That is not what the law provides for. In this regard I am satisfied that the Clerk failed to comply with the provisions of s 39 of the Constitution, as read with Standing Order 6.

Having concluded that the Clerk did not comply with the statutory requirements in his conduct of the election, the issue that falls for determination is, what F are the legal consequences that flow from the failure to comply with the statutory provisions?

Section 39 of the Constitution, as read with Standing Order 6, has directed that the Clerk shall conduct an election of a Speaker by secret ballot but has not provided what should be the consequence of the non-compliance with this peremptory direction by Parliament. G

This court recently had occasion to deal with the issue of interpreting a statute that does not prescribe the consequences of non-compliance with a statutory provision in the case of *Shumba & Anor* v *ZEC & Anor* 2008 (2) ZLR 65 (S). In that case I cited with approval a passage from Bennion *Statutory Interpretation* at pp 21-22, which sets out how courts should approach that H

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A issue. The learned author states that a court charged with the enforcement of a statute that does not state the consequences of non-compliance needs to decide what consequence Parliament intended should follow from such failure to comply. In that case I had this to say at pp 80E-81E:

> "It is the generally accepted rule of interpretation that the use of peremptory words such as 'shall' as opposed to 'may' is indicative of the legislature's intention B to make the provision peremptory. The use of the word 'may' as opposed to 'shall' is construed as indicative of the legislature's intention to make a provision directory. In some instances the legislature explicitly provides that failure to comply with a statutory provision is fatal. In other instances, the legislature specifically provides that failure to comply is not fatal. In both of the above instances no difficulty arises. The difficulty usually arises where the legislature C has made no specific indication as to whether failure to comply is fatal or not.
>
> In the present case, the consequences of failure to comply with the provisions of s 18 of the Zimbabwe Electoral Commission Act are not explicitly spelt out. In those statutory provisions where the legislature has not specifically provided for the consequences of failure to comply, it has to be assumed that the legislature has left it to the courts to determine what the consequences of D failure to comply should be.
>
> Francis Bennion *Statutory Interpretation* suggests that the courts have to determine the intention of the legislature using certain principles of interpretation as guidelines. He had this to say at pp 21-22:
>
> > 'Where a duty arises under a statute, the court, charged with the task of enforcing the statute, needs to decide what consequence Parliament intended E should follow from breach of the duty.
> >
> > This is an area where legislative drafting has been markedly deficient. Draftsmen find it easy to use the language of command. They say that a thing "shall" be done. Too often they fail to consider the consequence when it is not done. What is not thought of by the draftsman is not expressed in the statute. Yet the courts are forced to reach a decision.
> >
> > F It would be draconian to hold that in every case failure to comply with the relevant duty invalidates the thing done. So the courts' answer has been to devise a distinction between mandatory and directory duties. Terms used instead of "mandatory" include "absolute", "obligatory", "imperative" and "strict". In place of "directory", the term "permissive" is sometimes used. Use of the term

"directory" in the sense of permissive has been justly G criticised. (See Craies *statute Law* 7 ed 1971 p 61 n 74.) However it is now firmly rooted.

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

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Thereafter the learned author sets out some guiding principles for the determination A of whether failure to comply with a statutory provision is fatal or a mere irregularity.

One of these guiding principles is the possible consequences of a particular interpretation. If interpreting non-compliance with a statutory provision leads to consequences totally disproportionate to the mischief intended to be remedied, the presumption is that Parliament did not intend such a consequence and therefore the provision is directory." B

Maxwell *The Interpretation of statutes* 12 ed at 314 says much the same as the above cited excerpt from *Bennion.*

Thus the issue before this court is to determine what Parliament intended to be the consequence of the Clerk's breach of the statutory requirement to count only regular votes in determining the outcome of the election of the Speaker. C

I have come to the conclusion that Parliament intended to render invalid an election wherein the Clerk fails to comply with the provisions of s 39 of the Constitution, as read with Standing Order 6. I have come to this conclusion for two reasons: firstly, because of the peremptory language of the provision in question, and secondly because of the use of different language from the one used by Parliament when it legislated on the same subject matter in D another statute, namely s 177 of the Electoral Act [*Chapter 2:13*].

Dealing with the issue of the use of peremptory language in s 39 of the Constitution, as read with Standing Order 6, there can be no doubt that the language of the relevant section is peremptory, having regard to the use of the word "shall". I accept that there has been movement from the principle E of strict exaction of compliance with the wording of the statute to avoid invalidity to a more flexible approach giving the courts some latitude in determining the consequences of non-compliance. My understanding of the new approach is that, while the use of the word "shall" is no longer conclusive of the intention of Parliament to render invalid non-compliance, F it certainly still remains cogent evidence of such intention. This court has, in a number of recent cases, held that failure to comply with the peremptory direction of a statute leads to invalidity. In this regard, r 29 of the Supreme Court Rules provides as follows:

"29 Entry of appeal

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

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

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

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

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

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

(f) the address for service of the appellant or his legal practitioner" (the emphasis is mine).

In *Jensen* v *Acavalos* 1993 (1) ZLR 216 (S) this court held that by use of the word "shall" compliance with the requirement of r 29 was peremptory and that failure to comply with the rule rendered the notice of appeal a nullity B and that such a notice cannot be condoned or amended. Korsah JA at 219D had this to say about the notice of appeal that did not comply with r 29 of the Supreme Court Rules:

"This notice of appeal was defective for non-compliance with the mandatory provisions of Rule 29, subrules (c), (d) and (e) which require the applicant or his legal representative to state: (i) whether the whole or

only part of the judgment C is appealed against; (ii) the ground of appeal to be set forth concisely and in separately numbered paragraphs; and (iii) the exact nature of the relief which is sought."

The learned Judge of Appeal further stated at 219H-220D:

"The notice of appeal, being bad for non-compliance with the rules, was not cured by the filing on 3 January 1990, of grounds of appeal without a prayer. Indeed, D even if the grounds of appeal filed on 3 January 1990 had contained a prayer for relief, it would not have been effectual in validating the defective notice of appeal.

The reason is that a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say, it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for E condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs: *de Jager* v *Diner & Anor* 1957 (3) SA 567 (A) at 574C-D.

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

G Gubbay CJ and Manyarara JA concurred.

In *Matanhire* v *BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S) Malaba JA (as he then was) expressed the same sentiments when he stated at 149 E-G:

"A nullity cannot be amended. In *Jensen* v *Acavalos* 1993 (1) ZLR 216 (S) Korsah JA at 220B said that the reason why a fatally defective notice of appeal H could not be amended was that:

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'… it is not only bad but incurably bad'. A

Citing *Hattingh* v *Pienaar* 1977 (2) SA 182 (O) at 183 for authority, the learned Judge of Appeal said that what should actually be applied for is an extension of time within which to comply with the relevant rule and condonation of non-compliance.

In *Business Equipment Corp* v *Baines Imaging Group* 2002 (2) ZLR 354 (S) a notice of appeal which did not state the date on which the judgment appealed B against was given, in contravention of s 29(1)(a) of the Rules of the Supreme Court, was held to be fatally defective, and the procedure stated in *Jensen's* case *supra* was approved as the appropriate remedy in having a proper notice of appeal placed before the court. See also *Talbert* v *Yeoman Products (Pvt) Ltd* S-111-99."

The learned Judge of Appeal further stated at p 150B-C: C

"As no valid notice of appeal was delivered and filed within fifteen days of the date when the decision of the Labour Court was given, there was no appeal before the court and to merely insert the relevant date in the defective notice of appeal, as suggested by Mr *Muskwe*, without an application for an extension of time within which to institute the appeal and for condonation of non-compliance with the Rules of Court, would be grossly irregular. The matter had to be struck D off the roll."

It is quite clear from the above authorities that failure to comply with peremptory language of a statute can lead to a nullity.

Equally, there are decisions of this court wherein it has been held that non-compliance with peremptory statutory provisions does not necessarily lead E to a nullity. See *Sterling Products International Ltd* v *Zulu* 1988 (2) ZLR 293 (S) and the cases referred to therein.

The above authorities can be reconciled on the basis that the use of peremptory language is one of a number of indicators of the legislative intent where such intent is not explicitly stated. This obviously is a departure from the principle of strict exaction of compliance with the wording of the statute that F I referred to earlier. In my view, the use of peremptory language, such as the words "shall" or "must" in a statute is no longer conclusive evidence of the intention of Parliament, but remains cogent evidence of such intention.

As I have already stated, I concluded that Parliament intended to render null and void an election in which irregular or invalid votes were counted together G with valid votes to determine the outcome of the election of the Speaker for two reasons, namely the peremptory language of the section and

the use of different language from the one used by the Legislature on the same subject matter in a different statute.

The proposition that, generally speaking, Parliament, just like an individual, uses the same words or language to evince the same intent and different H

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A words or language to evince a different intent is grounded in elementary common sense. Maxwell *The Interpretation of statutes* 12 ed devotes a whole chapter on the presumptions arising from the change of language in statutory interpretation (see pp 282-289). His opening paragraph of this subject matter reads:

> "From the general presumption that the same expression is presumed to be used B in the same sense throughout an Act or series of cognate Acts, there follows the further presumption that a change of wording denotes a change in meaning (*Ricket* v *Metropolitan Railway Co.* (1867) LR 2 HL 175, *per* Lord Westbury; Ex p *Haines* [1945] KB 183; *Evans* v *Evans* [1948] 1 KB 175). 'Where the Legislature,' said Lord Tenterden CJ, 'in the same sentence uses different words, we must presume that they were used in order to express different ideas' C (*R.* v *Inhabitants of Great Bolton* (1828) 8 B & C 71 at p 74)."

For the presumption to arise the change of words does not necessarily have to be in the same section or the same Act. It can be from one statute to another. See Maxwell *op cit* at p 283, where the learned author states that:

> "There are many modern cases on change of wording, and they fall roughly D into three groups, according to whether the language alters (i) within the same section, (ii) within the same Act, (iii) from one statute to another."

For authority for the third category, which bears resemblance to the facts *in casu*, the learned author cites the following authorities: *A-G for Northern Ireland* v *Gallagher* [1963] AC 349; [1961] 3 All ER 299; *B* v *B and H (L intervening)* [1962] 1 All ER 29; Re *P (infants)* [1962] 3 All ER 789; [1962] E 1 WLR 1296 (ChD); *Irwin* v *White, Tomkins and Courage Ltd* [1964] 3 All ER 545; [1964] 1 WLR 387 (HL); *A-G of the Duchy of Lancaster* v *Simcock* [1966] Ch 1; [1965] 2 All ER 32 (ChD); *Seabridge* v *H Cox & Sons (Plant Hire) Ltd* [1968] 2 QB 46; [1968] 1 All ER 570 (CA); *Wild* v *Wild* [1968] 3 WLR 1148.

F While the authorities cited by Maxwell relate mainly to historically connected statutes, I see nothing in principle that should limit the presumption to preceding statutes to the exclusion of statutes on the same subject matter but not historically connected. After all, Parliament is presumed to be familiar with its own Acts. The corollary, that Parliament is ignorant of its own Acts, is simply untenable. Thus, at the time of enacting Standing Order 6 G in 2005, in terms of which the Clerk acted, Parliament was familiar with the provisions of s 177 of the Electoral Act, which was enacted earlier. This particular provision has been included in no less than nine electoral Acts in this country since 1928.

In my view, it is permissible for a court to look at the language of another H statute on similar or the same subject matter in the exercise to ascertain the

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intention of Parliament. Section 177 of the Electoral Act, as appears from A its heading, deals with the subject of the consequences of non-compliance with the Electoral Act. It provides as follows:

> **"177 When non-compliance with this Act invalidates election**
>
> An election shall be **set** aside by the Electoral Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to B the Electoral Court that –
>
> (a) the election was not conducted in accordance with the principles laid down in this Act; and
>
> (b) such mistake or non-compliance did affect the result of the election."

Section 177 of the Electoral Act clearly provides that it is only when non-compliance with the Act affects the result of the election that the election C should be set aside. In effect, this section incorporates into the Electoral Act the doctrine of substantial compliance. Section 39 of the Constitution, as read with Standing Order 6, provides for the election of the Speaker, but does not incorporate the principle of substantial compliance. In my view, if Parliament had intended that only

non-compliance that affected the outcome D of the election of the Speaker would render invalid such an election it would have used the same or similar language.

Also in determining the intention of Parliament, I took into account the fact that no draconian consequences would flow from a declaration of invalidity of the election. Parliament consists of a little over two hundred Members and ordering a re-election of the Speaker does not pose financial or logistical E problems of any magnitude. If properly organised, as it should be, I do not see the election of the Speaker taking more than an hour and it should require only a minimum of resources.

I am also mindful of the fact that Parliament is one of the most revered institutions in our, or any, society. It consists of the highest concentration F of political leadership of the country. Parliament makes the laws that we all obey. Parliament should, therefore, lead by example and should scrupulously obey its own laws. The election of the Speaker should be an example of how an election should be conducted. This is particularly so in Zimbabwe which is plagued by contestation of election results. Parliament should use G the election of the Speaker to set the best example to the rest of the country. It is unacceptable that Parliament should seek to salvage a shambolic and chaotic election of a Speaker through the doctrine of substantial compliance.

I do not wish to be understood as setting aside the election of the Speaker on the ground that it was chaotic. I am satisfied that the chaos and the conduct of Members of Parliament generally did not on their own affect the H

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A election to the extent that it can be concluded that the Clerk did not conduct an election. I am merely expressing concern that the Clerk failed to stamp his authority on the election and insist that Members of Parliament conduct themselves in accordance with his instructions. I, however, do not think that conduct alone is sufficient on its own to constitute a basis for setting aside the election of the Speaker.

B Before concluding, I feel constrained to make the following observation in the interests of clarity. I have read the judgment of Sandura JA. It is a misinterpretation of this judgment to conclude that it seeks to reinstate the old principle of strict compliance with the letter of the statute to avoid invalidity. This judgment is based on what I considered to be the intention C of Parliament as evinced by the language of the statute, and by contrasting the language of s 39 of the Constitution, as read with Standing Order 6, with the language of s 177 of the Electoral Act.

I also do not agree that the principle that a peremptory enactment must be obeyed was abandoned in the case of *Sterling Products International Ltd supra*. D My understanding of *Sterling's* case *supra* is that it modified the principle by endorsing the movement away from strict compliance to a more flexible application of the principle. This is the only basis on which one can reconcile Gubbay CJ's concurrence with the judgment of Korsah JA in *Jensen's* case *supra* and his judgment in *Sterling's* case *supra*. Manyarara JA concurred with both judgments. This court reaffirmed the modification of the principle E in *Shumba's* case *supra*.

In the result, I have come to the conclusion that the six named Members of Parliament did not vote by secret ballot and therefore their votes were irregular. The inclusion of the irregular votes in the determination of the final outcome of the election of the Speaker constitutes a failure to comply with s 39 of F the Constitution, as read with Standing Order 6, providing for the election of the Speaker of Parliament by secret ballot, thereby rendering it invalid.

For the foregoing reasons I would allow the appeal. In the result, I make the following order –

1. The appeal is allowed with costs, to be paid by the respondents jointly G and severally the one paying the other to be absolved.
2. The order made by the court *a quo* is set aside and the following substituted –

   "The application succeeds and the election of the second respondent as Speaker is hereby set aside."

H ZIYAMBI JA and GARWE JAconcurred.

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Malaba DCJ

MALABA DCJ: I have read the opinion expressed by the learned Chief Justice. A I regret that I am unable to agree with the decision that s 39(2) of the Constitution, as read with Standing Order No. 6 of the House of Assembly Standing Orders ("standing Order 6"), by implication compels the nullification of the election upon proof that the Clerk of Parliament ("the Clerk"), who was under the obligation to conduct the election of the Speaker of the House B of Assembly ("the Speaker") by a secret ballot, unlawfully counted invalid votes as secret ballots.

This case came to the Supreme Court by way of an appeal against the judgment of the High Court. The court *a quo* dismissed with costs an application for an order declaring that the election of the second respondent as the Speaker of the House of Assembly ("the House") on 25 August 2008 is null and C void and set aside. The applicants, who are members of the House who had taken part in the election of the Speaker, disavowed the application as an application for review. The substance of the relief sought and the reliance on the provisions of s 4(1) of the Administration of Justice Act [*Chapter 10:28*], however, show that it was an application for review. The applicants alleged D in effect that the Clerk who, as the administrative authority, was given the power to conduct the election of the Speaker by a secret ballot, in accordance with the machinery prescribed under s 39(2) of the Constitution, as read with Standing Order 6, failed to act in accordance with the requirements of the rule against counting invalid votes as secret ballots and as a result affected their rights or legitimate expectation in the election. E

A perusal of the papers filed in support of the application shows that the relief was sought on two grounds. The first ground was that there was "noise, utter chaos and disorder" in the Chamber of the House at the time appointed by the Clerk for the holding of the election of the Speaker such that the environment never became conducive for conducting the election by a secret ballot. The second ground was that, in violation of the secrecy of the ballot, F and in defiance of the procedure laid down by the Clerk, some members of the MDC-T party came out of the polling booth with ballot papers, on which they had marked their votes, unfolded. The allegation was that they displayed the ballot papers to others to disclose for whom they had voted before folding the ballot papers and depositing them in the ballot boxes. As G part of the second ground it was alleged that the Clerk was under a duty to stop or prevent the members of the MDC-T party from doing what they did, but in disobedience of his duty failed to do so.

It was not the applicants' case that the election of the second respondent as the Speaker of the House should be declared null and void because the Clerk counted invalid votes as secret ballots, thereby distorting the result of the H

A election. The reason is that to do so would have involved an admission by the applicants of the fact that there was counting of secret ballots produced by the electoral process the applicants alleged had not taken place. As the learned Chief Justice arrived at the conclusion, with which I disagree, on the ground that the Clerk counted invalid votes as secret ballots, I will deal with the question whether in the machinery for the election of the Speaker B prescribed under s 39(2) of the Constitution, as read with Standing Order 6, the unlawful conduct of the Clerk in counting invalid votes as secret ballots automatically nullifies the election.

My view of the case is that the application ought to have been dismissed or granted on the grounds on which the applicants made it. Before determining C the question whether the applicants established the grounds on which they sought the relief from the court *a quo*, I set out and construe the law in terms of which the election of the Speaker by a secret ballot was required to be conducted. It is for the Legislature to make provision by legislation for matters relating to elections to office in institutions of a democratic government. All matters relating to the organisation and procedure for election to the office D of the Speaker of the House must be determined on the construction of the broad terms of the legislation enacted for the purpose by Parliament.

Section 39(1) of the Constitution imposes on the House an obligation to elect a presiding officer, to be known as the Speaker, at its first meeting after dissolution of Parliament and before proceeding to transact any other E business. The election must therefore be held at the time prescribed under s 39(1) of the Constitution. It is required to be an election by a secret ballot. Only a secret ballot under the statute can give rise to a "result of the election". The right to vote in the election of the Speaker where more than one person is proposed for the post is given to members of the House who would have subscribed the oath of loyalty and are present in the chamber of the House at F the

time the election is called by the Clerk. By s 39(2) of the Constitution, as read with Standing Order 6, the Clerk is appointed as the official to conduct the election required by s 39(1) where more than one person is proposed as Speaker. By the same provisions the Clerk is enjoined to conduct the election of the Speaker by a secret ballot. When the members elect a Speaker from candidates nominated they do so in their individual capacity. They are not G acting as representatives of the people who elected them to the House.

Where the words "conduct the election" are used as they are used in s 39(2) of the Constitution, as read with Standing Order 6, in respect of a situation where more than one person is proposed for election for a post, it is clear that the word "election" is used with the intention that it should be understood H to mean the whole combined and continuous process for bringing about the

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result of the election. It is a process consisting of a number of material steps A prescribed by law, beginning with the call for the election and ending in the declaration of the result of the election. For the purposes of s 39(2) of the Constitution, as read with Standing Order 6, all these steps were driven by the free exercise of the right to vote by the electors directed by the Clerk entrusted with the responsibility of conducting the election by a secret ballot. B The words "conduct the election" compendiously describe the number of duties the Clerk would be expected to carry out to ensure that members who were desirous to elect the Speaker by means of a secret ballot did so freely. So to "conduct the election" in the context of s 39(2) of the Constitution, as read with Standing Order 6, denotes the concept of legality, in the sense that it contemplates the making of decisions or the taking of actions in the C performance of duties, the effect of which is to direct or manage the activities of the voters according to the prescribed requirements of the law to achieve the object or purpose of ensuring the election of the Speaker based on universal, equal, direct and personal vote freely expressed by a secret ballot.

In construing s 39(2) of the Constitution, as read with Standing Order 6, it is important to bear in mind that the right to vote vested in the members present and voting at the first meeting of the House is not affected by the requirement that the election should be conducted by a secret ballot. The statute relates to procedure alone and directs the mode in which the right to vote is to be exercised by the electors. The Legislature chose the secret ballot for its optimum benefits and prescribed it as the only method by which the E elector would validly exercise his or her right to vote for the Speaker. At the same time, it imposed on the Clerk the general obligation to provide the mechanisms and procedures for the recording, processing and protection of the secret ballot to bring about the election of the Speaker.

Every voter was entitled to express his or her will on the candidates by F voting "for" or "against" through the legally permitted form of voting. As s 39(2) of the Constitution, as read with Standing Order 6, prescribes a secret ballot and its attendant requirements as a condition the elector has to perform if he or she is desirous to give a valid vote for a candidate in the election of the Speaker, it is addressed to both the voter and the Clerk who has to conduct the election by a secret ballot. The validity of a vote and of G any act performed by the Clerk must be measured in terms of its conformity with the requirements of a secret ballot prescribed as the essence of the election of the Speaker. In my view, it is wrong to place on s 39(2) of the Constitution, as read with Standing Order 6, a narrow construction which views it as directed at the Clerk only. The Clerk does not vote. He does not produce the result of the election. His functions are managerial. The elector H

A is the driver of the election by a secret ballot. The Clerk and the voter must be viewed in the context of the legal relationship of the rights and duties they have to exercise or discharge to achieve the statutory objective or purpose.

The prescription of a secret ballot as the method for the election of the Speaker is based on the acceptance of the principle that it promotes and B protects freedom of expression of choice of a preferred candidate without undue influence, intimidation and fear of disapproval by others. The elector is given the right to mark the choice of one candidate from another or others in secret. The words "secret ballot" are used in the wide and narrow sense to mean the process by which the ballot is recorded, processed and protected, as well as the ballot in which there is complete and

inviolable secrecy designed C to drive away the fear of disclosure and secure to the voter freedom from undue influence, intimidation and fear of disapproval by others.

A "secret ballot" is therefore a ballot cast freely by a voter in secret when no other person is present and aware of what is happening. The ballot is secret to the voter, in the sense that he or she is the only person who knows for D whom he or she is voting. Whilst the caster of the vote remains unknown the secrecy of the ballot is maintained and the vote has been effectively cast in the election of the Speaker. It is the valid vote to be counted to ascertain the result of the election of the Speaker by a secret F ballot.

To maintain the secrecy, made to be extremely material as the foundation to the validity of the vote itself, the voter must meet certain conditions. He or E she is required not to put on the ballot paper on which the vote is given any writing or mark by which his or her identity as the voter can be known by any other person looking at the ballot paper. The voter is also required not to display or expose the ballot paper after he or she has given the vote so as to disclose to any other person for whom he or she voted before depositing F the ballot paper in the ballot box. So essential is the secrecy of the ballot to its validity that any departure by the voter from these conditions designed for the purpose of ensuring the maintenance thereof must render the vote void.

The mandatory obligation imposed on the Clerk was to perform the duties put on him to provide the mechanisms and procedures that enabled the voter G who was desirous to exercise the right to vote by a secret ballot to do so. The duties he had to perform were to ensure that the vote given in secret was recorded, processed, protected and counted, to bring about the election of the Speaker. The primary object of any act performed by the Clerk in the discharge of the obligation to conduct the election of the Speaker by a secret ballot would have been the maintenance of the secrecy of the ballot given H by the voter, unless the voter himself or herself failed to observe strictly the

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conditions essential to the validity of the vote as a secret ballot. The Clerk, A as the official appointed by the Legislature and given the responsibility of conducting the election of the Speaker by means of a secret ballot, was under an absolute duty not to do anything in the execution of his duties that would have the effect of compelling the voter to violate the secrecy of the ballot.

Although it does not say in express terms that the Clerk cannot record the B vote in some other way, it is clear that s 39(2) of the Constitution, as read with Standing Order 6, makes the prescribed manner of recording the ballot by means of a ballot paper, properly drawn up and with the names of the candidates and the appropriate spaces where the mark by which the vote would be given, the only manner in which a secret ballot was to be given. The Clerk has no discretion as to how the election should be conducted. C He must conduct it by a secret ballot. The valid vote in an election had to be one given for a candidate by means of a secret ballot. It was, therefore, the duty of the Clerk to provide the official ballot papers. It was his duty to put in place the polling booth in which the voters would mark the ballot papers, screened from observation by other potential voters. It was his duty to provide sealed and translucent ballot boxes in which the voters would D deposit the marked ballot papers for safekeeping before counting. The Clerk discharged these duties in accordance with the requirements of the law. He put in the chamber of the House the polling booth and two ballot boxes and provided the ballot papers.

It was also the Clerk's duty to provide the procedure by which the secret E ballot was to be recorded, processed, protected, counted and results of the election based on it declared. He again complied with this requirement. The Clerk explained to the members that the voter would only mark his or her vote on a ballot paper delivered by him just before proceeding to the polling booth and that the ballot paper had to have an official stamp marked on the back. Upon receipt of the ballot paper, the member was to go immediately F into the polling booth and there mark his or her ballot paper to express his or her choice. The voter was then required to fold the ballot paper up whilst in the polling booth so as to conceal the vote and then go and deposit the ballot paper so folded up into the ballot box. The voter was required to exhibit to the Clerk the official stamp on the back of the folded ballot paper before dropping G it into the ballot box. The procedure met the purpose of the legislation of ensuring equality of conditions for election to the office of Speaker for the candidates and the occurrence of an election based on universal equal, direct and personal suffrage freely expressed by a secret ballot.

It was the duty of the Clerk to monitor the proceedings and keep a continuous oversight of the actions of the voter as he or she moved from the polling H

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A booth to drop the ballot paper into the ballot box. In that way he would be able to detect conduct inconsistent with the exercise by the voter of the right to elect the Speaker in accordance with the procedure prescribed to ensure the maintenance of the secrecy of the ballot. Once he detected such conduct, it was the Clerk's duty to act judicially and determine that the conduct of the voter had stripped the ballot of secrecy and declare the vote invalid and B not to be counted.

At the end of the poll the Clerk was required to open the ballot box in the presence of the agents of the candidates. It was his duty to empty the ballot box and open each and every folded ballot paper and inspect it to ensure that only those ballot papers which were not contrary to the provisions and C spirit of s 39(2) of the Constitution, as read with Standing Order 6, as to secrecy were counted in the election of the Speaker. Before counting the valid ballot papers the Clerk was required to group and arrange them under the names of the respective candidates by placing in separate parcels those which were secret ballots opposite the name of the same candidate and D rejecting all invalid ballot papers.

The results of the election to be declared by the Clerk in an election of the Speaker conducted in terms of s 39(2) of the Constitution, as read with Standing Order 6, would not be the number of votes cast. The reason is that some of the votes would have lost their secrecy as they moved through the process E from the time they were given on the ballot paper in the polling booth to the time they were canvassed after the opening of the ballot box. The result of the election under s 39(2) of the Constitution, as read with Standing Order 6, is the outcome of secret ballots counted as such. The result of an election cannot include invalid votes because it is unlawful to count invalid votes as secret ballots. Courts do not ordinarily nullify that which has been done F lawfully. Nullification is a remedy intended to be used to redress a wrong.

There is yet another important aspect of the right to secrecy of the ballot which needs to be considered before the determination of the question whether the applicants established the grounds on which they sought relief in the court *a quo*. It is that the right to secrecy of the ballot protected under s 39(2) of G the Constitution, as read with Standing Order 6, is subject to the principle that everyone has a right to waive an advantage of a law made solely for his or her benefit and protection in his or her private capacity. He or she may dispense with the benefit or advantage, provided he or she does so without infringing any public right or public policy. See Maxwell *The Interpretation* H *of statutes* 12 ed p 328.

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There is no legal obligation that a voter must vote by secret ballot. The A requirement of a vote by a secret ballot is justified on the principle which, without unacceptably encroaching on the rights of the persons concerned to stay out of the prescribed system of election, fosters the values of honesty, freedom and reliability that should characterise electoral choice. As the voter must exercise the right to vote for the Speaker by a secret ballot given on B the ballot paper freely, he or she can waive the right to the secrecy of the ballot at the time the vote is cast or at any time before he or she deposits the ballot paper in the ballot box.

The right to vote by a secret ballot includes the right of the voter to disclose to any other person for whom he or she voted. He or she can in the exercise of that freedom decide to put a writing or mark on the ballot paper at the time C he or she casts the vote by which he or she can be identified as the voter and for whom he or she voted. He or she may decide to display to others the ballot paper so as to share the knowledge for whom he or she voted. So a voter can of his or her own free will inform whomsoever he or she chooses for whom he or she voted. A secret ballot is not compulsory insofar as the voter who is not desirous of taking part in the election by a secret ballot is concerned. D

The rule that there should be no writing or mark put by the voter on the ballot paper by which his or her identity as the voter can be revealed, and that the ballot paper should not be displayed to any other person so as to disclose for whom the vote was given, prescribes a condition of the validity of

the vote. The question whether there is a secret ballot for the purposes of the validity E of the vote will depend for its answer on the actions of the individual voter.

In *Jenkins* v *Board of Elections* 180 NC 169 (1920), cited by Mr *Chaskalson*, it is correctly stated by Brown J that:

> "… voting by ballot, as distinguished from *viva voce* voting, means a secret ballot, and … the elector in casting his ballot has the right to put it in the box and to refuse to disclose for whom he voted and that he cannot be compelled E to do so. But this privilege of voting a secret ballot has been held to be entirely a personal one. The provision has been generally adopted … for the protection of the voter and for the preservation of his independence in the exercise of this most important franchise. But he has the right to waive his privilege and testify to the contents of his ballot."

In *State* Ex Rel *Hutchins* v *Tucker et al* 106 Fla 905 (1932), also cited by G Mr *Chaskalson* in argument, Buford CJ quoted from Cooley *Constitutional Limitations* 7 ed p 912 where the learned author states:

> "The system of ballot-voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases and that no one is to have the right or be in a position to question his independent action either then or at any subsequent time. The courts have held that a voter even H

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> A in case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others who may accidentally or by trick or artifice have acquired knowledge on the subject should not be allowed to testify to such knowledge or to give any information in the courts upon the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it, his ballot is absolutely B privileged."

I turn now to determine the question whether the applicants established the grounds on which they based the application for the relief sought.

On the first ground, the first applicant in the founding affidavit said that there was "too much noise in the House" at the beginning of the process for the election of the Speaker. The intention was to show that the Clerk was C unable to manage the activities of the members according to the prescribed procedure for the achievement of the purpose of the electoral law. He said the noise was caused by members belonging to MDC-T party who were pacing up and down the chamber conferring noisily with each other in support of the second respondent. He said that was done "in a manner that created utter D disorder and raised very serious tensions in the House". After describing how Mr Biti displayed the ballot paper, after he had cast his vote in the polling booth, so as to disclose to others for whom he had voted, before folding the ballot paper up and depositing it into the ballot box, the first applicant said in para 32 of the founding affidavit:

> "Honourable Biti's shocking and unprecedented conduct caused more than a E fracas in the House as Honourable Members started shouting objections and counter objections, including trading insults, at the top of their voices while the voting process degenerated into total disorder …."

In paras 3.9, 3.10, 3.15, 5, 6, and 11 of the opposing affidavit the Clerk said:

> "3.9 The mood and atmosphere in the House of Assembly on the occasion was F neither unique nor unprecedented. Members of the House of Assembly were meeting together for the first time after a fiercely contested general election. As can be expected under the circumstances the conversation was lively and the exchanges exuberant. There was a fair amount of good-humoured raillery, including political taunting, verbal sparring and bantering, all done by Members from all the political parties represented in what appeared to be a good spirit of joviality. This kind of conduct is not unusual in our G Parliament or any other Parliament for that matter and accordingly, I did not consider it a cause for concern on this occasion.
>
> 3.10 It is my submission that what has been described by (the) applicant as 'gross disorder, chaos or fracas' in the House was actually nothing more sinister than increased hustle and bustle in the House, in turn the result of the increase in number of Members of the House (an increase in the membership H from 150 to 210 as a result of Constitutional Amendment No. 18). …

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> 3.15 Notwithstanding the environment in the House that I have described in A paragraphs 3.9 and 3.10 of this affidavit I was able to manage the entire proceedings of the day according to my present

programme without a hitch of any kind. It is, therefore, my submission that quite contrary to (the) applicants' allegations of 'utter disorder and fracas' the proceedings progressed exceptionally smoothly. …

5 I deny that at the time immediately before the elections took place there B was too much noise and there existed a state of utter disorder in the House. I also totally deny witnessing any manifestation of serious tensions. What I did witness in the House was the atmosphere that I have described in paragraphs 3.9 and 3.10 of this affidavit.

6 Save to confirm that I did call the House to order whenever I deemed it necessary and by so doing achieved a continuing level of order which enabled C me to discharge my obligation and safeguard the progress and integrity of the voting process as well as all other proceedings of that day the contents of this paragraph (25 of the founding affidavit) warrant no comment. …

11 I totally deny that there was total disorder in the House which I failed to control. If such a state of disorder had existed the process of voting would have been impossible which it was not. Generally, Members remained in D their places, heard their names being called, followed the order on the list, approached, took possession of the ballot papers and proceeded to vote privately. After voting they resumed their places without impediment in an exceptionally orderly manner given their numbers and the congestion in the Chamber."

The court *a quo* found on the facts that there was not so much noise as E to cause chaos or utter disorder, as described by the first applicant. The finding was justified by the evidence. The relevance of raising the issue of noise was to show that the Clerk was disabled from performing his duties to conduct the election of the Speaker by a secret ballot. The applicants did not refer to specific duties the Clerk failed to perform because of the noise. F To the contrary, the facts showed that all the Members who were present and desirous to vote did so.

Each of the two hundred and eight members received a ballot paper from the Clerk and went into the polling booth where he or she marked his or her vote on the ballot paper in secret. Some of the members came out of the polling G booth with their ballot papers folded to conceal the vote and dropped the ballot papers into the ballot boxes after exhibiting the official stamp on the back to the Clerk. Other members came out of the polling booth with their ballot papers unfolded and displayed them to others so as to disclose for whom they had voted before folding them and dropping the ballot papers into the ballot box. H

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A All the members responded to the alphabetical order in which their surnames were called. They could not have done that in the context of the environment of chaos or utter disorder described by the applicants. The first applicant conceded in para 25 of the founding affidavit that the Clerk occasionally intervened to restore order when it was necessary to do so. It was indeed the duty of the Clerk to maintain order during the electoral process. By that B admission the first applicant corroborated the Clerk, who said that he was able to act and control the situation when he considered that the noise would interfere with his ability to conduct the election by a secret ballot as required by the law. The Clerk was not a mere moderator. He was the governor of the electoral process for the purposes of securing the proper conduct of the C election. As such his evidence had to be accorded appropriate weight, where it was supported by that given by the applicants.

It is of interest to note that the Minister of Youth Development, Indigenisation and Empowerment, Mr Kasukuwere, and the member, Mr Zhuwawo, admit in the affidavits filed in support of the applicants that when they called out to draw the attention of the Clerk to the objections they were raising to what D they considered was a violation of the requirements of a secret ballot by members of the MDC-T party, who displayed their ballot papers to others so as to disclose for whom they had voted, the Clerk told them not to make noise. According to the two members, what was shouted were objections to the conduct of displaying ballot papers. The objections were not intended to E obstruct the Clerk in the conduct of the election. They were not the confused and undesirable sounds characteristic of noise. The environment cannot be accurately described as characterised by complete absence of order.

In view of the fact that all the two hundred and eight members went through the process by which they gave their votes on the ballot papers and dropped F them into the ballot boxes, with some displaying their ballots to others so as to show for whom they had voted, the allegation that there was so much noise that the atmosphere was not conducive for conducting the election of the Speaker by a secret ballot was not substantiated. The atmosphere was characterised by the factors

described by the Clerk, which enabled him to conduct the election of the Speaker fairly and efficiently.

G The first ground on which the application for relief was based was not proved.

The second ground was based on the allegation that it was unlawful for the members of the MDC-T party who displayed their ballot papers to do so and for the Clerk not to stop or prevent them from doing what they did. The intention was to show that the actions of the voters concerned and the H failure to act by the Clerk undermined the process by which the object of the

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electoral law was to be achieved, thereby violating the rights of the applicants A to elect the Speaker or be elected as the Speaker by a secret ballot. In that regard the first applicant said in the answering affidavit:

> "100: It is particularly notable that (the) second respondent himself was one of the Hon Members from the MDC-T party that *unlawfully opened and displayed their marked ballot papers* and this fact alone, which is captured in the DVD evidence, is enough to show that his claim to be Speaker is B legally vacuous. …
>
> 103. *The fact that some Honourable Members*, actually most of them belonging to (the) second respondent's MDC-T party including (the) second respondent, *defiantly opened and displayed their marked ballot papers simply means that there was no lawful election* and (the) second respondent is wishfully wrong to claim that he was lawfully elected from an election that was in C fact unlawful" (the emphasis is mine).

The applicants invariably described the conduct of the members of the MDC-T party in displaying their ballot papers to others so as to disclose for whom they had voted in terms which show that they considered the conduct unlawful. They said it was "shocking behaviour", "a brazen violation of the D secret ballot", a "deliberate and defiant violation of the election procedure", "open and defiant violation of the secret ballot", "blatant misconduct", "the failure to observe and respect a fundamental parliamentary rule in the election of (the) Speaker", "the rampant and systematic violation of the secret ballot", "the failure to conduct the votes in secret as required" and "an irregularity which is a grave breach of the Rules of Parliament". The E effect of the contention advanced by Mr *Hussein* on appeal was that the members of the MDC-T party who displayed the ballot papers to others so as to disclose for whom they had voted had no right to do so.

In para 6 of the answering affidavit, the first applicant emphasised the fact that he considered the failure by the Clerk to stop or prevent the members F of the MDC-T party who displayed their ballots from doing so as unlawful. He said:

> "6. His failure principally arose from his inability or unwillingness for whatever reasons to ensure that no Member left the polling booth after voting with an unfolded ballot paper and that no Member openly displayed his or her marked ballot paper to any other Member for whatever reason." G

In para 178 of the answering affidavit, the first applicant summarised the issue for determination by the court as follows:

> "At issue is only the unchallenged fact in the papers, namely that unfolded and marked ballot papers were displayed by many Honourable Members of the MDC-T party including (the) second respondent outside the polling booth during the election and that this was in violation of the procedure that marked H

> A ballot papers should be folded in the polling booth and (the) first respondent did nothing to stop this violation."

Mr *Hussein* argued on appeal that the failure by the Clerk to prevent or stop the members of the MDC-T party from displaying their ballot papers was evidence of breach by him of the duty to conduct the election of the Speaker B by a secret ballot.

The court *a quo* found on the facts that only six members of the MDC-T party were shown to have come out of the polling booth with unfolded ballot papers and to have displayed the ballot papers to others so as to disclose for whom they had voted. The finding was again justified. Although the first and second applicants had alleged in their affidavits that "many" members C of the MDC-T party had displayed their ballots, no evidence was produced to support the allegation. The use of the word

"many", in a case in which they were not able to state the number of the members of the MDC-T party who acted in the manner alleged, suggests that there was an element of exaggeration. This is particularly so when regard is had to the fact that the D applicants also said "some" members of the MDC-T party displayed their ballot papers so as to disclose to others for whom they had voted. Given the fact that the applicants were seeking an order of nullification of the election, it was necessary that their case be based on clear evidence of the number of voters who displayed their ballot papers. The legal consequence would have been that the voters concerned had disenfranchised themselves E by their own conduct.

Proceeding as the parties did on appeal on the basis that six members displayed their ballots so as to disclose for whom they had voted, did the applicants show that those voters acted unlawfully? Did they *ipso facto* show that the Clerk acted unlawfully in failing to stop or prevent those voters from behaving F in the manner they did? I must add that the only reasonable inference from the circumstances of the case is that the six members displayed their ballot papers to other members of the MDC-T party to disclose to them that they had voted for the second respondent.

All members, including the six who displayed their ballot papers, had the G right to waive the right to the secrecy of their votes. In displaying the ballot papers to others, the six members exercised their right to share with any other person the knowledge for whom they voted. As long as they were not coerced or compelled to expose their ballot papers to others, the voters acted lawfully. The power conferred on the Clerk to conduct the election of the Speaker by a secret ballot is limited by the right of the voter not to maintain H the secrecy of his or her ballot.

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The Clerk was not under any duty to stop or prevent the voters from voluntarily A displaying their ballot papers to others so as to disclose for whom they had voted. Whilst the duty on the Clerk to maintain the secrecy of the ballot given by the voter requires that he should refrain from doing anything that would compel the voter to disclose to any other person how he or she voted, it cannot be relied upon to justify conduct by which the voter would be B prevented from freely exercising the right to disclose to whomsoever he or she chooses for whom he or she voted because the secrecy of the ballot is protected under the law for the benefit of the voter. The Clerk owed the duty not to do anything to compel the voter to disclose for whom he or she voted to the voter. He cannot discharge the duty to the detriment of the interests of the voter by preventing or stopping him or her from exercising the right C of disclosure of information as to how he or she voted.

It is clear that the duty on the Clerk was not to interfere with the recording, processing and protection of a secret ballot as long as the voter maintained the secrecy of the ballot. The applicants did not show that the Clerk acted unlawfully by not stopping or preventing the six members from displaying D their ballot papers to others so as to disclose that they had voted for the second respondent. His duty was to manage and direct the activities of the electors in accordance with the rules designed to ensure a free and fair election by a secret ballot.

The applicants failed to establish the two grounds on which they sought the E relief from the High Court by way of an order declaring the election of the second respondent as the Speaker of the House null and void and set aside. The application ought to have been dismissed at that stage of the proceedings.

As I disagree with the learned judge on the comments he made on the legal consequences of the conduct of the six members in displaying their ballot papers to others so as to disclose for whom they voted and also disagree with F the learned Chief Justice on the conclusion he reached that the counting by the Clerk of invalid votes cast by the six members as secret ballots nullified the election of the second respondent as the Speaker of the House and not just the affected votes, I proceed to express my opinion on these matters.

The words "shall conduct the election of Speaker by a secret ballot" are G placed in a statute by the provisions of which the Legislature recognised the possession by the members of the House present at its first meeting of the right to vote for the Speaker by a secret ballot. The rule of law is that a right to vote must be exercised strictly according to the terms of the statute which confers it. What this means, on the facts of this case, is that when the six members displayed their ballot papers to others, so as to disclose for H

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A whom they had voted, they voluntarily took their votes out of the system of the election by a secret ballot prescribed under s 39(2) of the Constitution, as read with Standing Order 6. By the same conduct by which they waived the right to the secrecy of their ballots, the voters lifted the veil of secrecy from the ballots rendering them void and of no value in the election of the Speaker.

B I do not accept as a correct statement of the law the contention advanced by Mr *Chaskalson* and Ms *Damiso* on behalf of the respondents, and accepted by the learned judge in the court *a quo*, that the six ballots remained valid votes, notwithstanding the fact that they had been displayed by the voters concerned to others so as to disclose for whom they had been given. The learned judge at p 189C said:

> C " The courts should not interfere unless it is shown that the objective conditions put in place for the election precluded the possibility of a secret vote. Beyond this, it is then a matter purely for the individual voter if he chooses to divulge, whether publicly or in private, the specific manner in which he has cast his vote. If he does so of his own volition, without any external coercion or intimidation and howsoever his conduct might influence other voters, *this cannot detract* D *from the secrecy of his vote*or vitiate the secrecy of the ballot as a whole" (the emphasis is mine).

The statement that a voluntary display by a voter of the ballot paper so as to disclose to other people for whom he or she voted does not "detract from the secrecy" of the vote cannot be a correct statement of the legal effect of such conduct on the secrecy of the ballot affected. The object of the ballot E prescribed under s 39(2) of the Constitution, as read with Standing Order 6, is to secure complete secrecy as a condition of its validity, to be maintained not only by the voter desirous to elect the Speaker but by the official entrusted with the responsibility of conducting the election by a secret ballot during the electoral process, including the time when the counting of the votes F takes place. How can the official be able to maintain complete secrecy of a ballot in the face of conduct by the voter which removes the secrecy from the ballot? How the ballot can retain its secrecy thereafter I cannot imagine.

The secrecy is conferred on the ballot at the time the vote is given on the ballot paper in the polling booth. It must, however, be maintained thereafter to ensure the validity of the vote in the election of the Speaker. It is clear G from the object of the statute and the procedure for voting, that a ballot paper which has a writing or mark made on it by which the identity of the voter can be known or one that is displayed to other people so as to disclose for whom the vote was cast gets stripped of the secrecy of the ballot. The secret, as a secret, ceases to exist. The ballot becomes void and cannot be counted H in the election by a secret ballot.

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The view expressed by the learned judge did not take into account the effect A of the requirement of the procedure provided by the Clerk for voting by a secret ballot. The duty put on the voter desirous of maintaining the validity of his or her ballot in the election of the Speaker was that, after marking the ballot paper in the privacy of the polling booth, he or she would fold the ballot paper so as to conceal the ballot and keep it so folded until he or she B deposited the ballot paper in the ballot box for safekeeping. The rule was to ensure the preservation of the secrecy of the ballot for the purpose of its validity in the election.

The direct effect of the voter displaying the ballot paper to other people so as to disclose to them for whom he or she voted is the invalidation of the ballot C as a secret ballot. Without pretending that there was no criterion by which a secret ballot had to be identified, I think the conclusion that the ballots displayed by the six voters to others so as to disclose to them for whom they had voted did not lose their secrecy, does not accord with what seems to have been the intention of the Legislature. The proposition that the invalidity of the votes does not occur at the time the ballot papers are displayed so D as to disclose for whom the vote was given would create a situation which would be quite unclear and to a certain extent even illogical. Every exercise of a right has a direct consequence. The exercise of the right to vote which removes the secrecy of the ballot cannot have the same consequence as the exercise of the right which maintains the secrecy of the vote. E

Failure by the Clerk to respond to the actions of the six voters and formally declare the ballots void did not change the fact that the ballots had been rendered invalid by the very actions of the voters. The votes remained invalid at the time the Clerk counted them as secret ballots. He was not under

any duty to count invalid votes as secret ballots. The statute is in effect clear F that in no case will votes be allowed which are in any form other than the form of a secret ballot.

The result of the election of the Speaker by a secret ballot was not the number of votes cast, as some of them would have lost the essential element of secrecy as they travelled in their journey from the time they were cast to the time of G counting. The result of the election was who was elected by a secret ballot. The counting of invalid votes that had lost their secrecy affected two classes of voters. The first class is of voters who deliberately exercised their right to waive the benefits of the secrecy of the ballot by displaying the ballot papers to others so as to disclose for whom they had voted. The second class is that of voters who kept the knowledge for whom they voted to themselves. H

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A The first class of voters had no right or legitimate expectation that their votes would be counted as valid votes. In this case they did not, as a matter of fact, seek to enforce any such right or legitimate expectation. They appreciated the fact that they did not have such a protection. If anything, the legitimate expectation would have been that the votes they had voluntarily stripped of secrecy be not counted as secret ballots.

B The second class of voters had the right or legitimate expectation that their votes and the election based on them be declared lawful. The applicants belonged to this class of voters. It appears that they are acting against their own interests and those of other voters in this class. What right did they seek to protect or enforce by an order of nullification of the election? If it is the C right to a fair and free election by a secret ballot, they had to first show that it was violated by the respondents. They failed to show that violation. Where there is proof of violation of electoral rights, such as the right to vote or to stand for election, the need to enforce the rights under judicial protection may require that the election be set aside if it was shown that the violation had undue influence on the result of the election. There cannot be a remedy D without proof of violation of a right.

The learned Chief Justice reached the conclusion that nullification of the election was the only remedy for the unlawful conduct by the Clerk of counting invalid votes as secret ballots. The reason was that, whilst imposing on the Clerk the mandatory obligation to conduct the election of the Speaker by a E secret ballot, s 39(2) of the Constitution, as read with Standing Order 6, did not provide a remedy for the disobedience of the command. The conclusion that nullification of the election was the only remedy for what, in reality, was a nullity in respect of the six votes could only have been reached by implication of what is the intention of Parliament. It would be based on a F construction of s 39(2) of the Constitution, as read with Standing Order 6, which presumes that it is the intention of the Legislature that voters who had complied strictly with the law and voted by a secret ballot for the Speaker should lose their valid votes on account of a failure by an official to discharge his duty not to count invalid votes as secret ballots.

The principle of law to be applied is that where an enactment imposes an G obligation but is silent as to the remedy to be awarded for disobedience, a court must ascertain from the language by which the obligation is imposed whether it is the intention of the Legislature that nullification of the offending conduct should be the remedy to be awarded without any limit as to the scope of its operation or application. Maxwell on *The Interpretation of statutes* H 12 ed at p 314 summarises the principles to be applied as follows:

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> "… when a statute requires that something shall be done or done in a particular A manner or form, without expressly declaring what shall be the consequence of non-compliance, is the requirement to be regarded as imperative (or mandatory) or merely as directory (or permissive)? In some cases the conditions or forms prescribed by the statute have been regarded as essential to the act or thing regulated by it and their omission has been held fatal to its validity. In others such prescriptions have been considered as merely directory, the regard to them B involving nothing more than liability to a penalty if any were imposed for breach of the enactment. 'An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.' *Woodward* v *Sarsons* (1875) LR 10 CP 733.
>
> It is impossible to lay down any general rule for determining whether a provision is imperative or directory. 'No universal rule', said Lord Campbell LC, 'can be laid down for the construction of statutes, as to whether mandatory enactments C shall be considered directory only or obligatory with an implied nullification for

disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.' *Liverpool Borough Bank* v *Turner* (1860) 2 De G F & J 502 at pp 507, 508. And Lord Penzance said: 'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look D to the subject-matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.' *Howard* v *Bodington* (1877) 2 PD 203 at p 211."

See also *Sterling Products International Ltd* v *Zulu* 1988 (2) ZLR 293 (S). E

There is no question that s 39(2) of the Constitution, as read with Standing Order 6, is a mandatory enactment, the subject-matter of which is the election of the Speaker of the House. The object of the statute is to secure an election of the Speaker by members of the House qualified to vote by a secret ballot. The object is also to ensure by the imposition of the obligation on the Clerk to conduct the election of the Speaker by a secret ballot that F there is provided mechanisms and procedures for the recording, processing, protecting and counting of the secret ballot. In other words, it is to ensure the establishment of an effective system for the election of the Speaker by a secret ballot conducted fairly, efficiently and impartially.

The Clerk did put in place the mechanisms and procedures for the recording, G processing, protection and counting of secret ballots. Of the two hundred and eight members who voted, two hundred and two complied strictly with the requirements of the law for the exercise of their right to vote for the Speaker by a secret ballot. That is the main object for the achievement of which the provisions of s 39(2) of the Constitution, as read with Standing Order 6, were enacted. He had assembled together all the necessary mechanisms which H

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A were required by the law governing the election to be put in place at the time prescribed to ensure delivery of the election of the Speaker by a secret ballot. The six members who displayed their ballot papers to others so as to disclose for whom they had voted did so in the context of the mechanisms and procedures. The failure committed by the Clerk was not to declare the invalid ballots void. It was the unlawful conduct of counting invalid ballots B as secret ballots that has been used as a justification for the proposed award of the order of nullification of the election of the Speaker.

The disobedience did not relate to a secret ballot. In other words, it is not a case of the Clerk failing to record, process or count a secret ballot or declaring a secret ballot to be an invalid vote. Had that been the case, the result of the C election of the Speaker would have been affected by the disobedience of the Clerk to the duty to conduct the election of the Speaker by a secret ballot. He had no power to decide what should be counted to ascertain the result of the election. He was told by the law what to count and for what purpose. In this case, the Clerk counted what was at law a nullity as a secret ballot. His conduct did not give value to the invalid votes and did not in any way affect D the result of the election of the Speaker. The discounting of the invalid votes as well as the declaration of the conduct of the Clerk to be unlawful would not give rise to any difficulty in the determination of who the winner of the election of the Speaker was. The result of the election would not change. The nullification of the election based on a secret ballot would subvert the E purpose of the statute.

The general rule is that a declaration of nullity must be confined to the conduct in respect of a particular vote or class of votes, the invalidity of which has been established, unless the non-observance of the requirements of the law governing the specific duty is of a character which is contrary to the principle of an election by a secret ballot and is so great that it might F have permeated the process and affected the result of the election: *Phillips* v *Goff* (1886) 17 QBD 805. There are numerous cases in which courts have struck off the invalid votes and declared conduct in respect of them void without affecting the election. The principle applied has been that to nullify the results of the election based on votes given by a secret ballot in strict compliance with the requirements of the law governing the election would G imply that the provisions of the law complied with are misleading.

Had the Clerk declared the invalidity of the six votes at the appropriate stage in the election process, the declaration would have affected those votes only and not the other votes validly cast.

Why should the court, upon review of his conduct in failing to do the right thing at the right time, go farther than H the remedy the law had placed at his disposal had he acted lawfully?

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The purpose of voting is not only the differentiation of the electorate and the A expression of the will of the individual voters but also the ability to accept such decisions based on the will of the majority.

In my view, the principle of majority rule on the basis of which results of democratic elections are determined, requires that courts should refrain from interfering with the will of the majority of voters expressed in accordance B with the requirements of the law, on the ground that the official entrusted with the responsibility of conducting the election by a secret ballot unlawfully counted non secret ballots as secret ballots, especially where there would be no confusion at all as to who is the winner following the discounting of the invalid votes. An election may be set aside if it is not clear upon determination of the conduct forming the ground on which the validity of the election is C impugned who was the winner. In this case there is clear evidence of the election of the Speaker of the House in accordance with the mode of voting prescribed by the law governing the election concerned.

The general principles of the law on which I have based my decision in this case and believe are applicable in the resolution of the questions raised D were stated by Lord Coleridge CJ in *Woodward* v *Sarsons* (1875) LR 10 CP 733, referred to with approval in *Chanter* v *Blackwood* (1903-1904) 1 CLR 39 at 58-59. He said:

> " As the first point, we are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as matter E of fact, either that there was no real *electing* at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e., that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own F preference, by general corruption or general intimidation or to be prevented from voting by want of the machinery necessary for so voting, as by polling stations being demolished, or not open or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think G the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors *may have been* prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented H

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> A from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void …".

I am of the view that the construction of s 39(2) of the Constitution, as read with Standing Order 6, for the purpose of establishing the intention of the Legislature regarding the nullification of the election for the unlawful conduct of the Clerk in counting invalid votes as secret ballots, does not justify the B conclusion that it is the intention of the Legislature that breach of any of the numerous duties imposed on the Clerk under the general obligation to conduct the election of the Speaker by a secret ballot, should attract an order of nullification of the election regardless of the nature of the neglect of duty and its effect on the "result of the election".

C There can be no doubt that the majority of the voters freely expressed their preference of the candidate they wished to be the Speaker in the secrecy of the polling booth and exercised their right to maintain the secrecy of the ballot in accordance with the requirements of s 39(2) of the Constitution, as read with Standing Order 6. The majority of the voters were enabled D by the process conducted by the Clerk to freely elect by a secret ballot the Speaker from the two candidates. To declare such an election void would be to declare void what is lawful. The remedy

awarded would be wholly disproportionate to the wrong committed. There was, in fact, no failure by the Clerk to conduct the election by a secret ballot within the meaning of the statute. The ballots which were effectively cast decided who was elected E as the Speaker of the House.

The fact that the Clerk counted invalid votes as secret ballots because he had not seen the conduct by which they were rendered void did not change their invalid status. The question is whether the purpose for which the powers to conduct the election of the Speaker by a secret ballot were conferred on the F Clerk was fulfilled. A close interpretation of the facts leads to the conclusion that the purpose of the statute was accomplished. An appropriate remedy is one which accords with the intention of the Legislature. In this case, it is the one that upholds the result of the election of the Speaker by a secret ballot. The valid result is that the second respondent was elected the Speaker of the House by a majority of voters who cast secret ballots. It would, in my view, G be contrary to fairness and justice to say as a matter of principle that the Legislature intended that the election of the Speaker conducted by a secret ballot in terms of the law be nullified on account of, say, a single invalid vote counted by the official conducting the election as a secret ballot. The intention of the Legislature must be that only irregularities which undermined H the achievement of the object or purpose of the legislation of ensuring an

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election of the Speaker based on universal, equal, direct and personal vote A freely expressed by a secret ballot should vitiate the election.

In the exercise of review powers the court *a quo* came to the conclusion that the improper counting of invalid votes as secret ballots was not an irregularity of the class the Legislature intended would vitiate the election. The conclusion is, in my view, not evidence of a misdirection on the part of B the court *a quo*. It is when the irregularity affected the actual discharge of the positive duty to conduct the election by a secret ballot and not by any other type of vote that it may be used as a ground for challenging the validity of the election by a secret ballot.

The Legislature prescribed the standard which had to be used by everyone C including the court as an accurate and reliable criterion for determining the ballot papers which had to be counted to ascertain the result of the election. Applying the test, the Clerk came to a wrong conclusion in respect of the six ballots cast for the second respondent. They were not secret ballots qualified to be counted. The court *a quo* was on the facts in a position to apply the criterion to the ballot papers and arrive at the conclusion the Clerk ought to D have reached in respect of the invalidity of the six ballots had he properly applied the prescribed test. If it had to set aside anything, the court *a quo* should have set aside the counting of the ballot papers made by the Clerk and not the election itself. The legality of the election was dependent upon the will of the electorate having been freely expressed by a secret ballot reflected by accurate and reliable results. The unlawful act of counting E six invalid votes as secret ballots because of the wrong application of the prescribed standards of differentiating secret ballots from non secret ballots did not disable the court which had jurisdiction to do so from objectively scrutinising the facts and obtaining a reliable result of the election. The court would be acting within the bounds and limits of the requirement that F there should have been brought about an election of the Speaker by secret ballot on the basis of universal, equal, direct and personal right to vote freely expressed according to the principle of majority rule.

I would therefore dismiss the appeal.

Although I would dismiss the appeal, I think that the respondents should G not get their costs from the applicants. The respondents used language in their affidavits which was insulting of the first applicant and added nothing to the determination of the questions before the courts. It offended its sense of fairness and justice for the court to be put in a position in which it had to read through all the papers containing some of the impolite and discourteous language. H

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A The affidavit deposed to by Paurina Mpariwa in support of the second respondent covered some thirty-four pages, most of which dealt with the history of the formation of the MDC party, the conflicts which developed in its leadership and the split into the MDC-T and MDC-M formations, blamed on people who were not party to the proceedings. One wonders, for example, what point the first respondent intended to make if not to offend when he B said the application by the first

applicant was "the result of a contrived afterthought: the manifestation of a mischievous and dissentious character". Paurina Mpariwa's use of words like "foolish", "sell-out" and "turncoat" against another litigant in an application to be placed before a court of law reveals a serious lack of respect for judicial proceedings. There is need to C discourage the use of such invective language in court proceedings.

The appeal is dismissed with no order for costs.

SANDURA JA: I have read the judgment prepared by Chidyausiku CJ, but respectfully disagree with it. The judgment is based on the principle that a peremptory enactment must be obeyed or fulfilled exactly, and that in respect D of a directory enactment substantial compliance therewith will suffice. That principle was disapproved of and abandoned by this court about twenty-two years ago in *Sterling Products International Ltd* v *Zulu* 1988 (2) ZLR 293 (S). At 301B-302B Gubbay JA (as he then was), with the concurrence of McNally JA and Manyarara JA, said the following:

> "The categorisation of an enactment as 'peremptory' or 'directory', with the E consequent strict approach that if it be the former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfilment will suffice, no longer finds favour. As was pertinently observed by ven den Heever J (as he then was) in *Lion Match Co Ltd* v *Wessels* 1946 OPD 376 at 380, the criterion is not the quality of the command but the intention of the legislator, which can only be derived from the words of the enactment, its general plan and objects. The F same sentiment was expressed by Milne J in *JEM Motors Ltd* v *Boutle & Anor* 1961 (2) SA 320 (N) at 327 *in fine*-328B. This approach received the *imprimatur* of the South African Appellate Division in *Maharaj & Ors* v *Rampersad* 1964 (4) SA 638 (A) where, after concluding that the provision with which he was concerned was imperative, van Winsen AJA went on to enquire whether the failure in strict compliance therewith was fatal. He propounded the following test at 646 C-E:
>
> > G 'The enquiry, I suggest, is not so much whether there has been "exact", "adequate" or "substantial" compliance with this injunction, but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold H that, even though the position as it is is not identical with what it ought to

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> be, the injunction has nevertheless been complied with. *In deciding whether* A *there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance'* (emphasis added).
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> See also *Shalala* v *Klerksdorp Town Council & Anor* 1969 (1) SA 582 (T) at 587H-588B; *Nkisimane & Ors* v *Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434E; and more recently, *Ex p Dow* 1987 (3) SA 829 (D) at 831 B-D. B
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> Judges in this country also have not been slow to move away from the traditionally strict approach. See *Swift Transport Services (Pvt) Ltd* v *Pittman NO & Ors* 1975 (2) RLR 226 (G) at 228C-229C, 1976 (1) SA 827 at 828; *Macara* v *Minister of Information, Immigration and Tourism & Anor* 1977 (1) RLR 67 (G) at 70H; Ex p *Ndlovu* 1981 ZLR 216 (G) at 217F-G.
>
> Testing the matter then in the manner approved by these authorities, one is C constrained to discover the object of s 3(1) of the Regulations to determine whether that object is fundamental to the policy of the enactment and, if it is, to decide whether it is defeated or frustrated by the non-compliance complained of. The degree of observance and non-compliance is another relevant consideration."

In that case Gubbay JA was considering whether s 3(1) of the Labour Relations (General Conditions of Employment) (Termination of Employment) D Regulations 1985 ("the Regulations") (now repealed) had been complied with. The facts in that case are set out in the headnote which, in relevant part, reads as follows:

> "In July 1987 the appellant, the respondent's employer, suspended the respondent from her employment without pay, pending the outcome of the appellant's request to the Ministry of Labour for her dismissal on the grounds of having stolen a E confidential document from the company. The relevant section of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations required that (the) application be made to a labour relations officer, but the appellant applied to an acting regional hearing officer in the Ministry ..."

Having found that the object of the requirement of s 3(1) of the Regulations F (i.e. that upon suspension of an employee without pay and other benefits the employer was to apply forthwith to a labour relations officer for an order or determination terminating the contract of employment) was predominantly the protection of the interests of the employee, that that object was not frustrated or

materially impaired by the employer proceeding in the manner it did, and G that the degree of non-compliance was by no means great, the Court held that s 3(1) of the Regulations had been complied with.

In my view, the principles set out in the above authorities are the principles which should be applied in the present case in order to determine whether Standing Order No. 6 ("the Standing Order") was complied with in the election of the Speaker. H

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A In this regard, the following questions arise for consideration –

1. What is the object sought to be achieved by the Standing Order?; and
2. Was that object achieved in the election of the Speaker?

I shall deal with the questions in turn.

What is the object sought to be achieved by the Standing Order?

B The Standing Order reads as follows:

> "If more than one person is proposed as Speaker, the Clerk shall conduct the election of the Speaker by a secret ballot."

In my view, the object sought to be achieved by this Standing Order is the same as the object sought to be achieved by the secret ballot system all C over the world. It is to protect the voter, mainly against intimidation and victimisation, by enabling him or her to vote freely and in secret for the candidate of his or her choice, without fearing that other people would know for which candidate he or she has voted.

The secret ballot system in this country has its origin in the Ballot Act, 1872, D which introduced a secret system of voting in parliamentary and municipal elections in Great Britain. Before the Ballot Act was enacted in 1872, Britain had an open system of voting in parliamentary and municipal elections. In parliamentary elections, the voter would go onto a platform at the polling station and announce his choice of candidate to an officer, who then recorded it in what was called a poll book. Intimidation and victimisation were rife. E Employees were required by their employers to vote for particular candidates or lose their employment. The same applied to tenants. If they did not vote as the landlord wanted them to vote, they were evicted from the premises they occupied. In the circumstances, there was a growing demand for the protection of the voter against intimidation and victimisation by enabling him to vote freely and in secret. As a result, the Ballot Act 1872, which introduced F a secret system of voting, was enacted in order to meet that demand. The Act required that parliamentary and municipal elections be by secret ballot. Subsequently, when this country became a colony of Great Britain the secret ballot system was introduced in the country.

In my view, the object sought to be achieved by the secret ballot system G in Great Britain is the same as the object sought to be achieved by the Standing Order. That object is fundamental to the policy of the Standing Order.

Was the object sought to be achieved by the Standing Order achieved in the election of the Speaker?

In my view, there can be no doubt whatsoever that the answer to that question H is in the affirmative. All the two hundred and eight Members of Parliament

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("MPs") present marked their ballot papers in the secrecy of the polling A booths. Each MP was protected against intimidation and victimisation, and was enabled to vote freely and in secret for the candidate of his or her choice, without fearing that other people would know for which candidate he or she had voted.

Some MPs emerged from the polling booths with their ballot papers folded, B whilst others emerged from the polling booths not having folded their ballot papers. However, there was no evidence suggesting that any MP who had wanted to keep his or her ballot paper folded at all times outside

the polling booth had been prevented from doing so. In addition, no MP ever complained to the Clerk of Parliament that he or she had been compelled to display his or her marked ballot paper to any other person. C

However, assuming that it is correct that the six MPs who displayed their marked ballot papers did not comply with the Standing Order, the object sought to be achieved by the Standing Order was, nevertheless, not defeated or frustrated by the non-compliance complained of. Of the two hundred and eight MPs who voted, only six (i.e. about 2.9 percent of the total) displayed D their marked ballot papers before depositing them in the ballot boxes, whilst two hundred and two (i.e. about 97.1 percent of the total) voted in accordance with the provisions of the Standing Order.

Quite clearly, the degree of non-compliance was insignificant, whereas the degree of compliance was nearly one hundred percent. E

In the circumstances, as the object sought to be achieved by the Standing Order was achieved and not defeated or frustrated by the non-compliance complained of, and as the degree of the alleged non-compliance was insignificant, it follows that the Standing Order was complied with in the election of the Speaker.

Finally, I would like to comment on s 177 of the Electoral Act [*Chapter 2:13*] ("s 177 of the Act"). It reads as follows: F

> "An election shall be set aside by the Electoral Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the Electoral Court that –
>
> (a) the election was not conducted in accordance with the principles laid down in this Act; and
>
> (b) such mistake or non-compliance did affect the result of the election." G

Section 177 of the Act has its origin in the Ballot Act, 1872 ("the Ballot Act"), which introduced the secret ballot system in Britain. Section 13 of the Ballot Act provided as follows:

> "No election shall be declared invalid by reason of a non-compliance with the rules contained in the First Schedule to this Act, if it appears to the tribunal having H

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> A cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election."

Subsequently, s 13 of the Ballot Act was reproduced, in almost identical language, by the Legislature of the Colony of Southern Rhodesia, in the B Electoral Act, 1928. Section 60 of that Act read as follows:

> "No election shall be set aside by the court by reason of any mistake or non-compliance with the provisions of this Chapter, if it appears to the court that the election was conducted in accordance with the principles laid down in this Chapter, and that such mistake or non-compliance did not affect the result of the election."

C Thereafter, s 60 of the Electoral Act, 1928, was reproduced, in almost identical terms, in every Electoral Act enacted in this country, as can be seen from the following provisions –

1. s 85 of the Electoral Act, 1938;
2. s 85 of the Electoral Act [*Chapter 2*];
3. s 88 of the Electoral Act, 1951;
4. s 182 of the Electoral Act, 1969;
5. s 156 of the Electoral Act, 1979;
6. s 38 of the Electoral Amendment Act, 1987; E
7. s 142 of the Electoral Act, 1990;
8. s 149 of the Electoral Act [*Chapter 2:01*]; and
9. s 177 of the Electoral Act [*Chapter 2:13*].

Thus, the principle that an election will not be set aside by the court for non-compliance with the provisions of the electoral law if the election was conducted in accordance with the principles of the electoral law, and the F non-compliance did not affect the result of the election, is well-established and has been part of the electoral law of this country for at least eighty-two years. It is based on

common sense, for there would be no good reason for setting aside an election on the H basis of an irregularity which did not affect the result of the election.

G However, as I have already determined that the election of the Speaker was conducted in accordance with the principles of the Standing Order, and as it was common cause that the non-compliance complained of did not affect the result of the election, the only remaining issue for me to determine is whether the principle that the court would not set aside an election on the H basis of an irregularity which did not affect the result of the election, applies

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to the election of the Speaker. I have no doubt in my mind that it does. In A fact, there is no logical reason whatsoever why it should not apply.

In my view, the fact that the Standing Order does not state the principle is of no significance. The principle is based on common sense, and common sense dictates that if an irregularity does not affect the result of the election, it cannot form a basis for the nullification of the election. B

In addition, when the Standing Order was drafted, Parliament must have been aware that the principle had been part of the electoral law of this country for a very long time, and must have felt that there was no need to include in the Standing Order an obvious principle based on common sense. In any event, one would not expect the sort of details which usually appear in a statute to be set out in a Standing Order. C

Finally, I would like to comment on the following statement in the majority judgment:

> "It is unacceptable that Parliament should seek to salvage a shambolic and chaotic election of a Speaker through the doctrine of substantial compliance."

In my view, the description of the election as "shambolic and chaotic" is D not borne out by the finding made by the learned judge in the court *a quo*, which was as follows:

> "As regards the conduct of the election *in casu* generally, the papers before the court evince several conflicts of fact as to what transpired at the time. The applicants' assertions that the proceedings were brazenly unruly are squarely E rebutted by the averments of the first respondent. In this situation, the approach to be adopted was explained by Gubbay JA (as he then was) in *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) at 339, as follows:
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> > 'It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not F an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy *onus* upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact.'
>
> Having regard to the overall scenario prevailing in the House on the day in G question, it seems reasonably clear that the election proceedings under review were not conducted in an ideal manner. Nevertheless, despite the imperfections alluded to above, it cannot be said that the process was so disorderly as to be utterly chaotic. On the contrary, all the Members in the House were duly called upon to vote and were able to cast their votes in the polling booths provided. *Taking into account the usual volatility associated with the conduct of Parliamentary business generally, I am inclined to take the robust view that* H

Malaba DCJ

> A *the election proceedings as a whole were sufficiently regulated to enable the election to take place to a satisfactory conclusion*." (emphasis added)

In any event, as the appellants elected to proceed by way of motion proceedings in the court *a quo*, any disputes of fact between the parties had to be resolved in favour of the respondents. See *Plascon-Evans Paints Ltd* v *van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). In this regard, it is pertinent to note that B the allegation that the election was chaotic was denied by the respondents.

Accordingly, I would dismiss the appeal with costs.

Hussein Ranchod & Co, appellant's legal practitioners

Counsel to Parliament, first respondent's legal practitioner

C *Atherstone & Cook*, second respondent's legal practitioner

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/ATTORNEY-GENERAL v BENNETT 2011 (1) ZLR 396 (S)

ATTORNEY-GENERAL v BENNETT 2011 (1) ZLR 396 (S)

Citation	2011 (1) ZLR 396 (S)
Case No	Judgment No. S -7-11
Court	Supreme Court, Harare
Judge	Chidyausiku CJ
Heard	28 July 2010
Judgment	10 March 2011
Counsel	Details not supplied
Case Type	Application for leave to appeal
Annotations	Link to case annotations

Flynote

Criminal procedure – *discharge at close of State case – application for – basis on which application may be granted*
Evidence – *circumstantial evidence – probative value of – need to assess cumulative effect of all evidence* D

Headnote

The respondent was charged in the High Court with various offences. He pleaded not guilty. He was discharged at the end of the prosecution case. The Attorney-General appealed against the discharge.

Held, that in terms of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the State is required to serve on the accused a summary of the E State case, setting out the witnesses that it intends to call and a summary of the evidence that they will give. Similarly, the defence is required to furnish the State with a defence outline, in terms of which the accused sets out his defence to the charge and the evidence he intends to lead. At the close of the State case, the State had not led the evidence it alleged in the State outline that it would lead. Some of the evidence not led was F critical to the linking of the accused to the offence. This critical evidence for the State was either ruled inadmissible or the State witnesses told a different story from that alleged in the summary of the State case. In terms of s 198(3) of the Act, if at the end of the State case, the court considers that there is no evidence that the accused committed the offence G charged, or any other offence of which he might be convicted thereon, it *shall* return a verdict of not guilty. "No evidence" means (a) there is no evidence to prove the essential elements of the offence; or (b) there is no evidence on which a reasonable court, acting carefully, might properly convict; or (c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it. H

Chidyausiku CJ

A *Held,* further, that in assessing the probative value of circumstantial evidence, the court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together. Only after it has done so is the accused entitled to the benefit of any reasonable doubt which the court may have as to whether B the inference of guilt is the only inference which can reasonably be drawn. *In casu*, each of the circumstances relied upon by the State had very little, if any, probative value; taken together, the various circumstances did not make a case for the accused to answer.

Cases cited C

A-G v Bvuma & Anor 1987 (2) ZLR 96 (S)

A-G v Mzizi 1991 (2) ZLR 321 (S)

A-G v Tarwirei 1997 (1) ZLR 575 (S)

R v de Villiers 1944 AD 493

R v Victor & Anor 1964 RLR 364 (A); 1965 (1) SA 243 (RA)

Legislation considered D

Criminal Procedure & Evidence Act [*Chapter 9:07*], ss 198 and 259

Judgment

CHIDYAUSIKU CJ, in chambers, in terms of s 198(4) of the Criminal E Procedure and Evidence Act [*Chapter 7:09*]

The respondent in this case (whom I shall hereinafter refer to as "the accused") was charged in the High Court, firstly, with possession of weaponry with the intention to commit an act of insurgency, banditry, sabotage or terrorism in contravention of s 10(1) of the Public Order and Security Act [*Chapter 11:17*]. Arising from that charge were alternative charges of – F

(a) possession of dangerous weapons in contravention of s 11(1) of the Public Order and Security Act; or

(b) unlawful possession of prohibited firearms in contravention of s 24(1)(d) of the Firearms Act [*Chapter 10:09*]; or

(c) unlawful possession of firearms in contravention of s 4 of the Firearms C Act.

On the second count, the accused was charged with incitement to commit, or conspiracy to commit, an act of insurgency in contravention of s 6 of the Public Order and Security Act.

At the close of the State case, the accused applied for a discharge or acquittal in H terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (hereinafter referred to as "the Act"), which provides that: A

Chidyausiku CJ

> "(3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

The application found favour with the court *a quo* and the accused was found B not guilty and discharged at the close of the State case. The Attorney-General was dissatisfied with the outcome and now applies for leave to appeal against that finding. He makes this application in terms of s 198(4) of the Act, which provides in the relevant part as follows:

> "(4) If the Attorney-General is dissatisfied with a decision in terms of subsection (3), he may with the leave of a judge of the Supreme Court appeal C against such decision to the Supreme Court …".

In determining whether such leave should be granted or refused, the guiding factor is the prospects of success on appeal. Thus, if the appeal has prospects of success the leave to appeal should be

granted, but if the appeal has no prospects of success such leave should be refused. I will now examine the D Attorney-General's prospects of success on appeal.

The proposed grounds of appeal are set out in the proposed notice of appeal attached to this application. They read:

"1. The trial court erred at law when it considered the pieces of evidence in isolation from the other thereby failing to take a holistic assessment of all evidence the totality of which established a *prima facie* case against the E accused person. In other words, the existence of a bank account in the name of Peter Hitschmann, the e-mail communication between Hitschmann and Bennett as well as the fact that the said e-mails contain messages pointing to the funding of firearms acquisition all points to a conspiracy between the said Hitschmann and the respondent.

2. The trial court misdirected itself when it ruled that the authenticity of the E e-mail printouts was solely dependent on the credibility of a computer expert when in fact the circumstances surrounding the discovery of the said e-mails was the most fundamental consideration which the learned trial court did not even bother to consider in its evaluation of evidence. In other words, the court failed to make a finding of fact as to where those e-mails actually originated. In the context of the said e-mails having been G found in possession of an alleged co-conspirator, Peter Hitschmann, the fact that the latter disputed them called for the court to consider for a fact whether the e-mails were concocted or not. Had the court *a quo* approached the question with a view of making a finding of fact in that respect, the question of forensic evidence would have been a non-issue since the court eventually found Nyasha Matare's evidence generally impressive beyond reproach. H

2011 (1) ZLR p399

Chidyausiku CJ A

3. The court *a quo* misdirected itself when it reasoned that the police should have investigated whether Bennett had a computer carrying the said e-mail address used in the recovered e-mails, when in fact all the witnesses who testified told the court that Roy Bennett had absconded to South Africa where he obtained asylum for three years. With the full knowledge of that fundamental fact, the learned judge should not have made that gratuitous B finding in favour of the accused who never disputed absconding at the time Hitschmann was arrested in 2006.

4. The trial court erred at law when it found the testimony of Mutsetse appalling only because he acknowledged lack of knowledge as to the existence of computer criminals known as hackers without any tested evidence to the effect that the persons who discovered the e-mails on the person of C Hitschmann are criminals known as hackers. By so doing, the learned judge contradicted his earlier finding of fact that the mere fact that e-mails can be fake does not mean that the e-mails before the court as exhibit 13 are also fake. The ultimate finding that the e-mails are not admissible on the basis that they are capable of being faked was consequently outrageous in its defiance of logic. D

5. The learned judge *a quo* made an error of law when he found that the authenticity of e-mails was predicated upon computer forensics and scientific detection, whereas the print-outs (*sic*) just like any other document is admissible on the basis of the credibility of the person who discovered the document. Where in (*sic*) this case the said e-mails were discovered in custody of a co-conspirator and ultimately admitted as executive statements at law, their contents should have been interpreted by the court with a E view to find out if they had any link to real facts on the ground pointing at Bennett as a co-conspirator. The failure by the court to read and interpret the contents of the e-mails deprived it of the benefit of meticulously finding the relevance of other pieces of evidence whose totality affirm the link of the respondent to the offence. These are the incitement messages targeting a microwave link at Melfort near Goromonzi, the confirmation of bank F deposits in Manica, Mozambique, and the fact that Hitschmann actually possessed a myriad of weaponry ranging from prohibited firearms classified as dangerous by the Legislature to detonators and explosive devices."

The learned judge in the court *a quo*, in a meticulous and well reasoned judgment, concluded that the accused had no case to answer and discharged him at the close of the State case. I have carefully perused the voluminous G record in this case. I am satisfied that, on the evidence led up to the close of the State case, the learned judge could not have come to a different conclusion than that he did. After the learned judge ruled, quite correctly in my view, inadmissible the confessions of Hitschmann and the e-mails, there was literally no evidence linking the accused to the crimes he was charged with. H In the circumstances, the prospects of success on appeal are non-existent.

2011 (1) ZLR p400

Chidyausiku CJ

In terms of the Act, the State is required to serve on the accused a summary of A the State case, setting out the witnesses that it intends to call and a summary of the evidence that they will give.

Similarly, the defence is required to furnish the State with a defence outline, in terms of which the accused sets out his defence to the charge and the evidence he intends to lead. The record reveals that at the close of the State case, the State had not led the evidence B it alleged in the State outline that it would lead. Some of the evidence not led was critical to the linking of the accused to the offence. This critical evidence for the State was either ruled inadmissible or the State witnesses told a different story from that alleged in the summary of the State case. In particular, the *viva voce* evidence of Peter Hitschmann (hereinafter referred to as "Hitschmann") and Sipho Makone (hereinafter referred to as "Makone") C differed from the purported evidence set out in the Summary of the State case. This had the effect of destroying the State case. I shall deal with this aspect of the case later in this judgment.

Before dealing with the evidence in this case, I wish to set out the law.

The law D

Section 188(3) of the Criminal Procedure and Evidence Act [*Chapter 59*] is the predecessor to the present s 198(3) of the Act, in terms of which the court *a quo* may discharge the accused. Section 188(3) provided as follows:

> "(3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, E summons or charge, or any other offence of which he might be convicted thereon, it <u>may</u> return a verdict of not guilty" (the underlining is mine)

Section 198(3) is worded in identical terms, except for the substitution of the underlined word "may" by the word "shall". The Legislature, in substituting the word "may" with the word "shall", evinces the clear intention of the Legislature to remove the discretion from the court of deciding whether or F not an accused should be placed on his defence in the circumstances set out in s 198(3) of the Act. Previous authorities had differed on whether a court had such a discretion or not. The Legislature has spoken and the dispute determined beyond doubt. The law as it stands is that the court is bound to discharge an accused where it is satisfied that there is no evidence that the accused committed the offence charged in the indictment, summons or charge.

What constitutes "no evidence that the accused committed the offence charged in the indictment, summons or charge" has been the subject of interpretation by this court in a number of cases. A perusal of those authorities reveals that there is no evidence that the accused has committed the offence charged in the indictment, summons or charge in the following circumstances – H

Chidyausiku CJ A

(i) where there is no evidence to prove the essential elements of the offence (see *A-G* v *Bvuma & Anor* 1987 (2) ZLR 96 (S) at 110E-G);

(ii) where there is no evidence on which a reasonable court, acting carefully, might properly convict (see *A-G* v *Mzizi* 1991 (2) ZLR 321 (S) at 322B); and B

(iii) where the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it (see *A-G* v *Tarwirei* 1997 (1) ZLR 575 (S) at 576).

The State agrees with the above proposition. Indeed, counsel for the State cited the above authorities. The respondent's stance seems to be that the above circumstances are correct but not exhaustive. However, counsel for C the respondent did not cite any authority setting out any other circumstances.

I will now proceed to examine the evidence.

The evidence

The main thrust of the Attorney-General's case is that the court *a quo* assessed the evidence piecemeal and failed to consider the overall effect of D the evidence led. The contention by the Attorney-General is that the overall effect of the existence of a bank account in the name of Hitschmann in Mozambique and the contents of the e-mails established a *prima facie* case against the accused. This is the gist of the first ground of appeal set out in the proposed Notice of Appeal. The contention is supplemented in para 4 of E the applicant's statement in support of the application. It reads:

"4. It is submitted that the court *a quo* misdirected itself by assessing evidence in that matter (manner?) to an extent that the court ultimately assessed pieces of evidence in isolation thereby failing to adopt a holistic analysis of circumstantial evidence adduced by the State. The law surrounding assessment of evidence proves that the trial court should not adopt a F piecemeal approach in evaluating the weight of evidence. *In casu*, the mere fact that Makone went to Mozambique and confirmed the existence of the bank account in the name of Hitschmann, and obtained a bank statement showing deposits confirms that surely a bank account exists in the name of Hitschmann. In his testimony, Hitschmann confirmed that he holds a bank account in Mozambique, although he was at pains to explain why he holds the bank account in Mozambique. Makone stated that he G went to Mozambique not only to verify what Hitschmann himself had pointed out during interrogation, but to confirm the e-mail communication between Bennett and Hitschmann. Makone's testimony can thus not be faltered (faulted?) because he did not bring the said bank statement from Mozambique."

I do not accept that the court *a quo* misdirected itself by examining different H aspects of the evidence separately. In fact, this is how evidence is generally

evaluated. It is only after individual assessment of any evidence that a court A considers the overall effect of that evidence. It is quite clear from a reading of the judgment that the learned judge analysed the evidence piecemeal, but concluded that the overall effect of the evidence examined piecemeal was that it failed to establish a *prima facie* case or a case for the accused to answer at the close of the State case. B

I will now turn to consider the evidence led, or attempted to be led, by the State.

(i) Hitschmann's confession

The State sought to have admitted as evidence a confession by Hitschmann to the police. The law on the admissibility of such a statement is very clear. No C confession made by one person shall be evidence against another person. Some authorities suggest that a confession that constitutes an executive statement in a conspiracy charge is admissible against a co-conspirator. I shall revert to that aspect of the matter later when I deal with the admissibility of the e-mails. It is the e-mails that the State contends are executive statements. It was not the State's contention that Hitschmann's warned and cautioned statement D was an executive statement. Hitschmann allegedly made a confession to the police, in which he stated that the accused was the provider of the finance with which the illegal weapons were purchased in furtherance of the common purpose of committing the offences charged. That statement most probably provided the basis for the allegations in the State outline that Hitschmann E would state in his *viva voce* evidence that the accused provided money for the purchase of the weapons. The record shows that Hitschmann denied that in his *viva voce* evidence.

Hitschmann's confession was ruled inadmissible by the learned judge. In doing so, the learned judge relied on s 259 of the Act, which provides as follows: F

"259 Confession not admissible against other persons

No confession made by any person shall be admissible as evidence against any other person."

Given the unequivocal language of this section, there is no way the learned judge could have admitted as evidence the confession of Hitschmann. Indeed, G it has not been argued in this application that the court erred in holding the statements inadmissible. The probative value of this confession in support of the State case is non-existent. The learned judge's conclusion that the confession of Hitschmann is of no value to the State case cannot but be correct. Consequently, the probative value of the confession to the State case is zero. H

A (ii) Hitschmann's *viva voce* evidence

The next aspect of the evidence of Hitschmann which the learned judge considered was Hitschmann's *viva voce* evidence. In court Hitschmann denied that the accused was the main

financier of the criminal conduct alleged against the accused. In effect, he denied any criminal conduct on B his part or on the accused's part. Hitschmann was called as a State witness. His evidence, if anything, served to destroy the State case. The fact that Hitschmann was declared a hostile witness does not assist the State case in any way. Hitschmann's *viva voce* evidence adds zero to the State case.

(iii) The e-mails as evidence

C The State case was that certain e-mails, Exhibit 13, were downloaded from Hitschmann's computer. Hitschmann denied that Exhibit 13 was downloaded from his computer. To establish that the e-mails were downloaded from Hitschmann's computer the State called a Ms Matare, who testified that she did download some documents from Hitschmann's computer. She did not read the contents of the documents she downloaded. The court found her to D be a credible witness. Accepting her evidence to be truthful, its value to the State case is very limited. It only establishes that certain documents were downloaded from Hitschmann's computer. It does not establish that the e-mails, Exhibit 13, were genuine or authentic. The e-mails were accordingly admitted at that stage of the trial on condition that the State would establish E through other evidence that Exhibit 13 were genuine e-mails from the accused to Hitschmann. The court simply admitted Exhibit 13 at that stage of the proceedings as documents downloaded from a laptop computer belonging to Hitschmann. The court reserved the finding on whether the e-mails were genuine or not until after the State had led evidence to establish that the e-mails were genuine e-mails from the accused to Hitschmann. I pause here F to make the following observation. Whenever the State seeks to produce a statement as evidence, and the production of that statement is challenged, it immediately assumes the *onus* of proving firstly, that the statement was made as a matter of fact by the alleged author of the statement and, secondly, that the legal requirements governing the admissibility of such a statement have been complied with. The former is a question of fact and the latter G a question of law. Thus, *in casu*, the State had the *onus* to prove that the e-mails were as a matter of fact sent by the accused. It is only after the State had established that the e-mails were sent by the accused to Hitschmann that the question of their admissibility as executive statements would arise. The State failed to clear the first hurdle of proving, as a matter of fact, that H the accused sent the e-mails. Consequently, the issue of their admissibility

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Chidyausiku CJ

as executive statements fell away. As I have already stated, the court *a quo* A provisionally admitted the e-mails on condition that their genuineness would be proved later.

In this regard the learned judge had this to say at p 9 of the judgment (Judgment No. HH-79-10):

> "As previously stated in my earlier ruling, the court's admission of the e-mails B was conditional upon the State being able to prove that the questioned e-mails are genuine and authentic. The State's failure to prove the authenticity of the e-mails automatically renders the e-mails inadmissible. For that reason alone the court is not obliged to consider the contents of the e-mails and the question of interpretation does not arise."

This approach by the court *a quo* is supported by authority. See *R* v *Victor* C *& Anor* 11964 RLR 364 (A); 1965 (1) SA 243 (RA).

When the State closed its case, the court held that it had not led credible evidence to establish that the accused had as a matter of fact sent the e-mails, Exhibit 13, to Hitschmann. The court accordingly ruled them inadmissible and that they could not be used as evidence for the State. Whether the court was correct in excluding the e-mails as evidence is dependent on whether the D court correctly assessed the evidence of Mutsetse and Makone. I will now turn to examine whether the court *a quo* was correct in concluding that the evidence of Mutsetse and Makone did not establish that the accused was the author of the e-mails. With the exclusion of the e-mails as evidence, the case for the State literally collapsed and the State was left with no leg to stand on. E

(iv) The evidence of Mr Mutsetse

Perekayi Denshard Mutsetse ("Mutsetse") was called by the State as an expert witness to establish that the e-mails downloaded from Hitschmann's computer were authentic and represented

communication between Hitschmann and the accused. The learned judge's assessment of Mutsetse as a witness appears F on p 9 of the judgment:

> "In his testimony Mr Mutsetse made it clear that he was only contacted by the police in 2009, about three years later, *when it was now virtually impossible to trace the origins of the e-mails in question*. That being the case, he was constrained to make the valid concession under cross-examination that he could not establish the source or destination of the disputed e-mails. That concession G virtually destroyed any link between the accused and the questioned e-mails" (the emphasis is mine).

Further down, on p 9 of his judgment, the learned judge made the following scathing remarks about this witness:

> "It is needless to say that Mr Mutsetse was an appalling witness. He was argumentative and arrogant in the witness stand. When he could not stand the H

Chidyausiku CJ

> A heat he asked to be excused saying that he had some business to attend to in Mozambique. The court refused to let him off the hook, pointing out that every other witness had some business to attend to.
>
> The witness did not take kindly to that ruling and when eventually excused after exhausting his evidence he had a parting shot for the court when he retorted 'Thank you My Lord for wasting my time'. The court chose to turn a deaf B ear to his contemptuous behaviour seeing that he had been badly bruised and traumatised under cross-examination."

A reading of the evidence in the record clearly justifies the learned judge's assessment of Mutsetse's evidence. In any event, an appellate court is in no better position to assess the demeanour of a witness. It is only on those rare occasions where the trial court's finding is not supported by the record that C an appellate court interferes with such a finding. *In casu* the record supports the conclusion of the court.

Apart from this adverse finding on Mutsetse's credibility, his evidence as an expert witness was demonstrated to be palpably unreliable. When an expert gives evidence, it is critical that the expert's evidence provides the factual D basis of his opinion so that the court can decide whether or not to accept the expert's opinion. Apart from his dubious qualifications and experience entitling him to be considered as an expert, the factual basis of Mutsetse's opinion that the e-mails were sent by the accused to Hitschmann was demonstrated to be fallacious.

E Mutsetse's evidence was that the e-mails, Exhibit 13, had the following three features –

(1) the e-mails reflected the name of the service provider, which was hashmail.com;

(2) the bottom beach bore the characteristics https/; and F

(3) the e-mails bore the characteristics "From" and "To" denoting the names of the sender and the receiver.

Mutsetse's evidence in chief was that once these features are on an e-mail then the e-mail must be genuine and must be concluded as having been sent by the person and to the person indicated on the e-mail. On this basis he concluded that the e-mails were sent by the accused to Hitschmann as G reflected on the e-mails. When it was demonstrated in court that an e-mail can bear the above characteristics and still be fake, he made the concession that his opinion was inaccurate. No court could have accepted the opinion of Mutsetse as reliable in the face of a clear demonstration that the basis of such an opinion is fallacious and the expert's own admission that his opinion H was based on false premises.

Chidyausiku CJ

In the result, the court *a quo* was correct in concluding that the evidence A of Mutsetse did not establish that the e-mails were genuine and therefore admissible as executive statements. Accordingly, the court was entitled to exclude Exhibit 13 as inadmissible evidence. Once it is accepted that the e-mails were properly excluded as evidence, there is little else to support the State case. B

(v) The evidence of Makone

It was also argued for the State that the evidence of Makone, who was the investigating officer in this case, taken together with the contents of the e-mails, confirms that the e-mails were genuine. I am not persuaded by this submission. If Makone had given his *viva voce* evidence along the lines C suggested in the State Outline, and the court *a quo* had found his evidence credible, the court most probably would have held that the e-mails were genuine and admitted them as executive statements. However, the *viva voce* evidence of Makone departed materially from the State Outline. He stated that he had travelled to Mozambique and that all he was able to retrieve from Mozambique was the bank account number of Hitschmann. Hitschmann D never disputed that he had an account in a Mozambican bank. Makone never testified that he secured a bank statement showing that money was ever deposited into Hitschmann's account as alleged in the–mails. There was no bank statement of Hitschmann showing that any money was ever deposited into, or withdrawn from, that account. If the State had established by way of E bank statements that $5 000 was deposited into the account of Hitschmann, then that evidence could be regarded as evidence *aliunde* proving that the e-mails were genuine. Simply establishing that Hitschmann had a bank account in Mozambique falls far short as evidence *aliunde* proving that the e-mails were genuine. The difficulties that Makone and the State had in securing such evidence are understandable. Banks, generally speaking, do F not disclose information on their clients' accounts to third parties.

So the effect of all this is that the bits and pieces of evidence which the Attorney-General sought to rely on individually amounted to zero in their probative value. When you add zero to zero *ad infinitum* the sum total is always zero. The various pieces of evidence led by the State do not, either separately or cumulatively, constitute evidence on which a reasonable court, acting carefully, might properly convict the accused. I accept as correct the proposition that the court "must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken": *per* Davis AJA in *R* v *de Villiers* 1944 AD 493 at 508-509. I also accept that the court: H

Chidyausiku CJ

> A "… must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn",

as was stated by Davis AJA in *R* v *de Villiers supra* at 509.

In casu, each of the circumstances relied upon by the State has very little, B if any, probative value. Taken together, the various circumstances do not make a case for the accused to answer. In brief, the Attorney-General was expected to produce evidence to the effect that the accused was the financier of the illegal purchase of weapons. There is no admissible and reliable evidence that he did so. The confessions of Hitschmann to the police which tended to suggest that the accused was the financier of the illegal project C were ruled inadmissible and therefore of no value to the State. The e-mails which implicated the accused were correctly ruled inadmissible because the State failed to establish, as a matter of fact, that the accused sent the e-mails to Hitschmann. The evidence of Makone did not establish any facts from which any inference implicating the accused or confirming the e-mails as D genuine could be drawn. I entertain no doubt that the evidence led does not amount to any evidence upon which a reasonable court, acting carefully, could convict the accused. The court may have had the right accused but the admissible evidence does not add up.

In the result, I agree with the conclusion of the learned judge in the court *a quo* that this was a proper case in which a discharge in terms of s 198(3) of E the Act was appropriate. I see no prospects of the Supreme Court coming to a conclusion different from that of the court *a quo*.

As there are no prospects of success on appeal, leave to appeal against the decision of the court *a quo* is refused.

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

Mtetwa & Nyambirai, respondent's legal practitioners

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BITI v CHIMBOZA NO & ORS 2011 (1) ZLR 408 (H)

Citation	2011 (1) ZLR 408 (H)
Case No	Judgment No. HH-143-12
Court	High Court, Harare
Judge	Chiweshe JP
Heard	19 March 2011
Judgment	19 March 2011
Counsel	Mrs *B Mtetwa*, for the applicant *F Chimbari*, for the respondents
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Statutes – *Public Order and Security Act [Chapter 11:17] – power of police to control or prohibit meetings – police being of view that meeting could result in disorder – whether police obliged to consult convener – failure by police to do so – may be cured by evidence led at appeal to magistrates court* D

Headnote

The applicant, a senior official in a political party, notified the regulating authority in terms of s 25 of the Public Order and Security Act [*Chapter 11:17*] of his party's intention to hold a rally about a week later at a particular venue. The regulating authority responded by advising the applicant that the venue had already been booked by another organisation. E The applicant then sent another notice advising the regulating authority of his party's intention to hold a rally at another venue on the same date. The regulating authority advised the applicant that the proximity and timing of the intended rally was clashing with a rally to be held by another party, which would be held on the same date, at a venue some 500 metres away. On neither occasion did the regulating authority invite F the applicant for consultations, negotiations, amendment of the notice or any other issues as provided for under s 26(3) of the Act. Instead, the regulating authority issued a prohibition notice in terms of s 26(9). The applicant then filed an appeal with the magistrates court in terms of s 27B of the Act. The regulating authority gave evidence at the appeal G hearing. On the basis of that evidence the magistrate dismissed the appeal and confirmed the notice of prohibition.

The applicant argued that the second respondent had failed to comply with the peremptory provisions of the Act. The resultant prohibition order was therefore a nullity and the magistrate therefore should have granted the appeal. The applicant argued that the Act did not give the regulating H

A authority any discretion, based on his experience or otherwise, to dispense with the laid down procedures. The relevant provisions were mandatory and not merely directory, to be dispensed

with at the discretion of the regulating authority.

The respondents, whilst conceding that the regulating authority had not abided by the relevant provisions of the Act, argued that the nature of the B perceived threat was within his operational competency and experience. It was his experience that the holding of rallies by different parties at adjacent venues invariably led to violent clashes between supporters of rival parties. In the circumstances, therefore, he was justified in dispensing with the holding of consultative meetings as the threat was capable of C assessment without the input of third parties. In any event, he did not have sufficient manpower to neutralise the perceived threat. For these reasons, he had decided to issue the prohibition order.

Held, that the provisions of s 26(3) were couched in positive language and, on the face of it, would appear to be intended to be mandatory provisions to be complied with strictly by the regulating authority. In that case, the D regulating authority erred in issuing a prohibition order in the absence of any credible information given on oath. He also erred in failing to invite, as he would be required to do, the convener and other stakeholders to a consultative meeting to discuss the threat and the options available. However, by calling for evidence on oath from the regulating authority E and hearing the parties, the magistrate in essence cured the defects or omissions inherent in the manner in which the regulating authority had initially proceeded. Having done so and no doubt having found the information given on oath to have been credible, the magistrate confirmed the prohibition order.

Held, further, that *prima facie* the procedures specified in s 26(3) to be F complied with by the regulating authority will only be set in motion if the regulating authority receives information of a threat of disruption of traffic or of public order. If no such information is received, then it can reasonably be argued that the regulating authority need not proceed as prescribed. Here, the regulating authority, without receiving G any adverse information from a source other than himself, was of the opinion that, because of certain facts known to himself or drawn from his own operational experience, it would be imprudent to authorise the demonstration, meeting or public procession. In this situation, the consultation procedures cannot be triggered, because the legislature has not said that is what should be done. To fetter a regulatory authority's H discretion in the manner suggested by the applicant would severely curtail

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the effective discharge by the police of their constitutional mandate – A to maintain law and order in the country. In any event, it would not be prudent to require that a member of the police force be obliged to hold consultations in the manner prescribed to test the reasonableness or otherwise of any information known to him through operational experience or other sources privy to him or the force at large. Such B information might well be sensitive or privileged the disclosure of which might well be detrimental to public order and security.

Legislation considered

Public Order and Security Act [*Chapter 11:17*], s 26(3) C

Case information

Mrs *B Mtetwa*, for the applicant

F Chimbari, for the respondents

Judgment

CHIWESHE JP: In this urgent application for review the applicant sought an order couched in the following terms:

"IT IS ORDERED THAT: D

1. The decision of the court *a quo* be and is hereby set aside.
2. The prohibition by the second respondent on 14 March 2011 against appellant's intended rally be and is hereby set aside.
3. Consequently, applicant's rally scheduled for 19 March 2011 be and is hereby allowed to proceed in terms of the notice given to second respondent E on 11 March 2011.

4. The respondents, their agents or any person acting through them or on their behalf are hereby directed not to interfere with the proceedings at the applicant's rally held in terms of paragraph 3 above.
5. The rally referred to in paragraph 3 above shall proceed notwithstanding the noting of any appeal against this decision. F
6. The costs of this suit shall be borne by the respondents jointly and severally, each paying the other to be absolved."

I heard the application in chambers on Sunday 19 March 2011 around midday. At about two o'clock in the afternoon of the same day I handed down my decision. I dismissed the application with costs and indicated that my reasons G would follow. These are they.

The background facts to this application are as follows. The applicant is the Secretary General of the Movement for Democratic Change, a political party with representation in the country's legislature and the executive arm of government. The first respondent is the magistrate who heard the appeal lodged by the applicant against the decision of the second respondent. H

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A The second respondent is a police officer. He is the Officer Commanding Harare Central District and, for the purposes of s 26 of the Public Order and Security Act [*Chapter 11:17*], he is, in that capacity, the regulating authority of Harare Central District.

On 11 March 2011 the applicant caused written notice to be sent to the regulating authority of his party's intention to hold a rally on 19 March 2011 at the open space between Sheraton Hotel and Interpol Offices in Harare. The regulating authority responded by advising the applicant that the open space in question had already been booked by another organisation. The applicant then sent another notice advising the B regulating authority of his party's intention to hold a rally at the Glamis Arena on the same date, starting C at 10.00 hours and ending at 16.00 hours.

In a letter dated 14 March 2011, the regulating authority advised the applicant that the proximity and timing of the intended rally was clashing with a ZANU-PF rally which would be held on the same date, some 500 metres away from the Glamis Arena. On each of these two occasions, the regulating authority D did not invite the applicant for consultations, negotiations, amendment of the notice or any other issues as provided for under s 26(1) of the Act. For these reasons, the applicant avers that the regulating authority failed to comply with the provisions of that section. The applicant then filed an appeal with the magistrates court on 18 March 2011 under case number 3066/11.

At the hearing of the appeal, the second respondent was called to give E evidence on oath. He told the court that another rally had been booked for the same day and time by another political party in the vicinity of the intended venue and that the police would not have sufficient manpower to monitor the two rallies. It was the second respondent's operational experience that where two opposing parties hold rallies at the same place and time violence F was likely to flare between the rival supporters. It was on the basis of the evidence given by the second respondent that the magistrate dismissed the appeal and confirmed the notice of prohibition that had been issued by the regulating authority.

The applicant contends that, in dismissing the appeal, the magistrate misdirected herself, in that the second respondent had failed to comply with G the peremptory provisions of the Act. The resultant prohibitory order was therefore rendered null and void as a result of that failure by the second respondent. The magistrate therefore should have held accordingly and should have on that basis proceeded to grant the appeal.

The specific grounds of appeal were itemised as the failure by the second H respondent to receive and furnish evidence on oath with regards the threat, if

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any, to public order and security in the event that the rally had been allowed A to proceed, and, secondly, the further failure by the second respondent to convene a meeting with the applicant to explore available options. Thirdly, the applicant contends that the second respondent also failed to call for a consultative meeting where interested parties would have been invited to make representations to the regulating authority as to the fate of the rally. As B a result, argues the

applicant, the regulating authority could not have properly assessed the threat, if any, to public order and security in the absence of the input from the applicant and other interested parties. Further, it is averred that the regulating authority had not confirmed with the City of Harare whether indeed the venue or its environs had been booked for the same date and time by parties other than the applicant. The applicant also submitted that C his party had incurred considerable expense in cash and kind, all of which would go to waste in the event that the rally was not sanctioned.

The respondents opposed the application and sought confirmation of the decision of the first respondent. Whilst conceding that the second respondent had not abided by the relevant provisions of the Act, it was argued that the D nature of the perceived threat was within the operational competency and experience of the regulating authority. The regulating authority had given evidence on oath in the court *a quo*. It was his experience that the holding of rallies by different parties at adjacent venues invariably led to violent clashes between supporters of rival parties. In the circumstances, therefore, the regulating authority was justified in dispensing with the holding of E consultative meetings as the threat was capable of assessment without the input of third parties. In any event, the regulating authority did not have sufficient manpower to neutralise the perceived threat. For these reasons, the second respondent had decided to issue the prohibition order.

The applicant was adamant that the provisions of the Act did not give the F regulating authority any discretion based on his experience or otherwise to dispense with the laid down procedures. It was argued that the legislature intended that the relevant provisions be mandatory and not merely directory, to be dispensed with at the discretion of the regulating authority.

Section 26(3) of the Public Order and Security Act ("POSA") provides as follows: G

> "(3) If a regulating authority receives credible information on oath that there is a threat that a proposed procession, public demonstration or public meeting will result in serious disruption of, vehicular or pedestrian traffic, injury to participants in the procession, public demonstration or public meeting or other persons, or extensive damage to property or other public disorder, he or she shall forthwith advise the convener of the perceived threat and invite the convener to H

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> A a consultative meeting at a time and venue specified by the regulating authority in order to explore options to prevent the threat, and shall afford an opportunity to the convener to make representation thereon to the regulating authority.
>
> Provided …"

The provisions of this subsection are couched in positive language and, on B the face of it, would appear to be intended to be mandatory provisions to be complied with strictly by the regulating authority. If that be the case, then the regulating authority erred in issuing a prohibitory order in the absence of any credible information given on oath. He also erred in failing to invite, as he would be required to do, the convener and other stakeholders to a consultative meeting to discuss the threat and the options available.

C The magistrate to whom the appeal lay was alive to these requirements. By calling for evidence on oath by the regulating authority and hearing the parties, the magistrate cured in essence the defects or omissions inherent in the manner in which the regulating authority had initially proceeded. Having done so and no doubt having found the information given on oath D to have been credible, the magistrate confirmed the prohibition order. The magistrate was satisfied at the end of the day that the nature of the threat was within the operational competency of the police. Evidence on oath would tend to show that the regulating authority had operational knowledge and experience of the threat that would arise when two or more rival parties hold rallies at adjacent venues. Violence was likely to ensue between the rival E supporters. Given this operational experience the magistrate was of the view that it was not necessary for the regulating authority to call the meetings referred to under s 26(3).

On that basis, namely, that the regulating authority was justified in dispensing with the holding of such meetings, the magistrate upheld the prohibition order.

F The magistrate's decision appears proper in the circumstances. The applicant has attempted to introduce certain information as to whether there had been a double booking of the venue or its environs. It was sought to show that the other party had not booked the adjacent venue and that therefore the perceived threat would not have arisen. However, this additional information was not

put before the magistrate who, needless to say, would not have taken it into G account in arriving at that decision.

The respondents have raised a dimension that I must turn to. The opening sentence under s 26(3) reads "If a regulating authority receives credible information on oath that there is a threat …" *Prima facie,* therefore, the procedures specified therein to be complied with by the regulating authority H will only be set in motion if the regulating authority receives certain

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information. If no such information is received, then it can reasonably be A argued that the regulating authority need not proceed as prescribed. Indeed this position is in tandem with subss 26(1) and (2) where it is envisaged that where the regulating authority "is of the opinion that negotiations are not necessary" and that the demonstration/meeting can proceed, he shall notify the convener accordingly. In other words, he shall at his sole discretion B approve the holding of the demonstration or meeting.

However, the converse position has not been covered in the present provisions. This is the situation where the regulating authority, without receiving any adverse information from a source other than himself, is of the opinion that because of certain facts known to himself, or drawn from his own operational experience as in the present case, it would be imprudent to authorise the C demonstration, meeting or public procession. How does a regulating authority who has formed such an opinion on such reasonable grounds proceed? Does he invite the parties to consultations as presently envisaged? For what purpose? I ask this question because the whole procedure for consultation is designed to ensure that the information received is interrogated by the stakeholders. D How reliable is it? Can it be verified? Is there any substance to it or is it a mere hoax? If it is credible, how should the regulating authority deal with it? Does it warrant the regulating authority's action by way of prohibition, by way of placing certain conditions in the manner in which the meeting or demonstration should be conducted or by way of any other amendment to the convening notice? Ultimately, however, after all these procedures have E been complied with, it still remains within the discretion of the regulating authority to sanction, modify or prohibit the proposed public function.

In other words, the import of these provisions would appear to be aimed at assisting the regulating authority to exercise his discretion reasonably and from an informed position. F

I would hold therefore that where the exercise of that discretion is premised upon information within the regulating authority's knowledge and experience, as in the present case, the consultation procedures cannot be triggered. That is so because the legislature has not said that is what should be done. In fact the legislature saw it wise not to do so. To fetter a regulatory authority's G discretion in the manner suggested by the applicant would, in my view, severely curtail the effective discharge by the police of their constitutional mandate – to maintain law and order in the country.

In any event, it would not be prudent, in my view, to require that a member of the police force be obliged to hold consultations in the manner prescribed to test the reasonableness or otherwise of any information known to him H

A through operational experience or other source privy to him or the force at large. Such information might well be sensitive or privileged the disclosure of which might well be detrimental to public order and security.

In the result, I hold that the regulating authority in the circumstances of this case was not obliged to follow the procedures prescribed under s 26(3). If he was, as the magistrate seemed to believe, I would hold that the taking of B evidence on oath by the magistrate and the opportunity given to the parties to make representations cures the initial defects substantially. In that regard, the decision ultimately reached by the magistrate on the basis of what was put before her appears to me to be logical, proper and reasonable.

Finally, let me deal with a logistical issue. I heard this matter on an urgent C basis and on the very day that the applicant sought to hold the rally. It would not have been practicable, given the time constraints, to grant the order sought in the event that I had embraced the applicant's submissions.

That is so because the respondents would have required much more time than could possibly be availed to marshall manpower and other resources required for a rally of the envisaged magnitude. I would, therefore, have still dismissed D the application on that point alone.

It was for these reasons that I dismissed the application with costs.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

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

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DHLODHLO v DEPUTY SHERIFF, MARONDERA & ORS 2011 (1) ZLR 416 (H)

Citation	2011 (1) ZLR 416 (H)
Case No	Judgment No. HH-76-11
Court	High Court, Harare
Judge	Gowora J
Heard	21 September 2010
Judgment	30 March 2011
Counsel	*D Ochieng,* for the applicant *L Uriri,* for the third and fourth respondents No appearance for the first and second respondents
Case Type	Court application
Annotations	Link to case annotations

Flynote

Appeal – *noting of – effect – common law position – judgment appealed against suspended – appeal against arbitral award in labour matter – common law position applicable*

Court – *officers – Sheriff – duties – need for impartiality in the execution of duties – litigation between the parties – Sheriff cannot be seen to be* D *taking sides*

Employment – *arbitration – award – appeal against – noting of – effect – appeal cannot be executed upon – registration of award – effect*

Employment – *Labour Court – jurisdiction – arbitral award registered with High Court – such award thereby becoming an order of the High* E *Court – Labour Court having no jurisdiction to order stay of execution*

Headnote

The applicant had been employed by the fourth respondent. He was dismissed for misconduct. An appeal resulted in the matter being referred to arbitration; the arbitrator's award was in favour of the applicant. The F arbitrator awarded back pay, cash in lieu of notice and damages in lieu of

reinstatement. The amount to be paid in damages was specified, but the other sums were not quantified. The applicant had the damages award registered as an order of the High Court and then had a writ of execution issued. The fourth respondent's legal practitioner told the Deputy Sheriff that the execution had been stayed by an order of the G Labour Court, which had granted the stay following the noting of an appeal against the award. The applicant took the view that the writ was valid until set aside by the High Court.

Both parties noted appeals against the award of damages.

Held, that under r 324 of the High Court Rules, a writ of execution remains valid until the judgment has been satisfied. Under r 34(1) of the Labour H

A Court Rules 2006, where an order has been registered in terms of s 92B(3) of the Labour Act [*Chapter 28:01*], the court or a President sitting in chambers may order a stay of execution of the order. Section 92B of the Act allows for the registration of orders made by the Labour Court. It does not cover orders made by arbitrators. An arbitrator's award may be registered in terms of s 98(14). Section 92B does not provide for the B suspension of orders of arbitrators.

Held, further, that the effect of the registration with the High Court of an arbitral award which was granted in terms of s 98(9) of the Labour Act is that, apart from an appeal to the Supreme Court, only the High Court can interfere with the judgment or its execution and only the High Court C can order a stay of execution. Rule 43(1) of the Labour Court Rules, 2006 (SI 59 of 2006) cannot be read as giving the Labour Court the power to regulate the proceedings of the High Court. The Labour Court is not a court which can review or subject to appeal the proceedings of the High Court and it has no power to stay a judgment of the High Court. It is not within its jurisdictional power to do so.

D *Held*, further, that the proceedings against which the appeal was noted were conducted in the public domain law under the aegis of the Labour Act. As such, the common law presumption against the operation of judgments which have been appealed against operates, unless the Act provides to the contrary. The Labour Court, which is a creature of statute, is regulated E strictly within the four corners of the Labour Act which created it. That Act has not seen fit to interfere with the common law position which provides that an appeal against a judgment has the effect of suspending it. An arbitral award, therefore, granted in terms of s 98(9) of the Act, being the subject of an appeal, is not capable of being executed upon.

Held, further, that for a litigant to appeal against a judgment granted in his F favour and then attempt to execute against the judgment with which he has clearly expressed unhappiness is an abuse of process.

Held, further, that the Sheriff of Zimbabwe and his deputies are officers of the court and, in the execution of their duties, are required to be impartial. If a dispute arises between parties to litigation, the Sheriff and his deputies G cannot be seen to be taking the part of one of these parties against the other, nor can they be expected to conclude that a court order involving such parties is irregular and should be disregarded.

Cases cited

Bank of England v Vagliano Brothers [1891] AC 107

H *Chibaya v Chibaya* 1985 (2) ZLR 237 (H)

Gowora J

Mushaishi v Life Syndicate & Anor 1990 (1) ZLR 284 (H) A

Parker v Parker & Ors 1985 (2) ZLR 79 (H)

PTC v Mahachi 1997 (2) ZLR 71 (H)

S v Chakwinya 1997 (1) ZLR 109 (H)

R v de Jager 1953 (2) SA 197 (T)

Strime v Strime 1983 (4) SA 850 (C)

Stumbles and Rowe v Mattinson 1989 (1) ZLR 172 (H) B

Legislation considered

High Court Rules, 1971 (RGN 1047 of 1971), rr 323, 324 and 449

High Court Act [*Chapter 7:06*], s 20(1)

Labour Act [*Chapter 28:01*], ss 92B, 98(9), 98(13) and 98(14) C

Labour Court Rules 2006 (SI 59 of 2006), r 43(1)

Case information

D Ochieng, for the applicant

L Uriri, for the third and fourth respondents

No appearance for the first and second respondents D

Judgment

GOWORA J: This matter came before me as an urgent application. After having sight of the opposing papers filed by the respondents, I concluded that the matter was not urgent, and by agreement of the parties, it was enrolled on my roll of opposed matters as all parties had filed all the necessary affidavits and heads of argument. E

The dispute arises out of the registration of an arbitral award by this court at the instance of the applicant. Subsequent to the said registration, the applicant caused a writ of execution to be issued by the Registrar of this Honourable Court. The writ was served by the first respondent, who attached a number of assets belonging to the fourth respondent. When the first respondent attended at the fourth respondent's premises to remove the attached goods the third F respondent, a firm of legal practitioners engaged by the fourth respondent, intervened and allegedly advised the first respondent that the order of this court had been stayed by an order of the Labour Court. Thereafter the legal practitioners for the applicant on the one hand, and those representing the fourth respondent on the other, engaged in correspondence whose tone and G descended with each letter, culminating in each of them hurling insults, threats and counter accusations. It is sad to record that insults were traded between the legal practitioners of the applicant and the respondents.

Needless to say, the first and second respondents were not spared from this barrage. I think it is pertinent to remind legal practitioners that the second respondent and his deputies are officers of this court. In the performance of H

A their duties they are supposed to be impartial. If there exists a dispute between parties, it would be foolhardy for the second respondent especially to be seen to be taking the side of one party against another. If there is a court order which has been granted staying execution, as happened in this case, the second respondent, cannot be expected to conclude that the court order is irregular and should be disregarded. That would lead to a breakdown in the rule of B law as well as a complete disregard and breakdown of the judicial system. For the applicant to suggest, as he did, that the first and second respondents, ought to have, upon his demand, overlooked the existence of the order of the Labour Court and proceeded to levy execution in his favour "because the order was clearly wrong", is to my mind tantamount to encouraging any C official to disregard orders of the courts of this country. The respondents have no capacity to decide if an order is incompetent or otherwise. That is the function of these courts. The first and second respondents, having been threatened with criminal sanction, wisely in my view, decided to take no further action until a court had decided whether one or the other was in the right from a legal perspective. They have, as a result, been brought to court D for an order for *mandamus* for the Sheriff and his deputy to perform their duties in terms of the law. I cannot fault the manner in which they handled their task. The same cannot however be said of the legal practitioners for the applicants and the fourth respondent.

The starting point would, in my view, be the award that the applicant E obtained from the arbitrator which is the *causa causans* of the entire dispute. The applicant was employed by the fourth respondent as a director of the agricultural unit at the school. On 6 March 2009 he was dismissed

following a finding that he was guilty of willful disobedience to a lawful order. He filed an appeal to the Minister who referred the matter to an arbitrator for conciliation. The arbitrator heard the parties on 12 May 2009 and 0n 30 F June the arbitrator issued an award in favour of the applicant. The arbitrator found that there had been unfair labour practice against the applicant and gave the following award:

> "(i) that the employee be paid salary arrears from 1 March 2009 to 30 June 2009 and a gratuity with immediate effect; G
>
> (ii) that the employee be paid 3 months cash in lieu of notice, gratuity and any outstanding vacation leave days with immediate effect;
>
> (iii) that the employee be paid damages in lieu of reinstatement. Further that the parties negotiate the quantum of damages payable, if they fail to agree they should refer the matter back to arbitration."

The parties did not agree on the amounts to be paid and, as a result, on 7 June H 2010 the applicant referred the dispute to the arbitrator for an assessment of the

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monies due and owing as damages in lieu of reinstatement. The arbitrator A on 7 June 2010 awarded the applicant US $60 000 as damages in lieu of reinstatement. Armed with this award, the applicant then filed a chamber application with this court for the registration of the award. In the draft order attached to the application he sought registration of the awards granted to him on 16 July 2009 and 7 June 2010 respectively. The learned judge before B whom the application was placed, pointed out correctly, in my view, that the first mentioned award did not sound in money. To comply with this query the applicant then submitted two annexures, one of which was a payslip and the other a document which purportedly set out all the sums as salary and allowances claimed from February 2009 to June 2009. These amounts totalled US $ 29 367 were accordingly claimed on the amended draft order C filed by the applicant. There was, however, no indication on the papers that these amounts had been awarded by the arbitrator. On 21 June this court gave an order in favour of the applicant in which the arbitral award of June 2010 was registered together with an amount of US $ 29 367, which clearly was not part of the award by the arbitrator.

When the parties appeared before me I raised a query with the applicant's D counsel as to the entitlement by the applicant to have this aspect of the award registered with this court. Counsel, who had not been instructed on the circumstances surrounding the registration of the award, was unable to confirm that it was based on an award by the arbitrator. I indicated to the parties that in my view the award had been registered in error and that it was E my intention to invoke r 449 of the Rules of the High Court and rescind that part of the order. Accordingly, the order of this court dated 21 June 2010 relating to an award by Mpisaunga dated 16 July 2009 for the sum of US $29 3667 is hereby rescinded.

I turn now to the dispute between the parties. The applicant seeks an order that the process of execution be proceeded with by the first and second F respondents. He also seeks an order barring the fourth respondent from interfering with the first and second respondents in the execution of their duties. In the final relief, the applicant also sought an order to the effect that r 34 (1) of the Labour Court Rules 2006 (SI 59 of 2006) is *ultra vires* the Labour Act [*Chapter 28:01*]. G

Subsequent to his having an order issued in his favour, the applicant caused, on 23 June 2010, a writ of execution to be issued by the Registrar of this court. It is common cause that on 28 June the first respondent attended at the premises of the fourth respondent armed with the writ and attached two buses and a tractor. Removal was scheduled for 1 July 2010. He did not do so due to a letter dated 30 June 2010 from Messrs Kantor & Immerman which advised H

A the first respondent that a stay of execution had been granted in favour of the fourth respondent by the Labour Court and that therefore the respondent ought not to proceed further with the process. A copy of the order which was attached to the letter reveals that the order staying execution was granted in chambers by Kachambwa on 30 June 2010. The president had granted a stay on the execution of the judgment relating to the damages in *lieu* of B reinstatement but had allowed execution on the part of the award which was not the subject matter of an appeal. It transpired that the fourth respondent had not appealed against the award of 16 July 2009 but had

appealed the award issued on 7 June 2010. The applicant had apparently not been served with the notice of appeal. The applicant and his legal practitioners were not C

D convinced that the Labour Court could order stay of execution on an order emanating from this court and accordingly on 14 July the latter addressed a letter to the first respondent urging him to proceed with execution. The first respondent complied and served a fresh notice of removal on 16 July 2010. Removal was this time scheduled for 21 July 2010. He was unsuccessful as he was met with resistance. In the meantime, the fourth respondent's legal practitioners had addressed a letter to the first respondent which they copied to the applicant's legal practitioners on 19 July in which they intimated that the writ of execution was no longer legally enforceable and warning the first respondent that he risked being charged with a criminal offence if he persisted with execution. A further letter on the issue was written to E the applicant's legal practitioners on 22 July 2010, in which it was stated amongst other things that any instructions to the first respondent to proceed with execution would be unlawful because the writ had been suspended by the Labour Court. In view of the turn of events, the second respondent advised the first respondent to suspend execution pending the determination F of the application filed by the application in the Labour Court for rescission of the order for stay of execution. The applicant sought an explanation from the second respondent who reiterated that his office would not proceed with the process of execution until the rescission had been determined; hence the application before me as the applicant is of the view that until such time as the order of this court has been set aside the writ is valid.

G The execution of judgments of the High Court is provided for in Order 40 of the Rules. Rule 324 thereof provides that a writ of execution, once issued, remains in force until such time as the judgment has been satisfied. Rule 323 provides that one or more writs may be sued out by any person in whose favour a judgment has been pronounced if such judgment has not H been satisfied, stayed or suspended. The contention of the first and second

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respondents is that the writ cannot be enforced because it has been suspended A by the Labour Court.

The order by the Labour Court staying execution of the order of the 21 June 2010 was effected in terms of r 34(1) of the Labour Court Rules which is to the following effect:

> "Where a decision, order or determination has been registered in terms of section B 92B(3) of the Act, the Court or a President sitting in chambers may, upon application, order a stay of execution of the decision, order or determination." The issue which then arises is whether this was a decision, order or determination registered according to the provisions of s 92B of the Act. Section 92B(1) provides that the Labour Court may fix the date from which any decision, order or determination made by it may operate. Subrule (2) requires the court or the president who made the decision to submit sufficient copies of the order or C decision to the registrar who in turn will provide a copy to each of the parties affected by the order or decision. Section 92B(3) in turn permits the registration of the order or decision with magistrates court or the High Court, depending on the jurisdictional limit of the lower court. Clearly an award from an arbitrator cannot be registered under s 98B. A closer scrutiny of the Act actually reveals that the appropriate section for the registration of such awards is s 98(14), which D is to all intents and purposes a mirror of s 92B(3) except that there is reference to an arbitrator and an arbitral award, as opposed to the Labour Court and a decision, order or determination.

In my view, the Labour Court provided for the suspension of orders or decisions registered under s 92B(3) only. The judgments registered under s 98(14) have been excluded. Any suspension of any award granted under E s 98 would therefore be *ultra vires* the rules themselves as they have not provided for such suspension.

The matter however does not end there. The applicant has contended that, irrespective of what the Labour Court Rules may provide, that court does not have the jurisdiction or power to suspend or stay execution of an order F or judgment of this court. In terms of s 92B(4) of the Act, once a judgment or order has been registered with the High Court it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court. The same provision is found in s 98(15) of the same Act. Effectively, therefore, once this court issued an order registering the award in favour of the applicant, upon the registration, the award became to all intents and purposes a judgment G of the High Court. The contention by the applicant is that, as a result of the registration, the Labour Court ceases to have jurisdiction over the judgment and it cannot control, vary, set aside or rescind the judgment. I think this is a correct exposition of the law. The effect of the registration

with this court is that only the High Court, barring an appeal to the Supreme Court, can interfere with the judgment or its execution. This is because, the High Court, H

A being a court of superior jurisdiction, has the inherent power to regulate its own proceedings, as remarked by Gillespie J in *S* v *Chakwinya* 1997 (1) ZLR 109 (H) as follows:

> "… and the remedy for the accused here lies in the inherent jurisdiction of this court to regulate its own proceedings and to protect the rights of those coming before it."

B Clearly the import behind r 34(1) is to permit the stay of any judgment registered with a court, possibly with inferior jurisdiction to it. I say "possibly" because this aspect was not argued before me as that was not the situation confronting the parties. I am therefore not in a position to state with certainty that the rule permits this. It is an issue that would have to be argued before C a court can pronounce on it. What I can state is that the rule cannot be read as giving the Labour Court the power to regulate proceedings of the High Court. To the extent that it appears to do so, the rule is, in my view, in conflict with the Act and the limited jurisdiction granted to the court in terms of s 89 thereof. I am bolstered in this view by the comments of Sansole J in *Chibaya* v *Chibaya* 1985 (2) ZLR 237 at 238 where he quoted from remarks by Roper D J in *R* v *de Jager* 1953 (2) SA 197 (T) to the following effect:

> "The ordinary rule of law is that an order made by a court can (except by way of appeal or review in a higher court) not be varied except by the court itself; …"

It is trite that a judicial officer cannot vary or set aside a judgment or order issued by an officer of parallel jurisdiction, except in the case of a rescission E of an order granted in default, or in restricted circumstances in accordance with the provisions of r 449 of the Rules of this court. As the applicant rightly argues, if a judge cannot vary or alter aside an order issued by a judge with parallel jurisdiction, [1] how can it be possible for a judge from a lower court have the power to stay an order issued by a court of superior jurisdiction? I cannot conceive of a situation where a court can lawfully F interfere with execution or suspension of a court order issued by court of superior jurisdiction to its own.

Execution is a process of the court and every court has the power to control its own process subject to the rules of court. In the High Court that power is inherent. See *Strime* v *Strime* 1983 (4) SA 850 (C) and *Stumbles & Rowe* G v *Mattinson* 1989 (1) ZLR 172 (H). The courts in this country have all been imbued with the power to regulate their own proceedings and therefore no other court can legally interfere with those proceedings, unless in an appeal or a review of the proceedings of that other which in any case would have to be a court of inferior jurisdiction. *In casu*, the Labour Court is not such a

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court as can review or subject to appeal the proceedings of the High Court A and it ought not to have stayed the judgment of this court, as that is not within its jurisdictional power.

I have been enjoined in this vein to find by the applicant that r 34(1) of the Labour Court Rule is *ultra vires* the provisions of s 92B. The award, which is the subject matter of this dispute, falls for registration in terms of s 98 of B the Act and, therefore, this rule does not make reference to awards registered in terms of that section and any remarks by this court relating to s 92B would be *obiter*. I will therefore not venture into that territory as I believe that the law is clearly against the Labour Court staying the execution of an order of this court, even where it has been granted through the registration process of an order, award, decision or judgment emanating from that court or bodies C under its umbrella. Thus the order staying execution of the judgment of this court of 21 January 2010 does not bind this court and the stay is of no force and effect. The writ issued in consequence of that order is therefore valid and capable of execution by the first respondent or the second respondent.

It is clear that, as a result of the provisions of r 34(1), a lot of confusion has D been evident between the litigants as to which court, this court or the Labour Court, should be approached for relief when considering a stay of execution. The import behind s 92B(3) and (4) as well as 98(13) and (14) is to provide successful litigants under the Act an avenue for the due execution of any

orders or awards rendered in their favour. The purpose was not to make this court or the magistrates court the owner of those orders. However, in E order for the orders to be given legal effect for purposes of execution, the relevant sections provide that, upon registration, the order or award becomes an order of the court in which the registration has been effected. The legal consequences of the registration are manifold. Firstly, if there is need for a stay, in so far as the High Court is concerned, only this court can order a F stay of the order. I was not addressed on the issue of an award registered in the magistrates court and, in the absence of argument, I am unable to render an opinion. Secondly, once the order is registered, only the High Court can entertain an application for rescission or variation. The High Court does not have the jurisdiction to deal with labour matters, those being within the exclusive jurisdiction of the Labour Court and structures set up under the G Act. In the event that the initial order, judgment or award has to be reviewed, rescinded, varied or interfered with in any manner, this court plays no part. It cannot determine anything to do with labour on the merits. The absurd situation is therefore created where this court has registered an order which becomes its own, but if either party wishes it rescinded, this court cannot consider the merits of the application, as it has no jurisdiction to determine H

A labour issues. In the event, the parties have to utilise the structures set up under the Act to regularise or deal with the dispute and, once that is finalised, they approach the High Court to set aside its judgment which came by way of registration. I believe that the burden on the litigant, in the existence of the need to have a multiplicity of actions, is not just unduly burdensome, it can be costly. Invariably the employee is not legally represented and the B minefield presented by the need to jump from one court to another for redress may lead to an injustice. I would venture to suggest that the Labour Court be provided with the services of the Sheriff for purposes of effecting execution of its own judgments. This would instantly remove the confusion prevailing from the interpretation of r 34(1) of the Labour Court Rules. Already the C deputy sheriff and the messenger of court are empowered to serve process of that court and it would be a simple thing to extend those powers to execution of judgments rendered by the court.

I turn then to the substance of the application, as to whether or not I should issue an order in favour of the applicant directing the first and second D respondents to abide by their statutory duties and remove the attached assets and sell them in execution of the judgment of this court. The powers and duties of the Sheriff are provided for in s 20(1) of the High Court Act to the following effect:

> "subject to section *nineteen* and to rules of court, the Sheriff shall by himself or his deputy or an assistant deputy, execute all sentences, decrees, judgments, E writs, summonses, rules, orders, warrants, commands and other processes of the High Court, and shall make a return thereof to that court, together with the manner of execution thereof."

That there is a statutory obligation falling upon the shoulders of the Sheriff and his lawful deputy, in this case the first and second respondents is not F in dispute. Both are officers of this court and are bound by the High Court Act. The question to be determined here is whether or not the applicant has made out a case requiring this court to order that the first respondent execute his mandate in terms of the writ. The applicant has addressed this court at length on the validity of the writ. I do not believe that is the issue before me. The writ is valid until such time as the judgment of this court G has been set aside. The judgment has not. However, each of the parties has noted an appeal against the assessment of damages by the arbitrator in the sum of US$60 000.

It is trite that a litigant who is dissatisfied with a judgment or decision may appeal against that judgment or decision. Appeals under the Labour Act are H governed by that Act. Section 92D provides:

> "A person who is aggrieved by a determination made under an employment code, A may, within such time and in such manner as may be prescribed, appeal to the Labour Court."

The effect of noting an appeal under this section is described in s 92E in the following terms:

> "(1) An appeal in terms of this Act may address the merits of the determination B or decision appealed against.

(2) An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against.

(3) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires."

In terms of subsection (2), the Legislature has finally put to rest the confusion C in the law as to whether or not an appeal under the Act would suspend the operation of the decision or determination appealed against. The arbitral award was however granted in terms of s 98(9) of the Act. An appeal against the decision of the arbitrator on a question of law lies to the Labour Court in accordance with the provisions of s 98 (10) of the Act. Where s 92E provides that the noting of an appeal does not suspend the decision or determination, D there is no such provision in relation to an appeal against an award by an arbitrator. In *PTC* v *Mahachi* 1997 (2) ZLR 71 (H) Chatikobo J stated at p 75:

"I am concerned with proceedings conducted in the public law domain under the provisions of the Act. In this domain the common law presumption against the operation of judgments which have been appealed against applies unless the Act provides to the contrary. In this case, the Act is silent on the issue. But does E this silence mean that Parliament intended to alter the common law position? In *Phiri & Ors* v *Industrial Steel & Pipe (Pvt) Ltd* S-242-95 (not reported) Korsah JA said:

'There is a presumption, in the interpretation of statutes, that Parliament does not intend to change the common law, unless it expresses its intention with irresistible clearness, or, it follows by necessary implication from the F language of the statute in question, that it intended to effect such alteration in the common law; for 'construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction…..'

per Lord Halsbury LC in *Bank of England* v *Vagliano Brothers* [1891] AC 107 at 120. G

I am of the opinion 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 was lodged upon the effect of such appeal against the order made by the Minister.".

I will consider and accept, as Chatikobo J did before me in the *Mahachi* H

Gowora J

A case (*supra*) that the proceedings against which the appeal was noted were conducted in the public domain law under the aegis of the Act. As such, in the public domain law, the common law presumption against the operation of judgments which have been appealed against operates unless the Act has provided to the contrary *viz* s 92E(2). I am fortified in this view by comments made by Greenland J in *Mushaishi* v *Lifeline Syndicate & Anor* 1990 (1) ZLR 284 (H) at 287D B to the following effect:

"To my mind, it would be anomalous if an administrative decision of a quasi-judicial nature, as is the case here, were to be put on a different footing from court judgments and orders. In the absence of anything provided to the contrary in the relevant Act such decisions must be treated as suspended pending appeal."

C The sum total of the comments from the eminent jurists that I have quoted from leaves me with no other conclusion than that the arbitral award, having been appealed against, is not capable of being executed against. To hold otherwise would be to fly in the face of age old established common law principles, let alone logic. For a litigant to note an appeal against judgment granted in his favour and thereafter to seek to execute against the same judgment with which he has clearly expressed unhappiness is to say the least, an abuse of court process. In any event, the fourth respondent has noted an appeal against the award of damages by the arbitrator. The Labour Court is a creature of statute and is regulated strictly within the four corners of the statute which created it. The Act that created it has not seen fit to interfere E with the common law position which provides that an appeal against a judgment suspends the same. It stands suspended and the applicant has not convinced me otherwise.

In the premises, I find that the application has no merit and it should be dismissed with an appropriate order for costs. I therefore make an order as F follows:

IT IS HEREBY ORDERED AS FOLLOWS:

1) The order of this court dated 21 June be and is hereby varied by the rescission of the order for the sum of $29 367 registered in favour of the applicant as having been registered in error. G
2) The application for an order of mandamus against the first and second respondent be and is hereby dismissed.
3) The applicant is ordered to pay the costs of this application.

Sakala & Company, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

1 See *Parker* v *Parker* 1985 (2) ZLR 79 (H) at 85A

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Source:
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HEYWOOD HAULAGE INVESTMENTS CENTRAL AFRICA (PVT) LTD v COMMISSIONER-GENERAL, ZIMBABWE REVENUE AUTHORITY 2011 (1) ZLR 428 (H)

Citation	2011 (1) ZLR 428 (H)
Case No	Judgment No. HH-81-11
Court	High Court, Harare
Judge	Chiweshe JP
Heard	5 October 2010
Judgment	30 March 2011
Counsel	*P C Paul,* for the applicant *A B C Chinake,* for the respondent
Case Type	Application for declaratory order
Annotations	No case annotations to date

Flynote

Interpretation of statutes – *fiscal legislation – strict construction required – no room for equitable construction*

Revenue and public finance – *income tax – payment thereof in foreign currency* D *– employee's remuneration in foreign currency – remuneration not including payment in kind – tax not payable thereon in foreign currency*

Headnote

The applicant, for the three months before the multi-currency system came into effect in Zimbabwe, availed to its employees fuel coupons and food E hampers as part payment of remuneration due

to them. The rest was paid in local currency. The applicant had for the period under consideration paid employee tax in local currency. The respondent asserted that the fuel coupons and food hampers should be treated as remuneration in foreign currency and that PAYE in respect thereof should have been F paid by the applicant in foreign currency. The applicant contended that the issuance of fuel coupons and food hampers could not, as a matter of law, be regarded as remuneration in foreign currency. The applicant sought a declaratory order to the effect that PAYE in foreign currency was not due. The respondent argued that since the applicant obtained the fuel coupons and food hampers using foreign currency and that the G employees would in turn redeem them on the market in the form of foreign currency, PAYE should be paid in foreign currency. Alternatively, the respondent argued that the payment of remuneration in the form of fuel coupons and food hampers was a scheme aimed at avoiding the payment of tax in foreign currency. Finally, it was argued that "remuneration" paid in foreign currency was money or any other property, corporeal or H

Chiweshe JP

A incorporeal, having an ascertainable money value, paid in United States dollars or Euros or any of the designated currencies, to an employee by way of a salary, wage, etc.

Held, that in terms of para 3(1)(a) of the 13th Schedule to the Income Tax Act [*Chapter 23:06*], where remuneration from which employees' tax is required to be withheld is wholly or partly remuneration paid in foreign B currency, the employer must remit PAYE in respect thereof in foreign currency, that is, in United States dollars or Euros or any other currency denominated under the Exchange Control (General) Order. The definition of remuneration is restricted to payment in foreign currency. It does not include payment in kind, even if such kind might have been acquired C by the employer using foreign currency or redeemed by the employee in foreign currency. In interpreting tax legislation, one must give effect strictly to the words used by the legislature. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in common; nothing is to be implied. One can only look fairly at the language used.

Cases cited D

Cape Brandy Syndicate v IRC [1921] 1 KB 64

Loewenstein v CoT 1956 R & N 502; 1956 (4) SA 766 (FS)

Legislation considered E

Income Tax Act [*Chapter 23:06*], s 98; 13th Schedule, para 3(1)(a)

Case information

P C Paul, for the applicant

A B C Chinake, for the respondent

Judgment

F **CHIWESHE JP**: The applicant carries on business as a transport operator. During the months of November 2008, December 2008 and January 2009 the applicant availed to its employees fuel coupons and food hampers as part payment of remuneration due to them.

Following an audit of the applicant's business by the respondent in June G 2009, the respondent wrote to the applicant's accountants contending that the fuel coupons and food vouchers should be treated as remuneration in foreign currency and that PAYE in respect thereof should have been paid by the applicant in foreign currency. The applicant contended that the issuance of fuel coupons and food hampers cannot as a matter of law be regarded as remuneration in foreign currency. The applicant had in fact for the period H under consideration paid employee tax in local currency.

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The parties are unable to agree on the correct interpretation of the relevant A provisions of the Income Tax Act [*Chapter 23:06*]. In order to safeguard its interests the applicant has filed the present papers seeking a declaratory order in the following terms:

> "IT BE AND IS HEREBY DECLARED:
>
> That the receipt by applicant's employees of fuel coupons and food hampers B during the months of November 2008, December 2008 and January 2009 cannot be treated as remuneration in foreign currency, and that therefore PAYE in respect thereof was not payable in foreign currency as provided for in paragraph 3(1)(a) of the 13th Schedule to the Income Tax Act [*Chapter 23:06*]"

The respondent opposes this application on the basis that since it is common cause that the applicant obtained the fuel coupons and food hampers using C foreign currency and that the employees would in turn redeem the same on the market in the form of foreign currency, PAYE, it stands to reason, should be paid in foreign currency.

Alternatively, argues the respondent, the payment of remuneration in the form of fuel coupons and food hampers was a scheme aimed at avoiding the payment of tax in foreign currency as envisaged in s 98 of the Income D Tax Act [*Chapter 23:06*]

In terms of para 3(1)(a) of the 13th Schedule to the Income Tax Act, where remuneration from which employees' tax is required to be withheld is wholly or partly remuneration paid in foreign currency, the employer must remit PAYE thereof in foreign currency. Remuneration paid in foreign currency is E defined in the same schedule as "remuneration paid in United States dollars or Euros or any other currency denominated under the exchange control (general) order". Thus far the parties are agreed as to the import of these clear and unambiguous provisions of the 13th Schedule to the Act.

Thereafter the respondent loses the plot by attempting to supplement and F expand the definition of "remuneration paid in foreign currency" as he does in his opposing affidavit and heads of argument. Para 1.5 of the respondent's heads of argument reads:

> "1.5 Unfortunately this definition is not revealing anything as it is defining remuneration using the same word remuneration. For one to determine what remuneration paid in foreign currency *really* is, one has to look for the general G definition of remuneration. Remuneration is defined as 'any amount of income which is paid or payable by way of any salary, leave pay, allowance, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance, stipend or communication of pension or an annuity, whether in cash or otherwise and whether or not in respect of services rendered, including any amount referred to in paragraph (a), (b), (c) or (f) of the definition of "gross income" in subsection (1) of section 8'" (my emphasis). H

2011 (1) ZLR p431

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A The respondent further avers under para 1.6 of his heads of argument as follows:

> "1.6 . Amount is then defined in section 2 of the Act as 'for the purposes of the provisions of this Act relating to the determination of the gross income or taxable income as defined in subsection 1 of section 8, of a person, means –
>
> (a) money; B
>
> (b) any other property, corporeal or incorporeal having ascertainable money value and 'accrued', 'paid', 'received' or any cognate expression shall, in so far as it applies to an amount as defined in paragraph (b), be construed in a sense correlative with that in which it is construed when it applies to money."

After this irrelevant analysis the respondent then concludes and substitutes C the definition given by the legislature, with his own, as follows;

> "1.7. From this analysis it is submitted that the *final* definition of remuneration paid in foreign currency will be money or any other property, corporeal or incorporeal, having ascertainable money value, paid in United States dollars or Euros or any of the designated currencies to an employee by way of a salary, wage, etc." (my emphasis).

D Using this newly found definition of "remuneration in foreign currency" the respondent then proceeds to show how PAYE in respect of the applicant's employees would have been calculated. If the legislature had intended this expanded definition it would have legislated accordingly, in so many words. As it was then, the definition restricted "remuneration paid in foreign currency" E to payment in foreign currency. It did not include payment in kind, even if such kind might have been

acquired by the employer using foreign currency or redeemed by the employee in foreign currency. I would find in favour of the applicant in this regard.

The respondent's argument, however, makes attractive policy propositions upon which the legislature could act. Indeed the legislature has since acted F in line with the respondent's propositions by way of amendments to the Finance Act, effective from 1 January 2009. These amendments do not have retrospective effect.

It appears to me that, in interpreting tax legislation, one must give effect strictly to the words used by the legislature. In *Loewenstein* v *CoT* 1956 R G & N 502; 1956 (4) SA 766 (FS) at 772B Murray CJ quoted Lord Cairns in *Partington* v *A-G* 21 LT at p 375 as follows:

> "I am not at all sure that in a case of this kind – a fiscal case – form is not amply sufficient, because as I understand the principle of all fiscal legislation it is this: if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the H other hand, if the Crown, seeking to recover the tax, cannot bring the subject

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> within the letter of the law, the subject is free however apparently within the law A the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

And in *Cape Brandy Syndicate* v *IRC* [1921] 1 KB 64 Rowlatt J said:

> "In a taxing case one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as B to a tax. Nothing is to be read in common; nothing is to be implied. One can only look fairly at the language used".

The respondent has argued in the alternative that the applicant's conduct in paying remuneration in the form of fuel coupons and food hampers amounts to a scheme aimed at avoiding the payment of tax in foreign currency. C Having interpreted the definition of "remuneration paid in foreign currency" restrictively, it follows that the applicant was not under any obligation to remit PAYE in foreign currency. Accordingly, the applicant could not have hatched a scheme to avoid a tax that was not payable in the first place. I would absolve them in that regard.

In the final analysis the applicants are entitled to the order they seek. D

Accordingly it is declared as follows:

> That the receipt by the applicant's employees of fuel coupons and food hampers during the months of November 2008, December 2008 and January 2009 cannot be treated as remuneration in foreign currency, and that therefore PAYE in respect thereof was not payable in foreign E currency as provided for in para 3(1)(a) of the 13th Schedule to the Income Tax Act [*Chapter 23:06*].

Wintertons, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners F

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Source:
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JOHN SISK & SON ZIMBABWE (PVT) LTD v ALTEM ENTERPRISES (PVT) LTD & ANOR 2011 (1) ZLR 433 (H)

Citation 2011 (1) ZLR 433 (H)

Case No Judgment No. HH-83-11

Court	High Court, Harare
Judge	Patel J
Heard	9 November 2010; 10 November 2010
Judgment	31 March 2011
Counsel	*H Zhou*, with him *R Moyo*, for the plaintiff *B Chidziva*, for the first defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Landlord and tenant – *tenant – statutory tenancy – when created – requirements to be observed by statutory tenant*

D **Landlord and tenant** – *tenant – statutory tenant – eviction – grounds for – "good and sufficient grounds" – landlord requiring premises for his own use – what landlord must show – tenant in breach of lease – failure to pay rent – amount of rent not agreed – requirement to pay fair rental – what constitutes "fair rental"*

Headnote

E Under ss 22 and 23 of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), when a lease expires by effluxion of time or in consequence of notice duly given by the lessor, a statutory tenancy is automatically created. The new relationship between the parties is subject to the same rights and duties and is governed by the same terms and conditions as applied under the contractual lease, except where these are inconsistent F with the Regulations. Thereafter, the statutory tenant is entitled to remain in the leased premises and cannot be evicted so long as he continues to pay the rent due, within seven days of the due date, and performs the other conditions G of the lease. The "rent due" is the fair rent fixed by the Commercial Rent Board or, in any other case, the rent due in terms of the lease.

An order for the eviction of a statutory tenant may only be granted where the lessor has good and sufficient grounds for requiring such order, other than that the lessee has declined to agree to an increase in rent or that the lessor wishes to lease the premises to some other person. What constitutes "good and sufficient grounds" for the eviction of a statutory H tenant is not susceptible of exhaustive definition, but it is settled law that

such grounds exist where the lessor genuinely requires the use of the A leased premises for the operation of a business. The landlord need do no more than assert his reasons in good faith and then bring some small measure of evidence to demonstrate the genuineness of his assertion; it then rests upon the lessee who resists ejectment to bring forward circumstances casting doubt on the genuineness of the landlord's claims. B Once the court is satisfied that the lessor wishes to use the premises for his own purpose, the reason that has actuated him to make that decision is irrelevant and has no bearing on his *bona fides*. Moreover, it is the position of the lessor that has to be considered and not that of the lessee or his needs or circumstances. The fact that the landlord is prepared to incur some loss in order to facilitate its own business operations does C not preclude the right to repossess its property, though it may cast doubt on the landlord's *bona fides*.

Even if the landlord is unable to show "good and sufficient grounds" for eviction of a statutory tenant, he is entitled to cancel the lease if there has been a breach of the lease agreement. Such a breach could include D failure to pay the rent on due date and sub-letting the premises where the agreement specifically prohibits a sub-lease.

Where the amount of rent payable has not been agreed upon by the parties, the lessee must pay that amount which it contends represents a fair rental. Failure to do so entitles the lessor to cancel the lease and repossess the tenanted premises by ejecting the lessee. Offering a derisory amount E which could not possibly represent a fair rental for the premises would not relieve the tenant of his obligations. The tenant's contention as to what represents a fair rental must be reasonably formed and defensible by some commercial criterion.

Cases referred to F

Air Zimbabwe (Pvt) Ltd v Springbrook Travel & Safari Tours (Pvt) Ltd HH-194-01

Boka Enterprises (Pvt) Ltd v Joowalay & Anor 1988 (1) ZLR 107 (S)

Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd 1986 (2) ZLR 246 (S) G

Chibanda v Hewlett 1991 (2) ZLR 211 (H)

Delco (Pvt) Ltd v Old Mutual Properties (Pvt) Ltd 1997 (2) ZLR 414 (S)

Kingston Ltd v LD Inesonj (Pvt) Ltd 2006 (1) ZLR 451 (S)

Mobil Oil Zimbabwe (Pvt) Ltd v Chisipite Svc Station (Pvt) Ltd 1991 (2) ZLR 82 (S)

Moffat Outfitters (Pvt) Ltd v Hoosein & Ors 1986 (2) ZLR 148 (S) H

Patel J

A *RK Footwear Mfrs (Pvt) Ltd v Boka Booksales (Pvt) Ltd* 1986 (2) ZLR 209 (H)

Supline Invstms (Pvt) Ltd v Forestry Co of Zimbabwe 2007 (2) ZLR 280 (H)

Legislation considered

B Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), ss 22 & 23

Case information

H Zhou, with him *R Moyo*, for the plaintiff

B Chidziva, for the first defendant

Judgment

C **PATEL J**: The plaintiff in this matter seeks an order for the eviction of the defendants from its premises on Arcturus Road, Harare, and for the payment of holding over damages in the sum of US$1575.35 per month as from 1 March 2009 to the date of ejectment. The issues for determination are as follows: (a) whether or not the plaintiff lawfully terminated the statutory D tenancy and is entitled to vacant possession of the premises; (b) whether or not the plaintiff is entitled to holding over damages as claimed or at all.

The second defendant is in default, having failed to note an appearance to defend. Consequently, Mr *Zhou* submits that judgment may be entered against him in favour of the plaintiff in terms of the summons and declaration. However, what the plaintiff seeks is the eviction of the first defendant and E all those claiming occupation through it, including the second defendant. Moreover, the plaintiff's claims for holding over damages and costs of suit are directed only as against the first defendant. In the event, it is not possible to enter judgment against the second defendant before the plaintiff's claims against the first defendant are fully canvassed and resolved.

F **The evidence**

Austin Zvidzai has been the plaintiff's finance director since September 2004. He testified that the plaintiff and the first defendant entered into a lease agreement in 1998. The premises in question are presently owned by Escallonia Investments (Pvt) Ltd, a property holding company that is a wholly owned G subsidiary of the plaintiff. The lease agreement was for an initial period of three years and continued for a further seven years, terminating on 31 May 2008. Prior to that date, on 30 November 2007, the plaintiff's agents (Seeff Properties) wrote to the first defendant stating that the plaintiff wanted to use the premises for itself and giving three months notice to vacate before 1

March 2009. The premises were required for the storage of plaintiff's H pre-paid construction materials. Over the past four years, these materials have

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2011 (1) ZLR p436

Patel J

been stored in other premises of similar size rented from Keiss Enterprises A at US$450 per month. The first defendant did not vacate the premises. In May and June 2008, the plaintiff rejected three payments of ZW$6 million each which were tendered by the first defendant as monthly rentals. The first defendant has not paid any rent since 6 August 2008, when it forwarded a cheque for ZW$1 as rental for 24 months from August 2008 to July 2010. B The plaintiff rejected the cheque through its lawyers by letter dated 21 August 2008. The premises have fallen into extensive disrepair as appears from two inspection reports prepared by the plaintiff's agents. The first defendant has also committed other breaches of its tenancy, contrary to the provisions of the lease agreement. These include: paying the rentals due out of time and in respect of a period varied unilaterally; subletting part of the premises to C the second defendant without the plaintiff's approval; subletting an illegal extension to the premises constructed without the plaintiff's consent or approval by the local authority. All of these breaches are confirmed in the correspondence between the parties from October 2006 to February 2008. Consequently, the plaintiff's lawyers wrote to the first defendant on 9 March 2010 cancelling the lease on the grounds of breach and referring to their D earlier notice to vacate. The plaintiff's claim for holding over damages of US$1575.35 per month is based on a rate of 35c per square metre. This rate reflects a rent that is either comparable to or less than the rentals paid by other tenants at the same address.

Under cross-examination, the witness accepted that the inspection reports E prepared by the plaintiff's agents in September 2007 and February 2008 were not counter-signed by the first defendant. He also admitted that the plaintiff did not at any stage give the first defendant 14 days' notice to rectify the alleged tenancy breaches (other than those relating to the payment of rent) as required by the lease agreement. He further conceded that earlier correspondence giving notice to vacate, from the plaintiff's agents to the F first defendant, did not make any mention of the plaintiff requiring the premises for its own use. He accepted that one of the reasons for seeking the first defendant's eviction was that the plaintiff was not receiving fair value for the premises.

Patience Munetsi joined Seeff Properties in February 2001 and is presently G its rent manager. She has managed the lease *in casu* since January 2007. Her evidence was that when she inspected the premises on two occasions in 2007, she was told by the second defendant and another individual that they were there as the first defendant's sub-tenants. She found that the portions occupied by these two sub-tenants were badly disrepaired. In November 2007, in order to regularise the occupation of the premises by the sub-tenants, she wrote H

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A two letters to the first defendant, proposing separate leases and rentals for all three occupants. She also noted the illegal structural extension and sought a response by the end of 23 November 2007. In the absence of any response from the first defendant by that deadline, she wrote the letter of 30 November 2007, giving three months' notice to vacate. The first defendant's application to the Commercial Rent Board, dated 27 November 2007, was not served B on the plaintiff's agents and they did not receive any notice of hearing from the Board. She accepted that previous notices to vacate were given to the first defendant because of disagreement over rentals. The dispute was not referred to arbitration because the plaintiff wanted to avoid litigation. On 24 January 2008, the first defendant wrote to the effect that it was negotiating C the outright sale of its business to the second defendant. The latter then wrote to the plaintiff on 22 February 2008 stating that the proposed sale did not materialise. His letter shows clearly that he was occupying the premises without the owner's consent. At the present time, he is not in occupation but his machinery is still *in situ*. The witness conceded that the inspection reports compiled in September 2007 and February 2008 were not confirmed D by the first defendant and that the latter was not called upon to rectify the listed defects in accordance with the lease agreement.

Brian Fraser is the first defendant's managing director. At the commencement of the lease, the first defendant and its sister company ran a furniture manufacturing and rug weaving business. His evidence was that the leased E premises were disrepaired and unutilised for about three years before the first defendant took occupation. The allegedly unauthorised extension is a brick

storeroom that formed part of the leased premises from the very outset. It was not built by the first defendant but by one of the plaintiff's subsidiary companies. He referred to the letters from the plaintiff's agents in January and February 2006, giving notice to vacate, which showed that the real F reason for the plaintiff seeking eviction was the first defendant's failure to agree to the higher rentals proposed by the plaintiff. He also confirmed the correspondence between the parties and their lawyers, from November 2007 to February 2008, revolving around the second notice to vacate given on 30 November 2007. Immediately before that notice, he had applied to the Commercial Rent Board for the determination of a fair rent. He did not serve G the letter of application on the plaintiff or its agents and he heard nothing further from the Board thereafter. He has never seen the inspection report, dated 26 February 2008, relating to the condition of the premises. In the ensuing correspondence in March 2008, his lawyers made it clear that the premises were not in good condition from the outset. As regards the timing H of rent payments, his cheque payment of ZW$6 million for May 2008 was

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rejected by the plaintiff's lawyers because it was made one day out of time. A He had attended the agents' offices to make payment the day before, but the offices were closed. In June and August 2008, he tendered two further cheque payments of ZW$6 million each and a third cheque payment of ZW$1 following the devaluation of the Zimbabwe dollar. All of these payments were also rejected. (He later conceded that his tender of ZW$1 was in hindsight B not fair or reasonable). On 9 March 2010, the plaintiff's lawyers wrote to the first defendant giving a third notice to vacate requiring the premises for the plaintiff's own usage and, alternatively, cancelling the lease agreement on the grounds of breach. They also wrote to the second defendant on the same date, but this letter was not copied to the first defendant. The day before the trial commenced, he visited the warehouse of Keiss Enterprises. He observed C that the total area of the warehouse was about 200 square metres and that the plaintiff was utilising approximately half of that storage space. With respect to the plaintiff's list of items stored at the warehouse as at 4 August 2009, the quantities actually there are considerably less than those listed. The first defendant is willing and prepared to store the plaintiff's materials in the spare storage capacity of about 400 square metres within the leased D premises. The area actually occupied by the first defendant is approximately 3000 square metres, not 4500 square metres as is averred by the plaintiff. As from August 2010, he offered a monthly rental of US$800 which was comparable to the rents paid by other tenants in the complex at that time. As appears from the correspondence between the parties' lawyers in September E 2010, this offer was rejected as having become academic after the issuance of summons in this case. At the present time, the amount of US$1 575 claimed by the plaintiff represents a fair rental. The first defendant is now prepared to pay US$800 per month from March 2009 to August 2010 and US$1 575 per month from September 2010 onwards.

Under cross-examination, the witness explained that the rug weaving business F was sold to some friends in June 2006 and that they continued to contribute 30 per cent of the monthly rent to the plaintiff. They later extended their business to pottery manufacturing. In 2007, they sold the rug weaving business to the second defendant and donated the pottery business to a former employee. Neither the latter nor the second defendant has paid any rent to the G first defendant or the plaintiff. The witness admitted that the plaintiff and its agents were not told about any of these occupants of the premises. As regards the two inspection reports compiled in September 2007 and February 2008, the first is broadly accurate while the second is only partially correct. He did not receive either report from the plaintiff's agents. Most of the defects listed in these reports were present from the outset of the lease. He did not H

Patel J

A notify the defects to the agents, despite the obligation to do so under the lease agreement, because of the excellent relationship between the parties.

Statutory tenancy

By virtue of ss 22 and 23 of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), when a lease expires by effluxion of time or in consequence B of notice duly given by the lessor, a statutory tenancy is automatically created by operation of law. The new relationship between the

parties is subject to the same rights and duties and is governed by the same terms and conditions as applied under the contractual lease, except where these are inconsistent with the Regulations. See *Chibanda* v *Hewlett* 1991 (2) ZLR 211 (H). Thereafter, the statutory tenant is entitled to remain in the leased C premises and cannot be evicted so long as he continues to pay the rent due, within seven days of the due date, and performs the other conditions of the lease. The rent due in this context is the fair rent fixed by the Commercial Rent Board or, in any other case, the rent due in terms of the lease. An order for the eviction of a statutory tenant may only be granted where the lessor has good and sufficient grounds for requiring such order, other than that the D lessee has declined to agree to an increase in rent or that the lessor wishes to lease the premises to some other person.

In the instant case, it is common cause that the contractual lease expired on 31 May 2008. It is also not in dispute that the first defendant became a statutory tenant after that date.

E **Good and sufficient grounds for eviction**

What constitutes good and sufficient grounds for the eviction of a statutory tenant is obviously not susceptible of exhaustive definition. Be that as it may, it is settled law that such grounds exist where the lessor genuinely requires the use of the leased premises for the operation of a business. See *Moffat Outfitters (Pvt) Ltd* v *Hoosein & Ors* 1986 (2) ZLR 148 (S) at 154; *Checkers* F *Motors (Pvt) Ltd* v *Karoi Farmtech (Pvt) Ltd* 1986 (2) ZLR 246 (S) at 250; *Boka Enterprises (Pvt) Ltd* v *Joowalay & Anor* 1988 (1) ZLR 107 (S) at 115; *Mobil Oil Zimbabwe (Pvt) Ltd* v *Chisipite Service Station (Pvt) Ltd* 1991 (2) ZLR 82 (S) at 88; *Delco (Pvt) Ltd* v *Old Mutual Properties (Pvt) Ltd* 1997 (2) ZLR 414 (S) at 417.

G In *Kingstons Ltd* v *LD Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 456-457, it was observed that:

> "Our courts have held that the landlord need do no more than assert his reasons in good faith and then bring some small measure of evidence to demonstrate the genuineness of his assertion and it rests upon the lessee who resists ejectment to bring forward circumstances casting doubt on the genuineness of the lessor's H claims …

Patel J

> … In determining what constitutes good and sufficient grounds, the court A makes a value judgment which, if arrived at without caprice, bias or the wrong application of principle, will not lightly be set aside on appeal."

A lessor seeking eviction must show good and sufficient grounds therefor as at the date of the hearing of the matter. See *RK Footwear Manufacturers (Pvt) Ltd* v *Boka Booksales (Pvt) Ltd* 1986 (2) ZLR 209 (H) at 213. Once the court B is satisfied that the lessor wishes to use the premises for his own purpose, the reason that has actuated the lessor to make that decision is irrelevant and has no bearing on his *bona fides*. Moreover, it is the position of the lessor that has to be considered and not that of the lessee or his needs or circumstances. See *Air Zimbabwe (Pvt) Ltd* v *Springbrook Travel & Safari Tours (Pvt) Ltd* HH-194-01 at p 3; the *Mobil Oil Zimbabwe* case, *supra*, at 92-93. C

Premises required for own use

One of the first defendant's contentions is that the notice to vacate given on 30 November 2007 was motivated by the first defendant's application for the determination of a fair rent, lodged with the Commercial Rent Board only three days before. While noting the coincidence of these events, I am D unable to accept this contention for the simple reason that the first defendant's application was never served upon or copied to the plaintiff or its agents.

What is more relevant, in my assessment, is the sequence and content of the correspondence between the parties from January 2006 to November 2007. In their letter of 31 January 2006, the plaintiff's agents called upon the first E defendant to vacate the premises "should you be unable to pay the required rental". The agents then wrote on 28 February 2006 stating that the plaintiff had declined the first defendant's offer of ZW$60 million per month and that "we have been instructed to serve you with notice to vacate on 31 March 2006". At that stage, the obvious reason for demanding vacant possession was the failure to compel the first defendant to agree to the increased rent F required by the plaintiff.

In their subsequent letter of 30 November 2007, the agents gave another notice to vacate, citing the plaintiff's wish to use the premises for itself as the reason for giving notice. However, from the correspondence between 15 and 22 November 2007, as well as the evidence of Patience Munetsi, G it appears that the real reason for giving notice was the first defendant's failure to respond to the plaintiff's proposal for three separate leases by the stipulated deadline of 23 November 2007.

The plaintiff's assertion is that it requires the premises *in casu* for the storage of construction materials which are presently being stored elsewhere in a rented warehouse. By so doing, it stands to lose commercially, in that it will forego H

Patel J

A a monthly income of US$1575 from the disputed premises, while avoiding an outlay of $450 per month for the rented warehouse space. In principle, this is not a factor that operates *per se* to negative the plaintiff's assertion. That the plaintiff is prepared to incur some loss in order to facilitate its own business operations does not preclude the right to repossess its property. It does, however, cast considerable doubt on the genuineness of the claim that B it requires the premises for its own use. This is particularly so, in light of the fact that the premises are presently owned by the plaintiff's subsidiary company, which is in the business of holding property and is presently letting the whole complex in which the premises are situated. This doubt is heightened by Brian Fraser's unchallenged evidence that the plaintiff's C materials at the warehouse occupy only about 100 square metres of storage space, as compared with the 3000 square metres or more occupied by the first defendant.

Having regard to the foregoing, it seems to me that it was the disagreement between the parties as to the appropriate fair rent and the alleged breaches of the lease agreement, rather than the plaintiff's desire to use the premises D for its own business purposes, that prompted the plaintiff to give various notices to vacate in January/February 2006, November 2007 and March 2010. I accordingly find that the stated reason for requiring the leased premises, having been demonstrated not to be genuine, does not constitute good and sufficient grounds for the eviction of the first defendant.

E **Breach of lease agreement (general)**

By their letter of 9 March 2010, the plaintiff's lawyers gave the first defendant a further three months' notice to vacate. In the alternative, they cancelled the lease on the basis of various breaches of the lease agreement, which I will now address and deal with.

F Clause 10.7 of the lease agreement precludes any additions or alterations to the premises without the lessor's prior written consent, while clause 12.4 prohibits the breach of any law in regard to the use of the premises. The plaintiff's contention is that the first defendant constructed an unauthorised structure without the plaintiff's consent or approval by the local authority. Brian Fraser's testimony was that the structure was in existence from the G beginning of the lease in 1998 and was bricked up soon after by the plaintiff's subsidiary company, acting under instruction from the plaintiff. This evidence could not be gainsaid by either of the plaintiff's witnesses who only became involved in the matter as from 2001 and 2004 respectively. In the event, I take the view that the plaintiff has failed to establish any breach of the lease H in this regard.

Patel J

In terms of clause 10.1 of the lease agreement, the premises were deemed to A be in good order and repair at the commencement of the lease, in the absence of any written notification of defects within 14 days of commencement. Thereafter, as required by clause 10.2 to 10.5, the lessee was obliged to keep the premises in the same good order and repair and to maintain and repair the interior of the premises as well as the water, sanitation and electrical B installations. According to the inspection reports compiled by the plaintiff's agents in September 2007 and February 2008, there were several material defects in the premises that had not been attended to. However, it is common cause that these reports were never counter-signed by or communicated to the first defendant. Moreover, there is the evidence of Brian Fraser, which evidence I am inclined to accept, that most of the defects listed in these C reports were present from the outset of the lease and that he elected not to notify the defects to the agents because of the excellent relationship between the

parties. It follows that, in my assessment, the plaintiff has again failed to establish any material breach in this respect.

Clause 12.6 of the lease agreement prohibits the lessee from sub-letting D the whole or any part of the premises without the prior written consent of the lessor. The evidence of Patience Munetsi, which is corroborated by the correspondence between the parties, clearly shows that parts of the leased premises were separately occupied by the second defendant and an unnamed third party. In his testimony, Brian Fraser did not dispute this, but explained how these parties came to occupy the premises and that neither of them E has paid any rent to the first defendant or the plaintiff. He admitted that the plaintiff and its agents were not told about these occupants. In any event, it is common cause that the plaintiff did not give its prior written or verbal consent to sub-let the premises. That being so, I find it difficult to accept Mr *Chidziva's* submission that, by proposing separate leases in order to regularise F the situation, the plaintiff tacitly accepted the unauthorised occupation of the premises. Nor am I able to comprehend his submission that no breach has been established in the absence of any formal sub-lease agreement between the defendants. What matters is that the first defendant sub-let separate portions of the leased premises, whether for rental consideration or otherwise, without the prior written consent of the plaintiff. This indisputable breach G of the explicit prohibition against sub-letting clearly entitled the plaintiff to cancel the lease in terms of the cancellation clause embodied in the lease agreement. In the absence of this contractual right to cancel, the plaintiff would have been entitled to cancel at common law because the breach in question is tantamount to a material breach of the lease. See Cooper *Landlord and Tenant* 2 ed at p 256. H

Patel J

A Turning to the lease agreement *in casu*, clause 16.1 stipulates the right to cancel the lease and repossess the premises in four different eventualities. Two of these are presently relevant, to wit:

- clause 16.1.1 – the non-payment of rent or any portion thereof on due date; and B
- clause 16.1.2 – the failure to rectify a breach of any condition of the lease within a period of 14 days of written notice having been given by the lessor to the lessee requiring such breach to be remedied.

It is common cause that the plaintiff did not give the requisite 14 days' notice requiring the first defendant to rectify any of the breaches giving rise to cancellation of the lease. In this regard, Mr *Zhou* seeks to draw a distinction C between the "terms" and the "conditions" of the lease agreement. He submits that the breaches alleged *in casu* pertain to terms and not conditions, and that clause 16.1.2 is confined to conditions and therefore does not apply to those breaches. I must confess that I find this proposition quite startling and entirely devoid of merit. I perceive no material distinction whatsoever between the D "terms" of the lease agreement, on the one hand, and its "conditions", on the other. In my view, in keeping with what has become customary usage in the drafting of commercial contracts generally, and lease agreements in particular, the two words do not bear any special distinctive signification and are used interchangeably to denote the respective rights and obligations conferred upon and assumed by the parties to such contracts.

E The only breach that is presently relevant, the other alleged breaches not having been established, is the first defendant's breach of the prohibition against sub-letting. In this regard, Mr *Zhou's* alternative submission is that the first defendant was notified of this breach in the letter from the plaintiff's agents dated 24 October 2006. As I read the contents of this letter, although it does F make reference to the first defendant's failure to inform the agents about the pottery company's occupation, it is very loosely and vaguely worded. It does not, in my view, constitute the requisite 14 days' written notice requiring the first defendant to remedy a specific breach, in conformity with clause 16.1.2 of the lease agreement. Given the drastic consequences of non-compliance G by the first defendant with any such notice, it was incumbent upon the plaintiff or its agents to adhere strictly to the provisions of clause 16.1.2, if it intended at any stage to invoke and rely upon the right to cancel the lease conferred by that clause. Moreover, assuming that the lease agreement was prepared and drafted by or on behalf of the plaintiff, it is apposite to construe its terms and conditions strictly as against the plaintiff. Such construction H accords with the so-called *contra proferentem* rule.

Patel J

To conclude on this aspect of the case, the plaintiff failed to give the requisite A 14 days' notice to the first defendant to rectify its breach of the prohibition against sub-letting. Consequently, the plaintiff did not at any stage accrue the right to cancel the lease conferred by clause 16.1 of the lease agreement.

Breach of lease agreement (rent payments)

As I have already stated, clause 16.1.1 of the lease agreement entitles the B lessor to cancel the lease and repossess the premises in the event of the non-payment of rent or any portion thereof on due date. In respect of this breach, the lessor is not obliged to give any written notice to the lessee to remedy the breach.

In May 2008, the first defendant paid its monthly rental one day beyond C the seven day time limit stipulated by s 22 of the Commercial Premises (Rent) Regulations 1983. By letter dated 15 May 2008, the first defendant was notified of this breach and the cheque tendered by it was rejected. Two further cheque payments made by the first defendant in June 2008 were also rejected for the same reason. In August 2008, the first defendant tendered a D cheque for ZW$1 purportedly covering rentals for the following 24 months. In March 2010, the plaintiff cancelled the lease on the grounds of breach and instituted the present action for eviction. Thereafter, in August and September 2010, the first defendant tendered monthly payments of US$800 as fair rental for the premises.

As regards the first default in May 2008, I am inclined to accept Brian Fraser's E unchallenged explanation of his attempt to pay the rent by due date at the agents' offices. On that basis, in the absence of any case authority to the contrary that I am aware of, I take the view that the first defendant was not in breach of its rental obligations and therefore did not lose the protection of its statutory tenancy at that stage. F

As for the payment of ZW$1 tendered as rentals for 24 months, Mr *Chidziva* persists with the position that this tender was valid and should have been accepted by the plaintiff. This contention is patently absurd for a variety of very compelling reasons, not least of them being the concession by Brian Fraser that in hindsight this tender of ZW$1 was neither fair nor reasonable. G The amount tendered was unquestionably derisory and could not possibly have represented a fair rental for the premises by any measure of value, mercantile or otherwise. The subsequent tender of US$800 per month, 24 months later, was premised on the contention that the intervening period had been duly accounted for by the payment of ZW$1 in August 2008. This contention was not only mischievous but also obviously fallacious. Moreover, H

Patel J

A the tender had been overtaken by events, in particular, the cancellation of the lease and the institution of this action six months before.

It is settled law that where the amount of rent payable has not been agreed upon by the parties, the lessee must pay that amount which it contends represents a fair rental. The lessee's failure to do so entitles the lessor to B cancel the lease and repossess the tenanted premises by ejecting the lessee. See *Supline Investments (Pvt) Ltd* v *Forestry Company. of Zimbabwe* 2007 (2) ZLR 280 (H) at 281, where it was held as follows:

> "A tenant has an undisputed obligation to pay rentals for property that he hires from the landlord. That is the *sine qua non* for his continued occupation of the leased property. He has no right to occupy the landlord's property save in return for C payment of rent. Where the tenant disputes the amount of the rentals chargeable for any premises, in my view, that challenge does not absolve the tenant from paying any rentals at all. The minimum that the tenant in such a situation must pay is the amount that it contends represents fair rentals for the premises. This the tenant must pay to avoid being ejected on the basis of non-payment of rentals even if its challenge to what constitutes fair rentals is subsequently validated. At D most, the tenant can pay the disputed amount and claim or be credited with the difference once its contentions as to what constitutes fair rentals are validated."

I would add to these principles the additional requirement that the lessee's contention as to what represents a fair rental must be reasonably formed and defensible by some commercial criterion. He cannot relieve himself of his obligation to pay fair rent by tendering some arbitrary and paltry sum entirely E incommensurate with the rentable market value of the leased premises.

It follows from the foregoing that, as from August 2008, the first defendant was in clear breach of its obligation to pay the monthly rent due and thereafter lost its entitlement to the benefits and protection of its statutory tenancy. Consequently, the plaintiff became fully entitled to cancel the lease on that F ground, as it did, and to seek the eviction of the first defendant and its sub-tenants from the leased premises.

Holding over damages

In principle, holding over damages should represent the market rental value of the property in question at the relevant time. See Cooper *op cit* at p 234.

G According to the uncontested testimony of Brian Fraser, the area occupied by the first defendant is *circa* 3000 square metres. Having regard to the size of the premises occupied by other tenants in the same complex and the comparative rents paid by them from March 2009 onwards, I see no reason for departing from the rental amounts proposed by the first defendant at the H end of the trial. In the absence of any expert evidence on the point from

an independent estate valuator, I take these amounts to approximate and A represent the fair market rental for the premises *in casu*.

Costs

By virtue of clause 16.2 of the lease agreement, any legal costs and expenses reasonably incurred by the lessor, consequent upon the lessee's default in the due payment of rent or any other amount owing to the lessor, are claimable B and recoverable by the lessor on an attorney and client scale. Given the first defendant's clear breach in paying the rent due as from August 2008, there can be no doubt that the plaintiff is entitled to its costs on a higher scale.

Disposition

In the result, the plaintiff is entitled to the relief that it seeks, subject to C the reduction of the holding over damages claimed up to August 2010. Additionally, inasmuch as the first defendant has been in occupation of the leased premises for almost 13 years, I deem it just and equitable that it be given some time to relocate and surrender the premises.

Accordingly, it is ordered that:

(a) The first defendant and all those claiming occupation through it, including D the second defendant, shall vacate the plaintiff's premises, being Lot 2, Manresa, Arcturus Road, Harare, on or before 31 May 2011, failing which the Deputy Sheriff be and is hereby authorised to evict the first defendant and all those claiming occupation through it, including the second defendant, from the said premises. E

(b) The first defendant shall pay the plaintiff holding over damages in the sum of US$800 per month from 1 March 2009 to 31 August 2010 and US$1575 per month from 1 September 2010 to the date of vacant possession of the said premises being given to the plaintiff, together with interest on those sums at the prescribed rate, calculated from the F due date to the date of payment in full.

(c) The first defendant shall pay the plaintiff's costs of suit on a legal practitioner and client scale.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners G

Kantor & Immerman, first defendant's legal practitioners

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KUFA & ANOR v THE PRESIDENT & ORS 2011 (1) ZLR 447 (H)

Citation	2011 (1) ZLR 447 (H)
Case No	Judgment No. HH-86-11
Court	High Court, Harare
Judge	Chiweshe JP
Heard	22 March 2011; 5 April 2011
Judgment	6 April 2011
Counsel	*D Ochieng*, for the applicants *L Uriri,* for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Schedule 8 – status of – integral part of Constitution and subject to normal rules of construction*

Constitutional law – *Constitution of Zimbabwe 1980 – Schedule 8 – Art 20.1.6(5) – provision limiting number of Ministers – appointment of* D *extra Ministers – whether such appointment should be set aside*

Constitutional law – *interpretation of Constitution – liberal and purposive approach to be taken – effect of order – general inconvenience or injustice resulting – order should not be granted*

Headnote

E The composition of the executive arm of Government is governed by Schedule 8 of the Constitution of Zimbabwe, the first paragraph of which provides that the provisions of the Schedule shall prevail notwithstanding any other provision to the contrary elsewhere in the Constitution. Article 20.1.6 (5) of the Schedule provides that there shall be 31 Ministers, 15 nominated by ZANU-PF, 13 by MDC–T and 3 by MDC-M. In spite of F that provision, the President, in consultation with the Prime Minister, appointed ten extra Ministers. The applicants sought an order declaring that the appointment of the extra Ministers was unconstitutional and therefore null and void.

At the hearing, counsel for the respondents raised *in limine* a point as to the G jurisdiction of the court to hear and determine a "political question". He argued that Schedule 8 was the product of a political settlement and susceptible to change through political conduct. The Schedule raises political rather legal issues and any dispute arising there from is a matter for Parliament to resolve. While conceding that Schedule 8 came about as a result of the Global Political Agreement, the applicants' counsel H contended that once the terms of a political settlement were incorporated

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into the Constitution, they became part of our law. They could no longer A be regarded as mere political issues – they became legal issues, the import of which the court had jurisdiction to determine.

On the merits, the respondents argued that the provisions of Schedule 8 must be interpreted broadly and not restrictively and that the provisions of Art 20.1.6(5) relating to the complement of Ministers are directory rather B than peremptory. The preamble to the Schedule acknowledges that the three parties have an obligation to establish a framework for working together in an inclusive government and that the formation of such a government will have to be approached with sensitivity, flexibility and willingness to compromise. Schedule 8 was an extra-ordinary provision in the Constitution, placed there purely for political expediency. It therefore C stood on an entirely different footing from the rest of the provisions of the Constitution.

The applicants argued that the provisions under consideration, being clear and unambiguous, should be given their literal meaning.

Held, that the Constitution lies at the very foundation of the country's legal D order. To suggest that any of its provisions are merely political matters would undermine the rule of law and negate the very foundation of a democratic society.

Held, further, that, the issue was whether, in fulfilling their constitutional obligations, the respondents exceeded the mandate given to them in terms of Schedule 8 to the Constitution by appointing more than 31 Ministers. E Schedule 8 is part of the Constitution by virtue of the Constitution of Zimbabwe Amendment (No. 19) Act and the normal rules of statutory interpretation must apply. Once a political matter is inserted into the Constitution, it becomes justiciable. However, any remedy that the court may impose must take into account any adverse implications of such remedy on the political order of the day. F

Held, further, that the trend in the construction of constitutional provisions is that the courts have increasingly moved away from the strict interpretation urged by the applicants in favour of a liberal and purposive approach. This is the preferred approach, both nationally and internationally. If the order that the applicants seek were to be granted, it would destabilize the G Government of National Unity and cause unnecessary confusion within the body politic and prejudice the public interest at large. That cannot be said to be consistent with the intention of the Legislature in enacting Schedule 8 to the Constitution. The stated intention of the Legislature was to create a Government of National Unity in which the three major political parties would be represented proportionately. It was intended that H

Chiweshe JP

A this Government should achieve the objectives set out in the preamble to Schedule 8 and in the manner and spirit envisaged therein.

Held, further, that the provisions of a statute which relate to a public duty seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, that is to say, as directory only. Where, as in the present case, it is sought to invalidate the B actions of such public officers and the consequences of doing so would result in serious general inconvenience or injustice, and, where such invalidation would not promote the essential aims of the Legislature, such an order as to invalidation should not be granted. The figures set out in Art 20.1.6(5) had not been outrageously exceeded, given the complexity C of Government administration, and the proportion of representation as among the three parties remained largely the same. An anomaly had admittedly arisen but that does not warrant the grant of the order sought. In any event, this was not an anomaly that the Legislature itself could not address in one way or another, given its wide powers.

Cases cited D

Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe 2003 (2) ZLR 236 (S)

Crawford & Ors v Borough of Eshowe & Anor 1956 (1) SA 147 (N)

Doctors for Life International v Speaker of National Assembly 2006 (6) SA 416 (CC) E

Government of the Republic of Namibia and Another v Cultura 2000 and Another 1994 (1) SA 407 (NmS)

King & Ors v Attorneys Fidelity Fund Board of Control & Anor 2006 (1) SA 474 (SCA)

R v National Insurance Commissioners [1972] AC 944

Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S)

F *United Democratic Movement v President of South Africa & Ors* 2003 (1) SA 495 (CC)

Sutter v Scheepers 1932 AD 165

Legislation considered

G Constitution of Zimbabwe, art 20.1.6 (5) of Schedule 8

Case information

D Ochieng, for the applicants

L Uriri, for the respondents

Judgment

CHIWESHE JP: In this opposed application the applicants seek an order in H the following terms:

Chiweshe JP

"IT IS ORDERED THAT: A

1. The purported appointments and entry into office as Ministers of:
   Saviour Kasukuwere
   Joseph Made
   Walter Muzembi
   Flora Bhuka
   Sylvester Nguni B
   Henry Madzorera
   Giles Mutsekwa
   and
   Sekai Holland
   are hereby declared to be null and void.

ALTERNATIVELY C

1. Firstrespondent and second respondent be and are hereby directed, within seven days of the date of service of this order upon them, to prevent more than 15 ZANU PF nominees, 13 MDC-T nominees and 3 MDC M nominees from purporting to act and carry out the functions of Ministers so that the Ministerial complement of Government does not exceed 31 persons.
2. The first and second respondents are hereby ordered to publish in the D Government Gazette a list of Government Ministers in the number and manner required under the Constitution of Zimbabwe.
3. Only persons included in such list shall be entitled to receipt of any emoluments or entitlements as would accrue to a Minister from the Government or carry out the functions of a Government Minister.
4. It is hereby declared that there shall not be appointed any number of Ministers E above those catered for in terms of the Constitution of Zimbabwe.
5. The first respondent and second respondent shall pay the costs of this application."

The facts giving rise to this application are common cause. The composition of the executive arm of Government is governed by Schedule 8 of the Constitution of Zimbabwe. The first paragraph of that Schedule provides F that the provisions of Schedule 8 shall prevail notwithstanding any other provision to the contrary elsewhere in the Constitution. Article 20.1.6 (5) of Schedule 8 to the Constitution provides as follows:

> "There shall be thirty one (31) Ministers with fifteen (15) nominated by ZANU PF, thirteen (13) by MDC-T and three (3) by MDC-M."

During the month of February 2009 the first respondent, acting in consultation with the second respondent, appointed a total of 41 Government Ministers. All the 41 appointees duly took and subscribed before the first respondent, the oaths of office and loyalty prescribed for Ministers. This number exceeds by 10 the 31 Ministers provided for in terms of Art 20.1. 6 (5) of Schedule 8 to the Constitution. The third to the tenth respondents were all appointed H

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A after the 3first appointee. Their appointments were thus made in excess of the 31 Ministers provided for in terms of Schedule 8 to the Constitution. For that reason, the applicants aver that their appointments were unconstitutional and therefore null and void.

At the hearing of this application Mr *Uriri* (for the respondents) raised a B point *in limine* as to the jurisdiction of the court to hear and determine what he referred to as a political question. He argued that Amendment Number 19 to the Constitution, which inserted Schedule 8, was driven by Parliament's intention to give effect to the Global Political Agreement (GPA) entered into by the three major political parties, namely, ZANU PF, MDC-T and MDC-M. In doing so, Parliament was alive to the fact that the political C settlement would not remain static – it could change from time to time. It was for this reason that the provisions of Schedule 8 were not inserted under s 31 of the Constitution which would ordinarily deal with the executive structures of Government. He further argued that Schedule 8 heralds itself as a "Framework for a New Government". Article 20 thereof introduces the provisions of the GPA in order to give that agreement the force of law. D Schedule 8 is thus the product of a political settlement and susceptible to change through political conduct. Schedule 8, according to Mr *Uriri*, raises political rather legal issues. For that reason, any dispute arising therefrom is a matter for Parliament to resolve. The courts have no jurisdiction to hear and determine such dispute.

E Mr *Ochieng* (for the applicants) argued to the contrary. While conceding that Schedule 8 came about as a result of the Global Political Agreement, he contended, to my satisfaction, that once the terms of a political settlement are incorporated into the Constitution, they become part of our law. They can no longer be regarded as mere political issues – they become legal issues the import of which this court has jurisdiction to determine. This court has F full original civil jurisdiction over all persons and over all civil matters in Zimbabwe: s 13 of the High Court Act [*Chapter 7.06*]. I agree with the applicants when they state that the Constitution lies at the very foundation of the country's legal order. To suggest that any of its provisions are merely a political matter would undermine the rule of law and negate the very foundation of a democratic society. In support of this unusual proposition, Mr G *Uriri* cited the following cases: *King & Ors* v *Attorneys Fidelity Fund Board of Control & Anor* 2006 (1) SA 474 (SCA); *Doctors for Life International* v *Speaker of National Assembly* 2006 (6) SA 416 (CC); *United Democratic Movement* v *President of South Africa & Ors* 2003 (1) SA 495 (CC).

However, these cases are distinguishable from the present application and H in some respects, support the contention by the applicants that this court's

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jurisdiction is unassailable. In the *King* case *supra,* the issue was whether A the South African National Assembly had failed to fulfil its constitutional obligation to facilitate public participation in the legislative process. In the present application, the issue is not whether the first and second respondents have failed to fulfill their constitutional obligations; rather, the issue is whether in fulfilling that obligation, they have exceeded the mandate given B to them in terms of Schedule 8 to the Constitution by appointing more than 31 Ministers.

In the *United Democratic Movement* case *supra,* what the court dealt with at p 506 and identified as a "political question" was not the provisions of the disputed legislation themselves but the debate as to the merits of those provisions. That clearly would not be the concern of any court. The "merits C and demerits" are matters for Parliament to deal with during the legislative process. In this application the merits or demerits of the provisions of Schedule 8 to the Constitution are not in issue. It is the interpretation of those provisions which is at stake. Clearly again the distinction is obvious. The respondents have not established any basis upon which the jurisdiction of D this court is ousted. It was for this reason that I decided the point *in limine* in favour of the applicants.

On the merits, the applicants appear to have established a *prima facie* case for the grant of the order they seek, assuming a literal construction of the relevant provision is adopted. I agree with the applicants that Schedule 8 is E part of the Constitution by virtue of the Constitution of Zimbabwe Amendment (No. 19). I also agree that the dispute resolution mechanism in the political agreement (GPA) entered into by the three major political parties is not applicable in resolving disputes arising

out of the provisions of Schedule 8 to the Constitution. The normal rules of statutory interpretation must apply.

The respondents have, however, argued that the provisions of Schedule 8 F must be interpreted broadly and not restrictively. The respondents contend that the provisions of Art 20.1.6(5) relating to the complement of Ministers are directory rather than peremptory. It is argued that the preamble to Schedule 8 is instructive in the interpretation of the provisions of sub-para 5. The Schedule is entitled "Framework for a new Government". The G preamble acknowledges that the three parties have an obligation to establish a framework for working together in an inclusive government and that the formation of such a government will have to be approached with sensitivity, flexibility and willingness to compromise. The preamble also indicates the parties' commitment to carry the hopes and aspiration of "the millions of our people" and the parties' determination to work for conditions for "returning H

A our country to stability and prosperity". It acknowledges the need for gender equality and the appointment of women to strategic cabinet positions.

The respondents argue, and I agree, that the objectives and values set out in this preamble represent the objective for which Schedule 8 was inserted into the Constitution, and the reason why Schedule 8 was given primacy over the rest of the provisions of the Constitution. The Schedule therefore B represents part of the broader political agreement among the three political parties. Schedule 8 therefore, it is argued, is an extra-ordinary provision in the Constitution placed there purely for political expediency. It therefore stands on an entirely different footing from the rest of the provisions of the Constitution. It is then averred by the respondent that "a court of law having C established that a particular issue before it is of a purely political nature, notwithstanding its inclusion in the Constitution, the court should refuse to involve itself by prescribing a remedy for it". Reference is then made to the "political question" doctrine which admittedly, whilst recognized in the United States, has not been recognized in this jurisdiction. It is further argued that this principle of interpretation should be followed by our courts, D particularly when any intervention on the usual grounds of unconstitutionality may lead to instability within the political establishment and the citizenry, thereby defeating the whole purpose for which the Government of National Unity was established. As already alluded to earlier, I do not agree with the respondents in this regard. I am of the view that once a political matter is E inserted into the Constitution, it becomes justiciable. However, any remedy that the court may impose must take into account any adverse implications of such remedy on the political order of the day.

The respondents further propose that in interpreting the provisions of the Constitution, the principle of purposive interpretation of statutes should be taken into account. In terms of that principle, interpretation is not dependent F entirely on the literal meaning of the words used in a statutory provision. One must look beyond the manifested intention in order to give full effect to the intention of the Legislature. In this case the purpose of the provision in question was the establishment of a new Government on the basis of "flexibility, compromise and sensitivity" in line with the spirit underlying G the GPA. G E Devenish *Interpretation of Statutes* at p 36 is quoted thus:

> "An authentic purposive approach … endeavours to interpret a provision of a statute in accordance with the purpose or ratio under all circumstances regardless of whether there is ambiguity or not".

The contention of lack of ambiguity by the applicants, argue the respondents, is thus at variance with this approach and should therefore be rejected. The H purpose of the enactment takes precedence over ambiguity or lack of it. For

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these reasons, taking into account the purpose for which Schedule 8 was A inserted into the Constitution and the need for first respondent to appoint more than 31 Ministers as the practical means of achieving that purpose, the provision in question should be interpreted as directory rather than peremptory. For this proposition, the respondents have relied on *R* v *National Insurance Commissioners* [1972] AC 944 where, at 1005D to E, it was stated that there B should be "… a purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them." The respondents also relied on

Crawford & Ors v *Borough of Eshowe & Anor* 1956 (1) SA 147 (N) wherein it was stated at p 157H as follows:

> "No universal rule can be laid down for the construction of statutes as to whether C mandatory enactment should be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the courts of justice to try to get to the real intention of the Legislature by carefully attending to the whole scope of the statute concerned to be construed".

Further, in the same case, it is observed that "Provisions of a statute which relate to the performance of a public duty seem to be generally understood D as mere instructions for the guidance and government of those on whom the duty is imposed, that is to say directory only, where the invalidation of actions done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and where invalidation would not promote the essential aims of the E Legislature". The respondents also relied on the Namibian case of *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 487 (NmS) wherein at 418F it was observed that:

> "A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to continue F to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government."

In *Capital Radio Pvt Ltd* v *Broadcasting Authority of Zimbabwe* 2003 (2) ZLR 236 (S) at 247B-D Chidyausiku CJ made similar pronouncements as follows: G

> "However, there is another different approach to constitutional interpretation. This approach is supported by a long line of cases both nationally and internationally. In this approach a constitution is considered a document that is *sui generis* requiring special guidelines of interpretation. These guidelines or principles include:
>
> 1. the constitution must be interpreted as a living instrument; H

Chiweshe JP A

> 2. the constitution must be given a generous and purposive construction;
> 3. the constitution must be construed as a whole;
> 4. the spirit of the constitution, as reflected in the preamble and, national objective and directive principles of State policy, is to guide interpretation by the court; B
> 5. ratified treaties should provide a legitimate guide in interpreting constitutional provisions".

In *Rattigan & Ors* v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S) at 57F-H Gubbay CJ said:

> "This court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and C protections. What is to be avoided is the imparting as narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution, and best carries out its objects and promotes its purpose."

Traditionally, our courts have been guided by the decision in *Sutter* v *Scheepers* 1932 AD 165, wherein the following rules of interpretation were suggested:

> "(1) The word 'shall' when used in a statute is rather to be considered as D peremptory, unless there are other circumstances which negative this construction.
>
> (2) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.
>
> (3) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour E of an intention to make the provision only directory.
>
> (4) If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory. F
>
> (5) The history of the legislation also will afford a clue in some cases".

The applicants have argued that the provisions under consideration, being clear and unambiguous, be given their literal meaning. But it is clear to me that the trend in the construction of constitutional provisions is that the courts have increasingly moved away from the strict interpretation urged by the C applicants in favour of a liberal approach. Indeed the Supreme Court

in the *Capital Radio* case *supra,* has confirmed that this is the preferred approach nationally and internationally. I agree with the respondents' analogy in applying the rules set out in the *Sutter* case *supra* to the present case. They state at p 29 of their heads of argument as follows:

> "… it is evident that article 20.1.6 (5) is not couched in the negative form, and the H presumption, following the observations attributed to Maxwell above in relation

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Chiweshe JP

> to the performance of a public duty, should be that the provisions of the article A should be construed as being merely directory rather than peremptory. Further argument in favour of the article being directory exists in that it is couched in positive language and there is no sanction added in case the requisites are not carried out. There is also no explicit statement that if the numbers mentioned therein are not adhered to or complied with then any contrary act is to be void".

In addition to the guidelines in the *Sutter* case *supra*, I have already indicated B that our courts, nationally and internationally, have embraced a further doctrine in the construction of constitutional provisions – the doctrine of purposive interpretation. I am satisfied that it is primarily this doctrine, encompassing a liberal and broad approach to interpretation rather than the narrow and strict approach, that should guide the court in its determination C of the present matter. There is nothing in the Interpretation Act [*Chapter 1:01*] that precludes the court from proceeding accordingly.

If the order that the applicants seek were to be granted, it would destabilize the Government of National Unity and cause unnecessary confusion within the body politic and prejudice the public interest at large. That cannot be said D to be consistent with the intention of the Legislature in enacting Schedule 8 to the Constitution. The stated intention of the Legislature was to create a Government of National Unity in which the three major political parties would be represented proportionately. It was intended that this Government achieves the objectives set out in the preamble to Schedule 8 and in the manner and spirit envisaged therein. E

In the *Crawford* case *supra* it was observed that "the provisions of a statute which relate to a public duty seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, that is to say as directory only …" The point is also made therein that where, as in the present case, it is sought to invalidate the actions of F such public officers and the consequences of doing so would result in serious general inconvenience or injustice, and, where such invalidation would not promote the essential aims of the Legislature, such an order as to invalidation should not be granted.

In any event, the figures envisaged under Art 20.1.6(5) have not been G outrageously exceeded given the complexity of Government administration. Further, the proportion of representation as among the three parties remains largely the same. An anomaly has admittedly arisen but, in my view, that anomaly does not warrant the grant of the order sought. In any event, this is not an anomaly that the Legislature itself cannot address in one way or another, given its wide powers. H

Chiweshe JP

A Finally, I agree with the respondents that because this application raises an important legal issue of great public interest, there should be no order made as to costs.

For these reasons I order as follows:

1. That the application be and is hereby dismissed in its entirety. B
2. That there be no order as to costs.

Coghlan Welsh & Guest, applicants' legal practitioners

C *Attorney-General's Office,* respondents' legal practitioners

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FILON & ANOR v SIBANDA & ORS 2011 (1) ZLR 458 (H)

Citation	2011 (1) ZLR 458 (H)
Case No	Judgment No. HH-89-11
Court	High Court, Harare
Judge	Patel J
Heard	16 November 2010; 17 November 2010; 18 November 2010; 18 January 2011
Judgment	3 May 2011
Counsel	First plaintiff, in person, for the plaintiffs *M Mandikumba,* for the first, second and third defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Administration of estates – *estate administrator or non-testamentary executor – appointment – requirements – must have valid practising certificate issued under Estate Administrators Act [Chapter 27:20] – work done by assistant in company in partnership – must be done under direction of principal who is himself registered under Act* D

Wills – *validity – will not complying with formalities prescribed by Wills Act [Chapter 6:06] – when Master may accept document as a will – Master entitled to accept will if satisfied that it was drafted by deceased and intended to be his will – procedure when Master's acceptance found to be unreasonable* E

Headnote

Section 26(1) of the Estate Administrators Act [*Chapter 27:20*] prohibits any person registered under s 23 from performing, for gain, the work of an estate administrator or soliciting appointment as the a non-testamentary executor of a deceased estate, except in accordance with the terms and conditions of a valid practising certificate issued in terms of s F 28. A company or partnership may carry on the business of an estate administrator under certain specified conditions relating to the direct control and management of a principal who is, *inter alia*, a registered person. However, even in this situation, in every premises where any such business is not done personally by the principal, it must be done G under the direction of that principal by an assistant who is himself a registered person. Non-compliance therewith renders null and void any work done or appointment made pursuant to such conduct.

In a dispute concerning the registration of a will of the deceased, M, who died on 10 September 2001, the primary issue for determination was whether the will was, in fact, ever executed by M. The secondary H

A issue was whether the appointment of the third defendant as executor thereof, should be set aside. The evidence established that at the time of his death M owned three pieces of immoveable property. In 2005, at a family gathering, S, who was a friend of the deceased,

presented a document to the attending family members. The defendants contended that this was M's will, executed by him prior to his death. However, in B an affidavit deposed to by S, and admitted in evidence by the court in terms of r 408 of the High Court Rules, 1971, he denied this. S averred that the document, when he saw it, was unsigned and had been handed to him by the second defendant so as to be read out at the meeting. S had never claimed that it was M's will, nor had M ever mentioned the C existence of a will to him.

Some years later, on 11 November 2009, and on one day's notice, the Acting Deputy Master convened a meeting of all interested parties. It was attended by the first plaintiff. Despite her protests, she was informed that the document, which defendants claimed was M's will, had been accepted as such by the Acting Deputy Master. He appointed the third D defendant as the executor of M's estate and thereafter gave authority for the sale of one of the three pieces of the immoveable property. Thereafter, on perusing the estate file the first plaintiff discovered what purported to be a second will executed by M, complete with what purported to be his signature and bearing the same date as that which S had read out at E the family gathering in 2005. One of the "will" was more detailed than the other and were not, in content, identical. Further, the "will" which had been accepted by the Acting Deputy Master contained a nonsensical provision in relation to M's wife who had already died before the "will" was supposedly executed. The plaintiff, *inter alia,* sought an order setting aside the will as well as the appointment of the third defendant as executor F of M's estate. While the Acting Deputy Master did not contest the relief sought but elected to abide by the decision of the court, the other three defendants opposed it. It was argued upon their behalf that s 8(5) of the Wills Act [*Chapter 6:06*] created a rebuttable presumption in favour of the validity of any document purporting to be a will which is presented to the Master. In so far as the secondary issue was concerned, pertaining G to third defendant's appointment as executor, the defendants conceded that if the will was found to be invalid, then everything consequent thereon would be a nullity. Also, it was common cause that the third defendant was not in attendance at the Master's office at the time of his appointment. He was represented by a junior employee who was neither H a legal practitioner nor an executor. This, the defendants conceded, was

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procedurally irregular. Further, certain of the mandatory provisions of A the Estates Administrators Act [*Chapter 27:20*] were flouted by the Acting Deputy Master.

Held, that the interpretation placed on s 8(5) of the Will Act by the defendants could not be upheld. The correct interpretation of that section is that a will, which is complete and regular on the face of it, is presumed B to be valid unless the contrary is shown. A will that is incomplete or irregular is presumed to be invalid unless it is covered by one of the statutory exceptions. In terms of the exception provided by s 8(5) of the Act, a will that does not comply with all the prescribed formalities may be accepted as a will by the Master, but only if he satisfied that the document was drafted or executed by the deceased and that it was C intended to be his will.

Held, further, that given the glaring anomalies surrounding the two "wills" and in the light of the protests of the first plaintiff at the meeting on 11 November 2009, the Acting Deputy Master could not reasonably have accepted the document, which the defendants claimed to be a will , as M's will. He misdirected himself in so doing. D

Held, further, that neither will could be accepted as such and that M must be declared to have died intestate.

Held, further, that the appointment of the third defendant as the executor of M's estate was invalid and constituted a nullity. E

Cases cited

Davis v Davis (1894) 11 SC 253

Electrical & Furniture Trading Co (Pvt) Ltd v M & N Technical Svcs (Zimbabwe) (Pvt) Ltd 1988 (2) ZLR 265 (H)

Janda v Janda 1995 (1) ZLR 375 (S) F

Legislation considered

Administration of Estates Act [*Chapter 6:01*], ss 5 (1), 5(3a), 8(1) and 8(7)

Estate Administrators Act [*Chapter 27:20*], ss 26, 61, 61(1), 61(6) and 62(1).

High Court Rules, 1971 (RGN 1047 of 1971), r 408

Wills Act [*Chapter 6:06*], ss 8(1) and 8(5)

Case information

First plaintiff, in person, for the plaintiffs

M Mandikumba, for the first, second and third defendants

Patel J

Judgment

PATEL J: The dispute in this case revolves around the fourth defendant's registration of the will of one Martin Philip Motsi, who died on 10 September 2002, and the subsequent appointment of the third defendant as the executor of Motsi's estate. The principal assets of the estate consist of three immovable properties. Apart from the third and fourth defendants, the parties are related to one another.

The primary issue for determination is whether the will was in fact executed by the deceased and whether the Master erred in accepting that will. The secondary issue is whether or not the third defendant's appointment as executor should be set aside.

It is admitted by the defendants, firstly, that the third defendant was not in attendance at the meeting where he was appointed and, secondly, that his representative at that meeting was not a legal practitioner or executor. Nevertheless, they assert that this appointment as executor was not invalid.

The evidence

Rachel Filon (the first plaintiff) testified as follows. In 2005, at a family gathering in Bulawayo, an unsigned will of the deceased was produced by his friend, one Ginson Sibanda. The authenticity of the will was challenged by the plaintiffs and several others present at the gathering. Many years later, the plaintiffs were invited, on one day's notice, to a meeting at the Master's Office held on 11 November 2009. At the meeting, she raised various objections to the will that had been accepted by the Master on 6 November 2009 [Exhibit 1]. The signature of the testator was not the deceased's and the document was incomplete in certain material respects. The Master's official disregarded these objections and proceeded to appoint the third defendant as executor of the deceased estate, even though he was not present at the meeting [Exhibit 2]. The letters of administration were issued on 13 November 2009 [Exhibit 3]. The Master's authority to sell one of the estate assets, a property in Highfield, was granted on 19 November 2009 [Exhibit 4]. On 2 November 2009, even before the meeting was convened, the Master had given his consent to transfer that property [Exhibit 5]. Later, when she perused the estate file, she found the following documents: a second will with the same date and signatures [Exhibit 6]; an affidavit, dated 7 July 2005, by the second defendant purporting to distribute the assets of the estate as heir at customary law [Exhibit 7]; a death notice, filed by the third defendant on 22 September 2002, stating that the deceased had left a will [Exhibit 8]; an inventory of assets filed by the third defendant on 22 September 2009 [Exhibit 9]. She produced various letters and cards signed by the deceased [Exhibit 10] with signatures that differed from those on the two wills. In February

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Patel J

2010, she sought and obtained an urgent interdict against any disposal of the estate properties by the third defendant, pending the finalisation of this case. The Master's report of 15 February 2010 was filed in relation to that matter [Exhibit 11].

Sheila Motsi and Martha Motsi confirmed that Ginson Sibanda produced and read out a will at the family gathering in 2005. The will was typed but not signed and was different from Exhibits 1 and 6. In terms of this will, the immovable properties of the deceased were bequeathed to the first and second defendants.

Gloria Motsi (the second plaintiff) confirmed the preceding evidence as to the events in Bulawayo in 2005. The will produced was typed but not signed C by the deceased or anyone else. It was not the same as Exhibit 1 or Exhibit 6. She corroborated the first plaintiff's evidence as to what transpired at the meeting in November 2009. She also identified the signatures in Exhibit 10 as belonging to the deceased. The signatures on Exhibits 1 and 6 were not the deceased's.

Margaret Sibanda (the first defendant) testified as follows. At the 2005 D gathering in Bulawayo, Ginson Sibanda said that he had been given a will by the deceased and that the latter had signed it. The will was read out by one of her sons. The three immovable properties in Bulawayo and Harare were bequeathed to her and the second defendant. She was not shown or given the will to look at. A week after the gathering, in July 2005, the second E defendant sent Exhibits 1 and 6 to her by post because he was returning to the United Kingdom. She identified the signatures on Exhibits 1 and 6 as well as Exhibit 10 as those of the deceased. In 2009, she took steps to register the deceased estate and handed the relevant papers to the third defendant. She could not explain why Ginson Sibanda did not produce the will at the deceased's funeral in 2002. Nor could she explain why the deceased signed F two separate wills on the same date, *i.e.* 22 April 2002. No will of the deceased was ever brought to her attention between his death in September 2002 and the Bulawayo gathering in July 2005.

Ega Motsi is the deceased's grandson. His evidence related to the family gathering in 2005. At that time, Ginson Sibanda said that the deceased had G left the will with him to sign as a witness, but that the deceased died before he got around to signing it. The will had been signed by the deceased and one witness and was displayed to all present to look at. He maintained that what was produced by Sibanda was Exhibit 6 and not Exhibit 1. He could not recall the contents of the will and did not know how it was dealt with thereafter. H

Patel J

A Peter Sameke worked with the deceased from 1972 to 1992 and was his good friend. He stated that he knew the first defendant to be the deceased's daughter but only met her at the trial. His evidence was that the deceased signed both Exhibits 1 and 6 in his presence. At the same time, he affixed his signature as a witness to both documents and inserted the dates thereon. The deceased said that he would get the second witness, who would have B been Ginson Sibanda, to sign later that day. He could not explain why the deceased would have executed two separate wills at the same time.

Christopher Chigwanda (the third defendant) is a legal practitioner and administrator of deceased estates. In September 2009, he was instructed by the first defendant to administer the Motsi estate. She brought various C papers, including the two wills [Exhibits 1 and 6]. He submitted both wills to the Master's Office. (The statement at paragraph 6 of the Plea, which was prepared by his firm and in which it was denied that he registered the wills, was incorrect). He also filed the death notice [Exhibit 8] together with the inventory [Exhibit 9] on 22 September 2009. (The date on the death notice was incorrectly recorded as 22 September 2002). Rodwell Muparutsa attended D the meeting on 11 November 2009, representing the firm, and signed the acceptance of executor's office [Exhibit 2] on behalf of the witness. He admitted that this acceptance should have been subscribed to by himself. He could not explain why the Master's consent to transfer [Exhibit 5] predated his appointment as executor. He was also unable to explain why he registered E the estate on 22 September 2009 but only filed the two wills on 6 November 2011, or why he filed both wills instead of one. He conceded that there could only be one last will and testament in respect of any testator.

Eldard Mutasa has been the Acting Deputy Master since 2006. He testified that, as a matter of practice, juniors in a legal firm are allowed to represent their seniors and to sign acceptances of office on their behalf. He accepted that F this was not strictly in accordance with the wording of the subscribing clause in the relevant form [MHC 15]. Moreover, the practice was also contrary to s 26 of the Estate Administrators Act [*Chapter 27:20*] which requires that any person accepting such office must be a registered person with a valid practising certificate. As regards the two wills, he registered Exhibit 1 as G opposed to Exhibit 6 because the former was more detailed and covered all of the deceased's assets. Even though it did not comply with the requisite formalities, he accepted it as the deceased's last will, in conformity with section 8(5) of the Wills Act [*Chapter 6:06*]. As stated in his report [Exhibit 11], the Master's consent to transfer [Exhibit 5], which predates the letters of administration [Exhibit 3], was erroneously date-stamped by a member of his H staff. The consent to transfer should have been granted after or concurrently

Patel J

with the authority to sell [Exhibit 4] which the witness himself had granted A on 19 November 2009. He accepted that the death notice [Exhibit 8] clearly shows that the deceased was a widower and had left a will. However, he was unable to explain the anomalous provision in the registered will in favour of the deceased's wife. He also conceded that it was unusual to have two last wills signed by a testator on the same date. B

The final witness, Ginson Sibanda, presently resides in Bulawayo. He was unable to attend court in order to testify in person due to his advanced age and extremely poor health, as is evidenced by a medical report dated 17 November 2010 [Exhibit 12A]. He was accordingly directed, through his lawyers, to depose to a sworn affidavit duly authenticated by a notary public. His affidavit dated 10 February 2011 [Exhibit 12B] swears/declares C the following:

> "That sometime after the death of my friend Mr Martin Motsi, his son, Runyararo Motsi came to my house with a typed document which he said he had found amongst his late father's belongings. He asked me to read the document at a special meeting where his late father's clothes would be distributed. I read the document in the presence of my friend's family members including his three D sisters and children. Everyone present saw the document, touched the document and read for themselves and noted that it was not signed. Everyone present accepted the contents of the document in which my friend Martin Motsi was leaving his estate to his son, Runyararo. I never said the document was a will, and my friend Mr Motsi never mentioned a will to me. There was no other document produced at that meeting while I was there. E
>
> I have no interest in this Estate."

Assessment of witnesses

As regards the Bulawayo gathering in 2005, the evidence of the plaintiffs and their witnesses was clear and consistent on the crucial question as to what was produced by Sibanda at that time. It was that the document presented F was typed and unsigned by the deceased or by anyone else. In contrast, the defendants' evidence on this point is far from being clear. What the first defendant stated in court, that only one will was produced by Sibanda, is flatly contradicted by her statements at paras 5 and 6 of her opposing affidavit (filed on 4 December 2009) in which she refers to "will" having been produced. Again, at para 12 of the same affidavit, she states that "the wills G were exhibited to us duly signed and witnessed by one person". However, her evidence in court was that Sibanda did not display the will or pass it around and she was not shown or given the will to look at. She would, therefore, not have been in a position to say whether or not it was signed. The only other defence witness present at the gathering was Ega Motsi. When asked to identify the document that he saw, he insisted that what was produced by H

Patel J

A Sibanda and what he looked at was Exhibit 6 and not Exhibit 1. It follows that there is no evidence before the court by any witness to the effect that Exhibit 1, the signed and registered will, was produced by Sibanda at the Bulawayo gathering in 2005.

There is then the evidence of Peter Sameke, who signed as the sole witness to Exhibits 1 and 6 and who was identified by the defendants as a witness B shortly before the trial. His evidence was that he attended the burial of the deceased's wife, but that he could not recall where that burial took place. What is even more curious is that he claimed not to have met the first defendant until the date of the trial. This is surely not possible if he had indeed attended the burial, where he would undoubtedly have met the deceased's daughters, C including the first defendant. It is also incomprehensible that the defendants did not take steps to identify the sole witness to the two wills at a much earlier stage, *i.e.* soon after the contentious family gathering in 2005, rather than have him "discovered" only after the wills were filed with the Master. More significantly, his explanations as to why he inserted the dates for the other signatories to Exhibits 1 and 6 are quite implausible. The documentary D evidence shows that the deceased would have dated his own signature. As for the second witness, it does not make any practical sense to insert the date of signature for a witness who was not even present at the time.

Turning to Ginson Sibanda, it is common cause that he attended the Bulawayo gathering in 2005 and that he presented a document to the family members E at that time. His affidavit discloses the

following salient facts: the typed and unsigned document was given to him by the second defendant to be read out at the gathering; he duly complied and then handed the document over; it was seen and handled by all present, who also noted that it was not signed; he never said that it was a will and the deceased never mentioned any will to him; no other document was produced at the meeting while he was there.

F Counsel for the defendants challenges the admissibility of Sibanda's affidavit as not having been recorded in terms of the Rules of this Court. I find this submission difficult to understand, having regard to the wide discretion conferred by r 408 and given the reasons for which the affidavit was authorised. This rule provides that the court may at any time for sufficient G reasons and on such conditions as it thinks reasonable, *inter alia*, order that any particular fact or facts be proved by affidavit, or that the affidavit of any witness be read at the hearing or trial. This discretion is subject to the proviso that where the other party *bona fide* desires the production of a witness for cross-examination, and where such witness can be produced, an order shall not be made for the evidence of such witness to be given by affidavit. In H the present case, I am amply satisfied from the medical report tendered to

the court that it was not possible for Sibanda to attend the trial because of A "his poor health in general, reduced mobility, and partial loss of vision". I am also satisfied that the conditions, under which his affidavit evidence was adduced, did not in any way prejudice the defendants. See *Davis* v *Davis* (1894) 11 SC 253; *Electrical and Furniture Trading Co (Pvt) Ltd* v *M & N Technical Services (Zimbabwe) (Pvt) Ltd* 1988 (2) ZLR 265 (H). B

I fully appreciate that the probative value of the affidavit might be diluted by the fact that its contents were not susceptible to cross-examination. However, with that cautionary rule in mind, I take it to be evidentially relevant in assessing the credibility of the witnesses and accuracy of the evidence otherwise before the court. Taken in the context of all of the evidence lead at the trial, I find its contents to be corroborative of the plaintiffs' version C of what transpired at the family gathering in 2005. It also serves to belie the defendants' assertions that Sibanda was given the so-called will by the deceased and that what he produced was a signed document.

Whether will duly executed and properly accepted

In terms of s 5(1) of the Administration of Estates Act [*Chapter 6:01*], a notice D of death must be delivered or transmitted to the Master or a magistrate within 14 days after the death in question occurs. Again, s 8(1) of the Act stipulates that every person, who has in his possession at the time of the death of the maker of any will or who comes into possession of any will after the death of its maker, must forthwith, at the first opportunity, deliver or transmit every E such will to the Master or a magistrate. By virtue of ss 5(3a) and 8(7), the failure to comply with either of these mandatory requirements entails the commission of an offence and the imposition of the prescribed penalties.

In the instant case, no evidence was lead at the trial to explain the inordinate delay, from September 2002 to September 2009, in registering the deceased estate. Moreover, neither the first defendant nor any other witness was able to F explain why the existence of the two wills was not divulged soon after they surfaced in 2005 and why they were not presented to the Master's Office for registration until November 2009. This in itself raises considerable doubt as to the authenticity of the documents under consideration.

Both documents purport to be the deceased's "last will and testament" and G declare that the arrangements that they embody should not be disputed or changed but should be adopted as his will. In terms of Exhibit 1, the entire estate, inclusive of the three immovable properties, is bequeathed to the second defendant, with the exception of a demarcated portion of the Bulawayo property which is bequeathed to the first defendant. The terms of Exhibit 6 repeat the latter bequest in respect of the Bulawayo property, with H

A the addition that the entire estate should devolve to the second defendant in the event of the first defendant predeceasing the deceased. In essence, therefore, both documents need to be read

together in order complete the devolution of the deceased's entire estate.

In Exhibit 1, the second defendant is enjoined to take care of his mother (the B deceased's wife) and not neglect her till death. As I have already intimated, this provision is nonsensical in light of the fact that the deceased's wife had already died in 2001, before the will was purportedly executed in 2002. The signatures of the testator on both wills appear to resemble the deceased's undisputed signatures in Exhibit 10. However, it is also perfectly possible that they are very clever forgeries. In any event, in the absence of any expert C evidence on the point, I do not think it possible to make any specific finding in this respect. Finally, it is common cause that both wills are dated as having been signed on 22 April 2002 by the purported testator and only one witness.

It is not disputed that the deceased was of sound mind and in good health at all material times, including at the supposed date of execution of Exhibits D 1 and 6. The letters forming part of Exhibit 10 show that the deceased habitually dated his documents. It therefore seems highly improbable that he would not have dated his own signature to something so important as his own will. It is equally improbable that he would have signed the will in the absence of the second witness whose signature was specifically provided for on the face of the will. Finally, it is extremely difficult to accept that he E would have executed a will explicitly providing for the upkeep of his wife who had already died the year before.

Section 8(1) of the Wills Act [*Chapter 6:06*] prescribes the formalities for a valid will as follows: it must be in writing and signed by the testator, or some other person in his presence and at his direction, in the presence of two F or more competent witnesses present at the same time, and each competent witness must sign the will in the presence of the testator and of the other witness. In *Janda* v *Janda* 1995 (1) ZLR 375 (S), it was observed that the object of these formalities was to eliminate, as far as possible, the perpetration of fraud, speculation and malpractice. Consequently, the Supreme Court was constrained to declare invalid a will which had been made *bona fide* by G the testator and as he believed, pursuant to the law, for want of compliance with the formal requirements of section 8(1). This was so even though the effect of declaring the will invalid was to defeat the real intention of the testator. Following this decision, the Act was amended (by s 3 of Act 21 of 1998) by the insertion of s 8(5). This provision enables the Master to accept H a document as a will, even though it does not comply with all the formalities

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Patel J

for the execution of wills, where he is satisfied that the document drafted A or executed by a person, who has since died, was intended to be his will.

It is submitted by counsel for the defendants that s 8(5) of the Act creates a rebuttable presumption in favour of the validity of any document purporting to be a will that is presented to the Master. In my view, this submission is not sustainable on a proper construction of s 8 taken as a whole. The correct B position is that a will, which is complete and regular on the face of it, is presumed to be valid, unless the contrary is shown. A will that is incomplete or irregular is presumed to be invalid, unless it is covered by one of the statutory exceptions. In terms of the exception provided by s 8(5), a will that does not comply with all the prescribed formalities may be accepted as a will by the Master, but only if he is satisfied that the document was C drafted or executed by the deceased and that it was intended to be his will.

In the instant case, I am unable to see how the Master could reasonably have accepted Exhibit 1 as the deceased's will. Firstly, it was transmitted for registration over 7 years after the deceased had died. Secondly, although Exhibit 1 is more detailed than Exhibit 6, it does not capture the specific D eventuality provided for in the latter relating to the first defendant dying before the deceased. Thirdly, Exhibit 1 contains the nonsensical provision for the deceased's wife, who had already died before the will was supposedly executed. Fourthly, the Master was presented with two last wills and testaments, a veritable contradiction in terms. Given these glaring anomalies, coupled with the plaintiffs' strenuous objections at the meeting on 11 November 2009, E the Master should have instituted a more detailed inquiry into the matter. I accordingly take the view that he misdirected himself in accepting Exhibit 1 as the authentic will of the deceased for the purposes of the Administration of Estates Act [*Chapter 6:01*].

To conclude the primary issue for determination herein, the most plausible F scenario that emerges from the evidence before the court is that the second defendant, in connivance with Sameke, forged several draft wills over the years and used them as dictated by changing circumstances. Of course,

there is a range of other possibilities as to what precisely transpired between 2002 and 2009. Be that as it may, I do not deem it necessary to make any definitive finding in this regard. What I do find, on an overwhelming balance G of probabilities, is that neither of the documents presently under scrutiny was drafted or executed by the deceased Motsi as his last will and testament. It follows that the deceased did not draft or execute the document registered by the Master's Office on 6 November 2009 and that the Master erred in accepting it for registration. It also follows that the deceased must be declared to have died intestate. H

2011 (1) ZLR p469

Patel J

A **Appointment of executor**

The validity of the third defendant's appointment as executor of the deceased's estate must be considered, firstly, in relation to the validity of the will on which it appears to have been founded. According to the so-called minutes of the meeting held on 11 November 2009, the Master decided on this B appointment because the beneficiaries under the will supported it, despite the protestations of those who were not such beneficiaries. To this extent, although the third defendant was not appointed specifically in terms of the will, the Master's decision was effectively influenced by the provisions of the will. It is axiomatic that the appointment of an executor cannot be predicated on a will that is invalid. Indeed, counsel for the defendants accepts C the position that, if the will is found to be invalid, then everything done consequent to it is a nullity.

Additionally, quite apart from the above consideration, there is a further and more compelling reason for setting aside the appointment. It is admitted by the defendants that the third defendant was not in attendance at the Master's meeting where he was appointed, but was represented at that meeting by one of D his juniors who was not a legal practitioner or executor. The latter subscribed to the acceptance of office by the third defendant which, as was conceded by the defendants, was in itself procedurally irregular. More significantly, there are the mandatory provisions of the Estate Administrators Act [*Chapter 27:20*] that were flouted by the Master at those proceedings. Section 26(1) of E the Act prohibits any person registered under section 23 from performing the work of an estate administrator or soliciting s as the executor of a deceased estate, except in accordance with the terms and conditions of a valid practising certificate, issued in terms of s 28. More pertinently *in casu*, s 61(1), as read with s 61(6), renders it a punishable offence for any unregistered person to do anything for gain that constitutes the work of an estate administrator, or F solicit appointment as the executor of a deceased estate, or pretend or by any means whatsoever hold himself out to be a registered person. By virtue of s 62(1), notwithstanding the prohibition contained in s 61, a company or partnership may carry on the business of an estate administrator under certain specified conditions relating to the direct control and management G of a principal who is, *inter alia*, a registered person. However, even in this case, in every premises where any such business is not done personally by the principal, it must be done under the direction of that principal by an assistant who is himself a registered person. In my view, given that the conduct prohibited by s 61 is criminally punishable, the section is not merely directory but peremptory, and non-compliance therewith renders null and H void any work done or appointment made pursuant to such conduct.

2011 (1) ZLR p470

Patel J

For the above reasons, I find that the appointment of the third defendant A as executor of the deceased estate *in casu* was invalid and constituted a nullity. Obviously, the effect of such nullification also extends to the letters of administration, authority to sell and consent to transfer issued by the Master to the third defendant.

Relief sought and costs B

In the premises, the plaintiffs are clearly entitled to the relief that they seek in their pleadings. However, through their closing submissions they seek additional relief, firstly, that they be appointed joint executors of the deceased estate and, secondly, that the order for costs against them made by Guvava J on 1 April 2010 be rescinded or reversed.

I am wholly disinclined to accede to either of these additional claims. The C first does not form part of the relief sought in the original pleadings, which presently remain unamended, nor was it

canvassed in the evidence adduced at the trial. As for the second, this too does not appear in the pleadings and, in any event, the earlier order for costs is clearly *res judicata* and cannot be interfered with at this stage in the absence of appropriate proceedings D instituted for that purpose.

As regards the costs of this matter, however, I agree with the plaintiffs that the defendants' attempt to legitimise forged documents in pursuit of their material interests warrants the award of punitive costs against them.

Disposition E

Before declaring the order of this court, I deem it necessary to express my deep reservations about the manner in which the deceased estate *in casu* was handled at the Master's Office. As is evident from the testimony of the Acting Deputy Master, there is need for corrective measures to be put in place so as to avoid the irregular practices that appear to have become entrenched in the administration of deceased estates. The Registrar is F accordingly directed to transmit a copy of this judgment to the Master. An additional copy must also be forwarded to the Attorney-General with the request that he institute criminal investigations into the conduct of the first, second and third defendants.

In the result, it is declared that: G

(i) The document registered with the Master on 6 November 2009 as the will of the late Martin Phillip Motsi (the deceased) is null and void.

(ii) The deceased died intestate.

It is further ordered that:

(iii) The decision of the Master that the aforesaid document was executed H

Patel J

A or signed by the deceased be and is hereby set aside.

(iv) The Master's appointment of the third defendant on 11 November 2009 as the executor of the estate of the deceased be and is hereby set aside.

(v) The Master shall convene another meeting to appoint an executor of the estate of the deceased; the said meeting shall be presided over by B an official other than the official who presided over the meeting of 11 November 2009 or any of the officials who previously dealt with the estate of the deceased.

(vi) The first, second and third defendants shall pay the costs of suit, the one paying the others to be absolved, on a legal practitioner and client C scale.

Chigwanda Legal Practitioners, first, second and third defendants' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/CHIHORO v MUROMBO & ANOR 2011 (1) ZLR 472 (H)

CHIHORO v MUROMBO & ANOR 2011 (1) ZLR 472 (H)

Citation 2011 (1) ZLR 472 (H)

Case No Judgment No. HH-07-11

Court High Court, Harare

Judge Omerjee J & Karwi J

Heard 4 May 2011

Judgment 4 May 2011

Counsel Ms *F Chagadama,* for the applicant
T J Magaya, for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Court – *community court – jurisdiction – chief – resolving of land dispute* C

Land – *communal land – allocation – who may allocate – chief having no jurisdiction to allocate land*

Headnote

The appellant and respondent had been involved in a dispute over a piece of land in a communal area. The matter was taken to the local community D court, presided over by the local chief. The court found the appellant to be the rightful owner of the land and ordered the eviction of the respondent. Some months later, the respondent brought the chief's decision on review to the magistrates court, which granted the respondent's application. The magistrate's reasons for doing so were that s 26 of the Traditional Leaders Act [*Chapter 29:17*] prohibits occupation of communal land E other than with the approval of the rural district council. The same section confirms the administrative jurisdiction of the rural district council over the control, use and allocation of all communal land. The magistrate found that, by ordering the eviction of the respondent, the chief had effectively allocated communal land in contravention of s 26 of the F Traditional Leaders Act. The magistrate further found that, by evicting the respondent, the chief had usurped the powers of the council, which had authority over the land in question in terms of the Communal Lands Act [*Chapter 20:04*]. On that basis alone, the chief's judgment was annulled on the grounds of lack of jurisdiction. The appellant appealed against this decision. G

Held, that the chief only entertained a dispute relating to land, and did not allocate land, the land in question having already been allocated a long time before. While s 16(g) of the Customary Law and Local Courts Act [*Chapter 7:*05] provides that a local court shall have no jurisdiction in any case to determine rights in respect of land or immovable property, s 5(1)(e) of the Traditional Leaders Act provides that a chief shall be H

Karwi J

A responsible within his area for discharging any functions conferred upon him in terms of the Customary Law and Local Courts Act. Among the duties of a chief are adjudicating in and resolving disputes relating to land in his area (see s 5(1)(n) of the Traditional Leaders Act). *In casu*, the chief adjudicated and resolved a land dispute in his area. He did not allocate land. Allocation of land and resolving of a dispute are totally B different things. Allocation of land involves the granting of rights, interest and title to land to an individual, whereas the resolving of a land dispute involves the entertainment of a dispute between or amongst individuals over an already allocated piece of land. The appellant brought a dispute before the chief for resolution; he did not bring a request for allocation C of land. The chief accordingly had jurisdiction and the magistrate should not have set aside the chief's ruling.

Legislation considered

Communal Lands Act [*Chapter 20:04*], s 26(3)

Customary Law and Local Court Act [*Chapter 7:05*], ss 16(g) & 25

D Local Court Rules 1991 (SI 115 of 1991), r 10(2)

Magistrates Court Act [*Chapter 7:10*], s 17

Traditional Leaders Act [*Chapter 29:17*], ss 5(1)(e), 5(1)(n) & 26

Case information

Ms *F Chagadama,* for the applicant

E *T J Magaya,* for the respondent

Judgment

KARWI J: This matter has a long history of a dispute over the ownership of a piece of communal land, in Mayambara, Seke Communal lands. The parties to the dispute inherited the dispute from their parents. The appellant's father and the respondents' brother who were the original disputants died F many years ago. The matter was further confused by the lack of knowledge of the applicable law on the part of the parties and court officials. Along the way, wrong advice was given to the parties leading to wrong decisions being given in courts.

The background of this matter is that the appellant claims that his father was G allocated the stand in question in or around 1960, while the respondent says his family has enjoyed undisturbed possession of the stand since 1936. The appellant says that the respondents' brother was granted temporary use of the property in dispute as the appellant's father ordinarily resided in the city. The respondents' brother used structures built by the appellant's father. Upon the death of the appellant's father the first respondents' brother continued H to stay at the property. The appellant says he was prepared to compensate the

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respondent for the developments made on the stand, being a blair toilet A and borehole.

According to the appellant's heads of argument, when the appellant insisted on the claim to his father's property, the respondent refused, allegedly insisting that he was the rightful owner. Legal proceedings were instituted at the communal court, presided over by Chief Seke on 4 April 2009. The B applicant was found to be the rightful owner of the stand as records at the rural district office confirmed that the land was in the appellant's family name and that they were paying levies to council in respect of the land. The chief also ordered the eviction of the respondent.

On or about 5 May 2009 and acting on the wrong advice of the clerk of court, C the appellant issued summons for the eviction of the respondent. At that stage, the appellant was a self-actor. The presiding magistrate at the subsequent pre-trial conference held on 3 July 2009 ruled that the chief had already ruled on the matter and that the respondents were to appeal against that order if they were not satisfied with the ruling of the chief. Most importantly, the magistrate also ruled that the matter was not to be re-instated. D

Further wrong advice by the clerk of court led to more confusion. He advised the appellant to apply for summary judgment, which was granted in default. On 25 September 2009 the respondent applied for the review of the chief's order of 4 April 2009. The application for review was heard and granted on 8 October 2009. The appellant failed to oppose the application as his request E for extension within which to file opposing papers was denied. It is against the order of the magistrate granting the review of the chief s order that the appellant is appealing to this court.

The application for summary judgment was set down for 4 November 2009 and by the time it was heard the appellant had already noted this appeal.

In terms of r 10(2) of the Local Court Rules (SI 115 of 1991), a successful F party at a hearing at the community court may register the judgment at the magistrates court in terms of s 17 of the Magistrates Court Act. Upon being issued with a writ of execution by the clerk of court at the magistrates court, such party may obtain execution on the judgment in all respects as if it were a judgment of the magistrates court. Unfortunately, due to ignorance on the C part of the appellant, who was then a self-actor, and wrong legal advice of some bush lawyer in the form of the clerk of court who usurped the proper functions of a legal practitioner, this was not done in this case. This unfortunately led to serious bungling of the case, much to the expense and delay in the finalization

of this case. The respondent was supposed to appeal against the order of the chief. This again was not done. H

2011 (1) ZLR p475

Karwi J

A It is my considered view that the essence of the ruling by the magistrate at the pre-trial conference, if indeed it was a ruling rather than an observation, was to recognize that the matter had already been entertained at the community court and that correctly it could not be reinstated by way of summons. The matter had to be treated as a completed matter by the chief. Parties had either to accept the judgment or appeal against it or seek its review in terms B of the law. The magistrate was correct to refuse to deal with the so-called pre-trial conference for there was no such conference properly before him in terms of the law. Wrong procedure had been adopted. The magistrate was therefore correct to observe that the respondent would have to appeal against the chief's order. The matter should have ended there. It should be added that the essence of the observation by the magistrate did not amount to a C registration of the chief's order with the magistrates court as is required by law before one could execute on the strength of a writ from the magistrates court. The observation did not amount to absolution, as it is known in law.

After the magistrate's observation at the ill-conceived pre-trial conference, the parties resorted to many other wrong procedures, partly as a result of D wrong advice. Applications for summary judgment and rescission of judgment were some of the totally unnecessary steps taken by the parties. Whatever decisions were taken in pursuance of those applications were of no force or effect and do not advance or resolve this case.

Following his unhappiness with the chief's order, the respondent resorted E to filing an application for review at magistrates court. This approach is perfectly allowed in terms of s 25 of the Customary Law and Local Court Act [*Chapter 7:05*]. After hearing the matter, the magistrate annulled the chief's ruling. His reasons for doing so were that s 26 of the Traditional Leaders Act [*Chapter 29:17*] prohibited occupation of communal land other than with the approval of the the rural district council. The same section confirms the F administrative jurisdiction of rural district council over the control, use and allocation of all communal land. The magistrate found that, by ordering the eviction of the respondent, the chief had effectively allocated communal land in contravention of s 26 of the Traditional Leaders Act. The magistrate had further found that, by evicting the respondent, the chief had usurped the powers of Manyame Rural District Council, which had authority over the G land in question in terms of s 26(3) of the Communal Lands Act [*Chapter 20:04*]. On that basis alone, the chief's judgment was annulled on account of lack of jurisdiction.

It seems to me that the magistrate erred and misdirected himself in holding that the chief had no jurisdiction to entertain the matter considering the H correct circumstances of this case. It is my considered view that the chief

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2011 (1) ZLR p476

Karwi J

only entertained a dispute relating to land and did not allocate land. This is A so because the land in question was already allocated way back. It is correct that s 16(g) of the Customary Law and Local Courts Act provides that a local court shall have no jurisdiction in any case to determine rights in respect of land or immovable property. It is equally true that s 5(1)(e) of the Traditional Leaders Act provides that a chief shall be responsible within his area for B discharging any functions conferred upon him in terms of the Customary Law and Local Courts Act. Section 5(1)(n) of the Traditional Leaders Act specifically provides for the duties of chiefs as:

> "A chief shall be responsible within his area for
>
> …
>
> (n) adjudicating in and resolving disputes relating to land in his area." C

It is therefore clear that the chief adjudicated and resolved a land dispute in his area in terms of the law. He did not allocate land. Allocation of land and resolving of a dispute are totally different things. Allocation of land, in my considered view, involves the granting of rights, interest and title to land to an individual, whereas the resolving of a land dispute involves the D entertainment of a dispute between or amongst individuals over an already allocated piece of land. The appellant brought a dispute before the chief for resolution, not a request for allocation of land. The appellant would not have brought a case for allocation of land because his case was to the effect that his

father had been allocated the land in the 1960s and he was paying dues to council for the piece of land. The chief made the ruling confirming E that position, after satisfying himself that the piece of land in question was indeed registered in the name of the appellant's father.

Consequently, the appeal succeeds. The review judgment of magistrate in the court *a quo* is therefore set aside. The respondents are to pay costs of suit.

OMERJEE J concurred. F

O Matizanadzo & Associates, applicants' legal practitioners G

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DZANGAI v ESTATE CHINGARIRE & ORS 2011 (1) ZLR 477 (H)

Citation	2011 (1) ZLR 477 (H)
Case No	Judgment No. HH-106-11
Court	High Court, Harare
Judge	Mawadze J
Heard	16 March 2011
Judgment	11 May 2011
Counsel	*M D Hungwe,* for the applicant *F Chimbari* (executor), for the first respondent *T K Hove*, for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Administration of estates – *maintenance – dependant – claim by dependant for maintenance – considerations – what factors to consider in determining amount of maintenance, if any – when application should be made*

Headnote

D The applicant, the mother of two minor children she had with the deceased during their customary law union. The union was dissolved before the deceased died, but the deceased had continued to be solely responsible for the children's maintenance, paying, *inter alia*, school fees, clothing, food, shelter and medical expenses. The children had been going to a E private school in Harare. After the deceased's death, the applicant moved to South Africa with the children, where they were enrolled in a private school. The applicant had to pay the fees. Finding the burden excessive, she sought to have the fees paid out of the estate. She claimed a lump sum in respect

of each child, and sought an order that the deceased's matrimonial home be sold if the movable assets in the estate were F insufficient.

The Master of the High Court pointed out that the lump sum claimed exceeded the value of the estate and that, apart from the applicant's children, there were other beneficiaries to be maintained: the deceased's surviving spouse, her child, and another child of the deceased's who was born out of wedlock.

G *Held*, that, as dependants, the applicant's two children were eligible for maintenance in terms of s 3(1) of the Deceased Persons Family Maintenance Act [*Chapter 6:03*]. In terms of s 3(2), an application for such maintenance should be made within three months of the grant of letters of administration to the executor. The present application, having H been made almost six months after the grant of letters of administration,

Mawadze J

was well out of time. No application for condonation was made to the A Master and on that basis alone the application should be dismissed.

Held, further, that the application in any case fell short of the requirements set out in s 7 of the Act. The applicant would have to show that a grant of maintenance would be just and equitable, taking into account such factors as B

(1) the benefits, if any, the applicants would have been entitled to under the will or on intestacy;
(2) the period for which maintenance would be required;
(3) the number of other persons to be maintained from the estate; and
(4) the size and nature of the estate.

The claim failed to take these factors into account. C

Held, further, that while the court should always give preference to the best interests of the minor children in such applications, it still has to consider the interests of other beneficiaries. If the court were to order the sale of the matrimonial property, the rights and interests of the surviving spouse would be defeated. If the order sought were granted, D there would be nothing left in the estate for the executor to administer. Taking all these factors into account, it would not be just and equitable to grant the order sought.

Cases referred to

Ponter v Ponter 2000 (1) ZLR 336 (H) E

Shaw v Shaw 1992 (2) ZLR 134 (S)

Legislation considered

Deceased Persons Family Maintenance Act [*Chapter 6:03*], s 3(1) & (2); s 7 F

Case information

M D Hungwe, for the applicant

F Chimbari (executor), for the first respondent

T K Hove, for the second respondent

Judgment

MAWADZE J: This is an application for maintenance made in terms of G the Deceased Persons Family Maintenance Act [*Chapter 6*:*03*] (hereinafter referred to as the "Act"). The application is opposed by the second respondent.

The applicant is the mother of the two minor children, namely, Tasimba and Keith Chingarire, aged 11 and 12 years respectively. The two minor children are offspring of the deceased John Chingarire. The applicant and the late H

Mawadze J

A John Chingarire had a customary law union which was dissolved before the death of John Chingarire.

The first respondent is the estate of the late John Chingarire, represented by Mr F Chimbari, who was appointed the executor of the estate in terms of the letters of administration.

B The second respondent is the surviving spouse of the late John Chingarire. The fourth respondent is the Master of the High Court cited in his official capacity.

It is common cause that during the lifetime of the deceased the two minor children, Tasimba and Keith Chingarire, resided with the deceased and the C second respondent at the matrimonial house at 148 Blake Close, Emerald Hill, Harare, and that the deceased was solely responsible for their maintenance and upkeep which included *inter alia* school fees, clothing, food, shelter, medical expenses and all that issues incidental thereto. The two minor children were attending school at Gateway Private School and for each child US$1000 per term was paid. After the death of the deceased the applicant took custody of D the two minor children and relocated to South Africa where she apparently enrolled the two minor children at St Peter's Preparatory College. It would appear that the company which used to employ the deceased ceased to pay for the school fees of these minor children on the basis that they were now outside Zimbabwe. Apparently the applicant's reason for taking the children E into her custody was that they were discriminated against and ill-treated by the second respondent. No specific averments were made and these broad allegations are refuted by the second respondent.

The applicant contends that she has been paying school fees for these two minor children in South Africa, but is now unable to shoulder the burden. F She believes the two minor children's school fees and other incidentals thereto should be borne out of the estate of the minor children's late father. Although the estate is illiquid, it is not insolvent, as there are several assets, namely, motor vehicles and one immovable asset, being the matrimonial house in Emerald Hill, Harare.

During the hearing, the applicant amended the amount of money claimed as G maintenance for the two minor children and converted the sum from South African rand to US dollars.

The order sought by the applicant is in the following terms (as amended):

> "1. A lump sum maintenance in the sum of US $10 000 in respect to Tasimba Chingarire born on 5 February 1997 and US$10 000 in respect to Keith H Chingarire born on 1 February 1998.

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> 2. In the event that movable assets available are not enough to meet the A requirements enunciated in paragraph above in respect of each minor child, then the matrimonial home namely 148 Blake Close, Emerald Hill, Harare be sold to the best advantage and the proceeds be used to make payments referred to in para 1 and the remainder thereof will be to the respondent (*sic*) and her minor child namely Simbaniso Kundai and Stephanie Chingarire respectively. B
> 3. Costs of this maintenance application should be born by the estate late John Chingarire represented by the first respondent, Fredrick Chimbare, in his capacity as the executor dative".

The basis of the applicant's claim is itemised in paras 11 to 15 of the applicant's founding affidavit, which figures, however, are in South African currency. C What is important to note is that the maintenance claim covers tuition fees, boarding fees, development loan, PA levy, outings, photographs, linen, hot lunch and school uniforms inclusive of sports and swimming attire. Keith should now be in Grade 7 and Tasimba in Form I or equivalent. The lump sum claim for maintenance covers the period up to the completion of "A" level or equivalent by each minor child or such time the children attain the D age of 18 years.

The first and final administration and distribution account in the estate of the late John Chingarire is filed of record (reference DR 737/09). The account shows the assets of the estate, both movable and immovable, the liabilities of the estate, and the distribution plan. The net value of the estate is US$115 000 E and the estate is illiquid.

The Master of the High Court, both in the initial and supplementary reports, made the following pertinent comments:

(a) That the lump sum amount claimed by the applicant (before amendments) far exceeds the value of the estate; F

(b) That apart from the applicant's two minor children there are other potential beneficiaries to be maintained, like the surviving spouse and her minor child, and one Taonga born out of wedlock.

(c) That the winding up of the estate has been stalled by the application for maintenance which in terms of the law should be disposed of first G before the distribution of the estate can be authorised. See s 3(8) of the Act.

(d) That the executor is still to formally file the first and final liquidation and distribution account to allow for objections and winding up of the estate.

The contents of the Master's reports were not put into issue. H

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A Mr *F Chimbari* who represents the first respondent indicated in his submissions, which were not controverted, that he had availed the first and final liquidation and distribution account to all parties and that consensus was reached on all issues. He indicated that he was therefore surprised as to why this application had to be made. He indicated that there are virtually no challenges in winding up the estate and all things being equal he would B take at least 30 days to wind up the estate.

The two minor children, Tasimba and Keith Chingariri, are dependants as defined in s 2(1)(c) of the Act. They are therefore eligible for maintenance in terms of s 3(1) of the Act which provides as follows:

> **"3. Application for Maintenance**
>
> C Any dependant of a person who dies after the 9th January, 1979, may subject to this Act, make an application for an award from the net estate of the deceased".

The net estate is defined in relation to a deceased as all the property of his deceased estate which but for the provisions of the Act would be available for distribution to his heirs and legatees.

D Let me briefly comment on the concerns raised by Mr *Hove* for the second respondent in respect to the state of the papers filed of record by the applicant and the impolite language used by the applicant, especially in the answering affidavit. It goes without saying that the language to be used in affidavits should be courteous rather than insulting of the other party. Judicial proceedings should be respected by all those who approach the court and E intemperate language which adds no value to the issues to be determined by the court should be avoided as it also offends the sense of justice of the court. The remarks by Malaba DCJ in *Moyo & Ors* v *Zvoma NO & Ors* in this respect are apposite and need no further elaboration.

It is not in issue that the papers filed by the applicant were not paginated F and indexed. Some of the documents referred to as schedules for school fees payable were not attached. The copies filed of record and those served upon the second respondent are materially different. As an example, in the applicant's founding affidavit there are 17 paragraphs, but in the founding affidavit served upon the second respondent there are 12 paragraphs. In the submissions the applicant in response to the allegation of filing this G application out of time indicated that an application for condonation was made on 19 October 2009 and was granted on 16 November 2009. Reference is made to annexures A and B, supposedly attached to the submissions, but none is attached. Such conduct by counsel for the applicant, Mr *Hungwe,* deserves censure as it is misleading to the court. Mr *Hungwe* had profusely

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Mawadze J

apologised to the court for failure to properly index and paginate the papers A and for serving different copies of the application on the second respondent. I was tempted to accept his passionate apology, only for him in his closing submissions to refer to non-existent annexures in a bid to dispose of a point *in limine* raised by Mr *Hove*. Such indiscretions are unacceptable.

Let me turn to the merits of the application. B

Mr *Hove* raised a point *in limine* which, if resolved in his favour, should dispose of the matter, according to him. The issue raised by Mr *Hove* is that this application falls foul of the mandatory provisions of s 3(2)(b) of the Act and that no such condonation has been sought and granted.

Section 3(2)(b) provides as follows: C

"(2) An application referred to in subsection (1) shall be –

(a) …

(b) lodged with the Master or, where there is no office of the Master in the province where the applicant ordinarily resides, the provincial magistrate of the province –

(i) within three months of the date of the grant of the letters of administration to the executor of the deceased estate concerned; or D

(ii) …

Provided that the Master may, on good cause shown, grant an extension of the relevant period referred in subparagraph (i) or (ii) within which the application shall be made".

It is common cause that this application has been made almost six months after the granting of the letters of administration, which is well after the E stipulated three months. Apparently the Master did not address this issue and, from the record, the applicant did not seek an extension of the relevant period. One may infer that, by referring the matter for hearing in terms of s 4 of the Act the Master had by conduct condoned the non-compliance with the provisions of s 3 of the Act. The issue which arises is whether this F application is properly before this court. The applicant did not even seek condonation orally during the hearing of the matter. In fact, Mr *Hungwe* on that point submitted that his view was that the applicant's failure to comply with the provisions of s 3 was condoned by the Master by implication and that the applicant would leave that issue to the court to decide.

In the closing submission Mr *Hungwe* was now singing a different tune and G I quote his submissions:

"At the time of argument counsel for the applicant did not have full instructions and as such laboured under the impression that the application was never made and that condonation could be discerned from the Master of the High Court's conduct of placing the application before a judge. However, counsel for the applicant has since discovered that an application for condonation was made H

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Mawadze J

A indeed in writing on 19 October 2009 and failure to comply was condoned by letter dated 16 November 2009. See Annexure A and B hereto. On the premise of a foregoing, the objection raised by the second respondent *in limine* thus falls away".

The issue raised by counsel for the applicant is not part of both the founding and answering affidavit. It was not raised in argument. It is a new issue, B raised under the guise of closing submissions. It is not a legal issue but a factual issue. To start with, the so-called Annexures A and B are not even attached. It would be improper for the applicant to raise new factual issues by way of written closing submissions. As a fact, therefore, it has not been shown that an application for condonation was made before the Master. The Master did not even indicate so in both the first and supplementary reports. C The extension of the period envisaged in s 3 of the Act is not by conduct. An application should be made to the Master and good cause must be shown. In fact the respondent may, at the hearing, challenge such finding of good cause by the Master. In my view, no facts have been placed before me to show that such an application for the extension of the period was made and D I am not privy as to what good cause could have been provided. It would be wrong for this court to substitute the Master's statutory obligations with its own discretion. I am inclined, therefore, to dismiss the application on the basis that it is improperly before the court as it was made out of time.

Assuming I may be wrong in my finding stated above, I am still inclined to dismiss this application on the basis that it falls far short of the requirements E of s 7 of the Act which outlines the requirements to be met in granting a maintenance award in terms of s 7. It provides as follows:

"7. Award of maintenance

(1) After due inquiry into an application, the appropriate court *may,* subject to the provisions of this Act, if it considers that a dependent who has made an F application is in need of maintenance from the estate of the deceased concerned and that it is *just and equitable* that an award should be made, make an award against the net estate of the deceased in favour of such dependant. (emphasis is mine)

(2) In the determination of an application, the court shall have regard to –

(a) whether or not the dependant is in need of maintenance, taking into account, G where the deceased died leaving a will, the benefits if any, to which the dependant will be entitled under the will or,

where the deceased died intestate, the benefits, if any, to which the dependent will be entitled on intestacy;

(b) the period for which maintenance of the dependant is required;

(c) the ability of the dependent to maintain himself and whether or not it is desirable that he should work; H

(d) the number of persons to be maintained by the estate;

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(e) the general standard of living of the dependant and, during his lifetime, of A the deceased;

(f) the reason for the deceased failing to make provisions for maintenance of the dependant and, in this connection, whether or not the behaviour of the dependant was responsible in any way for such failure;

(g) where the deceased died leaving a will, the interests of the beneficiaries in respect of whom provision has been made under the will; B

(h) where the deceased died intestate, the interests of the persons who would normally succeed on intestacy;

(i) the size and nature of the net estate; and

(j) any other matter which, in the opinion of the appropriate court, is relevant to the determination of the issue" (my italics). C

As already stated, the two minor children are dependants and are in need of maintenance from the estate of the deceased. However, the applicant's founding affidavit does not, in my view, give any useful breakdown of the lump sum required for both minor children. Even if the court was to accept the minor children are in school in South Africa at the said college, the actual breakdown of the needs of the minor children was never made in any D meaningful way. This schedule of expenses was never made when the figures were converted to US dollars. In short, there is no objective and rational basis upon which the total lump sum payment of US20 000 is arrived at. The applicant did not even show how much she will contribute herself towards this total figure of US$20 000 as the natural mother of the minor children, E who herself has a duty to maintain the children.

The benefits which the two minor children are entitled to are similar to those of other dependants of the deceased's estate, as the deceased died intestate. The period for which the maintenance of the two minor children is sought is unjustifiable. One would have thought the applicant would seek interim maintenance pending the winding up of the estate. Instead, the applicant seeks F maintenance for the whole period up to the time the minor children turn 18 years or complete their education. One wonders what then will happen if a lump sum payment is made and the minor child dies or drops out of school at a certain level.

In my view, this claim fails to take into account the number of persons to G be maintained by the estate, or the interests of those who are to succeed on intestacy *vis-à-vis* the size and nature of the net estate. The estate is illiquid. What is available for distribution are only the motor vehicles valued at about US$40 100 and a house valued at US$75 000. The liabilities amount to about US$13 303.18, thus leaving a balance of about US$100 000 for distribution, the bulk of which is made of the matrimonial house valued at H

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A US$75 000. This would mean, excluding the house, what may be available for sharing is US$15 000 to US$20 000 at most. The amount of US$20 000 claimed by the applicant would, in my view, prejudice other dependants and beneficiaries. Besides the two minor children, there are the surviving spouse (the second respondent) Sibambaniso Kundai, her minor child Stephanie, the other child Sona (born out of wedlock) and other beneficiaries who are B children of the deceased – Kimberly, Laura and Janathan.

The interests of all these persons should be taken on board. In my view, the nature and the size of the net estate and the interests of the dependants and or beneficiaries are such that an award cannot be meaningfully made.

While the court should always give preference to the best interests of the minor C children in such applications, it nonetheless has to consider the interests of other beneficiaries. If the court is to

order the sale of the matrimonial house for purposes of making an award in terms of the Act, the rights and interest of the surviving spouse as provided for in s 68F(d)(1) of the Administration of Estates Act [*Chapter 6*:*01*] and s 3A(a) of the Deceased Estates Succession Act [*Chapter 6*:*02*] would in all essence be defeated. In my considered view, G if the maintenance order sought by the applicant is awarded there would be nothing left for the executor to administer, as all assets of the estate would have been disposed of under the guise of a supposedly interim maintenance award.

The correct approach in dealing with matters of this nature was pointed out E by Smith J in *Ponter* v *Ponter* 2000 (1) ZLR 336 (H) at 340F where the learned judge cited with approval *Shaw* v *Shaw & Anor* 1992 (2) ZLR 134 (S). The learned judge, quoting Gubbay JA (as he then was), had this to say in discussing the meaning of maintenance in the context of the Act:

> "… it covered such things as food, clothes, a house and all other 'necessaries and conveniences of life, having regard to various factors specified in subs (2) and F (3) of s 7 of the Act … the trigger of an order was two fold, firstly there *must be need, and secondly it must be just and equitable*" (emphasis is my own).

I am satisfied that this application falls far short of the requirements of s 7 of the Act. It is not just and equitable to grant the award prayed for. The executor, in my view, should be allowed without undue delay to finalize the administration of the estate.

G Accordingly, the application is dismissed with costs.

Chinyama & Partners, applicant's legal practitioners

A *T K Hove Partners*, second respondent's legal practitioners

* See above in this volume. – *Editor*

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TOBACCO SALES FLOOR LTD v SWIFT DEBT COLLECTORS (PVT) LTD 2011 (1) ZLR 486 (H)

Citation	2011 (1) ZLR 486 (H)
Case No	Judgment No. HH-111-11
Court	High Court, Harare
Judge	Gowora J
Heard	22 March 2011
Judgment	24 May 2011
Counsel	*D Halimani*, for the applicant Miss *T R Hove,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Company – *director – relationship to company – not necessarily an employee of company*

Landlord and tenant – *statutory tenant – eviction of – landlord alleging* D *good and sufficient grounds for eviction – what constitute "good and sufficient" grounds – what landlord must show – period of notice of eviction – factors which court must consider*

Practice and procedure – *affidavit – attestation – who may attest to affidavit – person having an "interest" in matter to which affidavit relates – such person not entitled to attest affidavit – exceptions – person whose* E *interest arises from employment – director of company seeking eviction of tenant – whether director has an interest in matter*

Practice and procedure – *motion proceedings – dispute of fact – approach court should take – need for dispute to exist before taking robust view*

Words and phrases – *matter in which person "has an interest" – meaning* F *of "interest"*

Headnote

The applicant sought the eviction of the respondent from premises it had leased to the respondent. The lease period had expired. The applicant claimed that it wanted the premises for its own use. In answer to the G papers filed by the respondent, the applicant filed an affidavit from a third party. The affidavit was attested by a member of the applicant's board of directors. The respondent challenged the admissibility of the affidavit, on the grounds that the director had an interest in the matter and was thus precluded by s 2 of the Justices of the Peace and Commissioners of Oaths (General) Regulations 1998 from attesting the affidavit. The H

A applicant argued that the director fell within the exceptions allowed by para 3 of the Schedule to the Regulations, in that the director was a person whose only interest arose out of his employment and in the course of his duty.

On the merits, the respondent resisted the application on various grounds, among which was an allegation that the lease had been extended verbally.

B *Held,* that a director of a company occupies a position materially different from that of an employee. The mere fact of holding office as a director creates no contractual relationship between the company and the director. The articles of association of the company do not create such a relationship. In addition, the occupation by a director of the position C of director does not make him an agent of the company. It also does not make him an employee, unless he has entered into a separate contract with the company as such. The director *in casu* was not an employee of the applicant, nor could he have attested to the affidavit in the course of his duties. It cannot be the function of directors of a company to attest to affidavits. The exception therefore did not apply to him.

D *Held,* further, that "interest" in a matter goes beyond social or ethical interest: the term would be synonymous with an expectation of a favourable result from the court. Where the person administering the oath and ultimately commissioning the affidavit has an interest in the contents of the affidavit, there would be an element of bias on the part of the E commissioner of oaths. Further, where the commissioner of oaths is associated with a party who filed proceedings in a matter and then is required to administer an oath to a deponent to an affidavit which has a bearing on the outcome of the litigation brought by the party he has an association with, then clear bias can be said to exist. A commissioner of oaths has a duty to ensure that a deponent to an affidavit swears to F the truthfulness of the contents of the affidavit. If the commissioner of oaths himself is not just acquainted with the facts, but wishes them to be placed before the court and wishes that the court has regard to them in the resolution of a dispute, such commissioner of oaths has an interest going beyond mere social or ethical interest. The applicant had G a proprietary interest to protect, and the commissioner of oaths, as a director on the board running the affairs of the applicant, could not be said be said to be a disinterested party.

Held, further, that where there is an allegation that disputes of fact exist, the court must, if possible, take a robust view and common sense approach and not take an over fastidious view of conflicts and must seek to resolve H the dispute despite the apparent conflict. Before taking a robust view,

however, the court must have concluded that real and genuine disputes A of fact did exist.

Held, further, that the applicant could only succeed if it proved that good and sufficient grounds existed for the respondent to be evicted from the premises it occupied. There are no set criteria for determining what amounts to good and sufficient grounds; each case must be decided on B its facts. In the assessment of whether or not there are good and sufficient grounds on the papers presented by the applicant, the court must of necessity look at the *bona fides* of the applicant, who must also bring some small measure of evidence to demonstrate the genuineness of his assertion. He can normally scarcely do more, and it rests with the lessee resisting ejectment to bring forward circumstances casting doubt upon C the genuineness of his claim. It is only the position of the lessor that has to be considered, that of the lessee being irrelevant for the enquiry. The legislation does not define what good and sufficient grounds are, but more importantly it only mentions the lessor not the lessee, reinforcing the views by the courts that the position of the lessee is not material.

Held, further, that, in deciding what notice to give to a lessee, the court must D not just consider the needs of the lessor but must also assess the hardship likely to be suffered by the lessee if it is evicted from the premises. It is a value judgment based on all the equities of the case.

Cases cited E

Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd 1986 (2) ZLR 246 (S)

da Mata v Otto 1972 (3) SA 858 (A)

Masukusa v National Foods Ltd & Anor 1983 (1) ZLR 232 (H)

Mobil Oil Zim (Pvt) Ltd v Chisipite Svc Station (Pvt) Ltd 1991 (2) ZLR 82 (S)

Trustees in Mashonaland of the Church of the Province of CA v Timms F 1973 (1) RLR 307 (G)

Union Wine & Spirit Corp Ltd v Ferreira 1948 (2) SA 647 (O)

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

Legislation considered G

Justices of the Peace & Commissioners of Oaths (General) Regulations, 1998 (SI 183 of 1998), s 2 & Schedule, para 3

Case information

D Halimani, for the applicant

Miss *T R Hove,* for the respondent H

Gowora J

Judgment

A **GOWORA J**: The applicant is the registered owner of a warehouse situate at Tobacco Sales Floor Complex, Gleneagles Road, Harare. The applicant carries on business at the said premises as a tobacco auction floor. On 11 July 2007 the applicant concluded a written agreement with the respondent in terms of which the latter leased from the applicant a portion of the warehouse; to wit an area of 1241.91 square metres. The lease was to endure for a period of B three years, commencing on 1 June 2007 and terminating on 31 May 2010. On 14 December 2009 the applicant addressed a letter to the respondent and informed it that it would not be renewing the lease as the premises were required by the applicant for its own use. A further letter was written to the respondent on 29 April 2010 again reiterating its position that it intended C to use the area occupied by the respondent and that consequently the lease would not be renewed at the expiry of the lease period. The applicant contends that it intends to use the premises for its expansion programme and that this constitutes good and sufficient grounds for this court to grant an order for the ejectment of the respondent from the premises it is occupying.

The respondent denies that the applicant is entitled to an order for its eviction D on several grounds. Firstly, it argues that the lease agreement was verbally extended when the applicant accepted payment for rent for the month of June 2010. The respondent also contends that during the currency of the written lease agreement a pattern of behaviour had emerged on the part of the applicant, where each time the applicant considered that there were arrear E rents, the applicant would send a written notice to the respondent requiring it to vacate the premises on the basis of the alleged arrears. Hence, upon receiving the two notices of December 2009 and April 2010 it made the decision that it would not vacate the leased premises.

Secondly, the respondent avers that the applicant's former Managing Director F had advised it to ignore the notice to vacate and consequently, based on that advice, a decision was made to ignore the notice. The respondent also considers that the reason why the applicant seeks its eviction is because the parties had initially negotiated to set up a partnership in the respondent's business. This fell through and it is the belief of the respondent that this is the motive for the applicant actively to seek the eviction of the respondent G from the premises. The respondent therefore doubts that the applicant is acting in good faith.

Lastly, the respondent contends that there exist disputes of fact such that this court cannot, on the papers, decide whether or not the lease was renewed with Mr Mangena and that the court would need to hear from Mr Mangena H on the issue relating to the alleged renewal. If the lease was not renewed,

then the respondent would be a statutory tenant and the applicant would A need to show that it was acting in good faith.

In answer to the papers filed by the respondent, the applicant filed together with its answering affidavit, an affidavit from the Chairman of the Tobacco Industry Marketing Board. The affidavit was commissioned by Mr R Gunn, whom both parties agree is a member of the board of directors of the B applicant. The respondent has therefore, in its heads of arguments, raised a point *in limine* challenging the admissibility of the affidavit in question. The respondent contends that Gunn is an interested party in these proceedings and that as such, the affidavit commissioned by him should not be considered by this court as Gunn cannot be considered as unbiased. According to the respondent, Gunn has a pecuniary interest in the proceedings before me C and consequently the affidavit he commissioned is tainted and should not be regarded.

Per contra, the applicant contends that by virtue of the provisions of para 3 of the Schedule to the Regulations, the affidavit is exempted from the prohibition contained in s 2 of the Justices of the Peace and Commissioners D of Oaths (General) Regulations 1998 (SI 183 of 1998) (hereinafter referred to as "the Regulations". The prohibition contained in s 2 is as follows:

> "(1) No justice of the peace or commissioner of oaths shall attest any affidavit relating to a matter in which he has any interest.
>
> (2) Subsection (1) shall not apply to the affidavits specified in the Schedule." E

The Schedule to the Regulations lists a number of persons who are exempted from the prohibition contained in s 2 above. The applicant contends that Gunn is covered by the exemption contained in para 3 of the Schedule which is to the following effect:

> "3. Affidavits attested to by a person who is neither a legal practitioner nor a member of the Public Service and whose only interest therein arises out of his F employment and in the course of his duty."

Gunn is not a legal practitioner nor is he a member of the Public Service. He is a director in the applicant. Apart from being a director of the applicant, I have not been given anything to suggest that he has an interest in the applicant extending beyond his occupation of a seat on the board of directors. Miss G *Hove* suggests that, by virtue of his being a director, he has a pecuniary interest in the resolution of the matter as it would be in the interests of the applicant for the respondent to be ejected from the premises.

It is generally accepted that the word "interest" must be given a limited meaning, and cannot be extended to cover the remote and indirect interest that an employee of an attorney has in the matters dealt with in the attorney's H

Gowora J

A office. Neither counsel addressed the question of the exception as it relates to the director of a company. It must be accepted that a director of a company occupies a position materially different from that of an employee. It is common cause that in this case Gunn is not an executive director of the applicant. According to Cilliers & Benade *Corporate Law* 3 ed at p117, the mere fact of holding office as a director creates no contractual relationship B between the company and the director. The articles of association of the company also do not create such a relationship. In addition, the occupation by a director of the position of director does not make him an agent of the company, it also does not make him an employee unless he has entered into a separate contract with the company as such.

C Gunn is not an employee of the applicant nor could he have attested to the affidavit in the course of his duties. It cannot be the function of directors of the applicant to attest to affidavits. The exception, therefore, does not apply to him. What remains to be decided is whether or not, as a director of the applicant, he can be said to have an interest in the matter before me.

D What is clear and obvious is that the policies of a company are carried out and implemented through decisions made by the board of directors. Being an artificial person, the board of directors of a company is its human agency. In the present circumstances it therefore becomes pertinent to determine if the board, of which Gunn is a member, can be said to have an interest such as would disqualify one of them from attesting to an affidavit in a matter in E which the company has an interest.

The case before me is not specifically to do with a financial dispute, it is concerned rather with the applicant wanting the lawful eviction of the respondent from its premises. The board of the applicant would not be performing its functions as a board if it did not ensure that this happens, F because ultimately the applicant would stand to benefit in the long run from the eviction. In any event, it is trite that litigation involving a corporate must be authorised by such entity. Gunn, as a member of the board, would have been one of the people who actually authorised the litigation to evict the respondent. The deponent to the founding affidavit filed on behalf of the applicant could only have done so on the authority emanating from the board. G If the board sanctioned it, it therefore stands to reason that Gunn was aware of the litigation to evict the respondent. The reason for the applicant seeking the eviction of the respondent is that it has expectations of an increase in the deliveries of tobacco to its floors. This has a financial benefit, in that it would not make business sense for the applicant to seek to remove a tenant H from its premises unless such result would be of financial gain to it in the

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Gowora J

long run. In any case its business is the auctioning of tobacco, so an increase A in deliveries can only result in more revenue for it.

What constitutes "interest" has been defined in a number of authorities emanating from South Africa, but not yet in this jurisdiction. It appears settled that "interest" goes beyond social or ethical interest. "Interest", in the context of this matter, would be synonymous with an expectation of a B favourable result from this court. Where the person administering the oath and ultimately commissioning the affidavit has an interest in the contents of the affidavit, it is clear that there is an element of bias on the part of the commissioner. Further, where one is associated with a party that filed proceedings in a matter and the person concerned is required to administer an oath to a deponent to an affidavit which has a bearing on the outcome C of the litigation brought by the party he has an association with, then clear bias can be said to exist. A commissioner of oaths has a duty to ensure that a deponent to an affidavit swears to the truthfulness of the contents of the affidavit. If the commissioner of oaths himself is not just acquainted with the facts but wishes them to be placed before the court and wishes that the court has regard to them in the resolution of a dispute, I would suggest that such D commissioner has an interest going beyond mere social or ethical interest. The applicant has a proprietary interest to protect, and Gunn, as a director on the board running the affairs of the applicant, cannot be said be said to be a disinterested party.

In the circumstances of this case, is the position contended by the applicant E that Gunn does not have an interest in the determination of this matter in his capacity as a director of the company sustainable? The short answer is that he would have an interest and that evidently a board resolution to the effect that the respondent be evicted had been passed. In my view, Gunn has an

interest in this matter and the affidavit that he attested to as commissioner of oaths cannot be given regard to in the determination of the dispute. It is tainted. F

I turn now to the merits of the application. The applicant has sought the eviction of the respondent from its premises on the premise that it has good and sufficient grounds to require the eviction of the tenant. This is relief that is available in a situation where there is no formal lease between the parties and the tenant has, by some process, become a statutory tenant. The averment G is made that the lease between the parties has expired. The applicant did not, however, in its founding affidavit refer to the respondent as a statutory tenant. The respondent contends, in argument, that this omission is fatal to the applicant's case as it has sought to establish its case in the answering affidavit. I note, however, that in the opposing affidavit the respondent's chairman, Lyton Shumba, makes the averment to this effect: H

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> A "If the existence of the lease is proved then the question of good and sufficient cause falls away. If the existence of the lease is disproved then we are a statutory tenant and the applicant still has to show that it is acting in good faith and demonstrate good and sufficient cause to evict us."

I find it mischievous, therefore, for Miss *Hove* to seek to argue that the applicant had not, on its initial application, based its claim on the status B of the respondent as a statutory tenant. The respondent does not allege or aver that the lease agreement is still extant. Instead, the whole tenure of the opposition is to the effect that the written agreement had expired but that a verbal lease agreement had then been concluded between the parties, but in the event that such lease agreement was not established on the papers, then and in that event the respondent was a statutory tenant and that the applicant C had to establish good and sufficient grounds for its ejectment. It is clear, therefore, that the respondent accepts that the lease agreement signed by the parties on 11 July 2007 expired on 31 May 2010.

It becomes necessary then to decide whether or not the respondent and the applicant entered into a verbal agreement as contended by the respondent. In D the affidavit of Shumba it is averred that the lease agreement was renewed with P Mangena, the former Managing Director of the applicant. There is no indication of who represented the respondent. The date when the renewal was agreed is also not mentioned. All that is said is that the lease was renewed for a further period of three years and that the rent was set at US$600 per month. The deponent states that they were told that they would receive a E new written lease agreement shortly thereafter. It never arrived.

The respondent admits that it received a notice from the applicant in December 2009 requiring it to vacate the premises at the end of the lease period, but states that the parties were embroiled in a rent dispute wherein the landlord was demanding rent of US$1 200. The respondent was offering US$600. F The deponent states that, by the time the reminder to vacate was sent in April 2010, the respondent had been advised by the Managing Director of the applicant to ignore the notice and pay rent as the lease had been renewed for a further three years.

In argument, both written and oral, it was the contention of Miss *Hove* that G there are numerous disputes of facts, to such an extent that this court cannot decide the matter on the papers before it. The respondent suggests that the matter should be referred to trial so that it can call Mangena, the applicant's former managing director, to give oral evidence as to the dealings between the applicant and the respondent, and specifically for him to come to court and explain why he concluded a verbal lease agreement with the respondent, its H terms and why the rent was not increased. The respondent contends further,

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that the applicant cannot confirm or deny the existence of lease, and that A the only person who can do this is Mangena, who must therefore speak for himself. The respondent also wishes for an opportunity to cross-examine him on the issue.

The applicant strongly denies the existence of any disputes of facts as alleged by the respondent. The applicant contends that where there is an allegation B that disputes of fact exist, the law is that the court must, if possible, take a robust view and common sense approach and not take an over fastidious view of conflicts, and must seek to resolve the dispute despite apparent conflict. See

Masukusa v *National Foods Ltd & Anor* 1983 (1) ZLR 232 and *Zimbabwe Bonded Fibreglass* v *Peech* 1987 (2) ZLR 338 (S). In the latter case Gubbay JA (as he then was) stated at 339C: C

> "It is, I think, well established in motion proceedings that a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling D of evidence, where there is a bona fide and not a merely an illusory dispute of fact."

However, before taking a robust view, a court must have concluded or found that in fact there are real or genuine disputes of fact that exist. See *da Mata* v *Otto* 1972 (3) SA 858 (A) and *Checkers Motors (Pvt) Ltd* v *Karoi Farmtech* E *(Pvt) Ltd* 1986 (2) ZLR 246 (S). Although the respondent contends that the applicant was, before embarking on these proceedings, aware that there was a dispute on an alleged renewal of the lease agreement, I am unable, on the papers before me, to find that that is so. The respondent received two letters written almost five months apart, in which the intention of the applicant to terminate the lease at the expiry of the same was made clear. The respondent F did not acknowledge either of them nor did it put the record straight with the applicant, if indeed a verbal agreement had been concluded with Mangena, and express its indignation and make it known that far from the lease expiring at the end of May 2010, the position was in fact that a new lease agreement had been concluded with Mangena. The respondent did not do this. It claims, G however, that it relied on the existence of such verbal lease agreement and that as a result it did not move out of the premises.

The opposing affidavit is devoid of detail on the alleged renewal of the lease agreement, but seems to have focused on the wrangles that the parties had on rent. Despite receiving two notices, one in December 2009 and another in April 2010, clearly spelling out the applicant's desire not to renew the H

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A lease upon its termination, the respondent did not choose to respond, yet it responded to letters that were raising issues to do with arrear rent. Prior to the two notices referred to above, the respondent had also received notices from the applicant seeking to terminate the lease agreement. The respondent appears to have responded to some, but ignored others. The notices seem, however, to bear out the contention by the respondent that during the currency of the B lease the applicant had sent various notices to the respondent, purportedly seeking the termination, prematurely, of the lease. Certainly the relationship appears to have been far from amicable but, in my view, the respondent had to show on the papers that after the expiry of the written lease agreement it was renewed verbally as suggested in the opposing affidavit.

C The respondent's failure to respond to the initial letter dated 14December 2009 and the reminder, in terms of which it was informed of the termination of the lease, is remarkable if viewed against the backdrop of the claim by the respondent that the lease had been renewed verbally with Mangena, the Managing Director . One would have expected an immediate response from the respondent categorically stating that the lease had been renewed and a D firm refusal to move out based on the alleged renewal. One would have, as well, expected the respondent to have responded to the notices by advising the applicant that it had concluded a verbal lease with the Managing Director and consequently was disregarding the notices, especially in view of the fact that the Managing Director who had brokered the lease had left the employ E of the applicant. This is especially surprising given the respondent's penchant in the past to respond at every turn to a perceived wrong. It is therefore inconceivable that it would have ignored two notices demanding that it vacate the premises on the basis of an expired lease agreement. Instead the respondent did not react. All it did was to pay rent on 1 June 2010.

As part of its papers the respondent annexed papers filed in the magistrates F court by both parties. The applicant had filed an application for the eviction of the respondent which application it subsequently withdrew. The respondent had, in turn, filed an application for a *mandament van spolie* after the security guards employed by the applicant had denied access to the respondent's clients into the premises. In an affidavit deposed to by Lyton Shumba, the G following statement is made in regard to an alleged verbal lease agreement;

> "On 1 June 2010, the applicant paid rentals for the month of June 2010. A copy of the said receipt is annexed hereto as Annexure B. In terms of a verbal lease agreement between the parties, once they

accept rent the lease would automatically be renewed for a period of three years."

This statement, in my view, is very different from the one in the opposing H affidavit from the same deponent to the effect that they had renewed the

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lease agreement with the former Managing Director. From the statement A quoted above, it is clear that the respondent says that the payment of the rent would constitute renewal of the lease agreement. This is a far cry from the averment that the lease had been renewed with Mangena. It is trite that, until rent or some mode of fixing the rent, is agreed upon there is no contract of letting or hiring premises. B

The lack of detail on the alleged verbal lease points to a lack of existence of any agreement between the parties. If the details had been agreed the respondent would have been happy to provide them to the court. I find no evidence that a verbal lease agreement was concluded between the applicant and the respondent and, in my view, the respondent in the absence of renewal had become a statutory tenant. C

Both parties are correct in arguing that the applicant can only succeed if it proves that good and sufficient grounds exist for the respondent to be evicted from the premises it presently occupies. The applicant is in the business of tobacco auctions. This entails the acceptance of tobacco from farmers which is then auctioned through the offices of the applicant. The applicant contends D that due to an increase in the production of tobacco it finds itself in need of more space to accommodate the upsurge in deliveries to its premises. It is incumbent upon the applicant to establish that indeed there has been an increase in its business operations, such that there is need for the ejectment of not, just the applicant, but its other tenants from the rented premises. In considering what a court should have regard to when assessing what amounts E to good and sufficient grounds under the regulations Beadle CJ in *Trustees in Mashonaland of the Church of the Province of Central Africa* v *Timms* 1973 (1) RLR 307 (G) at 312H-313A stated:

> "The Regulations provide no yardstick as to what a court should regard as sufficient ground for ordering the ejectment of a statutory tenant. The application of this F section was considered by the Appellate Division in the case of *Tucker* v *Buchan* 1968 (2) RLR 192 (A); 1968 (4) SA 809 (RA). The judgment in that case did not attempt to itemise the grounds which a court would regard as sufficient. The approach of MacDonald JA, in that case clearly indicates that the court must make a value judgment based on the merits of each particular case, and that this is the manner in which I consider I must approach this matter." G

There is no set criteria for determining what amounts to good and sufficient grounds and each case must be decided on its facts. It is easier to assess good and sufficient grounds in a situation where the landlord seeks eviction on the basis that it requires to effect necessary renovations to the premises. In such a situation, the landlord must show that there is indeed an intention to renovate. *In casu,* the applicant contends that it requires the premises for H

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A its expansion program. The respondent, on the other hand, has suggested that the applicant wishes to terminate the relationship due to the acrimony between the parties over rent.

Indeed, there is evidence on the papers that, during the respondent's occupation of the premises, the parties have at times been at loggerheads over the issue of rent. It is fair to state, however, that their differences never escalated to B the point where either party sought to terminate the lease on the basis of their differences over what rent should be payable. The evidence suggests that each time there would be an amicable settlement over the rent dispute. The applicant has not, on the papers before me, sought the eviction of the respondent formally through court process prior to the middle of 2010. I C therefore find it difficult to accept the contention advanced on behalf of the respondent that the motive behind the intent to evict the respondent is due to the parties' inability to agree on rent over the duration of the lease.

It is correct, as stated by the respondent, that the applicant had given the respondent notice on several occasions that it should vacate the premises. The respondent has attached to its opposing papers a number of letters written D either by the applicant's officials or by its managing agents, CBRE, in which notice to vacate the premises prior to the termination of the written lease was

given. The running theme in all the letters is that the applicant required the use of the premises for itself. The applicant, in all the letters produced in the record, indicated that the premises were required for its expansion E programme. In its founding affidavit the applicant has sought to explain that prior to 2007 there was a decline in the volumes of tobacco being delivered by farmers and, as a result, there was no need for the applicant to have use of more space than it was in occupation of. It had in fact excess space. A trend developed where the tobacco deliveries increased leading to a realisation and decision by the applicant that it needed to utilise the leased space.

F The applicant predicted that, for the 2010 tobacco season, there would be congestion at its floors which would stretch the facilities and possibly lead to a health hazard. The increased floor space, it contended, would go a long way in reducing the delays that tobacco farmers were experiencing in having their produce sold. Apart from making these averments, the applicant did G not produce any documentation in proof of the same. It was only in answer to the contention by the respondent to the effect that the applicant did not have good and sufficient grounds for its eviction from the leased premises that the applicant then sought to produce documents to prove the alleged increase in deliveries. The applicant has, as a consequence, attached extracts from newspapers, some of which are dated, others are not. An extract from H the *Business Digest* of 3 to 9 September 2010 contains an article which

confirmed that, as at that date, a total of 113.1 million kg of flue-cured A tobacco had been sold, with a value of US$344.2 million at the tobacco auction floors that were operational nation wide. The article indicated that projected total sales were 120 million kg for the season. An earlier article had projected that the sales from tobacco would rake in US $274 million. The article confirmed that sales of tobacco as at the date of the article, 10 to B 22 July2010, had doubled from the same period the previous year.

The respondent objected to the attachment by the applicant of the newspaper clippings, as well the amplification by the applicant of the projected increase in delivery of tobacco to its auction floors. The respondent has argued that the applicant is seeking to make its case in the answering affidavit as opposed to the founding affidavit. It is suggested in argument, that the applicant did C not set out a cause of action in the founding affidavit and that it was only in the answering affidavit that it sought to make out its case.

I am not convinced that the respondent is in fact correct. The respondent has, in its opposing affidavit, disputed that the applicant needs the increased floor space for an expansion programme. The respondent did, in fact, challenge D the applicant to provide the court with information as to what percentage of expected tobacco grown was to be delivered to it. The respondent has also challenged the applicant to show that the projected increase in tobacco deliveries would see an increase in deliveries to the applicant itself. I believe that the respondent is being impracticable in seeking an assurance from the applicant that there would be an increase in deliveries to its floors. Unless E the licence to auction tobacco has been withdrawn, one would expect that any registered or licensed tobacco auction can only benefit from an increase in tobacco cropping. There is no suggestion on the papers that any farmer intending to grow and market the crop must first register with an auction floor. It is enough, in my view, that the applicant has shown that there will be an increase in the production of tobacco. F

In my view, the assessment of whether or not there is good and sufficient grounds on the papers presented by the applicant must, of necessity, look at the *bona fides* of the applicant. In *Union Wine & Spirit Corp Ltd* v *Ferreira* 1948 (2) SA 647 (O) at 651-2 de Beer J stated:

> "It is difficult to see what more can ordinarily be required of a claimant than that G he should assert his good faith, and bring some small measure of evidence to demonstrate the genuineness of his assertion. He can normally scarcely do more, and it rests with the lessee resisting ejectment to bring forward circumstances casting doubt upon the genuineness of his claim."

I can safely state, from a reading of the opposing affidavit, that apart from the alleged rent dispute, the respondent has not brought forth any circumstances H

A that would cast doubt on the genuineness of the claim by the applicant that it requires the premises for its own use. The applicant, in its answering affidavit, went to great lengths to show how the tobacco deliveries were expected to rise. It has attached clippings from all sorts of newspapers whose running thread on the issue of tobacco is that there has been an increase in production and hence the need for more space at auction floors to accommodate buyers. B I cannot see what more the applicant could have done or said in order to establish good and sufficient grounds for the ejectment of the respondent from the leased premises.

The courts have held that, in deciding whether or not a lessor has good and sufficient cause to seek eviction, it is only the position of the lessor that C has to be considered, that of the lessee being irrelevant for the enquiry. As discussed above, the legislation does not define what constitutes good and sufficient cause, but more importantly it only mentions the lessor not the lessee, reinforcing the views of the courts that the position of the lessee is not material. See *Mobil Oil Zimbabwe (Pvt) Ltd* v *Chisipite Service Station (Pvt) Ltd* 1991 (2) ZLR 82 (S). It then becomes necessary for the lessee to D "bring forward" circumstances casting doubt upon the genuineness of the lessor's claim. The respondent points to the abortive proceedings in the magistrates court, the several letters of notice prior to the expiry of the lease period, the letter written in June 2010 seeking legal advice on the way to evict its tenants, and the applicant's futile attempts at interfering with the E respondent's occupation immediately following the abortive ejectment proceedings, as pointers to the applicant's lack of good faith in seeking its ejectment. Looked at in isolation, these factors could indeed point to a lack of good faith on the part of the applicant. However, even taking into account the fractious relationship between the parties over the years, the main theme running through the notices issued by the applicant to the respondent is that F it required the premises for its own use. The occasions when there were threats of eviction on the basis of the respondent being in arrears with rent are few. I am convinced that the reason for the ejectment is solely for the wish by the applicant to use the floor space to accommodate tobacco growers.

Next, it falls for me to consider the length of notice that the respondent G must be accorded before it is evicted. The respondent has known, from as far back as December 2009, that the applicant required the premises for its use. In April 2010 it was again served with notice that the applicant wished it to vacate by 31 May 2010. The respondent chose not to respond to either notice. Instead, it paid rent in the hope that the applicant would allow the relationship to carry on. The respondent has suggested that a reasonable H period of notice for it to vacate would be six months. Apart from the period

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mentioned in the draft order, the applicant has not addressed the question of A what would be a reasonable period of notice to be accorded to the respondent in the circumstances. It merely argued that there was no basis for granting the applicant a period of six months' notice

The respondent is in business and would appear to have been in occupation of the premises for quite some time. It requires time to locate space adequate B for its purposes and I would assume that that would be no mean feat. The applicant has not suggested that the tobacco season will start earlier than January or February in any given year. In deciding what notice to give to a lessee, a court must not just consider the needs of the lessor but must also assess the hardship likely to be suffered by the lessee if it is evicted from the premises. It is a value judgment based on all the equities of the case. C I am entitled to take into consideration the difficulties that the respondent is likely to encounter in securing accommodation suitable for its purposes. It seems to me that a period of six months to allow the respondent to find appropriate accommodation, given the length of time it has been in occupation, would not be unreasonable or an inordinate period. The applicant has not advanced any argument to the court alleging any prejudice it would suffer D were the respondent allowed a period of six months to vacate the premises. In addition, the lease agreement which governed the parties' relationship itself provided for a notice period of six months. If the respondent were ejected with immediate effect, as required by the applicant, hardship will be caused to it. I will therefore be guided by the notice period provided in the G lease and require the respondent to vacate within that period.

In the premises, I find that the applicant has established that it has good and sufficient grounds to have the applicant evicted from its premises and an order to that effect will be issued. Accordingly, an order will be issued in the following terms:

IT IS ORDERED THAT:

1. The respondent and all those claiming occupation through it of the leased premises shall vacate the premises situate at Tobacco Sales Floor Complex, Gleneagles Road, within six months from the date of service of this order.
2. The respondent shall pay the applicant's costs at a scale as between legal practitioner and client.

Wintertons, applicant's legal practitioners

Hove & Associates, respondent's legal practitioners H

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MBUNDIRE v BUTTRESS 2011 (1) ZLR 501 (S)

Citation	2011 (1) ZLR 501 (S)
Case No	Judgment No. S-13-11
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA and Cheda AJA
Heard	22 June 2010
Judgment	24 May 2011
Counsel	*T Pasirayi*, for the appellant No appearance for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Damages – *quantification of damages – serious bodily injury resulting from motor accident – evidence relating to assessment of damages available to plaintiff but not placed before court – effect – when proper for court to grant absolution from the instance – remittal by Supreme Court to* D *the court a quo so as to consider the question of damages*

Damages – *Lex Aquilia – method of assessing damages – compensation to be assessed so as to place the plaintiff in the position he have occupied but for the wrongful act resulting in his injury – consideration of comparable awards – inflation to be taken into account*

E **Damages** – *assessment of general damages for pain and suffering – upon issue of summons claim expressed in old Zimbabwean currency – effect of hyper-inflation since the issue of summons – need to place the plaintiff in the position he would have been in but for the wrongful act of defendant – whether permissible for the court to make an appropriate award in* F *new currency and expressed in American dollars*

Damages – *patrimonial property – damages claimable for cost of replacement of damaged vehicle – damages originally claimed in old Zimbabwean currency – subsequent amendment so as to claim in new United States currency – amended claim in conflict with the principle of currency* G *nominalism*

Headnote

"[W]here evidence is available to a plaintiff to place before the court to assist it in quantifying damages, and this is not produced, so that it is impossible for the court to do so, or there is no, or quite insufficient evidence which can be produced by an unfortunate plaintiff, he must H fail and the defendant must be absolved from the instance…" (*dicta per*

Garwe JA

Berman J in *Aaron's Whale Rocks Trust* v *Murray and Roberts Ltd &* A *Anor* 1992 (1) SA 652 (C) at 655H-656H applied).

The basic principle underlying an award of damages in the Aquilian action is that the compensation must be assessed so as to place the plaintiff, as far as possible, in the position he would have occupied had the wrongful act causing him injury not been committed. It is also established that B the fall in the value of money is to be taken into account in considering comparable awards. The allowance for inflation is a rough one and one should incline towards the conservative.

In July 2006, the appellant was involved in a collision between his vehicle and a vehicle driven negligently by the respondent. As a result of the accident, the appellant sustained very serious injuries causing him to be C hospitalised for a period, in total, amounting to about one and a half years. His vehicle was damaged beyond economic repair. In the consequent trial, which commenced in October 2008, the appellant claimed from the respondent general damages, *inter alia* for pain, suffering and disability, the sum of $1 billion (old currency) and a further sum for the cost of D future medical treatment. In respect of his vehicle, he had originally claimed in his summons $500 billion (old currency) but shortly before commencement of the trial, he had obtained two quotations for the replacement thereof in the sum of US$8 000. He had thereupon amended his claim accordingly. The High Court delivered its judgment on 16 April 2009 and in respect of each of the appellant's claims, granted E absolution from the instance. In so far as the claim for general damages was concerned, it held that the expert medical evidence was imprecise in that it was not clear to what extent an improvement in the appellant's condition would affect his degree of disability. Concerning his claim for costs of future medical treatment, the court considered that there was no evidence as to how long he would require physiotherapy and F rehabilitation and consequently no proper estimate could be determined as to what those costs might be. In dealing with the appellant's third claim in respect of the replacement cost of his vehicle, the court held that the alteration of the claim, expressed in the new currency, after a period in excess of two years, so as to reflect inflation, would be in breach of the G principle of the currency nominalism.

The appellant appealed. As far as his claim for general damages was concerned, he sought an order that the respondent be required to pay the sum of US50 000 being equivalent in the new (US) currency of $1 billion (old currency) as at the date of judgment. During the argument before the Supreme Court, it was noted that on 1 July 2009 the Legislature had H

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A dispensed with the old currency altogether and that all monies owing had to be paid in the new (US$) currency at a rate of one trillion dollars (old currency) to $1. It was argued therefore, on behalf of the appellant that an award for general damages expressed in the old currency would be meaningless as a result of the hyper inflation over the previous years. The appellant also sought an order that the respondent pay him the sum B of US$5000 in respect of his future medical expenses and the further sum of US$8000 being the replacement of cost of his vehicle.

Held, that in respect of the claim for general damages, the court *a quo* had erred in granting absolution from the instance. Notwithstanding that the effect of the future improvement in his condition on his general C disability was not explored, it was clear that his injuries had been very serious. He had been hospitalised for a very long time and would have to endure pain in the future. Having regard to these and other facts there was sufficient evidence before the court to enable it to make an award.

Held, further, that the claim for general damages must be remitted to the court *a quo* for a determination thereof.

D *Quaere*, whether in doing so, and having regard to the need to place the appellant as far as possible in the position he would have been had the wrongful act causing him injury not been committed, the court *a quo* should make an appropriate award based in the permitted new currency.

Held, further, that as far as the claim for the costs of future medical expenses E was concerned, the evidence led was clearly insufficient to establish for how long physiotherapy and rehabilitation would be required, although such evidence was available. In the circumstances, this claim was properly dismissed by the court *a quo.*

Held, further, that the appellants amended claim for the replacement costs of his vehicle must also be dismissed. Had the respondent been called F upon to pay shortly after the accident, he would have paid no more than $500 000 000 000 (old currency). The suggestion that owing to inflation, he must now pay US$8 000 (new currency) was not based on any legal principle and, as the court *a quo* had found, would have been in conflict with the principle of currency nominalism.

Cases cited G

Aaron's Whale Rock Trust v Murray and Roberts Ltd & Anor 1992 (1) SA 652 (C)

Ebrahim v Pittman NO 1995 (1) ZLR 176 (H)

Halwick Invstms v Nyamwanza 2009 (2) ZLR 400 (S)

H *Hersman v Shapiro and Co* 1926 TPD 367

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Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of A *Zimbabwe* 1988 (2) ZLR 482 (S); 1989 (3) SA 191 (S)

Marume & Anor v Muranganwa HH-27-07

Sandler v Wholesale and Coal Suppliers Ltd 1941 AD 194

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

Legislation considered B

Finance (No. 2) Act 2009 (Act 5 of 2009), s 17

Presidential Powers (Temporary Measures) (Currency Revaluation and Issue of New Currency) Regulations 2009 (SI 6 of 2009), ss 6 and 8

Case information

T Pasirayi, for the appellant C

No appearance for the respondent

Judgment

GARWE JA: At the conclusion of the hearing of this matter in the High Court, the court *inter alia* granted absolution from the instance in respect of the appellant's claim for general damages, future expenses and replacement value for his motor vehicle. It is only against that portion of the judgment D that the appellant has appealed to this Court.

The facts of this case are as follows. On 23 July 2006, the appellant was involved in a serious road accident with the respondent at the intersection of Breach Road and Kingsmead Road in Borrowdale, Harare. As a result of the accident the appellant sustained serious injuries. He was conveyed to E Parirenyatwa Hospital whilst in a coma. Thereafter he was detained in the High Dependency Unit for 17 days. He spent 7½ months at St. Giles Rehabilitation Centre. He spent a total of about 1½ years undergoing hospitalization.

It was accepted during the trial that prior to the accident the appellant had been active in sport and that he had been in charge of sport and discipline at St Johns College, Borrowdale. In particular he was in charge of rugby, F swimming, hockey and athletics at the school.

The court *a quo* found on the evidence that the accident was the result of gross negligence on the part of the respondent. In considering the appellant's claim for general damages, the court *a quo* found as a fact that the appellant will require surgical operations, regular physiotherapy and medication for G the rest of his life. The court also found that he experiences weaknesses of the forearm and arm on the left side and that he will suffer from pain for a very long time. A report prepared by Professor Kalangu stated that the lower plexus should show good improvement but did not indicate to what extent he was likely to improve. The court was of the view that in the absence of evidence from the two doctors who attended to the appellant, the extent of H

Garwe JA

A his disability was debatable. On that basis, the court *a quo* granted absolution from the instance.

On the question of future medical attention, the court accepted that the appellant will require transport to attend physiotherapy and rehabilitation and that he will require future medical attention. However, the court reached the B conclusion that the plaintiff had failed to show how many sessions he would be required to undertake to enable the court to assess the future expenses that he was likely to incur. On that basis, the court also granted absolution from the instance.

On the question of the replacement value of the motor vehicle, the court *a quo* came to the conclusion that since delictual damages are calculated as at the C time of the delict, the appellant had failed to explain satisfactorily the delay between the time of issuance of the summons and the time when quotations were obtained. In particular, the court was of the view that consideration of factors such as inflation in the calculation of delictual damages would amount to altering the quantum of the debt and would be in conflict with the D principle of currency nominalism. As a result, the court *a quo* also granted absolution from the instance.

In his grounds of appeal, the appellant has attacked the decision of the court *a quo* on three bases. These are:

1. That the court *a quo* erred in failing to consider the evidence placed E before it and thereafter to exercise its discretion to make an award for general damages in favour of the appellant.
2. The court *a quo* erred in failing to consider the evidence placed before it and thereafter in exercising its discretion to make an award for future medical expenses in favour of the appellant. F
3. The court *a quo* erred in applying the principle of currency nominalism and in failing to exercise its discretion to make an award in favour of the appellant for the replacement value of his motor vehicle.

The appellant seeks an order that para 2 of the order of the court *a quo* be set aside and that the respondent be ordered to pay (a) the sum of US$50 000, being the equivalent of Z$1 billion as at the date of judgment, as general G damages together with interest thereon at the rate prevailing in the United States of America from the date of judgment to date of payment in full; (b) the sum of US$5 000, being future medical expenses together with interest thereon at the rate prevailing in the United States from the date of judgment to the date of payment; and (c) the sum of US$8 000 being the replacement H value of the appellant's motor vehicle.

Garwe JA

It is appropriate at this stage to consider the approach that has been followed A by the courts in the assessment of damages in general, and special damages in particular. In *Hersman & Shapiro & Co* 1926 TPD 367, 379-80 Stratford J observed:

> "… monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are B cases where the assessment by the court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of C the damages suffered, still, if it is the best evidence available, the court must use it and arrive at a conclusion based upon it …".

In *Ebrahim* v *Pittman NO* 1995 (1) ZLR 176 (H) at 187C-D Bartlett J quoted with approval the remarks of Berman J in *Aarons Whale Rock Trust* v *Murray & Roberts Ltd & Anor* 1992 (1) SA 652 (C) at 655H-656F that:

> "Where damages can be assessed with exact mathematical precision, a plaintiff D is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the court to quantify his damage to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the court enough evidence from which it can, albeit with E difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss …
>
> There must of course be sufficient evidence before the court for it to be in a position to make a proper assessment of damages, for
>
> > '… it is not competent for a court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual F basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made':
>
> *per* Rose Innes AJ in *Monumental* Art *Co* v *Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118E. See also *Mkwananzi* v *van der Merwe & Anor* 1970 (1) SA 609 (A) at 630.
>
> Thus where evidence is available to a plaintiff to place before the court to assist G it in quantifying damages, and this is not produced, so that it is impossible for the court to do so, or there is no, or quite insufficient evidence which can be produced by an unfortunate plaintiff, he must fail and the defendant must be absolved from the instance…"

In *The Quantum of Damages in Bodily and Fatal Injury Cases* 3 ed by Corbett, Buchanan & Gauntlett, the learned authors state as follows at p 99: H

Garwe JA

> A "In the case of damages which are capable of exact mathematical computation, such as, for example, medical and hospital expenses, proper evidence establishing the loss and substantiating the precise amount of the claim must be tendered. Where, on the other hand, mathematical proof of the damages suffered is in the nature of things impossible, then, provided that there is evidence that pecuniary damage in this regard has been suffered, the court must estimate the amount of the damages as best as it can on the evidence available and the plaintiff cannot B be non-suited because the damages cannot be exactly computed. However, the application of this principle is dependent upon the plaintiff having adduced the best evidence available to him. Where he has not done so and the difficulties in assessing the quantum of damages are due to the manner in which he has conducted his case, then the court is justified in ordering, and does order, absolution from the instance."

C The remarks made in the authorities cited above no doubt correctly reflect the law on the approach to damages in bodily and fatal injury cases both in this country and South Africa.

The first ground of appeal that falls for determination by this court is whether the court *a quo* erred in failing to consider the available evidence and D thereafter making an award for general damages in favour of the appellant. The amount claimed as general damages before the court *a quo* was the sum of Z$1 billion as at the date of judgment. The Z$1 billion claimed represented damages for pain and suffering, disability, bodily disfigurement, shock, discomfort, loss of amenities of life and shortened life expectancy. The court *a quo* delivered its judgment on 16 April 2009 and in respect of E this particular claim granted absolution from the instance. The basis for that decision was that the remark by Dr Kalangu in his report that "lower plexus should show good improvement" was imprecise. The court *a quo* was of the view that it was not clear to what extent the improvement would affect the degree of disability. Further, although the report alluded to the need for F a repeat study after six months, no such examination appears to have been undertaken. In view of the medical opinion that the appellant's condition could improve with rehabilitation and treatment, the court concluded that the extent of the disability was debatable and that therefore the appellant had not placed sufficient evidence before the court to enable it to make a G proper assessment.

It is correct, as the court found, that no further tests were done to ascertain the degree to which the appellant was likely to recover. The fact that the appellant had sustained very serious injuries from which he could never fully recover was common cause. The court accepted that following the accident, he had had to be hospitalized for about one-and-a-half years. The court accepted the H report by Dr Kalangu that the appellant had sustained "complete paralysis of

Garwe JA

the left and complete paralysis of both lower limbs" (*sic*). The radiological A investigations had revealed a fracture of the left clavicle, fracture of the spine in C5 and C6 and dislocation of the vertebra in C5-6 associated with spinal cord compression. Dr Kalangu estimated the percentage of disability at 60%. He further found that the appellant will have pain for a long time and he will require physiotherapy. The court also accepted the report by Professor B Meikle of the Clinical Neurophysiology Laboratory, Harare Hospital, that the appellant had weakness of all the muscle groups in the left arm with no movement in the shoulder and elbow muscles. The Professor found the upper plexus to have been seriously injured with no sign of recovery "at present" but the lower plexus was expected to show good improvement. Although the Professor recommended repeat studies in six months, as already noted, C nothing further appears to have happened after the preparation of that report.

The court *a quo* found that the accident had had a serious effect on the appellant who before the accident had been in charge of sport at St Johns College, Borrowdale, and had generally been active in sport. His condition after the accident had also affected his relationship with his daughter who, D it appeared, simply could not understand why her father could no longer engage in the activities he used to.

The court *a quo* further accepted as fact that the appellant will, for the rest of his life, require medical attention, including operations, regular physiotherapy and medication.

It certainly would have helped had the appellant undergone further examination E thereafter so that the exact degree of his injuries could have been ascertained. This notwithstanding, the evidence placed before the court in my view was sufficient to enable the court to make an award. As Watermeter JA aptly put it in *Sandler* v *Wholesale & Coal Supplies Ltd* 1941 AD 194 at 199:

> "… it must be recognized that though the law attempts to repair the wrong done to F a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, G depending upon the judge's view of what is fair in all the circumstances of the case."

The extent of the injuries sustained was substantiated. The doctors suggested that there was some possibility of improvement but this could only be determined if a repeat study was carried out at a later stage. During the trial, the appellant said nothing about such a repeat study. The court itself H

Garwe JA

A did not ask in order to clarify the situation. The failure to lead evidence on this should not have resulted in the appellant being non-suited. As stated in the *Quantum of Damages in Bodily and Fatal Injury Cases* at p 99, in a case such as the present, a court does not grant absolution but may tend towards conservatism in assessing the damages. The learned authors state:

> B "The general attitude of the court has been that if there be evidence upon which an estimate not unfair to the defendant can be made, it should not refuse to make an award merely on account of the deficiencies in the case presented upon the plaintiff's behalf. Nevertheless, the failure to adduce such evidence would normally operate to the disadvantage of the plaintiff in that, in its absence, the court would normally tend towards conservatism in computing the damages."

In my view, this is the approach that the court *a quo* should have adopted. C I would agree with the appellant that the finding of absolution in these circumstances resulted in an injustice. It is not uncommon in claims for general damages for a plaintiff to claim, and a court to award, individual damages for pain and suffering, disfigurement, loss of amenities of life and shortened life expectancy – see *The Quantum of Damages in Bodily and Fatal* D *Injury Cases* at p 46. The finding of absolution must therefore be set aside.

The amount claimed as at the date of commencement of the trial in October 2008 was the sum of Z$1 billion. Judgment was given six months later in April 2009. At the time the country was gripped by a hyperinflation environment which quickly eroded the value of money. In February 2009, however, the multiple currency system was introduced. Whilst the Zimbabwean dollar E remained

legal tender, it is a fact that transactions in the local currency ceased, effectively rendering the Zimbabwean dollar valueless. At the time that the court was asked to make its determination, the appellant was seeking the sum of Z$1 billion. It is that claim that should have been considered by the court *a quo*.

F In terms of s 6 of the Presidential Powers (Temporary Measures) (Currency Revaluation and Issue of New Currency) Regulations SI 6 of 2009, financial institutions were instructed to accept, between 2 February 2009 and 30 June 2009, old Zimbabwean currency at the rate of one trillion dollars for one dollar of the new currency system. In terms of s 8 of the Regulations, G debts incurred before 2 February 2009 were deemed to have been incurred, entered, created or transferred in terms of the old currency system and were to be settled, discharged or liquidated in terms of the old currency system provided, however, that on or after 1 July 2009 every debt was to be settled, discharged or liquidated in terms of the new currency system only. In the definition section, "debt" includes anything which may be sued for or claimed H by reason of any obligation arising from statute, contract, delict or otherwise.

Garwe JA

By operation of the law therefore, the claim by the appellant for general A damages in the sum of Z$1 billion stood to be dealt with in terms of above regulations. The one billion dollars claimed under the old currency equated to a fraction of a cent under the new currency system.

Considering the extent of the injuries sustained by the appellant, the claim for damages in the sum of Z$1 billion may not have been an unreasonable B sum at the time of commencement of the trial proceedings. However, the law, through SI 6 of 2009, has converted what would otherwise have been a substantial claim to a most trivial one.

The result is obviously a most unfair one and the appellant and the general public would be excused for thinking that there is something seriously wrong C with the law or at least the way it works. The legislature should have been alive to the obvious injustices that were to follow, especially because on 1 February 2009 the Government introduced the multiple currency system under which it became possible to enter into transactions denominated in other currencies – see s 17 of the Finance (No. 2) Act 5 of 2009. That Act regularized the introduction of other foreign currencies as legal tender with D effect from 1 February 2009.

In his notice of appeal the appellant has requested that his previous claim of Z$1 billion be substituted with the figure of US$50 000. The appellant, in his heads of argument, has argued that the amendment is justified, regard being had to the current economic conditions of the country where an award E in Zimbabwean dollars would render such compensation meaningless. Alternatively, the appellant has argued that the court, in the exercise of its discretion, can make an award based on the record using the current multiple currency system. No authority for that proposition has been cited. Whether or not such a proposition would violate the principle of currency nominalism has not been explored or commented upon. Whether or not the approach in F *Makwindi Oil Procurement (Pvt) Ltd* v *National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (S); 1989 (3) SA 191 (ZS) can be extended to cover a situation such as the present has also not been explored. An action for damages for bodily injury is derived not from Roman law but from Teutonic law but, like the Aquilian Action, it seeks to place the plaintiff as far as possible in G the position he would have been had the wrongful act causing him injury not been committed. Such a result cannot be achieved by making an award of a fraction of the Zimbabwean cent in favour of the appellant.

In all the circumstances, I am satisfied that there is need for a full investigation into the question of the damages that ought to be awarded in this case. This court has not had the benefit of argument on this very important issue. It H

Garwe JA

A seems to me that the most appropriate approach would be to remit the matter to the court *a quo* for consideration of the whole question of damages. In *Halwick Investments* v *Nyamwanza* 2009 (2) ZLR 400 (S) this court clarified the circumstances under which a matter can be remitted to a trial court.

The second ground of appeal is that the court *a quo* erred in failing to exercise B its discretion to make an award for future medical expenses in favour of the appellant. In its judgment the court *a quo* accepted that the plaintiff will require transport to attend physiotherapy and rehabilitation. However, the court found that it had not been shown how many sessions the appellant will be required to undertake although the appellant had proved that each session would cost $5. On that basis, the court *a quo* granted the respondent C absolution from the instance.

During oral submission before this court, Mr *Pasirayi*, the appellant's legal practitioner, conceded that the evidence led was incomplete as it was not clear how long the appellant would require pain medication and physiotherapy. He accepted that had evidence been led on this aspect, the Court would have D been in a position to properly assess the future medical expenses.

It is clear that the evidence led on future medical expenses was insufficient and that although the evidence was available, none was led to show for how long the appellant would require pain medication and physiotherapy sessions. In these circumstances the court, in my view, correctly granted absolution from the instance.

E The third and last ground of appeal is that the court *a quo* erred in applying the principle of currency nominalism and in failing to exercise its discretion to make an award in favour of the appellant for the replacement value of his motor vehicle.

It is apparent from the record that when the appellant initially issued summons F in July 2007, he sought damages for, *inter alia*, pecuniary loss of the motor vehicle that was damaged in the sum of Z$500 000 000 (old currency). This figure was, in the appellant's own opinion, the replacement value of the vehicle at the time. What then happened after that was that on 24 September 2008 – shortly before the commencement of the trial – the appellant obtained two G quotations from Borrowdale Auto and Tandem Motors in respect of a similar vehicle i.e. a 1991 Nissan Sunny with 121 000 kilometres on the clock. Both gave quotations for US$8 000. The appellant conceded during evidence that he obtained new quotations in US currency owing to inflation. The court *a quo* was of the view that the delay between the time when summons was issued and the quotations obtained had not been satisfactorily explained H and that the explanation given that this had been done to take into account

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Garwe JA

inflation would amount to altering the quantum of the debt and would be in A conflict with the principle of currency nominalism.

It is correct, as the court *a quo* found, that in general terms damages should be assessed as at the time of the delict. The basic principle underlying an award of damages in the aquilian action is that the compensation must be assessed so as to place the plaintiff, as far as possible, in the position he would have B occupied had the wrongful act causing him injury not been committed. It is also established that the fall in the value of money is to be taken into account in considering comparable awards. The allowance for inflation is a rough one and should incline towards conservation: *The Quantum of Damages in Bodily and Fatal Injury Cases* at pp 7–8.

The amount initially claimed by the appellant as representing the replacement C cost of the vehicle was the sum of Z$500 000 000. This was later amended to US$8 000 shortly before the trial. No authority has been cited for such an approach in a matter involving partrimonial loss. Had the respondent been called upon to pay shortly after the accident, he would have paid no more than Z$500 000 000 old currency. The suggestion that owing to inflation he D must now pay US$8 000 is not based on any legal principle and would be in conflict with the principle of currency nominalism – see the remarks of Makarau JP (as she then was) in *Marume & Anor* v *Muranganwa* HH-27-07. Bearing in mind that the appellant was obliged to prove his claim for damages for the damaged vehicle as at the date of the delict, the amended claim in US dollars made shortly before the trial has no basis in law. It is now E established, certainly in South Africa, that a monetary debt has to be paid according to its nominal value and, to take into account inflation, interest is then added on that debt until payment is made in full. In this regard I can do no better than quote the remarks of Grosskopf JA in S*A Eagle Insurance Co. Ltd* v *Hartley* 1990 (4) SA 833 (A) at 841C-F that:

> "… non-economic loss is not susceptible of measurement in money. Any figure F which is awarded cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on the idiosyncracies of the assessor, the figure must be 'basically a conventional figure derived from experience and from awards in comparable cases' (*Ward* v *James* [1965] 1 All ER 563

(CA) at 576E). The need for even-handedness requires that, when comparing awards in comparable cases, regard must be had to the G purchasing power of the currency at the time when such cases were decided, otherwise one would not be comparing comparables. This does not offend against the principle of currency nominalism. In assessing general damages one is dealing, *not with a monetary debt, but with the valuation of a non-monetary loss.* Such a valuation must obviously be made in terms of currency values as they are at the time of valuation, and not in terms of the values of an earlier time. In the same way, as it was put in argument, a valuer determining the present value of H

Garwe JA

A a farm would not use the currency values of the past. *A monetary debt is not, however, subject to a similar type of valuation. It has to be paid according to its nominal value*" (the emphasis is my own).

I am not persuaded, therefore, that the court *a quo* erred in coming to the conclusion that the appellant had failed to establish the claim for US$8 000. In any event, prior to the introduction of the multiple currency system in B February 2009, it was not competent, except in the instances outlined in the *Makwindi case supra*, to institute claims for amounts denominated in foreign currency.

In the result, therefore, the appeal succeeds only to the extent that the order granting absolution from the instance in respect of general damages must C be set aside.

On the question of costs, I am of the view that as the appellant has only been partially successful on appeal, an order that each party pays its own costs would be most appropriate.

In the result I make the following order: D

1. The appeal succeeds to the extent that the finding of absolution from the instance in respect of the claim for general damages is set aside.
2. The claim for general damages is remitted to the court *a quo* for determination.
3. Each party is to pay its own costs.

E ZIYAMBI JA and CHEDA JA concurred.

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

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S v MATAPO & ORS 2011 (1) ZLR 514 (S)

Citation	2011 (1) ZLR 514 (S)
Case No	Judgment No. HH-97-11
Court	High Court, Harare
Judge	Omerjee J & Musakwa J
Heard	19 May 2011
Judgment	24 May 2011
Counsel	*C Warara,* for the appellants *C Mutangadura,* for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Criminal procedure – *charge – dismissal of for want of prosecution – not itself a bar to further proceedings – person may not be committed to custody pending trial*

Headnote

The dismissal for want of prosecution of the case against an accused person in D terms of s 160(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] means that the person must forthwith be discharged from custody. It is, however, not a bar to further proceedings, but upon being served with a notice of trial the accused may not be required to pay further bail or to be committed to custody. E

As to how an accused person whose case has been dismissed is brou ght to trial in terms of s 322 of the Act, it is not necessary that he be re-indicted before a magistrate in terms of s 66, which then enjoins the magistrate to commit the accused to custody. Section 66 provides for summary committal of an accused where the Attorney-General is of the opinion that any person is under reasonable suspicion of having committed F an offence for which the person may be tried in the High Court. After committal for trial and the dismissal of the case in terms of s 160(2), the Attorney-General has no need to revisit the process of committal: it is inconceivable that he will formulate a second opinion over a matter in which he previously caused the accused to be committed for trial. In G any event, in terms of s 137, as soon as the indictment has been lodged with the registrar, the case is deemed to be pending.

Legislation considered

Criminal Procedure & Evidence Act [*Chapter 9:07*], ss 65, 66, 137, 160(2), 169, 321, 322(1) & 322(2) H

2011 (1) ZLR p515

Musakwa J

A High Court Act [*Chapter 7:*06], ss 29 & 41

High Court (Criminal) Rules 1964 (SRGN 452 of 1964), r 5

Interpretation Act [*Chapter 1:01*], s 7

Magistrates Court Act [*Chapter 7:10*], s 60

Case information

C Warara, for the appellants

B *C Mutangadura,* for the respondent

Judgment

MUSAKWA J: This is an appeal against the decision of the magistrate's court wherein it ordered the committal of the appellants for trial before the High Court despite their case having been previously dismissed in terms C of s 160 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

This court, in judgment number HH-142-10 ordered the dismissal of the case against the appellants in terms of s 160(2) of the Criminal Procedure and Evidence Act. This was premised on the fact that the court came to the conclusion that the appellants had not been brought to trial within six months of their committal. The judgment was handed down on 9 July 2010. D Subsequently the State

brought the appellants before the magistrate's court where it sought their committal for trial before the High Court on the same charges.

The appellants' contention is that in light of the dismissal of the charges against them, the court a *quo* erred in ordering their re-indictment. They E therefore seek an order declaring their re-indictment null and void and that they be released forthwith.

In its heads of argument, the State raised a preliminary point in respect of the procedure adopted by the appellants. The contention was that this is not an appealable matter and should have been contested by way of review. At the F initial hearing when the matter was postponed, Mr. *Mutangadura* abandoned the point *in limine* in favour of the matter being heard on the merits.

Despite Mr *Mutangadura*'s concession, a closer look at this matter reveals that there is no provision for appealing against a magistrate's decision to re-commit the appellants. Criminal appeals from decisions of magistrates courts are noted in terms of s 60 of the Magistrates Court Act [*Chapter 7:10*] G which provides that:

> "(1) Subject to this section and any other enactment, any person who is convicted of any offence by a court may appeal to the High Court against the conviction and additionally, or alternatively, any sentence or order of the court following upon the conviction.
>
> H (2) ...

Musakwa J

> (3) A person who is convicted of any offence by a court and who is discharged A after conviction in terms of any provision of the Criminal Procedure and Evidence Act [*Chapter 9:07*] may appeal against such conviction to the High Court.
>
> (4) Any person who has been convicted by a court but sentenced by a judge of the High Court in terms of Part IX of the Criminal Procedure and Evidence Act [*Chapter 9:07*] may appeal to the Supreme Court against such conviction or any sentence imposed upon him or any order of court following upon such B sentence as though he had been both convicted and sentenced in the High Court."

As can be noted from the above provision, the decision appealed against does not relate to a conviction. In addition, there was no submission that the appeal was noted in terms of any other enactment. In essence, there is no appeal before us. C

However, in the course of determining this matter, it has come to our attention that there is an apparent injustice that merits the attention of this court.

In terms of s 65 of the Criminal Procedure and Evidence Act, the committal procedure is the only legally permissible way to bring an accused person for trial before the High Court. The provision in question states that:

> "No person shall be tried in the High Court for any offence unless he or she D has been previously committed for trial by a magistrate for or in respect of the offence charged in the indictment:
>
> Provided that –
>
> (i) in any case in which the Attorney-General has declined to prosecute, the High Court or any judge thereof may, upon the application of any such E private party as is described in sections thirteen and fourteen, order any person to be committed for trial;
>
> (ii) an accused person, other than an accused person committed for trial under section sixty-six, shall be deemed to have been committed for trial for or in respect of the offence charged in the indictment if the evidence taken before the committing magistrate contains an allegation of any fact or F facts upon which the accused might have been committed upon the charge named in the indictment, although the committing magistrate may, when committing the accused upon such evidence, have committed him or her for some offence other than that charged in the indictment or for some other offence not known to the law;
>
> (iii) an accused person who is in actual custody when brought to trial, or who appears to take his trial in pursuance of any recognizance entered into before G any magistrate, shall be deemed to have been duly committed for trial upon the charge stated in the indictment unless he or she proves the contrary;
>
> (iv) nothing in this section shall be construed as affecting the power of a judge to sentence a person whose case has been transferred to that court on the direction of the Attorney-General in terms of section two hundred and twenty-five; H

Musakwa J A

(v) no irregularity or defect in –

(a) any proceedings referred to in section sixty-six; or

(b) 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."

B The summary committal procedure is provided for by s 66 of the Act. There is no provision for a re-committal of an accused whose case has been dismissed. Since the appellants were previously committed for trial they were liable to be brought to trial in terms of s 322 as read with s 65.

The real issue for determination is what is the consequence of the dismissal C of a charge in terms of s 160(2). In this respect s 321 provides that:

"Any person who is acquitted on any indictment, summons or charge or whose case has been dismissed for want of prosecution shall forthwith be discharged from custody."

Although the dismissal of a matter for want of prosecution is no bar to further D proceedings, the legal ramification of such dismissal is that upon being served with a notice of trial an accused person shall not be required to pay further bail or to be committed to custody. In this respect s 322 provides that:

"(1) A person who –

(a) has been discharged in terms of section three hundred and twenty-one for want of prosecution; or E

(b) has been admitted to bail but not duly brought to trial;

may be brought to trial in any competent court for any offence for which he was formerly committed to prison or admitted to bail at any time before the period of prescription for the offence has run out:

Provided that, subject to subsection (2), a person referred to in – F

(a) paragraph (a) or (b) of this subsection shall not be liable to be committed to custody; or

(b) paragraph (b) of this subsection shall not be liable to find further bail;

in respect of proceedings for an offence referred to in this subsection.

(2) A person referred to in subsection (1) who was committed for trial for an offence referred to in that subsection may be prosecuted by the Attorney-General G before the High Court for that offence, and if that person, having been duly served with an indictment and notice of trial, fails to appear at the time mentioned in such notice, the court may, on the application of the Attorney-General, issue a warrant for his arrest and detention in prison until he can be brought to trial or until he finds bail for his appearance to stand his trial on the said indictment."

John Reid Rowland *Criminal Procedure in Zimbabwe* at 16-13 comments in H respect of the consequences of discharge for want of prosecution as follows:

2011 (1) ZLR p518

Musakwa J

"Where a person has been discharged for want of prosecution or admitted to bail A but not brought to trial, he may be brought to trial for any offence for which he was previously charged and in custody or on bail at any time before the period of prescription for the offence has run out. He may not, however, if he was previously in custody and discharged, be committed to custody. If he was on bail, he is not liable to find further bail. The Attorney-General may prosecute him before the High Court. If the accused fails to appear at the time mentioned B in the notice of trial, he may be arrested and detained in custody or released on bail."

Mr *Mutangadura* submitted that the consequences of a discharge arising from s 321 of the Criminal Procedure and Evidence Act do not apply to a dismissal of a case in terms of s 160(2). In support of this submission, he pointed out that this is because s 321 and s 322 fall under part XV of the C Act that is headed "Discharge of Accused Persons" and that the appellants were not discharged in terms of this part, but had their case dismissed. Mr *Mutangadura* is not correct in this submission because in interpreting statutes, headings and other references are inserted for convenience. In this respect s 7 of the Interpretation Act [*Chapter 1:01*] provides that: D

"In an enactment –

(*a*) headings and marginal notes and other marginal references therein to other enactments; and

(*b*) notes, tables, indexes and explanatory references inserted therein as part of any compilation or revision in terms of the Statute Law Compilation and Revision Act [*Chapter 1:03*]; E

shall form no part of the enactment and shall be deemed to have been inserted for convenience of reference only."

In any event s 160(2) on its own does not provide for what happens to an accused whose matter has been dismissed. The answer to that lies in s 321.

Although Mr *Mutangadura* eventually conceded that the appellants should F have been released following the dismissal of their case in terms of s 160(2) of the Criminal Procedure and Evidence Act, he further submitted that this is no longer possible as their trial has commenced. His contention was that, upon pleading to an indictment, an accused person's bail is terminated in terms of s 169. G

Section 169 of the Criminal Procedure and Evidence Act provides that:

"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 conclusion of the trial in the same manner in every respect as if he had not been admitted to bail." H

2011 (1) ZLR p519

Musakwa J

A It is clear from a plain reading of the above provision that it does not apply to a situation where an accused person is brought to trial in the High Court subsequent to his case having been dismissed.

Both counsels were not clear on how an accused person whose case has been dismissed is served with notice of trial in terms of s 322. Mr *Mutangadura* suggested that this can only be done upon being re-indicted before a B magistrate in terms of s 66 which then enjoins the magistrate to commit the accused to custody. A closer look at s 66 shows that it provides for summary committal of an accused where the Attorney-General is of the opinion that any person is under reasonable suspicion of having committed an offence for which the person may be tried in the High Court. It does not follow that C after committal for trial and a case is dismissed in terms of s 160 (2) then the Attorney-General revisits the process of committal. It is inconceivable that the Attorney-General can formulate a second opinion over a matter on which he previously caused an accused to be committed for trial, on the basis that there is again reasonable suspicion that the person committed an offence that warrants trial before the High Court.

D Any doubt on the above view is removed by a reading of s 137 of the Act which states that:

"As soon as the indictment in any criminal case brought in the High Court has been duly lodged with the registrar of that court, such case shall be deemed to be pending in that court."

E No meaningful research was conducted by both counsels concerning how an accused person can be served with notice of trial in terms of s 322. In terms of Rule 5 of the High Court (Criminal Procedure) Rules SRGN 452 of 1964 a notice of trial and indictment shall be served on an accused person by the deputy sheriff. In passing, it is noted that these rules were last amended in 1977. They definitely need to be amended as they contain some archaic F provisions relating to an accused's race. *

In terms of s 41 of the High Court Act [*Chapter 7:06*], in determining appeals the High Court may exercise its review powers conferred upon it by s 29 of the Act. This is done where it is necessary or expedient in the interests of justice.

G It is apparent that despite this not being a valid appeal, the appellants should not have been committed to custody. A declaratory order will be issued to that effect.

2011 (1) ZLR p520

Musakwa J

In the result it is ordered as follows – A

(a) The appeal is struck off.

(b) The appellants were not liable to be committed to custody upon being re-indicted.

OMERJEE J concurred. B

Warara & Associates, appellants' legal practitioners

Attorney-General's Office, respondent's legal practitioners C

* *Editor's Note*: These occur in r 3, which deals with the requirements for the committing magistrate to ascertain the accused's arrangements for his defence. If the accused was an African, the district commissioner had to be advised.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/RITENOTE PRINTERS (PVT) LTD v A ADAM & CO & ANOR 2011 (1) ZLR 521 (S)

RITENOTE PRINTERS (PVT) LTD v A ADAM & CO & ANOR 2011 (1) ZLR 521 (S)

Citation	2011 (1) ZLR 521 (S)
Case No	Judgment No. S-15-11
Court	Supreme Court, Harare
Judge	Chidyausiku CJ (in chambers)
Heard	26 January 2011
Judgment	31 May 2011
Counsel	*T Mpofu*, for the applicant *A T Tavenhave*, for the first respondent No appearance for the second respondent
Case Type	Application for urgent hearing
Annotations	Link to case annotations

Flynote

Appeal – *noting of – effect – appeal from magistrates court – party wishing to execute despite notice of appeal must apply for order of execution – unsuccessful party wishing to stay execution must apply for such relief*

D **Court** – *magistrates court – appeal from – noting of appeal – effect judgment not automatically suspended – party wishing to execute despite notice of appeal must apply for order of execution – unsuccessful party wishing to stay execution must apply for such relief*

Headnote

The first respondent instituted an action in the High Court for the eviction E of the applicant from two premises it had leased to the applicant. It also sought the payment of arrear rentals. This was done in two separate actions. The first action was referred to trial and a trial date was set. The other action was still at the pre-trial conference stage. At that stage the first respondent withdrew its actions in the High Court and then instituted F the same proceedings in the magistrate's court. It was successful in the magistrate's court and the magistrate's court ordered the eviction of the applicant as well as the payment of arrear rentals. Dissatisfied with the magistrate's judgment the applicant appealed against it to the High Court. The applicant, most probably because of the wording of s 40(3) of the Magistrates Court Act [*Chapter 7:10*], concluded that the noting of the appeal would not suspend the order of the magistrate's court and

accordingly filed an application in the magistrate's court for the stay of execution pending the determination of that appeal. The magistrate dismissed the application on the ground that she could not grant such relief, as the noting of the appeal had suspended the operation of her H order. In spite of the ruling that the operation of the order had been

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Chidyausiku CJ

suspended, the first respondent instructed the messenger of court to evict A the applicant; this was duly done.

Held, that what happens upon the noting of an appeal against the magistrate's judgment is governed by s 40(3) of the Act. The magistrate's ruling – that the noting of the appeal suspended the operation of her order – was erroneous. A proper reading of the section reveals that it confers on the B magistrate the power to stay execution despite the noting of an appeal. It also confers on the magistrate the power to order execution despite the noting of an appeal. It follows, therefore, that for the magistrate to exercise the discretion in terms of s 40(3) of the Act, the party seeking to have the discretion exercised in its favour has to make an application. Upon the making of such an application the magistrate exercises the C judicial discretion and makes a proper determination. Thus a party, in this case the first respondent, that wishes to execute despite the noting of an appeal has to apply for the magistrate to exercise the discretion in its favour before it can execute the judgment. Equally, if the losing party, in this case, the applicant, wishes to stay execution despite the noting of an appeal, it has to apply for such relief D

Legislation considered

Magistrates Court Act [*Chapter 7:10*], s 40(3)

Case information

T Mpofu, for the applicant E

A T Tavenhave, for the first respondent

No appearance for the second respondent

Judgment

CHIDYAUSIKU CJ: In this application the applicant (hereinafter referred to as "Ritenote Printers") seeks the following relief, set out in the draft order: F

"1.1 An order for the urgent hearing of the appeal filed contemporaneously with this application under case number SC 285/10 be and is hereby granted.

1.2 The applicant shall file its heads of argument in respect of the appeal matter within five days of this order, whereupon the respondents shall file their heads of argument within five days of receipt of the applicant's heads of argument.

1.3 … (deleted) G

1.4 Pending determination of the appeal, the applicant is restored into occupation of the leased premises being 109 Leopold Takawira Street and 147 Mbuya Nehanda Street, Harare.

1.5 The second respondent is ordered not to sell in execution any of the properties attached by him pending determination of the appeal.

1.6 That the costs of this application shall be (costs) in the cause." H

Chidyausiku CJ

A The facts of this case are common cause. They are as set out in the founding affidavit to this application and aptly summarised in the judgment of the learned judge in the court *a quo*. They are as follows. The first respondent (hereinafter referred to as "Adam & Co") instituted an action in the High Court for the eviction of Ritenote Printers from two premises it had leased to Ritenote Printers. Adam & Co also sought the payment of arrear B rentals from Ritenote Printers. This was done in two separate actions. The first action was referred to trial and a trial date was set. The other action was still at the pre-trial conference stage. At that stage Adam & Co withdrew its actions in the High Court and then instituted the same proceedings in the magistrate's court. Adam & Co was successful

in the magistrates court and C the magistrates court ordered the eviction of Ritenote Printers as well as the payment of arrear rentals.

Dissatisfied with the magistrate's judgment, Ritenote Printers appealed against it to the High Court. Ritenote Printers, most probably because of the wording of s 40(3) of the Magistrates Court Act [*Chapter 7:10*] ("the Act"), concluded that the noting of the appeal would not suspend the order D of the magistrate's court. Ritenote Printers accordingly filed an application in the magistrate's court for the stay of execution pending the determination of that appeal.

Section 40(3) of the Act provides as follows:

> **"40 Appeals**
>
> E (1) …
>
> (2) …
>
> (3) Where an appeal has been noted the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application."

F That application was dismissed by the magistrate on the ground that the magistrate was of the view that she could not grant such relief, as the noting of the appeal had suspended the operation of the magistrate's order. The following is the magistrate's ruling:

> "This is an application for stay of execution by the applicant who is the respondent in the main matter. The applicant appealed against the decision of the court G *a quo*, which appeal automatically suspended the operation of the judgment. The applicant is now applying again for stay of execution …, which is vague and embarrassing since execution has been stayed already by the appeal.
>
> However, the applicant has no prospect of success at the High Court and [the] balance of convenience favours the respondent who is the applicant in the main matter.
>
> H Accordingly the application for stay of execution is dismissed with costs."

2011 (1) ZLR p524

Chidyausiku CJ

If the magistrate had dismissed the application on the basis that the appeal A had no prospects of success, which appears to be her view, I would have no problem with that ruling. However, a proper reading of her judgment clearly suggests that she dismissed the application because she was of the erroneous view that the noting of the appeal automatically suspended her judgment. This is not what s 40(3) of the Act provides. What happens upon the noting B of an appeal against the magistrate's judgment is governed by s 40(3) of the Act. Adam & Co would probably not have needed to apply if the magistrate had dismissed Ritenote's application on the basis that Ritenote's appeal had no prospects of success.

In my view, the wording of s 40(3) of the Act leaves a lot to be desired, but a proper reading of the section reveals that it confers on the magistrate C the power to stay execution despite the noting of an appeal. The section also confers on the magistrate the power to order execution despite the noting of an appeal. It follows, therefore, that for the magistrate to exercise the discretion in terms of s 40(3) of the Act, the party seeking to have the discretion exercised in its favour has to make an application. Upon the D making of such an application the magistrate exercises a judicial discretion and makes a proper determination.

In casu, Ritenote Printers applied for the stay of execution of the order pending the determination of the appeal. The magistrate dismissed that application on the erroneous basis that her judgment had been suspended by the noting of the appeal. In effect, her ruling was that her judgment cannot E be executed because it had been suspended by the noting of an appeal. That determination, though based on a misdirection, is extant.

Adam & Co did not apply for leave to execute the judgment in its favour despite the noting of an appeal. As I have said, my reading of s 40(3) of the Act is that if Adam & Co wished to execute despite the noting of an F appeal it had to apply for such leave. *In casu* Adam & Co would probably not have needed to make the application if the magistrate's ruling had not been predicated on a serious misdirection. Adam & Co simply instructed the messenger of court, the second respondent, to evict Ritenote Printers and attach its property, which the messenger of court duly did. G

Ritenote Printers, upon being evicted, applied to the High Court seeking to set aside the eviction and the attachment of its property. The application was based on two grounds: firstly, that Adam & Co

did not apply for and obtain an order to execute the judgment of the magistrate despite the noting of the appeal, as is required by s 40(3) of the Act; and secondly, that the effect of the magistrate's ruling, cited above, was that Adam & Co could not execute H

2011 (1) ZLR p525

Chidyausiku CJ

A the judgment because in the magistrate's opinion the noting of an appeal had the effect of suspending her judgment.

It is quite clear that the magistrate's ruling, right or wrong, was that Adam & Co could not execute her judgment. As I have already stated, that judgment, though erroneous, is extant. Until it is set aside, it bars Adam & Co from B executing the judgment.

Gowora J dismissed Ritenote Printers' application. * In her reasons for judgment, the learned judge analysed in some detail the authorities on the doctrine of inherent jurisdiction enjoyed by the superior courts. She concluded, quite correctly in my view, that that jurisdiction empowers the superior courts to regulate their own process. Included in that jurisdiction C is the courts' power to order execution of their judgments despite the noting of appeals. The learned judge also concluded, again quite correctly in my view, that inferior courts do not have this inherent jurisdiction to regulate their own process. The power as to what inferior courts can do or cannot do is to be found within the four corners of the Act that creates them, in the D present case the Magistrates Court Act and, in particular, s 40(3) of the Act. The learned judge further concluded that the common law position that the noting of an appeal suspends the judgment appealed against does not apply to the magistrate's court. Consequently, the judgment in favour of Adam & Co was not suspended by the noting of an appeal by Ritenote Printers.

The learned judge further reasoned that, because the noting of the appeal did E not suspend the learned magistrate's judgment, Adam & Co were entitled to execute that judgment. In my view, this is where the learned judge erred. Firstly, the ruling of the magistrate that her judgment had been suspended by the noting of the appeal, though erroneous, was extant. While that judgment was extant Adam & Co could not act in contravention of it. The learned F judge did not set aside the magistrate's ruling. There was no appeal against that ruling. The application before the learned judge was simply to set aside the eviction and attachment orders. The parties simply ignored it. Secondly, s 40(3) of the Act regulates the issue of execution and stay of execution upon the noting of an appeal. It confers on the magistrate's court the discretion to authorise either. That discretion is a judicial discretion to be exercised upon G the making of an application by either party. Thus a party, in this case Adam & Co, that wishes to execute despite the noting of an appeal, has to apply to the magistrate for the magistrate to exercise the discretion in its favour before it can execute the judgment. Adam & Co made no such application

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2011 (1) ZLR p526

Chidyausiku CJ

and, in my view, cannot execute without an order authorising execution from A the magistrate. Equally, if the losing party, in this case, Ritenote Printers, wishes to stay execution despite the noting of an appeal, it has to apply for such relief. This is what Ritenote did. Regrettably the magistrate dismissed the application, on the erroneous basis that the application was superfluous as her judgment had been suspended by operation of law. The effect of the B magistrate's ruling is that Adam & Co cannot execute against Ritenote.

As I have already indicated, Adam & Co cannot, in terms of s 40(3) of the Act, execute until it has applied in terms of that section to execute its judgment and that application has been successful. It has made no such application. Consequently, in my view, it was not entitled to execute.

In the result, I am satisfied that Ritenote Printers has established a *prima facie* C right, which is likely to be confirmed on appeal to this court, entitling it to the interim relief that it has sought in this chamber application. Once the interim relief is granted, the need to hear the appeal on an urgent basis falls away.

I would therefore grant the application and make the following order:

(1) Pending the determination of the appeal, the applicant is restored to the D occupation of the leased premises, being 109 Leopold Takawira Street and 147 Mbuya Nehanda Street, Harare.

(2) The second respondent is ordered not to sell in execution any of the property attached by it pending the determination of the appeal.

(3) Costs in this application will be costs in the cause. E

Hamunakwadi, Nyandoro & Nyambura, the applicant's legal practitioners

Tavenhave-Machingauta, first respondent's legal practitioners F

* See *Ritenote Printers (Pvt) Ltd* v *Adam & Co & Anor* 2010 (2) ZLR 544 (H) – *Editor*

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/SAMANYAU & ORS v PLEXIMAIL (PVT) LTD 2011 (1) ZLR 527 (H)

SAMANYAU & ORS v PLEXIMAIL (PVT) LTD 2011 (1) ZLR 527 (H)

Citation	2011 (1) ZLR 527 (H)
Case No	Judgment No. HH -108-11
Court	High Court, Harare
Judge	Mutema J
Heard	4 November 2010
Judgment	8 June 2011
Counsel	*M Gwisai*, for the applicants *H Zhou,* for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Court – *judge – role in law making – need for courts to tread a path which will avoid inequity and injustice in situation where legislative intervention is not forthcoming*

Employment – *unlawful dismissal – damages in lieu of reinstatement –* D *calculation of – currency in which may be awarded – local currency worthless due to inflation – award may be made in foreign currency – date at which award should be calculated*

Practice and procedure – *judgment – currency in which judgment may be expressed – judgment may be expressed in currency which will redress* E *loss suffered – local currency rendered worthless due to inflation – appropriate to give judgment in foreign currency*

Headnote

The applicants were dismissed from their employment with the respondents. The applicants challenged their dismissal in the Labour Court, which found for them and ordered their

reinstatement, alternatively, payment of F damages in lieu of reinstatement. The respondent opted to pay damages, caused their quantification on 10 December 2008, equivalent to five years' salary using a cut off date of 5 July 2007. In February 2009, after the multi-currency system had been introduced, the respondent tendered payment in Zimbabwe dollars. The tender was rejected and G the applicants sought an order for payment in US dollars. They argued that the principle of currency nominalism has no place in labour law as it would be at variance with the Labour Act's aim of achieving social justice. Further, they sought a declaration to the effect that damages in lieu of reinstatement have to be paid in an effective manner, that is, in an amount, currency and quantity that achieves fairness as required by H the Act. A successful appellant, they argued, should have a discretion

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to choose payment of damages in the currency that will redress the A injury suffered and adequately compensate him for the loss as well as to fulfil the objectives of the Labour Act. Interpreting the order of the Labour Court to mean payment in Zimbabwe dollars would amount to making the order a *brutum fulmen* because the Zimbabwe dollar, by the time of the tender, had became *de facto* valueless and useless. This B would amount to non-payment, thereby reducing court orders to empty judgments which would be both unfair and against public policy.

The respondent argued that the matter was *res judicata*; that the High Court had no jurisdiction, this being a labour matter; and that the court had no right to order payment in US dollars when the applicants' contracts entitled them to payment in local currency. C

Held, that the matter was not *res judicata*: the original dispute before the Labour Court was concerned with the lawfulness or otherwise of the applicants' dismissal and the quantum of damages payable in lieu of reinstatement. That court did not deal with the issue of the form of currency of payment, which was the gravamen of the present application. D The present application was not to reverse, amend or modify the Labour Court's order, but simply for a declaratory order that, in view of the introduction of the multi-currency, and the judicial and State recognition of the *de facto* redundancy of the Zimbabwe dollar, a successful litigant may choose to be paid in any applicable foreign currency in the country and that payment in a moribund currency is not an effective fulfilment E of the court's order.

Held, further, that the court's jurisdiction was not ousted by s 89(6) of the Labour Act; the court is still entitled to issue declaratory orders, which the Labour Court is not entitled to issue.

Held, further, that it is not impermissible for the judiciary to make law by way F of decided cases if an opportunity presents itself to plug a legislative gap, especially where not to do so will leave many an unlawfully dismissed employee languishing in the asylum of financial misery. The applicants were not asking the court to declare that the principle of currency nominalism no longer has any place in our common law generally. They were simply asking the court to pronounce that, following the introduction G of the multi-currency regime in February 2009 and the concomitant disuse of the Zimbabwe dollar which had become moribund as a result of economic and many other circumstances which had conspired to facilitate this major unprecedented conflagration, and because Parliament has remained in a near catatonic state in addressing this occurrence, the court should declare that in the realm of employment relations, the H

A principle of nominalism has, for now, no place until economic normalcy has been restored. To allow an employer to tender damages in lieu of reinstatement in the form of Zimbabwe dollars in February 2009 would be tantamount to giving someone an ordinary stone and expecting him to transact using that stone as a medium of exchange. It does not make any sense in any sane society. On principles of equity, the court should B tread a path that will avoid inequity and injustice where legislative intervention is not forthcoming.

Held, further, that the principle of currency nominalism works fairly in an economy which can be described as normal or stable or, at the very worst, in which inflation is not hyper, but not in an environment with a runaway C inflation as was the case in this country in the period immediately preceding the introduction of the multi-currency regime. After the introduction of a multiple

currency system in February 2009, it is beyond doubt that the Zimbabwe dollar died a natural death by disuse. Where the local currency has been rendered valueless by inflation, to award damages in the local currency might be to deny a plaintiff the redress that he seeks. To give D someone such currency, which no one in the country was prepared to accept in any transaction, let alone beyond our borders, as damages in lieu of reinstatement, and after having laboured for the employer for periods ranging between 25 and 46 years, like the respondent did *in casu,* is not only not only clinging to a positivist jurisprudential approach; it E is immoral but an infringement of a human right. It offends against all known tenets of justice in a civilised and democratic society. If judges continue to cling to their precedents in such a scenario of social and economic change, like the grasp of an epileptic during a fit, they will certainly be sacrificing the fundamental principles of justice and fairness for which they stand. Such an award should not be a *brutum fulmen* but F must be meaningful and beneficial to the beneficiary.

Held, further, that in calculating the rate of salary, the rate used at the time of the reinstatement order should be used, not that applicable at a later date. The official rate of exchange used at the time should apply.

Cases cited G

Elgin Brown & Hammer v Dampskibssellskabet Torm Ltd 1988 (4) SA 671 (N)

Fabiola v Louis HH-25-09

First Mutual Life Assurance Ltd v Muzivi 2007 (1) ZLR 325 (S)

Gwaze v NRZ 2002 (1) ZLR 679 (H)

H *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC)

2011 (1) ZLR p530

Mutema J

Owners, MV Eleftherotria v Owners of MV Despina R [1971] 1 All ER 421 (HL) A

Redstar Wholesalers v Mabika S-52-05

Stanmarker Mining (Pvt) Ltd v Metallon Corp (Pvt) Ltd 2006 (1) ZLR 306 (H)

Sibanda v Anor v Chinemute NO & Anor HH-131-04 B

Zimnat Insurance Company Limited v Chawanda 1990 (2) ZLR 143 (S); 1991 (2) SA 825 (ZS)

Legislation considered

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

Case information

M Gwisai, for the applicants C

H Zhou, for the respondent

Judgment

MUTEMA J: This matter has trudged a long and tortuous journey. The applicants are former employees of the respondent who were charged with misconduct and dismissed in 2005 following disciplinary processes. The D applicants challenged their dismissal right up to the Labour Court. The Labour Court found for the applicants on 5 July 2007 and ordered their reinstatement, alternatively, payment of damages in lieu of reinstatement. The respondent opted to pay damages, caused their quantification on 10 December 2008 equivalent to five years' salary, using the cut off date of 5 July 2007, and tendered them to the applicants. E

The tender, dated 11 February 2009, from the respondent's legal practitioners addressed to the applicants' erstwhile legal practitioners, reads:

> "RE : L MAWERE AND OTHERS v FLEXMAIL : QUANTIFICATION OF DAMAGES
>
> In line with the judgment of the Labour Court handed down on 10 December, F 2008, please find herewith our client's cheque in the sum of $12 594.77 (revalued), in full settlement of the amounts due to your clients. A copy of the schedule as to how the various figures were arrived at is attached hereto.

You will note from the computation that the amounts have been revalued and inflation adjusted to February 2009.

The matter is accordingly closed …" G

The applicants, through their then legal practitioners, rejected the tender and returned the cheque in question. The attempt at payment was tendered after breakdown of quantification negotiations. The primary reason for rejecting the tender was that the respondent attempted to pay the damages in Zimbabwe dollars in February 2009 when the currency had become moribund. H

2011 (1) ZLR p531

Mutema J

A In their amended draft order the applicants are seeking a declaratory order in the following terms:

"IT IS HEREBY ORDERED:

1. The respondent be and is hereby ordered to pay damages in lieu of reinstatement to the applicants in United States Dollars using the initial United States Dollar salary scales which were used by the respondent when A it started paying its employees in foreign currency.
2. That the respondent pay the costs of suit".

The main thrust of the applicants' argument, as gleaned from the founding affidavit and heads of argument, is as follows:

The applicants have approached this court since it is the only court with C inherent jurisdiction, seeking a declarator that the principle of currency nominalism has no place in labour law (a common law principle), as it would be at variance with the Labour Act's aim of achieving social justice. Further, they seek a declaration to the effect that damages in lieu of reinstatement have to be paid in an effective manner, that is in an amount, currency and quantity that achieves fairness as required by the Labour Act. The applicants D further seek an order compelling the respondent to pay damages in US dollars, using the initial US dollar salary scales which were used by the respondent when it started paying its employees in foreign currency i.e. in February, 2009. A successful appellant, so the argument went, should have a discretion to choose payment of damages in the currency that will redress the injury suffered and adequately compensate him/her/it for the loss, as well as fulfil E the objectives of the Labour Act. Interpreting the order of the Labour Court to mean payment in Zimbabwe dollars would amount to making the order a *brutum fulmen* because the Zimbabwe dollar, by the time of the tender, had became *de facto* valueless and useless. This would amount to non-payment thereby reducing court orders into empty judgments which is both unfair F and against public policy.

The respondent's opposition was premised on the following main planks:

1. The matter is *res judicata,* in that the Labour Court handed down judgment ordering the respondent to either reinstate the applicants or pay damages in lieu thereof. Following quantification of such damages, the amount due and payable was duly remitted to the the applicants. In the event, G this application disguised as an "application for a declaratory order" is merely meant to deal with the same issues which were concluded by the Labour Court.
2. The issue brought before this court is an employment/labour issue and, by virtue of s 89(6) of the Labour Act, the jurisdiction of this court is H ousted.

2011 (1) ZLR p532

Mutema J

3. What the applicants are asking this court to do is to: A
   - 3.1 ignore the salaries payable to the applicants as at 5 July 2007 when an order of reinstatement was made by the Labour Court;
   - 3.2 depart from the current position of law, and order payment of damages based on a date after the order of reinstatement was made;
   - 3.3 ignore the lawful currency that governed the contractual relationship B between the parties as at 5 July 2007 (which required payment of salaries in Zimbabwe dollars) and set aside that trite position to enable the applicants to be paid, afresh, damages in lieu of reinstatement in US dollars. This is despite the fact that as at 5 July 2007, the applicants' employment contracts entitled them to remuneration in C Zimbabwe dollars and not in US dollars, as sought by the applicants.

4. The issues raised by the applicants have been dealt with by the courts on many occasions and are not unique to the applicants.

I am mindful of the fact that what the applicants are inviting this court to do, as submitted by Mr *Zhou*, boils down to two pertinent issues, *viz*: D

1. to do that which Parliament should, i.e. to make law by repealing the common law principle of currency nominalism; and
2. to "overrule" those decisions of the Supreme Court which have already made the point that, in quantification of damages in respect of labour disputes, the rates that are applicable are those that applied at the time E of dismissal or suspension. See *Redstar Wholesalers* v *Mabika* S-52-05 and *First Mutual Life Limited* v *Muzivi* 2007 (1) ZLR 325 (S).

Points 3 and 4 of the respondent's opposition cited above are interwoven with point 2, so I shall deal with them *pari passu* later on. First, let me deal with points 1 and 2 of the respondent's opposition quoted above. They allude to the issue of *res judicata* and ousting of this court's jurisdiction by virtue F of s 89(6) of the Labour Act.

As regards the issue of *res judicata,* I have not been persuaded that it is applicable in the instant case. In order to ground such a defence successfully, the litigant raising it must show that the dispute has been conclusively settled on the merits by a court of competent jurisdiction and that the two actions G are between the same parties, concerning the same subject matter founded on the same cause of complaint. See *Gwaze* v *National Railways of Zimbabwe* 2002 (1) ZLR 679 (H). The original dispute before the Labour Court was concerned with the lawfulness or otherwise of the applicants' dismissal and the quantum of damages payable in lieu of reinstatement. That court did not deal with the issue of the form of currency of payment, which is the H

Mutema J

A gravamen of the present application. That issue only arose following the introduction of the multi-currency regime in January/February 2009 – well after the Labour Court had already handed down its judgment, which was silent on the currency to be used, thereby providing the basis of discretion being asserted by the applicants. The present application seeks not to reverse, amend or modify the order that the applicants be paid five years' salary as B damages for the unlawful dismissal, but simply seeks a declaratory order that, in view of the introduction of the multi-currency system, and the judicial and State recognition of the *de facto* redundancy of the Zimbabwe dollar, a successful litigant may choose to be paid in any applicable foreign currency in the country and that payment in a moribund currency is not an effective C fulfilment of the court's order. The Labour Court not being endowed with inherent jurisdiction to make such a declaration, it cannot be said that the dispute was dealt with on the merits, let alone conclusively settled.

Regarding the issue that this court's jurisdiction is ousted by s 89 (6) of the Labour Act, I am unable to subscribe to this view. The subsection cited provides that:

> D "(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)".

Subsection (1) has six paragraphs listing the functions to be exercised by that court to the exclusion of all other courts. Those functions do not include E issuing declaratory orders. This means that the Labour Court has no inherent jurisdiction to issue declaratory orders and, in the event, the jurisdiction of the High Court remains intact. In *Sibanda & Anor* v *Chinemute NO & Anor* HH-131-04, Makarau JP (as she then was) put it aptly thus:

> "Thus, the power to issue a declaratory order is not available in all courts that apply common law. It is specific to this court …
>
> F It is common cause that the Labour Court has not been specifically empowered to issue declaratory orders as this court has been. It cannot create such a relief or the procedure for granting such relief as it is not a court of inherent jurisdiction"

I am in respectful agreement with this view. I now turn to the other points raised in opposition cited *supra*.

Regarding the point raised that the applicants are inviting this court to do what G Parliament should, *viz* to make law by repealing the common law principle of currency nominalism, it is settled law that it is not impermissible for the judiciary to make law by way of decided cases if an opportunity presents itself to plug a legislative gap, especially where not to do so will leave many an unlawfully

dismissed employee languishing in the asylum of financial H misery. The applicants are not asking this court to declare that the principle of

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currency nominalism no longer has any space in our common law generally. A They are simply asking the court to pronounce that following the introduction of the multicurrency regime in January/February 2009 and the concomitant disuse of the Zimbabwe dollar which had become moribund as a result of economic and many other circumstances which had conspired to facilitate this major unprecedented conflagration, and because Parliament has remained in B a near catatonic state in addressing this occurrence, this court should declare that in the realm of employment relations, the principle of nominalism has, for now, no place until economic normalcy has been restored.

This court is enjoined to take judicial notice of the reality that, immediately before and after the country adopted the multicurrency regime in about February 2009, the Zimbabwe dollar was so valueless that it had ceased C to be the medium of exchange in all financial transactions. To therefore have an employer tender damages in lieu of reinstatement in the form of Zimbabwe dollars in February 2009, as the respondent did to the applicants *in casu* is tantamount to giving someone an ordinary stone and expect him/her to transact using that stone as a medium of exchange. It does not make D any sense in any sane society. Should Zimbabwe continue being immutable to change on this score? On principles of equity, this court should tread a path that will avoid iniquity and injustice where legislative intervention is not forthcoming.

The words of Gubbay ACJ (as he then was) in *Zimnat Insurance Co Ltd* v E *Chawanda* 1990 (2) ZLR 143 (S) at 153D-F regarding judicial law-making bear useful repetition for clarity:

> "Even if confirmation of the appellant's liability to the respondent should meet with disapproval as being an encroachment upon the discretion reposed in the law-giver to change the law, we would strongly defend the Judiciary's right to do so. Law in a developing country cannot afford to remain static. It F must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adapt itself to fluid economic and social norms and values and to altering views of justice. If it fails to respond to these needs, and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off G by the people because it will cease to serve any useful purpose. Therefore the law must be constantly on the move, vigilant and flexible to current economic and social conditions".

The learned Acting Chief Justice then quoted the celebrated American jurist, Oliver Wendell Holmes' opening page of his famous work, *The Common Law,* which reads: H

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> A "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a Book of Mathematics".

B The learned Acting Chief Justice at 154A-E of the *Zimnat* case *supra,* then went on to say:

> "Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The judiciary C can and must operate the law so as to fulfil the necessary role of effecting such development. It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the judiciary than by the legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of D the judicial process. The opportunity to play a meaningful and constructive role in developing and moulding the law to make it accord with the interests of the country may present itself where a judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstructs the taking of such a course. If

judges hold to their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand".

The learned Acting Chief Justice then quoted a famous passage by Lord Atkin, referring to judicial precedents:

"When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course is for the judge to pass through them undeterred". *

The quotations cited above are not only attractive and persuasive but fit the instant scenario of the application before me like a glove. The principle of currency nominalism works fairly in an economy which can be described as normal or stable or at the very worst, in which inflation is not hyper, but not in an environment with a runaway inflation as was the case in this country in the period immediately preceding the introduction of the multi-currency regime. After introduction of multiple currency in February 2009, it is beyond doubt that the Zimbabwe dollar died a natural death by disuse. To then give someone such currency which no one nationwide was prepared to accept in any transaction, let alone beyond our borders, as damages in lieu of reinstatement, and after having laboured for the employer for periods

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ranging between 25 and 46 years like what the respondent did *in casu,* is not only immoral but an infringement of a human right. If judges continue to cling to their precedents in such a scenario of social and economic change, like the grasp of an epileptic during a fit, they will certainly be sacrificing the fundamental principles of justice and fairness for which they stand.

I am prepared, in the instant case, not to let the ghosts of the past stand in the path of justice, clanking their medieval chains, but to pass through them undeterred in the interests of justice and fairness.

In any event, the assertion that by granting the order sought would be usurping the role of the legislature has no legal leg to stand on, for the issuing of orders in foreign currency has been decisively dealt with before, locally, regionally and internationally. In *Makwindi Oil Procurement (Pvt) Ltd* v *National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC) Gubbay JA (as he then was) was of the view that, in the absence of any legislative enactments which require our courts to order payment in local currency only, the innovative approaches taken in England and South Africa and the making of orders in foreign currency had to be adopted in order to bring Zimbabwe into line with other foreign legal systems. In that case the court relied on the House of Lords decision in *Owners of MV Eleftherotria* v *Owners of MV Despina R* [1971] 1 All ER 421 (HL).

In South Africa, a similar approach was followed in *Elgin Brown & Hammer* v *Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N).

In *Fabiola* v *Louis* HH-25-09, after reviewing the three authorities cited immediately above, Makarau JP awarded delictual damages in foreign currency to a party who had purchased a house in local currency against a seller who had failed to effect transfer as a result of a prior sale to another party. At p 5 of the judgment the learned Judge President reasoned as follows:

"It appears to me that the issue I have to determine is whether to extend the approach that has been taken in the *Makwindi* case and be innovative enough to suggest that where a loss has been suffered and can be calculated in both the local and in a foreign currency, the court has a discretion to award judgment in that currency that will redress the injury suffered and adequately compensate the plaintiff for the loss. It would then follow that where that currency is the foreign currency, as opposed to the local currency, then judgment should be in the foreign currency, for to award damages in the local currency, where the local currency has been rendered valueless by inflation, might be to deny a plaintiff the redress that he or she seeks".

Adopting the approach taken in the *Fabiola* case *supra*, I am persuaded that, in the instant case, in order to compensate the applicants adequately, the currency which the respondent must pay them as damages for unlawful

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dismissal in lieu of reinstatement should be in a foreign currency. I say so because, in a multi-currency regime where the local currency has become moribund, to award damages to an

unlawfully dismissed employee who has toiled for the employer for between 25 and 46 years in such local currency is not only clinging to a positivist jurisprudential approach but iniquitous B and offends against all known tenets of justice in a civilised and democratic society. Such an award should not be a *brutum fulmen* but must be meaningful and beneficial to the beneficiary. Even on an international plane, in terms of Article 10 of the Termination of Employment Convention 1982 (ILO Convention No. 158), adequate compensation should be paid for unjustified loss of employment. Certainly payment in Zimbabwe dollars in this era will C not amount to adequate compensation.

The last point to deal with relates to points 3 and 4 of the respondent's opposition as encapsulated in the contention that the applicants are inviting this court to "overrule" those decisions of the Supreme Court which have already made the point that in quantification of damages in respect of labour D disputes, the rates that are applicable are those that applied at the time of reinstatement, as held *inter alia*, in *Redstar Wholesalers supra* and *First Mutual Life supra*.

In the instant case, the applicants, in applying for payment of their damages to be made in US dollars, want the rate applicable to be "the initial US dollar E salary scales which were used by the respondent when it started paying its employees in foreign currency". In support of their contention in this regard, the applicants argued in their heads of argument in this vein:

> "As to a potential objection of what would be the appropriate salary in foreign currency to use, this is not an insurmountable obstacle. Reference may be had to the salary scales of the first month that the respondent first started fully and wholly F paying its employees remuneration in foreign currency. Alternatively is to look at the first National Employment Council (NEC) salaries in foreign currency and applying those. After all these are exactly the salaries that the applicants would have been earning if they had been reinstated rather (than) being paid damages in lieu of reinstatement. What is called for here is not mathematical precision computation but substantive justice and fairness that, in the words of Omerjee J in *Stanmarker Mining (Pvt) Ltd* v *Metallon Corp*, places the successful party' G as nearly as possible in the same position as he would have occupied if the contract had been performed …'"

Prima facie, the argument is titillating. In *Stanmarker Mining (Pvt) Ltd* v *Metallon Corp (Pvt) Ltd* 2006 (1) ZLR 306 (H) at 343F, Omerjee J made the pronouncement when holding that, regarding judgments sounding in H foreign currency:

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> "it is the plaintiff's prerogative to claim in a currency that will most truly express A his loss and accordingly most fully and exactly compensate him for that loss. However, in order to succeed a claimant is required to lay a foundation that supports him claim".

In that case the court found that the plaintiff had laid an adequate foundation establishing its entitlement to damages in US dollars because the defendant was selling the disputed shares (which it claimed were valued in Zimbabwe B dollars) in US dollars, including their final disposal.

I am constrained to shy away from the applicants' contention in this connection for two reasons. Firstly, the pronouncements by Omerjee J in that case were confined to the choice of currency by the claimant, which I have already disposed of *supra* in the applicants' favour, and not to the rate of salary to C invoke when calculating damages in lieu of reinstatement. Secondly and more importantly, based on the doctrine of *stare decisis*, this court is bound by the plethora of Supreme Court decisions to the effect that in calculating damages for unlawful dismissal in lieu of reinstatement, the rate of salary to be used is the one pertaining at the date of the reinstatement order; certainly not the one obtaining at a later date. D

Since I have already held that the applicants must be paid their damages, not in Zimbabwe dollars, but in foreign currency of their choice (and they chose the US dollars), the rate of salary to be used in the calculation of the damages should be the one obtaining as at 5 July 2007 (the date of the reinstatement order) but being the official rate of exchange of the Zimbabwe E dollar-US dollar equivalent.

I also find that the respondent, in the face of the stark economic reality obtaining at the time of its tender of the damages, was quite unreasonable in refusing to yield to reason. It should accordingly pay the applicants costs of suit. In any event, costs always follow the result.

In the event, there is need to amend the applicants' amended draft order to F read as follows:

> "IT IS HEREBY ORDERED that:

1. The respondent be and is hereby ordered to pay damages in lieu of reinstatement to the applicants in United States dollars using the official rate of exchange of the Zimbabwe dollar-United States dollar equivalent G obtaining on 5 July 2007.
2. That the respondent pay the costs of suit".

Zimbabwe Labour Centre, the applicants' legal practitioners

Kantor & Immerman, respondent's legal practitioners H

* In *United Australia Ltd* v *Barclays Bank Ltd* [1941] AC 1 at 29 – *Editor*

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/ZIMBABWE REVENUE AUTHORITY v RESERVE BANK OF ZIMBABWE & ANOR 2011 (1) ZLR 539 (H)

ZIMBABWE REVENUE AUTHORITY v RESERVE BANK OF ZIMBABWE & ANOR 2011 (1) ZLR 539 (H)

Citation	2011 (1) ZLR 539 (H)
Case No	Judgment No. HH-127-11
Court	High Court, Harare
Judge	Gowora J
Heard	30 July 2010; 1 September 2010; 11 March 2011
Judgment	June 2011 (day not stated in the judgment)
Counsel	*U Sakhe*, for the applicant *L Mazonde*, for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Consolidated Revenue Fund – revenues collected from whatever source must be deposited in Consolidated Revenue Fund – any exceptions to manner of dealing with* D *such funds must be authorized by Parliament*

Revenue and public finance – *money collected by Revenue Authority – must be paid into Consolidated Revenue Fund – government expenditure – must be authorised by Act of Parliament and paid from Fund*

Revenue and public finance – *Reserve Bank of Zimbabwe and Zimbabwe* E *Revenue Authority – separate legal entities – Reserve Bank having no authority to make payment on behalf of State*

Revenue and public finance – *set off – debt owed by one department of the State cannot be set off against a debt owed to another department – same principle applicable to distinct corporate entities both under the control* F *of the Minister of Finance.*

Headnote

In pursuance of its obligations under the Revenue Authority Act [*Chapter 23:11*], the applicant, the Zimbabwe Revenue Authority, collected certain sums of money which were deposited in its account with two commercial banks. Pursuant to a directive issued through a monetary statement G from the Governor of the respondent, the Reserve Bank of Zimbabwe, certain of the sums thus collected were "swept" into accounts held by the respondent with those same commercial banks. Both parties are statutory bodies, capable of suing and being sued in their own names. In spite of demands, the respondent did not return the money, claiming H that it had been used for government expenditure. The applicant sought

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2011 (1) ZLR p540

Gowora J

an order directing that the monies be paid back to it. It argued that all A expenditure had to be accounted for in terms of the Constitution and that it was accountable to the Comptroller and Auditor-General.

Held, that the money held in the accounts constituted revenue collected by the applicant in terms of s 4 of the Revenue Authority Act. It was incumbent on the applicant to pay the money into the Consolidated B Revenue Fund, which is established in terms of the Constitution. The provisions of ss 101, 102 and 103 of the Constitution of Zimbabwe, 1980 are clear and admit of no doubt or ambiguity. All revenues collected from whatever source on behalf of Government must be deposited into the Consolidated Revenue Fund. All expenditure is equally provided for and is to be expended through the Consolidated Revenue Fund. Any C exceptions to the manner of dealing with the funds must be in terms of an Act of Parliament authorizing such departure. There was no statutory authority for the respondent to use the funds. There was no legal basis for the argument by the respondent that, as banker to the State, it had obligations to make payments as directed by the Minister of Finance.

Held, further, that while the parties might both function under the Ministry D of Finance, there were separate legal entities set up under separate Acts of Parliament. Each had its own board. There was no legal instrument authorizing the "sweeping" arrangement. Accordingly, the money should be repaid.

Held, further, that a debt owed by one department of the State cannot be set off against a debt owed to another department. This principle is grounded in public policy and utility and is designed to avoid confusion in State accounts. The same principle is similarly applicable in respect of two distinct and corporate entities, such as the Zimbabwe Revenue Authority and the Reserve Bank of Zimbabwe, whose only common denominator is of being under the control of the Minister of Finance. F

Cases cited

CoT v First Merchant Bank Ltd 1997 (1) ZLR 350 (S)

Tregers Industries Ltd v ZRA 2006 (2) ZLR 62 (H) G

Legislation considered

Constitution of Zimbabwe 1980, ss 101, 102 & 103

Reserve Bank of Zimbabwe Act [*Chapter 22:15*], ss 4, 6, 8(1), 14 & 19

Revenue Authority Act [*Chapter 23:11*], s 3

Case information

U Sakhe, for the applicant H

2011 (1) ZLR p541

Gowora J

A *L Mazonde*, for the respondents

Judgment

GOWORA J: The applicant is a statutory body, established as such in terms of s 3 of the Revenue Authority Act [*Chapter 23:11*]. It is established as a body corporate, capable of suing and being sued in its own name and, subject B to the Act, of performing all acts that bodies corporate may by law perform. Section 4 of the same Act defines its powers as being:

"(a) to act for the state in assessing, collecting, and enforcing the payment of all revenues;

(b) to advise the Minister on matters relating to the raising and collection of revenues; and C

(c) to perform any other function that may be conferred or imposed on the Authority in terms of this Act or any other enactment."

It is common cause that in the pursuance of its obligations in terms of this Act, the applicant collected certain sums of money which were deposited in its accounts with Standard Chartered Bank and CBZ Bank. It is also common cause that pursuant to a directive issued through a monetary statement from D the Governor of the Reserve Bank in 2009, certain of the sums of monies thus collected were swept into accounts held by the Reserve Bank with those commercial banks. The monies affected under this directive are set out in a letter dated 12 March 2009 addressed to the second respondent herein. The amounts are reflected as follows:

E CBZ Bank

USD	1 857 044.00
ZAR	2 807 759.00
Total in United States Dollars	2 130 000.00

Standard Chartered Bank

F USD	2 466 735.15
ZAR	2 473 417.57
BWP	139 527.61
GBP	55 900.82
EURO	3 061.00
G Total in United States Dollars	2 830 305.79
Grand Total	**4 960 305.70**

It is common cause between the parties that the applicant, ZIMRA has consistently called upon the Reserve Bank (RBZ) to remit to it the monies thus "swept" through the monetary policy statement. The RBZ has not complied. H It has consistently stated that the money was utilised by the Government and

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thus it is unable to return the money, which is the reason why ZIMRA has A now approached this court for an order directing that the monies be paid to it.

The RBZ is a body corporate which is capable of suing and being sued in its own name. It is governed by the Reserve Bank of Zimbabwe Act [*Chapter 22:15*]. For purposes of this dispute the relevant functions of the RBZ as set out in s 6 of the Act are the following: B

"(a) to regulate Zimbabwe's monetary system

(b) …

(c) to foster the liquidity, solvency, stability and proper functioning of Zimbabwe's financial system

(d) … C

(e) …

(f) …

(g) to act as banker and financial adviser to, and fiscal agent of the State."

When the matter was called, Mr *Mazonde*, counsel for both respondents, raised a point in *limine* relating to the citation of Dr Gono as the second D respondent in this dispute. He argued that the second respondent was appointed in terms of s 14 of the Act, and that the responsibility of the Governor under that section is for the day to day management control and administration of the bank. Such control and management is, however, subject to the general direction and policy given by the Minister and the board.

He further argued that in terms of s 19 of the Act the Board is responsible E for the formulation of policy of the Bank, supervision of the bank and administration of its general operations.

In terms of s 4 of the Act, the RBZ is a body corporate capable of suing and being sued in its own name. As such, any actions by the RBZ are performed by itself and should not attract personal liability from its officers. He cited F *Tregers Industries (Pvt) Ltd* v *Zimbabwe Revenue Authority* 2006 (2) ZLR 62 (H) for this proposition. Mr *Sakhe,* on behalf of the applicant, indicated that in the light of the authorities cited by Mr *Mazonde* he found himself unable to pursue the claim against the second respondent. I therefore uphold the point *in limine*.?On the merits, Mr *Sakhe* argued that ZIMRA had not G denied that it had directed the two banks to transfer funds to itself and further that it received the funds. He submitted further that the applicant did not know or consent to such transfer. He submitted further that the applicant could not legally have consented to such transfer even if it had been aware or been requested.

Section 101 of the Constitution of Zimbabwe provides: H

Gowora J

A **"Consolidated Revenue Fund**

All fees, taxes and other revenues of Zimbabwe from whatever source arising, not being monies that-

(a) are payable by or under an Act of Parliament into some other fund established for a specific purpose; or

(b) may, by or under an Act of Parliament, be retained by the authority that B received them for purposes of defraying expenses of that authority

shall be paid into and form one Consolidated Revenue Fund.

The sums held in the accounts in question constituted revenue collected by the applicant under s 4 of the Revenue Authority Act. The respondent has not disputed this. It was therefore incumbent upon the applicant to pay C such monies into the Consolidated Revenue Fund in accordance with the provisions of s 101 of the Constitution, unless there is authority by an Act of Parliament for the retention of such money by the authority that received the monies. The applicant has no discretion in the manner of dealing with the revenue as the section is imperative. Any expenditure incurred for and on behalf of the government must be authorised in terms of s 102 or s 103 D of the Constitution. Such expenditure must however emanate from the Consolidated Revenue Fund as authorised in terms of the Constitution. According to s 102, there are three ways in which monies withdrawn from the Consolidated Revenue Fund.

The respondent has not, in seeking to oppose this application, pointed to E any authorisation for the consumption of the monies under the section of the Constitution. It has not pointed to any Act of Parliament that authorised the transfer of funds from the commercial banks to itself. Instead, the respondent has sought to argue that as both institutions are government functionaries operating under the aegis of the Minister of Finance, then the government is the ultimate beneficiary of the monies withdrawn from the accounts and F the applicant should not seek to recover those sums from the respondent as it cannot be accountable for their consumption.

In its opposing papers, the respondent argued that it was the function of the RBZ to advance the general economic policies of the government as provided for in s 6(i)(d) of the Reserve Bank Act. It was contended further that in terms of s 8(1) of the same Act the respondent may be called upon to

G meet the settlement of "government's payment obligations". The respondent contends further that the appropriation of the monies in question was done with the requisite government approval and authorisation and that the then Acting Minister of Finance had been aware of the appropriation. The respondent contends further that it merely acted as agent and that ultimately H the government was the beneficiary of the funds in question. The respondent

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was not able, in view of the requirements of the Official Secrets Act [*Chapter* A *11:09*] to produce the documents in respect of which the monies were put to use. The respondent invited the applicant to avail officials to view the documents, which invitation, I am informed from the bar, was turned down by the applicant. It is also noted from the record that the respondent addressed several letters to the applicant and to the Minister of Finance wherein the B utilisation of the foreign funds the subject matter of this dispute, was also discussed. Indeed the correspondence confirms that the respondent utilised funds as requested by the government. The applicant has accepted in its answering affidavit that indeed the government was the ultimate beneficiary of the revenues collected by the applicant, and avers that it was necessary that any such revenue be accounted for in terms of the clear provisions of C the Constitution. The applicant also confirms that it is required to account to the Comptroller and Auditor General for all monies collected by it, and this is the reason for this litigation. The applicant adds that it has not been exempted from its legal obligation to account for all revenues collected.

It is suggested by the applicant that the respondent has failed to proffer a D defence to the claim for the repayment by it of the monies appropriated from Standard Chartered Bank and CBZ Bank respectively. I am unable to accept the contention by the respondent that as banker to the State, it had the obligation to make payments as directed by the Minister of Finance at the time. The provisions of ss 101, 102 and 103 of the Constitution are clear and admit of no doubt or ambiguity. All revenues collected from whatever E source on behalf of government must be deposited into the Consolidated Revenue Fund. All expenditure is equally provided for and is to be expended through the consolidated revenue fund. Any exceptions to the manner of dealing with the funds must be in terms of an Act of Parliament authorising such departure. I have not been pointed to any by the respondent which authorised it to depart from the provisions of the Constitution and consume F funds without statutory approval or authorisation.

The respondent has suggested in its opposing affidavit and heads of argument that as both itself and the applicant are government functionaries, they complement one another in their functions. It is averred in the opposing affidavit that the Minister of Finance then was represented on the board of G the applicant by the Secretary of Finance. Equally, the same Secretary for Finance was the conduit used by the respondent for seeking "authorities" from the Minister of Finance to negotiate financing facilities for government and to incur liabilities on its behalf. The respondent averred further that the litigation was superfluous as the ultimate beneficiary was the government which then owes the applicant. H

A To this the applicant has given a short answer. The two may indeed be functionaries under the Ministry of Finance but they are totally separate entities. The applicant contends that by raising this defence the respondent is alleging a merger of sorts between it and the respondent, wherein the two merge into the Government of Zimbabwe. Although not specifically pleaded as such, it seems that the respondent is raising the defence of set-off. From B my reading of the papers, it seems that there is an implication from the respondent that in view of the fact that the two entities are under the control of the Minister of Finance, then monies can be transferred between them without the need to follow statutory requirements. The further implication on the papers is that a set-off between the two is permissible. This issue has C already been decided by our courts, as to whether set-off is possible where two or more government departments are involved. In *Commissioner of Taxes* v *First Merchant Bank Ltd* 1997 (1) ZLR 350 (S) at 353C-F Gubbay CJ stated:

> "At common law set-off or *compensatio* is a method by which mutual debts being liquidated and due, may be extinguished. It takes place, *ipso jure*. If the debts are equal, both are extinguished; if unequal, the smaller is discharged and the D larger is proportionally reduced. There are, however, two important exceptions to the operation of the rule. A debt owed by one department of the State cannot be set E off

against a debt owed to another department. A set-off cannot be raised against taxes due to the fiscus or where goods are sold for the benefit of the State. See *Schierhout* v *Union Government* 1926 AD 286 at 291; *Pentecost & Co* v *Cape Meat Supply Co* 1933 CPD 472 at 497; Voet *Commentarius ad Pandectus* 16.2.16 (Gane's translation vol 3 at 166); van Leeuwen *Censura Forensis* E 1.4.36.11 and 13 (Barber and Macfayden's translation); Wessels *The Law of Contract in South Africa* 2 ed vol II at paras 2567 and 2568; *Willes' Principles of South African Law* 8 ed at 483. Both these exceptions are grounded in public policy and utility. The first is designed to avoid confusion in State accounts and the second to ensure the uninterrupted flow of tax revenue to the Treasury in the interests of good governance. In each instance, it is for the State to decide F whether or not set-off should apply even though the debts co-exist."

In casu, the court is not dealing with government departments but two distinct and separate corporate entities whose only common denominator is of being under the control of the Minister of Finance. They are set up under different Acts of Parliament. Each has a Board of Directors who run and control the G affairs and management of such entity. Each is capable of suing and being sued in its own name and each performs separate and distinct functions and roles as determined by the Acts under which it has been set up. As each of them maintain different accounts and the respondent has not pointed to any legal instrument authorising the alleged "sweeping" arrangements. The State, as represented by the Minister of Finance, does not appear to have H condoned the alleged "sweeping arrangements" going by the lack of will to

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resolve the dispute at the level of government as requested by the respondent A in correspondence. If set-off is being pleaded, the State has decided not to allow a set-off of the amounts appropriated by the respondent.

In the premises it is my finding that the respondent did appropriate the monies in question outside the provisions of the Constitution and the applicant is entitled to a refund. I therefore will issue an order in the following terms: B

IT IS HEREBY ORDERED

1. The first respondent shall within ten days of the date of service of this order upon it, pay or cause to be paid into the applicant's accounts generally known as the Commissioner General's Accounts held with Standard Chartered Bank of Zimbabwe the sums set out below: C
   1.1 The sum of Two Million Four Hundred and Sixty Six Thousand Seven Hundred and Thirty Five United States Dollars and Fifteen Cents (USD 2 466 735.15) into account number 8740507099000; and
   1.2 The sum of Two Million Four Hundred and Seventy Three Thousand D Four Hundred and Seventeen South African Rand and Fifty Seven Cents (ZAR 2 473 417.57) into account number 9440507099000; and
   1.3 The sum of Fifty Five Thousand Nine Hundred British Pound Sterling and Eighty Two Pence (GBP55 900.82) into account number E 2840507099000; and
   1.4 The sum of Three Thousand and Sixty One Euros (EUR 3 061) into account no. 9340507099000; and
   1.5 The sum of One Hundred and Thirty-Nine Thousand Five Hundred and Twenty-Seven Botswana Pula and Sixty-One Thebe (BWP F 139 527.61) into account number 1340507099000.
2. The first respondent shall, within ten days of the date of service of this order upon it, pay or cause to be paid into the applicant's accounts generally referred to as the Commissioner General's Accounts held with CBZ Bank Limited the sums of money set out below:
   2.1 The sum of One Million Eight Hundred and Fifty Seven Thousand G and Forty Four United States Dollars (USD1 857.044) into account number 0112077259 0020; and
   2.2 The sum of Two Million Eight Hundred and Seven Thousand Seven Hundred and Fifty-Nine South African Rand (ZAR 2 807 759) into account number 01120772590040. H

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3. The first respondent be and is hereby ordered to pay the applicant's costs.
4. The application against the second respondent be and is hereby dismissed with costs.

B *Kantor & Immerman*, applicant's legal practitioners

Chitapi & Associates, first and second respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/DEPUTY SHERIFF v TRINPAC INVESTMENTS (PVT) LTD & ANOR 2011 (1) ZLR 548 (H)

DEPUTY SHERIFF v TRINPAC INVESTMENTS (PVT) LTD & ANOR 2011 (1) ZLR 548 (H)

Citation	2011 (1) ZLR 548 (H)
Case No	Judgment No. HH-121-11
Court	High Court, Harare
Judge	Patel J
Heard	24 March 2011
Judgment	14 June 2011
Counsel	*T E Gumbo,* for the applicant *N Bvekwa,* for the claimant *P Kawonde,* for the judgment creditor
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Company – *corporate veil – lifting of – when permissible – general policy considerations – companies forming part of a single economic entity – when permissible to treat such companies as a whole instead of as separate units – whether necessary to obtain prior court order to lift* D *corporate veil before attaching property of subsidiary company within a group*

Headnote

The Sheriff brought interpleader proceedings, having attached property belonging to the claimant company. The attachment had followed E arbitral proceedings in which the judgment creditor had obtained an award against the claimant's holding company for arrears of salary. The claimant was one of a group of wholly-owned subsidiaries of the holding company, all of which were located at the same physical address. The judgment creditor had been employed by the holding company, and was deployable to serve any company within the group. F

The claimant asserted that the attached property belonged to it and not to the holding company and that its property could not be seized without a court order lifting the corporate veil. The judgment creditor argued that the corporate veil should be lifted, as the claimant was merely a vehicle through which the holding company carried out its business, and that G the plea was merely a ruse to defeat the judgment creditor's just claim.

Held, that while the cardinal principle of company law is that a company is a separate entity distinct from its members, there are well established exceptions to the principle, grounded in policy considerations. 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 H

Patel J

A association. When the corporation is the mere *alter ego* or business conduit of a person, it may be disregarded. Where a corporation is organised or maintained as a device in order to evade an outstanding legal or equitable obligation, the courts, even without reference to actual fraud, refuse to regard it as a corporate entity. Where fraud, dishonesty or other improper conduct is found, the need to preserve the separate corporate identity B would have to be balanced against policy considerations which arise in favour of piercing the corporate veil. The court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would have C to be considered on its merits. The exceptions to the general principle have also been extended beyond the realm of fraudulent or improper conduct to the situation where a single economic entity owns all the shares in its subsidiaries and controls every aspect of their operations. There is a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of D the whole group. Where the operations of an economic group are so close as to be virtually indivisible, considerations of policy tend to militate against any legal separation of its integral units, for to do so would be to perpetuate an essentially corporate fiction. This may not invariably be the case, but the equities would certainly favour such an approach in E dealings at arm's length with innocent outsiders. *In casu*, the claimant's assertion of ownership over the seized assets was nothing more than a subterfuge designed to defeat the judgment creditor's uncontroverted and undeniably just claim. Even in the absence of any fraudulent or other improper motive, the overarching control exercised by the holding company over its subsidiaries clearly justified the treatment of the group F as a single economic entity for the purpose of enforcing a debt incurred by any unit within the group, particularly where the judgment creditor was a former senior employee who was engaged to serve the entire group.

Held, further, that as to whether it is procedurally necessary for a judgment creditor to have obtained a prior court order lifting the corporate veil G before attempting to attach the property of a subsidiary company, mere procedural technicalities should not be allowed to frustrate or impede the effective satisfaction of a just claim. There was no logic or practical reason in requiring the judgment creditor to institute fresh proceedings to pierce the corporate veil in circumstances where those proceedings H would result in the same conclusion.

Patel J

Cases cited A

Cape Pacific Ltd v Lubner Controlling Invstmns (Pty) Ltd 1993 (2) SA 784 (C)

Cape Pacific Ltd v Lubner Controlling Invstmns (Pty) Ltd & Ors 1995 (4) SA 790 (A)

Dadoo Ltd & Ors v Krugersdorp Municipal Council 1920 AD 530 B

DHN Food Distributors Ltd v London Borough of Tower Hamlets [1976] 3 All ER 462 (CA)

Lategan & Anor NNO v Boyes & Anor 1980 (4) SA 191 (T)

Mawere v Min of Justice 2005 (1) ZLR 317 (H)

Salomon v Salomon & Ors [1897] AC 22 (HL)

US v Milwaukee Refrigerator Transit Co 42 Fed 247 (1905) C

Van Niekerk v Van Niekerk & Ors 1999 (1) ZLR 421 (S)

Case information

T E Gumbo, for the applicant

N Bvekwa, for the claimant

P Kawonde, for the judgment creditor D

Judgment

PATEL J: The applicant herein presently holds certain equipment attached by him pursuant to execution of judgment in *Barnsley* v *Harambe Holdings* HC 6651/10. The judgment creditor obtained an arbitral award in September 2010 for the payment by Harambe Holdings of arrear salary amounting to US$61 879. After the registration of the award with this court, the notice of E seizure and attachment of the equipment in question was issued in October 2010.

The claimant is a wholly owned subsidiary of Harambe Holdings. However, it asserts that the seized property belongs to it and not to Harambe Holdings. The judgment creditor disputes this on the basis that the judgment debtor is F inseparable from its subsidiaries and that any separation within the Harambe Holdings Group is deceitful.

On these facts, the principal issue for determination is whether the Harambe Holdings Group is a single entity or whether it should be separated for purposes of civil liability and execution.

The arguments G

Mr *Bvekwa* submits that the claimant is a separate company controlled by Harambe Holdings as its subsidiary. If Harambe Holdings were claiming the seized property, it would be possible to lift the corporate veil against it as it is a shareholder in the claimant. However, the veil cannot be lifted in the converse situation presently under consideration. What the judgment H

Patel J

A creditor should have done is to first apply for the veil to be lifted and, if it succeeded in so doing, it could then seize the assets of the subsidiary company. In interpleader proceedings, the property of the subsidiary entity cannot be seized without a court order lifting the corporate veil.

Mr *Kawonde* counters that the veil should be lifted because the claimant is B a vehicle through which Harambe Holdings carries out its operations. The judgment creditor was employed by the latter as its Chief Engineer, deployable to serve any entity within the Harambe Holdings Group, including the claimant. All the Group subsidiaries are located together at the same address with Harambe Holdings. Moreover, various documents (including letters, brochures and annual returns, as well as newspaper articles and the pleadings C in Case No. HC 5756/10) all demonstrate that the claimant is an integral entity within the Harambe Holdings Group. The claimant's plea is merely a ruse to avoid attachment so as to defeat the judgment creditor's just claim.

Lifting or piercing the corporate veil

The cardinal principle of company law, as enunciated in *Salomon* v *Salomon* D *& Co Ltd* [1897] AC 22 (HL) and *Dadoo Ltd & Others* v *Krugersdorp Municipal Council* 1920 AD 530 at 550, is that a company is a separate entity distinct from its members. Nevertheless, there are well established exceptions to the principle grounded in policy considerations. As was held in *US* v *Milwaukee Refrigerator Transit Co* 42 Fed 247 (1905) at 255:

> E "…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 has been regularly adopted and consistently followed in our law. See *Lategan & Anor NNO* v *Boyes & Anor* 1980 (4) SA 191 (T) at 200-201; *Van Niekerk v Van Niekerk & Ors* 1999 (1) ZLR 421 (S) at 427; F *Mawere* v *Minister of Justice* 2005 (1) ZLR 317 (H) at 327. In *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd & Ors* 1993 (2) SA 784 (C) at 816-818, it was observed that:

> "…when the corporation is the mere *alter ego* or business conduit of a person, it may be disregarded. This rule has been adopted by the courts in those cases where the idea of the corporate entity had been used as a subterfuge and to G observe it would work an injustice….
>
> In cases of fraud, whether actual or constructive, the courts regard the real parties responsible and grant relief against them or deny their claims and defences based on the principles of equity…. So, where a

corporation is organised or maintained as a device in order to evade an outstanding legal or equitable obligation, the courts, even without reference to actual fraud, refuse to regard h it as a corporate entity."

Patel J

On appeal in *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd &* A *Others* 1995 (4) SA 790 (A) at 803-804, the notion of equity was reaffirmed as follows:

> "It is undoubtedly a salutary principle that our courts should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences B that attach to it. But where fraud, dishonesty or other improper conduct (and I confine myself to such situations) is found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil. …And a court would then be entitled to look to substance rather than form in order to arrive at the true facts, C and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would obviously have to be considered on its own merits. "

The exceptions to the general principle have been extended beyond the realm of fraudulent or improper conduct to the situation where a single economic entity owns all the shares in its subsidiaries and controls every aspect of D their operations. Thus, in *DHN Food Distributors Ltd* v *London Borough of Tower Hamlets* [1976] 3 All ER 462 (CA) at 467, it was stated as follows:

> "Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the E subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. …This group is virtually the same as a partnership in which all the three companies are partners. …The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one." F

The rationale for this extension, as I perceive it, is that where the operations of an economic group are so close as to be virtually indivisible, considerations of policy tend to militate against any legal separation of its integral units, for to do so would be to perpetuate an essentially corporate fiction. Of course, this may not invariably be the case, but the equities would certainly favour such an approach in dealings at arms length with innocent outsiders. G

Disposition

The undisputed facts *in casu* are these. The claimant is a wholly owned subsidiary of Harambe Holdings and all the subsidiaries within the Group are located together at the same physical address. The judgment creditor was employed by the Group and was deployable to serve any entity within the H

Patel J

A Group, including the claimant. The relevant documentary evidence amply demonstrates that the claimant is an integral entity within the Group. To all intents and purposes, the claimant is effectively a vehicle or instrumentality through which Harambe Holdings carries out its bakery operations.

On these facts, it seems to me that the claimant's assertion of ownership over the seized assets is nothing more than a subterfuge designed to defeat the B judgment creditor's claim, which claim is uncontroverted and is undeniably a just one. Even in the absence of any fraudulent or other improper motive, the overarching control exercised by Harambe Holdings over its subsidiaries clearly justifies the treatment of the Group as a single economic entity for the purpose of enforcing a debt incurred by any unit within the Group, C particularly where the creditor, as in this case, is a former senior employee who was engaged to serve the entire Group.

The remaining question is this: Is it procedurally necessary for a judgment creditor to have obtained a prior court order lifting the corporate veil before attempting to attach the property of a subsidiary company? Mr *Bvekwa* was unable to cite any case authority in support of this proposition. In

advancing D the counter-proposition that there is no such condition precedent, Mr *Kawonde* relies upon the following passage in the later *Cape Pacific* case, *supra*, at 805-806:

> "In principle, I see no reason why piercing of the corporate veil should necessarily be precluded if another remedy exists. …If the facts of a particular case otherwise E justify the piercing of the corporate veil, the existence of another remedy, or the failure to pursue what would have been an available remedy, should not in principle serve as an absolute bar to a court granting consequential relief. …Whatever laxity or 'fault' there may have been on the part of the appellant in failing to pursue its rights under the doctrine of notice pales into insignificance compared to the impropriety of Lubner's conduct. Yet respondents seek to rely upon such failure to deny the appellant relief. Policy considerations dictate F that they should not be permitted to do so. In the circumstances the appellant's failure to pursue its remedy under the doctrine of notice does not in my view operate as a bar to the relief it seeks."

While these observations may not be directly pertinent to the question at hand, they certainly fortify the principle that mere procedural technicalities should not be allowed to frustrate or impede the effective satisfaction of a G just claim. In any event, I see no logic or practical reason in requiring the judgment creditor to institute fresh proceedings in this court to pierce the corporate veil in circumstances where those proceedings would entail the same conclusion that I have reached earlier.

In the result, the claimant's position cannot be sustained. Its prayer for an H order declaring the attached assets as belonging to it and for stay of execution

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Patel J

is hereby dismissed. The applicant is ordered and authorised to proceed with A the warrant of execution. The claimant shall pay the costs of the applicant and those of the judgment creditor.

V Nyemba & Associates, the applicant's legal practitioners

Bvekwa & Associates, claimant's legal practitioners B

Kawonde & Co, judgment creditor's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/MHANYAMI FISHING & TRANSPORT CO-OPERATIVE SOCIETY LTD & ORS v DIRECTOR-GENERAL, PARKS AND WILDLIFE MANAGEMENT AUTHORITY & ORS 2011 (1) ZLR 555 (H)

MHANYAMI FISHING & TRANSPORT CO-OPERATIVE SOCIETY LTD & ORS v DIRECTOR-GENERAL, PARKS AND WILDLIFE MANAGEMENT AUTHORITY & ORS 2011 (1) ZLR 555 (H)

Citation	2011 (1) ZLR 555 (H)
Case No	Judgment No. HH-92-11
Court	High Court, Harare
Judge	Makoni J
Heard	6 May 2010
Judgment	15 June 2011
Counsel	*J Shekede*, for the applicants *W P Zhangazha*, for the first and second respondents

J Mumbengegwi, for the third respondent

Case Type Opposed application

Annotations Link to case annotations

Flynote

Administrative law – *administrative decisions and acts – proceedings brought in terms of Administrative Justice Act [Chapter 10:28] – High Court's* D *powers – court not entitled to substitute decision of administrative authority with its own decision*

Administrative law – *review – exhaustion of domestic remedies – principles – when court should withhold its jurisdiction until domestic remedies are exhausted – relevant legislation providing effective redress – court* E *declining jurisdiction*

Practice and procedure – *affidavit – authorization of deponent – failure by deponent to assert that deponent on behalf of an artificial person had been authorized – other party raising issue of authorization – steps to be taken to deal with issue*

F **Practice and procedure** – *parties – citation of – Parks and Wild Life Management Authority – Authority itself and Board should be cited*

Headnote

Two of the applicants were co-operatives, registered in terms of the Co-operative Societies Act [*Chapter 24*:*05*] and the third was a company, G registered under the Companies Act [*Chapter 24:03*]. They had all, for several years, held permits to conduct commercial fishing operations. These permits had been routinely renewed, but the respondent authority notified the applicants that their permits would not be renewed after the expiry of a fairly lengthy notice period. The applicants approached the High Court in terms of s 3(1)(a), as read with ss 4 and 5, of the H Administrative Justice Act [*Chapter 10*:*28*], seeking an order setting aside

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the authority's refusal to renew their permits and requiring the authority A to issue permits to them. The applicants cited the respondents as the "Director General, Zimbabwe Parks and Wildlife Management Authority NO" and "Zimbabwe Parks and Wildlife Management Authority". The respondents took four points *in limine*:

(a) that under the Act, the High Court cannot substitute an administrative B decision with its own decision;

(b) that the applicants had failed to exhaust their domestic remedies under s 124(2) of the Parks and Wild Life Act [*Chapter 20*:*14*], the legislation under which fishing permits were granted;

(c) that the deponents of the applicants' founding affidavits did not have the authority to sign the affidavits; and C

(d) that the respondents had been wrongly cited.

Held, that it is a general principle of our law that the courts do not lightly interfere with decisions made by administrative authorities in the absence of illegality, irrationality or procedural impropriety. The High Court can interfere with an administrative decision on the aforementioned grounds. D In terms of s 4(2) of the Administrative Justice Act, the High Court may confirm or set aside the decision concerned or refer the matter back to the administrative authority concerned for consideration or reconsideration. The effect of granting the order to issue permits would be to substitute the decision of the respondents with that of the court. No such power is conferred on the court by s 4(2). Apart from the fact that the court would E be taking over the functions of an administrative authority, there was not adequate information upon which the court could make a decision.

Held, further, that where domestic remedies are capable of providing effective redress in respect of the complaint and, secondly, where the unlawfulness alleged has not been undermined by the

domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the F courts unless there are good reasons for not doing so. Among the factors to be considered in determining whether the court can withhold its jurisdiction until domestic remedies are exhausted are: the subject matter of the statute (transport, trading licences, town planning and so on); the body or person who makes the initial decision and the bases on which it G is to be made; the body or person who exercises appellate jurisdiction; the manner in which that jurisdiction is to be exercised, including the ambit of any re-hearing on appeal; the powers of the appellate tribunal, including its power to redress or cure wrongs of a reviewable character; and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which an the applicant complains H

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Makoni J

A *Held*, further, that s 124(1) of the Parks and Wild Life Act provides that any person who is aggrieved by any decision of an appropriate authority "may appeal" against the decision to the Minister of Environment and Natural Resources. Subsection (2) gives the Minister power to override the decision of the respondents. The appeal procedure was capable of providing effective redress to the applicant's complaint. The use of B the word "may" in subs (1) is to give an aggrieved party a choice as to whether to appeal or not.

Held, further, that once a party raises the issue as to whether the deponent to an affidavit has authority to depose to an affidavit on behalf of an artificial person, then the other party must place before the court some C form of proof that he is so authorised. For artificial persons, such proof will be in the form of resolutions. The deponents offered no evidence that they had been authorised to institute the proceedings on behalf of the applicants. They could have produced the resolutions annexed to the answering affidavits as the respondents had challenged their authority.

Held, further, that s 3 of the Parks and Wild Life Act establishes the Parks D and Wild Life Management Authority, which is a body corporate capable of suing and being sued in its corporate name. This is the entity that can be sued if there are any issues arising out of the Act. The authority is managed by the Parks and Wild Life Management Authority Board, which should have been cited as the first respondent, rather than the E Director-General.

Cases referred to

Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S)

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

Djordjevic v Chrmn, Practice Control Cttee, Medical & Dental F *Practitioners Council of Zimbabwe* 2009 (2) ZLR 221 (H)

Girjac Services (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243 (S)

Lawson v Cape Town Municipality 1982 (4) SA 1 (C)

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

Moyo v Forestry Commission 1996 (1) ZLR 173 (H)

G *Muzengi v Standard Chartered Bank Zimbabwe Ltd & Anor* 2002 (1) ZLR 334 (S)

Legislation considered

Administrative Justice Act [*Chapter 10*:*28*], s 4(2)

H Parks and Wild Life Act [*Chapter 20*:*14*], ss 3, 124(1) & 124(2)

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Makoni J

Case information

J Shekede, for the applicants A

W P Zhangazha, for the first and second respondents

J Mumbengegwi, for the third respondent

Judgment

MAKONI J: The applicants approached this court seeking an order in the following terms:

> "(1) The decision by the first and second respondents in refusing to renew the B fishing permits for the first, second and third the applicants be and is hereby set aside.
>
> (2) The first and second respondents are hereby directed to issue fishing permits to the first, second and third the applicants upon payment of the requisite fees and compliance with one statutory requirements.
>
> (3) The first and second respondents shall pay costs of suit jointly and severally, C the one paying the other to be absolved".

The background to the matter is that the three the applicants have been in the fishing business for a period spanning over 20 years. Within that period, the first and second respondents would issue them with annual fishing permits. On 5 October 2006, the first respondent wrote to the third the applicant advising D it that its fishing permit would not be renewed as it would be redistributed to other incoming players. The letter gave them one year's notice from 1 January 2007 to 31 December 2007. The first and second the applicants were later advised that the contents of the letter of 5 October 2006 applied to them as well. The applicants pleaded with the first respondent who extended E the period of operation to December 2009. Thereafter, the first respondent refused to renew the applicants' permits.

The applicants then approached this court in terms of s 3(1) (a) as read with ss 4 and 5 of the Administrative Justice Act [*Chapter 10*:*28*] ("the Act"). The basis for the application is threefold. Firstly they contend that the decision by the respondents to refuse to renew their fishing permits contravenes the F laws of natural justice and the relevant provisions of the Act. Secondly, they contend that they have a legitimate expectation that their fishing permits will be renewed. Lastly, they contend that the decision in refusing to renew their permits was made retrospectively and has no basis at law since the enabling statute does not provide for same.

The respondents raised four points *in limine*: C

(i) The High Court cannot substitute an administrative decision with its own in applications made in terms of the Act.

(ii) The High Court should exercise its discretion to withhold its jurisdiction from the applicants for failing to exhaust the domestic remedies by way of appeal to the relevant minister as allowed by the enabling statute. H

Makoni J A

(iii) The deponents of the applicants' affidavits have no authority to sign the founding affidavits on behalf of the applicants.

(iv) The first and second respondents have been mis-cited.

I will deal with the points *seriatum*.

Point I

B This point relates to para 2 of the draft order only. I will not dwell much on it as, in my view, even if I were to make a finding in favour of the respondents, it will not dispose of the matter. The court still has to consider whether it can grant the other paragraphs of the draft order.

Mr *Zhangazha* submitted that the applicants chose to proceed to seek relief C in terms of a specific statute and not through the common law approach. The relief they seek in para 2 of the draft order is one that effectively substitutes the administrative authority's decision. This is not envisaged anywhere in the Act.

Mr *Shekede* submitted that it is a general principle of our law that our courts D do not lightly interfere with administrative decisions made by administrative authorities in the absence of illegality, irrationality or procedural impropriety. The High Court can interfere with an administrative decision on the aforementioned grounds. He further submitted that in terms of s 4(2) of the Act, the High Court may confirm or set aside the decision concerned or refer the matter back to the administrative authority concerned for consideration E or reconsideration.

Paragraph 2 of the draft order reads:

> "2. The first and second respondents are hereby directed to issue fishing permits to the first, second and third the applicants upon payment of the requisite fees and compliance with other statutory requirements".

F The point being made by the respondents, which point I agree with, is that the effect of granting para 2 of the order, is to substitute the decision of the respondents with that of this court. No such power is conferred on this court by s 4(2) of the Act.

Section 4 (2) provides:

> G "(2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate –
>
> (a) confirm or set aside the decision concerned;
>
> (b) refer the matter back to the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court; H
>
> (c) direct the administrative authority to take administrative action within the

> relevant period specified by law, or if no such period is specified, within a A period fixed by the High Court;
>
> (d) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law, or if no such period is specified, within a period fixed by the High Court;
>
> (e) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section *three*." B

In my view, the language used in the above section was carefully crafted in a bid to avoid the undesirable situation where the courts would take over the functions of an administrative authority. See *Affretair (Pvt) Ltd & Anor* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S) at 21 where McNally JA quoted, with approval, comments in Baxter's *Administrative Law* that: C

> "The function of judicial review is to scrutinise the legality of administrative action, not to secure a decision by a judge in place of the administrator. As a general principle, the court will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise 'would constitute an unwarranted usurpation of D the powers entrusted to the public authority by the legislature'. Thus, it is said that: 'the ordinary course is to refer back because the court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances this principle will be departed from. The overriding principle is that of fairness'".

I also agree with Mr *Zhangazha* that no adequate information is available E to the court for it to be able to grant para 2. Before granting a permit, the respondents would look into such issues as the size of the nets, fish population, the number of operators allowed per year and many others. These are issues of an administrative nature which this court cannot inquire into. The court cannot therefore direct the respondents to issue permits to the applicants. I will therefore uphold the point *in limine.* F

Point 2 – Domestic remedies

It was submitted by Mr *Zhangazha* that s 124(2) of the Parks and Wild Life Act [*Chapter 20*:*14*] provides for an appeal to an aggrieved person to the Ministry of Environment and Natural Resources. The section gives G the Minister power to substitute the decision of the respondents. The Act therefore provides adequate relief to aggrieved persons.

Mr *Shekede*, on the other hand, submitted that s 124 was not peremptory and that domestic remedies can be dispensed with where there are special circumstances. He also submitted that the Act came into effect in 2004 when the Parks and Wildlife Act [*Chapter 20*:*14*] was already in existence. This H

A provides a party with a choice to either exhaust the domestic remedies or to approach the High Court.

It has been laid down in a number of cases, in our jurisdiction, that where domestic remedies are capable of providing effective redress in respect of the complaint and where the unlawfulness alleged has not been undermined B by the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the F courts unless there are good reasons for not doing so. See *Girjac Services (Pvt) Ltd* v *Mudzingwa* 1999 (1) ZLR 234 (S) at 249 D. See also *Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H) at 191D-192B, *Muzengi* v *Standard Chartered Bank Zimbabwe Limited & Anor* 2002 (1) ZLR 334 (S) at 338A-B, and *Djordjevic* v *Chairman of the* C *Practice Control Committee of the Medical and Dental Practitioners Council of Zimbabwe & Anor* 2009 (2) ZLR 221 (H).

Some of the factors to be considered in determining whether the court can withhold its jurisdiction until domestic remedies are exhausted were considered in *Lawson* v *Cape Town Municipality* 1982 (4) SA 1 (C) at 6H D to 7A where Comrie J said:

> "Among these are: the subject matter of the statute (transport, trading licences, town planning and so on); the body or person who makes the initial decision and the bases on which it is to be made; the body or person who exercises appellate jurisdiction; the manner in which that jurisdiction is to be exercised, including the ambit of any re-hearing on appeal, the powers of the appellate tribunal, including its power to redress or cure wrongs of a reviewable character; E and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which an the applicant complains".

Section 124 provides:

> "(1) Any person who is aggrieved by any decision of an appropriate authority, for unalianated land or for any waters in refusing to issue or cancelling or imposing F condition in respect of a permit referred to in subsection (4) of section *fifty-nine* or section *eighty-six* may appeal against the decision to the Minister.
>
> (2) Upon an appeal being made in terms of subsection (1) the Minister may uphold the decision of the appropriate authority or may direct the appropriate authority to issue a permit in terms of subsection (4) of section *fifty-nine* or section *eighty-six* or to delete all or any of the conditions imposed in respect of such permit and the appropriate authority shall comply with such direction."

G Subsection (1) of s 124 uses the word "may". The applicants argue that it is permissive and not peremptory. I agree with the respondents' position that the word was used to give an aggrieved party a choice whether to appeal or not. The appeal procedure is available to "*Any* person who is aggrieved by *any* decision of an appropriate authority …" (my italics). The appeal H procedure was therefore available to the applicants.

Makoni J

In my view, the appeal procedure was capable of providing effective redress A to the applicant's complaint. The Minister, in terms of subs (2), is empowered to do various acts, one of which is what the applicants seek in para 2 of the draft order. The powers that the Minister has are, as described by Comrie J in *Lawsen*'s case *supra* "of considerable breath and would in my view cater for most cases …". He can *inter alia*, issue permits, unlike this court which B does not have such powers under the Act. The Minister is better placed to acquire the appropriate information before he can grant a permit.

In view of the above findings, I will uphold the point *in limine*.

Point 3 – Authority to depose to the founding affidavits

The first and second the applicants are co-operatives. The third the applicant C is a registered company in terms of the laws of Zimbabwe. It was submitted by Mr *Zhangazha* that the deponents of the founding affidavits did not have authority to depose to the affidavits. In their answering papers, the applicants contended that the respondents had no basis to challenge their authority. They attached the certificates of registration and certificate of incorporation D as proof that the applicants were registered. It was submitted on their behalf that in terms of ss 22 and 28 of the Co-operatives Societies Act [*Chapter 24*:*05*] and ss 12 and 13 of the Companies Act [*Chapter 24*:*03*], they had the requisite authority.

The first and second the applicants are, in terms of s 21 of the Co-operative Societies Act [*Chapter 24*:*05*] bodies corporate with all the rights attendant E on a body corporate. The third the applicant is

a duly registered company. The three the applicants are therefore artificial persons.

> "Unlike an individual, an artificial person can only function through its agent, and it can only take decisions by the passing of resolutions in the manner provided by its constitution … F
>
> There is 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 authorised by the company to do so … This seems to me to be a salutory rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the court G 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 authorised would be to provide an affidavit made by an official of the company annexing a copy of the resolution …" H

Makoni J

A See *Mall (Cape) (Pty) Ltd* v *Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351-352 *per* Watermeyer J (as he then was), as quoted with approval in *Direct Response Marketing (Pvt) Ltd* v *Shepherd* 1993 (2) ZLR 218 (H) at 221C-D and F-G.

In my view, once a party raises an issue whether the deponent to an affidavit B has authority to depose to an affidavit on behalf of an artificial person, then the other party must place before the court some form of proof that he is so authorised. For artificial persons, such proof will be in the form of resolutions. The deponents offered no evidence that they had been authorised to institute the proceedings on behalf of the applicants. They could have produced the resolutions annexed to the answering affidavits as the respondents had C challenged their authority. There is therefore no evidence that the applications were duly authorised. In view of my finding, I will uphold the point *in limine.*

Point 4 – Mis-citation of the respondent

The respondents cited the respondents as the "Director General, Zimbabwe Parks and Wildlife Management Authority NO" and "Zimbabwe Parks and D Wildlife Management Authority". The proper citation for the first respondent is the Director General, Parks and Wildlife Management Authority and, for the second respondent, Parks and Wildlife Management Authority. When the respondents took issue with the citation, the applicants, in subsequent papers cited the respondents properly. It was contended, by the respondents, that the applicants did not adopt the procedure as laid down in the rules. E The applicants contended that they cited the respondents in such a manner in view of the various correspondence received from the first respondent whose letter heads reflected the second respondent as Zimbabwe Parks and Wild Life Management Authority.

Section 3 of the Parks and Wild Life Act [*Chapter 20*:*14*] establishes the F Parks and Wild Life Management Authority which is a body corporate capable of suing and being sued in its corporate name. This is the entity that can be sued if there are any issues arising out of the Parks and Wild Life Act. There is no such entity as the Zimbabwe Parks and Wild Life Management Authority. It was the duty of the applicants to check with the appropriate statute what entity to sue rather than rely on letter heads from correspondents. G The authority is managed by the Parks and Wild Life Management Authority Board. In my view, this should have been cited as the first respondent rather than the Director-General.

In view of the above, the applicants have brought non-existent entities before the court. I agree with Mr *Zhangazha* that you do not correct a citation in an H application by correctly citing the parties in subsequent papers.

Makoni J

I have upheld all the four points raised by the respondents *in limine.* It will A not be necessary for me to deal with the matter on the merits.

In the result, I make the following order:

(a) The application is dismissed.

(b) The applicants to pay the respondents' costs.

Wintertons, the applicants' legal practitioners

Chinamasa, *Mudimu*, *Chinogwenya & Dondo*, first and second respondents' legal practitioners

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KATERERE v CHIANGWA & ORS 2011 (1) ZLR 565 (H)

Citation	2011 (1) ZLR 565 (H)
Case No	Judgment No. HH-122-11
Court	High Court, Harare
Judge	Mavangira J
Heard	4 March 2010
Judgment	15 June 2011
Counsel	*G E Mandizha*, for the applicant *L Uriri,* for the first, third and fifth respondents No appearance for the second, fourth and sixth respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Administration of estates – *executor – executor dative – appointment of by Master – executor testamentary still alive, holding office and not incapacitated – appointment of executor dative improper – acts carried out by executor dative of no legal effect*

Headnote

In 1999 the applicant entered into an agreement for the sale of an immovable property from a deceased estate, which was represented by the executrix testamentary. She was granted authority in terms of s 120 of the Administration of Estates Act [*Chapter 6:01*] to sell the property otherwise than by public auction. The immovable property was transferred to the applicant in April 2007. At some unspecified stage after the first sale, the second respondent, the heir to the estate, purported to sell the property to the first respondent. At that time, the ownership of the property did not reside in the heir. In 2006, the first respondent and another person brought an action in the magistrates court against the second respondent and others seeking the transfer of the property to themselves. The magistrate granted the order by default and the Master then appointed an executor dative for the sole purpose of effecting the transfer. In July 2007 the property was purportedly transferred to the first respondent. The applicant

sought an order setting aside the transfer to the first G respondent. He contended that the appointment of the executor dative during the lifetime of the executrix testamentary and during a period of time when the executrix testamentary was still holding office and was not incapacitated, was not valid. He further contended that, when the second respondent sold the property, the second respondent had no title to pass and that the sale was made in the second respondent's personal H capacity and without authority. He also contended that, when the second

Mavangira J

respondent sold the property, he knew that it had already been sold to A the applicant as he had co-signed the agreement of sale between the applicant and the executrix testamentary.

The Registrar of Deeds expressed the opinion that, although the applicant's deed of transfer was lodged first, the first respondent's was processed first, thus rendering the applicant's deed invalid. B

Held, that in term of ss 10 and 14 of the Deeds Registries Act [*Chapter 20:05*], when the Registrar affixes his signature to the deed of transfer in favour of the applicant, the deed is, with effect from that date, deemed to be registered and ownership was conveyed from the deceased estate to the applicant. Thus the applicant became, or was henceforth deemed to be, the owner and the property no longer formed part of the deceased estate. C It therefore followed that when, three months later, it was purported to convey ownership of the property from the estate to the first respondent, the estate at that stage was no longer the owner thereof and it thus had no rights to transfer to the first respondent. The agreement of sale purportedly in favour of the first respondent therefore could not be valid. D

Held, further, that in any event, the executor dative having been appointed whilst the executrix testamentary was still alive, holding office, not incapacitated and still sane, was improperly appointed. The deceased had left a will in which the executrix testamentary was appointed. The Master was thus not dealing with an intestate estate. The appointment E of the executor dative was, in the circumstances, irregular and any acts carried out by him in the name of the estate would thus be of no legal consequence.

Held, further, that under s 11(1)(a) of the Deeds Registries Act, transfers of land and cessions of real rights therein follow the sequence of the successive transactions in pursuance of which they are made. Although F the deed of transfer in favour of the applicant was registered first, the Registrar's opinion that the deed was invalid could only be viewed as the Registrar's opinion and not a statement or declaration of the legal position. In terms of s 8(1) of the Act, no deed of transfer shall be cancelled by a Registrar except upon an order of court. There had been G no order of court which had cancelled or authorised the cancellation of the applicant's deed of transfer, which therefore remained valid.

Cases cited

Macfoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC) H

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

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A *X-Trend-a-Home (Pvt) Ltd v Hoselaw Investments* 2000 (2) ZLR 348 (S)

Legislation considered

Deeds Registries Act [*Chapter 20:05*], ss 8, 10, 11& 14

Case information

B *G E Mandizha*, for the applicant

L Uriri, for the first, third and fifth respondents

No appearance for the second, fourth and sixth respondents

Judgment

MAVANGIRA J: In 1999 the applicant entered into an agreement of sale in terms of which he purchased an immovable property from the estate of the late Maria Campbell-Logan as represented by the executrix testamentary of the estate. The immovable property, described as Stand 382 Good Hope Township of Subdivision B of Good Hope, was transferred to the applicant in April 2007 by deed of transfer no. 1597/2007.

On or about 1 October 2006 Tsungirai Musenha and the first respondent filed an application, as co-the applicants, in the magistrates court. They cited Robert Campbell-Logan (the second respondent herein), estate late Maria Campbell-Logan and the Registrar of Deeds (the fourth respondent herein) as the first, second and third respondents respectively. They contended therein that the second respondent herein had sold to them, and they had purchased, Stands Numbers 412 and 382. They further contended that the second respondent herein was then avoiding them for the purpose of passing transfer to them of the said properties. On or about 5 October 2006 a rule nisi was granted by the magistrates court in the following terms:

> "A rule nisi be and is hereby issued returnable to this honourable court on the …….. day of …….. 2006 calling upon the first and second respondents to show cause if any why? (*sic*)
>
> 1. first, second and third respondents and all those acting through them should not be barred from transferring to anyone other than first and second the applicants Stand Numbers 412 and 382 respectively being subdivisions of the remainder of subdivision B of Good Hope held under Deed Number 6180/95. (*sic*)
> 2. first, second and third respondents should not be ordered to effect transfer of Stands 412 and 382 to first and second the applicants, Stand Numbers 412 and 382 respectively being subdivisions of the remainder of subdivision B of Good Hope held under Deed Number 6180/95. (*sic*)
> 3. first, second and third respondents and all those acting through them should not be barred from disposing first and second the applicants in any way of their occupation of Stand Numbers 412 and 382 respectively. (*sic*)
> 4. first respondent should not be ordered to pay costs of this application. (*sic*)"

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The following interim relief was granted:

> "1. Pending the return date all respondents and all those acting through them be and are hereby interdicted from disposing or transferring to anyone Stand Numbers 412 and 382 respectively being subdivisions of the remainder of subdivision B of Good Hope held under Deed Number 6180/95."

On 8 November 2006 the magistrate granted default judgment in the same matter for an "interdict and compelling order" in favour of the applicants therein.

On 29 November 2006 the sixth respondent issued letters of administration appointing the third respondent as executor dative to administer the estate of the late Maria Campbell-Logan, for the sole purpose of effecting transfer of "a certain piece of land situated in the District of Salisbury being a remainder of subdivision B of Good Hope being Stand 382 into the name of Cosma Chiangwa." On 4 July 2007 the immovable property was transferred into the name of Chiangwa, the first respondent herein, by Deed of Transfer 4079/2007.

The applicant now applies for an order in the following terms:

> "1. That the sale to the first respondent by the second respondent of Stand 382 Good Hope is null and void. (*sic*)
> 2. That the registration of Stand 382 of Good Hope Township of Subdivision B of Good Hope into the name of first respondent is null and void. (*sic*)
> 3. That the appointment of the third respondent as Executor Dative of the estate of the late Maria Campbell-Logan is null and void.
> 4. That the applicant is the sole lawful registered owner of Stand 382 Good Hope Township of Subdivision B of Good Hope.
> 5. That the fourth respondent shall, within 3 days of service of this Order upon him, delete the name of the first respondent from the name of the applicant as the registered owner of Stand 382 Good Hope Township of subdivision B of Good Hope. (*sic*)
> 6. That the first, second, third and fifth respondents shall pay costs of these proceedings jointly and severally, the one paying the others to be absolved."

In the main, the applicant contends that the appointment by the sixth respondent of the third respondent as the executor dative of the estate during the lifetime of the executrix testamentary and during a period of time when the executrix testamentary was still holding office and was not incapacitated, is not valid in law. He further contends that when the second respondent sold Stand 382 G to the first respondent, he (the second respondent) had no title to pass and that the sale by the second respondent was done in the second respondent's personal capacity and was also done without authority. He also contends that when the second respondent sold the property to the first respondent he knew that it had already been sold to the applicant as he had co-signed the agreement of sale between the applicant and the executrix testamentary. H

Mavangira J

A It is also contended by the applicant that the fourth respondent registered the property into the name of the first respondent without checking his register. Furthermore, the fifth respondent, who was the conveyancer of the property into the first respondent's name, did not conduct any checks as to title to the property before drafting and lodging conveyancing papers with the Deeds Registry. If he had exercised care, he would have discovered that B the immovable property belonged to the applicant as it had already been registered into the applicant's name more than two months earlier.

The applicant further contends that the position stated by the executrix testamentary in the letter of 1 September 2007 is the correct position at law. The letter raised with the sixth respondent the invalidity of the appointment C of the executor dative as it was done when the executrix testamentary had not been removed from the office by a competent court or judge. The contention then was that the sixth respondent acted without authority when he appointed the third respondent as executor dative and consequently all acts done by the executor dative in relation to the transfer of the property are of no force or effect. The property was thus illegally transferred into the name of the first D respondent. He also contends that the third respondent ought to have known that the sale by the second respondent to Musenha and the first respondent was defective.

It is the applicant's contention that there is sufficient justification for this court to grant him the relief that he seeks.

E The respondents, on the other hand, contend that the application ought not to succeed for various reasons. Firstly, that the applicant is alleging fraud on the part of the persons who prepared and authored the documents which are being challenged and that such persons would need to be cross-examined in trial proceedings. They contend, secondly, that there are disputes of fact which cannot be resolved on the papers, such disputes being in relation to how two F agreements of sale could have been concluded for the same property with the fourth respondent. These issues, it is contended, cannot be adequately addressed in affidavits. The third reason stated is that the applicant has not challenged or caused the suspension of the "compellation orders authorising transfer of the property in issue emanating from the order granted by the G magistrates court." They contend that the court therein decided that the property belonged to the first respondent and until that order is suspended, this court cannot hear the applicant's case. The fourth reason stated is that the applicant has no real rights over Stand 382 Good Hope Township and that the Registrar of Deeds has confirmed by letter that the property belongs to the first respondent. It is contended that the applicant's supposed title deed H is not a valid title deed and does not confer any rights on him. Consequently,

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Mavangira J

the applicant cannot challenge the registration of a property which he does A not own. They contend that there is no double registration of the immovable property in issue. The fifth reason stated is that the applicants purported agreement of sale dated 1999 with the executrix testamentary is invalid because the executrix testamentary did not then have authority from the sixth respondent to sell the property, such authority only having been granted by the B sixth respondent on 27 February 2006. The applicant has in any event sued the wrong party as he should sue the estate from which his rights emanate in terms of the agreement of sale. Finally, it is stated that the relief prayed for by the applicant is impracticable and unprocedural as he may not sue to remove an executor or challenge the Master's decision in these proceedings.

In addition to the above, the first respondent states that he has been in C occupation of the property since July 1998 and has built a two-bedroomed house thereon. He has also been paying all utility bills and rates. Even before transfer of the property to him, he used to pay the bills. The first respondent also says that at the time of the alleged sale to the applicant he was already in occupation of the property and if the applicant had been diligent he could D easily have found that out. Furthermore, the second respondent could sell the property to him as he was the beneficiary and he had full authority to do so.

The respondents thus contend that the application should be dismissed with costs on the higher scale.

The papers before this court reveal the following. The agreement of sale in terms of which the applicant purchased the property in issue was executed E in 1999. The seller of the property in terms of that agreement being the estate late Maria Campbell-Logan was represented therein by the executrix testamentary of the estate. The executrix testamentary was granted authority in terms of s 120 of the Administration of Estates Act [*Chapter 6:01*] to sell the property otherwise than by public auction. The date of issue of such F authority is unclear as the only discernible part reads "2005".

The papers also show that on 29 November 2006 letters of administration were issued by the sixth respondent in terms of which the third respondent was appointed as the executer dative of the same estate and an endorsement was made therein that the letters were issued for the sole purpose of effecting transfer of the said property to the first respondent. G

It is also shown by the papers that there are two deeds of transfer in favour of the applicant and the first respondent respectively, in respect of the same property, being Stand 382 Good Hope Township.

It is a fact borne out by the papers, therefore, that there are two Deeds of Transfer in favour of two different persons in respect of the same property. H

2011 (1) ZLR p571

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A The first respondent has sought to rely, *inter alia,* on the letter written on 3 April 2008 by the Assistant Registrar of Deeds addressed to the third respondent and which reads in part:

> "Ref: Deeds Number 1597/2007 and 4079/2007
>
> Reference is made to your letter dated 28 March 2008 where you wanted this office to clarify the position of Deeds of Transfer 1597/2007 and 4079/2007. (sic)
>
> B Our investigation has shown that both deeds refer to Stand 382 Good Hope Township of Subdivision B of Good Hope. There are two records in our database. One in the name of David Katerere under transfer p11… 1597/2007, dated 2 April 2007, and the other in name of Cosma Chianwa under transfer 4079/2007 dated 4/7/2007. (*sic*)
>
> On further investigation we noted that Deed of Transfer 4079/2007 was deducted C first at the Surveyor-General's office and 1597/2007 was rejected because the stand was already registered.
>
> It is not clear why deed 4079/2007 was deducted first at the Surveyor-General. But this is not unusual since work is allocated to various examiners whose performances differ. What it now means is that Deed 4079/2007 has completed all the processes while transfer 1597/2007 has not, making it invalid. (*sic*)
>
> D However ownership of the property and cancellation of invalid deed has to be done by the courts in line with section 8 of the Deeds Registries Act [*Chapter 20:05*]."

At the hearing of this matter Mr *Mandizha* submitted that the appointment of the executor dative was for the sole purpose of transferring Stand 412 E into Tsungirai Musenha's name. He submitted that it was not clear how Stand 382 was transferred into the first respondent's name without letters of administration having been issued for that purpose. He submitted that the letters of administration in relation to Stand 382 were issued to the agent of the executrix testamentary and the third respondent was not such an agent. Yet, the transfer of Stand 382 into the first respondent's name was based *inter* F *alia,* on the papers prepared and signed by the third respondent as executor dative and the fifth respondent as conveyancer. This, he submitted, must be viewed in conjunction with the fact that the fourth respondent registered the property into the first respondent's name notwithstanding the fact that the applicant's name appeared on the Register as the registered owner of that property. At p 89 of the papers appears the letters appointing third respondent G as executor dative of the estate and for the sole purpose of transferring Stand 382 into first respondent's name.

It was also submitted that the letter written by the Registrar of Deeds indicating that the applicant's deed is invalid ought not to be admitted as evidence as the Registrar is one of the respondents and cannot be viewed as H being entirely objective. Furthermore, that in any event, declaring a deed

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invalid is the prerogative of the court and the Registrar was thus usurping A the court's power when he wrote the letter.

Regarding the case of *X-Trend-a-Home (Pvt) Ltd v Hoselaw Investments* 2000 (2) ZLR 348 (S) which was cited in the respondents' heads of argument, Mr *Mandizha* submitted that what is prohibited by law is an agreement for the transfer of ownership before the granting of a subdivision B permit. He submitted that such agreement is not proscribed by the Deeds Registries Act and that the Regional, Town and Country Planning Act has no relevance in matters of registration of title as title does not flow from the agreement but is a product of the powers conferred on the Registrar of Deeds and is regulated by the Deeds Registries Act [*Chapter 20:05*]. The provisions of the Deeds Registries Act are not affected by the Regional, C Town and Country Planning Act.

Mr *Mandizha* submitted that s 5(b) of the Deeds Registries Act requires the Registrar to examine all deeds or other documents submitted to him for execution or registration, and after examination reject any such deed or other such document the execution or registration of which is not permitted D by this Act or by other law, or to the execution or registration of which any other valid objection exists. He submitted that there is no requirement in this provision for the contract of sale of a piece of land to be submitted to the Registrar together with the deed for examination. Neither does it require the Registrar not to register transfer of a property the sale agreement of which contains a suspensive condition. He submitted that the Deeds Registries E Act does not require the Registrar to do so, and the Registrar should not concern himself with the agreement of sale as it is not his duty to do so. It was further submitted that in any event, there is no counter-application before this court for the setting aside of the Deed of Transfer registered in favour of the applicant. This, it was submitted, must be taken as an indication that F the first respondent knew, or must have known, that his title was defective.

It was also Mr *Mandizha*'s submission that the only question that this court must concern itself with is whose property is Stand 382. He submitted that the answer to this question is to be found in s 10 of the Deeds Registries Act which provides that once real rights have been registered in a person's name he shall be deemed to be the owner of the property. He submitted that G the use of the word "deemed" in the said section gives room for any party to challenge the ownership conferred on the person registered in the Deeds Registries office. Furthermore, that *in casu,* the first respondent has opted to use a shield instead of an offensive weapon as he has resorted to merely defending himself without seeking to assert his own title. He also submitted that in terms of s 11 of the same Act, transfers of land should follow the H

A sequence of registration. Thus whenever ownership is being changed, the registered owner must first divest himself of the ownership of the property or the court should divest him of it and then declare as owner the person who has challenged such title. On this basis, it was submitted, it is very clear that the first respondent's deed is unlawful and therefore null and void as his registration as owner was subsequent to that of the applicant, over the same B property. It was submitted that this is sufficient justification for this court to declare the registration of the first respondent as owner to be null and void. It was submitted that while the transfer to the first respondent purported to be transfer from the estate of the late Maria Campbell-Logan, the property was at the time no longer a part of the deceased estate because it had already C been transferred to the applicant. Furthermore, s 11(1)(b) of the same Act provides that it shall not be lawful to depart from any such sequence in recording in any Deeds Registry any change in the ownership in such land or of such real right unless the Registrar is satisfied that the circumstances are exceptional and has consented to such departure.

Mr *Mandizha*'s final submission was that the property was sold by the heir, D that is the second respondent, at a time when the property had not yet resided in the heir and thus he had no power

whatsoever to deal with the property as he did. He submitted that while the sale of another person's property is not unlawful, transfer or delivery of that property is unlawful and is null and void.

Mr *Uriri,* on the other hand, made submissions to the following effect. The E submissions by Mr *Mandizha* about the inapplicability of the Regional, Town and Country Planning Act have already been considered and rejected by the Supreme Court in *X-Trend-A-Home supra*. *In casu,* on Deed of Transfer 1597/07 the *causa* is given as a sale. He also highlighted that both the Deeds Registries Act and the regulations made in terms thereof require that each deed of transfer must, on the face of it, disclose the cause of the F transfer and that this is what in conveyancing terms is referred to as the *causa* clause. Such *causa* must be valid, otherwise the resultant deed, if based on an invalid *causa,* is necessarily invalid. The Deeds Registries Act and the Regional, Town and Country Planning Act are complementary and a *causa* which is invalid by reason of breach of the latter Act is necessarily invalid for purposes of the former Act. He quoted the famous statement by Lord G Denning in *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1121that "you can not put something on nothing and expect it to stay there". Mr *Uriri* submitted that the applicant is in fact seeking to enforce an illegal contract and that that is another reason why the application must fail, as the maxim *ex turpi causa* applies and cannot be relaxed in the circumstances.

H Mr *Uriri* also submitted that the applicant bases his case on facts which are in

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fact in dispute. The applicant claims that his title was registered first whereas A it is clear from the papers that the first respondent's deed of transfer has gone through all the processes and the applicant's has not. In this regard, reliance was being placed on the letter from the fourth respondent's office already referred to earlier. He submitted that this dispute of fact cannot be resolved on the papers. Furthermore, that this is a dispute which should have been B foreseen at the outset as the applicant was aware at the time of instituting this application that the first respondent was registered in terms of Deed of Transfer 4079/07 as the owner of the same property.

Mr *Uriri* submitted that, before instituting this application, the applicant was aware that limited letters of administration had been issued to the third respondent by the sixth respondent for purposes of transferring the property C in issue from the estate. Such letters of administration can only be set aside in terms of the procedure stipulated in the Administration of Estates Act [*Chapter 6:01*]. As that has not been done, the relief sought by the applicant in para 3 of his draft order cannot be granted. He further submitted that the limited letters of administration were issued pursuant to a compelling order issued by the magistrates court. As that order has not been set aside D and cannot be set aside in these proceedings, the applicant would first need to seek a nullification of that order if so advised. He submitted that from the papers it appears that, having become aware of the order, the applicant neither sought rescission of it nor a declaratory order to the effect that it was obtained by fraud, if that were his contention. Therefore, the instant E proceedings are certainly not the process by which the magistrate's order could be rescinded or set aside.

He submitted that, in view of the applicant's persistent denial that there are grave disputes of fact in this matter when there clearly are, the applicant cannot now ask the court to refer the matter for the hearing of evidence as F the applicant clearly ought to have proceeded by way of action in the first place. There is no justification for interference with the first respondent's registration as owner of the property and that for all the reasons stated above, the application must be dismissed with costs on the scale stated earlier in this judgment.

Section 14 of the Deeds Registries Act provides: G

> "subject to this Act or any other law –
>
> (a) the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by a registrar."

Section 8 of the Deeds Registries Act provides as follows:

> "(1) Save as is otherwise provided in this Act or in any other enactment, no registered deed of grant, deed of transfer, certificate of title or other deed conferring or H

A conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of court."

The letter by the Assistant Registrar of Deeds does not constitute cancellation of the Deed of Transfer in favour of the applicant. In my view, it expresses the author's opinion on the matter. In any event, there is no application or B counter-application before this court for the cancellation of the said Deed of Transfer. It does not, in my view, support the first respondent's contention that there is no double registration of the property. The fact is that there is double registration of the property in issue; the one registration being in favour of the applicant and effected on the 2 April 2007, whilst the other C registration is in favour of the first respondent and was effected on 4 July 2007, some three months later.

Section 10 of the Deeds of Registries Act provides:

"(1) Deeds executed or attested by a registrar shall be deemed to be registered upon the affixing of the Registrar's signature thereto…"

D Thereafter s 11 provides:

"(1) Save as otherwise provided in this Act or as directed by the court –

(a) transfers of land and cessions of real rights therein shall follow the sequence of the successive transactions in pursuance of which they are made…"

The fourth respondent is of the opinion that the deed of transfer in favour of the applicant is invalid for the reasons stated in the letter from his office, E which letter has already been quoted earlier. This aspect will be dealt with later in this judgment.

The respondents raised the point that the applicant's case is premised on an agreement of sale which is void *ab initio* for the reason that the sale was conditional upon the grant of a subdivision permit in terms of the F Regional,Town and Country Planning Act [*Chapter 29:12*]. It was submitted that that Act specifically proscribes such agreements and that both the Supreme Court and the High Court have held such agreements to be void *ab initio.* It follows, therefore, that nothing can be founded thereon and the applicant cannot seek to enforce that which he does not have. In support of these submissions the following cases were cited *inter alia*: *Macfoy* v *United* G *Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1121 where Lord Denning stated:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It as automatically null and void without more ado, although it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to H stay there. It will collapse."

Mavangira J

In *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S) Korsah JA stated: A

"If the order was void *ab initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it."

In *X-Trend-a-Home (Pvt) Ltd v Hoselaw Investments* 2000 (2) ZLR 348 (S) McNally JA, having revisited the history of s 39 of the Regional, B Town and Country Planning Act, stated at 355A-D:

"The agreement with which we are concerned is clearly 'an agreement for the change of ownership' of the unsubdivided portion of a stand. What else could it be for? Whether the change of ownership is to take place on signing, or later on an agreed date, or when a suspensive condition is fulfilled, is unimportant. It is the agreement itself which is prohibited. C

The evil which the statute is designed to prevent is clear. Development planning is the function of planning authorities, and it is undesirable that such authorities should have their hands forced by developers who say 'but I have already entered into conditional agreements; major developments have taken place; large sums of money have been spent. You can't possibly now refuse to confirm my unofficial subdivision or development.'" D

I will shortly deal with this submission.

The substantive part of the Master's report (the sixth respondent) states as follows:

"The estate of the late Maria Campbell-Logan who died testate is registered with me under DR1617/98 and Brenda Carol Leeper of Veritas Executor (Private) Limited as the appointed executrix testamentary. I also confirm that my office E authorised the sale of Stand No. 382 Good Hope Township in terms of s 120 of the Administration of Estates Act [*Chapter 6:01*]. My office is unaware of the double sale and, in compliance

with the court order under Case No. 12060/06, consented to the transfer of the disputed property in favour of the first respondent.

According to information on file there appear to be material disputes which needs (*sic*) to be determined so as to establish which between the two sales is F valid and legal."

In my view, this report does not detract from the facts which are established by the papers. The following are the facts which emerge from the papers and upon which this matter will be determined. Firstly, the applicant purchased the property in issue from the estate as represented by the executrix G testamentary. The first respondent, on the other hand, purchased the same property purportedly from the same estate but in his case the estate was represented by the executor dative. It is an undisputed fact that the executor dative was appointed to the office while the executrix testamentary was still alive, holding office, not incapacitated and still sane. Neither had the executrix testamentary been removed from office. Secondly, the applicant's H

A agreement of sale preceded that of the first respondent. Thirdly, it is also clear from the papers that the property was registered into the applicant's name on 2 April 2007 by Deed of Transfer 1597/2007 while the transfer to the first respondent was done three months later on 4 July 2007 by Deed of Transfer 4079/2007.

B The relevant law applicable to the instant matter, with particular regard to the registration of real rights as provided in the following sections of the Deeds Registries Act, is:

"10 When registration takes place

(1) Deeds executed or attested by a registrar shall be deemed to be registered C upon the affixing of the Registrar's signature thereto:

Provided that no such deed which is one of a batch of interdependent deeds, intended for registration together, shall be deemed to be registered until all the deeds of the batch have been signed by the Registrar.

(2) If by inadvertence the Registrar's signature has not been affixed to a deed at the time at which the signature should have been affixed in the ordinary course, the Registrar may affix his signature thereto when the omission is discovered, D and the deed shall thereupon be deemed to have been registered at the time at which the signature should have been affixed.

(3) All endorsements or entries made on title deeds or in registers in connexion with the registration of any deed executed or attested by a registrar shall be deemed to have been effected simultaneously with the registration of such deed, E although in fact they may have been made subsequent thereto" (emphasis added).

Section 11 then provides:

"11 Deeds to follow sequence of their relative causes

(1) Save as otherwise provided in this Act or as directed by the court –

(a) *transfers of land* and cessions of real rights therein *shall follow the sequence of the successive transactions in pursuance of which they are made,* and if F made in pursuance of testamentary disposition or intestate succession they shall follow the sequence in which the right to ownership or other real right in the land accrued to the persons successively becoming vested with such right;

(b) *it shall not be lawful to depart from any such sequence in recording in any deeds registry any change in the ownership in such land or of such real* G *right unless the Registrar is satisfied that the circumstances are exceptional and has consented to such departure:*

Provided that …" (emphasis added).

Section 14 provides:

"14 How real rights shall be transferred

H Subject to this Act or any other law –

(*a*) *the ownership of land may be conveyed from one person to another only by* A *means of a deed of transfer executed or attested by a registrar;*

(*b*) other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by a registrar:

Provided that attestation by a notary public shall not be necessary in respect of the conveyance of real rights acquired under a mortgage bond" (emphasis B added).

On a perusal of s 10, it follows therefore that when the Registrar affixed his signature to the deed of transfer in favour of the applicant on 2 April 2007, the deed was with effect from that date deemed to be registered. Furthermore, and on a perusal of s 14, ownership was conveyed from the estate of the C late Maria Campbell-Logan to the applicant. Thus the applicant became, and was henceforth deemed to be, the owner and the property no longer formed part of the deceased estate. It therefore follows that when, in deed of transfer 4079/2007 on 4 July 2007, it was purported to convey ownership of the property from the estate to the first respondent, the estate at that stage was no longer the owner thereof and it thus had no rights to transfer to the D first respondent. The agreement of sale purportedly in favour of the first respondent cannot therefore be valid. In any event, the third respondent ,having been appointed as executor dative whilst the executrix testamentary was still alive, holding office, not incapacitated and still sane, was improperly appointed. The deceased had left a will in which the executrix testamentary E was appointed. The sixth respondent was thus not dealing with an intestate estate. The third respondent's appointment as executor dative was, in the circumstances, irregular and any acts carried out by him in the name of the estate would thus be of no legal consequence.

According to the affidavit placed before the magistrate, the second respondent, who is the heir to the deceased estate, sold the property in issue to the first F respondent. It thus appears that the second respondent purported to sell the property before the property had vested in him; hence arises the illegality and nullity of the purported sale to the second respondent. Thus, both the agreement of sale and the deed of transfer in favour of the first respondent are null and void. G

None of the arguments raised by the first respondent as detailed earlier in this judgment can be of any avail to the first respondent in the face of the above stated and established facts. It would appear to me that the issue of whether or not the provisions of the Regional, Town and Country Planning Act are applicable and, if so, with what effect, cannot be of any avail to the respondents in the circumstances of this case. Neither can it be the basis for H

2011 (1) ZLR p579

Mavangira J

A this court in these proceedings, to declare invalid the agreement of sale in favour of the applicant. That agreement has not been subjected to scrutiny by this court. The fact is that the applicant is currently registered as the owner of the property and there is no basis for the court, in these proceedings, to deny the relief sought by the applicant. The first respondent cannot herein ask the court to declare the agreement invalid. The submission that the agreement of B sale in favour of the applicant was subject to a suspensive condition based on a proposed or desired subdivision of the main property and therefore illegal, has been the mainstay of the first respondent's stance. There is no application before this court challenging or impugning the said agreement of sale. Thus the dicta quoted from *X-Trend-A-Home supra* in support of C the first defendant's case are not of any relevance in the circumstances of this matter. The rule *nisi* in terms of which the magistrates court granted in favour of the first respondent and another interim relief in the form of an interdict barring the disposal or transfer of the property in issue has also been heavily relied on by the first respondent. However, a perusal of the rule *nisi* reveals that no return day was endorsed. Theoretically, therefore, D even though the interdict was granted as interim relief, it is in effect for an indefinite period. That would be unconscionable and could certainly not have been the intention of the magistrate. In any event, the applicant was not a party to the proceedings in that matter. Furthermore, as correctly pointed out by the applicant, the magistrate did not authorise an illegal transfer of the property. The purported transfer to the first respondent was invalid, as E already discussed above. On the other hand, the prior registration of the applicant's ownership in the Deeds Registry is the strength of, and fortifies, the applicant's case.

It appears to me that there is no material dispute of fact to justify either the dismissal of the applicant's application or to refer it to trial.

F Although the deed of transfer in favour of the applicant was registered first, the fourth respondent's opinion is that the deed is invalid for the reasons stated in the letter from his office already quoted earlier. It would appear to me that this can only be viewed as the Registrar's opinion and not a statement or declaration of the legal position. I am fortified in this assessment by the provisions of s 8(1) of the Act already quoted earlier, in terms of which any G deed of transfer shall

not be cancelled by a registrar except upon an order of court. There has been no order of court which has cancelled or authorised the cancellation of the applicant's deed of transfer.

The applicant has established justification for the granting of the order which he seeks and he must therefore succeed. Costs will follow the cause. For the H above reasons the following is the order of this court.

2011 (1) ZLR p580

Mavangira J

It is ordered that: A

1. the sale to the first respondent by the second respondent of Stand 382 Good Hope Township of Subdivision B of Good Hope is null and void;
2. the registration of Stand 382 Good Hope Township of Subdivision B of Good Hope into the name of the first respondent is null and void;
3. the appointment of the third respondent as executor dative of the estate B of the late Maria Campbell-Logan is null and void;
4. the applicant is the sole registered owner of Stand 382 Good Hope Township of Subdivision B of Good Hope;
5. the fourth respondent shall, within three days of service of this order upon him, delete the name of the first respondent from the Deeds Register C and retain the name of the applicant as the registered owner of Stand 382 Good Hope Township of Subdivision B of Good Hope.
6. the first, second, third and fifth respondents shall pay the costs of these proceedings jointly and severally, the one paying the others to be absolved.

Chigwanda Legal Practitioners, applicant's legal practitioners D

Chivhinge & Co, first, third and fifth respondents' legal practitioners E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/ARJUN INVESTMENTS (PVT) LTD v MUTAMBIRWA & ORS 2011 (1) ZLR 581 (H)

ARJUN INVESTMENTS (PVT) LTD v MUTAMBIRWA & ORS 2011 (1) ZLR 581 (H)

2011 (1) ZLR p581

Citation	2011 (1) ZLR 581 (H)
Case No	Judgment No. HB-64-11
Court	High Court, Bulawayo
Judge	Cheda J
Heard	14 March 2011
Judgment	16 June 2011
Counsel	*P Dube,* with him Mr *Sibanda,* for the applicant *G Nyoni,* for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Landlord and tenant – *tenant – statutory tenant – eviction of – good and sufficient cause for requiring eviction – can include fact that property is required for repairs and renovations directed by local authority*

Headnote

D To claim successfully to be a statutory tenant, a person must comply with the requirement to pay rent arising from the lease agreement. It is through that compliance that the person may seek and obtain protection from the courts. A landlord who wishes to evict a statutory tenant must show good and sufficient cause for requesting an order for the eviction of E the tenant. Good and sufficient cause would include that the landlord required the property for repairs and renovations as directed by the local authority. If the repairs are urgent and carried out while the tenant remains in occupation, the landlord may require him to vacate the premises, as it would be physically impossible for such repairs and renovations to F be effected while any person is in occupation of the rented property.

Cases cited

Byron v Anderson 1955 (3) SA 590 (N)

Central African Processed Exports (Pvt) Ltd & Ors v Macdonald & Ors 2002 (1) ZLR 399 (S)

G *Dyneley Invstms (Pty) Ltd v Stevens* 1968 (2) PH A215

Est Ishmail v Sayed 1965 (1) SA 393 (C)

Mackay v Theron 1947 (1) SA 42 (N)

Makoshori v Nyamushamba & Anor S-9-06

Marsh v Intermarket Bldg Soc S-59-05

H *MDC v President, Zimbabwe* 2007 (1) ZLR 257 (H)

Cheda J

Metro Intl (Pvt) Ltd v Old Mutual Property Invstm Corp (Pvt) Ltd 2008 (2) ZLR 257 (S) A

Moffat Outfitters (Pvt) Ltd v Hoosein & Ors 1986 (2) ZLR 148 (S)

Nerger Properties (Pvt) Ltd v R Chitrin & Ors (Pvt) Ltd 2006 (2) ZLR 287 (S)

Silver's Trucks (Pvt) Ltd & Anor v Dir of C & E 1999 (1) ZLR 490 (H) B

Sommer v Wilding 1984 (3) SA 647 (A)

Case information

P Dube, with him Mr *Sibanda,* for the applicant

G Nyoni, for the respondents

Judgment

CHEDA J: This is an urgent chamber application whose relief is as follows: C

"Terms of final Order

That you show cause to this Honourable Court why a final Order should not be made in the following terms:

IT IS HEREBY ORDERED THAT:

1) The Deputy Sheriff is herby directed and authorised to remove such of the respondents and any persons claiming through any of the respondents, D together with their goods and properties as may

remain on the premises by or after 1 April 2011, from the property known as Victoria House, or Victoria Flats, 103 Herbert Chitepo Street, Bulawayo.

2) The Deputy Sheriff be and is hereby authorised and directed to thereafter lock and secure the property against re-entry or re-occupation by taking such measures as she deems necessary. E

3) The Respondents shall, jointly and severally, the one paying, the others to be absolved, pay the costs of this Application.

INTERIM RELIEF GRANTED

Pending the determination of this matter, the Applicant be and is hereby granted the following relief:

a. It is declared that the applicant has the right to remove the respondents and F all persons claiming through them from the property known as Victoria House, or Victoria Flats, 103 Herbert Chitepo Street, Bulawayo at the expiry of the notice to vacate.

b. It is ordered that the respondents and all persons claiming through them, together with their goods and properties, shall vacate Victoria House by 31 March 2011."

The applicant was represented by Dipti Jateen Madhoo. It is a duly registered G company which owns an immovable property known as stand number 1053 Bulawayo Township, otherwise known as Victoria House or Victoria Flats, 103 Herbert Chitepo Street, Bulawayo (hereinafter referred to as "the property").

The applicant purchased the property from Guelder Rose Investments (Pvt) Ltd (hereinafter referred to as "Guelder Rose"). Upon transfer to itself there H

Cheda J

A were tenants in occupation of the property, of whom either all or some of them are still tenants to date. However, from the list provided by CB Richard Ellis, who are the estate agents and have always been managing the property, it is clear that there are some tenants who are not recognised tenants. It therefore appears that this property does not have clearly recognised tenants, in other words, tenants or occupants do as they please.

B It is the applicant's argument that although there is no written lease agreement it was an implied term that tenants should pay rentals, operational costs comprising of rates, garbage removal and other levies which they have not been paying and as such they owe a total of $25 165.69 in operational costs. In addition thereto, they are in rental arrears and as such they are in breach C of their terms and conditions of their lease agreements.

It was the applicant's further argument that the property is in a dilapidated state which resulted in its condemnation by the Bulawayo City Council. To that end the Bulawayo City Council wrote a letter in the following manner:

"City Of Bulawayo

Ref: BC/44

D 29 September 2008

Victoria House

No. 101 Hebert Chitepo Street.

Stand No. 1052 BT

BULAWAYO

Dear Sir/Madam

E RE: UNSIGHTLY/DILAPIDATED AND DANGEROUS BUILDINGS

A recent inspection on the above-mentioned stand revealed a contravention of the Model Building By-Laws of 1977, Chapter 2, Section 48a and 49.

The above-mentioned premises are now a danger to the health of persons occupying or using the building, source of unpleasant odours, disfigurement to the neighbourhood and offensive or embarrassing to the people living or F working on the premises or in the neighbourhood.

You are therefore advised to make a major facelift to the property, or demolish the structure within 21 days of the date of this letter.

Failure to comply will result in Council entering upon the premises and taking the necessary action and charge you the costs thereof. This is in terms of Chapter 21 Section 56 of the Model Building By-Laws.

G Yours faithfully

(Signed)

DIRECTOR OF HOUSING AND COMMUNITY SERVICE
c.c Acting Town Clerk
Chamber Secretary
A/Director of Health Services
H A/Principal Building officer" (my emphasis).

Cheda J

The applicant notified the the respondents of its desire to repossess the A property in order to effect repairs, but the respondents ignored, neglected or refused which resulted in a meeting between the parties aimed at resolving this impasse. It is further their argument that some of the respondents including one Roy Sibanda was very abusive and threatening. The court has taken judicial notice that Roy Sibanda is a member of Affirmative Action Group, an B organisation that purports to protect the interests of black businessmen. He is, however, not a tenant of the applicant but seems to have arrogated to himself the power of representing the respondents, which unfortunately has resulted in his abuse of the applicant. He has not responded to these allegations, which therefore mean that they are true. In view of that, he is strongly warned to conduct himself within the confines of the law, otherwise the applicant and C all others whose rights have been violated by him should take appropriate legal action against him in order to safeguard their proprietary rights.

The law regarding lease agreements is that, in return for the right to use and enjoy the property let to him/her, a lessee is under an obligation to pay rent. Rent is an essential element of a lease agreement: *Estate Ishmail* v *Sayed* 1965 (1) SA 393 (C) at 397A-B. A tenant who occupies premises without D paying rent can not be properly defined as a lessee.

The respondents, on the other hand, have argued that the matter is:

(1) not properly before the courts because the deponent to the founding affidavit is not authorised to do so as the names are different,
(2) that they were not given proper notice to vacate, E
(3) there is no urgency in the matter as the Bulawayo City Council's letter dates back to 2008,
(4) they have been paying rent not through CB Richard Ellis but to Khoza consultants,
(5) that they had the right of first refusal, and F
(6) the applicant sought their eviction by application instead of an action

I propose to examine these issues *in seriatim*

1 Matter not being properly before the court

On 3 February 2011 the applicant resolved to evict the respondents from G the property and duly appointed Jateen Madhoo to represent it in that issue. For the respondents to argue that they should have appointed someone else without justifying their argument is not tenable at law. It is clear to me that the applicant's representative uses three names. For that reason, the company resolution is indeed properly placed before the court. In my view, the company resolution is legal. H

Cheda J

A **2 Reasonable notice to vacate**

On 30 November 2010 the applicant through its legal practitioners of record notified all the respondents to vacate the property at the end of February 2011 as developmental work was due to commence on 1 March 2010. On 17 December 2010 the respondents advised the applicant by letter that they were not going to vacate the premises on the basis that they had a right of B first refusal on the property. Despite the fact that they did not agree with the applicant's attempt to repossess the property, that on its own is not reason enough to nullify the said notice. In fact the respondents responded to the notice in time, thereby attending to a meeting where one Roy Sibanda attended and turned out to be abusive to the applicants' legal practitioners. C Suffice to say that his abusive behaviour did not help the respondents, but, if anything, further alienated them from the applicant's attempt to conduct a civilized meeting.

It is further the respondents' argument that the notices to vacate were defective as they did not disclose the particulars of the landlord. This argument lacks merit, as the respondents have always known that there is a landlord hence D their reference to a lease agreement, which agreement cannot exist in the absence of another party, in this instance a landlord. This argument therefore falls on its face and is not worth pursuing.

3 Urgency

The respondents argued that this is a 2008 matter. They therefore query why it E was now being brought up as an urgent matter. The property was condemned not to be suitable for human habitation as far back as September 2008. The defect remains to date. In my opinion, the fact that it remains in that state on its own renders it urgent. The urgency increases by each day as long as the defect remains unattended to. Attempts to correct the defects were frustrated F by the respondents, this also makes the matter urgent.

Logically, the matter becomes urgent when irreparable harm, or no other alternative exists, which is the position *in casu*. The matter is for all intents and purposes extremely urgent. The building poses a health hazard and is delapidated, as observed by the Bulawayo City Council. Therefore, there would be no reason to further postpone the renovations. Urgency may either G be time or economic related: *Silver's Trucks (Pvt) Ltd & Anor* v *Director of Customs & Excise* 1999 (1) ZLR 490 (H).

4 Rentals

It is the applicant's assertion that the respondents have not been paying rentals to CB Richard Ellis, who are the appointed estate agents. But the respondents H have argued that they have been paying rent to Khoza Consulatants.

Cheda J

The applicant has submitted proof from CB Richard Ellis which shows A that the respondents have not been paying rent and other operational costs. Payment of rent is an essential element of a lease: *Estate Ishmail* v *Sayed* 1965 (1) SA 393 (C) at 397A-B. Our law is very clear on that point, namely, that in return for the right to the use and enjoyment of the property let, the lesee has an obligation to pay rent timeously, failing which they will be in breach of the contract. Indeed, it is clear that the respondents have been occupying this property without paying rent; this, without more, is a breach of the lease agreement. The respondents have no right to continue occupying the property without paying rent.

5 Right of first refusal

The respondents have also argued that the property should not have been sold C to the applicant as they have a right of first refusal. They did not, however, furnish the court with any proof thereof.

It is now settled law, if my understanding of our current legal position is correct, that the right of first refusal arises out of a contract between the landlord and tenant: *Nerger Properties (Pvt) Ltd* v *R Chitrin & Ors (Pvt)* D *Ltd* 2006 (2) ZLR 287 (S) and *Makoshori* v *Nyamushamba & Anor* S-9-06, where the court defined it as follows:

> "The essence of the right of first refusal or the right of pre-emption is that the grantor of such a right not to sale the object of the right to a third party unless the right has been given an opportunity to purchase the object of the right and has not offered to do so. See *Madam* v *Macedo Heirs& Anor* 1991 (1) ZLR 295 (S) E at 302A-B; and *Owsianick* v *African Candidate Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 316C-D."

It must be clearly expressed; it therefore cannot be implied. In addition, it cannot be enforced on a third party who purchases the property without prior knowledge of the right of first refusal: *Central African Processed Exports* F *(Pvt) Ltd & Ors* v *Macdonald & Ors* 2002 (1) ZLR 399 (S) and *Sommer* v *Wilding* 1984 (3) SA 647 (A).

It therefore stands to reason that a party seeking to enforce this right must prove its existence on a balance of probabilities.

6 The right of applicant to evict respondents. G

The respondents have always been aware of the applicant's intention to repossess its property. This is not only confirmed by the notices to vacate but also by Mr *Sibanda*, the applicant's legal practitioner, at a meeting held on 17 January 2011 where he informed those the respondents present that his client was repossessing its property. This meeting unfortunately turned out to be rowdy as a result of the inclusion of one Roy Sibanda, who has no H

Cheda J

A *locus standi* in this matter, but whose involvement seems to have polarised the parties, the result of which is detrimental to the respondents.

The respondents argue that the method used by the applicant to evict them was improper as they claim that they are statutory tenants. In our law, in order for one to successfully claim oneself as a statutory tenant one must B comply with the requirement to pay rent arising from the lease agreement entered into ,which is one of the essential requirements of a lease agreement. It is through that compliance that, as one has been paying rent, one may seek and obtain protection from the courts: *Moffat Outfitters (Pvt) Ltd* v *Hoosein & Ors* 1986 (2) ZLR 148 (S); *Metro International (Pvt) Ltd* v *Old Mutual Properties Investment Corporation (Pvt) Ltd* 2008 (2) ZLR 257 (S).

C On the other hand, the applicant is obliged to show good and sufficient cause for requesting an order for the eviction of the tenant: *Marsh* v *Intermarket Building Society* S-59-05 and *MDC* v *President of Zimbabwe* 2007 (1) ZLR 257 (H). The question then is, has the applicant done so?

The applicant, as the landlord, has shown that it required the property for D repairs and renovations as directed by the Bulawayo City Council. This, therefore, is, in my view, a good and sufficient cause which is legally acceptable: *Dyneley Investments (Pty) Ltd* v *Stevens* 1968 (2) PH A215. Further, if the repairs are urgent and carried out while the tenant remains in occupation, the landlord may require him to vacate the premises: *Mackay* v *Theron* 1947 (1) SA 42 (N). It will be physically impossible for such repairs E and/or renovations to be effected while the respondents or any other person is in occupation of the rented property.

The repairs or renovations were both urgent and necessary. In view of the respondents' refusal of the applicants' desire to carry out renovations, the applicant is left with no alternative but to approach the courts.

F The respondents' refusal must of course be examined. They refused to give vacant possession, even when there is proof of the danger the property poses to them, which is not prudent, with all due respect. This, in my considered opinion, is being unreasonable. Where a tenant becomes unreasonable in its refusal to vacate, the landlord has a right to evict him/her from the property as such stance is tatamount to a breach of the terms and conditions of the G lease under which he/she enjoys possession: *Byron* v *Anderson* 1955 (3) SA 590 (N).

Having taken into account all the circumstances surrounding this case, it is clear in my mind that the applicant has made a good case for itself. the respondents have no defence at all against the applicant.

H The following order is made:

Cheda J

INTERIM ORDER A

Pending the determination of this matter, the applicant be and is hereby granted the following relief:

(a) It is declared that the applicant has the right to remove the respondents and all persons claiming through them from the property known as Victoria House, or Victoria Flats, 103 Herbert Chitepo Street, Bulawayo B at the expiry of the notice to vacate.

(b) It is ordered that the respondents and all persons claiming through them, together with their goods and properties, shall vacate Victoria House by 31 March 2011. C

Webb, Low & Barry, applicant's legal practitioners

Moyo & Nyoni, respondent's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/ZINGWE v GWANZURA & ANOR 2011 (1) ZLR 589 (H)

ZINGWE v GWANZURA & ANOR 2011 (1) ZLR 589 (H)

Citation	2011 (1) ZLR 589 (H)
Case No	Judgment No. HH-129-11
Court	High Court, Harare
Judge	Kudya J
Heard	22 November 2010; 23 November 2010; 24 November 2010; 24 January 2011; 25 January 2011; 2 February 2011
Judgment	22 June 2011
Counsel	*B Mugomeza*, for the plaintiff *T Mawere*, for the first defendant Second defendant in person
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract – *validity – contract entered into fraudulently – contract intended to defeat divorced wife's claim to matrimonial home – meaning of "fraud" in this context*

D **Family law** – *husband and wife – divorce – division of property following divorce – sale of matrimonial home – home sold by husband – whether sale intended to defeat wife's rights in property*

Immoveable property – *title deed – cancellation – when court may order cancellation – fraud on part of registered holder of deed*

Headnote

E The first defendant and the second were formerly married. As part of their divorce settlement, it was agreed that the marital home, in which the wife (the first defendant) lived would be valued. Either could buy out the other on payment of a per cent share of the valuation, and had three months from the date of valuation to do so. In the event that neither F could buy out the other, the property was to be sold by auction and the proceeds divided equally. Before the expiry of the three month period, the second defendant (the former husband) purported to sell the house to the plaintiff, who brought an action seeking the eviction of the first defendant. At issue in the case were: (a) whether the plaintiff was aware G that the property was the subject of a matrimonial dispute; (b) whether or not the agreement between the plaintiff and second defendant was done fraudulently to defeat the court order; and (c) whether the first defendant was entitled to cancellation of the title deeds. After hearing evidence, the court concluded that

the plaintiff was aware that the property was the subject of a matrimonial dispute. On the remaining issues:

H *Held*, that the word "fraud", when used in relation to the type of disposition

Kudya J

which can be attacked in a case of this kind, does not bear the same A meaning as it bears in criminal law, or in the context of a contract induced by fraud. There need be no false representation or deceit by the husband in order to lay the disposition open to attack. It is equally clear, however, that not every disposition that has prejudiced the interests of the wife will be set aside at her instance. Every donation made out B of the assets of a joint estate diminishes the estate, and so prejudices the wife. And the same applies to a transaction, other than a donation, which results in loss to the joint estate. But such dealings, *simpliciter,* are not open to attack. What must be shown is *dolus*, in the sense of an intention to prejudice the wife's interests. The plaintiff was aware of the first defendant's rights in the property. The husband intended to defeat C the first defendant's rights. He acted clandestinely and with deliberate intention to defeat her rights and thus acted fraudulently and on the evidence it was clear that the plaintiff did so too.

Held, further, that a registered deed may be cancelled by order of court, on the authority of s 8 of the Deeds Registries Act [*Chapter 20:05*]. Such D action cannot be lightly taken, but even where there has been *justus error* the court must intervene. Here, there had been fraudulent intent on the part of the registered holder and failure to cancel would be to deprive the innocent person of her rights, benefit the guilty and put a premium on deceit. E

Cases referred to

B & H Eng v First National Bank of SA Ltd 1995 (2) SA 279 (A)

Colley v UDC Rhodesia Ltd 1975 (2) RLR 209 (A); 1976 (1) SA 821 (RA)

Crundall Bros (Pvt) Ltd v Lazarus NO & Anor 1991 (2) ZLR 125 (S)

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

Muganga v Sakupwanya 1996 (1) ZLR 217 (S) F

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

Mvududu v Mvududu NO & Ors 1981 ZLR 397 (G)

Pretorius NO v Smith & Ors 1971 (1) SA 459 (T)

Sibbald v Dakota Motors 1956 (3) SA 203 (T)

Tewe v Hanoki & Ors S-55-03 G

Legislation considered

Deeds Registries Act [*Chapter 20:05*], s 8

Case information

B Mugomeza, for the plaintiff

T Mawere, for the first defendant H

Kudya J

A Second defendant in person

Judgment

KUDYA J: The plaintiff concluded an agreement of sale with the second defendant on 20 January 2003 and took registered title of the immovable property, stand number 2946 Gwelo Township of Gwelo Township Lands, also known as 40 McIlwaine Southdowns, Gweru, on 19 February 2003.

B The first defendant, Mrs Gwanzura, is the former wife of the second defendant, Mr Gwanzura. Their marriage of 19 years was dissolved by the High Court sitting at Bulawayo on 23 July 2002 in case number HC 2877/98. The divorce order, *inter alia*, apportioned the house between the defendants. The relevant part of the order reads: C

"(a) That the immovable property known as 40 McIlwaine road Southdowns Gweru shall be valued by CC Sales (Pvt) Ltd within a month from the date of this order.

(b) That after the valuation either party shall pay the other 50 per cent of the valuation fine (*sic)* of the property and whichever party shall pay the other first will secure the property.

(c) In the event that either party is not able to raise the half share will (*sic*) three months from the date of valuations (*sic)* the property shall be sold by Trevor Dollar Estate agents at the best advantage of the parties and the purchase price shall be shared equally between the parties.

(d) In the event that the plaintiff has been paid his half share in terms of the divorce order he shall sign the transfer of guardianship (*sic)* documents within (*sic)* from the date of transfer failure (*sic)* which the Deputy Sheriff Gweru is hereby authorised to sign the transfer papers to effect transfer of ownership of 40 McIlwaine road, Southdowns, Gweru, to the defendant."

The property was duly valued by CC Sales Ltd Gweru on 28 November 2002 at ZW$8.4 million. The report gives a full description of the property. F It, *inter alia*, describes the swimming pool as non functional, badly cracked and in a bad state of repair. The main bedroom, one other bedroom and the garage had structural cracks. Some sections of the walls were damp and the roof leaked. In terms of the court order, either party had until 28 February 2003 to buy the other out, failing which the house would be sold to best advantage and the proceeds shared equally between the parties.

G Mrs Gwanzura remained in occupation of the house with the children of the marriage after Mr Gwanzura deserted them in 1997 and settled in Kwekwe with another woman. She has been residing in the house ever since the divorce order was granted.

The plaintiff issued summons out of this court on 31 March 2003 seeking H the eviction of Mrs Gwanzura, holding over damages and costs of suit. He

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based his claim on ownership. Mrs Gwanzura contested the claim and filed A her plea and counterclaim on 16 April 2003. She averred that the plaintiff, with prior knowledge of her rights in the immovable property, fraudulently and criminally connived with Mr Gwanzura to defeat her of those rights. She prayed for the dismissal of the claim and for the cancellation of the deed of transfer 373/03. On 19 May 2003, the plaintiff disputed the averments B made in the counterclaim.

Mr Gwanzura was joined in the matter with the consent of the parties on 28 January 2004 as the second defendant in reconvention. He filed his plea to the counterclaim on 27 February 2004. He averred that he had fully abided by the terms of the divorce order by buying out the defendant of her share in the immovable property before disposing it to the plaintiff; and denied C acting fraudulently, contemptuously or in connivance with the plaintiff.

At the pre-trial conference of 23 June 2004, the following three issues were referred to trial:

1. Whether or not the plaintiff was aware that the property was the subject D of a matrimonial dispute.
2. Whether or not the agreement between the plaintiff and second defendant was done fraudulently to defeat the court order under case 2877/98.
3. Whether the defendant is entitled to cancellation of title deeds.

The plaintiff testified on his own behalf and called the further evidence of his elder brother Tawona Zingwe. In addition he produced exh 1, a 16 paged E bundle of documents. Mrs Gwanzura gave evidence on her own behalf and called the evidence of Mr Dzimba, the senior partner of the Dzimba, Jaravaza and Associates, legal practitioners, who was her legal practitioner of record during and after the divorce proceedings. In addition, she produced three bundles of exhibits that were marked as exh 2, 4 and 5. Mr Gwanzura also F testified on his own behalf and produced exh 3, a three paged copy of an agreement of sale dated 11 July 2003 concluded between Mrs Gwanzura and Elizabeth Sithole purportedly for the sale of the immovable property.

The plaintiff has lived in the United Kingdom for the past 11 years, where he works as a research development officer. He flew into the country on 6 G December 2002. He instructed Trevor Dollar

Estate Agents of Gweru to buy a property in the low density suburbs of Gweru for him. He paid into their trust account ZW$15 million for that purpose. He left the country for the United Kingdom on 3 January 2003 before a suitable property had been found.

He mandated his late father Saul Zingwe to act on his behalf during his absence. He was not personally present during the preliminary stages before H

A the purchase of the immovable property. He did not physically participate in the purchase and transfer of the property to his name. He, however, received periodic progress reports over the telephone from his father. He was, however, unable to describe the house he purchased. When his father failed to receive vacant possession, he issued summons out of the Gweru magistrates court, on his behalf, on 5 November 2004 for the eviction of Mrs Gwanzura. When B default judgment for the cancellation of his title was entered against him on 24 October 2005, his father filed the founding affidavit for rescission on 23 February 2007. He denied possessing prior knowledge of Mrs Gwanzura's rights personally or through his agents.

The plaintiff's father died after the closure of pleadings but before trial. He C called the evidence of his elder brother Tawona Zingwe to testify on the events that took place on the day he accompanied his father to inspect the immovable property. Tawona stated that they met Mr Gwanzura for the first time at Trevor Dollar Estate Agents on that day. He could not recall when they went for the visit but estimated it to have been between 14 and 15 January 2003. Mr Gwanzura accompanied them to the property. At the gate D he observed that the house had a swimming pool and a cottage. They were met at the entrance to the house by Mrs Gwanzura who took them into the lounge. He inspected the house whilst seated in the lounge and noted that it had a big kitchen and three bedrooms. He was impressed by the state of the lounge and, excited at the prospect of finding a house after a long search, E he dispensed with the inspection of the three bedrooms. He stated that his father did not inspect the house. They went away in the euphoria of finding a suitable house after a long search. He was not present when the agreement of sale was concluded. After taking transfer, Mrs Gwanzura refused to vacate. It was at that stage that Chakanetsa and Partners, legal practitioners for Mr Gwanzura during the divorce proceedings and sale and transfer of F the property showed him and his father the divorce order.

During cross examination, he disputed that Mrs Gwanzura informed them that the house could not be sold because it was encumbered by a divorce order issued by the High Court and refused them entrance into and inspection of the house. Although he disputed it, the impression that I gathered from his G responses under cross examination was that a tense atmosphere prevailed at the immovable property on the day of inspection. He stated that no introductions were done by Mr Gwanzura; that whilst they sat down on the sofas Mrs Gwanzura remained standing and that no inspections were done. He confessed that he neither saw nor inspected the kitchen but relied on the description he received from Trevor Dollar Estate Agents. He revealed that H he was unaware that the first room of entry into the house from the verandah

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where he averred they were received by Mrs Gwanzura was the dining room. A He was also oblivious that they sat in a sunken lounge.

Tawona was not a credible witness. He gave contradictory evidence. He supplied a false date of the inspection. The reasons he gave for failing to conduct an inspection were proved false by Mrs Gwanzura and unwittingly by Mr Gwanzura. His lack of knowledge of the structure of the house from B the verandah to the lounge demonstrated that he did not enter the house. He was oblivious of the structural defects on the property that were noted in the valuation report.

Mrs Gwanzura stated that her former husband came to the house for the first time after his 1997 desertion on the day of inspection. It was on the morning C of 5 January 2003. He was in the company of an old man and a young man who he did not identify and who refused to identify themselves but who she later knew as Saul Zingwe and Tawona Zingwe, respectively. She met them in the verandah. They wanted to inspect the property on the instructions of Trevor Dollar Estate Agents. She alleged that she warned the old man not to be deceived by Mr Gwanzura who, under the terms of a High Court divorce D order, could not dispose of the property before he had bought

her out. Mr Gwanzura shouted at her. He went away arguing with the two strangers. She immediately contacted her legal practitioners who in turn dispatched letters to both Trevor Dollar Estate Agents and Mr Gwanzura's legal practitioners Chakanetsa and Partners on 6 January 2003. The letters pointed out that the sale of the immovable property, and especially through Trevor Dollar Estate E Agents, was unlawful and premature as three months had not yet elapsed from the date of evaluation. The letters were not responded to.

Later, her legal practitioners informed her of the payment of ZW$4.2 million from Chakanetsa and Partners of 20 January. The news prompted her to deposit an equivalent amount with her legal practitioners on 22 January 2003 who, F on 28 January, dispatched a bank certified trust cheque in the same amount with a covering letter to Mr Gwanzura's legal practitioners. The letter and cheque were received at Chakanetsa and Partners on 30 January 2003. She did not know what became of the bank cheque after it was received by Mr Gwanzura's legal practitioners. The money was paid over in expectation that G the cheque deposited by Mr Gwanzura's legal practitioners on 20 January would be dishonoured. As it turned out, that cheque was honoured by the drawee bank on 22 January.

She produced exh 4. It consists of the declarations by the purchaser, the plaintiff and seller, Mr Gwanzura and the power of attorney to make transfer by Mr Gwanzura. They were all deposed to on 20 January 2003. The declarations H

A were signed in Kwekwe, while the power of attorney to pass transfer was deposed to in Bulawayo. All the three documents stated the purchase price of the immovable property was ZW$5 million. The declarations provided the date of sale and purchase as 20 January 2003.

She convincingly demonstrated that exh 3, the purported agreement of sale of the property by her to Elizabeth Sithole, was forged. The first page originally B bore the description of an undeveloped property and the date stamp of her legal practitioners, Maputsenyika and Associates, that appear on the other two pages. For what it is worth, exh 3 was a red herring and was irrelevant to the present proceedings.

She filed an urgent chamber application on 25 February against the second C defendant, his lawyers and the Registrar of Deeds, which was served on 27 March 2003, to stop transfer of the property, in ignorance that transfer had already passed on 19 February 2003. She maintained that the transfer be cancelled for breach of a court order, averring that her legal practitioners accepted payment from Mr Gwanzura in good faith without knowledge of D the breach.

Mrs Gwanzura was a truthful witness. That the inspection took place on 5 January as opposed to 14 or 15 January was confirmed by the letter written by her legal practitioners on 6 January. Her version of the events of that day was confirmed by the shortcomings in the testimony of Tawona and Mr Gwanzura. That she denied them entry into the house was confirmed by E Tawona's failure to describe the house. Had he entered the house, he would have remembered its structural features such as the dining room and sunken lounge. Unlike Tawona, Mr Gwanzura confirmed that he indicated to his former wife that they were under instruction from Trevor Dollar Estate Agents to inspect the house. Gwanzura testified that the atmosphere was pregnant F with tension. He said his former wife was shouting at him, but he did not listen to what she was saying. Tawona stated that the atmosphere was calm and serene. It would not accord with human experience for Mrs Gwanzura to have kept quiet when she knew that the house was not yet ripe for sale. When she stated that she advised Saul and Tawona Zingwe of the existence of a court order she must have been telling the truth. That the probabilities G favour her version is further demonstrated by the inclusion in the agreement of sale of clause 1b to the effect that the balance of the purchase price would be paid after the inspection of the house or transfer. I believed her testimony on the events of 5 January 2003.

Mr Peter Dzimba, her legal practitioner at the time, also confirmed her H testimony. He wrote the letters of 6 January addressed to Trevor Dollar and

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Mr Gwanzura's legal practitioners. He confirmed that on 20 January Mr A Gwanzura paid the half share of the immovable property that would entitle him to full ownership rights in the property. He reluctantly conceded that the cheque was honoured on 22 January. He wrongly believed that the payment date would be the date on which the cheque was honoured, as opposed to the date of payment. That payment is deemed to have been made on the day of B payment is clear from the observations made in *Sibbald* v *Dakota Motors* 1956 (3) SA 203 (T) at 207; *Colley* v *UDC Rhodesia Limited* 1975 (2) RLR 209 (A);1976 (1) SA 821 (RA) at 825F-826A; and *B & H Engineering* v *First National Bank of SA Ltd* 1995 (2) SA 279 (A) at 286B. He confirmed the accuracy of the information in exh 5 that demonstrated that the money paid by Mr Gwanzura was invested by him with Trust Bank and then C Beverly Building Society on the instructions of and for the account of Mrs Gwanzura to hedge against loss in the event that her counterclaim failed. By 26 September 2005 it had grown to $16 824 954.90.

He stated that the bank certified cheque paid to Mr Gwanzura's legal practitioners was not returned. Despite the fact that the present case D commenced in March 2003 and his former client counterclaimed in April 2003, he failed to produce the invoice from Mr Gwanzura's legal practitioners, a copy of the cleared cheque or his own bank statements indicating debit entries in his trust account.

Mr Gwanzura stated that he made payment for his former wife's half share to his legal practitioners on 2 January 2003, who advised him that he could E thereafter sell the immovable property. He instructed them to sell the property and they in turn instructed Trevor Dollar Estate Agents to do so. On 14 January, his legal practitioners contacted him. Acting on the information they relayed, he went to Trevor Dollar Estate Agents on 15 January where he met his legal practitioner, the late Mr Mutandi, Saul Zingwe and his wife F and son Tawona. He went with the two prospective buyers to the house. His former wife led them into the lounge where they sat down. The prospective purchasers did not inspect the house but left soon thereafter, expressing satisfaction with what they had seen. His legal practitioners wrote out the cheque to Dzimba, Jaravaza and Associates on 8 January, but for reasons unknown to him they only delivered the cheque on 20 January. While he G failed to produce proof that he indeed paid in the money on 2 January, the image of the cheque produced at the back of the bank statement dated 25 January 2003 of his former legal practitioners is dated 8 January. It was common cause that it was receipted at Dzimba, Jaravaza and Associates who banked it and invested the proceeds. He further stated that he signed the agreement of sale on 20 January at Trevor Dollar's offices in Gweru. On H

A 25 January he then signed the declaration of the seller and power of attorney to pass transfer. He asked his wife to vacate the property but she refused.

He was cross examined by the plaintiff's counsel. He stated that, when he informed his former wife why they were at the house, she was visibly angered by his explanation. He stated that he did not inform the Zingwe B family about the court order but left the task to his legal practitioners and the estate agents. On the sequence of signing the agreement and payment of the money to Mrs Gwanzura's legal practitioners he repeated twice that he signed first before he proceeded to deposit the cheque at their offices.

Under questioning by Mrs Gwanzura's legal practitioner, he confirmed that C he deposited the money with his own legal practitioners using a cheque from one of his companies P and Elton Investments on either 2 or 3 January 2003. He was issued with a trust account receipt. He admitted that by 25 March 2003, when he was served with the urgent chamber application, he knew the basis upon which his wife challenged the sale. Notwithstanding this admission, he failed to produce proof that he indeed paid the amount D to his legal practitioners. He would have done so by producing the trust account receipt he received or the honoured cheque that he paid or P and Elton Investments Bank statements for the relevant period. He also made out that he signed the agreement before he deposited the ZW$4.2 million with Dzimba, Jaravaza and Partners. He must have realized the implication F of his answer, for he quickly changed and alleged that he actually paid first before he signed the agreement of sale. He conceded under searching cross examination that the Zingwe family members left the house prematurely before inspection because his former wife refused them permission to do so.

I found Mr Gwanzura an unreliable and untruthful witness. He gave F conflicting versions on when he gave instructions for the sale of the house. In one vein he said it was after 8 January 2003 and in another said it was actually either on 28 or 29 December 2002. Contrary to his evidence in chief, he denied in his opposing affidavit of 28 March 2003 filed in the urgent chamber application that Trevor Dollar sold the house on his behalf. Contrary to all other evidence, he was to aver that Saul Zingwe's wife was G present at the inspection. His failure to advise his former wife that he was selling the house because he had already bought her out was telling against him. I found myself in agreement with the contention by Mr *Mawere*, for Mrs Gwanzura, that Mr Gwanzura used some of the proceeds paid by the plaintiff to buy her out. He conceded that he knowingly cheated the *fiscus* H by declaring a low value for the purchase of the property.

Kudya J

After assessing the evidence of the plaintiff, Tawona and Mr Gwanzura A against that of Mrs Gwanzura, I was satisfied that she told the truth. I accept her testimony wherever it differs with their testimonies.

It is on the basis of these facts that I proceed to determine the three issues referred to trial. Whether or not the plaintiff was aware that the property was the subject B of a matrimonial dispute

A comparison of the testimony of Mrs Gwanzura and that of Tawona and Mr Gwanzura demonstrated that the plaintiff's representatives were aware of the existence of the divorce order when the agreement of sale was concluded. The plaintiff's father and brother were advised by Mrs Gwanzura not to be duped C by Mr Gwanzura as the sale of the house was encumbered by a divorce order of the High Court. In addition, Mr *Mugomeza,* for the plaintiff, conceded that Trevor Dollar were the agents of the plaintiff in the transaction. On 6 January 2003, Trevor Dollar was advised of the existence and effect of the divorce order. They nonetheless proceeded headlong to purchase the property for the plaintiff. I am satisfied that the plaintiff through his representatives D and agents was aware that the property was subject of a matrimonial dispute between Mr and Mrs Gwanzura. Whether or not the agreement between the plaintiff and second defendant was done fraudulently to defeat the court order under case 2877/98 E

The date on which the agreement of sale was executed was in dispute. The confusion was caused by the defendant's late father who in an affidavit filed on 23 February 2007 in the action that was brought in the Gweru Magistrates' court and later withdrawn averred twice that the agreement of sale was concluded on "2 January 2003". The affidavit was contrary to F the agreement produced in court and the declaration by seller signed by Mr Gwanzura and the declaration by purchaser signed by him that provided the date of 20 January 2003. 2 January coincides with the date on which Mr Gwanzura alleged he deposited the purchase price with his legal practitioners. The double repetition of the date as "2 January 2003" in one affidavit is inconsistent with a typographical mistake and points to a positive statement G of fact. I accept that the 2 January was not the date on which the contract of sale was concluded. It is contrary to the agreement itself and the other documents that I have already referred to. It is also contrary to the plaintiff's evidence that he was still in the country on that date and would have executed the agreement in person. It is contrary to the evidence of Mr Gwanzura, the other party to the agreement. I find the conclusion inescapable that it was a H

Kudya J

A deliberate falsehood designed to support Mr Gwanzura's averment that he deposited ZW$4.2 million with his own legal practitioners on that day. Such a conclusion paints the plaintiff's representative in poor light as a person who was prepared to connive with Mr Gwanzura to mislead Mrs Gwanzura.

Mr *Mugomeza* submitted that the agreement of sale was not concluded in B fraud of the divorce order. Mr *Mawere* made a contrary submission.

In *Pretorius NO* v *Smith & Ors* 1971 (1) SA 459 (T) at 461A-C Colman J stated that:

> "It is clear that the word 'fraud', when used in relation to the type of disposition which can be attacked in a case of this kind, does not bear the same meaning as it bears in criminal law, or in the context of a contract induced by fraud. There C need be no false representation or deceit by the husband in order to lay the disposition open to attack. It is equally clear, however, that not every disposition that has prejudiced

> the interests of the wife will be set aside at her instance, or that of her estate or heirs. Every donation made out of the assets of a joint estate diminishes the estate, and so prejudices the wife. And the same applies to a transaction, other than a donation, which results in loss to the joint estate. D But such dealings, *simpliciter,* are not open to attack.*"*

And at 462C:

> "I am of the opinion that the plaintiff in an action of this kind must prove *dolus*, in the sense of an intention to prejudice the wife's interests. I base that conclusion on *Voet's* use of the term 'fraud', and upon *Davis* v *Brisley's Minors* 18 SC 407, where the Acting Chief Justice, relying, apparently, on van den Linden*,* equated E the concept 'fraud of the wife' to 'willful intention to prejudice the wife'. A *bona fide* transaction, it seems to me, is not open to attack, however unwise it may be."

I understand Colman J to be saying that fraud of the wife's rights cannot simply be implied from the mere fact that prejudice has been occasioned F to the wife, but must be proved by showing that her husband carried out the transaction clandestinely or in deliberate disregard of the wife's rights.

Several cases have dealt with the same issue in this jurisdiction. These are *Muzanenhamo & Anor* v *Katanga & Ors* 1991 (1) ZLR 182 (S) at 187A; *Crundall Brothers (Pvt) Ltd* v *Lazarus NO & Ano*r 1991 (2) ZLR 125 (S) G at 129D-F; *Muganga* v *Sakupwanya* 1996 (1) ZLR 217 (S) at 219H-220A; *Tewe* v *Hanoki & Ors* S-55-03 at p 4 of the judgment. In *Muzanenhamo* and *Muganga supra*, McNally JA equated the fraudulent intent with intent to defeat the wife's just claim. In *Crundall Brothers supra* at 133C the Full Bench of the Supreme Court stated that:

> "The doctrine of notice, as it is called, requires nothing more than notice or H knowledge of the prior claim. It is not necessary to prove *mala fides* or fraud."

2011 (1) ZLR p600

Kudya J

In *Tewe's* case, *supra*, the purchasers were unaware of the dispute between A the wife Tewe and her husband Hanoki at the time of purchase or transfer. Ziyambi JA stated at p 4 of the judgment that:

> "since the rights of husband and wife are personal and do not as a matter of law affect third parties, for the appellant (wife) to succeed against the second and third respondents (purchasers) she had to show not only that they were aware B of her rights in the property but that they were attempting to defeat her rights."

I have already found that the plaintiff was aware of Mrs Gwanzura's rights in the property. Those rights were that she was firstly entitled to a one half share in the value of the property and, secondly, that she had three months within which to buy out her husband's half share and take title. The first leg of the formulation by Ziyambi JA is answered in Mrs Gwanzura's favour, C that is, that the plaintiff was aware of her rights in the property.

The issue that falls for determination is whether the plaintiff intended to defeat her rights. Mr *Mugomeza* contended that Mr Gwanzura first paid out his former wife before he concluded the agreement of sale with the plaintiff. He relied on the evidence of Mr Gwanzura to that effect. Mr Gwanzura's D testimony does not support the contention. Firstly, by 5 January 2003 he was disposing of the property before he had bought out his former wife's share. I found from his evasiveness on the point that even on 20 January 2003 when he concluded the agreement, he signed it before making payment of the half share due to Mrs Gwanzura. He failed to prove that he deposited the money on 2 January. The reason why the cheque dated 8 January was paid on 20 E January was demonstrated clearly by his legal practitioners trust account bank statement issued on 25 January 2003. The opening balance on 22 January was ZW$20 000. Two deposits, one cash and another by cheque boosted the balance to ZW$48 399 before a large transfer of ZW$7 224 166.40 pushed the credit balance to ZW$7 272 565.40. The plausible explanation of the source of those funds appears to be the nett amount due to Mr Gwanzura F from the deposit of ZW$7.5 million made by the plaintiff at the conclusion of the sale agreement. It was not within the contemplation of the order that he would sell the property to raise the money to buy out his former wife's share. I am satisfied that Mr Gwanzura intended to defeat Mrs Gwanzura's rights. He acted clandestinely and with deliberate intention to defeat his G former wife's rights. Mr Gwanzura, thus, acted fraudulently.

I am also satisfied that the plaintiff's actions also fall into the same category as those of Mr Gwanzura. He purchased a property with the defects noted by CC Sales (Pvt) Ltd without inspecting the property. His representatives falsely stated that they inspected the house. They inserted an unusual clause that they would pay the balance after inspection or transfer. They could not H

Kudya J

A insist on their right to inspect before concluding the agreement because they knew that they were trampling upon Mrs Gwanzura's rights, which she had advised them of on 5 January 2003. That the plaintiff's agents were acting *mala fide* was further reinforced by the connivance they embarked upon with Mr Gwanzura to cheat the *fiscus* by under declaring the purchase price. The plaintiff benefited by paying lower stamp duty and Mr Gwanzura by paying B less capital gains tax.

I hold that the agreement of sale was executed to defraud Mrs Gwanzura of her just rights that she was awarded in the divorce order.

Is the first defendant entitled to cancellation of the title deed?

It seems to me that the answer to the last question must be in the affirmative. C In *Mvududu* v *Mvududu NO & Ors* 1981 ZLR 397 at 405G-H McNally AJ, as he then was, held that:

> "A registered deed may be cancelled by order of court, on the authority of s 8 of the Deeds Registries Act [*Chapter 139*]. Such action cannot be lightly taken, but it seems to me that where there has been *justus error*, as here, and the rights D of Rhoda have been entirely overlooked, and those of Mwashinga and Enoch misconceived, so that a false certificate was issued by the District Commissioner, the court must intervene."

I am thus empowered by s 8(1) of the Deeds Registries Act [*Chapter 20*:*05*] to cancel a registered deed. In *Mvududu supra,* it was cancelled because there had been a *justus error*. In the present case there has been fraudulent E intent on the part of the registered holder. Failure to cancel would be, in the words of Korsah JA in *Hattingh & Ors* v *van Kleek* 1997 (2) ZLR 240 (S) at 246B, to "deprive the innocent person of his rights … benefit the guilty and put a premium on deceit".

Mrs Gwanzura prayed for costs on the scale of legal practitioner and client. F Costs are in the discretion of the court. I would have granted them because of the deceit exhibited in the present case by the plaintiff and Mr Gwanzura. The facts demonstrated that Mrs Gwanzura appropriated the payment made by Mr Gwanzura from the proceeds of the purported sale. They also show that an equivalent amount she paid to Mr Gwanzura reached his legal practitioners, even though there is no record of what became of it. The G ultimate loser in the present case was the plaintiff, who lost all his money and the house. It is in the light of this loss that I would award Mrs Gwanzura costs on the ordinary scale.

Accordingly, it is ordered that:

1. The plaintiff's claim be and is hereby dismissed with costs. H
2. Deed of transfer No 373/03 registered on 19 February 2003 in favour

Kudya J

of Stephen Zingwe of Stand 2946 Gwelo Township of Gwelo Township A Lands be and is hereby cancelled.

3. The plaintiff shall pay the first defendant's costs of suit in the counter claim.

Mutezo & Mugomeza, plaintiff's legal practitioners B

Mawere & Sibanda, first defendant's legal practitioners C

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ATTORNEY-GENERAL v PARMER 2011 (1) ZLR 603 (H)

Citation	2011 (1) ZLR 603 (H)
Case No	Judgment No. HB-86-11
Court	High Court, Bulawayo
Judge	Ndou J
Heard	7 March 2011
Judgment	23 June 2011
Counsel	*T Makoni*, for the applicant *T Cherry,* for the respondent
Case Type	Application for leave to appeal
Annotations	No case annotations to date

Flynote

Aviation – *offences – placing dangerous goods on aircraft – appropriate charge*

Criminal law – *offences under the Criminal Law Code [Chapter 9:23] – crimes involving aircraft – placing dangerous goods aboard an aircraft (s 115) – not an offence of strict liability – need for mens rea to be proved*

Headnote

D The respondent put a starter pistol, as used for athletics, in his hold baggage when he checked in for a commercial flight. The pistol was not functioning and was being taken for repair. The pistol used blank ammunition and could not be converted into a firearm. The pistol was detected before the E flight left and the respondent was arrested and charged with contravening s 115(1)(a) of the Criminal Law Code [*Chapter 9:23*]: placing "dangerous goods" on an aircraft. The relevant part of the definition of "dangerous goods" is "substances and things which, by reason of their nature or condition may endanger the safety of an aircraft or of any person on board an aircraft". The charge sheet, however, also referred to ss 49 and F 50 of the Civil Aviation (Security) Regulations 2006, which contain much wider definitions of "dangerous goods".

No evidence was led as to how the safety of the aircraft could have been endangered. No one could have had access to the pistol while the aircraft was in flight. The respondent was acquitted. The Attorney-General applied G for leave to appeal on a point of law against the acquittal. It was argued that the offence was one of strict liability.

Held, that the offence under the Code provided for imprisonment only. Accordingly, in terms of the proviso to s 17(5) of the Code, the offence could not be held to be one of strict liability; *mens rea* had to be proved.

Held, further, that it was wrong to import into a charge under s 150 of the H Code the definitions in provisions of ss 49 and 50 of the Civil Aviation

Ndou J

Regulations. The Civil Aviation Act [*Chapter 13:16*] makes it quite A clear that the offence which the State tried to import into the prosecution was, in effect, a "stand alone" offence. Part VII of the Regulations sets out a substantive offence and provides a penalty. If the prosecution had framed a charge under the Regulations, it would have been entitled to use the definition contained in s 49 and the court would have been able B to impose the penalty prescribed in s

79(5) of the Regulations. The State could have brought an alternative charge under the Regulations.

Held, further, that the magistrate should have considered whether the essential elements of the offences under Part VII of the Regulations were present. If they were, he could, in terms of s 274 of the Code, have convicted the respondent of contravening the Regulations. Accordingly, leave to C appeal should be granted. *

Cases cited

A-G *v* Mbewe 2004 (2) ZLR 86 (H)

S *v* Zemura 1973 (2) RLR 357 (H) D

Legislation considered

Civil Aviation (Security) Regulations 2006 (SI 207 of 2006), ss 49 and 50

Criminal Law (Codification & Reform) Act [*Chapter 9:23*], ss 17, 145, 150 & 274

Case information

T Makoni, for the applicant

T Cherry, for the respondent

Judgment

NDOU J: This is an application for leave to appeal against the acquittal of the respondent in terms of s 61(1) of the Magistrates Court Act [*Chapter 7:10*]. The salient facts of this case are the following. It is common cause F that the respondent is a young man doing his final year of a Masters Degree in South Africa. He is heavily involved in motor racing, as clearly evinced from the documents produced during the trial. This was not challenged by the State. On the fateful day he was taken by lift to Victoria Falls Airport where he intended to board a flight to South Africa. He had left it rather late G

Ndou J

A to check in. He had packed a non-working starter device, the subject matter of this case, in his hold luggage. He intended to take the device to South Africa to see if it could be mended in order to use it in his leisure activities. In the process of checking in prior to departure, he did not mention to the aviation authorities that he had this device in the luggage that was to be put in the hold of the aircraft. There is no evidence to show that, had he mentioned B that the device was in the luggage intended for the hold rather than cabin luggage, he would not have been allowed to proceed. The scanning security device at the airport revealed the presence of this device in the hold luggage when the respondent was about to board the aircraft. He was arrested and detained and the device seized. It was accepted during the trial that there was C no sinister motive in the respondent's possession of the device. It was also accepted that during the flight neither he, nor anyone else, could have had any access to the device. The respondent was charged under s 150(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (hereinafter referred to as "the Act"), the allegation being that he handed a race starter gun to the airport handling staff for the purpose of being placed aboard an D aircraft. This section falls under Part VI with the heading "Hijack and Other Crimes Involving Aircraft".

In this Part, "dangerous goods" is defined in s 145(1)(a) and (b). Subsection (1)(a) is inappropriate, as, on the evidence, its expert witness Inspector Makumbe (a ZRP Provincial Armourer) described the device as follows E – "the weapon is therefore not a firearm as it is only used for purposes as a starter gun for athletics". He also stated that the device used ".22 ammo blanks only as the barrel is blocked and has a spout on the top" and that "the weapon's main components are made of pewter, an aluminum alloy, and has got plastic grips … the material that was used, if not reinforced with steel or gun metal, cannot be made into a firearm and neither can it be converted F into a firearm." In the circumstances, the applicant must therefore rely on subs (1)(b) which states "substances and things which, by reason of their nature or condition, may endanger the safety of an aircraft or of any person on board an aircraft". The applicant did not adduce evidence during the trial that a

starter gun of this kind placed in the hold of the aircraft was, by reason of its nature or condition, dangerous to the safety of the aircraft or G any person aboard the aircraft.

In my view, the clear intention of the legislature is to punish persons who place on board an aircraft items like bombs and explosives that may detonate when the aircraft is in flight. The offence, on conviction, carries a sentence of up to 15 years' imprisonment without the option of a fine. The applicant's H main argument appears to be that the act by the respondent was one of strict

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Ndou J

liability. It seems to me that the entire basis of this application is premised on A this strict liability argument. As alluded to above, the penalty for contravention s 150 of the Code is imprisonment for up to 15 years without the option of a fine. This submission is, with respect, untenable. This is so because of the proviso to s 17 of the Code which states:

> "Provided that notwithstanding subparagraphs (i) and (ii) the court shall not B hold that the legislature impliedly intended a crime to be a strict liability if the penalty for it is *mandatory imprisonment or imprisonment without the option of a fine*" (my emphasis).

The offence defined in s 150 of the Code carried a penalty of imprisonment without the option of a fine and, accordingly, falls squarely within the terms of the proviso to s 17 of the Code. In other words, it cannot be argued that C the offence defined under s 150 of the Code is one of strict liability. *Mens rea* is therefore an element that the applicant had to prove: *S* v *Zemura* 1973 (2) RLR 357 (H) and *Attorney-General* v *Mbewe* 2004 (2) ZLR 86 (H). This main submission by the applicant is clearly wrong.

This is, however, not the end of the matter. The full citation of the charge D sheet, *in casu,* is the following-

> "C/S 150(a) of the Criminal Law Code Act *Chapter 9:23* [*sic*]"
>
> "Placing or carrying dangerous goods on an aircraft" ARW section 49(c)(i) and 50 of the Aviation (Security) *[sic]* Regulations 2006" (hereinafter referred to as "the CA Regulations).

It was wrong for the applicant to endeavour to import into s 150 of the E Code the definitions in the provisions of ss 49 and 50 of the Civil Aviation (Security) Regulations. The enabling Act under which the Regulations are promulgated makes it quite clear that the offence which the applicant endeavoured to import into this prosecution is in effect a "stand alone" offence. In other words, Part VII of the Regulations sets out a substantive offence and provides a penalty. If the applicant framed a charge under the F Regulations it would have been entitled to use the definition contained in s 49 thereof. The court would have been able to impose the penalty prescribed in s 79(5) of the Regulations.

However, the applicant chose not to charge the respondent under the more appropriate legislation. If the applicant had done so, it seems to me that it G would have been difficult for the respondent to avoid a conviction. This is so because Part VII of the Regulations covers a vast array of prohibited articles. It covers not only firearms and grenades but also such items as pellet guns, toy guns, scissors, pocket knives, spears, wooden articles, lighter fluid, certain wrist bands, etc. But does this error mark the end of the applicant's case? The applicant erred by simply not charging the offence defined in s 150 H

Ndou J

A of the Code as the main charge, with alternative charge(s) defined in Part VII of the Civil Aviation (Security) Regulations. This limits me to consider whether there are any competent verdicts flowing from a charge defined in s 150 of the Code. Put in another way, would the provisions of s 274 of the Code come to the aid of the applicant's case?

B The court *a quo* should have at least considered whether the essential elements of the offences under Part VII of the Regulations are present as provided for by s 274 *supra.* The magistrate overlooked the provisions of s 274 of the Code. For that reason alone I would grant leave to appeal.

Accordingly, the application for leave to appeal is hereby granted.

C *Criminal Division, Attorney General's Office***,** applicant's legal practitioners

Paul Connolly Legal Practitioners, respondent's legal practitioners

* *Editor's note*: on appeal, the High Court has the power under s 38A(2) of the High Court Act [*Chapter 7:06*] to (a) confirm the decision of the court *a quo*; (b) declare the verdict which it considers the court a quo should have given, without altering the judgment; or (c) where it is considered desirable, having regard to the interests of justice to do so, substitute a verdict of guilty and either pass sentence itself or remit the case to the lower court for the passing of sentence.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/S v NCUBE & ORS 2011 (1) ZLR 608 (H)

S v NCUBE & ORS 2011 (1) ZLR 608 (H)

Citation	2011 (1) ZLR 608 (H)
Case No	Judgment No. HH-139-11
Court	High Court, Harare
Judge	Mawadze J
Heard	24 June 2011
Judgment	24 June 2011
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure – *trial – juvenile offenders – need to treat juveniles as* C *special category of offender – need for juvenile offender to be assisted or legally represented at trial – age of child or juvenile offender – need for age to be established as soon as possible after arrest – reasons for establishing age – legislative provisions and international instruments governing treatment of juvenile offenders* D

Criminal procedure (sentence) – *general principles — juvenile offenders – full and meaningful pre-sentence enquiry essential – desirability of obtaining probation officer's reports – other courses open to court where such reports not available – corporal punishment – when should be imposed – should not be imposed as a means of completing proceedings quickly* E

Headnote

"The concept of placing a juvenile, particularly a very young child, unrepresented and unassisted by its parents on trial before a magistrate, is one that is inherently repugnant. The same juvenile would be regarded in the civil court as incapable of enforcing or defending its rights. What is different is that the criminal system of justice affords the unassisted F minor the capacity to defend himself. It might well be that to place such a child in a position where he or she is

expected to conduct his own defence in an alien environment in adversary proceedings is to expect far too much" (*dicta per* Gillespie J in *S* v *C* 1997 (2) ZLR 395 (H) approved).

Judicial officers should always bear in mind that children in conflict with G the criminal law constitute a special category of offenders for which there are specific and peculiar legislative provisions, both within our jurisdiction and other international conventions, designed to deal with such offenders. Useful guidance can be sought from both the United Nations Convention on the Rights of the Child (1990) and the African Charter on the Rights and Welfare of the Child (1999). Article 17 of the Charter H

2011 (1) ZLR p609

Mawadze J

A deals in some useful detail with the administration of juvenile justice in relation to children in conflict with the criminal law. Guidelines are given on such issues as arrest, detention, the presumption of innocence, legal representation and other related matters. Article 40 of the Convention sets out what may be deemed to be minimum standards to be met by the criminal justice system in dealing with children in conflict with the B criminal law. In our jurisdiction, the Criminal Procedure and Evidence Act [*Chapter 9*:*07*] (see ss 191, 195, 196, 197, 351, 352 and 353) and the Criminal Law (Codification and Reform Act) [*Chapter 9*:*23*] (see ss 6, 7, 8, 63 and 70) have a number of provisions that specifically provide for how the courts should deal with juvenile offenders and juvenile C witnesses who are both in contact or in conflict with the criminal law.

The issue of age of a juvenile is a very crucial factor to which a court should apply its mind in all criminal proceedings. The inquiry into a juvenile offenders age should start at the time of his arrest if the courts are to protect properly the rights of children who transgress the criminal law. Where a child is put on trial, an inquiry into the child's age must be made, D because from that inquiry many other important considerations flow. If the child is under 14 years at the time of the alleged offence, the first decision is whether there is evidence to displace the presumption that the child did not have criminal capacity. Even if such evidence is available, the next question is whether, as a matter of policy, such a young person E should be subjected to the might of the criminal justice system. Other methods of dealing with such an offender might be appropriate. Without knowing the age of the accused and whether they are juveniles or not, there is a real danger is that the accused persons might be subjected to an improper and incompetent penalty or sentence.

There can never be a just cause to proceed and sentence juvenile offenders F without getting all useful information to guide the court on the question of sentence. This would include obtaining probation officers' reports. A meaningful inquiry should be made either in relation to the circumstances surrounding the commission of the offence or circumstances peculiar to the offenders. This might entail calling the accused's parents or G guardians or school authorities to shed light in the matter. The need for the probation officer's reports in cases of this nature cannot be over-emphasized. While the courts face challenges in their dealings with the Department of Social Welfare, this can never be a just cause to proceed to sentence juvenile offenders without gathering all useful information to guide the court on the question of sentence. Even in the absence of a H probation officer and probation officers' reports, a trial court handling

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2011 (1) ZLR p610

Mawadze J

the matter of a juvenile should be innovative and seek to involve the A family of the juvenile before coming up with a management scheme or sentence. To simply proceed without both the probation officer's report and involvement of the juvenile's family is akin to proceeding in complete darkness.

The enthusiasm with quite a number of magistrates sentence juvenile offenders B to corporal punishment, even for non-serious offences, is a matter of concern. This may be an easy way out in disposing of a matter, but in dealing with juveniles in conflict with the criminal law the courts' primary concern is to safeguard the rights of these children rather than to complete the proceedings as quickly as possible. By taking the latter course, the court may end up imposing a retributive rather than a rehabilitative C type of sentence. In most cases involving juveniles in conflict with the criminal law, the court should refer such cases to the children's court, where

other various options of dealing with the juveniles are available. Where corporal punishment has been imposed, it is not possible to correct a misdirection on review, except in an academic sense. D

Cases cited

S v C 1997 (2) ZLR 395 (H)

S v Manwere 1972 (2) RLR 139 (A)

S v Mavasa HH-13-10

S v Ngulube 2002 (1) ZLR 316 (H)

S v Shariwa 2003 (1) ZLR 314 (H) E

S v Sparks and Anor 1972 (3) SA 396 (A)

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

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 6, 7, F 8, 63, 70 and 113(1)

Criminal Procedure and Evidence Act [*Chapter 9:07*] ss191, 195, 197, 351, 352 and 353

International instruments considered

African Charter on the Rights and Welfare of the Child (1999), art 17 G

Judgment

MAWADZE J: Both matters were dealt with by the same provincial magistrate sitting at Kwekwe and the issues which exercised my mind are common to both cases.

The facts giving rise to the charges and convictions in both matters can be summarised as follows: H

A **1. MORRISON NCUBE AND 3 ORS**

All the four accused persons are juveniles attending school at Fatima High School and are in Form 4. Accused 1 is aged 17 years, accused 2, 16 years, accused 3, 17 years and accused 4, 16 years. They all pleaded guilty to the charge of contravening s 113(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (theft). They were duly convicted and each accused was B sentenced to corporal punishment of two strokes on 6 October 2010.

The brief facts outlined are that on dates unknown to the State but between November 2008 and April 2009, the accused persons stole 20 computer speakers, one monitor, one mouse and two keyboards, the property belonging to the school valued at R2 000. The theft was only discovered by the School C Development Committee after an audit of assets was done and a report was made to the police leading to the arrest of the four juveniles. Property valued at R400 was recovered.

The circumstances surrounding the commission of the offence had not been fully outlined in the statement of agreed facts and no meaningful mitigation was recorded by the magistrate. I therefore raised the following issues with D the trial magistrate:

"1. Who represented or assisted the four minor children during the proceedings?

2. Where were the two keyboards and the monitors when they were stolen as the State outline is silent on this?

3. What did the four minors do with the property which was not recovered E and where was the other property recovered?

4. Why did the trial magistrate not record meaningful mitigation to ascertain circumstances surrounding the commission of the offence or reasons for committing the offence? In the alternative why were probation officers' reports not sought?"

The response by the magistrate is as follows: F

"1. The four minor children were not represented or assisted during the proceedings.

2. The keyboard and monitor were at Mr Mlotshwa, a teacher's house. It is not very clear where exactly they were at Mr Mlotshwa's house.

3. This was not canvassed.

4. It had taken hours before a probation officer's report could be availed. G I agree that it was a misdirection on my part not to canvass meaningful mitigation to ascertain the circumstances surrounding the commission of the offence. I am grateful to the observations made and I have taken note".

Let me hasten to point out that the record of proceedings does not show that a requests for a probation officer's reports was ever made as all the four juveniles pleaded guilty on 6 October 2010 and were duly convicted and H sentenced on that same day.

Mawadze J

I turn to the second matter. A

2. MICHAEL RUSONDO AND ANOR

Both the accused persons' ages in the charge sheet and State outline are given as 18 years. Accused 1, who stays with his parents, was a form 3 student at Manunure High School in Kwekwe at the material time and accused 2 was also in form 3 at a local private college in Kwekwe and was staying B with his mother.

Both accused were charged and convicted on their own pleas of guilty of two counts involving firstly contravening s 131(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] – unlawful entry – and secondly contravening s 113(1) of the same Act – theft. Both counts were treated as C one for purposes of sentence and each accused was sentenced to corporal punishment of two strokes. In addition each accused was sentenced to three months' imprisonment wholly suspended on the usual conditions of good behaviour.

The agreed facts are that on 16 July 2010 at about 2030 hours the accused persons scaled the durawall of Booms College in Kwekwe to access the D premises. They approached a window, which was secured with a wire, untied it to effect entry through the window. One of the accused stood guard outside whilst the other entered into the college premises wherein they stole an LG flat screen monitor, a keyboard, a mouse all valued at US$200. They later sold the property to one Amos Mhembere and all the property was recovered. E

I raised the following issue with the magistrate:

> "How old are the two accused persons? Both the charge sheet and the State outline indicate that they are 18 years old. It was only in mitigation that both said they were 17 years old. No attempt was made by the court to clarify this contradiction or to seek the State's views or to inquire into their dates of birth. No proof of age was sought by way of a dentist reports or birth certificates as F both accused are pupils in Kwekwe. No reasons are given why the magistrate believe they are not 18 years old but 17 years old. Their parents or guardians were not called and asked about the issue of age despite that the parents were said to be at home. Is there no danger of treating 18 year old persons as 17 year old persons, thereby imposing an incompetent sentence?"

The response by the magistrate is very brief and is as follows: G

> "I agree that I could have done more to ascertain the actual correct age of the accuseds. I just took the word of the accuseds. I have noted this shortcoming I am sorry".

The common thread which runs through both matters *in casu* is the failure by the magistrate to properly deal with cases involving children in conflict with the criminal law. Judicial officers should always understand and bear H

Mawadze J

A in mind that children in conflict with the criminal law are a special category of offenders for which there are specific and peculiar legislative provisions designed to deal with such offenders both within our jurisdiction and other international conventions.

Useful guidance can be sought from both the United Nations Convention B on the Rights of the Child (1990) and the African Charter on the Rights and Welfare of the Child (1999) (hereinafter the convention and the charter respectively). In specific terms Article 17 of the Charter deals in some useful detail with the administration of juvenile justice in relation to children in conflict with the criminal law. Guidelines are given on issues like arrest, detention, presumption of innocence, legal representation and other related C matters. Article 40 of the Convention sets out what may be deemed to be minimum standards to be met by the criminal justice system in dealing with children in conflict with the criminal law.

In our jurisdiction, the Criminal Procedure and Evidence Act [*Chapter 9*:*07*] (see ss 191, 195, 196, 197, 351, 352 and 353) and the Criminal Law D (Codification and Reform Act) [*Chapter 9*:*23*] (see ss 6, 7, 8, 63 and 70) have a number of sections that specifically provide for how the courts should deal with juvenile offenders and juvenile witnesses who are both in contact or in conflict with the criminal law.

Let me now turn to the misdirection I noted in the matters *in casu*. The convictions in both cases are in order and raise no issues save to indicate that E the trial magistrate should as a matter of practice indicate that the proceedings involving a juvenile or juveniles were held in camera. I presume magistrates are adhering to this requirement and that the omission only relates to failure to so endorse on the record of proceedings. I hope and pray I am correct in this regard.

F Section 191 of the Criminal Procedure and Evidence Act [*Chapter 9*:*07*] provides that, if a child is below 16 years and is being tried in the magistrates court, he/she may be assisted by a natural or legal guardian or the court may appoint another person to assist the juvenile. In both matters dealt with by the trial magistrate, the natural or legal guardians of the juveniles were G not even present during the proceedings. One may argue that *in casu* the juveniles were 16 years or above but my strong view is that this practice should be extended to all juveniles. In fact it is desirable for such children to be legally represented. I am persuaded in this view by the fact that in our civil law it is clear that minors or juveniles cannot represent themselves in any proceedings but in our criminal justice system such minors are given H capacity to represent themselves, as it were. I find this to be harsh and in

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violation of the children's rights as enshrined in both the Charter and the A Convention. Gillespie J in *S* v *C* 1997 (2) ZLR 395 (H) at 400G-401A made these pertinent observations:

> "The concept of placing of a juvenile particularly a very young child unrepresented and unassisted by its parents on trial before a magistrate is one that is inherently repugnant. The same juvenile would be regarded in civil court as incapable of enforcing or defending its rights. What is different is that the criminal system of B justice affords the unassisted minor the capacity to defend himself. It might well be thought that to place such a child in a position where he or she is expected to conduct his own defence in an alien environment in adversary proceedings is to expect far too much".

In *S* v *Rusondo & Anor* the trial magistrate did not ascertain the ages of the C accused persons. The query I raised and the trial magistrate's response fully canvases this point. The issue of age of a juvenile offender is a very crucial factor to which the court should apply its mind in all criminal proceedings. In fact, I would venture to suggest that the inquiry into the juvenile offender's age should start at the time of arrest if we are to properly protect the rights of children in conflict with the criminal law. I cannot do no more than to D associate myself with the incisive views of Gillespie J in *S* v *C supra* in which the learned judge stated that where a child is put on trial an inquiry into the child's age must be made because from that inquiry many other important considerations flow. If the child is under 14 years at the time of the alleged offence, the first decision is whether there is evidence to displace E the presumption that the child did not have criminal capacity. Even if such evidence is available, the next question is whether as a matter of policy such a young person should be subjected to the might of the criminal justice system. Other methods of dealing with such an offender might be appropriate. It is my fervent hope that the proposed system of diversion which currently is at a pilot stage earmarked for Harare, Bulawayo and Gweru would be F implemented with due haste.

In *S* v *Rusondo & Anor* the trial magistrate proceeded to deal with the offenders without even knowing whether they were juveniles or not. The misdirection is obvious. The sentence of corporal punishment is for male persons under the age of 18 years. See s 353(1) of The Criminal Procedure G and Evidence Act [*Chapter 9*:*07*]. The real danger is that the trial magistrate most probably

subjected the accused persons to an improper and incompetent penalty or sentence. I am therefore unable to certify such proceedings to be in accordance with real and substantial justice.

In *S* v *Ncube & 3 Ors* the trial magistrate firstly did not request and or obtain the probation officers' reports in respect of the four juveniles. No good H

2011 (1) ZLR p615

Mawadze J

A cause is given for such an omission. Secondly, no meaningful inquiry was made either in relation to the circumstances surrounding the commission of the offence or circumstances peculiar to the offenders. Their parents or guardians were not called to assist nor were school authorities called to shed light in the matter.

B Our courts have always emphasised the need for the trial court to carry out a full and meaningful pre-sentence inquiry in order to arrive at an appropriate sentence. See *S* v *Sparks & Anor* 1972 (3) SA 396 (A); *S* v *Manwere* 1972 (2) RLR 139 (A); *S* v *Shariwa* 2003 (1) ZLR 314 (H); *S* v *Ngulube* 2002 (1) ZLR 316 (H).

The need for the probation officer's reports in cases of this nature cannot be C over-emphasized. See *S* v *Tendai & Anor* 1998 (2) ZLR 423 (H). I am aware of the challenges the magistrates face in their dealings with other stakeholders like the Department of Social Welfare. In my view, that can never be a just cause to proceed and sentence juvenile offenders without gathering all useful information to guide the court on the question of sentence. I totally associate D myself with the views expressed by Makarau JP (as she then was) in *S* v *Mavasa* 2010 (1) ZLR 28 (H) at 32 wherein the learned Judge President said:

> "The issue that has presented itself to me is that even in the absence of a probation officer and probation officers' reports, a trial court handling the matter of a juvenile may be innovative and seek to involve the family of the juvenile before coming up with a management scheme or sentence. To simply proceed without E both the probation officer's report and involvement of the juvenile's family is in my view akin to proceedings in complete darkness … I would venture to suggest that trial magistrates in similar positions should be innovative and seek to gain an insight into the circumstances of the juvenile before them from other reliable sources such as school, family or community of the accused. A little bit of light is always better than no light at all, in my view".

F I have noted with great concern the enthusiasm by quite a number of magistrates to sentence juvenile offenders to corporal punishment even for non serious offences. This may be an easy way out in disposing of a matter. My strong conviction, however, is that in dealing with juveniles in conflict with the criminal law our primary concern is to safeguard the rights of these children, rather than to complete the proceedings as quickly as possible. G By doing the latter, we may end up imposing a retributive rather than a rehabilitative type of sentence.

While it remains debatable if corporal punishment was suitable in both cases *in casu*, magistrates should in most cases involving juveniles in conflict with the criminal law refer such cases to the children's court where other various H options of dealing with the juveniles are available. Magistrates should note

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2011 (1) ZLR p616

Mawadze J

that it is not possible to correct a misdirection on review where corporal A punishment has been imposed, except for academic purposes.

On the basis of the foregoing I am unable to confirm the proceedings in both cases as in accordance with real and substantial justice. I therefore withhold my certificate in respect of both matters. B

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Source:

S v MANGOMA 2011 (1) ZLR 617 (H)

Citation	2011 (1) ZLR 617 (H)
Case No	Judgment No. HH-136-11
Court	High Court, Harare
Judge	Bhunu J (with assessors Chivanda and Mhandu)
Heard	16 May 2011; 18 May 2011
Judgment	28 June 2011
Counsel	*C Mutangadura,* for the State Mrs *B Mtetwa,* for the defence
Case Type	Criminal trial
Annotations	Link to case annotations

Flynote

Revenue and public finance – *procurement of commodities by State – requirement to purchase through tender process – when procurement may be made without going through tender*

D **Criminal law** – *offences under the Criminal Law Code [Chapter 9:23] – s 174(1)(a) – criminal abuse of duty as a public officer – showing favour – doing anything contrary to duty as a public officer for purpose of showing favour to another person – Minister ordering purchase of fuel from a supplier without going to tender – no other supplier available and critical fuel shortage in existence – no offence disclosed*

Headnote

The accused, who was Minister of Energy and Power Development, was charged with criminal abuse of duty as a public officer, in contravention of s 174(1)(a) of the Criminal Law Code [*Chapter 9:23*]. He was alleged to have shown favour to a particular petroleum company by directing the F chief executive officer of the procurement agency to purchase a quantity of diesel fuel from that company, thereby showing favour to the company. Alternatively, it was alleged that he had unlawfully directed the same person to purchase the fuel without going to tender, in contravention of s 5(4)(a)(i) as read with s 35 of the Procurement Regulations 2002 (SI 171 of 2002). During the period in question, the accused was responsible G for overseeing the procurement of fuel in terms of the Procurement Act [*Chapter 22:14*] and Regulations. The procurement of petroleum products was done through the National Oil Company of Zimbabwe (NOCZIM) which in turn had an entity called Petrotrade as its special purpose vehicle for the importation of fuel. Under s 30(2) of the Act, the procurement H of commodities in excess of specified amounts without going to tender

Bhunu J

is authorised provided the procuring entity justifies in writing the need A to purchase such commodities (including fuel) without going to tender.

It was common cause that during the period in question there was an acute shortage of fuel in the country. None of the traditional suppliers of fuel had any diesel for sale and the accused authorised the purchase of the fuel in question. He did so contrary to the advice of his officials, who B were of the view that any purchases had to be done through the normal tender procedures.

Held, that the purchase was lawful. Section 30(2) was meant to provide a safety valve to enable state procurement entities to procure commodities expeditiously for the benefit of the state and the nation at large in times of dire need and emergencies without following the cumbersome, time-consuming C, normal tender procedures. No reasonable court could come to the conclusion that by merely directing the chief executive officer to purchase fuel without going to tender the accused was guilty of any criminal conduct. Whether or not the accused was abusing his office as a public official when he directed his subordinate to buy the fuel had to be determined by the motive and surrounding circumstances behind the D order. When the accused issued the directive it was in times of extreme emergency. Strategic fuel reserves were down to less than a day's supply and there was no fuel from traditional suppliers. Queues were beginning to form at fuel outlets. The situation called for extraordinary measures to avert the emergency. His motive was clearly to avert the situation which threatened the country with extreme shortage of fuel. He could E not be blamed for directing the purchase of fuel from the company when it was the only supplier of fuel at that time. There was no evidence that fuel could have been obtained from another supplier at a lower price, as no other fuel was available at the time. Accordingly, the accused should be discharged at the end of the State case. * F

Legislation considered

Procurement Act [*Chapter 22:14*], s 30(1) & (2)

Procurement Regulations 2002 (SI 171 of 2002), ss 5(4)(a)(ii) & 35 H

2011 (1) ZLR p619

Bhunu J

Case information

A *C Mutangadura,* for the State

Mrs *B Mtetwa,* for the defence

Judgment

BHUNU J: The accused is the Minister of Energy and Power Development. In the main count he is charged with criminal abuse of duty as a public officer in contravention of s 174 (10)(a) as read with s 174(2) of the Criminal Law B (Codification and Reform) Act [*Chapter 9:23*].

He is alleged during the period extending from the beginning of January 2011 to 12 January 2011 to have intentionally directed the Acting Chief Executive Officer of Petrotrade, one Griefshaw Revanewako to purchase five million litres of diesel from a South African company known as Nooa Petroleum C (Pty) Ltd for the purpose of showing favour to Nooa Petroleum (Pty) Ltd.

In the alternative, and arising from the same facts, he is alleged to have unlawfully instructed Griefshaw Revanewako, the said Acting Chief Executive Officer of Petrotrade, to purchase the five million litres of diesel from Nooa Petroleum (Pty) Ltd without going to tender, in contravention of s 30 of the Procurement Act [*Chapter 22: 14*] as read with ss 5(4)(a)(ii) and 35 of the D Procurement Regulations (SI 171 of 2002).

The facts giving rise to both charges are to a large extent common cause. The undisputed facts are that during the period under review the accused was the Minister of Energy and Power Development. In that capacity he was responsible for overseeing the procurement of fuel in terms of the E Procurement Act and Regulations. The procurement of petroleum products was done through the National Oil Company of Zimbabwe (NOCZIM) which in turn had Petrotrade as its special purpose vehicle for the importation of fuel. Petrotrade was however not a recognized registered lawful procurement entity at the material time.

In the normal run of things and all things being equal, s 30(1) of the F Procurement Act and regulations prohibits and criminalizes any purchase of commodities in excess of fifty thousand dollars without going to tender.

Subsection (2) of the same section however, permits the procurement of commodities in excess of the specified amounts without going to tender provided the procuring entity justifies in writing the need to purchase such G commoditie, including fuel, without going to tender. The section reads:

> **"30 Form of procurement proceedings**

(1) Except as otherwise provided in this Act, the procurement of –

(a) goods or construction work by a procuring entity shall be done by means of tendering proceedings in accordance with section *thirty-one*;

(b) services by a procuring entity shall be done by a method which complies H with section *thirty-two*.

2011 (1) ZLR p620

Bhunu J

(2) *Where in accordance with this Act a procuring entity adopts a method of* A *procurement other than one specified in subsection (1), the procuring entity shall include in the record of its proceedings a statement of the grounds and circumstances on which it relied to justify the adoption of that method"* (my emphasis).

It is clear from the provisions of s 30 of the Act that there are two lawful ways of procuring fuel in terms of the Procurement Act. The first mode of B procurement is by going to tender in terms of subsection one. The second mode is by purchasing fuel without going to tender in terms of subsection two.

I now turn to apply the law to the facts of this case. It is common cause and a matter of established fact that during the period in question there was an acute shortage of fuel in the country. All the state witnesses comprising C Justine Mupamhanga, the Permanent Secretary in the Ministry of Energy and Power Development, Morgan Mudzinganyama, the Director Petroleum in the ministry, Griefshaw Revanewako, the Acting Chief Executive of Petrotrade, Sikwila Tanaka, the financial manager at NOCZIM and Charles Kawaza, the Chairman of the State Procurement Board all gave incontrovertible evidence to the effect that at the material time the country was experiencing a critical D shortage of diesel.

The accused in his defence outline stated that none of their traditional suppliers of fuel had any diesel for sale. The Permanent Secretary confirmed the accused's defence to that effect. Under cross-examination he was asked:

"Q. Now Mr. Mupamhanga in your statement you accept that on or about 11 E January 2011 there was a fuel crisis in the fuel sector in the country

A. That is correct.

Q. How did that crisis come about.

A. *That resulted from the difficulties at Beira which led to ships bringing fuel not being able to dock. A major reason however was that there was no fuel from our traditional suppliers*" (my emphasis). F

The admitted critical shortage of fuel on the market prompted the accused, in his capacity as Minister of Energy and Power Development, to write a letter, exhibit one, on 12 January 2011 authorizing the Acting Chief Executive Petrotrade to purchase fuel without going to tender in a bid to salvage the situation. The letter reads: G

"Attention Eng. G Revanewako

AUTHORITY TO PURCHASE 5 MILLION LITRES GASOIL EX-TANK MATOLA FROM NOOA PETROLEUM WITHOUT GOING TO TENDER.

Having assessed the *fuel supply constraints the country is facing, I authorize that you procure 5 million litres of diesel, being the only fuel available from Nooa Petroleum in Matola at $0.88 per litre landed in Harare.* H

2011 (1) ZLR p621

Bhunu J

A The product should be shipped to cover Masvingo, Midlands and Matabeleland Provinces which are more affected by the shortage of fuel. Part of the fuel should be swapped with fuel in the pipeline that is owned by oil companies on a litre for litre basis. This will facilitate quick release of the product to these companies while at the same time speeding the availability of fuel on the market.

You are required to quickly implement these arrangements.

B Signed

E S. Mangoma (MP)

MINISTRY OF ENERGY AND POWER DEVELOPMENT" (emphasis mine)

Virtually all the State witnesses confirmed without exception that there was no fuel available from their traditional suppliers at the material time. Whether or not the accused's conduct in writing the above letter or directive C amounts to a criminal offence in the circumstances of this case depends on the interpretation of s 30(2) of the Procurement Act [*Chapter 22:14*].

Mr Kuwaza, as I have already pointed out, is the Executive Chairman of the State Procurement Board. In his evidence-in-chief he gave a comprehensive outline of his duties in this respect. His duties among others are to administer D the Procurement Act [*Chapter 22:14*]. In that respect he is responsible for investigating and taking appropriate action against irregular procurement of goods and services for the state in breach of the normal rules and regulations.

The witness gave a detailed explanation of the cumbersome procurement procedures by tender. It was his testimony that if purchases are to be done through the normal tender procedures it takes no less than 30 days just E to float the tender and further delays can be incurred through a system of appeals where one or more bidders are aggrieved by any particular award.

Before dollarisation NOCZIM was experiencing problems in sourcing foreign currency for the procurement of fuel. As a result in 2004, in a bid to avoid the inevitable delays occasioned by the cumbersome tender procedures and F scarcity of foreign currency, it solicited for and was granted permission to procure fuel urgently without going through the normal tender procedures, provided it submitted to the State Procurement Board a write-up justifying the need to procure fuel without going through the normal tender procedures.

As a result NOCZIM was required to gazette an approved list of reputable foreign fuel suppliers from which it could purchase fuel without going G through normal tender procedures. The list was however not cast in stone as NOCZIM was free to update the list from time to time according to the prevailing circumstances. NOCZIM did not, however, strictly adhere to this directive and would from time to time procure fuel from suppliers not on the approved gazetted list.

H It is plain that the dispensation granted to NOCZIM by the State Procurement

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Bhunu J

Board way back in 2004 accords with the provisions of s 30(2) of the A Procurement Act.

It is clear that s 30(2) of the Procurement Act was meant to provide a safety valve to enable state procurement entities to procure commodities expeditiously for the benefit of the state and the nation at large in times of dire need and emergencies without following the cumbersome time consuming B normal tender procedures.

Whereas subs (1) provides for the general rule prohibiting procurement without going to tender, subs (2) provides for the exception which permits procurement without going to tender for good cause shown in writing. The adage that for every general rule there is an exception is therefore apt. C

In crafting subs (2) the legislature had undoubtedly foreseen the cropping up of circumstances which may require the urgent purchasing of commodities without going to tender, for the common good.

The accused appears to have fallen into trouble because he persisted in buying the fuel from Nooa Petroleum against the advice of his subordinates. This was D compounded by the fact that Nooa Petroleum ended up rendering defective service through its agent Mowhelere. The mere fact that Nooa Petroleum through Mowhelere may have rendered defective service cannot however, without more, amount to criminal conduct on the part of the accused.

The advice given to the accused by his Permanent Secretary and Director Petroleum to the effect that any purchases of fuel had to be done through E the normal tender procedures was incorrect and bad at law. Both the accused and Mr Kawaza, the Executive Chairman of the Procurement Board, were, however, aware of the provisions of s 30(2) of the Procurement Act. They were therefore aware of the correct legal position.

It is amazing that both the Permanent Secretary, who is responsible for F overseeing the procurement of fuel, and the Acting Chief Executive Officer Petrotrade responsible for procurement of fuel were ignorant of this vital provision of the law meant to facilitate the procurement of fuel in times of emergency and dire need. Upon being confronted with the provisions of s 30(2) of the Procurement Act, everyone concerned had no option but to G confess in open court that it was not *per se* unlawful to procure fuel without going to tender

Thus, in ordering the Acting Chief Executive Officer Petrotrade to procure 5 million litres of diesel from Nooa Petroleum without going to tender, the accused was simply directing the officer to procure the diesel in terms of s 30(2) 0f the Procurement Act. H

Bhunu J

A Once the Acting Chief Executive Officer had been directed by the accused to procure fuel without going to tender, it was incumbent upon him to provide the necessary write-up to justify the procurement in terms of s 30(2) of the Act.

If any fault is to be found at all regarding the procurement of the fuel in question, the blame must be laid squarely at the door of the procurement B entity for its failure to provide the necessary write-up according to law. This explains the Chairman of the State Procurement Board Mr Kuwaza's attitude, when he said that, apart from what he read in the newspapers, he was not aware of any offence that the accused had committed. He was, of course, correct in this respect.

C Having regard to the provisions of s 30(2) of the Act, no reasonable court, in my view, would come to the conclusion that, by merely directing the Acting Chief Executive Officer to purchase fuel without going to tender, the accused was guilty of any criminal conduct.

Whether or not the accused was abusing his office as a public official when he directed his subordinate to buy fuel from Nooa Petroleum is determined D by the motive and surrounding circumstances behind the order.

It is common cause that when the accused issued the directive it was in times of extreme emergency. Strategic fuel reserves were down to less than a day's supply and there was no fuel from traditional suppliers. Queues were beginning to form at fuel outlets. The situation called for extraordinary E measures to avert the emergency.

The accused's motive was clearly to avert the situation which threatened the country with extreme shortage of fuel. It is difficult to blame the accused for directing the purchase of fuel from Nooa Petroleum when it was the only supplier with fuel at that time.

F There is also no logic in suggesting that the fuel was purchased at an exorbitant price in circumstances where there was only one supplier. In any case the evidence quite clearly establishes that no one was able to establish if fuel could be found at a cheaper price elsewhere on that day, for the simple reason that there was no fuel on offer apart from Nooa Petroleum.

G In the final analysis, having regard to the surrounding circumstances and the motive for the directive, it cannot by any stretch of the imagination be suggested that the directive was meant to extend any favour to Nooa Petroleum. In any case, the State was unable to lead any evidence tending to show that the motive for the directive was other than to avert the emergency H staring the nation in the face at the material time.

Bhunu J

For the foregoing reasons we were of the unanimous view that on the A evidence presented before us, the State has failed at the close of its case to establish a *prima facie* case upon which a reasonable court acting carefully might convict the accused on either count. That being the case, the court has no option but to discharge the accused at the closure of the State case.

The accused is accordingly found not guilty and acquitted on both counts B at the closure of the State case.

Attorney General's Office, State's legal practitioners

Mtetwa & Nyambirai, accused's legal practitioners C

* *Editor's note*: s 35 of the Procurement Regulations states that "Any person who contravenes any provisions of these regulations shall be guilty of an offence' but provides no penalty. There is no general penalty provision in the Procurement Act, nor does s 31 of the Act (under which regulations may be made) provide for the creation of offences or the imposition of penalties. Section 30 of the Act does not create an offence. There would thus appear no legal basis for the alternative charge.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/THIRDLINE TRADING (PVT) LTD & ANOR v BOKA INVESTMENTS (PVT) LTD & ANOR 2011 (1) ZLR 625 (H)

THIRDLINE TRADING (PVT) LTD & ANOR v BOKA INVESTMENTS (PVT) LTD & ANOR 2011 (1) ZLR 625 (H)

Citation	2011 (1) ZLR 625 (H)
Case No	Judgment No. HH-130-11
Court	High Court, Harare
Judge	Uchena J
Heard	24 February 2011
Judgment	29 June 2011
Counsel	*H Zhou*, for the applicant *J Mafusire*, for the respondents
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Company – *legal proceedings – proceedings brought after winding up order granted – application for rescission of default judgment – such proceedings having effect of disposing of company's right of action –* D *proceedings void*

Company – *winding up – by court – legal proceedings brought by company after winding up order granted – application for rescission of default judgment – such proceedings having effect of disposing of company's right of action – proceedings void*

Headnote

E The day after a provisional winding up order had been granted against the applicant company, an application was brought in the company's name for the rescission of a default judgment previously granted against it by the first respondent. The respondent argued that the application was a nullity in view of the provisions of s 213(a) of the Companies Act F [*Chapter 24:03*], which provides that in a winding up by the court no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose. The applicant's counsel submitted that it is only proceedings to be proceeded with or commenced against the company G being wound up which are affected by s 213(a) and that proceedings instituted by the company are not affected.

Held, that in terms of s 213(c), every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void. H The determination of the application for rescission would lead to the

Uchena J

disposition of the applicant's right of action, which enabled it to make A the application. Once a determination is made on that right of action, the Master or liquidator cannot revisit that right of action, as the cause of action will have been finalized by the court's determination. There was no order of court authorizing the application for rescission, nor was the application at the instance of the Master or the liquidator. Accordingly, B the proceedings were a nullity.

Legislation considered

Companies Act [*Chapter 24:03*], s 213, 221(2) & 253

High Court Rules 1971 (RGN 1047 of 1971), rr 3, 4C, 226(1), 246(1)(b) & 449 D

Case information

H Zhou, for the applicant

J Mafusire, for the respondents

Judgment

UCHENA J: The dispute between the parties first appeared before me as a chamber application for a default judgment. The application was instituted by the first respondent who was then the applicant. The application was against the second respondent and the applicants who were the defendants in the main case.

The default judgment was premised on the second respondent not having entered appearance to defend. The application cites the second defendant and E the applicants as respondents, though the body of the application specifically states that "application for default judgment is hereby made against the first defendant only". The second respondent is the first defendant in the main action. The applicants, who are the second and third defendants in the main action, had entered appearance to defend. F

The default judgment was granted on the following terms:

> "The first defendant is hereby barred, restrained and interdicted from issuing to either the second defendant or the third defendant or both the second and third defendants a tobacco auction floor licence issued in terms of s 44 of the Tobacco Marketing and Levy Act [*Chapter 18:12*], in respect of premises known as the Boka Tobacco Auction Floors situate on the 13 kilometre peg along Simon G Mazorodze Road Harare."

The applicants have, after initially asking the court to rescind the default judgment through correspondents, which was vigorously opposed by the first respondent, now filed a chamber application, for the rescission of the default judgment in terms of r 449(1)(a), of the High Court Rules. It was submitted on their behalf that the default judgment was erroneously granted H

A in the absence of interested parties. Rule 449 provides as follows:

> "(1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order –
>
> (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or B
>
> (b) in which there is an ambiguity or a 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.
>
> (2) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may C be affected have had notice of the order proposed."

Mr *Zhou* for the applicants filed heads of arguments, in which he submitted that the applicants were not given notice of the application for default judgment, and that the default judgment was therefore granted in the absence of interested parties. He submitted that the applicants are interested parties, because the order sought and granted directly affect them.

D Mr *Mafusire* for the respondents filed heads of arguments, in which he argued that there is no rule which obliges an applicant for a default judgment against a co-defendant who will not have entered appearance to defend, to serve co-defendants who will have entered appearance to defend.

The first issue is, therefore, whether or not I should have directed that the E co-defendants be served, as the order sought and granted, was intended to and affects them directly. It effectively takes from them that which they had entered appearance to defend.

The second issue is whether or not the default judgment was erroneously sought and erroneously granted, and can be rescinded in terms of r 449(1) F (a). The parties filed heads of arguments for and against the rescission of the default judgment. I set the case down for counsel for the applicants and the respondents to present any further arguments in terms of r 246(1)(b) of the High Court Rules. Rule 246(1)(b) provides as follows:

"(1) A judge to whom papers are submitted in terms of rule 244 or 245 may –

(a) … G

(b) require either party's legal practitioner to appear before him to present such further argument as the judge may require."

Rule 246 enables a judge, where necessary, to call legal practitioners for the parties and ask them to present such further argument as the judge may require. In this case, the parties had filed detailed heads of argument, which did not H however deal with what I thought was the determining factor in this case.

2011 (1) ZLR p628

Uchena J

When the parties appeared before me on 24 February 2011, I allowed them A to amplify their heads of argument, after which I asked them to address me on the provisions of r 4C (a) and (b) for which I had invoked the provisions of r 246(1)(b). Rule 4C provides as follows:

"The court or a judge may, in relation to any particular case before it or him, as the case may be – B

(a) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;

(b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient." C

Mr *Zhou* for the applicants submitted that r 4C authorised a judge to direct a departure from the rules, and to fill gaps not provided for in the rules. Mr *Mafusire* for the respondents submitted that the rule shows that the court is not made for the rules but that the rules are made for the court. He agreed with Mr *Zhou* that r 4C entitles a judge or the court to give directions on D procedure where the rules do not provide for a matter before the court. The legal practitioners are agreed on the court's power to direct a departure from any provision of the High Court Rules (r 4C(a)) and to fill gaps in the rules where the rules do not provide for the circumstances of a case before the court (r 4C(b)).

I then reserved judgment and started working on it but was interrupted by the E respondents' counsel's letter dated 7 March 2011, in which he advised that the proceedings of 24 February 2011 were null and void as the applicants' companies had been provisionally wound up by an order granted by Makoni J on 23 February 2011. He relied on s 213 of the Companies Act [*Chapter 24:03*], which provides as follows: F

"In a winding up by the court –

(a) no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose;"

(b) any attachment or execution put in force against the assets of the company after the commencement of the winding up shall be void; G

(c) every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void."

I caused the letter to be brought to the attention of the applicants' counsel for his comment. By letter dated 7 April 2011, he commented that it is only H

2011 (1) ZLR p629

Uchena J

A proceedings to be proceeded with or commenced against the company being wound up which are affected by s 213(a). He submitted that proceedings instituted by the company are not affected. I caused the applicants' counsel's letter to be referred to the respondents' counsel for his reply to the applicants' counsel's comments. By letter dated 20 April 2011 the respondents' counsel referred the court to s 213(c) which provides as follows:

> B "(c) every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void".

The determination of this application will lead to the disposition of the C liquidated applicants' right of action, which enabled it to make this application.

There is no doubt in my mind that s 213(a) of the Companies Act deals with the proceeding with or commencement of actions against the company. This means actions by the company itself are not covered under s 213(a). I am also satisfied that s 213(c) of the Companies Act is aimed at preserving the property and rights of action of the company wound up by the court, unless D the court winding up the company orders otherwise. This, in my view, means proceeding with this case *mero motu* or at the instance of the company which has now been liquidated will lead to the disposition of its right of action without the leave of the court or the involvement of the Master or the provisional liquidator who has been appointed. Once a determination is made on that right of action, the Master or liquidator cannot revisit that E right of action as the cause of action will have been finalized by the court's determination. Section 213(c) provides that such action (the extinction of the right of action) shall be void unless "the court orders otherwise". This, in my view, means the proceedings of 24 February 2011 are void as there was no order of the court authorizing them. This view is supported by s 221(2) F of the Companies Act, which provides as follows:

> "(2) The liquidator shall have power, with the leave of the court or with the authority mentioned in subsection (4) or in paragraph (a) of subsection (4) of section *two hundred and eighteen* –
>
> (*a*) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature and, subject to any law relating to G criminal procedure, any criminal proceeding:
>
> Provided that immediately upon the appointment of a liquidator or a provisional liquidator the Master may authorize upon such terms as he thinks fit legal proceedings for the recovery of any outstanding accounts, the collection of which appears to him to be urgent".

This section makes it clear that any action after liquidation can be started H or continued by the Master or the liquidator. Section 253 also supports this

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view, as it provides that, on liquidation: A

> "(1) All the powers of the directors shall cease except so far as the liquidator or the creditors of the company sanction their continuance."

There is in this case no indication that the directors were authorised to continue with the prosecution of this application.

It therefore seems to me that the proceedings of 24 February 2011 were B authorised by persons whose powers to act on behalf of the company had ceased.

In the result I hold that the proceedings of 24 February 2011 are a nullity as they were not by the leave of the court or at the instance of the Master or the liquidator. C

The provisions of s 213(c) of the Companies Act have the effect of freezing the disposition of the company's assets, including disposition of the company's rights of action through this application. The use of the word "every disposition" disables me from proceeding with these proceedings, *mero motu* or on the applicants' application, as it is every disposition which is rendered void unless the court orders otherwise. D

A judge hearing a chamber application cannot make the order referred to in s 213(c), as such an order can only be made by a court as defined in Order I r 3 of the High Court Rules 1971. Order 1 r 3 defines chamber application, court application, court and a judge as follows;

> "chamber application" means an application to a judge in terms of paragraph E (*b*) of subrule(1) of rule 226;
>
> "court" means the General Division of the High Court;

"court application" means an application to the court in terms of paragraph (*a*) of subrule(1) of rule 226;

"judge" means a judge of the court, sitting otherwise than in open court. F

This means that where a statute provides that certain things can be done by a court, the doing of such things must be triggered by a court application to a court. Rule 226(1)(a) and (b) makes a distinction between court applications and chamber applications and to whom they are made.

In the result, the determination of the applicants' application is held in abeyance until the applicant takes the necessary steps to enable the court to G finalise the application.

Dube Manikai & Hwacha, applicants' legal practitioners

Scanlen & Holderness, respondents' legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 1/NDLOVU v HIGHLANDERS FOOTBALL CLUB 2011 (1) ZLR 631 (H)

NDLOVU v HIGHLANDERS FOOTBALL CLUB 2011 (1) ZLR 631 (H)

Citation	2011 (1) ZLR 631 (H)
Case No	Judgment No. HB-95-11
Court	High Court, Bulawayo
Judge	Cheda J
Heard	30 June 2011
Judgment	30 June 2011
Counsel	*N Ndlovu*, for the applicant *Z Ncube,* for the respondent
Case Type	Application for summary judgment
Annotations	No case annotations to date

Flynote

C **Court** – *High Court – jurisdiction – labour matter – what is – acknowledgment of debt arising out of a labour dispute – court having jurisdiction*

Employment – *Labour Court – jurisdiction – labour matter – what is – acknowledgment of debt arising out of a labour dispute – High Court having jurisdiction*

Headnote

D An acknowledgment of debt, even if it arises from a labour dispute, does not fall within the definition of a labour dispute as envisaged by s 89(6) of the Labour Act [*Chapter 28:01*]. An acknowledgment of debt is nothing but a liquid document which is covered by the Rules of the High Court, E for which an application for summary judgment can be applied.

Cases cited

Heyns v Heyns 1978 RLR 324 (A)

Hindley & Co Ltd v General Fibre Co Ltd [1940] 2 KB 517

Hire-Purchasing Furnishing Co v Richens (1887) 20 QBD 387 (CA)

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

York Estates Ltd v Wareham 1949 SR 197; 1950 (1) SA 125 (SR)

Legislation considered

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

Case information

G *N Ndlovu*, for the applicant

Z Ncube, for the respondent

Judgment

CHEDA J: This is an application for a summary judgment.

The historical background and genesis of this matter is that the applicant H (hereinafter referred to as "Madinda") is a yesteryear international football

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Cheda J

icon who entered into an employment contract with the respondent (hereinafter A referred to as "the Club"). The contract was signed on 7 October 2008. One of the terms and conditions of the contract was that the Club was to pay him US$5 000 per month and US$3 000 for the 2009 season. The Club fell into financial difficulties and failed to pay him. The total amount due is US$18 580, which amount was acknowledged by the Club's representative B on 3 August 2009. Despite demand, the Club has failed to honour irs part of the agreement, resulting in these proceedings.

At the start of this hearing, the Club raised two points *in limine,* namely, that this court has no jurisdiction to hear this application as it is a labour dispute, and secondly, that this was an illegal contract as the Club and Madinda contracted to pay and be paid in foreign currency without authority from C the Exchange Control Authority.

Where points *in limine* have been raised the court has a discretion, either to deal with the points *in limine* first before hearing the merits or to allow submissions to be made on the merits before making such determination on the points raised *in limine*. In the exercise of that discretion, I allowed D arguments on the merit to proceed.

With regard to the issue of jurisdiction, I have had sight of *Tuso* v *City of Harare* 2004 (1) ZLR 1 (H), which was referred to me by Mr *Ncube* for which I am grateful. I am of the view that the present case is distinguishable as it deals with an acknowledgement of debt, which is, itself, a liquid E document and therefore does not fall within the definition of a labour dispute as envisaged under s 89(6) of the Labour Act [*Chapter 28:01*]. It is my respectful view that, while it was the intention of the legislature to oust the jurisdiction of the courts from adjudicating on matters involving labour disputes, an acknowledgement of debt, even if it arises from a contract of labour, is not what the legislature intended to mean. An acknowledgment of F debt is nothing but a liquid document which is covered by the High Court Rules, for which an application for a summary judgment can be applied for.

The second point deals with illegality. It is the Club's submission that the transaction which involved the agreement to pay Madinda in US dollars was illegal. Sections 4 and 10 of the Exchange Control Regulations, 1996 (SI 109 G of 1996) make it clear that any such transaction is illegal unless authorised by the Exchange Control Authority. The parties contracted to deal in a foreign currency in an unlawful manner. In other words, they agreed to commit a crime. In the circumstances they are both culpable.

The general rule is that the court cannot enforce a contract whose object is to commit an illegality. The element of intention is crucial in this instance., If H

Cheda J

A it was unilateral, it is unenforceable at the suit of the party who is proved to have had the intent to break the law at the time of the contract. If the intent was mutual the contract is not enforceable at all. This principle has been with us under the Roman-Dutch law and the English law. See *Hindley & Co Ltd* v *General Fibre Company Ltd* [1940] 2 KB 517 and *Hire Purchasing Furnishing Co* v *Richens* (1887) 20 QBD 387 (CA). For that reason, no B court will lend its support to a man who bases his cause of action upon an illegal or immoral act.

In casu, the parties knew at the time that the country was going through economic hardships and that the Zimbabwean dollar was tumbling uncontrollably. From an economic point of view, they felt that it was only proper C for them to transact in foreign currency, which was in direct contravention of the provisions of the Exchange Control Regulations. By acting in this manner, they were no doubt mutually committing an offence. It is for that reason that Madinda cannot be allowed to enforce an illegal contract.

I must add here that the parties have a long established relationship which is held in high esteem by the nation and, as such, it was not necessary for D this matter to have been allowed to degenerate to this level. It is clear that both parties have immensely benefited from each other during their blissful days and as such there may be a need for them to re-visit the negotiating table and iron out their differences. This, in my view, will help resolve this matter once and for all. This is only my opinion.

E What cannot escape this court is that this was an illegal contract and the law, as stated above, is also clearly laid down in *Heyns* v *Heyns* 1978 RLR 324(A); and in *York Estates Ltd* v *Wareham* 1949 SR 197; 1950 (1) SA 125 (SR), where Lewis ACJ said:

> "As a general rule, a contract or agreement which is expressly prohibited by statute is illegal, null and void even when, as here, no declaration of nullity has F been added by the statute."

The position is that the contract is a nullity and not even the principle of equity can rescue it. The parties have made submissions on the merits, but, in view of the points raised *in limine,* it is not necessary to proceed to determine the issue any further.

G Order

The point raised is upheld and the application is dismissed accordingly.

Cheda & Partners, applicant's legal practitioners

H *Coghlan & Welsh*, respondent's legal practitioners

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MUHWATI v NYAMA 2011 (1) ZLR 634 (H)

Citation	2011 (1) ZLR 634 (H)
Case No	Judgment No. HH-137-11
Court	High Court, Harare

Judge	Mawadze J
Heard	30 June 2011
Judgment	30 June 2011
Counsel	*S Hofisi*, for the plaintiff Defendant in default
Case Type	Unopposed application
Annotations	No case annotations to date

Flynote

Damages – *assessment – delictual – adultery – principles – basis of a claim* C *for adultery – contumelia and loss of consortium – what each consists of – estimate of damages due to plaintiff for each*

Delict – *actio injuriarum – adultery – claim for damages – how damages to be claimed – damages for emotional stress and embarrassment – not claimable separately – fall under head of contumelia* D

Headnote

A claim for adultery damages is generally premised on two aspects, which are damages for *contumelia* and damages for loss of *consortium*. *Contumelia* is equated to the injury, hurt, insult and indignity inflicted upon a plaintiff by the adultery committed by a defendant with his E or her spouse. *Consortium* relates to the loss of comfort, society and service of a wife or husband as a result of the adultery committed by the defendant. There is no basis for a plaintiff to split his or her claim into other aspects like emotional stress, embarrassment or the breakdown of the marriage, all of which fall under the ambit of *contumelia* and the loss of *consortium*. F

The factors which a court should take into account in arriving at an estimate of the damages due to a plaintiff for *contumelia* may be listed as follows:

(a) the character of the spouse involved;

(b) the social and economic status of the plaintiff and defendant;

(c) whether the defendant has shown contrition; G

(d) the need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse;

(d) the level of awards in similar cases.

Cases cited

Chinyadza v Phiri HH-76-09 H

2011 (1) ZLR p635

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A *Dera v Kambeza* HH-175-10

Doyle v Salgo (1) 1957 R & N 840; 1958 (1) SA 36 (FS)

Gombakomba v Bhudhuyo HH-118-06

Katsumbe v Buyanga 1991 (2) ZLR 256 (H)

Khumalo v Mandishona 1996 (1) ZLR 434 (H)

Mtungwazi v Sibanda HB-61-90

B *Nyandoro v Tizirai* HH-12-06

Takadini v Maimba 1996 (2) ZLR 737 (S)

Case information

S Hofisi, for the plaintiff

Defendant in default

Judgment

C **MAWADZE J:** This is an application for default judgment. The claim is for adultery damages in the sum of US$20 000.

The brief facts of the matter may be summarised as follows. The plaintiff (now the applicant) issued summons out of this court on 12 March 2010 D seeking adultery damages in the sum of US$20 000 against the defendant (now the respondent). The plaintiff's prayer as captured in the declaration, para 9 of which is as follows:

"Whereof the plaintiff claims for:

(a)	Loss of contumelia	US$5 000
(b)	Loss of consortium	US$5 000 E
(c)	Emotional stress	US$3 000
(d)	Embarrassment	US$2 000
(e)	Breakdown of marriage	US$5 000
(f)	Costs of suit" (*sic*).	

The plaintiff's prayer is couched differently in the affidavit of evidence, para 19 of which reads as follows:

F "19 Wherefore I pray the following:

a)	Damages for loss of contumelia	US$5 000
b)	Damages for loss of consortium	US$5 000
c)	Damages for emotional stress and embarrassment	US$5 000
d)	Breakdown of marriage and loss of support	US$5 000 (*sic*)".

The defendant was served with the summons at her place of residence G through her sister in law on 23 March 2010. No appearance to defend was filed. The plaintiff applied for a default judgment after the expiry of the time within which to file appearance to defend. The application was filed on 9 September 2010. The matter was referred to the unopposed roll. On 16 June 2011 I directed Mr Hofisi for the plaintiff to file heads of argument H in addition to the affidavit of evidence already filed of record justifying the

basis for the claim and more importantly the *quantum* of damages. This was A done on 21 June 2011.

The facts of this case as can be gleaned from both the plaintiff's declaration and affidavit of evidence is as follows.

The plaintiff married Moses Muhwati on either 7 February or 7 March 1987 (the marriage certificate is not clear) in terms of the Marriage Act [*Chapter* 5:*11*]. The marriage was blessed with two children Vimbai and Kudzai who are now both majors.

The adulterous relationship between the defendant and the plaintiff's husband started in 2006. By then the plaintiff had been married for about 19 years. This adulterous relationship has continued unabated to date. It has therefore been in existence for about six years. In fact a child, Tinotenda, was born out of this relationship in 2008.

It is not clear as to when the plaintiff confronted the defendant and advised her of the marital status of her husband, Moses Muhwati. It is the plaintiff's case that at all material times the defendant, when engaged in sexual intercourse with her husband, the defendant was aware of Moses Muhwati's marital status, hence the adulterous nature of the relationship. The plaintiff stated that she even approached the defendant's mother and aunt at the defendant's residence at number 33 Mwambi Street, Mbare, Harare to register her disapproval of the adulterous relationship between the defendant and her husband. The plaintiff said the defendant had ignored her initial attempt to dissuade the defendant from the relationship. According to the plaintiff, the defendant's mother and aunt assured her that they would prevail upon the defendant and cause her to desist from such a relationship with the plaintiff's husband. Apparently nothing positive came out of this promise. Instead the adulterous affair between the defendant and the plaintiff's husband blossomed resulting in the birth of a child in 2008. The plaintiff's husband has since moved out of the matrimonial home in Bluff Hill Harare and is now cohabiting with the defendant and their child. The plaintiff's marriage which had hitherto been stable and strong for 19 years has been wrecked. She has now lost the love, comfort, society and companionship she used to have with her husband. Most importantly she has lost the conjugal rights. The plaintiff makes it clear that she has now lost all other services she used to get from her husband as her marriage now exists on paper only.

It is the plaintiff's case that she has now lost all financial support she used to get from her husband. Her husband is a director and shareholder of two companies, Demotive (Pvt) Ltd and Demotors (Pvt) Ltd. The companies generated financial resources to support the family. The plaintiff said her

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husband owns a farm in the District of Umtali, being subdivision 2 of the remaining extent of Essex measuring 57 hectares, where they grow various cash crops realising a substantial income. According to the plaintiff she used to receive US$3 500 from the income generated from the companies and the farm, which she used to buy food for the family and pay school fees for the children. All this is now history, as the defendant and her child are now the sole beneficiaries of all the fruits reaped from the business concerns and farming activities. The plaintiff has been banished from the farm.

It is the plaintiff's contention that her self-esteem has been severely lowered to the point of ultimate humiliation. The plaintiff is a banker and head of operations at Interfin Bank. Her job commands respect but this is no longer the case as her marital tribulations are now an open secret at her work place where she has obviously lost all respect. The plaintiff's social and religious life has not been spared either. She is a devout Christian belonging to the ZAOGA, church where her father in law is a bishop. Her husband and the defendant, through their adulterous affair, have embarrassed her even at church. She can no longer enjoy her freedom of worship. According to the plaintiff, her husband is a shareholder and organising secretary of Gunners Football Club and she used to attend soccer matches and other related social functions as "very important persons" in the company of her husband. Her role in this regard has been taken over by the defendant. She is now even ashamed to be seen at such social gatherings.

I am satisfied that the plaintiff in both her affidavit of evidence and heads of argument has addressed the issues pertaining to the basis for the claim and the *quantum* of adultery damages. I am, however, not persuaded that the plaintiff is entitled to adultery damages in the sum of US$20 000.

As already stated, there is some confusion and or lack of clarity in the F plaintiff's prayer both in the declaration and the affidavit of evidence. The heads of argument filed by the plaintiff are very detailed and useful. I am indebted to Mr *Hofisi* in that regard. Be that as it may, the plaintiff could not still justify the claim of damages in the sum of US$20 000, even from the cases referred to.

G I am satisfied that the plaintiff's marriage has been virtually destroyed. She had lost her husband of 24 years to the defendant. Her dignity and self esteem has been lowered in the eyes of her peers, workmates, fellow church members and the public at large. The plaintiff's children, though majors, have lost a father and all the financial support. I am in no doubt that the H defendant's conduct has caused immense emotional stress and embarrassment

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to the plaintiff. It is, however, not an easy task to quantify all these findings A into financial terms.

A claim for adultery damages is generally premised on two aspects, which are damages for *contumelia* and damages for loss of *consortium*. See *Khumalo* v *Mandishona* 1996 (1) ZLR 434 (H). There is no basis therefore for the plaintiff to split her claim into other aspects like "emotional stress, embarrassment, B breakdown of marriage" which all fall under the ambit of *contumelia* and loss of *consortium*. By adopting this approach alone the plaintiff's claim is reduced to US$10 000 from US$20 000.

In *Chinyadza* v *Phiri* HH-76-09 Kudya J at p 4 of the judgment defined *contumelia* as follows: C

> "*Contumelia* is equated to the injury, hurt, insult and indignity inflicted upon a plaintiff by the adultery committed by a defendant with his or her spouse".

The learned judge made reference to a number of case,s which include *Doyle* v *Salgo (1)* 1957 R & N 840 (FS) at 844 A; *Katsumbe v Buyanga* 1991 (2) ZLR 256 (H) at 258C: *Takadini* v *Maimba* 1996 (2) ZLR 737 (S) at 735F: *Nyandoro* v *Tizirai* HH-12-06; and *Gombakomba* v *Bhudhiyo* HH-118-06. D

In *Khumalo* v *Mandishona supra* Malaba J (as he then was) outlined factors the court should take into account in arriving at an estimate of the damages due to the plaintiff for *contumelia*. Let me proceed to list them and highlight their relevance in the present case.

(a) The character of the spouse involved: From the facts of the matter E it would appear that both the plaintiff and her husband were devout Christians and they had lived in happy matrimony for 19 years before the defendant intruded into their marital relationship.

(b) The social and economic status of the plaintiff and defendant: The defendant chose not to defend this claim and the court is inhibited in F assessing any other factors which may be mitigatory and or in her favour. I have already referred to the plaintiff's social and economic status and how all this have been ruined.

(c) Whether the defendant has shown contrition: There is nothing to show that the defendant is contrite. In fact, the defendant in her wisdom decided G to disregard the court proceedings. The inference one may draw is that the defendant is oblivious to the consequences of her conduct and was careless in that regard. Such an attitude should be considered by the court and properly assessed as an aggravating factor.

(d) The need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse. There H

Mawadze J

A is always the inherent danger that the plaintiff is exposed to the risk of contracting the HIV virus as a result of her husband's promiscuous conduct of engaging in extra marital sex with the defendant. The courts play a vital role in preserving the institution of marriage and should punish accordingly those who find pleasure in promiscuity. B

(e) The level of awards in similar cases: All the cases cited in the heads of argument indicate that the level of awards made both for damages for contumelia and loss of consortium do not amount to US10 000. These include *Mtungwazi* v *Sibanda* HB-61-90; *Nyandoro* v *Tizirai supra*; *Chinyadza* v *Phiri supra*; and *Dera* v *Kambeza* HH-175-10. The awards in respect of damages for *contumelia* range from US800 to US$5 000. C I am satisfied that an award of US$2 500 is adequate to compensate the plaintiff for *contumelia*.

Consortium relates to loss of comfort, society and service of wife or husband as a result of the adultery committed by the defendant. See *Chinyadza* v *Phiri supra*. I have already referred to the plaintiff's evidence in that regard. Mr *Hofisi* in the heads of arguments did not refer to specific awards made D by this court in relation to damages for loss of consortium. In *Chinyadza* v *Phiri supra* an award of US$500 was made for loss of consortium. In *Dera* v *Kambeza supra* the court granted damages in the sum of US$400 for loss of *consortium. In casu* the defendant chose not to defend the claim and the plaintiff's averments are not controverted. In the exercise of my discretion, E after weighing all the factors as outlined in the plaintiff's evidence, I estimate damage for loss of *consortium* to be US$2 500.

In the result it is ordered that the defendant shall pay the plaintiff the sum of US$5 000 as damages for adultery, with interest thereon at the prescribed rate from the date of judgment to the date of full payment and costs of suit.

F *V Nyemba & Associates*, plaintiff's legal practitioners

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