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S v MADZOKERE & ORS 2011 (2) ZLR 1 (H)

Citation	2011 (2) ZLR 1 (H)
Case No	Judgment No. HH-154-11
Court	High Court, Harare
Judge	Uchena J
Heard	14 June 2011; 15 June 2011; 16 June 2011; *CAV*
Judgment	1 July 2011
Counsel	*C Kwaramba*, for the applicants *E Nyazamba*, for the respondent
Case Type	Bail application
Annotations	No case annotations to date

Flynote

Criminal procedure – *bail – application for bail – principles to be observed – requirement for court to lean in favour of granting bail – grounds on which bail may be denied – propensity to disturb public order – what* D *must be shown*

Headnote

The release of an accused person on bail is aimed at enabling him to attend trial from out of custody. It does not mean that he has no case to answer. On the other hand, the detention of an accused in custody is to secure his attendance to stand trial, if there are genuine grounds for believing that the factors mentioned in s 117(2) of the Criminal Procedure and E Evidence Act [*Chapter 9:*07] have been established against him. That is why the seriousness of the charge the accused is facing is not on its own enough to deny an accused person bail. The court must therefore endeavour to strike a balance between the interests of justice and the accused's liberty. Section 117(1) leans in favour of the liberty of the F accused person, where it states that the accused "*shall be entitled to be released* on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, *unless the court finds that it is in the interests of justice that he or she should be detained in custody*" (emphasis added). The intention of the legislature was to make s 117 consistent with the presumption of the accused's innocence until proved G guilty. That proof or lack of it can only be established at the accused's trial. The factors to be considered in a bail applications are:

1. whether, if the applicant is released on bail, he will endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or H
2. whether the applicant will abscond if released on bail; or

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3. whether the applicant will interfere with witnesses or evidence if A released on bail; or

4. whether the release of the applicant on bail will undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or
5. where, in exceptional circumstances, there is the likelihood that the B release of the accused will disturb the public order or undermine public peace or security.

One or more of these factors must be established. They need not all be proved before a court can find that it is in the interests of justice for the accused to be detained in custody pending trial.

If it is alleged that release on bail would undermine or jeopardise the objectives C or proper functioning of the criminal justice system (including the bail system), the applicant must be proved to have done things which can affect the proper functioning of the criminal justice system or to be likely to do so.

Case referred to D

S v Hussey 1991 (2) ZLR 187 (S)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:*07], s 117(1) & (2) E

Case information

C Kwaramba, for the applicants

E Nyazamba, for the respondent

Judgment

UCHENA J: The applicants are facing a charge of contravening s 47 (1) (a) of the Criminal Law Codification and Reform Act [*Chapter 9*:*23*]. It is alleged F that they murdered Petros Mutedza, who was an inspector in the Zimbabwe Republic Police. He had been called to disperse MDC (T) youths who had gathered unlawfully at Glen View 3 Shopping Centre. The same group of MDC (T) youths, numbering about 50, had earlier on been dispersed by other police officers from Glen View 4 Shopping Centre. G

When the deceased and his team of uniformed police officers arrived at Glen View 3 Shopping Centre, he inquired from some of the youths as to where their leaders where. He was informed that they were in Munyarari Night Club, after which he and five police officers entered the night club to tell the youths' leaders that they should disperse as their gathering had not been authorised by the police. The group of youths then shouted in Shona H

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A "matatyangaauraiwe". The deceased, and his police officers, were then attacked, with various missiles, including stones, bricks and stools. They were forced to run away from the night club, with a volley of missiles being thrown at them. The deceased mistook the white Nissan Hardbody, which was later driven away by the sixth applicant, for their unmarked police motor vehicle. He ran to it and tried to open the door so he could seek refuge in B the motor vehicle, but the sixth applicant closed the door and drove the motor vehicle a few metres away from the deceased. He was struck the fatal blow and fell to the ground. He was then kicked and trampled by the mob of youths, until he lost consciousness and died. On seeing the result of their acts, some of the youths jumped into the Nissan Hardbody, and the C sixth applicant drove them away at high speed. The eleventh applicant also drove her motor vehicle from the scene with some of the youths who had attacked the deceased. Those who remained at the scene quickly removed their MDC (T) T-shirts, and left the scene.

The other police officers ran to their police motor vehicle but one of them D was seriously injured.

The applicants applied for bail pending trial, which the State strenuously opposed. Mr *Kwaramba* made detailed submissions on why the applicants should be granted bail. Mr *Nyazamba,* for the respondent, also made detailed submissions on why the applicants should not be granted bail. They both relied on s 117(1) and (2) of the Criminal Procedure and Evidence Act E [*Chapter 9*:*07*] (CP&E Act), which provides as follows:

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

(2) The F refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established — G

(a) where there is a likelihood that the accused, if he or she were released on bail, will —

(i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or

(ii) not stand his or her trial or appear to receive sentence; or

(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(iv) undermine or jeopardise the objectives or proper functioning of the H criminal justice system, including the bail system; or

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2011 (2) ZLR p4

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

The section makes it clear that an accused person is entitled to be released on bail, unless the court finds that it is in the interests of justice that he or she should be detained in custody. The detention of an accused person in B custody can only be in the interests of justice if one or more of the factors mentioned in s 117(2) is or are established against him.

The release of an accused person on bail is aimed at enabling him to attend trial from out of custody. It does not mean he or she has no case to answer. On the other hand the detention of an accused in custody is to secure his or her attendance to stand trial, if there are genuine grounds for believing that C the factors mentioned in s 117(2) have been established against him. That is why the seriousness of the charge the accused is facing is not on its own enough to deny an accused person bail. The court must therefore endevour to strike a balance between the interests of justice, and the accused's liberty. Section 117(1) leans in favour of the liberty of the accused person, hence D the use of the words, "*shall be entitled to be released on bail* at any time after he or she has appeared in court on a charge and before sentence is imposed, *unless the court finds that it is in the interests of justice that he or she should be detained in custody"* (my emphasis). The intention of the legislature was obviously to make s 117 consistent with the presumption of the accused's innocence until proved guilty. That proof or lack of it can E only be established at the accused's trial.

The factors to be considered in the applicants' bail applications are therefore:

1. whether, if the applicant is released on bail, he or she will endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or F
2. whether the applicant will abscond if released on bail, or
3. whether the applicant will interfere with witnesses or evidence if released on bail, or
4. whether the release of the applicant on bail will undermine or jeopardise the objectives or proper functioning of the criminal justice system, G including the bail system;
5. whether or not the release of the applicant on bail will disturb the public order or undermine public peace or security.

In general, Mr *Kwaramba* for the applicants submitted that the applicants are good candidates for bail and gave each applicant's personal details. He H

2011 (2) ZLR p5

Uchena J

A extensively dealt with each of the grounds which the State had in its response advanced as the reasons why the applicants should not be released on bail.

Endangering society and other persons and commission of other offences

Mr *Kwaramba* submitted that the applicants cannot endanger society as B they did not commit the offence and have no previous convictions showing they were ever involved in public violence. He submitted that the offence is merely being thrust upon the MDC (T) when it could have been

committed by an ordinary member of the public who may escape prosecution because the police have devoted their effort on the MDC (T) party's activists. He C submitted that the applicants are not facing other charges which would show they have a propensity towards committing offences.

Abscondment

Mr *Kwaramba* argued that the applicants will not abscond because the State's case against them is weak. While admitting that the murder of a police officer D during the execution of his duties is a serious offence, he argued that the applicants are denying the charge and that the seriousness of an offence on its own is not a ground for refusing an applicant bail. He submitted that the applicants are of fixed abode and that all, except the third applicant, live and have families in this country. Most of them are of limited means and would E not be able to start a new life in a foreign country. He said those who have means have strong links to this country through their assets, family ties and businesses. He said those who have travel documents can surrender them to the court, and in any event they have already been taken by the police, from which they can easily be accessed.

F He further submitted that the State's allegations that the applicants will abscond because most of them were arrested away from their homes, or during night raids at their homes, is not an indication that they will abscond, as most people are bound to be away from home, especially during the day.

Mr *Kwaramba* submitted that the State case is not strong because the medical report states that the deceased died of a head injury. He argued that it is G impossible for all the applicants to have thrown the half brick which caused that head injury. He submitted that as police intelligence officers observed the attack on the deceased they must have indicated who threw the half brick. He submitted that there is no allegation that there was common purpose which would make the conduct of the person who threw the half brick attributable H to the other applicants. He also submitted that the post mortem report states

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that the deceased died of a head injury due to assault. He argued that the A doctor has shown bias because he mentioned that there was an assault.

Mr *Kwaramba* further submitted that the State's case is not strong because the alibis proffered by the applicants were not investigated by the police.

Interference with witnesses and evidence

Mr *Kwaramba* submitted that the applicants do not know the witnesses, and B therefore cannot interfere with witnesses they do not know. He submitted that the witnesses who were described as police officers, who were in plain clothes, cannot be interfered with by the applicants. He submitted that the exhibits are already in the custody of the police and can no longer be interfered with. He submitted that the investigations are almost complete so there is C no fear that the applicants can interfere with investigations.

Undermining or jeopardising the criminal justice system, including the bail system

Mr *Kwaramba* submitted that the release of the applicants on bail will not undermine the criminal justice system, as they have no pending cases in the D courts. They do not have previous convictions which would tend to show a propensity towards criminal conduct on their part.

Disturbing public order or undermining public peace or security

Mr *Kwaramba* submitted that the applicants will not disturb public peace, or undermine public peace and security if they are released on bail. He argued E that the applicants do not have previous convictions, or pending cases which would show that they can disturb public peace order and security if released on bail. He said their good records show that they are unlikely to disturb public order, peace and security.

The State's response F

In response to the applicants' submissions Mr *Nyazamba* for the respondent submitted that the applicants are not good candidates for bail. He made submissions on the five grounds relied upon by the applicants' counsel.

Endangering society and other persons and commission of other offences G

Mr *Nyazamba* submitted that the applicants will endanger society as they are likely to commit offences involving public violence,which offences have, according to Inspector Ntini the investigating officer, become prevalent. He added that the release of the applicants, who are political activists, will be received by society with shock. H

A **Abscondment**

Mr *Nyazamba* submitted that the applicants are facing a very serious case involving the murder of a police officer who was on duty. He submitted that the applicants face capital punishment if convicted and that will induce them to abscond if granted bail. He submitted that the State's case is very strong, B as the applicants were seen committing the offence by police intelligence officers who were at the scene and had called the deceased and his reaction team of uniformed police officers. He also submitted that the applicants were seen by members of the public who are assisting the police with the identification and addresses of the offenders. He submitted that the amounts of bail suggested by the applicants are so inadequate that they are an indication C that the applicants intend to abscond on their being released on bail.

He further submitted that some of the applicants have behaved in a manner indicative of their intention to abscond. He said some had left their homes, avoiding arrest, and were arrested at lodges where they were staying, hiding from the police who were looking for them at their homes. One had abandoned his home and was staying at his workplace. Others were staying away from D their homes, avoiding the police, and were arrested during police raids during the night. He said the two applicants who drove others from the scene sped off at high speed obviously to avoid arrest.

On the alleged weakness of the State's case, he submitted that there is strong evidence on which the applicants may be convicted because the applicants E who were, a distinct group, wearing party regalia were observed by police intelligence officers and members of the public committing the offence. On the alleged failure by the police to investigate the applicants' alibis, he said the police investigated them and found to the contrary.

He submitted that the fact that one half brick struck the fatal blow does not F matter as the applicants and others not yet arrested were acting in common purpose. He said that is why they shouted "matatyangaauraiwe", after which they threw various missiles at the police, and kicked and trampled the deceased as a group.

Interference with witnesses and evidence

G Mr *Nyazamba* submitted that the applicants will interfere with witnesses for the State and evidence as some members of the public are still slowly coming up with evidence. He submitted that the witnesses are afraid of the applicants, and may not continue to come up with further evidence if the applicants are released on bail as their fear will intensify. He explained that though the police witnesses saw the applicants and others not yet arrested H committing the offence, it is the witnesses who are members of the public

who are giving the police details like the offenders' names and addresses. A He conceded that the exhibits are already in the custody of the police and that such evidence is unlikely to be interfered with. He said it is the evidence that the police are still gathering which may be interfered with.

Undermining or jeopardising the criminal justice system, including the bail system B

Mr *Nyazamba* said the release of the applicants on bail is likely to cause public outrage as this was a politically motivated public violence related murder. He further submitted that the applicants' ability to influence witnesses will undermine the criminal justice system.

Disturbing public order or undermining public peace or security C

Mr *Nyazamba* submitted that the applicants, who are MDC (T) political activists, will organize public violence related offences, using their influence. He used their congregating at Glen View Four, and later at Glen View Three, as proof that they have such a propensity and shows persistence in unlawful behaviour. He further submitted that their attacking police officers and killing D one of them was in furtherance of their desire to defy the law.

Applicants' Response

In his response Mr *Kwaramba,* for the applicants, persisted with his earlier submissions, and criticised the respondent's counsel for introducing new principles of bail, like the effect of offering low bail amounts. He submitted E that the amounts offered is what the majority of the applicants can afford. He argued that bail should not be granted in excessive amounts as that will be equal to denying the applicants bail.

On the State's submission that the applicants had behaved in a manner indicative of an intention to abscond, he submitted that most of the applicants were arrested at their homes. F

On interference with witnesses, he argued that the identity of the witnesses was not revealed so the applicants cannot interfere with witnesses they do not know. He concluded his reply by submitting that the presumption of innocence is still operating in the applicants' favour, and that the applicants had discharged the onus on them of proving, that they are proper candidates G for bail.

Analysis of submissions and evidence.

The submissions made by both parties establish the following general evidence, which has to be considered along side that which is personal to each applicant. H

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1. The A applicants are facing a serious charge of murder of a police officer, during the execution of his duties, committed in circumstances of public violence.
2. None of the applicants were arrested at the scene.
3. Some were arrested at lodges during night raids by the police, and while B traveling in commuter omnibuses within Glen View.
4. That the exhibits were taken by the police and are with the police.
5. That some applicants are holders of travel documents which are now with the police.
6. That the commission of the offence was witnessed by police intelligence C officers and members of the public.
7. That about 50 MDC (T) youths had on that day previously gathered at Glen View Four shopping centre, from which they had been dispersed by police intelligence officers.
8. That they regrouped and gathered at Glen View Three shopping centre D from which the deceased and other uniformed police officers tried to disperse them after having been called to the scene at the instance of police intelligence officers who were at Glen View Three shopping centre.
9. That on arrival the deceased inquired from some MDC (T) youths where E their leaders where, and was advised that they were in Munyarari Night Club.
10. That they entered the night club, after which the group shouted "matatyangaauraiwe", and the group started throwing various missiles at the deceased and his officers. F
11. That the deceased was hit by a half brick on the side of his head, kicked, and trampled by the group.
12. The group then left the scene as follows, some jumped into two motor vehicles which were driven from the scene at high speed by two of the applicants. G

13. Those who remained behind removed their T-shirts to avoid being identified and walked away.

In terms of s 117(1) of the CP&E Act the courts should, in considering bail applications, lean towards granting bail, unless the court finds that it is in the interests of justice that an applicant for bail should be detained in custody. H The section provides as follows:

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> "(1) Subject to this section and section 32, a person who is in custody in respect A of an offence *shall be entitled to be released on bail* at any time after he or she has appeared in court on a charge and before sentence is imposed, *unless the court finds that it is in the interests of justice that he or she should be detained in custody* (my emphasis)."

In terms of s 117(2) of the CP&E Act, it will be in the interests of justice to keep an accused person in custody: B

> "(a) where there is a likelihood that the accused, if he or she were released on bail, will —
>
> (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
>
> (ii) not stand his or her trial or appear to receive sentence; or C
>
> (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
>
> (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or
>
> (b) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security." D

The use of the word "or" after each subsection means that if the State proves that the applicant for bail is likely to do one or more of the things mentioned in s 117(2)(a) to (b), he can be denied bail. They need not all be proved before a court can find that it is in the interests of justice for an accused to be detained in custody pending his or her trial. E

Section 117(1) makes it clear that an accused person is entitled to be released on bail unless the court finds that it is in the interests of justice that he or she should be detained in custody. The detention of an accused person in custody can only be in the interests of justice if one or more of the factors mentioned in s 117(2) is or are established against him. The release of an F accused person on bail is aimed at enabling him or her, to continue to enjoy his or her liberty, and attend trial from out of custody. It does not mean he or she has no case to answer. On the other hand, the detention of an accused in custody is to secure his or her attendance to stand trial is justified if there are genuine grounds for believing that one or more of the factors mentioned in s 117(2) have been established against him. That is why the seriousness G of the charge the accused is facing is not on its own enough to deny an accused person bail. In *S v Hussey* 1991 (2) ZLR 187 at 190A-B Ebrahim JA commented on this issue as follows:

> "I do not understand that either the *Chiadzwa* or the *Maratera* cases *supra* are authority for the proposition that the mere fact that an offender is facing a serious charge, albeit a very prevalent offence, justifies his incarceration pending his H

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A trial. It is clearly a factor that should be taken account of, together with other factors, in determining whether a person should be kept in custody until the time of his trial, but it can never be the only factor to justify keeping alleged offenders in custody. It is a well-established principle of our law that a man is innocent until proved guilty. To disregard this very well-founded principle and to incarcerate an individual purely because he faces a serious offence would be B in disregard of this very valid and important principle and weaken respect for the law and the social condemnation of those who break it".

The court must therefore endeavour to strike a balance between the interests of justice, and the accused's liberty. Section 117(1) leans in favour of the liberty of the accused person, hence the use of the words, "shall be entitled to be released on bail at any time after he or she has appeared in court on C a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody." The intention of the legislature was obviously to make s 117 consistent with the presumption of the accused's innocence until proved guilty. That proof or lack of it can only be established at the accused's trial.

D In this case, the State's strong objection to bail is based on the possibility that the applicants will abscond if granted bail and the possibility that they may interfere with State witnesses who are already assisting the police and those who are likely to come forward with information on the deceased's murder. The State is also concerned about the possibility of the applicants disturbing public order or undermining public peace and security, and E undermining or jeopardising the objectives or proper functioning of the criminal justice system.

The last three grounds are not strong and, in fact, s 117(2)(b), which relates to disturbing peace order and security, is only applicable in exceptional circumstances. This, in my view, would apply if the applicants can, on F being released on bail, engage in public violence which would disturb public order and undermine public peace and security. For this ground to apply, there must be clear evidence establishing the applicants' propensity to disturb public order and undermine peace and security. The respondent's allegation that the applicants can do so is only based on what they are alleged to have done in this case. That does not establish a strong propensity, as it G is still just an allegation to be proved at their trial. What would establish a strong propensity is evidence that the applicant has previous convictions for public violence and is facing several similar cases. The use of the words "in exceptional circumstances" in s 117(2)(b) clearly indicates that the legislature was conscious of the remote possibility of this ground ever being ordinarily H applicable. Therefore, whenever this ground is advanced, it should be carefully

considered to ascertain whether that likelihood is present. I am satisfied that A it has not been established in this case.

The undermining or jeopardising of the objectives or proper functioning of the criminal justice system, including the bail system, was also relied on as a ground for denying the applicants bail. An applicant must be proved to have done things which can affect the proper functioning of the criminal B justice system or to be likely to do so. If an applicant is likely to interfere with witnesses or evidence, he may be denied bail on this ground, but only if that interference cannot be restrained by imposition of a bail condition restraining him from doing so. If he is likely to skip bail and abscond he is likely to affect the bail system. This ground will therefore be dealt with together with the States grounds of abscondment and interference with C witnesses and evidence.

The State strongly argued that the applicants are likely to abscond, because the State's case against them is strong and that if convicted they are likely to face capital punishment or a long term of imprisonment. It was, on the other hand, argued by counsel for the applicants that the State's case is weak D and cannot induce the applicants to abscond. The fact that the deceased died at Glen View Three shopping centre after being attacked by a mob is not in dispute. What is in dispute is who was in that mob. The applicants say they were not part of that mob, while the State says they were. The State says police internal security officers saw the applicants at Glen View Four E and caused their dispersal. They again saw them at Glen View Three, and called the deceased and other uniformed police officers to come and disperse them. The fact that police internal security officers were monitoring the applicants' movements tend to strengthen the State's case. If the officers observed the applicants for a long time, their evidence may be strong enough at trial, and knowledge of that may have an effect on the applicants. However, the F mere fact that the State's case is strong is not on its own enough to deny an applicant bail. The circumstances of each applicant will therefore be considered to determine each applicant's suitability for bail.

It was submitted that most of the applicants have travel documents which can enable them to leave the court's jurisdiction. It was also argued that those G without travel documents can leave the country without travel documents or hide within the country. The applicants' counsel's response to that is that the police already have the passports of those who have such documents and they are willing to surrender them to the court. The surrendering of an applicants' travel documents usually satisfies the State's fear of abscondment unless there are other pointers to the applicants' intention to abscond. H

A The applicants' interference with witnesses was advanced as a reason for not granting the applicants bail. The names of the witnesses were not revealed, leaving the applicants without

knowledge of who the witnesses are and therefore unlikely to interfere with unknown witnesses. The real and satisfactory fear is that other likely witnesses may not come forward to assist the police if the applicants are released on bail. However, that fear does not B affect the applicants as they have already been identified and arrested. It can be ordered that they do not interfere with State witnesses and evidence.

In an application of this nature, the stating point should be an inclination to grant bail, if it is not in the interest of justice for the applicants to remain in custody. I am satisfied that, with stringent conditions, the applicants who C have not shown a propensity to abscond can be granted bail. I am, however, also satisfied that those who have shown a propensity to abscond should not be granted bail, as they are flight risks. This calls for the assessment of each applicants' circumstances as *per* the State and the applicant's evidence and submissions. I appreciate the need to treat jointly charged accused persons equally, but where a distinction can be shown between bail applicants their D individual cases can be treated differently.

[The learned judge then considered the case of each individual applicant, granting bail to 12 of them and dismissing the applications of the remainder.]

Mbidzo, Muchadehama & Makoni, applicants' legal practitioners

E *Attorney General's Office, Criminal Division*, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/TRUSTCO MOBILE (PTY) LTD & ANOR v ECONET WIRELESS (PVT) LTD & ANOR (1) 2011 (2) ZLR 14 (H)

TRUSTCO MOBILE (PTY) LTD & ANOR v ECONET WIRELESS (PVT) LTD & ANOR (1) 2011 (2) ZLR 14 (H)

2011 (2) ZLR p14

Citation	2011 (2) ZLR 14 (H)
Case No	Judgment HH-158-11
Court	High Court, Harare
Judge	Mutema J
Heard	1 July 2011; *CAV*
Judgment	4 July 2011
Counsel	*T Mpofu,* for the applicants Mrs *J Zindi*, with her *T Nyambirai,* for the first respondent *J Mafusire,* for the second respondent
Case Type	Urgent application
Annotations	Link to case annotations

Flynote

Contract – *cancellation – breach of contract by one party – notice by wronged party – must be with immediate effect – notice of cancellation at some future date – such notice invalid* D

Practice and procedure – *urgent – application – delay in bringing matter to court – delay reasonable in circumstances – such delay not defeating urgency of case*

Practice and procedure – *interdict – application – requirements – clear right established – not necessary to prove irreparable injury*

Headnote

The first applicant, a Namibian company, and the respondents concluded an E agreement in terms of which the first applicant undertook to provide the first respondent with certain software and support services to facilitate the provision of free life insurance cover to Zimbabwean cellular phone users and customers of the first respondent against the purchase of cellular airtime from the first respondent. In terms of the agreement, the first F applicant would procure, for and on behalf of the first respondent, such life cover from the second respondent, at no cost to the first respondent's customers against payment of a fee to the first applicant by the first respondent, prescribed and calculated in terms of that agreement. The agreement was to endure for an initial fixed duration of 18 months. A dispute arose when the first applicant and the first respondent could G not agree on the mode of calculating the royalty fees payable to the former. After some initial correspondence, the first applicant wrote to the first respondent advising that the latter was formally in breach of the agreement for non-payment of royalties to it and premiums to the second respondent. The letter stated that all obligations to provide insurance would be suspended three days later if all overdue payments were not H

Mutema J

A received by then and that, if all overdue amounts were not received within 14 days from the date of the letter, the contract would be deemed to be cancelled in terms of clause 17.1 of the agreement. The following day the first respondent replied, saying "Your intention to terminate the agreement has been noted and accepted." In reply, the first applicant called on the first respondent to provide three names of people from B whom an arbitrator could be chosen to enable referral of the dispute to arbitration in terms of the agreement. The first respondent reiterated its view that the contract had been cancelled and that terminated the first applicant's link to the first respondent's mobile platform. The applicants sought an urgent order directing the first respondent to restore the link and C to refrain from acting in a manner inconsistent with the agreement until arbitration proceedings had been complete. The first respondent argued that the matter was not urgent; that the draft order was defective; that the relief sought amounted to an interdict, for which the requirements had not been met; that the applicants had repudiated the agreement; and that if it was found that the first respondent had repudiated the agreement, D specific performance should not be granted.

Held, that where there has been a delay in bringing an application to court, either the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action. Law, unlike mathematics, is not an exact science. Whatever the length of the delay, if a reasonable E or credible explanation for the delay is tendered, the delay should not detract from the urgency of the matter. *In casu* the explanation tendered for the delay was not only reasonable but understandable. Given the logistical difficulties encountered in the preparation, drafting and issuing of the application over three different jurisdictions, the delay did not defeat the urgency of the matter.

F *Held,* further, that Article 9 of the Schedule to the Arbitration Act [*Chapter 7*:*15*] empowers the High Court to grant an interim measure of protection in the form of an interdict or other interim measure to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual where, as here, the arbitral tribunal has not yet been appointed and the matter is urgent. The relief being sought was designed to ensure G that any award which may be made in the arbitral proceedings in favour of the applicants would not be rendered ineffectual.

Held, further, that the fact that the agreement was to endure for 18 months with the first applicant receiving royalties, and that only 9 months had elapsed, clearly constituted a *prima facie* right accruing to the first H applicant. Where, as here, a clear right is established which is not open

Mutema J

to doubt, it is not necessary for an applicant to prove irreparable injury. A No other adequate remedy was available to the applicants to achieve the preservation of the *status quo* pending determination of the dispute by way of arbitration.

Held, further, that a valid notice of cancellation must clearly inform the guilty party of the wronged party's unqualified, immediate and final B decision to treat the contract as being at an end. The right to resile from the contract must be exercised immediately. A notice of cancellation which takes effect in the future is invalid. Here, the right to resile from the agreement was not exercised *ex nunc*, so the notice was not valid and there was no cancellation which the first respondent could note and or accept. C

Held, further, that having found that there was no valid cancellation of the agreement and that the agreement was still alive, specific performance ought to be ordered to restore the *status quo ante.*

Cases cited

Charuma Blasting & Earthmoving Svcs (Pvt) Ltd v Njainjai & Ors D 2000 (1) ZLR 85 (S)

Ganief v Hoosen 1977 (4) SA 458 (C)

Jackson v Unity Ins Co Ltd 1999 (1) ZLR 381 (S)

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H)

Waste Management Services (Pvt) Ltd v City of Harare 2003 (1) ZLR 571 (S) E

Legislation considered

Arbitration Act [*Chapter 7:15*], Schedule, art 9

Case information

T Mpofu, for the applicants F

Mrs *J Zindi*, with her *T Nyambirai,* for the first respondent

J Mafusire, for the second respondent

Judgment

MUTEMA J: The first applicant is a subsidiary of the second applicant. Both companies are Namibian-based. On 17 August, 2010 the first applicant and G the respondents concluded a tripartite agreement in terms of which the first applicant undertook to provide the first respondent with certain software and support services to facilitate provision of free life insurance cover to Zimbabwean cellular phone users and customers of the first respondent against the purchase of cellular airtime from the first respondent. In terms of the agreement, the first applicant would procure, for and on behalf of the first H

A respondent, such life cover from the second respondent at no cost to the first respondent's customers against payment of a fee to the first applicant by the first respondent, prescribed and calculated in terms of that agreement. The project would be known in Zimbabwe as "Ecolife". The business model for the provision of free life cover as against the purchase of airtime amounts to B an intellectual property (whose copyright and international patent has been applied for) known as Transaction Facilitation System. This business system and software is called the Trustco Mobile Concept.

The agreement was to endure for an initial fixed duration of 18 months. There is no consensus on the papers as to the extent of the success of the implementation of the system but what can be gleaned is that substantial C revenue running into millions of US dollars was reaped from it to the benefit of the three parties to the agreement. Matters came to a head when the first applicant and first respondent could not agree on the mode of calculating the royalty fees payable to the former. Following a series of correspondence between the two partiesthe first applicant, through its group

managing D director, wrote to the first respondent on 31 May, 2011 advising that the latter was formally in breach of the agreement for non-payment of royalties to it and premiums to the second respondent. The operative part of that correspondence reads:

> "Therefore be advised that all obligations of Trustco will be suspended on 3 June 2011 at 12 00 hours Namibian time if all overdue payments are not received by E then. … Kindly be further advised that if all overdue amounts, of which you have been advised, are not received within 14 days from date hereof Trustco will deem the contract cancelled in terms of clause 17.1 of the main agreement".

That clause reads:

> "17.1 If either of the parties breaches any provision of this agreement and fails to remedy the breach within fourteen (14) days of dispatch of a written notice F to do so, the Party not in default may, not withstanding any provision to the contrary in this Agreement, without prejudice to any of its other rights in law, cancel the agreement forthwith;"

On 1 June 2011 the first respondent, through its chief executive officer, replied to the first applicant's letter of 31 May 2011 in this vein:

> "We G acknowledge receipt of your letter dated 31 May 2011 regarding the above. *Your intention to terminate the agreement has been noted and accepted.*
>
> Econet maintains that it has discharged all its obligations under our agreements with you. We repeat our averment that royalties are only payable in respect of subscribers who buy airtime of a value exceeding $3 per month. Those subscribers who buy airtime of a value amounting to $3, but do not buy any H additional airtime are not entitled to cover.

Mutema J

> Consequently, no royalties are payable in respect of such subscribers. …" (my A emphasis).

On 3 June 2011 the first applicant replied to the first respondent's letter of 1 June 2011. In the letter the dispute over payment of royalties and interpretation of the agreement raged on. The first respondent was called upon to provide three names of people from whom an arbitrator could be chosen to enable B referral of the dispute to arbitration in terms of clause 19 of the agreement. The peroration of that letter reads:

> "Legal advice received indicated that we are not entitled to switch off the system until 14 working days have lapsed since 31 May 2011. Hence the system will remain operative until then".

On 5 June 2011 the first respondent's chief executive officer replied to the C above letter saying *inter alia*:

> "We refer to your letter of 3 June 2011 and advise that we stand by our letter of 1 June 2011 in terms of which we accepted your notice of termination of our agreement. Therefore, we consider the agreement terminated. We shall proceed to make arrangements to ensure that our subscribers are not prejudiced by the termination of the agreement that was initiated by you.. We do not owe the D amounts that you claim to be outstanding ... Your request for a referral of our dispute to arbitration was made on the assumption that the agreement between us was going to remain in force.
>
> Your assumption was misguided because you had already given us notice to terminate the agreement in your letter of 31 May 2011, and we had accepted such notice in our letter of 1 June 2011. Because you made your election to E terminate the agreement, you cannot withdraw such election, more particularly as we had accepted and communicated to you our acceptance of the termination of the agreement."

About the time this letter was written, the first respondent terminated the first applicant's link to the former's mobile platform. The parties then sought the services of legal practitioners. The first applicant's legal practitioners, F Rudolph, Bernstein and Associates, wrote to the first respondent's chief executive officer on 8 June 2011 explaining that their client's letter of 31 May 2011 was misconstrued because the intention to cancel the agreement should the first respondent fail to remedy the breach within the fourteen day period did not, and was never intended to, constitute an invitation to G the first respondent for a consensual termination of the agreement which it purported to accept. In the event, the first respondent's conduct amounted to an attempt to repudiate the agreement whereas any dispute should be referred to arbitration in terms of clause 19 of the agreement. The letter gave the first respondent 9 June 2011 as the deadline for restoration of the first applicant's electronic links to the former's mobile platform to facilitate H

Mutema J

A resumption of service provision in terms of the agreement, failing which "urgent injunctive relief" would be sought in order to restore the *status quo ante* pending institution of arbitration proceedings.

On 9 June 2011 the first respondent's legal practitioners of record responded to the first applicant's legal practitioners' letter alluded to *supra*. Therein B the stance was adopted that as it was the first applicant which sought the termination of the agreement which the first respondent accepted, therefore the first applicant cannot be heard to allege that it was the first respondent which repudiated the agreement. In the result, the first applicant cannot tender performance of an agreement which it has cancelled and which cancellation has been accepted.

C The foregoing narration culminated in the filing of the urgent chamber application on 24 June 2011. The provisional order being sought is worded in the following terms:

> **"Final Relief Sought**
>
> That you show cause why the following final order must not be granted: D
>
> 1. Pending the determination of the dispute between the parties by the process of arbitration in terms of the provisions of the Arbitration Act, the first respondent shall not take any steps neither shall it act in any such manner as is inconsistent with the rights of the applicants arising from the agreement between the parties (as amended), and shall not act in any such way unless entitled to so act in terms of any Arbitral Award that may be handed down. E
> 2. The costs of this application shall be costs in the envisaged arbitration proceedings.
>
> **Interim Relief Granted**
>
> That pending determination of this matter on the return date, applicants are granted the following relief:
>
> 1. The first respondent is directed to restore to the first applicant the internet- F based reporting links and all access to Trustco Mobile hardware and software, thus enabling it to monitor and process airtime purchase transactions and otherwise perform its obligations in terms of the agreement; and
> 2. The first respondent be directed to refrain from undertaking and implementing a competing, infringing service to that provided by the first applicant in terms of the agreement.
>
> **Service** G **of the Provisional Order**
>
> The applicants' legal practitioners be and are hereby granted leave to effect service of this provisional order upon all respondents."

The application was vigorously opposed by the first respondent, while the second respondent's response was that since no relief was being sought H against it, it will abide by any decision of the court.

Mutema J

Mr *Nyambirai*, who took over from Mrs *Zindi* after the latter's indication A that she was indisposed, opposed the application on five main planks. They are the following:

1. The matter is not urgent;
2. The draft order, even as amended, remains defective in that the interim relief sought is substantially the same as the final one; B
3. Part of the relief sought is by way of interdict which in effect amounts to an interdict and the requirements of an interdict have not been met;
4. It is the applicants who repudiated the agreement and *Waste Management Services (Pvt) Ltd v City of Harare* 2003 (1) ZLR 571 (S), relied upon by the applicants, is distinguishable; and C
5. In the event of a finding being made that the first respondent repudiated the agreement, so far as relief related to specific performance being sought is concerned, the court is urged to exercise its discretion and disallow specific performance.

I will deal with the five broad issues raised in opposition *seriatim*. D

Whether or not the matter is urgent

The case relied upon by both sides is the often cited one of *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H).

On the papers before me, the need to act arose on 5 June 2011 when the first respondent switched off the first applicant's access to the IT platform. This E prompted the first applicant to contact its

attorneys in Johannesburg, South Africa on 6 June 2011 and travelling to that country for consultations. The attorneys then wrote to the first respondent on 8 June 2011 clarifying the first applicant's position regarding the purported cancellation of the agreement by the first respondent and threatening urgent injuctive relieve to restore F the *status quo ante*.

On 9 June 2011 the first respondent's attorneys wrote a letter to the first applicant's attorneys indicating that the agreement was considered cancelled. Between then and 24 June 2011, when this application was filed, the first applicant explained the reason for the delay as follows: G

- It briefed its South African attorneys in respect of the highly technical aspects of its Trustco Mobile System in relation to the copyright, patent and other intellectual property related issues;
- It had to seek the input of a further South African advocate experienced in intellectual property-related issues; H

Mutema J

- It A had to secure and appoint and obtain advice from local attorneys and counsel relating to various procedural and substantive aspects of Zimbabwean law in order to draft and finalise the application papers;
- The first draft of the application papers was received by it on 13 June 2011 for consideration, comment and review. This was done over the B next three days, since various versions were exchanged, and the first applicant's Namibian based technical development employees had to be roped in; various amendments were effected;
- After briefing Messrs Bhana SC and Puckrin SC who previously were admitted to practise in Zimbabwe, it was realised following advice from C Gill, Godlonton and Gerrans (the local correspondent attorneys) that the briefed South African counsels would need to apply for a residency exemption to be allowed audience in Zimbabwean courts and its granting was not guaranteed and its application would further prolong the delay;
- On 16 June 2011 Advocate Erik Morris (local counsel) was briefed and D on 17 June 2011 (a Friday) Advocate Morris indicated that he needed the weekend to consider a few technical issues he had reservations about;
- On the same Friday the first applicant's group managing director, Quinton van Rooyen, and Jan Jones came to Zimbabwe to consult with Advocate E Morris. Their South African attorney also came and consulted with the same advocate and the local correspondent attorneys on 20 and 21 June 2011;
- The papers were ultimately finalised on 22 June 2011 and the application filed on 24 June 2011. Given the logistical difficulties encountered in F the preparation, drafting and issuing the application over three different jurisdictions, the delay did not defeat the urgency of the matter.

The *obiter* in the *Kuvarega* case *supra* is that where there has been a delay in bringing the application to court, either the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous G action. Law, unlike mathematics, is not an exact science. Whatever the length of the delay, if a reasonable or credible explanation for the delay is tendered, that delay should not detract from the urgency of the matter. *In casu* I consider that the explanation tendered for the delay is not only reasonable but understandable. In the event, the delay should not detract H from the urgency of the matter.

Mutema J

Defect of draft order in that the interim relief sought is substantially A the same as the final one

The argument advanced in this connection is that paras 1 and 2 of the interim relief sought, when compared with para 1 of the final order sought, amount to the same relief. The danger here, so the argument went, is that the applicants will be allowed to get away with proving their case on a *prima facie* basis B and get a relief of a final nature.

Article 9 of the Schedule to the Arbitration Act [*Chapter 7*:*15*] empowers the High Court, via paras 1, 2 and 3, to grant, upon request, an interim measure of protection in the form of an interdict or other interim measure to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual where the arbitral tribunal has not yet been appointed C and the matter is urgent.

In casu ,the matter is urgent, the arbitration tribunal has not yet been appointed and the relief being sought is designed to ensure that any award which may be made in the arbitral proceedings in favour of the applicants will not be rendered ineffectual. The interim relief sought is merely to have the *status quo* D in terms of the agreement between the feuding parties restored while the final relief is to show cause, on the return date, why the applicants' rights arising from the agreement should not be preserved pending the determination of the dispute between the parties by way of arbitration in terms of the Arbitration Act. One cannot seriously contend that the two reliefs being sought amount to the same relief as contended for by Mr *Nyambirai* who, in endeavouring E the elucidate the alleged similarity, said the interim relief's substance is "get us connected and do not use another competing system" while the final relief means "once connected remain so". While language can never be accurate, the two reliefs are clearly not the same.

That requirements for an interdict have not been met F

The requirements for a temporary interdict are trite and there exists a plethora of case law authorities on this subject. They are these:

1. a *prima facie* right, even though open to some doubt;
2. a well-grounded apprehension of injury;
3. the absence of some other adequate and ordinary remedy; and G
4. the balance of convenience.

It is common ground that the parties entered into an agreement whose terms are spelt out in the agreement document. The first applicant's mobile concept was to be used for the purpose of providing life cover insurance to the first respondent's mobile cellular phone subscribers. That agreement was to H

Mutema J

A endure for 18 months, with the first applicant receiving royalties. Only nine months have gone. This clearly constitutes a *prima facie* right accruing to the first applicant. It is not even open to some doubt. The first applicant, via being connected to the first respondent's IT platform, used to monitor the number of subscribers to Ecolife so as to be able to determine the amount B of royalties it was entitled to. The first respondent, due to some dispute between the parties, which dispute should go for arbitration, has switched off the first applicant's access to the platform. Over and above that, the first respondent contends that the agreement has since been terminated/cancelled at the instance of the first applicant but the first applicant contends that the C agreement still subsists. The first applicant apprehends the injury that it can no longer monitor the amount of subscription to Ecolife and it has also been weaned off its dues in the form of royalties before the agreement has run its full life or has been lawfully terminated. It also fears that, by moving to an alternative system five days after "terminating" the agreement, the first respondent has infringed on its concept. I find this to constitute a well D grounded apprehension of injury. It is idle for the first respondent to argue that it is not infringing on applicants' mobile concept, which it alleges has defects, and that it is not subject to intellectual property rights because the application to patent it was refused. While the applicants attached documentation of the application to ARIPO (African Regional Intellectual E Property Organisation) including acknowledgment of receipt thereof, the first respondent simply averred in its opposing affidavit that such application was not successful without any attachment from ARIPO to that effect. If the applicants' system was defective, why take nine months to terminate? Why agree to use the system in the first place if the first respondent had its F own mobile concept and why the capability now to move to an alternative system five days following "cancellation?" Where, such as in this case, a clear right is established which is not open to doubt, it is not necessary for an applicant to prove irreparable injury: *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 (S).

G Regarding the absence of other adequate remedy available, none other is available to the applicants to achieve the preservation of the *status quo* pending determination of the dispute by way

of arbitration. The balance of convenience clearly favours the applicants as the prejudice to them would be very much greater than to the first respondent. Damages will be difficult H to prove on the part of the applicants.

Mutema J

Who repudiated the agreement A

This seems to be the crux of the matter. The first respondent's argument is that it was the first applicant which repudiated the agreement via its letter of 31 May 2011 whose "intention to terminate the agreement" the former "noted and accepted" via its letter dated 1 June 2011.

In *Jackson v Unity Insurance Co Ltd* 1999 (1) ZLR 381 (S) Gubbay CJ, relying B on the *ratio* in *Ganief v Hoosen* 1977 (4) SA 458 (C), held that a valid notice of cancellation must clearly inform the guilty party of the wronged party's unqualified, immediate and final decision to treat the contract as being at an end. The right to resile from the contract must be exercised immediately. What the landlord purported to do was to declare that the contract was to terminate C at some future date and hold the tenant bound until that date arrived. Since this was not a valid notice of cancellation, ejectment could not be ordered.

The case which laid to rest the notion that a notice of cancellation which takes effect in the future is invalid only applies to contracts of lease is *Waste Management Services (Pvt) Ltd v City of Harare* 2003 (1) ZLR 571 (S) at 573G-H where Sandura JA, with the concurrence of Cheda JA, said: D

> "It is pertinent to note that De Kock J (in *Ganief supra)* referred to the right to resile from a contract, and not the right to resile from a contract of lease. Had the intention been to restrict the principle to leases he would have said: 'In my view, the right to resile from a contract of lease is one that must be exercised *ex nunc.'* In any event, I cannot see any logical basis for restricting the principle to a contract of lease. In addition, it is clear from the judgment of this court in E *Jackson v Unity Insurance Co. Ltd* 1999 (1) ZLR 381 (S) that the court was of the view that the principle in *Ganief v Hoosen supra* applied to the cancellation of any contract".

A close look at the first applicant's letter of 31 May 2011, the basis upon which the first respondent purported to "note and accept" the intention to terminate the agreement by its letter of 1 June 2011, clearly shows that the F notice to terminate the agreement was in the future. The pertinent paragraphs in the first applicant's letter of 31 May 2011 are para 4 and the second last one. Paragraph 4 reads:

> "Therefore be advised that all obligations of Trustco will be suspended 3 June 2011 at 12.00 Namibian time if all overdue payments are not received by then" G

The penultimate paragraph reads:

> "Kindly be further advised that if all overdue amounts, of which you have been advised, are not received within 14 days from date hereof Trustco will deem the contract cancelled in terms of Clause 17.1 of the main agreement".

In the result, on the weight of the authorities cited above, the first applicant's notice of cancellation was in the future. The right to resile from the agreement H

Mutema J

A was not exercised *ex nunc,* therefore, since the notice was not valid, there was no cancellation which the first respondent could note and or accept. In the event, the agreement still subsists, and by extension, the first respondent's fifth plank of opposition, *viz* that in the event of the court finding that it was the first respondent who repudiated the agreement, the specific performance being sought by the applicants is in the court's discretion and the court should B decline that relief, should not detain me. Having found that there was no valid cancellation of the agreement and that the agreement is still alive, specific performance ought to be ordered to restore the *status quo ante.*

The application is accordingly granted in terms of the amended draft order.

Quaere: whether Mr Tawanda Nyambirai being the chairman of the C first respondent, can represent the latter without sustaining some ethical considerations.

Gill, Godlonton and Gerrans, applicants' legal practitioners

Mtetwa and Nyambirai, first respondent's legal practitioners

Scanlen D *& Holderness,* second respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/PIRORO v REGISTRAR-GENERAL OF CITIZENSHIP & ORS 2011 (2) ZLR 26 (H)

PIRORO v REGISTRAR-GENERAL OF CITIZENSHIP & ORS 2011 (2) ZLR 26 (H)

Citation	2011 (2) ZLR 26 (H)
Case No	Judgment No. HH-128-11
Court	High Court, Harare
Judge	Mavangira J
Heard	24 March 2011; 31 March 2011; CAV
Judgment	6 July 2011
Counsel	*B W Elliot*, for the applicant *F Chimbaru*, for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Constitutional law – *citizenship – by birth – person who qualifies as a citizen of Zimbabwe by birth cannot be deprived of citizenship by default or in any other manner* D

Constitutional law – *citizenship – Citizenship of Zimbabwe Act [Chapter 4:01] – s 9(7) – provision ultra vires s 9 of Constitution Zimbabwe, 1980 – citizenship by birth – Parliament not empowered to pass laws providing for the deprivation of citizenship in the case of citizenship by birth – Universal Declaration of Human Rights – art 15 – s 9(7) of Citizenship of Zimbabwe Act in breach thereof* E

Headnote

Historically, up to the time of Independence, the main criterion for citizenship was the place of birth of the person concerned. However, in 1972, the origin and citizenship of the person's parents at the time of that person's birth became more relevant. With the advent of Independence the main laws relating to citizenship of Zimbabwe were published as a Schedule F to the Zimbabwe Constitution Order 1979 (SI 1979/1600 of the United Kingdom). Chapter II of the Constitution deals with citizenship. Section 5(1) of the Constitution, as originally promulgated in 1979, provided for citizenship by birth in respect of persons born in this country on or after 18 April 1980 in the same manner as that provided in s 5 of the Citizenship of Rhodesia Act [*Chapter 23* of 1974]. This meant that G the place of birth of the person concerned was still the main criterion. However, in 1996, the 14th Amendment to the Constitution made the citizenship of the person's

parents as important as the place of birth of the person concerned. For a person to be a citizen by birth of Zimbabwe, he or she had to be born in Zimbabwe and his or her mother or father had to be a citizen of Zimbabwe at the time of his or her birth. The most H

2011 (2) ZLR p27

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A recent amendment to the citizenship law in Zimbabwe was by the 19th Amendment to the Constitution which came into effect on 13 February 2009. That Amendment repealed Chapter II *in toto* and substituted it in substantially different terms. The original s 4, which stated that citizens before Independence were citizens after that date, does not appear in the new Chapter II. In its place there is a section which deals with the B concept of citizenship.

Under pre-Independence legislation, a citizen by birth could not be deprived of his citizenship. Only a person who was a citizen by registration or naturalization could be so deprived, after due notice and an enquiry. The Independence Constitution made it clear that a citizen by birth could C not be deprived of citizenship, but in 1983 this was amended to allow for a citizen by birth to lose citizenship if he was or became a citizen of another country. However, the 2009 amendment replaced all the previous provisions relating to citizenship.

Section 9 of the Constitution of Zimbabwe, 1980, as amended, was repealed D and substituted by Act 1 of 2009, which came into effect on 13 February 2009 and which dealt with matters relating to citizenship, including the deprivation thereof. The new s 9, which was introduced by this amending Act, completely overhauled the law relating to citizenship by birth in Zimbabwe and restored the position to what it was prior to the promulgation of the Constitutional Amendment No. 3 (Act 1 of E 1983). The power given to Parliament in relation to the deprivation of citizenship is that which is now contained in s 9(c) of the Constitution, which specifically empowers Parliament to provide for "circumstances in which persons qualify for or lose their citizenship by descent or registration". There is no provision empowering parliament to pass laws F to provide for the deprivation of citizenship in the case of citizenship by birth.

If a person fulfills the requirements of s 5(1) of the Constitution of Zimbabwe, 1980, then he is a citizen by birth of Zimbabwe. The effect of this provision, when read with the new s 9, is that a person who qualifies as a citizen by birth cannot be deprived and cannot have been deprived of G that citizenship by default or in any other manner during his lifetime. Section 9(7) of the Citizenship of Zimbabwe Act [*Chapter 4:01*], in so far as it relates to citizens by birth of Zimbabwe, is *ultra vires* s 9 of the Constitution. It also breaches the provisions of Article 15 of the Universal Declaration of Human Rights.

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Cases cited A

Carr v Registrar-General 2000 (2) ZLR 433 (S)

Manwere v Registrar-General of Citizenship & Anor HH-87-02

Tsvangirai v Registrar-General & Ors HH-29-02

Legislation considered B

Citizenship of Zimbabwe Act [*Chapter 4:01*], s 9(7)

Constitution of Zimbabwe 1980, s 9

International instruments considered:

Universal Declaration of Human Rights, art 15 C

Case information

B W Elliot, for the applicant

F Chimbaru, for the respondents

Judgment

MAVANGIRA J: This matter was heard on 24 March 2011. On 31 March 2011 this court issued an order in the following terms:

"IT IS DECLARED THAT: D

1. The applicant is a citizen of Zimbabwe by birth in terms of section 5 of the Constitution of Zimbabwe.
2. The provisions of section 9(7) of the Citizenship of Zimbabwe Act, *Chapter 4:01* insofar as it relates to citizenship by birth, are *ultra vires* the powers the powers vested in the Parliament of Zimbabwe in terms of section 9 E of the Constitution of Zimbabwe and are in consequence of no force and effect.

ACCORDINGLY IT IS ORDERED THAT:

1. The first respondent shall within 14 days of the date of this order renew the applicant's Zimbabwe passport. F
2. The first respondent shall pay the applicant's costs of suit."

The following are the reasons why this court granted the relief sought.

The facts of this matter are that the applicant's father was born in Mozambique in 1941. He came to Zimbabwe in about 1955 when he was still young and lived most of his life in Zimbabwe. At some stage he became a citizen of Zimbabwe. He died in Harare on 8 February 2008. G

The applicant's mother was born in Zimbabwe. She was a citizen of Zimbabwe by birth. She lived all her life in Zimbabwe and died in Harare on 18 April 2008

The applicant was born in Zimbabwe on 29 April 1967. He is the holder of a Zimbabwe National Identity document. On 19 June 2000 the applicant was H

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A issued with a Zimbabwe passport on the basis that he was a Zimbabwean citizen. The passport expired on 18 June 2010 when the applicant was in Canada where he is living and working. Before its expiry, the applicant submitted an application form to renew his Zimbabwe passport. He submitted the form to the first respondent through the Zimbabwe Embassy in Canada. The first respondent has refused to grant the application for a renewal.

B The first respondent's reasons for adopting the stance which he has taken with the applicant may be summarised as follows. Firstly, he argues that contrary to s 9(1) of the Citizenship of Zimbabwe Act [*Chapter 4:01*], the applicant was a dual citizen of Zimbabwe and Mozambique and that as a consequence, and in terms of s 9(7) of the Act, the applicant has lost his C Zimbabwe citizenship. Secondly, he argues that before the applicant is entitled to apply for a new Zimbabwe passport, he has, in the first instance, to renounce Mozambique citizenship in terms of Mozambican law. Then, in accordance with the provisions of s 14(1)(b) of the Act, he has to apply to the second respondent to be restored as a Zimbabwe citizen in terms thereof. Furthermore, that, in this instance, the applicant will have restoration of D citizenship by registration and not by birth. The applicant, it is argued, will suffer no prejudice by being a citizen of Zimbabwe by registration rather than by birth. Only if and when the said application is approved will the first respondent recognise the applicant as a citizen of Zimbabwe.

The first respondent's third argument appears to be that the law relating to E citizenship which applies to the applicant's case is that contained in Chapter II of the Constitution of Zimbabwe, as set out in the Schedule to the Zimbabwe Constitution Order (SI 1979/1600) as amended but only up to and including Constitution Amendment No. 14 of 1996. The first respondent would appear to consider that in dealing with the applicant's case, the provisions of Constitution Amendment No. 19 (Act 1 of 2009) are not relevant. The F first respondent appears to imply that if the applicant becomes a citizen of Zimbabwe again, he concedes that he would be obliged to issue the applicant with a new Zimbabwe passport.

Initially, Mrs *Chimbaru* for the respondents made detailed submissions in line with the above summary, in opposition of the application. Her G submissions were also in line with the heads of argument filed on behalf of the respondents. She highlighted that, despite his protestation and claims to the contrary, the applicant is a citizen of Mozambique and that as he had not proved that he had renounced his Mozambican citizenship, he had fallen foul of Zimbabwean law which prohibited dual citizenship. She submitted that he had, therefore, by operation of law, lost Zimbabwean citizenship. As H a result, the first respondent was entitled to refuse to renew his Zimbabwe

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passport on the ground that he also held Mozambican citizenship by descent, A which citizenship he had not renounced. However when the court asked her to make submissions regarding the effect of this court's decision in *Manwere v Registrar-General of Citizenship & Anor* HH-87-2002, a matter in which the facts are on all fours with the facts of the present matter and which was cited in the applicant's heads of argument, she readily conceded that the B opposition mounted by the respondents in this matter cannot be sustained.

The court was of the view that the concession, though belated, was properly made. The following are the reasons why the court was of the view that the concession was properly made and, further to that, that the applicant had laid sufficient basis to justify the granting of the order, which he sought and which the court proceeded to grant soon after (a few days after) the hearing. C It needs to be mentioned that the applicant's heads of argument have been most useful to the court in the articulation of the justification for the granting of the order which this court granted on 31 March 2011.

In *Citizenship Law in Africa: A Comparative Study* by Bronwen Manby, it is stated that the term "citizenship" in law denotes a legal bond between an D individual and the State in which the State recognises and guarantees that individual's rights. It is stated that the most common rights of citizenship are the right to permanently reside within the State, the right to vote, the right to be elected to public office, the right to freedom of movement within and outside the State, which includes the right to a passport issued by the State, and the right to diplomatic protection by the State. E

In general terms the concept of Zimbabwe citizenship is set out in s 4 of Chapter II of the Constitution of Zimbabwe as amended, up to and including the last amendment which was Constitution Amendment No. 19 (Act 1 of 2009) as follows:

> "**Zimbabwean citizenship** F
>
> (1) There is a common Zimbabwean citizenship and all citizens are equal, that is to say citizens are entitled, subject to this Constitution, to the rights, privileges and benefits of citizenship and are subject to the duties and obligations of citizenship.
>
> (2) It is the duty of every Zimbabwean citizen –
>
> (a) to observe this Constitution and to respect its ideals and institutions; and G
>
> (b) to respect the national flag and the national anthem; and
>
> (c) to the best of his or her ability, to defend Zimbabwe in time of need.
>
> (3) Every Zimbabwean citizen is entitled to the protection of the State wherever he or she may be.
>
> (4) Zimbabwean citizenship may be acquired by birth, descent or registration.
>
> [Section substituted by section 3 of Act No. 1 of 2009 (Amendment No. 19)]" H

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A Section 9(1), (2) and (7) of the Citizenship of Zimbabwe Act states:

> "**Prohibition of dual citizenship**
>
> (1) Subject to this section, no citizen of Zimbabwe who is of full age and sound mind shall be entitled to be a citizen of a foreign country.
>
> (2) A citizen of Zimbabwe of full age who, by voluntary act other than marriage, B acquires the citizenship of a foreign country shall immediately cease to be a citizen of Zimbabwe.
>
> …
>
> (7) A citizen of Zimbabwe of full age who–
>
> (a) at the date of commencement of the Citizenship of Zimbabwe Amendment Act, 2001, is also a citizen of a foreign country; or C
>
> (b) at any time before that date, had renounced or purported to renounce his citizenship of a foreign country and has, despite such renunciation, retained his citizenship of that country;
>
> shall cease to be a citizen of Zimbabwe six months after that date unless, before the expiry of that period, he has effectively renounced his foreign citizenship in accordance with the law of that foreign country and has made a declaration D confirming such renunciation in the form and manner prescribed.
>
> [Subsection substituted by Act 12 of 2001.]"

From a reading of this section, it appears that all persons affected by the provision had the period from 6 July 2001 to 6 January 2002 within which to renounce their alleged foreign citizenship, after which period they would E cease to be a citizen of Zimbabwe by operation of law. Non-compliance with s 9(7) would result in being classified as a non-citizen and thus an alien. Section 2 of the Immigration Act defines the word "alien" as "a person who is not a Zimbabwe citizen." A reading of the section also makes it clear that it applies only to those people who are in actual fact citizens of a foreign F country and not to people who may have some potential claim to foreign citizenship but who have taken no steps to take up that potential claim. This interpretation has already been made/stated/enunciated by this court in a number of cases which I will shortly refer to.

In casu the first respondents' stance is that because one of the applicant's parents, his father, was born in a foreign country, the applicant has to renounce G foreign citizenship in order to retain his Zimbabwe citizenship, even though he has taken no voluntary or active steps to acquire such foreign citizenship. The first respondent has been brought before these courts in a number of cases in which the applicants were aggrieved after the first respondent made decisions on the basis of this same interpretation. The following are some H of such cases.

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In *Tsvangirai v Registrar-General & Ors* HH-29-02 Adam J stated at p 50 A of the judgment:

> "The first respondent, if he is demanding from Zimbabwe born citizens, one or both of whose parents were born in a foreign country that they renounce their foreign citizenship, then he is flagrantly acting *ultra vires* s 3(2) of the Citizenship of Zimbabwe Act. His conduct would certainly be unlawful."

In *Manwere v Registrar-General of Citizenship & Anor supra* the applicant's B father had also been born in Mozambique. The facts in that matter are virtually identical to the facts of the instant matter. The first respondent raised therein the same arguments as he has raised *in casu*. The court rejected them all. Omerjee J stated at pp 3-4 of the judgment:

> "He (the first respondent) then goes on to say that the applicant is a Mozambican C citizen by descent and repeats that assertion three times. Mere repetition of a bald statement does not convert it into a statement of fact, becoming as it were sacrosanct and incapable of determination by a court".

As already stated, the pertinent facts in that matter are virtually identical to the facts of this matter. Omerjee J's judgment in that matter, as well as Adam J's judgment in the *Tsvangirai* case *supra*, are clear and extensive as D to the correct legal position. Other instructive cases include the following: *Sibanda v Registrar-General of Citizenship NO* HH 3626/02; *Uriri v Registrar-General of Citizenship & Anor* HH 7128/03. Similar arguments by the first respondent were also rejected in *Ncube v The Registrar-General & Anor* HH 7316/06 by Bhunu J who in that matter awarded costs on the higher scale against the first respondent. E

This erroneous interpretation of s 9(7) adopted by the first respondent results in a scenario where a person, in this case, the applicant, is deprived of the only citizenship he has, thereby rendering him stateless.

It was submitted that the provisions of s 9 are not applicable firstly, because the applicant was not as at 6 July 2001, a dual citizen of Zimbabwe and F Mozambique. Consequently, s 9(7) of the Act did not apply to him. Secondly, the applicant has never been a citizen of a foreign country and thus he has not breached the provisions of s 9(1) of the Act. Thirdly, and as he had not acquired a foreign citizenship, s 9(2) of the Act does not apply to him. On the facts presented to the court, the submissions were found to be justified. G

It was also submitted before this court that the concept of citizenship in this jurisdiction first arose in 1949 with the promulgation of the Southern Rhodesian and British Nationality Act 1949 (No. 13 of 1949). Furthermore, that there were related and similar statutes promulgated in the United Kingdom and in other colonies of the United Kingdom at that time. Section 6(1) and (2) of that Act was headed "Citizenship by Birth" and it provided: H

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> "6(1) Subject t A o the provisions of subsection (3) of this section, every person who was born before the commencement of this Act shall on the date of commencement of this Act become a Southern Rhodesian citizen by birth if he was born on or after the 12th day of September 1890 within the territories which at the commencement of this Act are comprised in Southern Rhodesia.

(2) Subject to the provisions of subsection (3) of this section, every person born B in Southern Rhodesia after the commencement of this Act shall be a Southern Rhodesian citizen by birth".

The next statute relating to citizenship in this jurisdiction was the Citizenship of Rhodesia and Nyasaland Act 1957. (No. 12 of 1957) which was promulgated during the Federation. Section 6 of that statute was in similar terms as the 1949 Act.

C Thereafter came the Citizenship of Rhodesia and British Nationality Act 1963 (No. 63 of 1963). This statute is relevant to this particular case as the applicant who was born on 29 April 1967, was born whilst it was in force. It is therefore relevant in relation to the provisions of s 5 of the Constitution.

Section 6 of the 1963 Act provided:

D "6(1) A person born in Southern Rhodesia on or after the date of commencement of this Act [this, in terms of s 2, was defined as "on the date of dissolution of the former Federation] shall be a citizen of Southern Rhodesia by birth unless –

(a) at the time of the birth of the person his father –

(i) possessed such immunity from suit and legal proceedings as is accorded E to an envoy of a foreign sovereign power accredited to Her Majesty; and

(ii) was not a citizen of Southern Rhodesia.

or

(b) at the time of the birth of the person – F

(i) his father was an enemy alien: and

(ii) his mother was interned in a place set aside for the interment of enemy aliens or the place of the birth of the person was under occupation by the enemy.

(2) A person who was, immediately before the date of commencement of this Act – G

(a) a former citizen by birth; and

(b) a citizen of the former Federation;

shall on that date become a citizen of Southern Rhodesia by birth".

Thereafter came the Citizenship of Rhodesia and British Nationality Amendment Act 1967 (Act 25 of 1967). It amended s 6(1) of the 1963 Act H by the insertion after para (b) of the following paragraph:

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"or A

(c) at the time of the birth of the person his father was a prohibited immigrant in terms of a law relating to immigration in force in Rhodesia or was not lawfully residing in Rhodesia in terms of such law:

Provided that if subsequent to his birth his father is accepted for permanent residence in Rhodesia under a law relating to immigration in force in Rhodesia, he shall be a citizen of Rhodesia by birth". B

Following thereon was the Citizenship of Rhodesia Act 1970, which was amended in 1972 and 1973 and published in the Revised Edition of the statutes in 1974. Section 5 of the original 1970 Act dealt with citizenship by birth in the same manner as s 6 of the 1963 Act as amended by the 1967 Act. However, in terms of Act 49 of 1972, which was incorporated into Chapter C 23 of the 1974 Revised Edition of the Statutes, a new subs (d) was added after s 5(1)(c), which stated:

"(d) in the case of a person so born on or after the 12th January 1973, at the time of his birth his father or, in the case of an illegitimate child, his mother was –

(i) not a citizen of Rhodesia, and D

(ii) not ordinarily resident in Rhodesia."

Thus, up to the time of Independence, the main criteria for citizenship was the place of birth of the person concerned. However, in 1972, the origin and citizenship of the person's parents at the time of that person's birth became more relevant. E

With the incidence of Independence the main laws relating to Citizenship of Zimbabwe were published as a Schedule to the Zimbabwe Constitution Order 1979 (SI 1979/1600 of the United Kingdom). Chapter II of the Constitution deals with citizenship. Section 4 of Chapter II of the original Constitution as promulgated in 1979 stated: F

"4. A person who, immediately before the appointed day, was or was deemed to be a citizen by birth, descent or registration shall, on and after that date, be a citizen of Zimbabwe by birth, descent or

registration, as the case may be".

Section 5(1) of the Constitution, as originally promulgated in 1979, provided for citizenship by birth in respect of persons born in this country on or after G 18 April 1980 in the same manner as that provided in s 5 of the Citizenship of Rhodesia Act [*Chapter 23*] in the 1974 Revised Edition. This meant that the place of birth of the person concerned was still the main criterion.

The next relevant amendment to citizenship laws was the Constitution Amendment No. 14 (Act 14 of 1996), which came into effect on 6 December 1996. The original s 4, relating to persons born before 1980, had provisions H

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A which were the same as those relating to persons born in the period from Independence on 18 April 1980 to 6 December 1996. However, the original s 5 was substantially amended for persons born on or after 6 December 1996. The relevant portions of s 5, as amended by Constitution Amendment No. 14 (Act 14 of 1996), were as follows:

"5(1) A person born in Zimbabwe on or after the appointed day but before the B date of commencement of the Constitution of Zimbabwe Amendment (No. 14) Act, 1996, shall be a citizen of Zimbabwe by birth, unless ... (the remainder is as in s 5 of the original 1979 Constitution).

(2) …

(3) A person born in Zimbabwe on or after the date of commencement of the C Constitution of Zimbabwe Amendment (No. 14) Act, 1996, shall be a citizen of Zimbabwe by birth if at the time of his birth his father or his mother is a citizen of Zimbabwe".

Thus, Constitution Amendment No. 14 made the citizenship of the person's parents equally important to the place of birth of the person concerned. For a person to be a citizen by birth of Zimbabwe, he or she had to be born in D Zimbabwe and his or her mother or father had to be a citizen of Zimbabwe at the time of his or her birth.

The most recent amendment to citizenship in Zimbabwe was by Constitution Amendment No. 19 (Act 1 of 2009) which came into effect on 13 February 2009. That Constitution Amendment repealed Chapter II *in toto* and substituted E it in substantially different terms. The original s 4 which stated that citizens before 18 April 1980 were citizens after that date, does not appear in the new Chapter II. In its place, there is a section which deals with the concept of citizenship and which has already been quoted earlier in this judgment (that is s 4 of Chapter II of the Constitution of Zimbabwe, as amended up to and including the last amendment, which was Constitution Amendment F No. 19 (Act 1 of 2009)).

"**Zimbabwean citizenship**

(1) There is a common Zimbabwean citizenship and all citizens are equal, that is to say, citizens are entitled, subject to this Constitution, to the rights, privileges and benefits of citizenship and are subject to the duties and obligations of citizenship.

(2) It G is the duty of every Zimbabwean citizen –

(a) to observe this Constitution and to respect its ideals and institutions; and

(b) to respect the national flag and the national anthem; and

(c) to the best of his or her ability, to defend Zimbabwe in time of need.

(3) Every Zimbabwean citizen is entitled to the protection of the State wherever H he or she may be.

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(4) Zimbabwean citizenship may be acquired by birth, descent or registration. A
[Section substituted by section 3 of Act No. 1 of 2009 (Amendment No. 19)]."

Section 9(1), (2) and (7) of the Citizenship of Zimbabwe Act states:

"**Prohibition of dual citizenship**

(1) Subject to this section, no citizen of Zimbabwe who is of full age and sound mind shall be entitled to be a citizen of a foreign country. B

(2) A citizen of Zimbabwe of full age who, by voluntary act other than marriage, acquires the citizenship of a foreign country shall immediately cease to be a citizen of Zimbabwe.

…

(7) A citizen of Zimbabwe of full age who

(a) at the date of commencement of the Citizenship of Zimbabwe Amendment Act, 2001 is also a citizen of a foreign country; or

(b) at any time before that date, had renounced or purported to renounce his citizenship of a foreign country and has, despite such renunciation, retained his citizenship of that country; shall cease to be a citizen of Zimbabwe six months after that date unless, before the expiry of that period, he has effectively renounced his foreign citizenship in accordance with the law of that foreign country and has made a declaration confirming such renunciation in the form and manner prescribed.

[Subsection substituted by Act 12 of 2001.]

The new s 5 deals with citizenship by birth as did the original one. However, its provisions are materially different from the original one. Section 5(1) as it is now states:

"5(1) Everyone born in Zimbabwe is a Zimbabwean citizen by birth if, when he or she was born --

(a) either of his or her parent was a Zimbabwean citizen; or

(b) either of his or her grandparents was a Zimbabwean citizen by birth or descent".

Thus, for a person born in Zimbabwe to be a citizen by birth of Zimbabwe, the above subsection must be complied with. Furthermore, this section is the sole provision in terms of which a person born in Zimbabwe can qualify as a citizen by birth of Zimbabwe as the previous s 5 was repealed and is of no force or effect. *In casu* the applicant qualifies as a citizen by birth of Zimbabwe in terms of s 5(1)(a), in that when he was born "either of his parents was a Zimbabwean citizen". The undisputed facts are that when he was born his mother was a Zimbabwean citizen.

The first respondent referred in his opposing affidavit and attached a copy of the provisions of s 5(a)(ii) of the Constitution. He states that this is the relevant provision of the law in relation to this case and contends that it

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has not been complied with by the applicant. However, that provision was repealed by Constitution Amendment No. 19 of 2009 and therefore of no force or effect. The first respondent's stance is thus without any legal basis and cannot prevail.

The following submission also made in the applicant's heads of argument is instructive. The preamble to the Citizenship of Zimbabwe Act 1984 contains the provisions of ss 4, 5, 6 and 7 of the Constitution as at 18 April 1980. These sections have since been repealed and substituted in the Constitution itself. The preamble to the 1984 Act is therefore out of date and I would venture to suggest may require up-dating especially in view of the provisions of s 6 of the Interpretation Act [*Chapter 1:01*] which provides:

"The preamble to an enactment and any punctuation in an enactment shall form part of the enactment and may be used as aids to the construction of the enactment".

With regards the declaration in para 2 of the order granted by this court as quoted earlier in this judgment, the applicant's heads of argument have been again of great assistance in the articulation of the reasons warranting the granting of the same. This is the declaration that the provisions of s 9(7) of the Citizenship of Zimbabwe Act are *ultra vires* s 9 of the Constitution.

Section 27(1) of the 1949 Citizenship Act provided as follows:

"A Southern Rhodesian citizen who is a citizen by registration or a neutralized person shall cease to be a Southern Rhodesian citizen if he is deprived of his citizenship by an order made under this section…"

Then, a citizen by birth of Southern Rhodesia could not be deprived of his or her citizenship. Even then, in the case of citizenship by registration or naturalization, the section required that prior notice be given and an opportunity afforded to the person concerned to make representations to a judicial body, the High Court, against the action which was proposed to be taken against him. Section 27, subss (5) and (6), of that Act provided:

"(5) Before making an order under this section the Governor shall cause to be served on the person against whom an order is proposed to be made a notice in writing informing him of the ground on which it is proposed to be made and of his right, upon making application therefor in the prescribed manner, to have his case referred for enquiry.

(6) If the person against whom the order is proposed to be made applies in the prescribed manner for an enquiry, the Governor shall refer the case for enquiry and report, in accordance with the rules of court, to the High Court".

The 1957 Citizenship Act also only allowed for deprivation of citizenship if the person concerned was a citizen by registration or naturalization, not by H birth. Section 27(1) of the 1957 Act was in similar terms to s 27(1) of the

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1949 Act. As with the 1949 Act, s 27(4) and (5) provided that prior notice A had to be given and an opportunity afforded to the person concerned to make representations to a Commissioner, who had to be qualified as a judge or senior advocate, for deprivation of citizenship, if the person concerned was a citizen by registration or naturalization, not by birth. This was provided for in s 18(1) of the Act. Section 18(4) and 18(5) were similar to ss 27(4) B and 27(5) of the previous Act. However, the 1963 Act introduced a provision which was not in existence before. Section 23 provided as follows:

> "A citizen of Southern Rhodesia of full age and capacity who, while outside Southern Rhodesia, by some voluntary and formal act, other than marriage, becomes a national of a foreign country shall thereupon cease to be a citizen of Southern Rhodesia". C

As submitted by Mr *Elliot*, "citizenship" in the above section was not qualified and must therefore have included citizenship by birth. However, for a person to lose citizenship, the person had to be outside the country and become a foreign citizen by "some voluntary and formal act, other than marriage".

In the 1970 Citizenship Act s 15 (s 16 in the 1974 Revised Edition) only D allowed for deprivation of citizenship in the case of citizenship by registration. Section 15(3) and (4) contained similar provisions as in previous Acts regarding the right to notice and to be heard by a judicial body. Section 16(1)(a)(b) provided for deprivation of citizenship if a person was declared a prohibited immigrant or was deported but this could only have related to citizenship by E registration. There was no power given to the Minister to deprive a citizen by birth of citizenship except in terms of s 16(1)(c) which was in the same terms as s 23 of the previous Act.

At Independence, citizenship laws were elevated from an Act of Parliament to the Constitution. I would agree with Mr *Elliot* that this signified the F importance of citizenship. Section 9 of the 1979 Constitution stated:

> "(9) An act of Parliament may make provision, not inconsistent with this Chapter, in respect of citizenship and, without prejudice to the generality of the foregoing, for –
>
> (a) … G
>
> (b) subject to the provisions of s 8 (which provided for dual citizenship) and provided that a person shall not thereby be rendered stateless –
>
> (i) the circumstances in which a person who is a citizen of Zimbabwe, other than by birth, and who becomes a citizen of some other country or person who is a citizen of some other country and who becomes a citizen of Zimbabwe shall cease to be a citizen of Zimbabwe. H

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> (ii) depriving A any person, other than a citizen by birth or descent, of his citizenship of Zimbabwe; and depriving any person, other than a citizen by birth or descent, of his citizenship of Zimbabwe; and
>
> (c) the renunciation by any person of his citizenship of Zimbabwe".

Thus in terms of the above provision, a citizen by birth of Zimbabwe could B not, under any circumstances, be deprived of his or her right to citizenship.

In terms of s 3 of the Constitution Amendment Act No 17(Act 1 of 2003), the original s 9 was repealed and substituted by a new s 9 which stated:

> "(9) Notwithstanding the provisions of this Chapter, an Act of Parliament may make provision in respect of citizenship and, without prejudice to the generality of the foregoing, may provide for – C
>
> (a) the acquisition of citizenship of Zimbabwe by persons who are not eligible or who are no longer eligible to become citizens of Zimbabwe under this Chapter;
>
> (b) the circumstances in which a person may cease to be a citizen of Zimbabwe.
>
> (c) the deprivation of any person of his citizenship of Zimbabwe;
>
> (d) the renunciation by any person of his citizenship of Zimbabwe: D

Provided that no such law shall provide for the cessation by, or deprivation of, any person of his citizenship of Zimbabwe where such person is a citizen thereof by birth except on the grounds that he is or has become a citizen of some other country."

This provision introduced a significant amendment of the citizenship laws E in Zimbabwe as it specifically empowered Parliament, for the first time, to pass a law to provide that a citizen by birth could be deprived of citizenship but that this was only limited to "on the grounds that he is or has become a citizen of some other country".

Following the 1983 Constitutional Amendment, a new Citizenship of F Zimbabwe Act was promulgated by Act 23 of 1984 and in terms of the 1984 Revised Edition of the statutes became [*Chapter 4:01*]. Section 9 of that Act is headed "Prohibition of dual citizenship". Subsections (1) and (2) of s 9 of the Act have remained in unamended and state as follows:

"9(1) Subject to this section, no citizen of Zimbabwe who is of full age and sound mind shall be entitled to be a citizen of a foreign country.

(2) A G citizen of Zimbabwe of full age who, by voluntary act other than marriage, acquires the citizenship of a foreign country shall immediately cease to be a citizen of Zimbabwe".

The original s 9(7) stated as follows:

"9(7) A citizen of Zimbabwe of full age who on 1 December, 1984, is also a H citizen of a foreign country shall cease to be a citizen of Zimbabwe one year

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after that date unless, on or before the expiry of that period, he has renounced A for his foreign citizenship in the form and manner prescribed".

The form and manner which was prescribed provided for renunciation in terms of Zimbabwe law. In *Carr v Registrar-General* 2000 (2) ZLR 433 (S), the Registrar-General argued that in order to effectively renounce a foreign citizenship. This had to be done in terms of the foreign law concerned. B However the Supreme Court ruled that s 9(7) did not provide for this and that renunciation in terms of Zimbabwe law was sufficient. Following this decision, the Citizenship of Zimbabwe Amendment Act (Act 12 of 2001) was promulgated and came into effect on 6 July 2001. Section 9(7) was repealed and substituted. The new s 9(7), which is still in force, reads:

"9(7) A citizen of Zimbabwe of full age who – C

(a) at the date of commencement of the Citizenship of Zimbabwe Amendment Act, 2001, is also a citizen of a foreign country; or

(b) at any time before that date, had renounced or purported to renounce his citizenship of a foreign country and has, despite such renunciation, retained his citizenship of that country;

shall cease to be a citizen of Zimbabwe six months after that date unless, before D the expiry of that period, he has effectively renounced his foreign citizenship in accordance with the law of that foreign country and has made a declaration confirming such renunciation in the form and manner prescribed"

The Citizenship of Zimbabwe Amendment Act 2003 (Act 12 of 2003) dealt with persons who were born in Zimbabwe of "migrant workers" from "SADC countries". In terms of the Act and the regulations published in terms E thereof (SI 101A of 2004), these citizens were regarded as having lost their citizenship and were therefore required to apply to "restore" their citizenship.

In 2009, s 9 of the Constitution was repealed and substituted, as was the whole of Chapter II of the Constitution, by Constitution Amendment No. 19 (Act 1 of 2009) which came into effect on 13 February 2009. This is the F section which is now in force: It provides:

"9. An Act of Parliament may provide for –

(a) the prohibition of dual citizenship;

(b) procedures for the renunciation of citizenship;

(c) the circumstances in which persons qualify for or lose their citizenship by descent or registration; and G

(d) any other matters regarding citizenship".

As submitted by Mr *Elliot*, this new s 9 of the Constitution has completely overhauled the law relating to citizenship by birth of Zimbabwe and has restored the position to what it was prior to the promulgation of Constitution Amendment No. 3 (Act 1 of 1983). The power given to Parliament in relation H

Mavangira J

A to deprivation of citizenship is that contained in s 9(c) which specifically empowers Parliament to provide for "the circumstances in which persons qualify for or lose their citizenship by descent or registration". There is no provision empowering Parliament to pass laws to provide for deprivation of citizenship in the case of citizenship by birth. The previous s 9 contained B the proviso quoted earlier, but the current s 9 does not contain such or any equivalent provision.

The current s 8 of the Constitution is headed "Citizenship and Immigration Board". There was no equivalent provision in the repealed s 8, which was in fact left vacant after the original s 8, which provided for dual citizenship, was repealed by Act 1 of 1983. The current s 8 states in para (a) that an Act C of Parliament "must" provide for the establishment of a "Citizenship and Immigration Board to be responsible for granting and revoking citizenship by registration". It specifically does not empower the board to revoke citizenship by birth.

Thus a person who is a citizen by birth cannot be deprived of his or her D citizenship, thereby confirming the paramount importance which the Constitution rightly assigns to citizenship by birth. I find persuasive Mr *Elliot*'s submission that, although para (d) of s 9 stated that Parliament may provide for "any other matters regarding citizenship", this paragraph must be read in the context of the preceding paragraphs and cannot be interpreted E to give Parliament unlimited powers.

Another aspect of citizenship by birth is that s 4 of the 1979 Constitution stated *inter alia* that a person who was a citizen by birth immediately before 18 April 1980 was on and after that day a citizen of Zimbabwe by birth. This section remained as it was originally until Constitution Amendment No. 19. Section 5 of the 1979 Constitution as amended by Act 14 of 1996 applies F different criteria to qualify as a citizen by birth depending on whether the person concerned was born between 18 April 1980 and 6 December 1996 and after 6 December 1996. In the new Chapter II introduced by Act 1 of 2009, the previous s 4 has been repealed and its provisions have completely disappeared. The new s 5 is the only provision relating to citizenship by G birth. It contains one set of criteria and its provisions apply to anyone born in Zimbabwe. Regardless of when he or she was born, that person comes within its provisions.

The reference to Article 15 of the Universal Declaration of Human Rights is also apposite. The Article provides:

> "1. Everyone H has the right to a nationality.

Mavangira J

> 2. No one shall be arbitrarily deprived of his nationality nor denied the right A to change his nationality."

Section 9 of the Constitution prescribes the powers of Parliament in relation to citizenship and it does not empower Parliament to deprive a citizen by birth of his or her citizenship of Zimbabwe. I also find persuasive the submissions that the effect of s 5(1) of the Constitution is that if a person B fulfils the requirements set out therein, then he or she is a citizen by birth of Zimbabwe. Furthermore, that the effect of s 9 as read with s 5(1) of the Constitution is that a person who qualifies as a citizen by birth in terms of s 5(1) cannot be deprived, and cannot have been deprived of that citizenship by default or in any other manner during his or her lifetime.

In the circumstances, if the above analysis is correct, which in my view it C is, then s 9(7) of the Citizenship of Zimbabwe Act not only breaches the provisions of Article 15 of the Universal Declaration of Human Rights, but it is also *ultra vires* s 9 of the Constitution of Zimbabwe in so far as that provision relates to citizens by birth of Zimbabwe.

The above was found to be sufficient justification for the granting of the order quoted at the beginning of this judgment. D

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

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

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Source:
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S v MAPANZURE & ANOR 2011 (2) ZLR 43 (H)

Citation	2011 (2) ZLR 43 (H)
Case No	Judgment No. HH-141-11
Court	High Court, Harare
Judge	Kudya J
Heard	6 July 2011
Judgment	6 July 2011
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C **Criminal procedure** *(sentence) – offences under Criminal Law Code – stock theft (s 114(2)(a)) – penalties applicable – mandatory minimum sentence in absence of special circumstances – offence committed before mandatory minimum sentence introduced – accused person convicted after penalty increased – increased penalty not applicable*

D **Interpretation of statutes** *– retrospectivity – statutes not having retrospective effect unless clearly stated or retrospectivity a necessary implication*

Headnote

The accused were convicted of stock theft, the offence having been committed before, but the convictions occurring after, an amendment to the Stock E Theft Act [*Chapter 9:18*] came into operation in 2004. The Stock Theft Act itself was repealed by the Code in 2006, which re-enacted the provisions of that Act in s 114. That amendment had introduced a mandatory minimum sentence of imprisonment unless special circumstances were found. The magistrate based his various sentences on the assumption F that the mandatory minimum sentence was applicable, having found no special circumstances to exist.

Held, that the general rule at common law is that statutes are not to operate retrospectively, unless it is expressly stated that an enactment shall be retrospective in its operation or it is a necessary implication from the language used. This was not the case here. If the legislature intended the G section to have retroactive effect it would have expressly said so. It did not. After all, it was radically increasing the punishment for the theft of a bovine or equine animal. In addition, the legislature repeated the same wording which was held in a 1976 decision to have no retrospective effect. The legislature is assumed to have been aware of that decision H when it promulgated the present section in identical terms.

Kudya J

Editor's note: this decision is in accordance not only with principle but also A with s 18(5) of the Constitution of Zimbabwe 1980, the relevant portion of which provides that "no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence *at the time when it was committed*" (emphasis supplied). B

Cases cited

S v Forsten HH-177-04

S v Manaka HH-77-05

S v Mutandwa & Anor 1977 (1) RLR 273 (G); 1977 (3) SA 391 (R) C

S v Mzanywa & Ors 2006 (1) ZLR 179 (H)

S v Ndlovu & Anor 2006 (2) ZLR 32 (H)

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 114(2)(a) D

Judgment

KUDYA J: The present review judgment deals with the issue of whether s 114 (2)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9*:*23*] (the Criminal Law Code) has retrospective effect. The section first appeared in the present format as s 12A of the Stock Theft Act [*Chapter 9*:*18*] before the Stock Act was repealed by the Criminal Law Code on 23 June 2006. E The repealed statute reintroduced the mandatory minimum penalty of not less than nine years but not more than 25 years' imprisonment for the theft of bovine or equine animals.

There have been conflicting decisions in the High Court on whether the section applies retrospectively to offences that were committed before the F mandatory sentence was promulgated on 27 August 2004. My research has revealed that only one case held that the section has retrospective or retroactive effect. This was the decision of Ndou J, with the concurrence of Bere J, in *S* v *Mzanywa & Ors* 2006 (1) ZLR 179 (H). I have been able to locate four cases from the Harare High Court that held that the section did G not have retroactive effect. These are *S* v *Forsten* HH-177-04, a judgment of Bhunu J, concurred with by Makarau J (as she then was); *S* v *Manaka* HH-77-05 (Bhunu J, with the concurrence of Uchena J); and *S* v *Ndlovu & Anor* 2006 (2) ZLR 32 (H), a judgment of Kamocha J in which Garwe JP, as he then was, not only concurred but wrote a separate opinion underscoring the point that the section did not carry retroactive effect. H

2011 (2) ZLR p45

Kudya J

A In the present matter what happened is as follows. On an unknown date but in August 2004, the second accused, who was employed as a charge hand at the complainant's homestead, connived with the first accused, the brother of the complainant, and stole and sold the complainant's heifer. The two falsely indicated to the complainant that the heifer had gone missing. It was, however, recovered on 18 February 2011 from the person to whom it had been sold, B leading to the apprehension and prosecution of the two accused persons.

The two accused persons were correctly convicted on their respective pleas of guilty, to stock theft in violation of s 114(2)(a) of the Criminal Law Code. The trial magistrate recorded mitigation before properly explaining the meaning, nature and scope of special circumstances peculiar to the case. C He did not find any special circumstances. On 30 March 2011 he sentenced each accused person to ten years' imprisonment and suspended one year's imprisonment for five years on appropriate conditions of future good conduct.

The difficulty that confronted me on review was the failure to disclose the particular date in August 2004 when the theft occurred. The theft could D have taken place either before or after 27 August 2004, when the mandatory minimum sentence came into effect. In the absence of a clear indication of whether it took place before or after the crucial date, it seemed to me appropriate to give the benefit of the doubt to the accused persons and find that it took place before the defining date. It was only after making such E a finding that the question raised at the beginning of this review judgment cried out for an answer.

In *Mzanywa's* case, *supra*, Ndou J stated at pp 180G-181B:

> "The issue here is whether the provisions of s 12 apply retrospectively in respect of offences committed before it came into operation where the accused is only convicted after its promulgation? It is a fundamental rule of law that no statute F shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication: *Carson v Carson & Anor* [1964] 1 WLR 511 at 516, *DPP v Lamb* [1941] 2 KB 89, *Maxwell on Interpretation of Statutes* 12 ed at 226-7. The operation of this presumption is difficult because the distinction between statutes that operate retrospectively for the purpose of the presumption and those which G do not is hard to draw: Cross *Statutory Interpretation* 2 ed at pp 184-6 and Re *Athlumney* [1898] 2 QB 547 at 551. This presumption against retrospectivity is rebutted by a statutory provision or Act either expressly or by necessary implication: *S v Fazzie & Ors* 1964 (4) SA 673 (A) and *Lek v Estate Agents Board* 1978 (3) SA 160 (C).
>
> By using the phrase 'who is convicted' as opposed to 'who has committed', H the legislature clearly intended that s 12 should have retroactive operation. The

> date of conviction is the decisive date from the wording of s 12. The date of the A commission of the offence is rendered irrelevant."

He held that the use of the phrase "who is convicted" as opposed to "who has committed" was decisive.

On the other hand, Kamocha J stated in *Ndlovu*, *supra*, at pp 34G-35B:

> "The second error relates to applying the law retrospectively. The theft of the four B donkeys was committed on 25 October 2003, which was ten months before the Stock Theft Amendment Act 6 of 2004 was enacted. The magistrate sentenced the accused for an offence committed before the law was enacted using the provisions of the new law. That, in my view, is not proper as the general rule at common law is that statutes are not to operate retrospectively. See *Craies on Statute Law* 7 ed by S G G Edgar at p 391. Francis Bennion *Statutory Interpretation* (Butterworths 1984) at p 313 states the principle as follows: C
>
> > 'It is a principle of legal policy that, except in relation to procedural matters, changes in the law should not take effect retrospectively. The court, when considering, in relation to the fact of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle.'
>
> This general rule can, however, be departed from where it is expressly enacted D that an enactment shall be retrospective. Further, *Craies supra* at p 392 states that:
>
> > 'If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give such an operation.'
>
> The above approach has been adopted by our courts several times, for instance in *Agere* v *Nyambuya* 1985 (2) ZLR 336 (S) at 338H-339A, where Gubbay JA E (as he then was) had this to say:
>
> > 'It is a fundamental rule of construction in our law, dating probably from Codex 1:14:7, that there is a strong presumption that retrospective operation is not to be given to an enactment so as to remove or in any way impair existing rights of obligations unless such a construction appears clearly from the language used or arises by necessary implication. For instance, F where it is expressly retrospective, or deals with past events, or concerns a matter of procedure, practice or evidence. The supposition is that the legislature intends to deal only with future events and circumstances.'
>
> See also *Bater & Anor* v *Muchengeti* 1995 (1) ZLR 80 (S) at 84G-H and *Nkomo & Anor* v *A-G & Ors* 1993 (2) ZLR 422 (S) at 428H-429B.
>
> *In casu* there is nothing to suggest that the provisions of s 12 inserted by the G Stock Theft Amendment Act No. 6 of 2004 were to be applied in retrospect. Neither can it be said that there is a necessary implication from the language used that the legislature intended the said section to operate retrospectively. There was, therefore, no basis for the trial court to have had recourse to s 12 of the Stock Theft Act [*Chapter 9*:*18*] as amended when sentencing the accused. He should have exercised the jurisdiction conferred on him by the Stock Theft Act prior to the amendment." H

A The views expressed by Kamocha J find further support in *S* v *Mutandwa and Another* 1977 (1) RLR 273 (G); 1977 (3) SA 391 (R). In that case two accused persons were convicted of stock theft on 29 September 1976 and sentenced to the mandatory minimum sentence promulgated in the Stock Theft Amendment Act (Act 10 of 1976). At 391E Davies J (with whom Whitaker J agreed), set aside the

mandatory minimum sentences because B the trial magistrate overlooked the fact that the Stock Theft Amendment Act was not operative at the time of the commission of the offence.

The 1976 Amendment Act was couched in identical terms as the present s 114(2)(a) of the Criminal Law Code. It read:

> "Any person *who is convicted* of the theft or attempted theft of any equine or bovine animal or receiving knowing it to have been stolen or inciting or conspiring with C any other person to commit any of the foregoing offences shall, if there are no special circumstances in the particular case as provided in subsection (2) ..."

In my view, the distinction sought to be drawn by Ndou J in the wording of the present section does not confer retroactive effect on the section. If the legislature intended the section to have retroactive effect, it should D have expressly said so. It did not. After all, it was radically increasing the punishment for the theft of a bovine or equine animal. In addition, the legislature repeated the same wording which was held had no retrospective effect in 1976. The legislature is assumed to have been aware of that decision when it promulgated the present section in identical terms.

E Accordingly, I would, with respect, differ with the conclusion reached in *Mzanywa*'s case. I find myself in agreement with the decisions which hold that it has no retroactive effect.

Accordingly, the two accused persons should have been sentenced to sentences that were appropriate before the promulgation of s 114(2)(a) in its present format.

F The mandatory minimum sentence imposed by the trial magistrate is set aside and is substituted by the following:

> Each accused: three years' imprisonment of which one year's imprison–ment is suspended for five years on condition he does not within that period commit any offence involving dishonesty for which he is sentenced G to a term of imprisonment without the option of a fine.

Chitakunye J concurred.

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Source:
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S v CF (A JUVENILE) 2011 (2) ZLR 48 (H)

Citation	2011 (2) ZLR 48 (H)
Case No	Judgment No. HH-143-11
Court	High Court, Harare
Judge	Kudya J
Heard	6 July 2011
Judgment	6 July 2011
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – sexual intercourse with a young person (s 70) – both parties young persons – no offence committed*

Headnote

Section 61 of the Criminal Law Code [*Chapter 9:23*] defines "young person" as "a boy or girl under the age of sixteen years." The offence in s 70(1) D (a) of the Code (having extra-marital sexual intercourse with a young person) seeks to protect young persons from adults who take advantage of their immaturity by engaging with them in extra marital sexual activities. It is envisaged that young persons are not mature enough to appreciate the consequences of such activities. It is clear from the wording of the legislation that not only are girls protected, but young male persons are E protected as well. The result is that no offence is created where a young male person engages a young female person in any consensual sexual act.

Case referred to

S v A Juvenile HB-18-03 F

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 70

Judgment

KUDYA J: This review judgment deals with the issue of whether under G s 70(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], a male young person can be competently convicted of engaging in extra-marital sexual intercourse with a female young person.

The facts in the present case were that in April 2009 the 15-year-old accused who was in form 3, fell in love with a 14-year-old form 1 girl at a secondary school where they were both attending. They first had consensual sexual H

Kudya J

A intercourse in July 2009 and thereafter continued to do so on divers occasions. The matter came to light when the girl fell pregnant.

The boy was charged and convicted on his own plea of guilty of contravening s 70(1)(a) of the Criminal Law Code. He was sentenced on 14 May 2010 to receive a moderate corporal punishment of three cuts with a rattan cane to B be administered in private by a designated prison officer. The sentence was duly carried out even before the record was submitted on review. On 9 July 2009 I asked the trial magistrate whether the conviction was competent at law. His terse response of 10 December 2010 stated:

> "After going through the relevant section and other literature, I concede that I erred in convicting the accused person who is also a minor."

C I noted from my discussions with other judges that it appeared that there were many such cases that were coming on review. Accordingly, I wrote to the Attorney-General on 4 February 2011, seeking his opinion on the matter. I am indebted to him for his response of 8 April 2011, which I reproduce hereunder.

> D "The probation officer's report, which forms part of the record had the following findings and recommendations:
>
> > 'Both juveniles will benefit from pre-marital sex counselling as they are both victims of it. Taking the girl to live with the boy would not yield fruitful results as they are both children who still need parental guidance to grow up physically and emotionally. In view of the above highlights, it is respectively recommended that the charges be dropped and the juvenile E continue in school, [which] will guarantee a brighter future to and better control of the juvenile.'

Notwithstanding the probation officer's recommendations, both the trial prosecutor and the presiding magistrate seem not to have paid any due regard to the probation officer's report.

Be that as it may, we have noted that s 61 of the Act defines 'young person' as 'a F boy or girl under the age of sixteen years'. The offence in s 70 of the Act seeks to protect young persons from adults who take advantage of their immaturity by engaging with them in extra-marital sexual activities. It is envisaged that young persons are not mature enough to appreciate the consequences of such activities. That is why the probationer officer remarked that both the boy and girl were victims of pre-marital sex.

G It is clear from the wording of the legislation that not only girls are protected but young male persons are protected as well. In short, no offence is created where a young male person engages a young female person in any consensual sexual act. See the remarks of Ndou J in *S v Juvenile* HB-18-03 that:

> 'Whilst it might be a bitter pill to swallow for parents, youngsters aged under sixteen can freely indulge in sexual activities outside criminal sanction of the Sexual Offences Act as long as H the sexual act is consensual. This does

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Kudya J

> not seem ideal in this era of HIV/AIDS. There is nothing criminal about A accused's conduct although morally and religiously reprehensible.'

The facts in that case involved a 15-year-old boy who had sexual intercourse with a 15-year-old girl. The conviction was set aside. The offence of having sexual intercourse with a young person under the Sexual Offences Act, now repealed, is the precursor to s 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. However, s 70 of the Act did not change the position B pronounced by Ndou J *supra*.

It is our respectful view that if a proper consideration and due regard had been given to the above cited case, prosecution would not have been warranted in the circumstances.

Accordingly, the Attorney-General is unable to support the conviction."

I agree with the observations and conclusions of the Attorney-General. C

Unfortunately, the punishment that was visited on the juvenile in this case cannot be reversed. There are only two options that are open to me on review in these circumstances. The first is to quash the proceedings and set aside the sentence so that the juvenile is not saddled with a criminal record. The second is to prevent other similarly placed juveniles from suffering the same D fate as the present juvenile.

Accordingly, it is ordered that:

1. The conviction and sentence imposed on the juvenile is hereby quashed;
2. The Registrar is directed to bring this review judgment to the attention of both the Chief Magistrate and the Director of Public Prosecutions for E distribution to both magistrates and prosecutors throughout the country.

Chitakunye J agrees.

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Source:
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MUYAMBO v NGOMAIKARIRA & ORS 2011 (2) ZLR 51 (H)

Citation 2011 (2) ZLR 51 (H)

Case No Judgment HH-138-11

Court High Court, Harare

Judge Patel J

Heard 11 January 2011; 12 January 2011; *CAV*

Judgment 7 July 2011

Counsel *V Muza*, for the plaintiff
B Kamanga, for the first, second, fifth & sixth defendants

Case Type Civil trial

Annotations Link to case annotations

Flynote

Delict – actio injuriarum – *unlawful arrest and detention – when committed – presumption of animus injuriandi in event of illegal arrest or imprisonment – what defendant must show to establish lawful arrest*

Headnote

D The delict of unlawful arrest and detention is committed when a person, without lawful justification, restrains the liberty of another by arresting or imprisoning him. The plaintiff need only prove that the arrest or imprisonment was illegal and not that there was intention to act illegally or to cause harm. In our law, unlike South African law, *animus injuriandi* E is presumed and, therefore, intention is not a requirement for this delict. Moreover, the use of force is not a prerequisite and neither is pecuniary loss. Damages can be awarded for any affront or humiliation stemming from the unlawful arrest and imprisonment of the plaintiff. Although this action is usually brought against members of the police or other uniformed force, a private individual can also be held liable for this F delict committed against another private individual. In order to establish the lawfulness of an arrest without a warrant, the onus lies upon the defendant to show probable cause or reasonable suspicion. In exercising the power of arrest, he must act as an ordinary honest person would act, on suspicions which have a reasonable basis, and not merely on wild suspicion. In other words, the arrestor must act in such circumstances as G would ordinarily lead a reasonable person to form the suspicion that the arrestee has committed an offence. It is not the function of the police to arrest at large and to use the interrogatory process in order to determine whom to charge. As regards damages for wrongful imprisonment, the deprivation of personal liberty is an odious interference and constitutes H a serious infraction of fundamental rights, attracting an exemplary

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Patel J

assessment of reparation. The longer and more oppressive the period of A detention, the higher should be the quantum of damages.

Cases cited

Botha v Zvoda & Anor 1997 (1) ZLR 415 (S)

Feldman v Minister of Home Affairs 1992 (2) ZLR 304 (S) B

Macheka v Metcalfe & Anor HH-62-07

Mapuranga v Mungate 1997 (1) ZLR 64 (H)

Min of Home Affairs v Bangajena 2000 (1) ZLR 306 (S)

Muzonda v Min of Home Affairs & Anor 1993 (1) ZLR 92 (S)

Rousseau v Boshoff 1945 CPD 135 C

Case information

V Muza, for the plaintiff

B Kamanga, for the first, second, fifth & sixth defendants

Judgment

PATEL J: The plaintiff claims general damages for malicious arrest and detention, as well as special damages in respect of his motor vehicle. His D original claim was for a total sum of US$60 860 but this amount was reduced to US$20 600 at the trial.

The third and fourth defendants did not enter any appearance to defend and were consequently barred. The first, second, fifth and sixth defendants assert that the plaintiff's arrest and detention were lawful and accordingly deny any wrongfulness on their part. E

The Evidence

David Muyambo, the plaintiff, is a business man with diverse businesses in Chipinge. His evidence was as follows. On 27 September 2008, at Veneka Business Centre, he was stopped by the first, second and third defendants who identified themselves as policemen. They forced him into his vehicle and F took him to his house. At the entrance gate, he was hand-cuffed by the first defendant. The second defendant produced a rifle, cocked it and pointed it at the plaintiff's head. His four young children and six workers were chased out of the yard. The defendants then conducted a search of his residence and said they were looking for firearms. This was followed by a search of his Pajero G motor vehicle and a further search in the main house. Having found nothing at the residence, the defendants then took him into their vehicle and drove to Humani Ranch, where he was placed in a peacock cage while they went to meet the fourth defendant, who was the owner or manager of the Ranch. Thereafter, they took him to Mukwasine police station where the officer in charge refused to detain him. They then proceeded to Sabi police station H

A where he was detained in the cells at midnight. The following morning, he was taken to Bikita CID station and detained for two days until his workers located him. It was alleged that he had killed a rhino but no formal charge was levelled against him. He produced a certified copy of entries in the detention book at Bikita police station which shows the details pertaining to his detention. According to the plaintiff, the charge cited under CR 83/09/08 B is incorrect. He was released on 30 September 2008 without having been formally charged with any offence. On 3 October 2008 a meeting was held at Bikita CID station and he was told that no charges would be laid against him. On 4 October 2008, he lodged a formal complaint against the first, second and third defendants. The first and second defendants were arrested but not subsequently prosecuted. He later discovered that the third defendant C is employed by the fourth defendant and that the latter engineered a false charge of poaching against him.

As regards damages, the plaintiff claims US$2 000 for repairs to his Pajero, as evidenced by an invoice from Mitsubishi Motors for ZAR15 600. In addition, he claims US18 600 for shock, pain and suffering, arising from D his humiliation and ill-treatment by the defendants, both in public and in front of his children and workers. He withdrew his claim in respect of the remaining heads of damage.

Sgt. Chigaro was based at Chishumbanje police station in September and October 2008. His evidence was that Humani Ranch is part of Chiredzi E Conservancy but is privately owned by the fourth defendant. He recorded the plaintiff's statement and investigated the allegations of vehicle damage, unlawful detention and impersonation against the first, second and third defendants. He inspected the Pajero at the plaintiff's homestead and found that its door panels had been broken. He then located and arrested the first and second defendants and took them to his officer in charge. They ran F away from his office and he found them the following day at Sabi police station. They were evasive and refused to have their statements recorded. He was then sent to Bikita CID station and recorded statements from Ass/Insp Mapfaka and Sgt Mawuka. They confirmed that there were no criminal allegations against the plaintiff. They also said that the CR number.was assigned in order to detain the plaintiff. The witness produced a copy of his G own statement made on 5 October 2008 ("his recorded statement"). He also produced copies of the statements recorded at Bikita CID

station a few days later. The first and second defendants were not prosecuted because the public prosecutor in Chipinge said that the plaintiff's complaint was a civil matter.

Under cross-examination, the witness conceded that his recorded statement H referred to a case of criminal defamation, impersonation and malicious

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2011 (2) ZLR p54

Patel J

damage to property, but did not refer to any allegation of unlawful detention. A When questioned by the court, he accepted that his recorded statement made no mention at all of his attempts to arrest the first and second defendants. Moreover, he had great difficulty in recollecting certain important dates. In particular, it was noted that his recorded statement was undated, while the statement recorded at Bikita CID station were dated 6 April 2009 and 6 April B 2008. He further indicated that his recorded statement was made in April 2009, when preparing the docket against the first and second defendants, and not in October 2008 as stated in his evidence-in-chief. Given that he is an experienced police officer, his failure to reconcile the relevant dates renders his testimony rather dubious and difficult to credit. C

As regards the defendants, none of them were available to testify at the trial. However, the second defendant's undated report was admitted by consent. Thereafter, the recorded statement and report were read into the record by both counsel. It was noted that the deponents to the statements recorded at Bikita CID station were not in court to give their testimony and that, therefore, D their statements could not be meaningfully examined.

According to the second defendant's report, on 27 September 2008, he and the first defendant received a tip-off from the third defendant, a security agent at Humani Ranch. This was to the effect that the plaintiff, who had been spotted in the area, was a suspect in a recent case of rhino poaching. E After the plaintiff was located, he was arrested, handcuffed and advised of the charge against him. He was not humiliated and no firearm was pointed at his head. He was taken to his residence, where he consented to the search of the house and his Pajero. No damage was caused to the vehicle. He was then taken to Mkwasine police station and Middle Sabi police station and F detained overnight. The following day he was taken to Bikita CID station for interrogation, where Ass/Insp Mapfaka ordered his detention in relation to a pending case. On 5 October 2008, the first and second defendants were taken to Chishumbanje police station by Sgt Chigaro. The plaintiff was called at night and told them about his plan to claim damages from the fourth G defendant and that they would "share the spoils". When they refused to co-operate, the plaintiff threatened that he would ensure their discharge from the ZRP. Thereafter, a docket was compiled against the second defendant, but the charges were withdrawn before plea. As regards the plaintiff, he had been procedurally arrested on reasonable suspicion, as was confirmed at Bikita CID station, and he was then detained awaiting his interrogation. H

2011 (2) ZLR p55

Patel J

A **Unlawful arrest and detention**

The delict of unlawful arrest and detention is committed when a person, without lawful justification, restrains the liberty of another by arresting or imprisoning him. See *Macheka* v *Metcalfe & Anor* HH-62-07 (at pp 6-7) and the authorities there cited. As is explained by Feltoe *A Guide to the* B *Zimbabwean Law of Delict* (2 ed) at p 48, the plaintiff need only prove that the arrest or imprisonment was illegal and not that there was intention to act illegally or to cause harm. In our law, unlike South African law, *animus injuriandi* is presumed and, therefore, intention is not a requirement for this delict. Moreover, the use of force is not a prerequisite and neither is pecuniary loss. Damages can be awarded for any affront or humiliation stemming from C the unlawful arrest and imprisonment of the plaintiff. Although this action is usually brought against members of the police or other uniformed force, a private individual can also be held liable for this delict committed against another private individual. See *Mapuranga* v *Mungate* 1997 (1) ZLR 64 (H).

In order to establish the lawfulness of an arrest without a warrant, the onus D lies upon the defendant to show probable cause or reasonable suspicion. In exercising the power of arrest, he must act as an ordinary honest person would act, on suspicions which have a reasonable basis, and not merely on wild suspicion. See *Rousseau* v *Boshoff* 1945 CPD 135 at 137. In other words, the

arrestor must act on such circumstances as would ordinarily lead E a reasonable man to form the suspicion that the arrestee has committed an offence. It is not the function of the police to arrest at large and to use the interrogatory process in order to determine whom to charge. See *Feldman v Minister of Home Affairs* 1992 (2) ZLR 304 (S) at 309; *Botha v Zvada & Anor* 1997 (1) ZLR 415 (S) at 418-419.

F As regards damages for wrongful imprisonment, as was aptly observed in *Muzonda v Minister of Home Affairs & Another* 1993 (1) ZLR 92 (S) at 100-101, the deprivation of personal liberty is an odious interference and constitutes a serious infraction of fundamental rights, attracting an exemplary assessment of reparation. Thus, in *Mapuranga's* case, *supra*, a plaintiff who was detained for 8 hours was awarded damages amounting to ZW$4 000. The G longer and more oppressive the period of detention, the higher should be the quantum of damages, as in *Botha's* case, *supra*, where a plaintiff detained for 6 days in a crowded cell was awarded the sum of ZW$20 000. Again, in *Minister of Home Affairs* v *Bangajena* 2000 (1) ZLR 306 (S), the plaintiff was awarded ZW$20 000 as general damages after having being detained H just before midnight until his release the following midday.

Patel J

Whether report filed was malicious A

On the evidence before the court, it is difficult to ascertain whether or not the third and fourth defendants acted maliciously in filing the report against the plaintiff. The evidence of the plaintiff in this regard was flimsy and lacking in detail. However, it is fairly clear that the third and fourth defendants instigated the plaintiff's arrest. Having done so, they did not even care to B enter an appearance to defend this action. Therefore, whether or not they were actuated by malice, they must be held accountable together with the first and second defendants for the plaintiff's arrest.

Whether arrest, search and detention were unlawful

As I have already stated, none of the defendants was present at the trial to testify C in their defence. Consequently, apart from the second defendant's written report, there is nothing else before the court to support the reasonableness of the defendants' suspicions leading to the plaintiff's arrest. In particular, there is no explanation from the defendants as to when, where or how the rhino in question was allegedly hunted by the plaintiff, or as to who saw the plaintiff in the vicinity of the crime. There is in fact no nexus linking the plaintiff to D the commission of the alleged offence, other than the "tip-off" from the third defendant. Moreover, the first and second defendants arrested and handcuffed the plaintiff without first interrogating him. In short, the nature and extent of the suspicion that the defendants acted upon cannot be tested. Having regard to the undisputed fact that no charges were subsequently laid against E the plaintiff, the only conclusion one can draw is that the defendants acted without reasonable and probable cause in arresting the plaintiff.

As for the alleged ill-treatment and humiliation of the plaintiff, his general demeanour when testifying in this regard suggested that he was exaggerating for effect and was not being entirely truthful. Moreover, his evidence on this aspect was not corroborated by any other witness, for instance, any member F of the public or his workers and children who he claims witnessed his ill-treatment by the defendants. In any event, the second defendant denies any such maltreatment. He explains in his report that the plaintiff was co-operative and that his arrest and the search of his residence and vehicle were properly conducted. His version of the relevant events is no less credible than that G of the plaintiff. In my view, on a balance of probabilities, the plaintiff has failed to establish his assertions in this respect.

Turning to the plaintiff's detention, it is common cause that he was arrested on 27 September 2008 and detained at several places before being released on 30 September 2008. In this regard, there is no explanation from the defendants as to why the plaintiff was detained at Bikita CID Station for two H

Patel J

A days, without being interrogated, only to be released without having been formally charged. Even if one were to accept that he was lawfully arrested on reasonable suspicion, the length of his detention simply cannot be justified on the facts before the court.

Claim for general damages

B On the foregoing findings, the plaintiff is clearly entitled to general damages for unlawful arrest and detention. The only issue in this respect is the appropriate quantum of damages that should be awarded. The plaintiff claims an amount of US$18 600. Apart from the illegality of his arrest, the plaintiff was detained approximately 300 kilometres away from his residence C for a relatively protracted period of three days. In the absence of any other aggravating features, and having regard to the amounts awarded in the cases cited earlier, I would consider the sum of US$3 000 as representing a fair and equitable measure of damages on the facts of this case.

Claim for special damages

D The plaintiff claims the sum of US$2 000 as special damages in respect of repairs to his motor vehicle. In support of this claim, he tenders an invoice for ZAR16 500 from a South African firm. However, his claim is beset with several difficulties.

The first difficulty is the absence of any evidence to the effect that the vehicle was in good condition before it was searched by the defendants. Secondly, E the invoice does not indicate which vehicle was to be repaired, as it does not reflect any registration or other details identifying it as the plaintiff's vehicle. Thirdly, the date of the invoice (17 September 2008) predates the day when the search was conducted and, in any event, does not tally with the date stamped on the invoice (17 November 2008). The plaintiff was unable F to explain these discrepancies. Fourthly, and most importantly, he was unable to produce any receipts to demonstrate that the repairs in question had in fact been paid for. This failure is inexplicable given that the plaintiff's schedule of documents, filed on 1 September 2010, specifically lists "invoices and receipts for vehicle repairs". For all of these reasons, the plaintiff's claim G for special damages cannot be sustained and must be dismissed.

Disposition

In the result, judgment is granted in favour of the plaintiff as against the defendants as follows.

It is ordered that the defendants shall jointly and severally, the one paying H the others to be absolved, pay to the plaintiff:

Patel J

(a) the sum of US$3 000 (as general damages for unlawful arrest and A detention) together with interest thereon at the prescribed rate from the date of the summons to the date of payment in full;

(b) costs of suit.

Muza & Nyapadi, plaintiff's legal practitioners B

Civil Division of the Attorney-General's Office, first, second, fifth and sixth defendants' legal practitioners

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Source:
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BOWES & ORS v MANOLAKAKIS 2011 (2) ZLR 59 (H)

Citation	2011 (2) ZLR 59 (H)
Case No	Judgment No. HB-103-11
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	21 July 2011
Judgment	21 July 2011
Counsel	Ms *N Ncube,* for the applicant *N Siphuma,* for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

C **Constitutional law** – *Constitution of Zimbabwe 1980 – ss 18(1) and 18(9) – right to protection of the law – application for security for costs not to be granted unreasonably*

Costs – *security for – action brought by peregrinus – incola's right to seek security for costs – court's discretion as to whether to order security –* D *considerations – security for costs a discretionary remedy – remedy arises out of judicial practice – relief must not be granted unreasonably*

Headnote

The protection of provision of security for costs by a peregrinus is only available to an *incola* of Zimbabwe, who is not, a general rule, required E to provide security for costs. In seeking this protection, he must prove that the respondent is a *peregrinus*. He must also satisfy the court that he is indeed an *incola* before the protection can be granted. Such status is not acquired merely by having a claim within Zimbabwe, which claim is the subject of the dispute, no matter how substantial that claim may be. An *incola* connotes an element of residence, not temporary residence F but constituting domicile in the country.

In Zimbabwe there are no rules providing for an order of security for costs. The issue of security for costs arises out of judicial practice. The court, however, retains the exclusive discretion to make such order or not. In exercising its discretion the court is guided first and foremost by the provisions of s 18(1), as read with s 18(9), of the Constitution of G Zimbabwe 1980, namely, that every person is entitled to the protection of the law and to be afforded a fair hearing within a reasonable time by an impartial tribunal in the determination of the existence or extent of his civil rights or obligations.

The respondent, a *peregrinus*, had instituted proceedings seeking to set aside H the will of her late husband, M, which, she alleged, had been drafted by

Mathonsi J

P and bore a forged signature. In her lifetime, P, who was also recently A deceased, had been the partner of M and the mother of two children. The respondent was a *peregrinus*. The first applicant, who was the executor dative of the estate of the late P, sought an order of security of costs against the respondent. Apart from the first applicant himself and the estate of the late M, all parties to the proceedings were effectively *peregrini*. B The applicants proposed to bring witnesses, at very considerable cost, from both Greece and South Africa to prove that the

signature on the will was not a forgery. The respondent was a very elderly woman and there was nothing before the court to show that she was able to pay the costs in question.

Held, that there was nothing to show that the proposed costs of bringing C witnesses from Greece and South Africa were reasonable and the respondent should not be denied justice by any unreasonable obstacles being placed in her way. In the circumstances and in the exercise of the court's discretion, the application for security for costs must be dismissed, with the costs thereof to be costs in the main cause. D

Cases cited

Ginsberg v Estate Kulf 1924 SWA 1

GRE Ins Ltd v Chisnall 1981 ZLR 551 (S)

Zendera v McDade & Anor 1985 (2) ZLR 18 (H)

Zietsman v Electronic Media Network Ltd & Ors 2008 (4) SA 1 (SCA) E

Legislation considered

Constitution of Zimbabwe 1980, ss 18(1) and 18(9)

Case information

Ms *N Ncube,* for the applicant

N Siphuma, for the respondent F

Judgment

MATHONSI J: The late doctor John Joseph Manolakakis was a Greek medical doctor practicing medicine in Zimbabwe. He died on 2 July 2006 in Bulawayo, Zimbabwe, at the age of 72 leaving behind flats number 1703 G and 1704 Kenilworth Towers, Ascot, Bulawayo and some household furniture and personal effects according to the inventory submitted upon registration of his estate as DRB 611/06.

The late doctor did not leave behind any children and is survived by his mother, the respondent in this application. It would appear that at the time of his death he had a "living in partner", Evangelia Patrinos (nee Kristakis), H

Mathonsi J

A the mother of Ioannis Ioannidis and Constandinos Patrinos, who are cited in this application as fourth and fifth applicants.

Evangelia Patrinos also died on 8 March 2008 in Greece at the age of 62 and is survived by the fourth and fifth applicants. Her estate, DRB 587/08 is cited in these proceedings as third applicant, while that of the late Dr B Manolakakis is second applicant. According to the inventory submitted in DRB 587/08, Evangelia Patrinos' estate has no assets in Zimbabwe at all except the claim to the estate of Dr Manolakakis and her death records show that she was a Greek national as well.

The fourth and fifth applicants are also foreign nationals currently based in Athens, Greece and Lincolnshire, England respectively. Clearly therefore C third, fourth and fifth applicants are, for all intents and purposes, *peregrini* and not *incolae* applicants at all.

In case number HC 2226/08 the respondent, who herself is a *peregrinus* based in Greece, brought an action against the applicants seeking the nullification of a will purportedly drawn by the late Dr Manolakakis. In that action the D plaintiff, who is respondent in the present application, alleges that the said will was drafted by Evangelia Patrinos who went on to forge the erstwhile doctor's signature. The claim has been contested and at the pre-trial conference of the parties, only one issue was identified for trial namely, "whether or not plaintiff did comply with the Wills Amendment Act No. 21/98".

After the matter was referred to trial, this application was made for an order E directing the respondent, as a *peregrinus*, to pay the sum of US$29 150 as security for costs and costs of the application on an attorney and client scale. The basis of the application is that the respondent does

not have assets in this country as would provide security for the costs of the applicants in the event of a successful contestation of her action.

F It has been argued on behalf of the respondent that, while six applicants are cited in the application, there is in actual fact only one applicant who is the first applicant. Before her death, the late Evangelia Patrinos was appointed executrix dative in the estate of the late Dr Manolakakis by letters of administration issued on 23 August 2006. When she died, the first applicant was appointed executor dative of her estate by letters of administration G issued on 9 March 2008.

However, up to now the sixth applicant has not appointed an executor dative to replace the late Evangelia Patrinos in the estate of the late Dr Manolakakis. For that reason I agree that the first applicant cannot purport to represent the second applicant, the estate of the late Dr Manalakakis. He can only H represent the third applicant, the estate of the late Evangelia Patrinos who

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Mathonsi J

was herself a *peregrinus* and whose estate has nothing in this country other A than the contested claim in the estate late Dr Manolakakis.

I have already stated that fourth and fifth applicants are also foreign nationals based in Greece and England. They are therefore not *incolae.* In addition to that, first applicant does not purport to make the application on their behalf. The first applicant in fact states in his founding affidavit that he makes the B application in his capacity as the "director of National Executor and Trust (Pvt) Ltd". This is not helpful at all because he holds letters to administer the third applicant's estate in his personal capacity. He can only bring an application on behalf of the third applicant.

This is particularly so as none of the other applicants have given him authority to make the application and they have not deposed to affidavits in support of C the application. It is inconceivable that the sixth applicant would have given first applicant authority to bring this application on his behalf.

I therefore come to the conclusion that there are only two applicants in this matter, the first and third applicants with the first applicant only acting in a representative capacity as the executor of the third applicant. The merits of D the application will be considered on that basis alone.

The basis of the rule requiring a *peregrinus* to provide security for the costs of an *incola* defendant was set out by Sandura JP (as he then was) in *Zendera v McDade & Anor* 1985 (2) ZLR 18 (H) at 20A-D as follows:

> "The issue relating to the furnishing of security for costs by a plaintiff who is E a *peregrinus* is discussed by the learned authors of *The Civil Practice of the Superior Courts of South Africa* 3 ed at p 25. There the learned authors have this to say:
>
> > 'A *peregrinus* who initiates proceedings in our courts must, as a general rule, give security to the defendant for his costs, unless he has within the area of jurisdiction of the court immovable property with a sufficient margin unburdened to satisfy any costs which may arise. F
> >
> > The presence of immovable property is a defence to a claim for security, but the doctrine has not been extended to include movable property.
> >
> > The court has, however, a discretion to dispense with security in exceptional cases but should exercise its discretion sparingly.'
>
> The rule requiring a *peregrinus* to give security for the defendant's costs was laid down as far back as 1828 in *Witham v Venables* (1828) 1 Menz 291 and G subsequently explained in *Lumsden* v *The Kaffrarian Bank* (1884-5) 3 SC 366. *The object of the rule is to make sure that an* incola *will not suffer any loss if he is awarded the costs of the proceedings. The rule exists primarily to protect the interests of an* incola *who is sued by a* peregrinus*"* (the emphasis is mine).

It is important to note that the protection of provision of security for costs is only available to an *incola* of this country. An *incola* is not, as a general rule, H

Mathonsi J

A required to provide security for costs. Writing about that issue, Herbstein and van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed at p 251 state:

> "The burden of proving that the respondent is a *peregrinus* lies on the applicant, i.e. the defendant, but if it appears that until recently the plaintiff has been an *incola* of some foreign country, the onus is on him to show that he has changed B his domicile and has become an *incola* of the Republic. In such a case, it is not sufficient for him merely to make a statement to the effect that he has changed his domicile but he should place before the court facts from which it is able to judge of the reliance to be placed upon his statement. The court will scrutinize such evidence closely, but if the court is satisfied that there is nothing improbable in the evidence and that it would not be justified in declining to accept it, an order for security for costs will be refused even where the respondent has come C to this country for the express purpose of instituting an action."

By parity of reason, a party seeking the remedy of security for costs must satisfy the court that it is an *incola* before the protection can flow to it. Clearly such status is not acquired merely by having a claim within Zimbabwe which claim is the subject of the dispute, no matter how substantial the property is. D See *Ginsberg v Estate Kulf* 1924 SWA 1 at 2. *Incola* connotes the element of residence, not temporary residence, but domicile in this country.

In Zimbabwe there are no rules providing for an order for security for costs. The issue of security for costs arises out of judicial practice. The court however retains the exclusive discretion to make such an order or not to. In E my view, in exercising its discretion, the court is guided first and foremost by the provisions of s 18(1) as read with s 18(9) of the Constitution of Zimbabwe, 1980, namely, that "every person" is entitled to the protection of the law and to be afforded a fair hearing within a reasonable time by an impartial tribunal in the determination of the existence or extent of his civil rights or obligations. See *Zietsman* v *Electronic Media Network Ltd & Ors* F 2008 (4) SA 1 (SCA).

In casu, virtually all the interested parties, except for the estate of the late Dr Manolakakis which is effectively not a party to this application, are foreigners having their domicile elsewhere (Voet 2.8.1). They therefore do not have an automatic right to security for costs in this jurisdiction. In addition to that, the respondent is an extremely elderly woman who has not been shown to G have sufficient means to pay the costs in question.

The respondent should not be denied justice by unreasonable obstacles being placed in the way of persons seeking redress. As stated in *GRE Insurance* v *Chisnall* 1981 ZLR 551 (S) at 559H and 560A, the fact that the respondent has immovable property situated within the country is not the only ground H for refusing to grant security for costs.

Mathonsi J

I take the view that it would be a judicious exercise of my discretion not to A order security to be paid. Having come to that conclusion, it is not necessary for me to examine whether the *quantum* of the costs claimed is reasonable for purposes of proving the single issue that has been referred to trial. I have in mind the fact that the applicants propose to bring witnesses all the way from Greece and South Africa at very high cost merely to prove that the disputed B signature belongs to the late Dr Manolakakis. On the evidence available, it has not been shown that the proposed costs are reasonable.

In the result, the application is dismissed, with costs to be costs in the main action.

Lazarus & Sarif, applicants' legal practitioners C

Sansole & Senda, respondent's legal practitioners

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Source:
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RECOY INVESTMENTS (PVT) LTD v TARCON (PVT) LTD 2011 (2) ZLR 65 (H)

Citation	2011 (2) ZLR 65 (H)
Case No	Judgment No. HH-159-11
Court	High Court, Harare
Judge	Gowora J
Heard	14 January 2011; *CAV*
Judgment	27 July 2011
Counsel	*P C Paul*, for the applicant *T Hussein*, for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Arbitration – arbitration *clause – clause requiring referral to arbitration in event of dispute – need for dispute to exist – need for party relying on clause to apply for stay of court proceedings*

D **Contract – option** *– what is – lease agreement giving option to renew at rent to be agreed on – effect – no rights given to tenant – no obligation imposed on landlord to negotiate or agree to new rental*

Landlord and tenant *– lease – renewal of – option – lease giving option to renew at rent to be agreed on – no right given to tenant to renew lease and no obligation on landlord to negotiate with tenant*

E **Practice and procedure** *– declaratory order – when may be granted – need for applicant to show tangible interest in relation to an existing, future or contingent right or obligation*

Headnote

The applicant sought a declaratory order, to the effect that a lease agreement F between itself and the respondent did not give the respondent an option to renew. The relevant clause provided that "the tenant shall have an option to renew this lease agreement for a further period of five years by giving written notification to the landlord not less than three months and not more than six months prior to the expiry of this lease. The terms and conditions of such renewal shall be in terms of this agreement except G that the rental and deposit shall be mutually agreed upon at the time that renewal is exercised"

At the time of the application, the lease still had over 18 months to run. The respondent opposed the application on the grounds that there was an arbitration clause which ousted the jurisdiction of the court and that, in H any event, the application was premature as the parties' rights had not

Gowora J

matured. The arbitration clause provided that "Any dispute between A the parties in regard to any matter arising out of this lease agreement or its interpretation or their respective rights and obligations under this agreement or its cancellation or any matter arising out of its cancellation shall be submitted to and decided by arbitration". The applicant argued that the application was not a "dispute" as envisaged by the lease agreement. B

Held, that in terms of art 8 of the Schedule to the Arbitration Act, which is clear and admits of no ambiguity, the court has the jurisdiction to hear the matter where none of the parties has applied for a stay of the proceedings and a consequential referral to arbitration. A party wishing to have the matter decided by arbitration is obliged to set the terms of the dispute. An arbitration process cannot be set in motion in the absence of C a dispute. Before reference to arbitration there must,

therefore, exist a dispute which is capable of formulation prior to the appointment of an arbitrator. In the absence of a dispute, an arbitrator cannot be appointed and therefore there can be no reference to arbitration. Here, the respondent did not allege that there was a dispute and had not applied for a stay of proceedings. The court accordingly had jurisdiction. D

Held, further, that an existing dispute is not a pre-requisite for the making of declaratory order and the court is not precluded from granting a declaratory order on the basis that there is no dispute. However, the court will not exercise its discretion where the applicant has, in seeking a declaratory order, raised abstract, hypothetical or academic questions. E The applicant must have some tangible and justifiable interest in relation to an existing, future or contingent right or obligation which will flow from the grant of the declaratory order. A person seeking a declaration of rights must set forth his contention as to what that alleged right is. He must also show that he has an interest in the right. Inherent in the F concept of a right is the idea that the right resides in a determinate person and the persons interested in the right are those in whom it inheres on against whom it avails. The fact that the rights or obligations under the renewal clause had not yet matured was not a bar to a declaratory order being granted, as a declarator can be granted in respect of an existing, future or contingent right. G

Held, further, that an agreement which purports to give a tenant an option "at a rental to be mutually agreed upon" does not give the tenant a valid and subsisting option which he can exercise, nor is the landlord under an obligation to negotiate with a lessee in order to determine a rental for any further period. The fact that the lease agreement provides for possible renewal of the lease agreement for a further period is of no H

Gowora J

A moment. If an offer is vague or capable of more than one meaning or not certain or specific, it is not capable of being accepted and thereby converted into a binding contract. In the absence of a specific provision for rental in the renewal clause, pending agreement on such rental, there was no valid and subsisting option which the respondent could exercise.

Cases referred to B

Biloden Properties (Pty) Ltd v Wilson 1946 NPD 736

Durban City Council v Assn of Bldg Socs 1942 AD 27

PCL Consulting (Pty) Ltd v Tresso Trading 119 (Pty) Ltd 2009 (4) SA 68 (SCA)

C *Reserve Bank v Photo craft (Pty) Ltd* 1969 (1) SA 610 (C)

Legislation considered

Arbitration Act [*Chapter 7:15*], First Schedule, art 8(1)

High Court Act [*Chapter 7:06*], s 14

Case information

D *P C Paul*, for the applicant

T Hussein, for the respondent

Judgment

GOWORA J: The applicant has approached this court for an order in the following terms: E

1. It is declared that the lease agreement between the applicant and respondent dated 16 April 2007 in respect of 5 Martin Drive Msasa does not confer upon respondent any option to renew the lease.
2. The respondent shall pay the costs of this application in the event of it being opposed by the respondent.

F The background to this application is as follows. On 16 April 2007 the applicant let, in terms of a written agreement, certain premises known as 5 Martin Drive, Msasa, to the respondent. The lease was to endure for a period of five years. According to the applicant's papers filed of record it was

set to terminate on 31 March 2012. The applicant states in the founding affidavit that it is considering occupying the premises for its own use upon the expiration G of the lease and has therefore approached this court to determine whether, the respondent, in terms of clause 5.1 of the said lease has a right of renewal.

The respondent is opposed to this court granting the relief prayed for. It has raised a point *in limine* to the effect that this court lacks the jurisdiction to determine the matter as the parties, in terms of clause 17.1 of the lease H agreement, have agreed that any matter arising from the lease agreement

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Gowora J

be referred to arbitration. Additionally, the respondent contends that if the A point *in limine* is not successful, then in that event, it would argue that the parties' rights or obligations arising from the lease agreement have not yet matured and that therefore this application is premature.

Clause 17.1 on which the respondent seeks to rely on in its submissions that this court lacks jurisdiction to determine any matter arising from the lease B agreement, is to the following effect:

"17. ARBITRATION

For the purpose of this clause:

17.1 Any dispute between the parties in regard to any matter arising out of this lease agreement or its interpretation or their respective rights and obligations under this agreement or its cancellation or any matter arising C out of its cancellation shall be submitted to and decided by arbitration.

17.2 ...

17.3 ...

17.4 ...

17.5 The decision of the arbitrator shall be final and binding on the parties D to the dispute and may be made an order of court at the instance of any of the parties to the dispute.

17.6 ...

17.7 The provisions of this clause:

17.1.1 constitute an irrevocable consent by the parties to any proceedings in terms hereof and no party shall be entitled to withdraw therefrom or E claim at any such proceedings that it is not bound by such provisions;

17.7.2 are severable from the rest of this agreement and shall remain in effect despite the termination of or invalidity for any reason of this agreement.

17.8 This clause shall not preclude any party from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator." F

It is contended by the respondent that clause 17.1 refers to a wide manner of dispute resolution as it refers to any matter and is not restricted to the interpretation of the lease agreement. It is also contended that the applicant has not taken the court into its confidence regarding the reasons why it does not wish to be bound by the lease agreement which has provided for a speedy G resolution of any disputes in terms of the arbitration clause.

The applicant denies that it is, by launching these proceedings, attempting to withdraw from the arbitration clause. It contends further that the dispute before me is not a dispute as envisaged by clause 17.1 of the lease agreement. Chapter 11 of Article 8 of the Model Law (UNCITRAL) obliges a court before which proceedings are brought in a matter which is the subject of H

Gowora J

A an arbitration agreement, to stay those proceedings and refer the parties to arbitration. In the event, however, that the court finds that the agreement is null and void, inoperative or incapable of being performed, it is not obliged to refer the parties to arbitration. Article 8 also provides that the court should refer the parties to arbitration if one of the parties requests in writing for the stay of the proceedings at the same time that such party submits his statement B on the substance of the dispute.

The respondent has, in its opposing affidavit, indeed adverted to the arbitration clause in the lease agreement. The respondent has, however, contented itself in merely alleging that due to the

existence of the arbitration clause, the jurisdiction of this court is ousted.

C In my view, the respondent has a misapprehension of the law. The court has the jurisdiction to hear the matter where none of the parties has applied for a stay of the proceedings and a consequential referral to arbitration. Article 8 is clear and admits of no ambiguity. I am bolstered in this view by *dicta* from Cloete JA in *PCL Consulting (Pty) Ltd v Tresso Trading 119 (Pty) Ltd* D 2009 (4) SA 68 (SCA) at 71G-72C to the following effect:

> "The mere fact that parties have agreed that disputes between them shall be decided by arbitration does not mean that court proceedings are incompetent. If a party institutes proceedings in a court despite such an agreement, the other party has two options:
>
> (i) It may apply for a stay of the proceedings in terms of s 6 of the Arbitration E Act 42 of 1965; or
>
> (ii) It may in a special plea (which is in the nature of dilatory plea) pray for a stay of proceedings pending the final determination of the dispute by arbitration.
>
> The definitive statement of the law in this regard is to be found in *Rhodesia* F *Railways Ltd v Mackintosh* 1932 AD 359 at 370-371 where Wessels ACJ said:
>
> > 'All that s 6(1) lays down is that you cannot adopt the cheaper and speedier procedure therein provided when once you have delivered pleadings or taken any other step in the proceedings. If you have taken any step in the proceedings, then you can no longer adopt the speedier and less costly procedure of applying to the court to stay proceedings but you must file G your pleadings in the ordinary way. In pleading, however, you can raise the defence that the case ought to be decided by arbitration. This can be done by a special preliminary plea'".

A party wishing to have the matter decided by arbitration is obliged to set the terms of the dispute. An arbitration process cannot be set in motion in the absence of a dispute. Before reference to arbitration, there must therefore H exist a dispute which is capable of formulation prior to the appointment of

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an arbitrator. In the absence of a dispute, an arbitrator cannot be appointed A and therefore there can be no reference to arbitration.

The respondent, in opposing the procedure adopted by the applicant, has erred in two fundamental aspects. It accepts that a dispute does not exist. It is correct that the lease agreement contains an arbitration clause in the wide sense. The ambit of the clause does not detract from the requirement B that a dispute must exist if an arbitrator is to be appointed. *In casu*, even if the respondent had applied for a stay of these proceedings, this court would not have been able to refer the matter for arbitration as there is no dispute capable of formulation.

The second error on the part of the respondent is that it has not applied C for a stay of these proceedings and for a reference to arbitration. This may primarily be due to its stance that there is no dispute between the parties.

In the premises I find that this court has jurisdiction to deal with the matter on the merits.

Section 14 of the High Court Act [*Chapter 7:06*] provides:

> "The High Court may, in its discretion, at the instance of any interested person, D inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination".

The respondent does not dispute this court's power and inherent discretion to inquire into and determine the rights or obligations of parties seeking the E same. *In casu*, however, the respondent contends that the applicant is seeking legal advice from this court.

It is trite that an existing dispute is not a pre-requisite for the making of a declaratory order and the court is not precluded from granting a declaratory order on the basis that there is no dispute. However, the court will not exercise its discretion where the applicant has, in seeking a declaratory order, raised F abstract, hypothetical or academic questions. The applicant must have some tangible and justifiable interest in relation to an existing future or contingent right or obligation which will flow from the grant of the declaratory order. A person seeking a declaration of rights must set forth his contention as to what that alleged right is. He must also show that he has an interest in the G right. Inherent in the concept of a right is the idea that it, the right, resides in a determinate person

and the persons interested in the right are those in whom it inheres on against whom it avails. In *Durban City Council v Association of Building Societies* 1942 AD 27 Watermeyer CJ stated:

> "Clearly the interest of the applicant must be a real one, not merely an abstract intellectual interest". H

Gowora J

A There are circumstances under which a court can grant a declaratory order to answer abstract academic or hypothetical questions, but this is not the case here.

The respondent has concluded that the application is not properly taken because the parties' respective rights or obligations have not yet matured. B It was the position of the respondent that the lessee is obliged to give notice not more than six months prior to the termination or expiry of the lease agreement. In the circumstances of this case, the election on the part of the respondent would have to be done in September 2011. The application was filed in August 2010 and the respondent argued that, as this was almost two years before the termination of the lease, that means that the application C would be woefully premature.

The parties concluded a written agreement of lease which spells out the rights and obligations of each of the parties. Specifically the lease, in clause 5.1 thereof, makes provision for the respondent to give the applicant, written notice not more than six months before the termination of its intention to D renew the lease for a further five year period.

The applicant requires this court to inquire into the facts placed before it and determine whether or not the respondent has been afforded an option to renew the lease. It is correct, as suggested by the respondent, that the rights or obligations under the renewal clause have not yet matured. This is, E however, not a bar to a declaratory order being granted, as a declarator can be granted in respect of an existing, future or contingent right.

I turn now to the merits of the application. Clause 5:1 is to this effect:

> "Subject to the provisions of the agreement signed by the same parties in respect of the sale of the premises, the tenant shall have an option to review this lease agreement for a further period of five years by giving written notification to the F landlord not less than three months and not more than six months prior to the expiry of this lease. The terms and conditions of such renewal shall be in terms of this agreement except that the rental and deposit shall be mutually agreed upon at the time that renewal is exercised."

It has been held that an agreement which purported to give the tenant an option "at a rental to be mutually agreed upon" in fact did not give the tenant G "a valid and subsisting option" which he could exercise. See *Reserve Bank v Photocraft (Pty) Ltd* 1969 (1) SA 610 (C). Nor, from decided authorities, is the landlord under an obligation to negotiate with a lessee in order to determine a rental for any further period. The fact that the lease agreement provides for possible renewal of the lease agreement for a further period H is of no moment. If an offer is vague or capable of more than one meaning

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Gowora J

or is not certain or specific, it is not capable of being accepted and thereby A converted into a binding contract.

In the absence of a specific provision for rental in the renewal clause, pending agreement on such rental, there was no valid and subsisting option which the respondent can exercise. In my view, the *dicta* by Broome J (as he then was) in *Biloden Properties (Pty) Ltd v Wilson* 1946 NPD 736 at 744 is not B only on point *in casu* but also instructive. He stated:

> "A true option is nothing more than an offer by one party to a contract to the other, which offer remains open according to the terms of the contract. The option holder has merely to accept the offer in the manner and within the time prescribed by the contract, and a new contract comes into existence between him and the other party. But in the present case the giving of notice under C clause 11 does not bring a contract into existence, for all the terms, other than the period, have still to be arranged. And unless those terms are agreed upon there will be no contract at all. In my opinion the true effect of clause 11 is that the due exercise by the lessee is nothing more than a notice to the lessor that he wishes to renew and desires to negotiate. The parties are then in the position of negotiators, but neither is obliged to agree to anything. It may be that some D duty to act in good faith is cast upon the lessor, but the exact nature and extent of that duty, if it exists at all, are impossible to define."

The respondent has not argued the matter on the merits, having contented itself with raising issues which were procedural in nature. I have thus no real opposition in substantive form to deny the applicant the order it seeks.

The applicant had sought an order against the respondent in the event that this E matter was opposed. As discussed above, there was no live dispute between the parties prior to the institution of these proceedings. The applicant intends to utilise the premises for its benefit at the expiry of the lease period. The application was therefore launched by the applicant for its rights under the lease to be clarified so that it can plan its affairs. It in fact wished to have F the air cleared prior to the expiry of the lease and this would benefit the applicant time wise and financially.

The respondent, in my view, was within its rights to contest the application and assert its own position. Given the absence of a simmering dispute between the parties, I find no basis for the respondent being mulcted in costs. This application was launched solely for advancing the interests of the applicant. G There is no fault attributable to the respondent that can justify an order for costs against it. I will therefore not make an order for costs against either of the parties.

In the premises an order will issue as follows:

It is hereby ordered: H

2011 (2) ZLR p73

Gowora J

1. It A is declared that the lease agreement between the applicant and respondent dated 16 April 2007 in respect of 5 Martin Drive does not confer upon the respondent any option to renew the lease.
2. That there shall be no order as to costs.

B *Wintertons*, plaintiff's legal practitioners

Hussein Ranchhod & Co, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/BUTAU v BUTAU 2011 (2) ZLR 74 (H)

BUTAU v BUTAU 2011 (2) ZLR 74 (H)

2011 (2) ZLR p74

Citation	2011 (2) ZLR 74 (H)
Case No	Judgment No. HH-165-11
Court	High Court, Harare
Judge	Guvava J
Heard	4 February 2011; *CAV*
Judgment	18 August 2011
Counsel	Mrs *J B Wood,* for the applicant *M Mandevere,* for the respondent
Case Type	Opposed application

Annotations No case annotations to date

Flynote

Practice and procedure – *pleadings – amendment of – when amendment should be allowed – court's discretion – principles*

Headnote

In determining whether or not to grant an amendment to pleadings in terms D of r 132 of the High Court Rules 1971, the court is enjoined to consider two points. The first is whether the plaintiff has any prospects of success on the issue upon which the amendment is sought. The second issue is whether or not an injustice would be occasioned to the defendant which cannot be remedied by an appropriate order of costs.

Pleadings may be amended at any stage of the proceedings. The court has E a discretion to allow a party to amend his pleadings or, in the case of an application, to file further affidavits at any time prior to judgment. The grant or refusal of an application for an amendment to pleadings is thus a matter for the discretion of the court, which is to be exercised judiciously, taking into account all the circumstances before it. If F there has been an omission from the original pleadings, no matter how negligent or careless the first omission may have been and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

The object of pleadings is to define issues. It would be difficult for the G applicant to lead evidence on an issue if that issue was not part of the original pleadings and if this omission would prevent full inquiry into the dispute.

Cases cited

Horne v Hine (2) 1947 SR 128; 1947 (4) SA 757 (SR) H

Guvava J

A *Macduff & Co (in liquidation) v Johannesburg Consol Invstm Co Ltd* 1923 TPD 309

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 132

Case information

B Mrs *J B Wood,* for the applicant

M Mandevere, for the respondent

Judgment

GUVAVA J: The applicant instituted proceedings in this court seeking an order to amend her declaration and plea to the defendant's claim in reconvention. C The brief facts which have given rise to this matter may be summarized from the applicant's founding affidavit as follows.

The applicant in this matter is the plaintiff in case number HC 4981/07 wherein she is seeking an order for divorce and ancillary relief. The respondent is the defendant in that matter. During the course of her marriage to the respondent they acquired various movable and immovable properties. She alleges that D some of the property was sold by the defendant for his exclusive benefit prior to the institution of the divorce proceedings. Following advice, she did not include the property which had been sold by her husband as marital assets which should be considered when making an award at divorce in her declaration. The applicant however, still feeling aggrieved by the matter, E sought to amend her pleadings at pre-trial conference stage before Musakwa J. When the respondent opposed her notice to amend she decided to institute these proceedings. In terms of the notice

which was filed with this court on 29 March 2010 the applicant seeks to amend para 8 of the declaration by adding four items which include a motor vehicle, sewing machine, building materials and sewing materials. It also seeks to add new paras 10 and 11 F which place a monetary value on the items and seek a half share of the value. The notice also seeks to claim a half share of the rent the defendant charged and received for an immovable property which they jointly owned between June 2005 and June 2009. The notice also seeks to add the same claim to her plea to the defendant's counter-claim.

G The respondent opposed the application and filed an opposing affidavit. It was his argument that the property claimed had been sold during the subsistence of the marriage for the mutual benefit of the family. He further stated in his affidavit that some of the property was not matrimonial property as it was stolen during the subsistence of the marriage. He then goes on to explain what happened to the proceeds in respect of each item claimed by H the applicant in the notice to amend.

Guvava J

In my view, it is not for this court to determine the circumstances of the sale A of the property. The sole issue before me is whether or not the applicant can amend her pleadings. The High Court Rules 1971, as amended, set out in what circumstances pleadings may be amended. Order 20 Rule 132 provides as follows:

> "Subject to rules 134 and 151, failing consent by all parties, the court or a judge B may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties"

The leading case on this issue is *Horne v Hine (2)* 1947 SR 128; 1947 (4) SA 757 (SR), which sets out what should be taken into account by a court or C judge in determining whether or not to grant the amendment to pleadings in terms of the above rule. It seems to me that the court is enjoined to consider two points. The first point to be considered is whether the plaintiff has any prospects of success on the issue upon which the amendment is sought. The second issue is whether or not an injustice would be occasioned to the defendant which cannot be remedied by an appropriate order of costs. I will D deal with the two points raised.

It was Mrs *Woods'* argument for the applicant that the sole purpose of seeking the amendment was to show that the applicant should be entitled to a larger share of the existing matrimonial estate when it is distributed, as the respondent had already benefited when he sold the other property which E they owned. Indeed it was conceded by the respondent both in his opposing affidavit and in the heads of argument that these were issues which would have to be dealt with in evidence. Mr *Mandevere* in his submissions advanced two main arguments as to why the amendment should not be granted. Firstly, he argued that the applicant knew of this property prior to the issuance of summons and that she could not seek to include the property at this stage F of the proceedings.

It is clear from a reading of the above-cited rule that pleadings may be amended at any stage of the proceedings. Herbstein and van Winsen in *The Civil Practice of the Supreme Court of South Africa* 4 ed at p 514 state that the court has a discretion to allow a party to amend his pleadings or, in the G case of an application, to file further affidavits, at any time prior to judgment. Thus the grant or refusal of an application for an amendment to pleadings is a matter of discretion of the court which is to be exercised judiciously taking into account all the circumstances before it.

The applicant explained in her founding affidavit the reason why she omitted the property in question from her declaration. The explanation offered is, H

Guvava J

A satisfactory and I have found no reason to disbelieve her on that point. In *Macduff & Co (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1923 TPD 309 at 310 the court stated follows:

> "However neglectful or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side; there is no injustice if the other side B can be compensated by costs."

It therefore seems to me that the fact that the applicant was aware of the property prior to issuing of summons should not be a bar to her application for an amendment unless it can be shown that there would be prejudice to the respondent.

C Secondly, Mr *Mandevere* stated that there was nothing that would stop the court, in considering the award to be made in terms of the Matrimonial Causes Act [*Chapter 5:11*], to take into account the property which the applicant seeks to be included in her amendment. He submitted that all that the applicant would need to do is to lead evidence during the trial with regard to the property in question. In his opinion it was not necessary to D seek an amendment to the pleadings to enable the applicant to lead such evidence. It seems to me that there is no dispute as between the parties that evidence in relation to the property which the applicant seeks to include in the amendment is relevant to the court when it makes a determination on their proprietary rights. Whilst it is quite clear that the court, in determining the E matter, cannot distribute the property as it was sold, it has a wide discretion in making an award which would ensure that there is an equitable distribution between the parties.

The object of pleadings is to define issues. In my view, it would be difficult for the applicant to lead evidence on this property if it was not part of her F pleadings and this would obviously prevent full inquiry into the dispute.

The applicant submitted that there would be no prejudice to the defendant if the application was granted. Indeed, Mr *Mandevere* did not seek to argue that the respondent would be prejudiced in the event that the application was allowed. I can find no prejudice which would be occasioned to the defendant. In fact, the amendment will allow a full ventilation of all the issues which G are between the parties.

The applicant has been successful and cost would ordinarily follow the cause. However, in view of the fact that the defendant has been put to the expense of opposing the application, which could have been avoided had the applicant included everything in her declaration, I will penalize her by H denying her costs in this matter.

2011 (2) ZLR p78

Guvava J

Accordingly I make the following order: A

1. The application be and is hereby granted.
2. There shall be no order as to costs.

Atherstone & Cook, applicant's legal practitioners

Mbidzo, Muchadehama & Makoni, respondent's legal practitioners B

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/MWI ZIMBABWE (PVT) LTD v RUWA TOWN COUNCIL & ANOR 2011 (2) ZLR 79 (H)

MWI ZIMBABWE (PVT) LTD v RUWA TOWN COUNCIL & ANOR 2011 (2) ZLR 79 (H)

2011 (2) ZLR p79

Citation	2011 (2) ZLR 79 (H)
Case No	Judgment No. HH-237-11
Court	High Court, Harare
Judge	Kudya J

Heard 2 September 2011

Judgment 2 September 2011

Counsel *L Uriri*, for the applicant
T Magwaliba, for the first respondent
R T Malanga, for the second respondent

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Administrative law – *review – grounds for – legitimate expectation – contractual matter – party awarded tender by town council – decision to award tender not communicated to party – no legitimate expectation that tender would be awarded*

D **Local government** – *urban council – resolution – rescission of – process to be followed – Minister of Local Government – no power to rescind resolution – may direct council to do so – district administrator – no power to rescind or suspend council resolution*

Headnote

E The first respondent town council had invited tenders for the supply of water to the town. The council's technical committee had recommended that the tender be warded to the second respondent, which was the lowest bidder, but the council resolved to award the tender to the applicant. The district administrator for the area wrote to the secretary of council, directing that the resolution to award the tender be suspended in terms F of s 314(1) to (3) of the Urban Councils Act [*Chapter 29:15*]. A special full board meeting of the council was held on the issue as a result of the district administrator's letter. A motion to rescind the previous resolution and accept the technical committee's recommendation was adopted and the tender awarded to the second respondent. A week later, the Minister G of Local Government, purportedly acting in terms of s 314 of the Act rescinded the resolution, which had already been purportedly rescinded by the council. He said that the resolution violated s 211 of the Act, as it was not in the best interests of the inhabitants of the town, who had not had safe and adequate water supply for a long time.

The applicant then filed an application, seeking an announcement of the results H of the tender within four days of the order and an interdict against the

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Kudya J

award of the tender to any party other than itself. On the return day, it A proposed to seek a declaration of nullity of the rescission of the tender and an order that it be confirmed as the winner of the tender process. It was argued for the applicant that the resolution still subsisted and that it granted a legitimate expectation to the applicant that it won the tender.

It was argued for the council that the resolution was properly rescinded B by council in terms of s 89 of the Act. It was also argued that until the results of the tender were officially communicated to the applicant, the applicant did not have a *prima facie* right or any legitimate expectation of those rights to the award of the tender to itself.

Held, that the procedure for rescission of a council resolution is set out in s 89 of the Act. That procedure was not followed: no committee was set up C that recommended cancellation of the resolution, nor was there evidence that seven' days notice of motion, signed by not less than one-third of the membership of the council, was moved through the chamber secretary before the meeting at which the resolution was purportedly rescinded.

Held, further, that the district administrator had no authority to usurp the D Minister's powers in s 314 of the Act, nor did he have power to suspend the resolution pending discussion.

Held, further, that the Minister is not empowered by s 314 to rescind council resolutions. He may, if he is of the view that any resolution, decision or action of a council is not in the interests of the inhabitants of the council area or is not in the national or public interest, may direct the E council to reverse, suspend or rescind such resolution. It is the council that reverses, suspends or rescinds or does any such action directed by the Minister. It is not the Minister himself who does it. All that council is enjoined to do is to obey the Minister.

Held, further, that here, the rescission was not properly rescinded and was still extant. The council had yet to comply with the Minister's directive. F

Held, further, that under s 88(6)(b)(ii) of the Act, the public has no right to inspect or obtain copies of minutes relating to a tender where the lowest bid is not the one accepted by the council. Accordingly, until the offer was communicated, the applicant had no legitimate expectation that the tender would be awarded to it. Further, the process of oversight by the G Minister or council over council decisions demonstrated the absence of any legitimate expectation by any tenderer in the process until the conclusion of the oversight role.

Cases referred to

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

Kudya J

A *Chirambasukwa v Min of Justice* 1998 (2) ZLR 567 (S)

Legislation considered

Urban Councils Act [*Chapter 29:15*], ss 88(6)(b), 89 & 314

Case information

L Uriri, for the applicant

B *T Magwaliba*, for the first respondent

R T Malanga, for the second respondent

Judgment

KUDYA J: On 2 September 2011 I dismissed with costs the provisional order sought by the applicant. I delivered a handwritten judgment in which I set C out the reasons for my decision. On 5 September 2011 the applicant wrote a letter to the Registrar requesting my written reasons. The letter was only brought to my attention on 18 October 2011 together with the applicant's reminder of 10 October 2011. I reproduce hereunder the full judgment I delivered on 2 September 2011.

The first respondent, Ruwa Town Council, floated a tender for the supply of D water to Ruwa. It is common cause that, at a meeting held on 18 July 2011, the full council rejected the recommendation of its technical committee in favour of the second respondent and by vote recommended to award the tender to the applicant.

While the applicant filed unsigned minutes, in its opposing affidavit the council E filed the same copy of the minutes which were duly signed by the chairman on 24 August 2011. Those minutes in regards to the date of their signature put paid the submission by Mr *Magwaliba* that the minutes of council are approved at the next meeting. Those minutes were never approved at the meeting of 12 August 2011. However, of importance is that on 1 August 2011 the district administrator for Ruwa and Epworth wrote to the secretary F of the council. He, amongst other things, wrote that the resolution to award the tender be suspended in terms of s 314(1) to (3) of the Urban Councils Act [*Chapter 29:15*]. The letter indicated that he was suspending the minutes pending the resolution of the issue and requested to meet the full board and management of council by 3 August 2011. On 12 August 2011 at 0926 hours a special full board meeting was held on the issue by council. It was G held at the behest of the district administrator's letter. It was to rescind the resolution of 18 July 2011. A motion to rescind and then adopt the rejected technical committee's report was moved. The minutes of 12 August show that the resolution was rescinded and that the lowest bidder, who was the second respondent, was awarded the tender. The minutes further record H under the resolution that confusion followed from those councillors who

Kudya J

did not wish rescission to take place and the meeting was duly adjourned at A 0950 hours. While the resolution rescinding the minutes refers to the wrong minute number of the minutes (the middle figure is given as 8 instead of 7) it is clear that reference was being made to minutes of 18 July. On 16 August 2011, the Minister of Local Government, Urban and Rural Development, purportedly acting in terms of s 314 of the Urban Councils Act, rescinded the B resolution. He was, as it turned out, rescinding a resolution that had already been purportedly rescinded by council. He set out his reasons in that letter for the action that he took. He averred that the resolution violated s 211 of the Act as it was not in the best interests of the inhabitants of Ruwa, who had not had safe and adequate water supply for a long time. He wrote in the last paragraph of that letter: C

> "In terms of s 314 of the Urban Councils Act, I hereby rescind resolution No FB 81/07/11 and instruct council to transparently and accountably handle the tender and report to me as soon as is practically possible."

The first respondent proceeded to award the tender to the second respondent by letter dated 17 August 2011. The second respondent concluded contractual D arrangements with an insurance company based on the letter in question.

On 25 August 2011 the applicant then filed the present application, seeking an announcement of the results of the tender within four days of the order and an interdict against the award of the tender to any party other than itself. On the return day it will seek a declaration of nullity of the rescission or attempted rescission of the tender and, secondly, that it be confirmed as the E winner of the tender process. The applicant therefore seeks both an interim mandatory interdict and an interim prohibitory interdict. The essential elements are the same. I prefer the way the elements were set out in *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S) at 517B-E where Malaba JA, as he then was, stated: F

> "It must be borne in mind that an interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief. There are, however, requirements which the applicant for interim relief must satisfy before it can be granted. In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267A-F, Corbett J (as he then was) said an applicant for such temporary relief must show:
>
> (a) that the right which is the subject matter of the main action and which he G seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
>
> (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
>
> (c) that the balance of convenience favours the granting of interim relief; and H

Kudya J

> (d) that A the applicant has no other satisfactory remedy."

I did not hear Mr *Uriri*, for the applicant, submit that the applicant had a clear right at all. Rather, he started his submissions on the element that it had a *prima facie* right that may be open to doubt. Mr *Magwaliba* and Mr *Maganga* both contended that the applicant did not have even a *prima facie* right open to doubt. Both respondents abandoned the contention that the unsigned copy B of minutes filed of record by the applicant was invalid. The signed copy, as already alluded to, was signed by council. The accuracy of those minutes and contents is demonstrated in the papers filed by council. Again, were it not so, the flurry of correspondence that followed in the wake of the meeting between council and the district administrator and the minister and even the C applicant would not have been generated. So those minutes, it is apparent, did exist. They say what the applicant says they contain. Mr *Uriri* contended that both the minutes and the resolution are valid. He further contended that the resolution still subsists and that it grants legitimate expectation to the applicant that it won the tender. Mr *Magwaliba*, for the council, contended that the resolution was properly rescinded by council in terms of s 89 of the D Urban Councils Act whch reads as follows:

> "**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 – E

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

(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 F

(b) if the rescission or alteration occurs within six months from the date of the 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-thirds 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 G 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 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 H the case may be.

2011 (2) ZLR p84

Kudya J

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

Mr *Uriri* contended that that process was not followed at all by the council. No committee was set up that recommended cancellation of the resolution. There was no evidence that seven days' notice of motion signed by not less than one-third of the membership of council was moved through the chamber B secretary before the meeting of 12 August 2011. Rather, the minutes indicate that the notice was raised on 11 August 2011. The councillors present at the meeting of 18 July 2011 were not given two days' notice of the meeting of 12 August 2011. Mr *Uriri* attacked the process used to rescind by basically attacking the failures to abide by the provisions set out in s 89, that is, that it was given on 11 August, and not seven days before, nor did the chamber C secretary serve the notice on the councillors present at the first meeting two days before the meeting of rescission. It would therefore appear that Mr *Uriri* is on firm ground when he avers that the resolution was not properly rescinded by council. I did not hear either Mr *Magwaliba* or Mr *Maganga* make any contrary averment on the impropriety of the intervention of the district administrator in the saga. It is clear that it appears that he does not D have the authority to usurp the minister's powers in s 314 of the Urban Councils Act. However, at least in that letter, the district administrator did not seek to rescind the resolution. He sought to suspend the resolution pending discussion. It however appears that he does not even have such powers to suspend the resolution. It also appears that neither is the Minister entitled by s 314 to rescind council resolutions. As worded s 314 reads: E

"**314 Minister may reverse, suspend, rescind resolutions, decisions, etc. of councils**

(1) Where the Minister is of the view that any resolution, decision or action of a council is not in the interests of the inhabitants of the council area concerned or is not in the national or public interest, the Minister may direct the council to F reverse, suspend or rescind such resolution or decision or to reverse or suspend such action.

(2) Any direction of the Minister in terms of subsection (1) to a council shall be in writing.

(3) The council shall, with all due expedition, comply with any direction given to it in terms of subsection (1)". G

My understanding of that subsection is that it is the council that reverses, suspends or rescinds or does any such action directed by the Minister. It is not the Minister himself who does it. All that council is enjoined to do is to obey the Minister; but the Minister is not the one who rescinds the resolution of council as he purported to do in the instant matter. We have an unfortunate situation in this matter where the Minister purportedly rescinded a resolution H

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A that the council had rescinded. I have already found that council did not properly rescind the resolution. The resolution was therefore not rescinded. It still subsists. In my view, the Minister's letter of 16 August 2011 amounts to a directive to council to rescind the resolution. The council has, however, failed to act upon it with due promptness. The resolution SBF 81/07/2011 of 18 July 2011

is extant. It has not been rescinded. There is, however, no B doubt that council is obliged, in terms of s 314, to rescind the resolution.

Mr *Magwaliba,* on the authority of *Chirambasukwa v Minister of Justice* 1998 (2) ZLR 567 (S), strongly argued that until the results of the tender were officially communicated to the applicant, the applicant did not have a *prima facie* right or any legitimate expectation of those rights to the award of the C tender to itself. Mr *Uriri* argued, to the contrary, that council resolutions on tenders are public documents and that the process is held in the public domain where the public and press are allowed. He then distinguished the present case from the *Chirambasukwa* case on the basis that in the C*hirambasukwa* case the court was dealing with a cabinet resolution protected by the Official Secrets Act [*Chapter 11:09*] and dealt with in secrecy.

D The minutes of 18 July 2011 do not show that the meeting was held in public. In fact, what they show is that, after the technical experts had made their presentations, they were excused from the meeting, leaving the councillors to deliberate over the recommendations of the technical committee. The names of the councillors who attended the meeting are listed in the minutes. The E fact that this was a private meeting is buttressed by the provisions of s 88(6)(b)(ii) of the Urban Councils Act that denies the public the right to inspect or obtain copies of minutes relating to a tender where the lowest bid is not the one accepted by council.

By parity of reasoning, there is therefore no differentiation between the present matter and the *Chirambasukwa* case. Until the offer was communicated F to the applicant, it had no legitimate expectation that the tender would be awarded to it. That this is so is further buttressed by the unfortunate run of events that transpired after the meeting of 18 July 2011. In short, what the Urban Councils Act demonstrates is that the council itself or the Minister have an oversight role to play in the award of a tender before or even after G it is communicated to the winner. The Minister can intervene and direct the rescission of the tender as he purported to do in this matter. The council can also rescind its decision as it purported to have done. The process of oversight by the Minister or council over council decisions demonstrates the absence of any legitimate expectation by any tenderer in the process until the conclusion of the oversight role. Therefore, the resolution of 18 July H 2011, subject as it was to review by the council or the Minister, granted no

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right of expectation of clinching the tender to the applicant. I therefore agree A with Mr *Magwaliba* that the absence of any official communication to the applicant deprived it of any derivative rights flowing from the resolution in question. It had no rights of expectation towards landing the tender. In the absence of such rights in the main claim, the applicant's application for a provisional order must fail. This is because all the four factors that must be B established by the applicant who seeks a temporary interdict are conjunctive and not disjunctive.

But for what it is worth, while irreparable harm and absence of a satisfactory remedy would have favoured the applicant, I am satisfied from the submissions made by Mr *Maganga* that the balance of convenience favours the second respondent. In this unfortunate saga, the second respondent became the C unintended victim of the bungling by the first respondent. The second respondent demonstrated through the letter from council dated 17 August 2011 that it was officially notified that it had won the tender. The result was that it concluded further contracts with other parties, such as an insurance company ,to satisfy the tender requirements set out in the tender. The investment that the second respondent has made into the scheme thus far tilts the scales in D the balance of convenience in its favour.

In conclusion, I am satisfied that the applicant has failed to establish a *prima facie* case based on legitimate expectation for the interim relief it seeks.

The first respondent asked for costs on a legal practitioner and client scale whilst the second respondent asked for costs on the ordinary scale. Costs are E always in the discretion of the court. Were it not for the bungling exhibited by the first respondent in handling the resolution in issue, I would have granted its request for costs on the higher scale. While I will grant it its costs based on the principle that costs must follow the result, it is only fair and just that they be on the ordinary scale. F

Accordingly, the application is dismissed on the merits with costs.

Dube, Manikai and Hwacha, applicant's legal practitioners

Magwaliba and Kwirira, first respondent's legal practitioners

Maganga and Company, second respondent's legal practitioners G

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MANYANGE v MPOFU & ORS 2011 (2) ZLR 87 (H)

Citation	2011 (2) ZLR 87 (H)
Case No	Judgment No. HH-162-11
Court	High Court, Harare
Judge	Patel J
Heard	1 September 2010; 2 November 2010; 18 January 2011; 15 March 2011; CAV
Judgment	6 September 2011
Counsel	*H Zhou*, for the plaintiff *F Mutamangira*, for the first defendant *C Muringi*, for the second and third defendants
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Defamation – *damages – factors to be taken into account – purpose of award of damages*

D **Defamation** – *defences – fair comment – principles – what must be shown – need for statement to be a comment – facts on which comment based must be true – comment must be on a matter of public interest*

Defamation – *defences – truth and public interest – what must be shown – material allegation must be true – relevance of other matters of public interest arising in same matter*

E **Defamation** – *plaintiff – reference to – defamatory statement not identifying plaintiff – subsequent publication of a statement disclosing plaintiff's identity and linking him with previous defamatory statement – plaintiff entitled to base action on earlier statement*

Practice and procedure – *absolution from the instance – principles – quantum* F *of proof that must have been shown – preference for allowing case to proceed*

Headnote

After 16 years in his post as mining commissioner in Kadoma, the plaintiff was instructed that he had been laterally transferred to Bulawayo in terms of an earlier notice and instructing him to assume duty at his new G station without any further delay. Subsequently, two articles appeared in a newspaper containing statements attributed to the first defendant, in his capacity as Minister of Mines, to the effect that certain mining commissioners had been transferred because of their

corruption and that they were refusing to transfer as per letters from their lawyers. The H plaintiff's lawyers had written to the Secretary for Mines contesting his

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transfer. This letter was copied to the Minister and the Deputy Minister A of Mines. There followed two further articles in the same newspaper relating to the transfer of Ministry officials and specifically referring to the plaintiff by name. The plaintiff claimed damages for defamation arising from the newspaper articles, citing the first defendant in his personal capacity, as well as the editor and the publisher of the newspaper. The B plaintiff had never been charged with any act of misconduct involving corruption or other illegal activity. He was never interviewed by the newspaper to present his side of the story. He argued that the newspaper articles, taken together, justified the inference that he was one of several corrupt officials being transferred in the Ministry of Mines. The articles, C he claimed, impacted negatively on his professional career in the future as he intended to leave the Ministry of Mines at some stage for other pastures.

It was argued for the defendants that the first defendant, as Minister of Mines, had a public duty to speak out against corruption. The statements made by him were truthful and accurately reflected the endemic corruption D and malpractices within the Ministry. The second and third defendants contended that they were justified in publishing the articles *in casu* and were discharging their duty of informing the public, which has a clear interest in being informed of the matters reported. They had a duty to report on the corruption of public officers and their resultant transfers E and reassignment, and the public had a reciprocal interest in receiving such information. They also argued that the articles were a fair comment on a matter of public interest.

At the end of the plaintiff's case, the defendants applied for absolution from the instance.

Held, that the test to be applied as to whether to grant absolution is not whether F the evidence for the plaintiff establishes what would finally be required to be established to obtain judgment. It is whether the plaintiff has made out a *prima facie* case against the defendant on the basis of which the court could or might find for the plaintiff. A reticent defendant should not be allowed to shelter behind the procedure of absolution from the G instance. In practice, the courts are loath to decide upon questions of fact without hearing all the evidence from both sides, and have usually inclined towards allowing the case to proceed. At this stage of the trial, it is not pertinent to evaluate the weight of the evidence adduced or the preponderance of probabilities, save where such findings are manifest from the evidence already heard. H

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A *Held,* further, that in an action for defamation, the plaintiff is required to prove that the injurious statement referred or related to him, not necessarily that he was specifically mentioned by name. The test for this purpose is an objective one, *viz.* whether the ordinary reasonable person reading or hearing the statement would have understood the words complained of as applying to the plaintiff. As regards a series of statements, the publication B of defamatory words and the identification of the person intended to be defamed need not occur contemporaneously. Evidence of a subsequent statement identifying the plaintiff is admissible as proof that an earlier defamatory statement referred or related to him.

Held, further, that a reasonable person would have understood the articles C as possibly, but not necessarily, alluding to the plaintiff, by reference to his office and the fact of his resisting transfer through his lawyers. Once the later articles, which mentioned the plaintiff by name, were published, the reasonable reader, taking all four articles conjunctively, would undoubtedly have identified the plaintiff as one of the mining commissioners who was being transferred on the grounds of corruption. D The articles, taken together, imputed on the part of the plaintiff (amongst others) a proclivity towards corrupt behaviour, illegal activities, dishonest and unprofessional conduct and attempting to cover up illegalities. Such imputations were unquestionably defamatory in accordance with the applicable tests laid down by the courts.

E *Held,* further, that for the defence of public interest or justification to succeed, the statement alleged to be defamatory must be true and must be made in the public interest. It is not necessary for the truth of every word to be established. It suffices that the statement is substantially true in every material respect. The element of public interest lies in telling the

public something of which it is ignorant and which is in its interest to know. As F for the element of truth, what must be true is the "sting of the charge" or the material allegation only. The articles contained information that was undoubtedly of considerable public interest, as the alleged malpractices within the Ministry and the consequent reassignment of Ministry officials were of unquestionable public importance. However, what was relevant was whether the material imputation that the plaintiff himself was corrupt G and dishonest was factually true. The defendants proffered nothing to verify that imputation. In the absence of any evidence to substantiate the utterances of illegality and impropriety against the plaintiff, the claim of justification in the public interest could not avail the defendants.

Held, further, that for the defence of fair comment to succeed, the defendant H must show (a) that the statement complained of was an opinion or

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comment and not a statement of fact; (b) that the comment was fair and A not excessive; (c) that the factual allegations on which the comment is based were true; (d) that the comment was based on facts expressly stated or clearly indicated in a document or speech containing the defamatory matter; and (e) that the comment was on a matter of public interest. There was nothing approximating a comment or opinion in the B offending articles which contained statements of fact, drawn from the first defendant's utterances and from correspondence by the plaintiff's lawyers. There was nothing by way of comment or opinion expressed in the articles. Even if one were to stretch the notion of comment to include the content of the articles, the defendants failed to show that the factual allegations on which the supposed comment was based were true. The C defendants could not rely on the defence of fair comment.

Held, further, that in assessing the quantum of damages, a variety of factors had to be considered, including the content and nature of the defamatory publication; the plaintiff's standing in society; the extent of the publication; the probable consequences of the defamation; the D conduct of the defendant; the recklessness of the publication; comparable awards of damages in other defamation suits; and the declining value of money. Damages for defamation are intended to compensate the plaintiff for sentimental loss and should not, as a rule, be punitive.

Cases cited E

Bane v Calvin 1959 (1) SA 863 (C)

Chinamasa v Jongwe Printing & Publishing Co (Pvt) Ltd & Anor 1994 (1) ZLR 133 (H)

Crawford v Albu 1917 AD 102

Dorfman v Afrikaanse Pers Publikasies (Edms) Bpk en Andere 1966 (1) PH J9 (A) F

Erasmus v Boss 1939 CPD 204

Garwe v Zimind Publishers (Pvt) Ltd & Ors 2007 (2) ZLR 207 (H)

Johnson v Beckett & Anor 1992 (1) SA 762 (A)

Johnson v Rand Daily Mail 1928 AD 190

Kennedy v Dalasil 1919 EDL 1 G

Levy v Modus Publications (Pvt) Ltd 2000 (1) ZLR 68 (H)

Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd 1984 (2) ZLR 151 (S)

Macheka v Metcalfe HH-62-07

Madhimba v Zimbabwe Newspapers (1980) Ltd 1995 (1) ZLR 391 (H)

Mahommed v Kassim 1972 (2) RLR 517 (A); 1973 (2) SA 1 (RA) H

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A *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A)

Masuku v Goko & Anor 2006 (2) ZLR 341 (H)

Mnangagwa v Nyarota & Anor HH-153-04

Moyo v Chipanda 2004 (2) ZLR 67 (H)

Moyo v Nkomo & Dabengwa HB-38-11

Moyse & Ors v Mujuru 1998 (2) ZLR 353 (S)

B *Ndewere v Zimbabwe Newspapers* (1980) Ltd & Anor 2001 (2) ZLR 508 (S)

Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others 1994 (1) SA 708 (A)

Nestoros v Innscor Africa Ltd 2007 (2) ZLR 267 (H)

Quintessence Co-ordinators (Pty) Ltd v Government of the Republic of Transkei 1993 (3) SA 184 (Tk)
C

Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor 1994 (1) ZLR 445 (H)

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

Tekere v Zimbabwe Newspapers (1980) (Pvt) Ltd & Anor 1986 (1) ZLR 275 (A) D

Theron v Behr 1918 CPD 443

Thomas v Murimbo 2000 (1) ZLR 209 (H)

Velempini v Engineering Services Department Workers' Committee for the Engineering Services of the City of Bulawayo & Ors 1988 (2) ZLR 173 (HC)

Vermaak v van der Merwe 1981 (3) SA 78 (N)

E *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 (S)

Young v Kemsley & Ors 1940 AD 258

Case information

H Zhou, for the plaintiff

F Mutamangira, for the first defendant

F *C Muringi*, for the second and third defendants

Judgment

PATEL J: The plaintiff is the mining commissioner for the district of Kadoma. He claims damages in the sum of US$30 000 for defamation arising from several newspaper articles published in *The Chronicle* in March and April 2009. The first defendant is the Minister of Mines, but is sued in this case in G his personal rather than official capacity. The second defendant is the editor of *The Chronicle*, while the third defendant is the publisher of that newspaper.

The issues for determination in this matter revolve around the words uttered by the first defendant and published by the second and third defendants in *The Chronicle*. Firstly, were these statements understood to refer to the plaintiff H and, if so, was the plaintiff injured in his name and reputation? Secondly, if

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the statements were defamatory of the plaintiff, was their publication justified A on the grounds of fair comment and/or the public interest? And lastly, if the plaintiff was defamed without justification, what is the quantum of damages that he should be awarded?

Evidence for the plaintiff

The plaintiff testified as follows. He is the mining commissioner for Kadoma B district. He has held that post since his promotion in 1993 and is comfortably settled in Kadoma. In March 2009, after returning from vacation leave, he received a memo from the Secretary of Mines advising him that he had been laterally transferred to Bulawayo in terms of an earlier notice and instructing him to assume duty at his new station without any further delay. C Subsequently, he saw two articles in *The Chronicle* of 17 and 20 March containing statements attributed to the first defendant, qua Minister of

Mines, to the effect that certain mining commissioners had been transferred because of their corruption and that they were refusing to transfer as per letters from their lawyers. On 16 March, the plaintiff's lawyers had written to the Secretary for Mines contesting his transfer. This letter was copied to D the Minister and the Deputy Minister of Mines. There followed two further articles in *The Chronicle* on 3 and 15 April relating to the transfer of Ministry officials and specifically referring to the plaintiff by name.

According to Public Service Commission Circular No. 11/2004, the power to transfer an official of any rank equivalent or senior to that of the plaintiff E vests in the Commission. The transfer of the plaintiff was directed by the Secretary of Mines and not by the Commission.

In April 2009, a district police officer visited the plaintiff's office on two occasions. In the same month, the Chief Mining Commissioner and the Director of Finance in the Ministry of Mines also came to the plaintiff's office. They replaced the lock on the door to his office and he only resumed F occupation of the office after obtaining an interdict from this court against the Ministry and the police. Apart from the present action, the plaintiff also instituted an application before the Labour Court in April 2009 claiming to have been subjected to an unfair labour practice. This application was heard in September 2009 and is still awaiting the court's ruling. G

Under cross-examination, the plaintiff conceded that he had never approached the first defendant directly in order to resolve the allegations of corruption before filing the present action. However, this suit for defamation was not part of any strategy to resist and avoid his transfer to Bulawayo. Moreover, it was only instituted on 29 May 2009 because until then he lacked the requisite funds to pay his lawyers. The plaintiff has never been charged with any act H

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A of misconduct involving corruption or other illegal activity. Moreover, he was never interviewed by *The Chronicle* to present his side of the story. He takes the view that the newspaper articles in question, taken together, justify the inference that he is one of several corrupt officials being transferred by the Ministry of Mines. They impact negatively on his professional career in the future as he intends to leave the Ministry of Mines at some stage for B other pastures.

Absolution from the instance

at the end of the plaintiff's case, the defendants applied for absolution from the instance. In *Nestoros v Innscor Africa Ltd* 2007 (2) ZLR 267 (H) at C 268E-H, the relevant test to be applied was considered, as follows:

> "The approach to be adopted in an application for absolution from the instance was succinctly expounded by Gubbay CJ in *United Air Charters (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 341 (S) at 343, as follows:
>
> > 'The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an D application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him. See *Supreme Svc Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5D-E; *Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) at 158B-E.'
>
> Moreover, in considering an application for absolution, the court should lean in favour of continuing the case rather than dismissing it. See *Standard Chartered* E *Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 (H) *per* Smith J at 552-553."

See also *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 (S) at 94, where the above approach was reiterated by the Supreme Court. The test to be applied is not whether the evidence for the plaintiff establishes what would F finally be required to be established to obtain judgment. It is whether the plaintiff has made out a prima facie case against the defendant on the basis of which the court could or might find for the plaintiff. See *Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) per Dumbutshena CJ at 156-158.

G In principle, a reticent defendant should not be allowed to shelter behind the procedure of absolution from the instance. And in practice, the courts are loath to decide upon questions of fact without hearing all the evidence from both sides, and have usually inclined towards allowing the case to proceed. See *Theron v Behr* 1918 CPD 443 at 451; *Erasmus v Boss* 1939 CPD 204 at 207;

Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971 (1) RLR 1 (A) at 5-6. Moreover, at this stage of the trial, it is not

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pertinent to evaluate the weight of the evidence adduced or the preponderance of probabilities, save where such findings are manifest from the evidence already heard. See *Quintessence Co-ordinators (Pty) Ltd v Government of the Republic of Transkei* 1993 (3) SA 184 (Tk) at 185.

In the present matter, the argument for absolution in favour of the defendants runs as follows. The statements made by or attributed to the first defendant refer to other corrupt officials and do not specifically refer to the plaintiff. Furthermore, a reasonable person who is aware of the plaintiff and his circumstances would not read the articles in question to mean that the references to corrupt officials also apply to the plaintiff. The real reason for the present action is that the plaintiff is opportunistically using it as a ruse to delay or prevent his transfer to another posting. As regards the quantum of damages, the plaintiff has failed to lead any evidence to support his claim and this is fatal to his case, as there is no basis upon which the court can make a decision to award damages. Finally, in his evidence, the plaintiff has accepted the defences raised pertaining to fair comment and the public interest.

In an action for defamation, the plaintiff is required to prove that the injurious statement referred or related to him, not necessarily that he was specifically mentioned by name. The test for this purpose is an objective one, *viz*. whether the ordinary reasonable person reading or hearing the statement would have understood the words complained of as applying to the plaintiff. See *Young v Kemsley & Ors* 1940 AD 258 at 281; *Bane v Colvin* 1959 (1) SA 863 (C) at 865. As regards a series of statements, it is settled law that the publication of defamatory words and the identification of the person intended to be defamed need not occur contemporaneously. Thus, evidence of a subsequent statement identifying the plaintiff is admissible as proof that an earlier defamatory statement referred or related to him. See *Vermaak v van der Merwe* 1981 (3) SA 78 (N) at 83; *Moyo v Chipanda* 2004 (2) ZLR 67 (H) at 72.

Turning to the matters complained of *in casu*, the first article published on 17 March 2009 does not mention the plaintiff's name. However, it does state that some of the mining commissioners have been recalled or transferred because of allegedly corrupt activities. The same allegations of corruption are then repeated in the second article on 20 March 2009. It was further added that the corrupt officials were resisting their transfer and that the first defendant had received several letters to that effect from their lawyers. The evidence shows that on 16 March 2009 the plaintiff's lawyers had sent a letter to the Secretary for Mines protesting against the attempts to transfer the plaintiff forcibly. At this juncture, a reasonable person would have understood the articles as possibly, but not necessarily, alluding to the plaintiff, by reference to his office and the fact of his resisting transfer through his lawyers. The

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third article published on 3 April 2009 as well as the fourth article on 15 April 2009 explicitly identify the plaintiff by name, as one of the mining commissioners who was resisting transfer and who had engaged the services of Gill, Godlonton & Gerrans for that purpose. At this stage, taking all four articles conjunctively, the reasonable reader would undoubtedly have identified the plaintiff as one of the mining commissioners who was being transferred on the grounds of corruption.

In my view, the *prima facie* and cumulative effect of the impugned articles was to identify the plaintiff as a corrupt official and to injure him in his name and reputation. Whether or not it was the intention of the defendants to defame the plaintiff is an altogether separate inquiry that must await the articulation of the defendants' case in court. Furthermore, whether the statements in casu amounted to fair comment or were justified in the public interest are defences that the defendants will have to prove through their testimony. Again, the issue of damages is a matter for assessment once the extent of the injury to the plaintiff's reputation is clearly established.

It follows that the plaintiff has made out a *prima facie* case against the defendants on the basis of which the court could or might find for him. In the result, the application for absolution from the instance is dismissed. As regards costs, although the plaintiff has incurred additional expense in

opposing the application, I am inclined at this stage to hold that the costs of the application shall be costs in the cause.

E Evidence for the defendants

Obert Mpofu, the first defendant, has held public office in Zimbabwe since 1980 and was appointed as the Minister of Mines in February 2009. He testified that he did not know the plaintiff personally before the trial commenced. His statements in the first and second articles arose from public F complaints about the allocation of mining claims. The first article emanated from an interview given to journalists and the second from his speech at a police pass-out parade. His statements were not directed against the plaintiff but against Ministry officials generally. On the other hand, the third and fourth articles were concerned with transfers within the Ministry and not G the allocation of claims. The third article was drawn from previous public statements and the fourth from a telephone interview. At that time, he was aware of a previous letter from the plaintiff's erstwhile lawyers in March 2004 but the subsequent letter of 16 March 2009 from his current lawyers was not brought to his attention until after the articles had been published. On 23 March 2009 he wrote to the Commissioner of Police requesting the H assistance of the police in enforcing the transfer of three mining commissioners,

including the plaintiff. Following the latter's appeal to the Public Service A Commission, the Secretary for Mines responded to the Commission on 8 May 2009 explaining the Ministry's position. Under cross-examination, the first defendant explained that the first and second articles contained journalistic paraphrasing of his utterances to some extent. In the third article, only the last two columns are quoted from his own statements. As for the specific B references to the plaintiff in the third and fourth articles, he personally did not mention the plaintiff by name.

Breshne *v* Malaba, the second defendant, was the editor of *The Chronicle* at the relevant time. He was responsible for supervising the reporters and content of the articles *in casu*. His evidence was that all four articles dealt with statements on matters of public concern and importance, i.e. alleged C corruption in the Ministry of Mines generally. The first and second articles made no mention of the plaintiff by name. The third and fourth articles did make specific reference to the plaintiff and were drawn from letters written by the plaintiff's lawyers. They were not intended to hurt or defame the plaintiff directly. After the last article was published, the plaintiff's lawyers D wrote to *The Chronicle* to complain about the articles. He then personally telephoned the plaintiff, as well as his lawyers, and invited his version of the story, but no response was ever received. Under cross-examination, he accepted that his invitation was probably only made after summons in this case had been issued and that he did not at any stage apologise to the plaintiff. When questioned by the court, he explained that the third and fourth articles E were simply following up on the first and second articles.

Paul Nkala has been the deputy news editor of *The Chronicle* since 2002. He personally compiled the third article. Its content was drawn from court applications filed by the mining commissioners challenging their transfers. The statements from the first defendant were taken from a telephone interview F on 2 April 2009, seeking his response to the letter from the plaintiff's lawyers. The essence of the article is captured in its headline and it was not intended to insinuate any corruption on the part of the plaintiff. The witness also authored the fourth article. This article too was not intended to scandalise the plaintiff or make any allegation of corrupt or improper conduct. Under cross-examination, he conceded that the third article might not have been G drawn from any court application, as the relevant applications by the plaintiff were only filed on 8 April and 14 May 2009.

Citation of first defendant and service of process

In his closing submissions, Mr. *Mutamangira* argued that the first defendant made his utterances in the discharge of his public duties. Consequently, the H

A plaintiff has no cause of action against the first defendant in his personal capacity. Therefore, because there was non-compliance with the citation requirements of s 4 of the State Liabilities Act [*Chapter* 11:10] and the formalities governing the service of process under Order 5A of the High Court Rules, 1971, the plaintiff's election to sue the first defendant in his personal capacity is fatal to his case. The thrust of this argument is not entirely clear. B In any event, it is an aspect that was not raised at all in the first defendant's plea, nor was it directly canvassed in the evidence presented in court. It certainly cannot be entertained at this juncture.

Whether statements referred to plaintiff

C As I have already stated earlier, the plaintiff in a defamation action is required to prove that the injurious material referred or related to him, but not necessarily that he was specifically mentioned by name. The authorities that I have cited above (*Young's case and Bane's case*) articulate the test for this purpose as being an objective one, viz. whether the ordinary reasonable person reading or hearing the statement would have understood the words D complained of as applying to the plaintiff. See also Burchell *The Law of Defamation in South Africa* at pp 128-129. Again, the cases already referred to (*Vermaak's case* and *Moyo's* case) make it clear that the publication of defamatory words and the identification of the person intended to be defamed need not occur contemporaneously. The evidence of a subsequent statement identifying the plaintiff is admissible as proof that an earlier defamatory E statement referred or related to him.

In any event, it may be necessary to exercise some measure of caution in ascertaining what impression the ordinary reader is likely to have formed when reading newspaper reports. As was observed in *Dorfman v Afrikaanse Pers Publikasies (Edms) Bpk en Andere* 1966 (1) PH J9 (A) at 45, cited F with approval in *Madhimba v Zimbabwe Newspapers (1980) Ltd* 1995 (1) ZLR 391 (H):

> "In such an inquiry the court must eschew any intellectual analysis, of the contents of the report and of its implications, and must also be careful not to attribute to the ordinary reader a tendency towards such analysis or an ability to recall more than an outline or overall impression of what he or she has just read."

G Turning to the articles *in casu*, the defendants' evidence has not persuaded me to depart from my earlier findings when determining their application for absolution from the instance. In particular, it is difficult to credit the first defendant's assertion that the letter of 16 March 2009 from the plaintiff's current lawyers, which letter was copied to him, was not brought to his attention H until after the articles had been published. This difficulty is compounded

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by the fact that he wrote to the Commissioner of Police on 23 March 2009, A specifically requesting the assistance of the police in enforcing the transfer of three mining commissioners, including the plaintiff, who were identified by their names.

The first article states that some mining commissioners had been recalled or transferred because of allegedly "corrupt activities". The second article B then repeats the same allegations of corruption and adds that the "corrupt officials" were resisting their transfer through letters to that effect from their lawyers. Following these two articles, those readers who knew the plaintiff might have understood the articles as possibly, but not necessarily, alluding to the plaintiff, by reference to his office and the fact of his resisting transfer through his lawyers. C

Subsequently, the third and fourth articles explicitly identify the plaintiff by name, as one of the mining commissioners who was resisting transfer and who had engaged a named firm of lawyers for that purpose. Apart from the author's own statements, that link is also attributed in both articles to statements made by the first defendant. Additionally, the first defendant is D quoted in the third article as stating that some officials have been "issuing claims to undeserving individuals" and were suspected of "refusing to be transferred to buy time to cover up their illegal activities". He is then quoted in the fourth article as insisting that there was no going back on the reassignment and transfer of the officials concerned. At that stage, taking all four articles conjunctively, the reasonable reader would undoubtedly E have identified the plaintiff as one of the mining commissioners who was being transferred on the grounds of corruption. Even taking into account the cautionary approach alluded to above, I do not think that it would need an extremely astute or unusually incisive reader to conclude that the first and second articles were referable to the plaintiff. F

Whether statements defamatory of plaintiff

Having determined that the articles complained of related to the plaintiff, there appears to be very little in the defendants' closing submissions to dispute their defamatory effect. It is simply contended that the articles, given the context in which they were written and published, did not bear or convey G the meanings and insinuations ascribed to them by the plaintiff, and were not intended to defame him.

As I read them, the articles taken together impute on the part of the plaintiff (amongst others), a proclivity towards corrupt behaviour, illegal activities, dishonest and unprofessional conduct and attempting to cover up illegalities. Such imputations are unquestionably defamatory in accordance with the H

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A applicable tests laid down by the courts. See *Chinamasa v Jongwe Printing & Publishing Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) at 149; *Madhimba's* case, *supra*, at 400; *Moyse & Ors v Mujuru* 1998 (2) ZLR 353 (S) at 356; *Masuku v Goko & Anor* 2006 (2) ZLR 341 (H) at 347. The unavoidable conclusion, as I have found earlier, is that the cumulative effect of the impugned articles was to identify the plaintiff as a corrupt official and to B injure him in his name and reputation.

Public interest or justification

It is submitted for the first defendant that as the Minister of Mines he had a public duty to speak out against corruption. The statements made by him were truthful and accurately reflected the endemic corruption and malpractices C within the Ministry of Mines. On their part, the second and third defendants contend that they were justified in publishing the articles in casu and were discharging their duty of informing the public which has a clear interest in being informed of the matters reported. They had a duty to report on the corruption of public officers and their resultant transfers and reassignment, D and the public had a reciprocal interest in receiving such information.

For the defence of public interest or justification to succeed, the following requirements must be satisfied. In essence, the statement alleged to be defamatory must be true and must be made in the public interest. See *Johnson v Rand Daily Mail* 1928 AD 190; *Neethling v du Preez & Ors; Neethling v The Weekly Mail and Others* 1994 (1) SA 708 (A); *Ndewere v Zimbabwe Newspapers* E *(1980) Ltd & Anor* 2001 (2) ZLR 508 (S). It is not necessary for the truth of every word to be established. It suffices that the statement is substantially true in every material respect. See *Johnson's* case, *supra*, at 205.

The element of public interest lies in telling the public something of which it is ignorant and which is in its interest to know. See *Mahommed v Kassim* F 1972 (2) RLR 517 (A); 1973 (2) SA 1 (RA) at 9-11. As for the element of truth, it is well established that what must be true is the "sting of the charge" or the material allegation only. See *Kennedy v Dalasil* 1919 EDL 1 at 9; *Johnson's* case, *supra*, at 197. As is succinctly summarised by Burchell op cit at pp 211-212:

> "The truth of the statement means that truth of such statement in so far as it is of G a defamatory nature".

Turning to the present case, there is no doubt that the articles in question contained information that was of considerable public interest. The matter published centred on the functions and activities of senior civil servants. The alleged malpractices within the Ministry of Mines and the consequent H reassignment of Ministry officials were of unquestionable public importance.

Patel J

Additionally, as was explicitly acknowledged by the plaintiff himself, it is A true that there were allegations of corruption within the Ministry. However, what is relevant for present purposes is whether the material imputation that the plaintiff himself was corrupt and dishonest was factually true. Apart from making certain bald assertions, the defendants were unable to proffer anything to verify that imputation. Indeed, the plaintiff testified that there were B no allegations of misconduct levelled against him, while the first defendant confirmed that the plaintiff had not been charged with any criminal offence. In the absence of any evidence to substantiate the utterances of illegality and

impropriety against the plaintiff, I am satisfied that the claim of justification in the public interest cannot avail the defendants.

Fair comment C

The first defendant asserts that he was merely expressing an opinion on the prevailing state of affairs in the Ministry of Mines. His opinion was not outlandish, emotive or needlessly scandalous of the plaintiff and his reputation. His comments were a true reflection of the corrupt practices of Ministry officials and were necessary to restore the public's confidence in D the Ministry. In turn, the second and third defendants argue that what they reported in their articles, when read in context, constituted fair comments on the utterances made by the first defendant. They amounted to opinions based on true factual allegations concerning official corruption and transfers within the Ministry, and were matters of public interest pertaining to the conduct of public officials. E

The defence of fair comment imposes upon the defendants the onus to prove the following. The statement complained of was an opinion or comment and not a statement of fact. The comment was fair and not excessive. The factual allegations on which the comment is based were true. The comment was based on facts expressly stated or clearly indicated in a document or F speech containing the defamatory matter. Lastly, it must be shown that the comment was on a matter of public interest. See *Crawford v Albu* 1917 AD 102; *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) at 1167; *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H); G *Velempini v Engineering Services Department Workers' Committee for the Engineering Services of the City of Bulawayo & Ors* 1988 (2) ZLR 173 (HC); *Johnson v Beckett & Anor* 1992 (1) SA 762 (A); *Madhimba's* case, *supra*, at 410; *Moyse's* case, *supra*, at 359.

In the instant case, I unable to discern anything approximating a comment or opinion in the offending articles, whether in the statements attributed to the first defendant or in the reportage of the second and third defendants. H

Patel J

A In essence, the articles contain statements of fact, drawn from the first defendant's utterances and from correspondence by the plaintiff's lawyers. There is nothing by way of comment or opinion expressed in the articles. In any event, even if one were to stretch the notion of comment to include the content of the articles, the defendants have failed to show that the factual allegations on which the supposed comment is based were true. For these B reasons, it is clear to me that the defendants clearly cannot rely on the defence of fair comment in this case.

Quantum of damages

In assessing the quantum of damages in a defamation case, it is necessary to consider a variety of factors. These include the following: the content and C nature of the defamatory publication; the plaintiff's standing in society; the extent of the publication; the probable consequences of the defamation; the conduct of the defendant; the recklessness of the publication; comparable awards of damages in other defamation suits; and the declining value of money. See *Tekere's* case, *supra*, at 289; *Shamuyarira v Zimbabwe Newspapers* D *(1980) Ltd & Anor* 1994 (1) ZLR 445 (H) at 503; *Levy v Modus Publications (Pvt) Ltd* 2000 (1) ZLR 68 (H) at 70-71 & 73; *Mnangagwa v Nyarota & Anor* HH-153-04; *Masuku's* case, supra, at 350; *Garwe v Zimind Publishers (Pvt) Ltd & Ors* 2007 (2) ZLR 207 (H) at 236-242; *Macheka v Metcalfe* HH-62-07. In applying these factors, it must be borne in mind that damages for defamation are intended to compensate the plaintiff for sentimental loss and E should not as a rule be punitive. See *Shamuyarira's* case, supra, at 502-503; Levy's case, supra, at 73; *Thomas v Murimba* 2000 (1) ZLR 209 (H) at 217.

Insofar as concerns recent comparable awards, the only relevant case that I was able to locate was *Moyo v Nkomo & Dabengwa* HB-38-11, in which four cases dating from December 1986 to January 2000 were considered. F The damages granted in those cases ranged from the equivalent of US$526 to US$8 750. In *Moyo's* case itself, Bere J awarded the sum US$5 000 as fair compensation on the facts before him.

The plaintiff herein claims the sum of US$30 000 as the appropriate quantum of damages for the injury to his name and reputation. It is common cause that he is one of a handful of mining commissioners in the country and has been the G mining commissioner for Kadoma since 1993. It is

also not disputed that the offending articles were carried in a daily newspaper circulating in Bulawayo and probably elsewhere in Zimbabwe. The plaintiff's unchallenged evidence was that he has never been charged with any act of misconduct involving corruption or other illegal activity. Moreover, he was never interviewed or H invited to present his side of the story, until after he had issued summons in

Patel J

casu, and no retraction of the defamatory material was ever tendered. The A articles could have a negative impact on his professional career in the future.

Apart from this, there was very little in the plaintiff's own testimony to support the amount that he claims. While his professional status is relatively clear, he said nothing at all about his social standing. Although it may not be necessary, as is remarked by Mr. *Mutamangira*, to go so far as to "divine B by esoteric quackery" the quantum due, the absence of any evidence on this aspect makes it very difficult to arrive at an appropriate computation of *solatium* for the harm suffered by the plaintiff. After all, the most significant measure of a man's *fama* or reputation must be his social status or estimation in the eyes of others. Without this, the injury sustained by him can only be perceived as being personalised and confined to his self-esteem. In this C context, it is also necessary to accurately ascertain the scope of coverage of the defamatory material. Mr *Zhou* submits that *The Chronicle* is a widely read national newspaper. However, no evidence was lead at the trial as to the extent of its circulation and the nature of its readership.

There is one further point that must be taken into account in assessing the D plaintiff's claim. He conceded under cross-examination that he had never approached the first defendant directly, before instituting this action, in order to discuss and resolve the allegations against him. It is quite possible, if he had done so, that this matter might have been amicably settled out of court. The plaintiff's failure to do so is yet another factor that must weigh negatively against him so as to reduce the quantum of damages that he is entitled to. E

One final point concerns the relative degrees of responsibility for the injury occasioned to the plaintiff, as between the three defendants. It is clear from the evidence that the first defendant himself did not directly identify the plaintiff by name in the offending articles. He was indirectly reckless in that regard. In contrast, the second and third defendants specifically named the plaintiff. F Moreover, they did not, as would be expected of a professional journalist or reputable newspaper, invite the plaintiff to comment before publishing the defamatory material. Their overall conduct was clearly more reprehensible than that of the first defendant. That being so, it would be proper and fitting to apportion the damages to be awarded, as between the first defendant on G the one hand and the second and third defendants on the other, so as to reflect their respective degrees of culpability.

Having regard to all of the foregoing, I am of the view that the sum of US$6 000 represents a fair and reasonable measure of the damages that should be awarded to the plaintiff. In the result, the plaintiff is entitled to judgment in his favour as follows. H

Patel J

A It is ordered that:

1. The first defendant shall pay to the plaintiff the sum of US$2 000 together with interest thereon at the prescribed rate, calculated from the date of service of summons to the date of payment in full.
2. The second and third defendants, the one paying the other to be absolved, B shall pay to the plaintiff the sum of US$4 000 together with interest thereon at the prescribed rate, calculated from the date of service of summons to the date of payment in full.
3. The first, second and third defendants, the one paying the others to be absolved, shall bear the costs of suit.

C *Gill, Godlonton & Gerrans*, plaintiff's legal practitioners

Mutamangira & Associates, first defendant's legal practitioners

Chirimuuta & Associates, second & third defendants' legal practitioners

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DEPUTY SHERIFF, HARARE v ECOPLASTICS (PVT) LTD & ANOR 2011 (2) ZLR 104 (H)

Citation	2011 (2) ZLR 104 (H)
Case No	Judgment No. HH-186-11
Court	High Court, Harare
Judge	Gowora J
Heard	3 June 2011; *CAV*
Judgment	7 September 2011
Counsel	*S Machingauta*, for the applicant *N Bvekwa*, for the first claimant *P Kawonde*, for the judgment creditor
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Company – corporate *veil – lifting of – when permissible – fraud and other improper conduct shown – separate identity a sham or device – companies forming part of a single economic entity – when permissible to treat* D *such companies as a whole instead of as separate units*

Headnote

The law is far from settled with regard to the circumstances under which a court may pierce the corporate veil. Each case is determined according to its facts. The court does not have a general discretion to simply disregard E a company's separate legal personality whenever it considers it just to do so, 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 that attach to it.

Proof of fraud, dishonesty or other improper conduct might justify piercing the F corporate veil. 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. Generally, though, there would have to be an element of fraud or other improper conduct of the company's affairs; similarly, where the separate corporate identity G can be said to be a device, stratagem, cloak or sham, the corporate veil might be lifted.

The corporate veil is not lifted specifically to expose fraudulent activity on the part of a company and its shareholders. It can be lifted where it is necessary to reveal the *alter ego* of the company, even for the benefit of the company concerned. H

Gowora J

A Where one company is part of a group and where a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries and the subsidiaries must do what the parent company says, then it is right to treat them as a single unit.

Cases referred to

B *Botha v van Niekerk en 'n Ander* 1983 (3) SA 513 (W)

Cape Pacific Ltd v Lubner Controlling Invstms (Pty) Ltd & Ors 1995 (4) SA 790 (A)

DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 3 All ER 462 (CA)

C *Mawere v Min of Justice* 2005 (1) ZLR 317 (H)

Salomon v Salomon & Co Ltd [1897] AC 22 (HL)

Shipping Corp of India Ltd v Evdomon Corp & Anor 1994 (1) SA 550 (A)

US v Milwaukee Refrigerator Tpt Co 42 Fed 247 (1905)

Case information

S Machingauta, for the applicant

D *N Bvekwa*, for the first claimant

P Kawonde, for the judgment creditor

Judgment

GOWORA J: On 16 September 2010 C Mesikano issued an arbitral award in favour of Christopher William Barnsley, herein referred to as the judgment creditor. The award was for payment of a total sum of $61 879. The respondent E in the dispute was Harambe Holdings (Pvt) Ltd. Pursuant to that award, the judgment creditor applied to this court for the registration of the award in accordance with the provisions of s 98(14) of the Labour Act [*Chapter 28:01*]. This court then issued an order under case No. HC 6651/11 and registered the award as an order of court. Pursuant thereto, the Registrar of this court F issued a writ of execution on 5 October 2010 for the execution of the order granted in favour of the judgment creditor. The applicant, armed with the said writ, then attached the items that are listed on p 7 of this application.

On 12 November 2010 the first claimant filed an affidavit with the applicant wherein it stated that the items attached by the second claimant did not belong to the judgment debtor but to itself. Resultant thereto, the applicant, G acting in accordance with the provisions of r 322 of the High Court Rules, issued out of this court an interpleader notice to the judgment creditor who did not admit the claim. Both claimants then proceeded to file papers for the determination of the validity of the claim.

In addition to the affidavit of 12 November 2010, the first claimant has filed H another affidavit dated 21 December 2010. In the affidavit, deposed to by

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one Lovemore Chanyau, it is averred that the judgment creditor is a former A employee of Harambe Holdings (Pvt) Ltd. In that capacity, it is stated that the judgment creditor is aware that the assets attached by the applicant do not in fact belong to Harambe Holdings but to Ecoplastics (Pvt) Ltd. He states further that he is aware that the judgment creditor may, as he did in the dispute under case No HC 8373/10, raise the issue that the claimant is B wholly owned by the judgment debtor. He adds that indeed the judgment debtor and the first claimant are related, but states that as they are individual companies they are not one and the same. He states further that the property attached belongs to the first claimant and that ownership of the property has nothing to do with any perceived relationship between the two entities.

In his opposing affidavit, the judgment creditor confirms that he was employed C by Harambe Holdings (Pvt) Ltd as a group engineering director. He avers that Harambe Holdings consists of a

group of companies which include Ecoplastics. He states that the holding company, Harambe Holdings, does not have or lacks operational capacity. He also states that there is no record in the Company Registry to show that Ecoplastics is a registered company with D limited liability. He annexed to his affidavit a brochure issued by Harambe Holdings (Pvt) Ltd showing Ecoplastics as a division of the same.

He has also referred to a copy of a letter from the chief executive officer of Harambe Holdings wherein the head note refers to the wholly owned subsidiaries of the same. Ecoplastics is one of the subsidiaries or divisions and the judgment creditor states that it is run by Harambe Holdings. He also E refers to a newspaper article in a daily newspaper circulated in the country in which the said chief executive officer mentions Ecoplastics as a wholly owned subsidiary of Harambe Holdings.

It is not clear on the papers whether or not Ecoplastics is a registered corporate entity. Mr *Kawonde* has submitted that in the opposing affidavit the judgment F creditor made an averment that Ecoplastics was not a registered entity. He argued that, since the first claimant made no effort to dispute this, it can be taken that the first claimant accepts the position that it was never registered.

For some unfathomable reason, Mr *Bvekwa* sought to argue from the bar that indeed there was proof that Ecoplastics was registered. This amounted G to him giving evidence from the bar.

The fact of the matter is that it may well be lawfully registered and for this court to conclude that it is not so registered when it is would not in the long run be beneficial to either party. I will, therefore, assume for purposes of determining the dispute between the parties that it is a registered entity. It would therefore have a separate and distinct personality from Harambe H

Gowora J

A Holdings (Pvt) Ltd. A lawfully registered corporate entity is at law a distinct and separate entity from its shareholders or sponsors and any assets it holds belong to it. Conversely, where accountability is concerned, any accountability for its actions, omissions or liabilities is solely for its account. In *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd & Ors* 1995 (4) SA 790 (A) Smallberger JA stated at 803H-804A:

> B "It is undoubtedly a salutary principle that our courts should not highly 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 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 C 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 (*cf* Domanski 'Piercing the Corporate Veil – A New Direction' (1986) 103 *SALJ* 224). And a court would 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 be. Each case would obviously have to be considered D on its own merits."

The second claimant contends that the first claimant is a vehicle through which Harambe Holdings fraudulently avoids its obligations in a well orchestrated and pre-conceived manner. It is contended further that the first claimant is an *alter ego* of Harambe Holdings and the instrument through which the E latter carries out its operations.

It goes without saying that the law is far from settled with regard to the circumstances under which a court may pierce the corporate veil. Each case is determined according to its facts. It is also correct to say that a court does not have a general discretion to simply disregard a company's separate legal F personality whenever it considers it just to do so. See *Botha v van Niekerk en 'n Ander* 1983 (3) SA 513 (W). It is accepted, however, that in *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL) it appears to have been recognized that proof of fraud or dishonesty might justify the separate corporate entity of a company to be disregarded. Subsequent thereto it has been accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the G corporate veil. In *Shipping Corporation of India Ltd* v *Evdomon Corporation & Anor* 1994 (1) SA 550 (A) Corbett CJ said:

> "It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances H justify 'piercing' or 'lifting' the corporate veil. And in this regard it should not

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make any difference whether the shares are held by a holding company or by A a Government. I do not find it necessary to consider, or attempt to define, the circumstances under which the court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud, or other improper conduct of its affairs. In this connection the words 'device', 'stratagem', 'cloak' and 'sham' have been used…."

An examination of the property attached by the applicant shows that part of B such property is for bread making. The first claimant, which does not appear to form part of the bakery division within the group, does not even make an effort to explain how it owns the property in question.

I am persuaded to accept that this is one of those rare instances where the court can use its discretion and lift the corporate veil to reveal the *alter ego* C that is behind the corporate legal entity of a company. Harambe Holdings perpetuates a sham that it has subsidiaries that have distinct and separate identities from its own. Its own letterhead shows that, whatever these divisions may appear, they are in fact its tools for use by it. They do not possess their own letterheads, as they are clearly attached to it. Their employees are D recruited and appointed by Harambe to work and serve the entire group, as reflected in the organogram. The second claimant has not been in a position to dispute the claim by the judgment creditor that Harambe Holdings has no operational capacity and that it owns no assets which are owned by the divisions, and that the whole structure is created in such a manner that Harambe Holdings is not in a position to pay its debts due to lack of any E asset base. In looking at the substance in this matter, it is clear that Harambe Holdings uses the sham of distinct corporate personality to avoid paying its liabilities. The letter appointing the judgment creditor was written by D Govere, the chief executive officer for Harambe Holdings. According to the organogram, the judgment creditor, after the restructuring of the group, F would have fallen under the chief operating officer for the Industrial Division, with Govere being at the helm of the entire group. From annexure D to the papers, being the restructuring of the group, it cannot be in dispute that the group was run as a single entity. The structure was such that the direction and control of all the companies and divisions under Harambe were driven G and directed from head office. This is an appropriate case for this court to lift the corporate veil and find that Harambe Holdings cannot be separated from its subsidiaries or divisions.

Within Zimbabwe our courts have not hesitated in piercing the corporate veil in the interest of justice. In *Mawere* v *Minister of Justice* 2005 (1) ZLR 317 (H) at 327 Uchena J stated: H

Gowora J

> A "In general a company is a separate *persona* from its sponsors or shareholders and it should be personally held accountable for its actions. However in *van Niekerk* v *van Niekerk & Ors* 1999 (1) ZLR 421 (S) at 427D-E Sandura JA said:
>
> > 'whilst it is true that if Homefield should have been registered in the name of Franklin Trading, as alleged by Iona, Franklin Trading would be the B "person aggrieved" for the purposes of s 52(9)(i) of the Act, in reality the person aggrieved is Iona. In saying this I am mindful of the fact that it is of cardinal importance, that the property of a company be kept separate and distinct from those of its shareholders. However, there are exceptions to the principle, enunciated in *Salomon* v *Salomon & Co Ltd* [1897] AC 22 (HL), that a company is a separate entity from its members.

In *US* v *Milwaukee Refrigerator Transport Co* 42 Fed 247 (1905), Sanborn C J after stating that a company should be seen as a separate entity from its shareholders, said the following at 255:

> " … but, when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud and defend crime, the law will regard it as an association.""

It is axiomatic that the corporate veil is not lifted specifically to expose D fraudulent activity on the part of a company and its shareholder. It can be lifted where it is necessary to reveal the *alter ego* of the company, even for the benefit of the company concerned. In *DHN Food Distributors v Tower Hamlets London Borough Council* [1976] 3 All ER 462 (CA) at 467 Lord Denning MR had this to say;

> E "… We all know that in many respects a group of companies are treated together for the purposes of general accounts, balance sheet and profit and loss account. They are treated as one concern. 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 especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement F of the subsidiaries. These subsidiaries are bound hand and foot to the

parent company and must do what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdworth & Co (Wakefield) Ltd v Caddies* [1955] 1 All ER 725. So here. This group is virtually the same as a partnership in which all three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. G The three companies should for present purposes be treated as one, and the parent company, DHN should be treated as that one."

In casu, it has been established by the affidavit of the second claimant that he had been employed to amongst other duties to manage all group engineering projects and installations. He was expected to liase with divisions on safety H matters and procurement issues. He was mandated to develop preventive

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maintenance programs for all divisions, building inspections for all structural A works and the introduction of best practices in all manufacturing processes. As a director he was also expected to undertake full executive functions for the group of companies at fora and engagements inside and outside the group. There is annexed to the documents a flyer in respect of Ecoplastics. Although its address is reflected as 50 Lytton Rd Workington, the head office B is reflected as 1st Floor, Bristol House, 97 Kwame Nkurumah Avenue, Harare, itself the address for Harambe Holdings.

Although it was argued that the first claimant is a separate legal entity to Harambe Holdings, this argument must be construed in the light of the facts and the circumstances obtaining on the ground. Harambe Holdings owns all C the share capital of Ecoplastics on the facts presented by the first claimant. From the letterhead of Harambe Holdings it emerges that the directors for the holding company and what is termed divisions are the same. It is fair to say that the subsidiaries do not have any directors as they do not have separate letterheads. In effect they do not have a separate existence from Harambe Holdings. They are not only wholly owned by Harambe, they are D controlled and run by Harambe Holdings.

My assessment of the facts is that the subsidiaries or divisions are the agents of Harambe Holdings. It conducts business through them as well as hold assets through them. The judgment creditor specifically stated that Harambe Holdings did not have operational capacity. This was not disputed E by the first claimant. It created them and it pulls all the strings where they are concerned. It is the principal and they all do its bidding. Their assets are at its disposal. Harambe Holdings employs staff for the divisions, it pays them and they report to it. Ecoplastics, amongst the other subsidiaries, is the vehicle through which Harambe Holdings transacts its business. In my view F Harambe Holdings is to all intents and purposes the *alter ego* of Ecoplastics. In the premises I am unable to find a separation between Ecoplastics and Harambe Holdings in terms of property and control of the two entities. They are intricately intertwined. My finding is therefore that they do not constitute separate corporate entities and the attachment executed in favour of the judgment creditor against property at 82 Lytton Road is valid. G

The applicant did not attach a draft order to the interpleader notice. It is in the heads of argument that reference is made to an order and a prayer for costs. It seems to me that scant attention was paid to the preparation of these documents. In view of the fact that the applicant has no real interest in the outcome of this matter I will oblige by allowing an order of costs in his favour. H

A In the premises, the claim by the first claimant is hereby dismissed. The judgment creditor's claim is upheld. The first claimant is ordered to pay the costs of this application.

V Nyemba & Associates, applicant's legal practitioners

B *Bvekwa Legal Practice,* first claimant's legal practitioners

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 2/PAZVAKAVAMBWA v PORTCULLIS (PVT) LTD 2011 (2) ZLR 112 (H)

PAZVAKAVAMBWA v PORTCULLIS (PVT) LTD 2011 (2) ZLR 112 (H)

Citation	2011 (2) ZLR 112 (H)
Case No	Judgment No. HH-175-11
Court	High Court, Harare
Judge	Patel J
Heard	7 June 2011; *CAV*
Judgment	13 September 2011
Counsel	*M Nkomo,* for the applicant Ms *E Mushore,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – s 20(1) – freedom of expression and information — derogation therefrom so as to protect the reputations of others – s 20(2)(b) – public policy a legitimate consideration in considering any law formulated thereunder* D

Constitutional law – *Constitution of Zimbabwe, 1980 – s 20(1) – freedom of expression and information – information of applicant's criminal record circulated by the respondent for the benefit of the financial sector – creditworthiness of clients of banks a matter of vital interest to bankers – information retained indefinitely by respondent on its database – whether public policy requires limit on how long such information may* E *be retained – dissemination of such information to the financial sector not contrary to public policy – reasonable man test – service rendered by respondent to financial sector not objectionable*

Costs – *no order as to costs – application – dismissal of – application of considerable public importance – no order as to costs* F

Human rights – *freedom of information – freedom of speech – right to privacy – record of information kept on individuals and supplied to subscribers needing to assess individual's creditworthiness – record of criminal conviction – whether there should be a limit on how long such information may be retained* G

Headnote

"The creditworthiness of clients or potential clients is a matter of vital interest and any information honestly given to people who are legitimately interested in it does not … attract liability, no matter the consequences to the client" (*dicta per* Williamson J in *Ebrahim v Mer Products CC & Anor* 1994 (4) SA 121 (C) at 126 followed). H

Patel J

A The respondent's business was to collect, store and disseminate public information on persons likely to use the banking services or credit facilities of financial institutions. In terms of its standard contract with its various clients, its centralized system was available to check the antecedents of its client's customers so as to avoid the possibility of civil or criminal default. In 1998, following the applicant's conviction on B five counts of contravening s 3(1)(f) of the

Prevention of Corruption Act [*Chapter 9:16*], the applicant had been sentenced to a fine of Z$30 000 or a term of imprisonment in default of payment. His subsequent appeal to the Supreme Court against the convictions and sentence had failed. The respondent had recorded the foregoing information, obtained from C the media, on its database and made it available to those of its clients who had sought information as to applicant's credit worthiness. As a result, the applicant had been unable to access banking services or loans from financial institutions. It was the applicant's case that the respondent's maintenance of records *ad infinitum* was unreasonable and caused disproportionate prejudice to past offenders. For this reason, it D should be declared unlawful as being contrary to the public policy of rehabilitating offenders and their right to reintegrate into society. It was argued, therefore, that the relevant contracts between the respondent and its clients were also contrary to public policy. The respondent placed reliance on s 20(1) of the Constitution of Zimbabwe 1980, in terms of which it enjoyed a right to freedom of expression and information.

E *Held,* that the rights set out in s 20(1) of the Constitution were subject to s 20(2)(b), which did permit a derogation therefrom, provided that any such derogation was not shown to be reasonably justifiable in a democratic society. In this regard, the public policy of Zimbabwe was a legitimate consideration in assessing the constitutionality of any law formulated F or conceived under s 20(2)(b) to restrain any act or conduct impugning on the reputations, rights and freedoms of others.

Held, further, that as the information relating to the applicant was initially published in, and extracted from, the public domain, the fact that it had been retained on the respondent's database for an indefinite period, did not detract from the reasonableness or legitimacy of the respondent's G actions.

Held, further, that in final analysis, it is necessary in each case to balance the social policy rehabilitation and reintegration of offenders as against community interests and standards. *In casu*, the closed financial community, within which the respondent operated its services, would H not find anything objectionable in the conduct of which the applicant

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Patel J

complained, nor would the notional "reasonable man" consider such A conduct unreasonable. The service provided by the respondent and the underlying standard contract with its clients were not contrary to public policy.

Held, further, that notwithstanding that the application must be dismissed, as the issues raised by the applicant were matters of considerable public importance, there should be no order as to costs. B

Cases cited

Ebrahim v Mer Products CC & Anor 1994 (4) SA 121 (C)

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

Hawker v Life Offices Assn of SA & Anor 1987 (3) SA 777 (C)

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

Tel-One (Pvt) Ltd v Communications and Allied Services Workers Union of Zimbabwe 2007 (2) ZLR 262 (H)

Legislation considered D

Constitution of Zimbabwe 1980, ss 20(1), 20(2)(a) and 20(2)(b)

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 23(2)

Prevention of Corruption Act [*Chapter 9:16*], s 3

Case information

M Nkomo, for the applicant

Ms *E Mushore,* for the respondent E

Judgment

PATEL J: The background to this matter is as follows. The respondent's business is to collect, store and disseminate public information on persons likely to use the banking services or credit facilities of financial institutions. In terms of the respondent's standard contract with its clients, the latter use F its centralised system to check the antecedents of their customers so as to avoid the possibility of civil or criminal default. According to the preamble to that contract, the respondent operates a credit protection bureau on behalf of the Zimbabwe Financial Clearing Association (ZFCA). The ZFCA provides information for its registered and associated members, on a confidential G basis, as to the creditworthiness of persons and companies referred to it by its members for research. The contract is concluded between the respondent and any client who is a ZFCA member subscriber and who wishes to join the respondent in order to utilise its services.

The applicant was employed by the National Insurance Company of Zimbabwe (NICOZ) as its Managing Director until his dismissal in 1996. H

Patel J

A Subsequently, in 1997, he was convicted on five counts of contravening s 3(1)(f) of the Prevention of Corruption Act [*Chapter 9:16*]. Following his conviction, he was sentenced to a fine of $30 000 or five years and eight months' imprisonment in default of payment of the fine. He appealed to the Supreme Court, but his conviction and sentence were both upheld. [1]

The matter was reported in *The Herald* of 31 July 1998. According to that B report, the applicant made four unlawful donations and corruptly sanctioned a loan to a co-operative of which he was a member. He was found guilty of corruption for having deliberately concealed these five transactions from the NICOZ Board. The respondent then extracted the report and kept a record of it in its database. The contents of that record are contractually availed to and C accessed by financial institutions wishing to establish the creditworthiness of prospective customers. The effect of this listing is that the applicant has been unable to access banking services and loans from financial institutions.

The applicant's lawyers have written to the respondent and its lawyers requesting that he be de-listed from the respondent's database. He has not received any response to this request. He now seeks an order declaring D unlawful his continued listing on the respondent's database. He also seeks an order directing the respondent to expunge his name from its database.

The arguments

The applicant contends that he continues to be denied access to banking services and loans despite having served his criminal sentence. There is E no law that authorises the respondent's blacklist or any legal basis for his listing being maintained. Moreover, the maintenance of criminal records ad infinitum is unreasonable and causes disproportionate prejudice to past offenders. It should therefore be declared unlawful as being contrary to the public policy of rehabilitating offenders and the right of offenders to F reintegrate into society. The relevant contracts between the respondent and its clients are also contrary to public policy.

In this regard, Mr Nkomo submits that these contracts must operate within the bounds of reasonableness. The period over which the database records are maintained, i.e. in perpetuity, is unreasonable and contrary to the sentencing policy of rehabilitation. In the instant case, having regard to the sentence G imposed upon the applicant, a period of 5 years would have been reasonable. He further submits that the right to freedom of expression and information is not absolute and must be balanced against the rights of other individuals and broader public policy. The rights of the applicant have been violated for an unreasonable period of time. The prejudice occasioned to the applicant

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Patel J

is greater than the prejudice likely to be suffered by the respondent. In this A respect, the interests of the individual should take precedence over the rights of juristic persons.

The respondent's case is that it provides a service to banks at their request. The banks rely on the information provided in dealing with grants of credit to their customers. The respondent does not decide whether or not to grant B credit. The decision in each case lies with the bank concerned. The respondent is merely a custodian of information in the public domain or contained in public court records. There is no law that precludes anyone from maintaining a database of records in the public domain. The respondent is operating lawfully and in good faith. In any event, it is not practically possible to expunge from its records what has already happened. This would entail a C breach of its duty of care to enable its clients to make sound decisions on credit clearance and the grant of banking facilities. Allowing the relief sought by the applicant would assist him in concealing facts of importance to banks in deciding whether or not to grant credit.

Ms *Mushore*, for the respondent, submits that it would be contrary to public D policy to prevent the dissemination of public information. This is underscored by the constitutional right to the freedom of expression and information. She further submits that the declaratory order sought by the applicant is incapable of being granted inasmuch as the dissemination of information of a criminal conviction cannot be declared to be unlawful. For that reason, and because the application is unwarranted and without merit, the applicant's conduct should E be disapproved by an award of costs on a higher scale or *de bonis propriis*.

Freedom of expression and information

Section 20(1) of the Constitution of Zimbabwe guarantees the freedom of expression, *viz*. the freedom to hold opinions and to receive and impart ideas and information without interference. Section 20(2)(a) allows for derogations F from this freedom under the authority of any law to the extent that the law in question makes provision in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health. Section 20(2)(b) permits further derogations under the authority of any law for the purpose of, inter alia, protecting the reputations, rights and freedoms of G other persons or the private lives of persons concerned in legal proceedings. However, any such derogation is not permissible where it is shown not to be reasonably justifiable in a democratic society.

It will be noted that s 20(2)(a) does not contemplate the possibility of any derogation under the specific head of public policy. Nevertheless, it seems to me that the public policy of Zimbabwe should be a legitimate consideration H

Patel J

A in assessing the constitutionality of any law formulated or conceived under s 20(2)(b) to restrain any act or conduct impinging on the reputations, rights and freedoms of other persons. In other words, conduct in pursuit of the freedom of expression or information may be lawfully curtailed where it is contrary to any public policy pertaining to the rights and freedoms of others.

B **Public policy and reasonableness**

As was clearly recognised by Hungwe J in *Tel-One (Pvt) Ltd v Communications & Allied Services Workers Union of Zimbabwe* 2007 (2) ZLR 262 (H) at 265G, the concept of public policy in any given society is an elusive one, depending upon transient and sometimes subjective views on what is in the C public benefit or what constitutes the public good. See also my observations in *Gramara (Pvt) Ltd & Another v Government of the Republic of Zimbabwe & Others* 2010 (1) ZLR 59 (H) at 73. Nevertheless, it is generally accepted that an act will be regarded as being contrary to the public policy of Zimbabwe if it violates notions of elementary justice or constitutes a palpable inequity that would hurt the conception of justice in Zimbabwe. See the remarks of D Makarau J (as she then was) in *Pamire & Ors v Dumbutshena NO & Anor* 2001 (1) ZLR 123 (H) at 128.

I do not think it can be disputed that sentencing policy in criminal matters, as enunciated through legislation and the courts, is an integral part of the public policy of Zimbabwe. It is also well established that our sentencing E policy is geared towards the rehabilitation of offenders and their reintegration into society. The question that arises for determination *in casu* is whether the retention of a criminal record in perpetuity on the database of a credit protection bureau, for disclosure to its clients on a confidential basis, violates our notions of elementary justice or constitutes a palpable inequity that is contrary to public policy.

F A South African case that is clearly germane to this question is that of *Ebrahim t/a Broadway Fisheries v Mer Products CC & Another* 1994 (4) SA 121 (C). The court in that matter was seized with the issue of liability arising from the respondents having divulged, confidentially and within their particular trade, adverse information relating to the creditworthiness of the applicant. This G resulted in credit to the applicant being curtailed and his business activities being severely hampered. It was held by Williamson J, at 123A-C, that:

> "The swopping of information about the creditworthiness of clients or prospective clients in a trade is the most natural and normal thing and everybody in business would know this. Applicant obviously knew it for he gave trade references. Provided the information is given honestly and *bona fide* I can see absolutely H nothing wrong with this practice."

Patel J

It was argued for the applicant in that matter that, even if the respondents A were merely acting in good faith within the normal parameters of business, their actions could nevertheless be wrongful if, according to the *boni mores* of the community, the exercise of their rights was unreasonable. Reliance was placed in this connection on the decision in *Hawker v Life Offices Association of South Africa & Another* 1987 (3) SA 777 (C) at 781D-I, where Howie J stated: B

> "However, insofar as counsel sought to contend that unreasonableness did not result in unlawfulness, I disagree. If interference with another's subjective right is unreasonable according to the standard of the *boni mores* of the community then it is unjustifiable and thus unlawful.
>
> …Whether respondent's action in the present matter was unreasonable and C thus unlawful involves a weighing up of the particular conflicting interests of the parties, their relationship to one another, the circumstances of the case and considerations of social policy. *Law of South Africa* vol 8 para 20 and see the *dicta* quoted by *van Heerden and Neethling (op cit* at 70), especially in *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 188H-189A, where the importance is stressed of having regard to 'the morals of the market place, the business ethics of that section of D the community where the norm is to be applied'."

Reverting to *Ebrahim's* case, at 126A-C, Williamson J concluded as follows:

> "The creditworthiness of clients or potential clients is a matter of vital interest and any information honestly given to people who are legitimately interested in it does not, in my view, attract liability, no matter the consequences to the client. …If one were to enquire of the notional reasonable man in the marketplace in E which these parties operate whether he thought that the behaviour of either respondent conflicted with the *boni mores* of the community, I am sure that there would be shocked surprise that such a question could even arise on the facts of this case."

Mr *Nkomo* submits that *Ebrahim's* case is distinguishable from the present in that the court is confronted with the blacklisting of the applicant on the F basis of a criminal judgment as opposed to the exchange of information as a matter of course within a closed business community. He further submits that such sharing of information on creditworthiness is not the same as the blacklisting of the applicant by a credit bureau.

In my view, *Ebrahim's* case is not distinguishable on the facts in the present G case, which also involves an exchange of information within a closed business community, namely, the financial institutions that are members of the ZFCA and the respondent. The information distributed by the respondent is confined to this closed community. Moreover, it cannot be said that the respondent's database consists of a "blacklist", inasmuch as it is not a national credit protection agency whose information is accessible to the public at H

Patel J

A large. Rather, it gathers relevant information for capture on its database and is contractually bound to furnish any information in its possession to a client subscriber who makes an enquiry pertaining to that client's existing or prospective customers.

Duration of information

B I now turn to consider the indefinite period for which the information *in casu* has been retained on the respondent's database. In this regard, Mr *Nkomo* relies upon the provisions of the South African

legislation governing credit bureaux to argue that the perpetual retention of this information is unreasonable and disproportionately prejudicial to the applicant.

C According to its long title or preamble, the object of the National Credit Act No. 34 of 2005 is to regulate credit information in South Africa and to establish national norms and standards relating to consumer credit. Section 73 of the Act requires the framing of regulations prescribing the time frame and the form and manner in which consumer credit information held by credit bureau must be reviewed, verified, corrected or removed. Such regulations, D as enacted in May 2006 and amended in November 2006, prescribe the maximum retention periods for which consumer credit information may be displayed and used for purposes of credit scoring or credit assessment. The prescribed period for civil court judgments and rehabilitation orders is five years, while the applicable retention period for administration orders and sequestrations is ten years. Liquidations form the one category in relation E to which information may be displayed and used for an unlimited period.

In support of his argument, Mr *Nkomo* also cites s 3 (now repealed and replaced by the Criminal Law Code [*Chapter 9:23*]) of the Prevention of Corruption Act [*Chapter 9:16*]. This section empowered the convicting court to give summary judgment in favour of the accused's principal in addition F to passing sentence on the convicted person. Such judgment would have the same effect as if the judgment had been given in a civil action instituted in the convicting court. Consequently, so it is argued, the maximum retention period of five years prescribed for civil judgments under the National Credit Act should serve as an appropriate guideline in the present matter. What this argument overlooks is that the summary judgment envisaged by this G provision may be granted *in addition* to the criminal sentence imposed on the convicted person. Consequently, any supposed correlation between the two becomes tenuous and of no particular assistance in the present matter.

As for the broader submission, while I might be inclined to accept the South African legislation as affording a useful analogy to some extent, I do not H think that the argument for applying those provisions can be sustained *in*

Patel J

casu. Firstly, the South African law provides for the registration of credit A bureaux nationally and governs consumer credit information generally. It also prescribes maximum retention periods for the specific purpose of credit scoring or credit assessment. Its basic objective, as I perceive it, is to regulate the provision of consumer credit in the national marketplace, not only by financial institutions but by business enterprises of all kinds. In the instant B case, however, we are concerned with a somewhat different scenario, *i.e.* the accessing of relevant information by a limited group of financial institutions under the terms and conditions of a subscription contract, concluded with a single credit protection bureau affiliated to a financial clearing association, the ZFCA. Secondly, and more significantly, the South African law is centred on information pertaining to civil liabilities and obligations and the C judgments of civil courts. It is wholly unconcerned with information relating to criminal convictions and sentences imposed in the criminal context. This is for the obvious reason that criminal liability is a totally distinct and separate matter calling for entirely different legislative treatment, assuming that such is possible in any event.

Quite apart from the fact that there is no relevant legislation on the point, it D seems to me virtually impossible to assess what would constitute an appropriate period for retaining the record of a criminal conviction and resultant sentence. The length of a sentence of imprisonment does not necessarily afford a useful guide because of the infinite variability of criminal sentences. For instance, a custodial term may be imposed as an option to the payment of a fine, it may E be wholly or partially suspended subject to the fulfilment of one or more conditions, it may be fixed to run concurrently or consecutively in the case of several counts, or it may be reduced by way of remission during the course of incarceration itself. There is also the situation of habitual offenders who might be subjected to the operation of previously suspended sentences or who are serving several sentences arising from multiple offences committed F at different times. In short, any attempt to rely upon temporal proportionality as a criterion for assessing the reasonableness of retaining criminal records would be purely arbitrary and nothing more than an exercise in imprecision.

In any event, it is axiomatic that criminal conduct is morally more reprehensible than civil misconduct and that its consequences are inherently more serious G than the implications of civil liability. This is well illustrated by the 20 year period of prescription applicable to the prosecution of

criminal offences generally (other than murder) in terms of s 23(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. *A fortiori*, it seems logical to postulate that there can be no prescriptive period for the retention of records relating to proven criminal conduct. Moreover, the fact that a person convicted of a H

Patel J

A crime involving dishonesty has served his sentence does not necessarily mean that he is reformed and that he is no longer a credit risk. In each case, a proper assessment would have to be made by the financial institution concerned on the basis of all relevant information, *i.e.* the individual's past record as well as such additional information as he proffers in order to demonstrate that he is now creditworthy. For all of the foregoing reasons, I am not convinced B that the retention of a criminal record on a creditworthiness database for an indefinite duration can logically be characterised as being disproportionate or unreasonable.

Conclusions

In the instant case, it is common cause that the respondent avails its database C to its client subscribers in terms of its standard contract and under the strictest confidentiality. The relevant information is only furnished to a subscriber member with a genuine interest in that information, *i.e.* one that requires it in order to evaluate the creditworthiness of persons seeking its credit or other financial facilities. This information is not disseminated indiscriminately D to all and sundry. As discussed in the South African cases cited earlier, the respondent operates in good faith to furnish relevant information on a confidential basis to persons with a legitimate interest in that information.

In any event, insofar as concerns the information specifically relating to the applicant himself, it is information that was initially published in and extracted from the public domain. The fact that it has been retained on the respondent's E database for an indefinite period does not, as I have concluded above, detract from the reasonableness or legitimacy of the respondent's actions.

In the final analysis, it is necessary in each case to balance the social policy of rehabilitation and reintegration of offenders as against prevailing community interests and standards. I have no doubt that the closed financial community F within which the respondent operates its service would not find anything objectionable in the conduct complained of by the applicant. As for the larger community, the applicant has failed to persuade me that the notional reasonable man on the proverbial commuter omnibus would consider that conduct to be unreasonable. All in all, I am satisfied that the service provided by the respondent and the underlying standard contract with its subscriber G clients are not contrary to public policy.

As for costs, Ms *Mushore* for the respondent has not established any convincing ground for an award of punitive costs as against the applicant or his counsel. I do not consider the applicant's claim to be merely frivolous or vexatious. He obviously bears a genuine grievance and the arguments H advanced on his behalf by Mr *Nkomo* were not only of considerable substance

Patel J

but also meritoriously delivered. In any event, I take the issues raised by this A application to be matters of considerable public importance. Accordingly, in keeping with past judicial practice in relation to such matters, I am disinclined to award any costs against the applicant, even though he has not succeeded in these proceedings.

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

Donsa-Nkomo & Mutangi, applicant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

1 *See S v Pazvakavambwa 1998 (2) ZLR 125 (S). – Editor*

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Source:
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STARAFRICA CORPORATION LTD v SIVNET INVSTMS (PVT) LTD & ANOR 2011 (2) ZLR 123 (H)

Citation	2011 (2) ZLR 123 (H)
Case No	Judgment No. HH-178-11
Court	High Court, Harare
Judge	Patel J
Heard	9 June 2011; *CAV*
Judgment	13 September 2011
Counsel	*A P de Bourbon SC*, with him *D Ochieng,* for the applicant *E W W Morris,* for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Arbitration – *award – review – application – procedure to be followed – application made in terms of High Court Rules – when may be treated as application made under Arbitration Act*

D **Practice and procedure** – *review – arbitral award – procedure to be followed – application made in terms of High Court Rules – when may be treated as application made under Arbitration Act*

Headnote

In an application for review of an arbitrator's award, the applicant did not E state that the application was made in terms of art 34 of the Model Law (contained in the First Schedule to the Arbitration Act [*Chapter 7:15*]), but it was specifically averred that the award was in conflict with public policy as well as being grossly irregular.

Held, that an arbitration award cannot be challenged or set aside by way of review proceedings. Recourse to a court against an arbitral award may F be made only by an application for setting aside in accordance with paras (2) and (3) of art 34 of the Model Law.

Held, further, that the principal object of para (1) of art 34 is to ensure the finality of arbitration proceedings by defining and restricting the scope of challenges to arbitral awards. This is achieved by stipulating that any G such challenge may be made only by an application for setting aside *in accordance with* paras (2) and (3). Paragraph (2), as amplified by para (5), sets out the substantive grounds upon which an arbitral award may be set aside. Paragraph (3) prescribes the time limit within which such an application must be made. Apart from this, art 34 says nothing more about the procedure governing an application for setting aside.

Patel J

Held, further, that the differences between an application under art 34 and A review proceedings under the High Court Act [*Chapter 7:06*] generally are (a) that the interventionary powers of the High Court are confined to setting aside the impugned award and do not extend to any other corrective measure; and (b) that the time limit for a review application is eight weeks, subject to extension for good cause, while the period B stipulated under art 34(3) is three months, without the possibility of extension. Apart from these procedural distinctions, the substantive grounds for setting aside an award, in terms of art 34(2) as read with art 34(5), are virtually the same as the grounds for review under common law and the High Court Act.

Held, further, that the requisite procedural provisions are set out in Order C 32 of the High Court Rules 1971 relating to applications generally, which provisions also apply to the conduct of review proceedings under Order 33. Although Order 33 is unquestionably subsidiary legislation, its fundamental objective is to prescribe the procedure to be applied in the exercise of review powers embodied in its parent statute, the High D Court Act. The procedural exigencies of the Model Law should not be seen as being in conflict with the High Court Rules. Rather, art 34 should be construed and applied in conjunction and conformity with the Rules, including Order 33, which should be treated as a complementary adjunct to the application contemplated by art 34. Article 34(1) does not exclude or preclude an application for the setting aside of an arbitral award by E way of review proceedings under Order 33, provided such application is in accordance with arts 34(2) and (3), *viz.* premised on one or more of the grounds enumerated in art 34(2) and (5), and made within the three months time limit stipulated by art 34(3).

Held, further, that where the application for review was made within the time F limits set out in the Model Law and the grounds for review were those set out in the Model Law, it would be permissible to treat the application as one made under art 34.

Cases cited

Federated Trust Ltd v Botha 1978 (3) SA 645 (A) G

Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A)

Mtetwa & Anor v Mupamhadzi 2007 (1) ZLR 253 (S)

Nxasana v Min of Justice & Anor 1976 (3) SA 745 (D)

Legislation considered

Arbitration Act [*Chapter 7:15*], First Schedule, arts 34(1), (2), (3) & (5) H

2011 (2) ZLR p125

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A High Court Act [*Chapter 7:06*], ss 26, 27, 28

High Court Rules 1971 (RGN 1047 of 1971), rr 256, 257, 258 & 259

Case information

A P de Bourbon SC, with him *D Ochieng,* for the applicant

E W W Morris, for the respondents

Judgment

B **PATEL J:** In Case No. HC 4174/10, the applicant in this matter filed for the review and setting aside of an arbitral award rendered in arbitration proceedings between the parties. The award was made on 26 May 2010 and the application for review was filed on 21 June 2010. There were delays in confirming and preparing the record of those proceedings for various reasons. C The applicant now seeks condonation for the late filing of the arbitral record to enable the review proceedings to continue.

The respondents oppose this application. They contend that there was no need for the arbitral record to have been confirmed by the parties. The applicant should have simply attached the bundle of documents constituting the record D to its founding affidavit in Case No. HC 4174/10. Because of the

consequent absence of any arbitral record before this court, the application for review must fail. Moreover, the court cannot condone the late filing of the record as it should have been attached to the applicant's founding affidavit and identified *ab initio*.

E In response, the applicant avers that the arbitrator (Muchadeyi Masunda) was initially asked to prepare and lodge the arbitral record, in terms of r 260(1) of the High Court Rules 1971. He declined to do so and it therefore became necessary to have the record agreed for practical purposes, because of its sheer volume of over 400 pages. The respondents initially gave the impression of their willingness to confirm the record but subsequently F declined to do so. The record was eventually filed on 29 September 2010 and the present application was made on 8 October 2010. The belated lodging of the record should be condoned by way of interlocutory relief so that the review application can be heard on its merits.

The submissions

G Mr *de Bourbon* submits that an application for review under art 34 of the Model Law requires a record of the arbitral proceedings under scrutiny. Such record would consist of a transcript of the evidence lead and the documents filed before the arbitral tribunal. Only the arbitrator can produce a full record of the arbitration proceedings. He further submits that the respondents' H opposition to the present application is an exercise in sterile formalism.

Patel J

They would not suffer any prejudice if the record filed by the applicant is A accepted for the main review application.

Mr *Morris* concedes that there would be no prejudice to the respondents if the record were to be admitted. However, he takes the point that the main application in case No. HC 4174/10 is a nullity by virtue of the decision in *Mtetwa & Another v Mupamhadzi* 2007 (1) ZLR 253 (S) at 254F-255C and B 256B-C. It was held by the Supreme Court in that case that any challenge to an arbitral award must be made in terms of art 34 of the Model Law exclusively. It cannot be made by way of review under Order 33 of the High Court Rules 1971. The main application and its founding affidavit refer simply to an application for review, without making any mention of art 34. C The main application therefore constitutes a nullity and, as was affirmed in *Mtetwa's* case at 255G-256B, it cannot be extended or amended beyond the three month period stipulated in the Model Law. Consequently, the present application for condonation is futile and must fail.

In reply, Mr *de Bourbon* accepts that an arbitration award can no longer be D challenged or set aside using common law review proceedings. He also accepts that the main application refers to an application for the review of the arbitral award *in casu*. However, he points out that both in the main application and in its founding affidavit it is specifically stated that the award is in conflict with public policy as well as being grossly irregular. Therefore, he submits that the main application was in fact made under art 34 of the Model Law E and not Order 33 of the Rules.

Setting aside of arbitral awards and proceedings for review

Article 34 of the Model Law (First Schedule to the Arbitration Act [*Chapter 7:15*]), in its relevant portions, provides as follows:

> "(1) Recourse to a court against an arbitral award may be made only by an F application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the High Court only if –
>
> (a) the party making the application furnishes proof that –
>
> (i) a party to the arbitration agreement referred to in article 7 was under G some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of *Zimbabwe*; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or H

Patel J

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration …; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, … or, failing such agreement, was not in accordance with this Model Law; or

(b) the High Court finds, that –

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

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

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) …

(5) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if –

(a) the making of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award."

As was recognised by the Supreme Court in *Mtetwa's* case (*supra*) at 254F-255C, the use of the words "exclusive" and "only" in art 34 make it clear that recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) and (3) of art 34. Gwaunza JA proceeded to hold that this provision "quite simply and effectively precludes" any application for the setting aside of an arbitral award "otherwise than in terms of paras (2) and (3) of art 34". She fortified that position by noting, at 256B-C, that "Article 34 is part and parcel of a statute, the Arbitration Act, and should therefore hold dominance over Order 33 of the High Court Rules, which is subsidiary legislation".

While I am in general agreement with the views expressed by her Ladyship, it seems to me, with the greatest respect, that the court might have overlooked certain aspects of the relationship between art 34 of the Model Law and the High Court Rules. The principal object of para (1) of art 34 is to ensure the finality of arbitration proceedings by defining and restricting the scope of challenges to arbitral awards. This is achieved by stipulating that any such challenge may be made only by an application for setting aside *in accordance with* paras (2) and (3). Paragraph (2), as amplified by para (5), sets out the substantive grounds upon which an arbitral award may be set aside. Paragraph

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Patel J

(3) prescribes the time limit within which such an application must be made. Apart from this, art 34 says nothing more about the procedure governing an application for setting aside.

Part V of the High Court Act [*Chapter 7:06*] deals with the review powers of this Court. Section 26 of the Act restates the inherent common law power of review as follows:

"Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe."

Section 27 elaborates the traditional grounds for review in the following terms:

"(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be –

(a) absence of jurisdiction on the part of the court, tribunal or authority concerned;

(b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;

(c) gross irregularity in the proceedings or the decision.

(2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

Also relevant for present purposes is s 28 which sets out the High Court's powers on review of civil proceedings and decisions:

"On a review of any proceedings or decision other than criminal proceedings, the High Court may, subject to any other law, set aside or correct the proceedings E or decision."

The procedure governing reviews under the Act is provided for in Order 33 of the High Court Rules 1971. Rule 256 states that proceedings for review shall be by way of court application directed and delivered to all the affected parties. Rule 257 requires that the court application must state shortly and clearly the grounds upon which the applicant seeks to have the proceedings F set aside or corrected and the exact relief prayed for. Apart from this, in terms of r 258, the application procedure set out in Order 32 shall apply to any application for review. Lastly, by virtue of r 259, any proceedings by way of review must be instituted within eight weeks, subject to the possibility of that time being extended for good cause shown. G

Reverting to Article 34 of the Model Law, the challenge envisaged under that provision is not one on the merits of the arbitral award in question. It is essentially a species of review of the arbitration proceedings and resultant award. The differences between an application under art 34 and review proceedings generally are fairly obvious. Firstly, the interventionary powers of the High Court are confined to setting aside the impugned award and do H

A not extend to any other corrective measure. Secondly, the time limit for a review application is eight weeks, subject to extension for good cause, while the period stipulated under art 34(3) is three months, without the possibility of extension. See *Mtetwa's* case (*supra*) at 255G-256B. Apart from these procedural distinctions, the substantive grounds for setting aside an award, in terms of Article 34(2) as read with Article 34(5), are virtually the same as the B grounds for review under common law and the High Court Act. Moreover, as I have stated earlier, art 34 does not contain any procedural detail regulating an application for setting aside. The requisite provisions are set out in Order 32 of the Rules relating to applications generally, which provisions also apply to the conduct of review proceedings under Order 33. I would also add that, C although Order 33 is unquestionably subsidiary legislation, as was noted in *Mtetwa's* case (*supra*) at 256B-C, its fundamental objective is to prescribe the procedure to be applied in the exercise of review powers embodied in its parent statute, the High Court Act.

The thrust of all of the foregoing is that the procedural exigencies of the Model Law should not be seen as being in conflict with the High Court D Rules. Rather, art 34 should be construed and applied in conjunction and conformity with the Rules, including Order 33, which should be treated as a complementary adjunct to the application contemplated by art 34. If this is correct, art 34(1) does not exclude or preclude an application for the setting aside of an arbitral award by way of review proceedings under Order E 33, *provided such application is in accordance with arts 34(2) and (3), viz.* premised on one or more of the grounds enumerated in art 34(2) and (5), and made within the three months' time limit stipulated by art 34(3).

Disposition

Inasmuch as I am bound by the decision in *Mtetwa's* case (*supra*), the above F *dicta* can be no more than *obiter*, for future consideration should that decision be revisited by the Supreme Court. In the instant case, the unavoidable proposition of law that must apply is that an arbitration award cannot be challenged or set aside by way of review proceedings. Nevertheless, I do not perceive this to be an impediment to the relief sought by the applicant for the following reasons.

G It is common cause that the main application was lodged within four weeks after the arbitral award *in casu* was made. This is a feature that distinguishes the present matter from the untimely application in *Mtetwa's* case (*supra*). It is also not in dispute that the main application sought the setting aside of the arbitral award by way of review. In fact, it makes three references to the H review of the award. However, in para 1 of the application, it is specifically

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stated that the award is in conflict with the public policy of Zimbabwe. This A averment is repeated in para 11 of the founding affidavit, where it is also alleged that the award was grossly irregular. Conflict with public policy is not a traditional ground of review but a specific ground for recourse

under art 34(2)(b)(ii). Again, gross irregularity constitutes a breach of the rules of natural justice, which is also recognised as a ground for recourse under B art 34(5)(b). Having regard to all of these *indicia*, I am satisfied that, both in intention and effect, the main application was made under art 34 of the Model Law and not Order 33 of the High Court Rules. I am further satisfied that it was made in substantial compliance with the requirements of art 34(1) inasmuch as it was instituted for the setting aside of the arbitral award in accordance with art 34(2) and (3). It should therefore proceed to be heard C on the merits on the basis of the record prepared by the applicant and not objected to by the respondents.

In arriving at these conclusions, I take heed of the point that is often made that procedural rules are fashioned so as to be flexible tools, adaptable to meet particular needs and circumstances. See *Nxasana v Minister of Justice & Another* 1976 (3) SA 745 (D) at 751G-H. In this regard, the courts should D eschew resort to formalism and apply procedural rules so as to secure the inexpensive and expeditious completion of litigation before them. See *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654C-D. In short, I am inclined to agree with Mr *de Bourbon* that the respondents' opposition to the interlocutory relief sought herein propounds no more than sterile formalism E (see *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 663D) and should be rejected on that account.

In the result, the applicant is entitled to the relief that it seeks, including the costs of instructing two counsel. It is accordingly ordered that:

1. The late filing of the record in Case No. HC 4174/2010 be and is hereby condoned. F
2. The respondents pay the costs of this application, including the costs of two counsel.

Coghlan Welsh & Guest, applicant's legal practitioners

Atherstone & Cook, respondents' legal practitioners G

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ZHANDA & ANOR v T J GREAVES (PVT) LTD & ANOR 2011 (2) ZLR 131 (H)

Citation	2011 (2) ZLR 131 (H)
Case No	Judgment No. HH-185-11
Court	High Court, Harare
Judge	Mtshiya J
Heard	26 July 2011; 5 September 2011; *CAV*
Judgment	14 September 2011
Counsel	Applicants in person *T Mpofu*, for the first and second respondents Ms *Hove*, for the third respondent
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Land – acquisition – *rural land – former owner of acquired land – no right to remain on land – offer letter or other document in respect of acquired land – person to whom such document is issued has right to occupy land – Minister stating that land should be subdivided and former owner* D *allowed to remain on portion – holder of offer letter entitled to eviction order unless offer letter amended*

Headnote

Where rural land has been acquired, the former owner of the land has no right to remain on the land. The holder of an offer letter has the legal right to E occupy and use the land allocated in terms of the letter and has the right to seek the eviction of the former owner of the land. This is so even if the owner is occupying the land following advice from Government officials and notwithstanding an affidavit from the responsible Minister that the land should be subdivided and that the former owner be allowed to occupy one of the sub-divisions. The holder of an offer letter is entitled F to an eviction order against the former owner unless the offer letter is amended or withdrawn or an offer letter is given to the former owner.

Cases referred to

CFU & Ors v Min of Lands & Ors 2010 (2) ZLR 576 (S)

Kondonis v Min of Lands Case No. SC 72/11

G *S v Davy* 1988 (1) ZLR 386 (S)

Zhanda & Anor v T J Greaves (Pvt) Ltd & Ors HH-148-11

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 4C

2011 (2) ZLR p132

Mtshiya J

Case information

Applicants in person A

T Mpofu, for the first and second respondents

Ms *Hove*, for the third respondent

Judgment

MTSHIYA J: This is an urgent application wherein the applicants seek the following relief: B

"1. The applicants be and are hereby authorised, directed and empowered to execute the judgment under Case Number 6257/11 notwithstanding the appeal noted against that judgment by the respondents.

2. The first and second respondents be and are hereby restrained from vandalizing and or removing fixed assets on the land including electrical installations, water irrigation pipes and dwelling houses. C

3. The Sheriff or his lawful Deputy be and is hereby directed, empowered and authorised to execute the eviction of the first and second respondents from the whole of Enondo farm, and all those claiming occupation through them, the appeal noted by the respondents notwithstanding.

4. The Deputy Sheriff be and is hereby authorized to enlist the assistance and services of the Office Commanding Mashonaland East Province of D the Zimbabwe Republic Police, if need be, in the execution of this order.

5. The first and second respondents pay the costs of this application".

The application is opposed.

The brief background to this application is as follows: On 29 November 2010 the applicants were, in terms of the Land Acquisition Act [*Chapter* E *20:10*] ("the Act"), jointly issued with an offer letter for

the whole of Enondo Farm (Enondo). The farm is in Seke district, Mashonaland East Province, and measures approximately 763 hectares in extent. The said farm was previously owned by the respondents before being acquired by the State in terms of the Act.

On 6 July 2011 the applicants obtained a court order for the eviction of the respondents from Enondo. The eviction order (In *Zhanda and Anor v TJ Greaves and 2 Ors* HH-148-11) reads as follows:

> "1. That first and second respondents and all those claiming occupation through them be and are hereby ordered to vacate a certain piece of land in the district of Salisbury known as Enondo B held under deed of transfer 5199/82 prior to the Land Reform Program within Seven (7) days of the date of this order.
>
> 2. That the third respondent be and is hereby ordered to facilitate the occupation of the said farm by the applicants.
>
> 3. The Sheriff or his Deputy be and are hereby authorized to eject first and second respondents from the said farm should they fail to comply with the provisions of paragraph one of this order.

Mtshiya J

> 4. The Sheriff or his deputy be and are hereby authorized and directed to call upon the assistance of the Zimbabwe republic police should first and second respondents resist eviction.
>
> 5. First and second respondents are to bear the costs of this application".

Through this urgent application, the applicants seek execution of the above order pending the determination of the respondents' appeal in the Supreme Court. The applicants argue that the appeal was noted only to delay execution of the court order. The applicants also state that the respondents have no good and sufficient cause to oppose the application on the merits.

Mr *Mpofu,* for the respondents, argued that the matter was not urgent. He said there was no explanation as to why the application was only filed on 21 July 2011 when the appeal was noted on 11 July 2011. He also submitted that, apart from seeking final relief in terms of r 244 of the High Court Rules 1971, the applicants, as self actors, should have at least filed an affidavit of urgency.

Mr *Mpofu* further submitted that the noting of an appeal in the Supreme Court meant that proceedings in the High Court relating to the same matter should come to a halt until the appeal is determined. On the basis of the above preliminary points, Mr *Mpofu* urged the court to dismiss the application.

Mr Zhanda, one of the applicants, submitted that it took ten days to file the urgent application because he had gone to Binga for a funeral. He said "no-one else other than himself would have facilitated the funeral". However, he did not deal with the other technical issues that were raised by the respondents' counsel. I take it that this was the result of him being a lay person.

In dealing with the preliminary issues raised by Mr *Mpofu,* I take note of the fact that both applicants were not legally represented. However, both applicants have since demonstrated a keen desire to fight for what they believe to be their rights. They started the fight in the magistrates court and have continued the fight in this court. I therefore do not believe that we should read much in the ten days' delay of filing this application. The total circumstances of the case should be taken into context. I also hold the view that matters of this nature should not be clouded in legal technicalities, moreso if so doing will prejudice a party deserving of the court's protection and the relief sought. This need becomes more necessary where the party seeking relief is not legally represented. The court should be driven by a desire to resolve the dispute which, *in casu*, I believe, is clearly defined. The case is not new and what each party wants is clearly known. I would therefore remove legal technicalities from the path of the court and deal with this application.

Having said the above, I believe the application substantially meets the requirements of urgency. In coming to this decision I also, like Bhunu J,

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derive comfort from r 4C of the High Court Rules 1971 which allows for departure from set rules and procedures where the interests of justice so dictate. The rule in question provides as follows:

> "The court or a judge may, in relation to any particular case before it or him, as the case may be –

(a) direct, authorise or condone a departure from any provision of these rules, B 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

In view of the foregoing, I am unable to uphold the preliminary issues raised by the respondents.

On the merits of the application, Mr *Mpofu* submitted that the initial judgment of this court was granted in the absence of vital information. Part of that information is contained in the affidavit of the Minister of Lands and Rural D Resettlement, who, in terms of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] is the acquiring authority. The Minister's affidavit informs as follows:

"1. I am the Minister of Lands and Rural Resettlement and also the Acquiring Authority in terms of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. E

2. I write this affidavit pursuant to a letter dated 6 July 2011 from legal representatives of first respondent who request clarity on the position regarding Enondo Farm and its occupation and use.

3. I am aware of the proceedings in HC 6257/11 in which Hudson Jostiono Zhanda and Irene Zhanda are applying for the eviction of TJ Greaves from Enondo B. F

4. The Zhandas have an offer letter in respect of the property measuring 765 hectares issued on 29 November 2010.

5. The Province has however indicated that there is need to maintain maximum farm sizes in the area and therefore recommended that the farm be subdivided and allocated to the Zhandas and the former owner which will result in maximum G farm size being maintained.

6. I support the Governor's recommendation to adhere to the agreed policy of maximum farm sizes through re-planning.

7. I therefore confirm that Enondo will be subdivided to effect this position."

Furthermore, and in addition to the Minister's affidavit, on 22 July 2011 the Provincial Lands Committee/the Governor in a document titled "Withdrawal H

Mtshiya J

A Schedule For Downsized Farms – Mashonaland East Province" recommended, in relation to Enondo farm, as follows:

> "The white farmer Mr Greaves has been recommended to stay. The farm is to be downsized in line with the maximum farm size regulations and therefore a replan will accommodate both Mr Greaves and Mr Zhanda."

It was argued that in the absence of the above documents the earlier decision B of this court was based on an incomplete record. Mr *Mpofu* further submitted that ever since Enondo was acquired by the State, the respondents had remained on the property on the basis of advice from Government officials. In support of his argument that the respondents were on the property because of advice from State officials, he referred me to *S v Davy* 1988 (1) ZLR 386 (S) C where Gubbay JA, as he then was, had this to say:

> "It necessarily follows that in my opinion the rule that ignorance or mistake of law is no excuse which judicial officers have applied for so long in this country in conformity with both English law and the decisions of the South African courts prior to the advent of *de Blom's* case *supra* remains valid. Its strength has hardly been shaken. *It is, however, subject to the exception that where the accused acted upon incorrect advice as to the law, given by a Government official* D *who is primarily responsible for the administration of the particular statute to which the matter relates, his ensuing mistake of law is a good defence.* See *S v Zemura supra* at 377E-G. As stressed by Lewis AJP in *S v Bledig & Anor* 1974 (1) RLR 100 (A) at 109A.
>
> > 'There is something in the nature of an estoppel present when the State prosecutes a person for certain conduct when he has been induced by advice E received from a responsible representative of the State to embark on such conduct'
>
> Clearly the exception is grounded in reasons of public policy. *Where the State has misled a man into a contravention of the law, as a matter of public policy he should be entitled to an acquittal*. But care must be taken not to extend the exception beyond the strict limits of Zemura's case, for to do so would be F 'extremely dangerous and would tend to frustrate the enforcement of statutory provisions'. See *Bledig's* case *supra* at 108 *in fine*" (my emphasis).

Mr *Mpofu* also referred me to the Supreme Court's decision in *Kondonis v Minister of Lands & Ors* Case No. S-72-11 where the Supreme Court had made the following order:

> "1. The acquisition of applicant's land being a certain piece of land situate in G the District of Salisbury being Lot 17 of Good Hope, measuring ten comma nine seven nine zero (10,9790) hectares and held under Deed of Transfer 1267/85 is outside the provisions of the law more particularly s 16B(2) (a) and 16A of the Constitution of Zimbabwe and therefore invalid and is accordingly and therefore invalid and is accordingly set aside.
>
> 2. The consequential endorsement of the applicant's deed of transfer is equally H set aside and the applicant's deed of title is therefore restored.

2011 (2) ZLR p136

Mtshiya J

> 3. The offer letter granted to second the respondent on 21 February 2011 is A invalid and therefore set aside".

It is important to note, as is clear from the above order, that the issue for determination in that case was whether or not the property in question had been acquired in terms of the law. The court ruled that the acquisition was "outside the provisions of the law and was therefore invalid". The acquisition was set B aside. Accordingly no offer letter could attach to an unlawful acquisition.

In citing the above cases, Mr *Mpofu* argued that the respondents could not be regarded as outlaws. He said they had been permitted to remain on the land by State officials pending re-allocation.

With respect to the appeal filed in the Supreme Court, Mr *Mpofu* submitted C that in condoning departure from rules the court had exhibited judicial bias. He also alluded to the fact that an earlier appeal could not be regarded as having been withdrawn in the absence of a tender of costs. Accordingly, he argued, the appeal from the magistrates court filed in this court was still pending.

Mr *Mpofu* went on to submit that the generalisations on capital outlays were not factual. He said there were prospects of success in the appeal lodged by D the respondents in the Supreme Court. That being the case, he argued, it would not be appropriate for this court to grant the relief sought by the applicants.

On their part, the applicants, through Mr Zhanda, submitted that in terms of law the respondents were committing an offence by remaining on Enondo. The applicants had been stripped of their rights to remain on the property. E He said the acquiring authority should not be allowed to break the law of the land in order to accommodate the respondents.

Mr Zhanda submited the Minister's affidavit was not an offer letter but a document merely expressing an intention.

In making his submissions, Mr Zhanda relied heavily on the Supreme Court F decision in *Commercial Farmers Union & Ors v Minister of Lands & Ors* 2010 (2) ZLR 576 (S) at 595-596 where Chidyausiku CJ states, in part, as follows:

> "(4) A former owner or occupier of acquired land who without lawful authority continues occupation of acquired land after the prescribed period commits G a criminal offence. If the former owner or occupier continues in occupation in open defiance of the law, no court of law has the jurisdiction to authorise the continued use or possession of the acquired land.
>
> (5) Litigants who are acting outside the law, that is, in contravention of s 3 of the Act, cannot approach the courts for relief until they have complied with the law. See *Associated Newspapers of Zimbabwe (Private) Limited v The Minister of State for Information and Publicity and Ors* case *supra.* H

2011 (2) ZLR p137

Mtshiya J

> (8) The A holder of an offer letter, permit or land settlement lease has a clear right, derived from an Act of Parliament, to take occupation of acquired land allocated to him or her in terms of the offer letter, permit or land settlement lease. *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"* B (my emphasis).

On the basis of the above Mr Zhanda urged the court to grant the applicants the relief they are seeking. He said the earlier judgment of Bhunu J was very clear on the law.

Ms *Hove*, for the acquiring authority, said she had no submissions to make C and would abide by the court's decision. This was despite the court having directed her to file written submissions. However, given the legal position *in casu*, Ms *Hove's* stance was not surprising at all.

I am of the view that the law regulating the issues for determination in this application has already been clearly set out in the two cases cited above, D namely *Commercial Farmers Union & Ors v Minister of Lands & Ors* and *Zhanda & Anor v TJ Greaves (Pvt) Ltd & Ors.*

In his judgment in the latter case Bhunu J also relied on the judgment of the Supreme Court, as demonstrated at p 5 of his judgment where he quotes from the Supreme Court judgment as follows:

> "On the other hand, s 3 of the Act criminalizes the continued occupation of E acquired land by the owners or occupiers of land acquired in terms of s 16B of the Constitution beyond the prescribed period. The Act is very explicit that failure to vacate the acquired land by the previous owner after the prescribed period is a criminal offence. It is quite clear from the language of s 3 of the Act that the individual applicants as former owners or occupiers of the acquired land have no legal rights of any description in respect of the acquired land once the F prescribed period has expired …
>
> *The holders of the offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights. The individual applicants as former owners or occupiers of acquired land lost all rights to the acquired land by operation of the law The lost rights have been acquired by the holders of offer letters,* G *permits or land settlement leases. Given this legal position, it is the holders of offer letters, permits and land settlement leases and not the former owners or occupiers who should be assisted by public officials in the assertion of their rights"*(my emphasis).

I fully agree with the above and I am of the view that the authorities cited by the respondents in trying to prove that they have not violated the law are not H relevant. As already noted, the *Kondonis* case *supra* was not dealing with a

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case where the acquiring authority had legally acquired the land in question. A There was therefore no offer letter to talk about. *In casu*, there is no dispute that the land in question is now State land allocated to the applicants. The acquiring authority is enabled by law to allocate the land as he deems fit. The offer letter issued to the applicants is not disputed. It is on that basis that they are able to independently argue their case. B

I also agree with the applicants that the acquiring authority's affidavit does not constitute an offer letter. The respondents have no lawful authority to remain on the land and therefore do not deserve the protection of the court.

The import of the Minister's affidavit is merely to relay to the court the acquiring authority's intention(s). The court's knowledge of those intentions does not change the legal position, namely, that as opposed to the respondents' C position, the applicants have an instrument that renders their claim to occupy the property lawful. The acquiring authority has, since the dispute started, neglected or failed to do the correct thing *i.e.* either withdraw/amend the offer letter granted to the applicants or grant an offer letter to the respondents in terms of its expressed intentions. The acquiring authority has the authority D to do the correct thing and *in casu* what we have is lawful authority for the applicants to occupy Enondo.

Apart from arguing that State officials advised them to remain on the property, I did not hear the respondents to be challenging the lawful position of the applicants.

I agree that generally an appeal suspends the operation of the judgment E appealed against.

In *Econet v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR R 149(H) Smith J said:

> "In this country, as in South Africa, the noting of an appeal in a civil case automatically suspends the execution of any judgment or order granted by the court of first instance, In *South Cape Corp v Engineering Mgmt Svcs* 1977 (3) SA 534 (A) F Corbett JA (as he then was) said at 544:
>
> > '… it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal … The purpose of the rule is to prevent irreparable damage from being done to the intending appellant'
>
> An application may however be made to the trial court for leave to execute G pending the appeal and in any such application the onus is on the applicant to shoe special circumstances (see *South Cape Corp supra* at 545 and 548). In *Wood NO v Edwards & Anor* 1966 RLR 336 (G); 1966 (3) SA 443 (R) Lewis J (as he then

was) made it clear that the general rule, as stated above also applies in Zimbabwe and he referred with approval to *Reid v Godart* 1938 AD 511 when it was also stated that 'The foundation of the common law rule …. is to prevent irreparable damage to the intending appellant'". H

2011 (2) ZLR p139

Mtshiya J

A *In casu*, I believe the applicants have, in their application, demonstrated that they are on the side of the law and therefore require protection from the court. The respondents are operating outside the law and therefore deserve no protection from this court. I therefore see no prospects of success in the appeal noted in the Supreme Court by the respondents. The law, in my view, dictates that the applicants must succeed. I therefore see no reason why the B relief sought by the applicants should not be granted.

In the premises I make the following order in favour of the applicants:

It is ordered that:

1. The noting of the appeal by TJ Greaves (Pvt) Ltd and TJ Greaves shall not suspend the execution of the order granted by Bhunu J on 6 July C 2011; and
2. The first and second respondents shall pay the costs of this application.

Munangati & Associates, first and second respondents' legal practitioners

Office of the Attorney-General, third respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/RIO TINTO (AFRICA) PENSION FUND v GWARADZIMBA NO & ANOR 2011 (2) ZLR 140 (S)

RIO TINTO (AFRICA) PENSION FUND v GWARADZIMBA NO & ANOR 2011 (2) ZLR 140 (S)

2011 (2) ZLR p140

Citation	2011 (2) ZLR 140 (S)
Case No	Judgment No. S-18-11
Court	Supreme Court, Harare
Judge	Malaba DCJ, Sandura JA & Garwe JA
Heard	20 July 2010; *CAV*
Judgment	15 September 2011
Counsel	*E W W Morris*, for the appellant *H Zhou,* for the first respondent *S J Chihambakwe*, for the second respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Company – *winding up – distribution account – confirmation by Master – effect – account thereby becoming final – subsequent claim by creditor have shares forming part of estate delivered to creditor not competent* D *– once account confirmed, creditor only entitled to payment in terms of account*

Headnote

The High Court dismissed an application for an order compelling the respondents to deliver to the applicant (now the appellant) certain shares. The trustees of the appellant, a self-administered pension fund, decided E to employ a stockbroking company, Sagit, to manage its share portfolio. The appellant delivered the portfolio to Sagit, whose mandate was to manage the portfolio. Such management entailed the purchase and sale of shares which, when purchased, would be held in a Sagit nominee company or in the appellant's name. Following further deliberations, F the appellant resolved to administer its own scrip and requested Sagit to surrender all the shares it was holding on its behalf. Sagit delivered most of the scrip but a dispute arose regarding the quantity of the shares due to the appellant from the nominee company. After further investigations, a new reconciliation of the outstanding shares was agreed between the appellant and Sagit. However, Sagit was placed under liquidation and G the first respondent was appointed liquidator. In correspondence between the appellant and himself, the first respondent acknowledged that the shares were due to the appellant and undertook to deliver them against delivery of other shares that the appellant was holding.

In the meantime, following the liquidation of Sagit, the appellant submitted its claim at the second meeting of creditors. The claim was provisionally H

Malaba DCJ

A accepted by the Master. After verification of the facts, the first respondent accepted the appellant's claim for payment, calculating the amount by using the price per share from the Zimbabwe Stock Exchange. He then prepared the first interim and distribution account, which he submitted to the Master in terms of s 279 of the Companies Act [*Chapter 24:03*]. Acting in terms of s 281 of the Act, he advertised the account in the B *Gazette* as lying open for inspection at the Master's Office. No creditor, including the appellant, filed any objection against the contents, the form or amount awarded to each of the creditors. Accordingly, the Master confirmed the account. The first respondent then gave notice of such confirmation in the *Gazette* and advised that he would start C paying the proved creditors. No objections were received. He paid all proved creditors, including the appellant, who was paid the sum he had calculated. The appellant rejected the payment and transferred it back to the first respondent. The appellant then instituted proceedings for the delivery to itself of the shares. The High Court dismissed the application. The appellant appealed.

D *Held*, that the provisions of the Companies Act relating to the accounts, plan of distribution, notification to creditors, confirmation and distribution had all been complied with. The first respondent lodged his account with the Master in terms of s 279. Thereafter, the account lay open for inspection for the required period and the liquidator gave due notice thereof by E advertisement in the *Gazette*. There were no objections lodged with the Master at any time before the confirmation of the account. In terms of s 283, because no objection had been lodged, the Master confirmed the account. When the Master confirmed the account, the account ceased to be an interim account. It became a final account. Nowhere in the Act is F there provision for the Master to confirm an interim account. In terms of s 283, such confirmation has the effect of a final sentence, save as against such persons as may be permitted to re-open the account before any dividend has been paid thereunder.

Held, further, that the shares were included in the estate of Sagit. No objection to such inclusion was lodged with the Master. What the appellant did was G to file a claim as an ordinary creditor. Once the account was confirmed, the question whether the shares actually belonged to Sagit became irrelevant as those shares, or the value thereof, became the subject of distribution in terms of the confirmed account. Once the account was confirmed, the shares could not be delivered to the appellant except in H terms of the plan of distribution. In any event, the first respondent was

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Malaba DCJ

not holding share certificates in the name of the appellant. The shares, A or some of them, were held in the name of a subsidiary of Sagit.

Held, further, that what the appellant should have done was seek a declarator to the effect that these were its shares and that they should not form part of the estate. The appellant instead behaved like an ordinary creditor. Even when the account lay open for inspection, the appellant should have B filed an objection and ensured that the shares were not the subject of a plan of distribution in the estate. The need to object before confirmation of the account is a legal one. The objection is made to the Master, who is obliged to make a decision on the objection. Such decision is even subject to review. The purpose of an objection is to enable the Master to arrive at a correct decision before confirming the account. Once the C account was confirmed, the appellant's claim was not competent, unless the account was re-opened or set aside in terms of the law.

Held, further, on the issue of whether the respondents were equitably estopped from denying the appellant its right to the shares after having undertaken to deliver them, that estoppel cannot, generally, found a cause of action.

Held, further, that although, in terms of s 221 of the Act, a liquidator has power D to compromise or admit any claim, this is subject to leave being given by the court or by a resolution of creditors and contributories. The liquidator can use this before the final account is presented for confirmation, but once the account is confirmed, a liquidator would have no power to enter into a compromise, as any payment made pursuant thereto could E amount to an undue preference and would not be in accordance with the account confirmed by the Master.

Legislation considered

Companies Act [*Chapter 24:03*], ss 221, 279, 281, 282, 283 & 284 F

Case information

E W W Morris, for the appellant

H Zhou, for the first respondent

S J Chihambakwe, for the second respondent

Judgment

GARWE JA: The appellant in this case, Rio Tinto (Africa) Pension Fund ("the appellant"), sought an order in the High Court compelling the respondents G to deliver to itself certain shares and to pay the costs of the application. The High Court dismissed the application with costs [1]. Against that order the appellant has now appealed to this court.

Garwe JA

A The background to this matter is as follows: The appellant is a self-administered pension fund registered in terms of the law for the benefit of employees of Rio Zim Ltd, a company registered according to the laws of Zimbabwe. In 1992 the trustees of the appellant decided to employ Sagit Stockbrokers (Pvt) Ltd ("Sagit") to manage its share portfolio. Pursuant to this decision, the appellant delivered the portfolio to Sagit, whose mandate was to manage B the portfolio. Such management entailed the purchase and sale of share which when purchased, would be held in a Sagit nominee company, Trust Nominees, or in the appellant's name. Following further deliberations, the appellant resolved to administer its own scrip and requested Sagit to surrender all the shares it was holding on its behalf. Sagit delivered most of the scrip but a dispute arose regarding the quantity of the shares due to the appellant C from Trust Nominees. After further investigations, a new reconciliation of the outstanding shares was agreed between the appellant and Sagit. Sagit proposed to settle the matter by offering other shares. Sagit was, however, placed under liquidation by order of the High Court dated 15 October 2008 and the first respondent, Arafas Mtausi Gwaradzimba, appointed liquidator. D In further correspondence between the appellant and the first respondent, the latter acknowledged that the shares were due to the former and undertook to deliver them against delivery of other shares that the appellant was holding.

In the meantime, following the liquidation of Sagit, the appellant submitted its claim at the second meeting of creditors. The claim was provisionally E accepted by the Master. After verification of the facts, the first respondent accepted the appellant's claim for payment at a value of $25 706.94. The first respondent arrived at that figure using the price per share from the Zimbabwe Stock Exchange.

The first respondent then prepared the first interim and distribution account which he submitted to the Master in terms of s 279 of the Companies Act, F [*Chapter 24:03*] ("the Act"). Acting in terms of s 281 of the Act, the first respondent proceeded to advertise the account in the *Government Gazette* of 10 April 2009 as lying open for inspection at the Master's Office. It is not in dispute that no creditor, including the appellant, filed any objection against the contents, the form or amount awarded to each of the creditors. G There being no objections, the Master proceeded to confirm the account on 13 May 2009. The first respondent then gave notice of such confirmation in the *Government Gazette* of 22 May 2009 and further advised in the same gazette that he would start paying the proved creditors. No objections were received. The first respondent proceeded with the distribution of the assets and made payments to all proved creditors. In the case of the appellant, the H first respondent paid $25 706.94 and by letter dated 2 July 2009 advised the

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Garwe JA

former of such payment by electronic transfer to its Barclays Bank account. A It is common cause the appellant rejected the payment and transferred the same back to the first respondent. The appellant then instituted proceedings for the delivery to itself of the shares.

In the court *a quo* the appellant argued that the first respondent had undertaken to deliver the shares and not the value thereof. The appellant further submitted B that any shares that had been administered by Sagit had remained its property and did not fall to be regarded as part of the estate of Sagit in liquidation. The appellant also argued that, by paying cash under an interim account, the first respondent had not acted in good faith and that the appellant is not bound by the terms of any interim distribution account.

The first respondent, on the other hand, submitted that he had no difficulties C with the suggestion that he should deliver the shares to the applicant, provided the value thereof was equivalent to the value of the appellant's claim as reflected in the distribution plan. He submitted that the appellant was aware that he did not have the actual share certificates in his possession. He further submitted that the appellant had been aware of the fact that the interim D account was lying open for inspection but had not objected. At no time did he agree to deliver the shares outside the scope of the distribution plan, as such agreement would supercede the confirmed account and constitute an undue preference over other creditors.

The court *a quo* was of the view that, once the interim account was confirmed, E this had the effect of a final judgment. The court was of the further view that whilst there may have been some merit in the argument that the shares had never become the assets of Sagit, that submission was irrelevant as long as there was no order authorizing the re-opening or setting aside of the account and that unless this happened any attempt to deal with the shares in a manner contrary to the confirmed final account would be unlawful. On that basis, F the court dismissed the application with costs.

In its notice of appeal, the appellant has attacked the decision of the court *a quo* on the following grounds:

1. That the court *a quo* erred in holding that the shares in question had already been dealt with in terms of a final sentence without addressing G the question whether those shares were part of the estate of Sagit.
2. The court *a quo* erred in holding that it could not grant the relief sought in the absence of an order re-opening or setting aside the account. The court should have found that the shares in question were never part of the estate and that the confirmation of the account could not affect the appellant's claim. H

Garwe JA

3. The A court *a quo* misdirected itself in finding that the account that lay open for inspection was a final account. It should instead have found that the accounts were interim accounts which

could be corrected without the necessity of setting aside the account.

4. The court *a quo* misdirected itself in failing to appreciate that the irrevocable undertaking to deliver the shares was made after the B confirmation of the interim accounts.
5. In the circumstances, the court *a quo* should have found that the respondents were equitably estopped from denying the appellant its right to the said shares. C
6. Alternatively, the court *a quo* should have found that the first respondent had compromised the claim with an offer of delivery of the shares and should have been held to such compromise.
7. In as far as the second respondent is concerned, the court *a quo* should have found that it would be iniquitous to allow the second respondent to shield behind his official capacity.

D From the above grounds, it seems to me that the first issue that falls for determination is whether the account in question was final, as the court held, or whether it was merely interim, as argued by the appellant.

Section 279 of the Act is the starting point. That section provides:

> "**279 Liquidator to lodge with Master accounts in winding up**
>
> E (1) Every liquidator shall, unless he receive an extension of time as hereinafter provided, frame and lay before the Master, not later than six months after his appointment, an account of his receipts and payments and a plan of distribution or, if there is a liability among creditors to contribute towards the cost in the winding up, a plan of contribution apportioning their liability. If the account is not the final account, the liquidator shall from time to time, and as the Master may F direct, but at least once in every six months, unless he receives an extension of time, frame and lay before the Master a further account and plan of distribution."

Once the account has been lodged with the Master in terms of the above section, the account must lie open for inspection and the liquidator is required to give due notice thereof by advertisement in the Gazette. Section 281 of the Act provides:

> G "**281 Inspection of accounts**
>
> (1) Every liquidator's account shall lie open for inspection by creditors, contributories or other persons interested for a period of not less than fourteen days in the following manner –
>
> (a) … H
>
> (b) …

Garwe JA

> (c) … A
>
> (2) The liquidator shall give due notice thereof, by advertisement in the *Gazette*, and shall state in that notice the period during which and the place or places at which the account will lie open for inspection and shall post or deliver a similar notice to every creditor who has proved a claim against the company.
>
> (3) …".

Following the advertisement referred to above, interested parties are permitted B to lodge objections at any time before the confirmation of the account – in this regard, see s 282 of the Act.

For purposes of the present appeal, it is ss 283 and 284 that are particularly pertinent. Those sections provide as follows:

> "**283 Confirmation of Account** C
>
> When an account has been open to inspection as hereinbefore prescribed and –
>
> (a) no objection has been lodged; or
>
> (b) …
>
> (c) …
>
> the Master shall confirm the account and his confirmation shall have the effect of D a final sentence, save as against such persons as may be permitted by the court to re-open the account before any dividend has been paid thereunder.
>
> **284 Distribution of estate**
>
> (1) Immediately after the confirmation of any account the liquidator shall proceed to distribute the assets in accordance therewith or to collect from the creditors liable to contribute thereunder the amounts for which they may be E liable respectively.

(2) The liquidator shall give notice of the confirmation of the account in the *Gazette*, stating that a dividend is in course of payment or that a contribution is in course of collection and that every creditor liable to contribute is required to pay to the liquidator the amount for which he is so liable, and the address at which the payment of the contribution is to be made, as the case may be." F

The facts of this case, which are virtually common cause, show clearly that the above provisions of the Act were complied with. The first respondent lodged his account with the Master, as he was required to in terms of s 279. Thereafter, the account lay open for inspection for the required period and the liquidator gave due notice thereof by advertisement in the *Gazette*. There G were no objections lodged with the Master at any time before the confirmation of the account. In terms of s 283, because no objection had been lodged, the Master confirmed the account.

It is clear that, when the Master confirmed the account, the account ceased to be an interim account. It became a final account. Nowhere in the Act is there provision for the Master to confirm an interim account. In terms of H

Garwe JA

A s 283, such confirmation shall have the effect of a final sentence, save as against such persons as may be permitted to re-open the account before any dividend has been paid thereunder.

The appellant was aware of the fact that the account was lying open for inspection. Neither the appellant nor the other creditors filed any objections with the Master, who proceeded to confirm the same. On the facts, the court B *a quo* cannot be criticized for coming to the conclusion that this was a final account.

The second issue that falls for determination is whether the court *a quo* should have addressed the question whether the shares were part of the estate of Sagit and whether the confirmation did not affect the appellant's claim for C delivery of those shares.

It is not in dispute that the shares in question were included in the estate of Sagit. No objection to such inclusion was lodged with the Master. What the appellant did was to file a claim as an ordinary creditor. Once the account was confirmed, the question whether the shares actually belonged to Sagit D became irrelevant as those shares, or the value thereof, became the subject of distribution in terms of the confirmed account. It cannot be correct, therefore, that the confirmation did not have any effect on the appellant's claim for delivery of the shares. The reality is that, once the account was confirmed, the shares could no be delivered to the appellant except in terms of the plan of distribution.

E In any event, it is clear that the first respondent was not holding share certificates in the name of the appellant. The papers before this court suggest that the shares or some of them were held in the name of Trust Nominees, a subsidiary of Sagit. Had the shares been in the name of the appellant, then the appellant would have been on firmer ground to claim delivery of the F share certificates.

It seems to me that the appellant has only itself to blame. Believing that some of the shares that formed part of the estate of a company in liquidation were its own and aware that the account was lying open for inspection, the appellant should have immediately protected its rights by seeking a declarator to the effect that these were its shares and that they should not form part of G the estate. The appellant did not do so, but behaved like an ordinary creditor. Even when the account lay open for inspection, the appellant should have filed an objection and ensured that the shares were not the subject of a plan of distribution in the estate. After all, the appellant was at all times legally represented and the implications of the various steps taken by the liquidator H should have been obvious. The need to object before confirmation of the

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Garwe JA

account is a legal one. The objection is made to the Master, who is obliged A to make a decision on the objection. Such decision is even subject to review. It is clear that the purpose of an objection is to enable the Master to arrive at a correct decision before confirming the account.

In all the circumstances, the court *a quo* was correct in holding, as it did, that once the account was confirmed, the claim by the appellant was not B competent, unless the account was re-opened or set

aside in terms of the law. The relief sought by the appellant was therefore wrong. In the circumstances there was no need, on the part of the court *a quo*, to determine whether the shares were or were not part of the estate of Sagit.

The third issue that falls for determination is whether the court *a quo* should C have found that the respondents were equitably estopped from denying the appellant its right to the shares after having undertaken to deliver the same. This submission, in my view, is without merit. As the first respondent has correctly observed in his heads of argument, the appellant's cause of action as set out in its papers was not based upon equitable estoppel but on its alleged ownership of the shares in question. The court *a quo* could not therefore have D been expected to make a determination on an issue that was not before it.

In any event estoppel cannot, in general terms, found a cause of action. In *Spencer Bower and Turner Estoppel by Representation*, 2 ed by Sir Alexander Kingcome Turner, the learned author remarks at p 6:

> "The doctrine of estoppel by representation forms part of the English Law of E evidence … Its sole office is either to place an obstacle in the way of a case which might otherwise succeed, or to remove an impediment out of the way of a case which might otherwise fail. It has no other function. Emphatically, it is not a cause of action in itself, nor does it create one … To use the language of naval warfare, estoppel must always be either a mine–layer or a mine–sweeper: it can never be a capital unit."

Whilst it is correct that the English and Australian legal systems have accepted F the existence of equitable estoppel and that such estoppel may found a cause of action in cases of acquiescence and election, I am not aware of any decision in this jurisdiction which has accepted such estoppel to be part of our law. The English law of equity has never been part of the law of this country.

In the alternative, the appellant has argued that the first respondent had G compromised the claim by offering to deliver the shares and should therefore be held to such a compromise. It is correct that in terms of s 221 of the Act, a liquidator has power to compromise or admit any claim. This is, however, subject to leave being given by the court or by a resolution of creditors and contributories. My understanding is that such compromise can be entered into in order to settle disputed amounts or claims. It is the kind of power that H

Garwe JA

A a liquidator can use before the final account is presented for confirmation. Once confirmed, a liquidator would have no power to enter into such a compromise. Clearly the powers bestowed upon the liquidator in terms of s 221 of the Act were intended to facilitate the smooth winding up of the affairs of the company. This involves taking custody of all the property of the company, realise the same, pay creditors and, if there is a surplus, pay B each member his share. Once the final account is confirmed, a liquidator has no powers to compromise, as any payment made pursuant thereto could amount to an undue preference and would not be in accordance with the account confirmed by the Master.

The last ground of appeal is that, so far as the second respondent is concerned, C the court *a quo* should have found that it would be iniquitous to allow the second respondent to shelter behind his official capacity. It is not in dispute that the second respondent, in his official capacity as liquidator of Sagit, accepted that the shares were due to the appellant and would be returned to the latter. However, this was not done and the first respondent's explanation is that it was the value of the shares rather than the shares themselves that was D being referred to. That is not what the first respondent said in correspondence to the appellant. He and his legal practitioners agreed to return the shares. There can be no doubt that, on the facts, the first respondent did not act professionally. He made an undertaking to return the shares but did not do so. What is clear, however, is that so far as the liquidation of the company E is concerned, the first respondent cannot be said to have acted improperly. He followed the law, although the agreement to return the shares may have lulled the appellant into a false sense of security. I do not believe, however, that on the facts of this case there would be a basis for an order against the second respondent in his personal capacity. In dealing with this aspect the court *a quo*, remarked at p 7 of the judgment:

> F "… In the absence of any fraudulent act relating to the manner in which the account was confirmed by the Master of the High Court, I see no need to dwell at length with the issue of whether or not the first respondent should have been sued in his personal capacity as well. There is nothing in the record to suggest that after 8 April 2008, when the applicant learnt that Sagit had filed for voluntary liquidation, the second respondent then secretly or fraudulently proceeded to G procure confirmation of the account. The

record shows that the account was procedurally confirmed on the basis of the reconciled position agreed to by both parties."

That conclusion cannot be faulted.

In the result, I find that the appeal is without merit and that the court *a quo* H was correct in dismissing the application.

2011 (2) ZLR p150

Garwe JA

The appeal is accordingly dismissed with costs. A

MALABA DCJ and SANDURA JAconcurred

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

Wintertons, first respondent's legal practitioners

Chihambakwe, Mutizwa & Partners, second respondent's legal practitioners

1 *See* Rio Tinto (Africa) Pension Fund *v* Gwaradzimba NO & Anor *HH-65-10, a judgment of Mtshiya J delivered on 14 April 2010.* – Editor

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/MULEYA v MULEYA 2011 (2) ZLR 151 (H)

MULEYA v MULEYA 2011 (2) ZLR 151 (H)

2011 (2) ZLR p151

Citation	2011 (2) ZLR 151 (H)
Case No	Judgment HB-118-11
Court	High Court, Bulawayo
Judge	Ndou J & Mathonsi J
Heard	5 September 2011; CAV
Judgment	15 September 2011
Counsel	*M Thakalisa*, for the appellant No appearance for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Court – magistrates *court – jurisdiction – distribution of matrimonial property following divorce – court having jurisdiction only over registered customary law marriages – no jurisdiction to order distribution in respect of unregistered union*

D **Customary law** *– marriage – unregistered customary law marriage – division of property following termination of marriage – magistrates court not empowered to distribute matrimonial property – claim for share of estate must be based on other recognised causes of action*

Family law *– husband and wife – divorce – division of matrimonial property* E *following divorce – unregistered customary law union – how division of property may be determined – need to plead recognised cause of action*

Headnote

Unregistered customary law unions are not recognised marriages in our law and as such s 7 of the Matrimonial Causes Act [*Chapter 5:13*] does not apply to them. While the courts have always been willing to assist F women who are married in terms of an unregistered customary union and would readily divide property acquired during the subsistence of an informal union, that can only be done where well-founded claims for a share of the estate are made and a proper and recognisable cause of action is pleaded and certainly not on the basis of the union *per se*. G Section 11(b)(iv) of the Magistrates Court Act [*Chapter 7:10*] allows magistrates to preside over divorce cases of persons married under the Customary Marriages Act [*Chapter 5:07*] but it has no application to unregistered customary law unions. The existence of an unregistered customary law union does not, on its own, clothe the magistrates court with jurisdiction to distribute the matrimonial property, the union not H being a marriage. Other recognised causes of action, such as joint

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2011 (2) ZLR p152

Ndou J

ownership, tacit universal partnership, unjust enrichment or equity, A should be pleaded.

Cases cited

Feremba v Matika 2007 (1) ZLR 337 (S)

Jengwa v Jengwa 1999 (2) ZLR 121 (H) B

Kazuva v Dube HB-119-10

Mandava v Chasweka 2008 (1) ZLR 300 (H)

Mtuda v Ndudzo 2000 (1) ZLR 710 (H)

Legislation considered

Magistrates Court Act [*Chapter 7:10*], s 11 C

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

Case information

M Thakalisa, for the appellant

No appearance for the respondent

Judgment

MATHONSI J: The respondent issued summons out of the Gwanda magistrates D court against the appellant to which was attached an affidavit sworn to by herself and annexures to the affidavit listing property valued at US$67 300 acquired by the parties. In the affidavit she alleged that she was customarily married to the appellant and their union was blessed with eight children. The respondent further stated in the affidavit that the appellant and herself had E separated two years earlier and she prayed that the court would divide the property the parties acquired during the subsistence of the union.

The appellant did not enter appearance to defend, but somehow the parties appeared before the trial magistrate and a kind of trial was conducted. During that trial, the respondent gave evidence under oath and even called F a witness. The import of her evidence was to the effect that she had married the appellant in 1970 and they have eight children together, but the appellant chased her

away. While she set out the property that they acquired together, no evidence was led at all as to how that property was acquired and how it should be shared.

The appellant, although allowed to cross-examine the respondent and her G witness, was not accorded an opportunity to lead evidence himself. The trial magistrate went on to deliver judgment in which she concluded:

> "In conclusion the court noticed that the two were married for the past thirty years and they jointly acquired some property. Though defendant says he still loves plaintiff, the court noted that the two parties had been staying separately for two years. The plaintiff('s) witness told this court that he even tried to intervene but

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Ndou J

A defendant showed no sign that he still loved his sister and he was assisted by his (defendant's) son. The court therefore found that it was just to have the two parties sharing their property."

She went on to arbitrarily share the property equally between the parties. The appellant appealed against the judgment of the magistrates court on the following grounds: B

> "1 The trial magistrate erred in ordering the division of 'matrimonial property' of the parties when the parties where (*sic*) not married to each other in terms of the Customary Marriages Act [*Chapter 5:07*] the only type of marriage which the magistrates court has jurisdiction over.
>
> 2. In any case the alleged division of property was not fair and equitable as it made awards in excess of the property appellant owns."

C This matter is fraught with procedural irregularities. The process filed and the manner in which the trial was conducted meant that it is a hybrid of trial action and application procedure. A litigant cannot issue a summons commencing action which is supported by affidavit as this is an unacceptable mixture of procedures. There is nothing in the record to suggest that any D of the rules relating to the filing of pleadings and the holding of a pre-trial conference were complied with. The filing of an affidavit suggests that the application procedure was being resorted to but then the trial court went on to take oral evidence.

Even the hearing of oral evidence was not completed because the appellant, who was the defendant in the court *a quo*, was not allowed to lead evidence. E This was in clear violation of the basic tenets of natural justice, in particular the *audi alteram partem* rule.

All magistrates courts are formal courts of record whose proceedings are governed by set rules and established procedure. These rules should be followed and anything done outside the rules is susceptible to being set F aside as being unprocedural. See *Mandava v Chasweka* 2008 (1) ZLR 300 (H) at 302B, *per* Makarau JP (as she then was).

In *Kazuva v Dube* HB-119-10 at p 4 I had occasion to comment as follows:

> "It is clearly incompetent for the magistrates court to invent a new procedure of dealing with disputes which procedure is not provided for in the rules of the court and is a mixture of summons action and application procedure. That procedure G simply does not exist. The two procedures are mutually exclusive and cannot be employed at the same time to resolve the same dispute."

As if that was not enough, the respondent sought a division of property on the basis of an unregistered customary law union. She did not plead any other recognisable cause of action like joint ownership, tacit universal partnership, H unjust enrichment and/or equity.

Ndou J

Unregistered customary law unions are still not recognised marriages in our A law and as such s 7 of the Matrimonial Causes Act [*Chapter 5:13*] does not apply to them. While the courts have always been willing to assist women who find themselves in the situation of the respondent and would readily divide property acquired during the subsistence of an informal union, that can only be done where well-founded claims for a share of the estate are made and a B proper and recognisable cause of action is pleaded, and certainly not on the basis of the union *per se*: *Feremba v Matika* 2007 (1) ZLR 337 (H); *Jengwa v Jengwa* 1999 (2) ZLR 121 (H); *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H).

Section 11(b)(iv) of the Magistrates Court Act [*Chapter 7:10*] allows magistrates to preside over divorce cases of persons married under the C Customary Marriages Act [*Chapter 5:07*] but it has no

application to unregistered customary law unions.

As stated by Makarau JP in *Feremba* v *Matika supra* at 340B:

> "The court has jurisdiction to apply customary law and can apply such law to the distribution of the assets of the parties who were in such a union. If however the court for some legitimate reason is not applying customary law, then two D further issues arise. Firstly, for it to have jurisdiction, then the value of the assets to be distributed has to be ascertained, for the ordinary monetary jurisdiction of the magistrates court will apply. Secondly, for a claim based on common law, a recognised cause of action must be pleaded."

As the existence of an unregistered customary law union does not, on its E own, clothe the magistrates court with jurisdiction to distribute the property, it not being a marriage, other recognisable cause of action should have been pleaded. It was not.

In my view, the magistrate fell into error in dividing the property as if the parties were married in terms of the Customary Marriages Act and also in F not addressing the issue of monetary jurisdiction if she felt that she had to deal with the matter in terms of common law. This, coupled with the fact that the procedure for trial action was not followed and the appellant was not even accorded an opportunity to lead evidence, means that the proceedings cannot be allowed to stand. The matter has to be remitted to allow the court to comply with the rules and the law relating to such estates. G

In the result, I make the order that:

1. The appeal is allowed to the extent that the order of the court *a quo* is set aside.
2. The matter be and is hereby remitted to the magistrates court for a trial *de novo* before a different magistrate. H

2011 (2) ZLR p155

Ndou J

3. The A parties are required to file pleadings in terms of the rules and to hold a pre-trial conference before the trial proper.
4. Each party shall bear its own costs.

NDOU J concurred.

B *Tshakalisa c/o Moyo & Nyoni,* applicant's legal practitioners

Zimbabwe Women Lawyers' Association, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/NYATHI & ANOR v NCUBE NO & ORS 2011 (2) ZLR 156 (H)

NYATHI & ANOR v NCUBE NO & ORS 2011 (2) ZLR 156 (H)

2011 (2) ZLR p156

Citation	2011 (2) ZLR 156 (H)
Case No	Judgment No. HB-123-11
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	6 September 2011; *CAV*
Judgment	15 September 2011

Counsel *L Nkomo,* for the applicants
G Nyoni, for the respondents

Case Type Civil application

Annotations No case annotations to date

Flynote

Succession – intestate – *heirs ab intestato – deceased dying intestate – widow dying intestate thereafter but before deceased's estate wound up – intestate heirs to be ascertained at date when intestacy occurs – entitlement of widow's estate to inherit not erased by her death notwithstanding that her* D *husband's deceased estate had not been wound up – Deceased Estates Succession Act [Chapter 6:02] – s 3A*

Headnote

Intestate heirs are, in all cases, to be ascertained at the date when the intestacy occurs.

The applicants were the surviving children of the late DN who died intestate. E At the time of his death he had been married to SN. She, however, survived him by only five months before she too died intestate. At the time of her death, she was the executrix dative of the estate of her late husband and had been in the process of winding up that estate, which included various immoveable properties. After her death, the first F applicant and the first respondent were appointed as joint executor and executrix dative respectively. A dispute, however, arouse between them, concerning who was to benefit under the law of intestate succession. At the hearing, it was argued on behalf of the applicants that a deceased estate cannot inherit *ab intestato* and, therefore, the estate of SN was incapable of inheriting from the estate of the late DN. The respondents, G however, placed reliance upon s 3A of the Deceased Estates Succession Act [*Chapter 6:02*] and submitted that the intestacy of DN occurred as at the date of his death, and not at any subsequent date, and that, in terms of provisions of the Act, SN did inherit from his husband's estate.

Held that the respondent's argument was correct. Upon the death of DN, his widow, SN, became entitled, in terms of the Deceased Estates Succession H

2011 (2) ZLR p157

Mathonsi J

A Act to inherit. This entitlement could not be wiped out by her death, five months after the death of DN, so as to allow the applicants to inherit from their father's estate as if SN had pre-deceased him.

Cases cited

Chaumba v Chaumba 2002 (2) ZLR 51 (S)

B *Swift v Pichanick NO & Ors* 1981 ZLR 622 (S)

Legislation considered

Deceased Estates Succession Act [*Chapter 6:02*], s 3A

Case information

C *L Nkomo,* for the applicants

G Nyoni, for the respondents

Judgment

MATHONSI J: The two applicants are the surviving children of the late Derick Nyathi who died intestate on 16 January 2007. At the time of his death, the late Derick Nyathi was married to the late Siphiwe Nyathi who D survived him, they having been married on 14 April 1989 in terms of the Marriage Act [*Chapter 5:11*]. They had no children.

Siphiwe Nyathi died intestate five months after the death of her husband on 22 June 2007. She is survived by her parents. At the time of her death, she had been appointed executrix dative of the estate of her husband by E letters of administration issued on 3 April 2007. She had, in the process of administering the estate, advertised it according to law and prepared a first and final distribution account in terms of which she, as the surviving spouse, was to inherit, among other properties, stand 2182 Emganwini, Bulawayo. The two applicants were to each inherit a child's share of their father's estate. That distribution account was yet to be approved by the fourth respondent F when she died intestate.

After the death of Siphiwe Nyathi, the first applicant and the first respondent were appointed joint executor and executrix dative respectively of her estate by letters of administration dated 16 October 2007. The first respondent then prepared a first and final distribution account, in terms of which the G bulk of the property of the late Derick Nyathi and the late Siphiwe Nyathi was to devolve to the parents of the latter, Madli Ncube and Jester Ncube, in equal shares.

The first applicant, as co-executor, refused to sign the account and instead this application was launched, in which the applicants seek an order declaring H that the estate of the late Siphiwe Nyathi is incapable, under intestacy law,

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Mathonsi J

of inheriting from the estate of the late Derick Nyathi. They would like a A declarator that the two of them are the rightful beneficiaries of the estate of their late father.

Mr *Nkomo,* appearing for the applicants, argued that, under the common law of intestate succession, a deceased estate cannot inherit as heir *ab intestate.* He relied heavily on *Swift v Pichanick NO & Ors* 1981 ZLR 622 (S) in which B the Supreme Court discussed the concept of the common law of intestacy that estates do not inherit on intestacy.

While appearing to accept that statute law has made inroads into the common law of intestate succession, in that s 3A of the Deceased Estates Succession Act [*Chapter 6:02*] clearly allows the surviving spouse to inherit from his/her deceased spouse, Mr *Nkomo* argued that only a surviving spouse is C entitled to inherit and not that spouse's deceased estate. In his view, the fact that Siphiwe Nyathi died before she could take over the estate of her late husband means that her entitlement, in terms of s 3A, died with her, as holding otherwise would offend the common law position set out in *Swift v Pichanick NO supra*. D

Mr *Nyoni,* for the respondents, strongly argued that in respect of the intestacy of Derick Nyathi, the date of such intestacy should be reckoned at the time of his death and not at a subsequent date and that the late Siphiwe Nyathi did, in fact, inherit from the estate of her husband in terms of the provisions of the Deceased Estates Succession Act. The inheritance of the applicants should be limited to that provided for in the relevant statute. E

In my view, the decision in *Swift v Pichanick NO (supra*) has been completely misunderstood as it certainly does not support the argument made on behalf of the applicants. While the Supreme Court discussed the common law concept that estates do not inherit intestacy in the context of a failed will resulting in intestacy, the court was never in doubt that what is paramount is the fact F that the intestate heirs are in all cases to be ascertained at the date when the intestacy occurs. That is what is contained in the majority decision delivered by Lewis JP, with Baron JA agreeing.

In the present case, the intestacy of Derick Nyathi occurred on 16 January 2007, when he died without a will. At that point the provisions of s 3A of the Deceased Estates Succession Act took effect. The section provides: G

> "The surviving spouse of every person who, on or after [the 1st November 1997], dies wholly or partly intestate shall be entitled to receive from the free residue of the estate –
>
> (a) the house or other domestic premises in which the spouses or the surviving spouse, as the case may be, lived immediately, before the persons death; and H

Mathonsi J

(b) the A household goods and effects which, immediately before the person's death, were used in relation to where such house or domestic premises referred to in paragraph (a);

where such house, premises, goods and effects form part of the deceased person's estate."

It means therefore that, by the clear provisions of a statute, Siphiwe Nyathi, B as the surviving spouse of Derick Nyathi, became entitled to receive from the free residue of his estate the effects set out in that provision. Indeed, she even set in motion the winding up process which was to result in the effects being transferred to her name and produced a distribution account, which was filed with the fourth respondent before she died.

C In my view, the situation obtaining in this case is distinguishable from that where an estate inherits intestate from another, as would happen if the intestate heir dies before the intestacy occurs. That view seems in line with that adopted by the Supreme Court, much later than *Swift (supra*), in *Chaumba v Chaumba* 2002 (2) ZLR 51 (S), where the heir apparent according to customary law, Ishmael, had died before the estate was transferred to him. In arriving at D the conclusion that Ishmael's son should inherit, Cheda JA stated at 53F:

"The fact that Ishmael may not have been formally appointed heir before he died should not make any difference, as his death cannot change the custom."

In the present case, it is unthinkable that after the legislature gave Siphiwe Nyathi an indisputable right to inherit from her husband's estate, such right would be wiped away by her death so as to allow the applicants to inherit E from their father as if his wife had predeceased him. Such a construction would make nonsense of the legislative intent to empower spouses to inherit, undisturbed, from the estates of their deceased spouses.

The applicants are certainly entitled to each inherit a child's share from their father's estate in accordance with the provisions of the law but certainly not F to eclipse their step-mother's entitlement.

I therefore come to the conclusion that the application is without merit. It is accordingly dismissed with costs.

Cheda & Partners, applicant's legal practitioners

G *Moyo & Nyoni*, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/TSODZAI v MAGEZA & ANOR 2011 (2) ZLR 160 (H)

TSODZAI v MAGEZA & ANOR 2011 (2) ZLR 160 (H)

Citation	2011 (2) ZLR 160 (H)
Case No	Judgment No. HH-193-11
Court	High Court, Harare
Judge	Bere J
Heard	20 July 2011; 21 July 2011, 12 September 2011; 16 September 2011; CAV
Judgment	16 September 2011
Counsel	*P Takawadiyi,* for the plaintiff

S Manyangwa, for the defendant

Case Type Civil trial

Annotations No case annotations to date

Flynote

Insurance – *claim – subrogation – right of insured person to bring action against wrongdoer although already compensated by insurer – duty of insured to become trustee for insurer – need for insured to make clear that action is for benefit of insurer* D

Headnote

The plaintiff brought an action against the defendants for damages arising out of a motor vehicle accident. The defendants' liability was not in question, the only issue being the nature and extent of damages to the plaintiff's motor vehicle and the quantum thereof. The quantum was established but, during the course of his evidence, the plaintiff mentioned that he had E been paid the same amount he was claiming in this action by his insurers (who were, incidentally, his employers). This admission triggered the issue of the plaintiff's *locus standi in judicio* in bringing the action and a consideration of the principle of subrogation. The plaintiff argued that he had a recognised right to bring this action against the defendants. F The defendant argued that the plaintiff, having been indemnified by his insurer, could not possibly have had a right to initiate action against the defendants to recover the same amount paid to him.

Held, that subrogation means the substitution of one person for another, so that the person substituted or subrogated succeeds to the rights of the person whose place he takes. It expresses the insurer's right to be G placed in the insured's position so as to be entitled to the advantage of all the latter's rights and remedies against the third parties. The law of subrogation rests on the principle that no-one should be paid twice in respect of the same loss. The effect is that a person insured against accident has the right to recover damages from a wrongdoer for any wrong done to him, even though he has already been compensated in H

Bere J

A respect of such wrong by the insurers. However, under the principle of subrogation, the insured, if fully compensated by the insurer, becomes a trustee for any compensation paid him by the wrongdoer and is bound to hand over to the insurer whatever money he receives from the wrongdoer over and above the actual loss he has sustained, after taking into account the amount he has received under the contract of insurance. Where the B insured institutes an action against an offending party, as *in casu*, the pleadings must leave no doubt that the insured is taking action for the benefit of his insurer. Anything short of that would lead to the inevitable conclusion that he intends to have a double benefit over the same loss. The court must not be left to speculate as to whether the plaintiff may C or may not hand over the benefits of his litigation to the insurer.

Cases cited

Ackerman v Loubser 1918 OPD 31

Heath v Le Grange 1974 (2) SA 262 (C)

Case information

D *P Takawadiyi,* for the plaintiff

S Manyangwa, for the defendant

Judgment

BERE J: On 6 October 2009 the plaintiff issued summons out of this court against the two defendants claiming US$3 013, being the cost of repairs caused to his motor vehicle by the alleged negligent driving conduct of E the second defendant who was employed by the first defendant as a driver.

The basis of the plaintiff's claim was that his motor vehicle was damaged as a result of the second defendant's driving conduct at the corner of Willowvale and Nyandoro Road, Harare.

The second defendant's liability derives from the concept of vicarious F liability, having been the employer of the first defendant, who was driving the offending bus on the date in question and during the course and within the scope of his employment.

On 4 June 2010 the parties held a joint pre-trial conference where the issues for referral for trial were basically the nature and extent of damages to the G plaintiff's motor vehicle and the quantum thereof.

The evidence

The plaintiff's case was precise and to the point. He testified that the damage caused to his motor vehicle as a result of the accident were the damages noted on exh 2, which was a quotation from the company that carried out H the repairs to his motor vehicle.

He disclosed to the court that his motor vehicle had no pre-accident damage A and that all the damage was a direct result of the accident of 6 September 2009.

I had no difficulty in following the evidence presented by the plaintiff, and both defendants could not possibly have been expected to controvert the plaintiff's averments that his motor vehicle was damaged as a result of the accident in question. The defendants speculated that the motor vehicle B could have been damaged on the front left mirror, the left door moulding and wheel arch moulding prior to the accident in issue. The defendants' natural disadvantage in this regard was that they did not enjoy the privilege of having seen the plaintiff's motor vehicle prior to the accident.

The defendants sought to rely on the damages noted and recorded by the C attending detail Sgt Musarurwa on p 15 of the traffic accident book, exh 8. I do not believe that that approach is consistent with the correct reading of the evidence of the Sergeant in its totality. It will be noted that the officer concerned did make a concession that the rudimentary assessment of damages made by the police at the scene of the accident cannot possibly override the detailed damages which are recorded by those expertly qualified to carry D out vehicle repairs like High Tech Panel Beaters (Pvt) Ltd who noted the damage and eventually repaired the motor vehicle.

In the court's view, the damage noted by High Tech Panel Beaters (Pvt) Ltd is a fair reflection of the damage sustained by the plaintiff's motor vehicle. This is particularly so if regard is had to the impossible-to-challenge evidence E by the plaintiff that, prior to the accident of 6 September 2009, his motor vehicle had had no damage at all.

In their joint plea filed in this court on 1 February 2010, both defendants did accept partial liability for the damage sustained by the plaintiff's motor vehicle. That admission was based on the damage that they claimed to have seen at the scene of the accident coupled with the damage noted by F Sgt Musarurwa on the date of the accident. I have already dealt with the limitations of the evidence of the attending detail who himself conceded not to be an expert in vehicle repairs and further that those who repaired the vehicle in question were better positioned to advise the court on the extent of the damage to the plaintiff's vehicle. G

When the second defendant gave evidence he did not only challenge the extent of the damage to the plaintiff's vehicle but went further to challenge the manner in which the plaintiff presented evidence of the damage in the nature of the three quotations sourced. He reasoned that the plaintiff was obliged to seek the services of a loss adjuster in addition to getting the three quotations. H

A The position taken by the second defendant did not impress the court for the following reasons. Firstly, this new stance was a departure from the content and thrust of the joint plea filed where this was never taken as an issue.

Secondly, even in his proposed summary of evidence filed on 4 March 2010, the second defendant had not raised this new ground of his defence to the B plaintiff's claim.

Such approach adopted by the second defendant is a desperate attempt to avoid the obvious for in civil proceedings one's plea must form the foundation of one's case. That plea cannot be embellished at every window of opportunity that presents itself to the defendant. If that happens, like in this case, the defendant can only present himself in a bad light to the court.

C In justifying the quantum for damages, the plaintiff did not only present to the court three quotations as is the practice but went further to rely on the evidence of one Clever Feruka who for all intents and purposes the court accepted as an expert in assessing damages. He carried with him 12-13 years of experience and is a foreman at High Tech Panel Beaters (Pvt) Ltd which D was mandated to repair the plaintiff's motor vehicle.

The evidence of Feruka was brief and to the point. He was impressive. I am satisfied from his testimony that the cost of repairs effected on the plaintiff's vehicle were necessary and the cost thereof fair and reasonable if regard is had to the other two competing quotations tendered. I am certain the approach E adopted in the quantification of damages to the plaintiff's vehicle is in line with the *ratio* pronounced in *Heath v le Grange* 1974 (2) SA 262 (C).

In all the circumstances of this case I am satisfied that the plaintiff has established to the satisfaction of the court the extent and cost of repairs to his motor vehicle.

F However, the enquiry does not end here. It will be remembered that during the course of this trial, pursuant to an enquiry made by the court, the plaintiff revealed for the first time to court, that he had been paid the same amount he was claiming in this action by his insurers and incidentally his employers, Altfin Insurance Company Ltd.

G The revelation by the plaintiff brought to the fore the issue of the plaintiff's *locus standi in judicio* in bringing up this action and this then triggered the consideration of the principle of subrogation.

Subrogation

Counsel for the plaintiff gave a spirited and persuasive argument calculated H to justify that at law the plaintiff had a recognised right to bring this action

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Bere J

against the defendants. Counsel referred me to several authorities which I A found to be quite instructive.

The defendants' counsel held a completely different view. Her view, well expressed in the various authorities she cited, was that the plaintiff, having been indemnified by his insurer, could not possibly have had a right to initiate action against the defendants to recover the same amount paid to him. In B support of her position counsel sought inter alia to lean on the ratio stated in *Ackerman v Loubser* 1918 OPD 31.

Perhaps before I deal with the issue of subrogation, I should deal first with the implications of the minute of the pre-trial conference held by the parties, which formed the basis for referral of this matter to court. One school of thought C seems to be that once the parties have agreed on the pre-trial conference minute, that should form the basis of the subsequent trial proceedings and the outcome of that trial must be determined by such issues as agreed at the pre-trial hearing.

The other competing position is that whilst it is desirable to be guided by D the pre-trial conference issues as agreed, there may be occasions when the outcome of a case is determined on a completely different issue which may have completely escaped the attention of the parties as well as the judge presiding over such a pre-hearing meeting.

The position that I take is that a pre-trial minute must never be looked upon E as an immutable document, but merely as a guide. It is a document which must not enslave or hold the presiding

judge hostage. It must be departed from where the ends of justice so demand, like in this case where the determining issue arises unexpectedly.

Having taken the view that it is possible to expand the pre-trial issues during the course of trial, I must now go back and consider whether or not the plaintiff F has *locus standi in judicio* to bring this action against the defendants in the light of him having been indemnified by his insurers.

By way of definition I find the following from Gordon and Getz *The South African law of Insurance* 3 ed (Juta & Co Ltd 1983) at p 243 to be quite instructive: G

> "Subrogation means the substitution of one person for another so that the person substituted or subrogated succeeds to the rights of the person whose place he takes. It expresses the insurer's right to be placed in the insured's position so as to be entitled to the advantage of all the latter's rights and remedies against the third parties. *The law of subrogation rests on the principle that no one should be paid twice over the same loss*." (My emphasis). H

Bere J

A This principle of law finds eloquent expression in, among other authorities, of the much celebrated case of *Ackerman v Loubser (supra)* where the headnote reads at p 31:

> "a person insured against accident has the right to recover damages from a wrongdoer for any wrong done to him although he has already been compensated in respect of such wrong by the insurers, but, as the principle of subrogation is B applicable in our law, the insured, if fully compensated by the insurer, becomes a trustee for any compensation paid him by the wrongdoer and is bound to hand over to the insurer whatever money he receives from the wrongdoer over and above the actual loss he has sustained after taking into account the amount he has received under the contract of insurance.
>
> *Semble*: An insured who has been fully compensated by the insurer may cede C his right of action against the wrongdoer to the insurer and the insurer may then sue in the name of the insured."

I do make a firm observation and deduction from precedent that where the insured takes the initiative to institute action against an offending party, as in the case before me, the pleadings must leave no one in any doubt that the insured is taking action for the benefit of his insurer. Anything short of that D would lead to the inevitable conclusion that he intends to have a double benefit over the same loss. The court must not be left to speculate as to whether the plaintiff may or may not hand over the benefits of his litigation to the insurer.

In *Ackerman v Loubser (supra*) at p 33 the pleadings made the plaintiff's intention abundantly clear and this is what his evidence stated: "I am bringing E the action to recover the amount of damage sustained. The amount has been paid by the African Guarantee and Indemnity Company with whom the car was insured. I produce the policy. By condition 16 I am compelled to take action if requested by the company. *The company have requested me to take action*." In cross-examination he states: "The claim I bring before the F court today has been paid on the understanding that I take action against the defendant…."

Compare the plaintiff's disclosure in *Ackerman*'s case (*supra*) with the apparent non-disclosure by the plaintiff in the instant case. Had the plaintiff not inadvertently revealed to the court that he had been indemnified, it is quite clear that the plaintiff intended to keep that development to his breast. G Even after the issue of his indemnification came to light, the plaintiff did not through his evidence advise the court that he intended to hold the "fruits of his action" for the benefit of his insurer.

To further compound his position, the plaintiff's declaration and his summary of evidence deliberately withheld this vital information about his H indemnification. I am unable to countenance such level of dishonesty. In my

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Bere J

view, all this was calculated to ensure that the plaintiff would quietly enjoy a A double benefit over a single loss, knowing fully well that his insurer, Altfin Insurance, had adequately indemnified him. There is nothing on paper or in his evidence that his actions were meant to benefit his insurer. If anything, there is overwhelming evidence that he intended to line his pockets, thus running foul of the very basic principle of subrogation. I am unable to positively reward the plaintiff's non-disclosure. B

Consequently, I am more than satisfied that the plaintiff has no *locus standi in judicio* to bring this action against the defendants.

On this technicality the plaintiff's action is dismissed with costs. C

P Takawadiyi & Associates, plaintiff's legal practitioners

Mabuye & Co, defendants' legal practitioners

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Source:
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VON AHN v DZVANGAH NO & ORS 2011 (2) ZLR 167 (H)

Citation	2011 (2) ZLR 167 (H)
Case No	Judgment No. HH-192-11
Court	High Court, Harare
Judge	Mawadze J
Heard	30 May 2011; CAV
Judgment	18 September 2011
Counsel	*J Mafusire*, for the applicant *P Makuwaza*, for the first and second respondents No appearance for the third and fourth respondents
Case Type	Opposed application for declaratory order
Annotations	No case annotations to date

Flynote

Evidence – *civil matter – foreign law – proof of – nature of evidence which must be led*

Family law – *husband and wife – marriage – property consequences of marriage – determined by law of husband's domicile at time of marriage*

D **Private international law** – *marriage – property consequences of marriage – determined by law of husband's domicile at time of marriage*

Headnote

The applicant, a German national, married the deceased, a Zimbabwean woman in Germany, where the applicant was then domiciled. They E lived together in Germany for 27 years and moved to Zimbabwe when the applicant retired. The movable property acquired by the couple, including household goods, farming implements, industrial equipment and other assets, was shipped to Zimbabwe. The bills of landing and customs clearance certificates were in the wife's name to facilitate easy access. In Zimbabwe, the couple acquired various immoveable properties, F which were registered in the wife's name, the applicant having been informed that as a foreign national

he could not have immovable property registered in his name or the joint names with his wife. An offshore bank account was also acquired in the wife's name. The wife executed a will, in which bequeathed her entire estate to the second respondent, her daughter by a previous relationship. The wife died about six years G after the couple had settled in Zimbabwe.

The applicant sought an order claiming five-eighths of the estate. He contended that it was German law that governed their marriage and that, in the absence of a pre- or ante- nuptial contract, such a marriage was in community of property. Under German law, when the wife bequeathed H her entire estate to her daughter, it could only have been in respect of her

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Mawadze J

one half of the joint estate. According to German law, he was entitled A to the other half of the joint estate; and, on the basis of the principle of forced heirship, since his late wife disinherited him in terms of the will, he could only lay claim to a quarter of her half, that is, one eighth of the joint estate. In support of his contentions as to what German law provided, he attached a declaration by an official in the German Embassy in Harare and a legal opinion by a practising German attorney. B

The respondents argued, *inter alia*, that the marriage was one of convenience. On the merits, the main issues were the law governing the proprietary rights of the applicant and his late wife and whether the applicant had proved what German law was on the matter.

Held, that the marriage had lasted for 33 years and had only been terminated C by the death of the wife. There was therefore no basis to suggest that this was a troubled marriage or that it was one entered into for the primary purpose of evading the immigration laws in Germany or Zimbabwe or that the couple had no intention of living together as husband and wife.

Held, further, that it is an accepted principle of private international law that, D where there is no ante-nuptial contract, the proprietary consequences of a marriage are governed by the husband's domicile at the time of the marriage, in this case Germany. This rule is absolute and admits of no exceptions.

Held, further, on the question of whether the applicant had proved what German law was on the matter, that the requirements of s 25(3)(a) to E (c) of the Civil Evidence Act [*Chapter 8:01*], although not mandatory, gave useful guidance. The letters from the German lawyer did not state the lawyer's qualifications and experience as a practising attorney, and his opinion was not supported by any relevant material like German case law, statutes, text books or German common law. The format of the letter and its contents were of such a nature that the court could not F rely on it as sufficient proof of German law on the point in issue.

Held, further, that while the order sought could not be granted, it would be grossly unjust to dismiss the application on this point alone. The matter should be referred to trial so that proper and sufficient evidence on the position of the German law on the point in issue could be led. G

Cases referred to

Dobrock Hldgs (Pvt) Ltd v Turner & Sons (Pvt) Ltd & Ors 2006 (2) ZLR 353 (H)

Jesse v Chief Immigration Officer & Ors 1996 (2) ZLR 720 (H)

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

Mawadze J

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

Pertsilis v Calcaterra & Anor 1999 (1) ZLR 70 (H)

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

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

Legislation considered

B Civil Evidence Act [*Chapter 8:01*], ss 24 & 25

Case information

J Mafusire, for the applicant

P Makuwaza, for the first and second respondents

No appearance for the third and fourth respondents

Judgment

C **MAWADZE J:** This is an opposed application for a declarator wherein the applicant seeks an order in the following terms:

"IT IS DECLARED AND ORDERED AS FOLLOWS:

1. All assets acquired whether jointly or separately by the applicant and his D deceased wife the late Susan von Ahn (nee Hlongwane) who died at Harare on 15 January 2010 shall be amassed into one joint estate.
2. Within thirty days from the date of this order, or such longer period not exceeding thirty days as the third respondent may allow, the first respondent shall file with the third respondent an inventory of all the assets of the joint estate comprising all the property, movable or immovable, corporeal or E incorporeal and including but not limited to all the rights, title and interest in any such property such as rent or any other income.
3. After approval by the third respondent of the inventory aforesaid, the second respondent shall within ten days thereof or such extended period not exceeding ten days as the third respondent may allow, nominate, appoint or instuct valuators from the list of valuators kept and maintained by the F third respondent and direct and cause them to valuate the joint estate and the costs thereof shall be part of the costs of the administration of the joint estate.
4. Following the valuation the joint estate aforesaid, the first respondent shall prepare the first and final distribution account in the joint estate in the normal manner in terms of the Administration of Estates Act [*Chapter 6:01*] and G bequeath to the applicant so much of the assets, including cash, as would constitute not less than five eights of the joint estate.
5. The cost of this application shall be assessed on an attorney-client scale and shall constitute part of the costs of the administration of the joint estate, provided that if any person opposes the application the costs shall follow the event".

H The background of facts of the case are in order.

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The applicant is a German national aged 65 years and on a resident permit A in Zimbabwe. He is a pensioner and now a widower.

The first respondent is cited in her capacity as the executrix testamentary in the estate of the applicant's late wife Susan von Ahn (née Hlongwane), a Zimbabwean national who died at Harare on 15 January 2010.

The second respondent, aged 50 years, is applicant's step-daughter, born B to the applicant's late wife from a previous relationship. She is married and has a family of her own. She is also the sole heir to the applicant's late wife's estate in terms of the last will and testament executed in Harare on 20 December 2009.

The third respondent, the Master of the High Court of Zimbabwe, and the C fourth respondent, the Registrar of Deeds, are both cited in their official capacities.

The facts giving rise to this application can be summarised as follows. The applicant and his late wife Susan von Ahn (née Hlongwane) married in Germany in terms of German law on 23 July 1977 where the applicant was D domiciled. The marriage was not blessed with any children. The couple lived in Germany until 2004 when they immigrated to Zimbabwe after their retirement. The movable property acquired by the couple according to the applicant, which include *inter alia* household goods, farming implements, industrial equipment and other assets was shipped to Zimbabwe. E

The relevant annexures filed by the applicant are annexures F, a bill of landing, Annexure E, Zimbabwean Customs Declaration, and Annexures G1 to G9, an inventory of goods shipped to Zimbabwe. It is the applicant's contention that the couple jointly owned substantial amounts of money invested in off shore accounts with the Standard Chartered Bank, which accounts applicant cannot now access as they are on his late wife's name. F

It is the applicant's contention that the couple also acquired immovable property in Zimbabwe which property is also registered in his late wife's name. The applicant's explanation is that he got erroneous advice that as a foreign national he could not have immovable property registered in his name or the joint names with his wife. The properties in issue are: G

(a) Two adjacent plots each, 1364 m2, stand 282 and 283 of Lot 22 Block D Avondale West Harare, brought in 1980 when the couple was still in Germany and later consolidated into one title 6315/03. There is a cottage built also on this property from which the second respondent collects rentals. H

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(b) Stand A No. 37, measuring 2072 m2,, known as 12 Kenny Road Avondale West, a luxurious double story four bedroomed house with lockable garage and workers' quarters, deed of transfer number 343/93 and was bought in 1992.

(c) No. 20 Wicklow Road Avondale West, measuring 793 m2,, a 3-bedroomed B house with separate cottages, deed of transfer No. 1843/2000. There is also a nursery on this property which is being rented out.

The applicant in his founding affidavit contends that, given the strong bond between him and his late wife, the fact that all the immovable property was registered in his late wife's name was of no concern to him because the couple's assets were never classified as "his" or "hers" but always "theirs". C Likewise, the bills of landing and customs clearance certificates were in his late wife's name to facilitate easy access.

The applicant's late wife succumbed to cancer and died on 15 January 2010. However, on 24 December 2009 the applicant's late wife drafted her last will and testament which was prepared by Muvingi, Mugadza & Mukome legal D practitioners. This will bequeathed the wife's entire estate to her daughter, the second respondent. The validity of this will is not in issue. The applicant however contends that his wife's will should be construed as relating only to the one half of the joint estate that she owned by virtue of German law, being the law of matrimonial domicile.

E It is the applicant's contention that under German law which governs their marriage and in the absence of a pre- or ante- nuptial contract, such a marriage is in community of property. In support of this position the applicant attached to his founding affidavit Annexure Q a declaration by the German Embassy in Harare, and Annexures R and R1, a legal opinion by a practising German F attorney.

In paras 17.1 to 17.9 of the founding affidavit, the applicant outlines what he perceives to be the position of the German law which governed his marriage to the late wife and their proprietary rights. According to the applicant, therefore, when his late wife bequeathed her entire estate to the third respondent it could only have been in respect of her one half or four eighths of the joint estate. G The applicant contends that, according to German law, he is entitled to the other half of the joint estate and that, since his late wife disinherited him in terms of the will, he can only lay claim to a quarter of her half of the joint estate which is one eighth on the basis of the principle of *forced heirship* in terms of German law. All in all, therefore, the applicant claims that he is H entitled to five eighths of the joint estate and that his late wife could only

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competently bequeath the balance of three eighths of the joint estate to her A daughter the second respondent as per his late wife's will.

The first and second respondents strongly opposed the applicant's claim of what he perceives to be his share of the joint estate.

Both the first and second respondents raised some preliminary points which I now proceed to dispose of. B

1. That the application before the court is premature.

The first and second respondents' view is that the applicant should have waited for the drawing up of the final liquidation and distribution account before seeking a declaratory order in the

aforementioned terms. I am not C persuaded by this argument at all. In my view, the applicant properly acted in terms of s 43 of the Administration of Estates Act [*Chapter 6:01*], which provides as follows:

> "**43 Public notice by executors to creditors and others to lodge their claims.**
>
> Every executor shall, so soon as he has entered on the administration of the D estate, forthwith cause a notice to be published in the *Gazette* and in some newspaper published or circulating in the district which the deceased ordinarily resided, calling upon all persons having claims due, or not yet due, as creditors against the deceased or his estate to lodge the same with the executor within such period from the date of publication thereof as is therein specified, not being less, save and except as in section *sixty-six* is provided, than thirty days E or more than three months, as in the particular circumstances of each case is by the executor deemed proper".

It is common cause that when the first respondent proceeded to act in terms of s 43 of the Administration of Estates Act the applicant advised the second respondent of his claim. The second respondent, as per correspondence filed F of record, took a clear and an unambiguous stance that all the immovable assets of the spouses belonged to the applicant's late wife and that the will in issue was not confined to one half of the so-called joint estate. This response from the first respondent and the second respondent left the applicant with no option but to seek a declaratory order. It is disingenuous to suggest that the G applicant should have waited for the drawing up of the final distribution and liquidation account to lodge whatever claim he would have. Such a course of action would serve no purpose, as it would be akin to the applicant closing the door after the horse has bolted or seeking shelter after being already soaked and drenched in rain. My finding is that the application is properly before the court and was not made prematurely. H

Mawadze J

A **2. That there is a conflict of interests which justifies recusal of the applicant's legal practitioners**

It is my view that this allegation is unfounded when one considers the facts of the matter which facts are common cause between the parties. While it may be true that the applicant's late wife once approached Mr Mafusire's B partner in Scanlen & Holderness and asked him to draft a will, the fact of the matter is that the last will and testament of the late Susan von Ahn was not drafted by Scanlen & Holderness but by Mavingi, Mugadza & Makome legal practitioners. It is also important to note that the will in question is not in dispute. It therefore has not been shown in any useful manner by the first and second respondents that Mr *Mafusire* for the applicant acquired C information which could be used to the detriment of the interests of the deceased or the first and second respondents so as to result in real mischief and prejudice to them. See *Pertsilis v Calcaterra & Anor* 1999 (1) ZLR 70 (H) and *Dobrock Holdings (Pvt) Ltd v Turner and Sons (Pvt) Ltd & Ors* 2006 (2) ZLR 353 (H).

D **3. That the marriage between the applicant and late wife was one of convenience**

This bold allegation by the first and second respondents is not supported by the facts of the case. I am rather inclined to accept the applicant's rather strong language when he described this allegation as reckless, abnoxious E and patently indecent, especially in relation to the second respondent, his stepdaughter. It is common cause that the marriage between the applicant and his late wife lasted for 33 years. The couple lived as husband and wife in Germany from 1977 to 2004. It cannot be argued that this marriage was not consummated. When the couple came to Zimbabwe in 2004 they stayed together for six years and were only separated through the cruel act of death. F There is therefore no basis to suggest that this was a troubled marriage or that it was a marriage entered into for the primary purpose of evading the immigration laws in Germany or Zimbabwe or that the couple had no intention of living together as husband and wife. See *Jesse v Chief Immigration Officer & Ors* 1996 (2) ZLR 720 (H) and *Hambly v Chief Immigration Officer* 1998 (2) ZLR 285 (H). G In fact the applicant and his late wife lived up to their marriage vows "till death do us part".

After dismissing the preliminary points raised by the first and second respondents, I now turn to the merits of this application.

The first issue I shall proceed to deal with is the question of the relevant H law which governs the proprietary rights of the applicant and his late wife.

Mawadze J

It is not in issue that the marriage between the applicant and his wife was A solemnised in Germany.

It is now an accepted principle in the field of the international private law that, where there is no ante-nuptial contract, the proprietary consequences of a marriage are governed by the husband's domicile at the time of the marriage. It has not been disputed that the applicant was domiciled in Germany at the B time of the marriage.

W Ncube *Family Law in Zimbabwe* p 163 has this to say:

> "It is a settled principle of Roman Dutch common law that the proprietary consequences of marriage are governed by law of the country of the husband's domicile at marriage where there is no ante-nuptial contract. This rule is absolute and admits of no exceptions so that the law of the husband's domicile at time C of marriage determines the proprietary regime of the spouses for all time … It would not matter that the spouses intended to acquire a domicile different from that of the husband at the time of the marriage. The new intended domicile is irrelevant."

The learned author also makes reference other renowned authors like C F Forsyth *Private International Law: the modern Roman Dutch Law including* D *the jurisdiction of the Supreme Court* 3 ed at p 259 and Corbett, Hahlo, Hofmeyr & Kahn *The Law of Succession in South Africa* at p 619.

In *Lafontant v Kennedy* 2000 (2) ZLR 280 (S) at 283 McNally JA, while dealing with the property acquired *stante matrimonie,* had this to say:

> "In Roman Dutch Law the proprietary consequences of a marriage are governed E by the law of the husband's domicile at the time of the marriage. See *Frankel's Estate & Anor v The Master & Anor* 1950 (1) SA 220 (A) at 223, 237, 238 and 251; *Sperling v Sperling* 1975 (3) SA 707 (A); *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C) at 494C-D."

I am satisfied that the law governing the proprietary consequences of the marriage entered into between the applicant and his late wife in Germany F is German law.

The next issue to consider is the specific rule of law in Germany which would be applicable in resolving the dispute between the applicant and the first and second respondents. Ncube *op cit* at pp 163-164 makes the pertinent comment:

> "Once the above rule of private international law has been used to determine the G country whose law is applicable in resolving a matrimonial dispute, the specific rule of law of that country which applies to such disputes must be determined".

At this stage I may have to digress and address my mind to the argument by the first and second respondents that all the property in issue constituting the so called joint estate, especially the immovable property, belonged to the deceased, since it is registered in the deceased's name. While it is correct that H

Mawadze J

A the registration of immovable in one's name is proof of ownership of such property, our courts have held that this would not preclude a spouse or any other person from claiming a legitimate and rightful share of that property in appropriate circumstances. See *Takafuma v Takafuma* 1994 (2) ZLR 103 (S); *Lafontant v Kennedy supra*; *Nyamweda v Georgias* 1988 (2) ZLR 422 (S) B and *Young v van Rensburg* 1991 (2) ZLR 149 (S).

In casu the applicant is claiming what he deems to be his rightful share of the property and has explained the appropriate and legitimate circumstances thereof.

The final point I shall now consider is whether the applicant has proved C before the court the point in issue, which is the proof of Germany law.

I have already made reference to the relevant annexures attached to the applicant's founding affidavit which are:

(i) Annexures D and D1, extracts from German marriage register.

(ii) Annexures P and P1 an affidavit and declaration of marriage dated 18 D September 2010 by the applicant.

(iii) Annexure Q dated 6 October 2010 by the Consul and First Secretary of the German Embassy, certifying that the applicant was married in community of property.

(iv) Annexure R and R1 dated 28 September 2010 – a letter written to the E applicant's counsel by a fellow legal practitioner in Germany in a law firm called Hans-Jurgen Clausen giving an opinion on the point in issue, that is, the position of the German law, which is foreign law.

Section 25 of the Civil Evidence Act [*Chapter 8:01*] provides as follows:

"**25 Foreign law**

F (1) A court shall not take judicial notice of law of any foreign country or territory, nor shall it presume that the law of any such country or territory is the same as the law of Zimbabwe".

Section 24 of the Act defines what constitutes judicial notice.

Section 25(2) to (5) provides as follows:

G "(2) Any person who, in the opinion of the court is suitably qualified to do so on account of his knowledge or experience shall be competent to give expert evidence as to the law of any foreign country or territory, whether or not he has acted or entitled to act as a legal practitioner in that country or territory.

(3) In considering an issue to the law of any foreign country or territory, a court H may have regard to –

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(a) any finding or decision purportedly made or given in any court of record in A that country or territory where the finding or decision is reported or recorded in citable form; and

(b) any written law of that country or territory, and

(c) any decision given by the High Court or Supreme Court as to the law of that country or territory.

(4) The law of any foreign country shall be taken to be in accordance with B a finding or decision mentioned in paragraph (a) of subsection (3), unless the finding or decision conflicts with another such finding or decision on the same question.

(5) For purposes of paragraph (a) of subsection (3), a finding or decision shall be taken to be reported or recorded in citable form only if it is reported or recorded in writing in a report, transcript or other document which, if the report, C transcript or document had been prepared in connection with legal proceedings in Zimbabwe, could be cited as an authority in legal proceedings in Zimbabwe".

Mr *Mafusire* for the applicant submitted that the evidence on German law on the point in issue has been sufficiently provided for through the document D from the German Embassy in Zimbabwe and in form of a letter written to him by a practising attorney in Germany who should be deemed to be an expert.

I am not convinced that the applicant has or a balance of probabilities proved the position of the German law on the point in issue. The documents produced by the applicant fall far short of the requirements of s 25(3)(a) to (c) of the Civil Evidence Act. Although such requirements are not mandatory, they E give useful guidance to the court. I am not persuaded by the fact that the document from the German Embassy in Zimbabwe proves the position of German law on the issue in contention. While the letter from a practising attorney in Germany may shed some light on the German law on explained therein, the letter itself falls far short of proving the position of the German F law and fails to meet the requirements of s 25(3)(a) to (c) of the Civil Evidence Act. To start with, the author does not even state his or her qualifications and experience as a practising attorney. The opinion of this practising attorney is not supported by any relevant material, like German case law, statutes, text books or German common law. The format of the letter and its contents are of such a nature that this court can hardly put reliance on it as sufficient G proof of German law on the point in issue. I am therefore not satisfied that the applicant, despite being aware of the need to prove German law on the point in issue, has on a balance of probability proved the specific rule of law in Germany which governs the proprietary consequences of the applicant's marriage. A material dispute therefore remains unresolved as to the exact position of German law on the point in issue. H

2011 (2) ZLR p177

Mawadze J

A I have no doubt in my view that the German law governs the proprietary consequences of the applicant's marriage. While I am not inclined for reasons already given, to grant the declaratory order it would be grossly unjust to dismiss this application on this point alone. The applicant would

be rendered destitute without fully ventilating his rights and entitlement. Even if the court was to take a robust and common sense approach, it would not resolve the B point in issue as regards the position of German law. An injustice would be done to the applicant at this stage. The first and second respondents have not helped matters, as no attempt was made to find the position of German law on the point in issue. It is therefore only fair and just to refer this matter to trial so that proper and sufficient evidence on the position of the German C law on the point in issue can be led.Accordingly it is ordered that:

1. Case No. HC 7997/10 be and is hereby referred to trial.
2. The court application shall stand as summons and notice of opposition shall stand as notice of appearance to defend.
3. The applicant shall file a declaration within ten days of this order and thereafter the matter shall proceed in terms of the rules D
4. Costs shall be costs in the cause.

Scanlen & Holderness, applicant's legal practitioners

Sinyoro & Partners, first & second respondents' legal practitioners

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Source:
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ECONET WIRELESS (PVT) LTD v SARUCHERA NO 2011 (2) ZLR 178 (H)

Citation	2011 (2) ZLR 178 (H)
Case No	Judgment HH-171-11
Court	High Court, Harare
Judge	Mavangira J
Heard	26 July 2011; 27 July 2011; *CAV*
Judgment	21 September 2011
Counsel	*H Nkomo*, for the applicant *A Mugandiwa*, for the respondent *A B Chinake* and *T Tandi*, on a watching brief for Renaissance Hldgs (Pvt) Ltd
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Appeal – execution – *leave to execute pending appeal – application – must be made specifically, not in a manner requiring interpretation, deduction or inference* D

Headnote

An application for leave to execute on a judgment notwithstanding the noting of an appeal is such a special application that there should be no need for it to be interpreted or deduced or inferred from the papers. The papers must clearly and specifically indicate the exact nature of the application before the court. The applicant must take care to address the principles or E factors which the court must apply in determining such an application.

Cases cited

Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd 1989 (1) ZLR 152 (H)

Pissas v Pissas 2008 (1) ZLR 261 (H)

Case information

H Nkomo, for the applicant F

A Mugandiwa, for the respondent

A B Chinake and *T Tandi*, on a watching brief for Renaissance Hldgs (Pvt) Ltd

Judgment

MAVANGIRA J: On 29 June 2011 in HC 5213/11 I issued a provisional order G in favour of Econet Wireless (Pvt) Ltd as the applicant, against Renaissance Financial Holdings Limited as the first respondent and Reggie Saruchera (in his capacity as the curator of Renaissance Merchant Bank Ltd) as the second respondent. The terms of that order read:

> "That you show cause to this honourable court why a final order should not be made in the following terms: H

Mavangira J

1. In A the event of the respondents failing to discharge all of their obligations towards the applicant, including the payment of all capital amounts due and owing to the applicant together with all interest accrued, by 30 October 2011, the first respondent's shareholding in Africa First Renaissance Corporation Limited, be transferred to the applicant.
2. The respondents pay costs of this application on an attorney and client scale B ,the one paying the other to be absolved.

Interim relief granted

1. The second respondent be and is hereby directed to forthwith deposit with the Registrar or Master of the High Court, Harare, Share Certificates of the first respondent in Africa First Renaissance Corporation Limited.
2. The first respondent be and is hereby interdicted from transferring, C disposing of or encumbering in any other way, its shareholding in Africa First Renaissance Corporation Limited, pending the finalisation of this application".

My reasons for granting the provisional order were laid out in my judgment which was availed to the parties on 15 July 2011. On 8 July 2011 an appeal was noted in the Supreme Court by Reggie Saruchera as the appellant with D Econet Wireless (Pvt) Ltd being cited as the respondent. During the hearing of the instant matter it was indicated by Mr *Mugandiwa* that the said notice of appeal had since been withdrawn and a new notice of appeal, which reflected the appellant as Reggie Saruchera (in his capacity as curator of Renaissance Merchant Bank) had been filed on 20 July 2011.

E On 21 July 2011 the instant application was filed. The applicant seeks herein a provisional order in the following terms:

> "Terms of the interim relief sought
>
> It is hereby ordered that:

1. The appeal noted by the respondent under SC 153/11 shall not suspend the operation of the order as against the respondent granted by Honourable F Justice Mavangira in HC 5213/11.
2. The respondent be and is hereby directed to forthwith, deposit with the Registrar of the High Court, Harare, the Share Certificates in respect of shares held by Renaissance Financial Holdings or its nominees in Africa First Renaissance Corporation Limited, in total amounting to 30% of the issued share capital of Africa First Renaissance Corporation Limited to be G kept by the Registrar pending the discharge in full of Renaissance Financial Holdings Limited's obligations to the applicant.

3. The noting of an appeal in this case shall not suspend the operation of this particular order.
4. That the respondent be and is hereby ordered to pay costs at an attorney and client scale including costs of two (2) counsels where two (2) counsels H are employed.

2011 (2) ZLR p180

Mavangira J

Terms of the final order sought A

It is ordered that:

1. In the event of the respondent failing to discharge all of its obligations towards the applicant, including the payment of all capital amounts due and owing to the applicant together with all interest accrued, by 30 October 2011, the Registrar complies with the operational order confirmed in proceedings under HC 5213/11." B

The instant matter was heard on 27 July 2011. At the onset of proceedings Mr *Mugandiwa* raised a number of preliminary issues which he listed as "jurisdiction, urgency, procedure, service on interested parties and whether or not this court is *functus officio* in respect of part of the relief sought". With regard to the preliminary point on jurisdiction the respondent's contention is C that the application before this court is not one for leave to execute pending appeal but for a declarator. In the event, it was submitted, the court is thus being asked to exercise jurisdiction in terms of s 14 of the High Court Act [*Chapter 7*:*06*] and not its inherent jurisdiction as it would in an application for leave to execute pending appeal. An application for leave to execute pending appeal, it was contended, involves the enforcement of the court's D decisions and the applicable principles differ with those applicable when a declarator is being sought. It was contended that the court is being asked to grant the declarator in para 1 of the interim relief sought on the basis that the appeal was defective and therefore a nullity, as no leave of this court had been sought and granted for the respondent to appeal against its decision. E Furthermore, that as the validity or otherwise of the appeal is a matter for the Supreme Court to deal with, this court ought to decline jurisdiction for that reason.

In response, Mr *Nkomo* submitted that as this court still has to either confirm or discharge the provisional order, it follows that it has jurisdiction to hear this matter. In any event, the relief that the applicant seeks herein, he F submitted, is interlocutory in nature as it is for the respondent to deposit share certificates with the Registrar. He also submitted that the appeal is in any event a nullity and this court cannot be prevented from hearing this matter.He also submitted that it is only in the first paragraph of the interim relief sought that a declarator is sought and that should the court be persuaded by G Mr *Mugandiwa*'s submissions on this aspect, it is only this paragraph which should be affected by his submission.

Regarding urgency, Mr *Mugandiwa* submitted that for more than three weeks after 29 June 2011 when the provisional order was granted, the applicant took no action, only to file this application on 21 July 2011. He also submitted that the certificate of urgency does not explain why these proceedings were H

2011 (2) ZLR p181

Mavangira J

A not instituted immediately after the noting of the appeal on 8 July 2011. He urged the court to find that the matter is not urgent.

In response, Mr *Nkomo* submitted that from 8 July 2011, when the appeal was noted, to 21 July 2011, when this application was filed, there were nine working days only. In any event, he submitted, the assumption had been made that the respondent had made a genuine mistake by noting an appeal without B first seeking the leave of this court, hence their letter to the respondent's legal practitioners pointing this out. The respondent's legal practitioner's response was served at his offices on 13 July 2011 while he was away. On his return on 18 July 2011 he realised that his interpretation of the provisional order and that of the respondents legal practitioners differed. He thus immediately C took steps leading to the filing of this application on 21 July 2011. He urged the court to find that there was no inordinate delay and that the short delay that there was had been adequately explained.

On the preliminary issue that he referred to as "procedure", Mr *Mugandiwa* submitted that declaratory relief, which is provided for in terms of s 14 of the D High Court Act, is relief that cannot be sought by way of chamber application. He submitted that r 226(1) distinguishes between a court

application which is made in writing to the court and notice is given to all interested parties and a chamber application which is made in writing to a judge. He submitted that the applicant had adopted the wrong procedure by seeking declaratory relief by way of a chamber application. He further submitted that as declaratory E relief is final in nature, it cannot be sought by way of a provisional order.

Mr *Nkomo*'s response was that there is no law that bars a party from seeking relief of this nature on an urgent basis. He submitted that s 14 of the High Court Act is silent on the aspect. He also submitted that the submission made in relation to r 225(1) is merely a question of semantics.

F Regarding the issue of service on interested parties, Mr *Mugandiwa* submitted that the applicant has not cited nor served Renaissance Financial Holdings Ltd (RFHL), with the application. He submitted that RFHL, which was a party in HC 5213/11, has also noted an appeal in the Supreme Court against the High Court's decision, and that consequently any order that this court may make in this instant matter would be rendered a *brutum fulmen* by its G non-joinder, as the appeal by RFHL also has the effect of suspending the High Court's decision in HC 5213/11 even in relation to other parties, including the respondent herein.

In response, Mr *Nkomo* submitted that the only interested party, in so far as the order being sought by the applicant is concerned, is the respondent H herein. It is the respondent, he submitted, that holds the share certificates that

the applicant seeks to be deposited with the Registrar of this court. RFHL A does not have or hold the said shares.

The fifth and final preliminary issue raised by Mr *Mugandiwa* was that this court is *functus officio* in so far as para 2 of the interim relief sought is concerned. Mr *Nkomo* immediately interjected and submitted that the paragraph as it then stood ought to be amended to read exactly as reads B para 1 of the interim relief granted in HC 5213/11. However, even with the concession or amendment made, Mr *Mugandiwa* submitted that the court is being asked to make an order which it has already made in HC 5213/11 and therefore, in that regard, it is *functus officio*. Mr *Mugandiwa* further submitted that the present application is essentially the issue that this court will be dealing with on the return day in HC 5213/11. It is thus an issue that C is pending in HC 5213/11 and it will be dealt with in proceedings for the discharge or confirmation of the provisional order of 29 June 2011 in HC 5213/11. He submitted that the matter has thus been improperly raised in these proceedings.

Mr *Nkomo*'s response was that this court cannot be, and is not, *functus officio* D as the provisional order in HC 5213/11 is still pending before it, for either confirmation or discharge.

Mr *Mugandiwa* submitted that the instant application seeks, as the main relief, a declarator and that the relief sought in the paragraphs subsequent to para 1 of the interim relief sought is consequential thereto. Mr *Nkomo,* on the other hand, submitted that the application is in effect one for leave E to execute pending appeal.

Paragraph 1 of the interim relief sought reads:

> "It is hereby ordered that:
>
> 1. The appeal noted by the respondent under SC 153/11 shall not suspend the operation of the order as against the respondent …" F

In para 3 of the applicant's founding affidavit the following is stated:

> "3. The applicant has approached this honourable court on an urgent basis seeking among other things the following relief:
>
> 3.1 A declarator that the appeal noted by the respondent under SC 153/11 shall not suspend the operation of the order as against the respondent …." G

Paragraph 3.1 is repeated in the applicant's answering affidavit.

It is clear from the papers filed by the applicant that the basis for it seeking the relief in para 1 of the interim relief is its contention that the respondent's notice of appeal is defective and therefore a nullity by reason of the respondent not having first sought and obtained this court's leave to appeal. It contends H

Mavangira J

A that the provisional order in HC 5213/11 is interlocutory in nature and thus the respondent has no automatic right of appeal.

Paragraph 2 of the interim relief granted in the provisional order in HC 5213/11 is an interdict. In terms of s 43(2)(d)(ii) of the High Court Act [*Chapter 7*:*06*] the respondent did not need to seek and obtain leave to appeal against the order. The court was also referred to *Pissas v Pissas* 2008 (1) ZLR 261 (H) B at 266 C-D, where Gowora J stated:

> "So assuming I am incorrect in finding that access is an incidence of custody and that on that basis the applicant would not have required leave to file the appeal, part of the order from the judgment appealed against was an interdict. On that basis, the appeal would qualify under the exceptions referred to in s 43(2)(d) of the Act. I find, therefore, that there was no need for leave to appeal and that C therefore there is an appeal pending before the Supreme Court".

It would appear to me that *in casu*, as in *Pissas supra,* an appeal is pending before the Supreme Court.

Gowora J further stated at 266E-G:

> "… The noting of an appeal has the effect of suspending the order or judgment D which is the subject matter of the appeal. The authority for that principle is the *dictum* by Corbett JA (as he then was) in *South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A). What the learned judge of appeal had to say at 544 H-545A was to the following effect:
>
> > 'Whatever the true position may have been in the Dutch courts, and more particularly the court of Holland (as to which see *Ruby*'s *Cash Store (Pty*) E *Ltd* v *Estate Marks & Anor* 1961 (2) SA 118 (T) at pp 120-3), it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. *To obtain such leave, the party in whose favour the judgment was given must make special application"* F (emphasis added).

The emphasis added to the above *dicta* has been necessitated by the nature of the relief being sought by the applicant *in casu*. The applicant, in its own words, seeks a declarator from this court in so far as para 1 of the interim relief is concerned. The wording of the said paragraph confirms this statement. G In the next breath the submission was made at the hearing that effectively this is an application for leave to execute pending appeal. It would appear to me that an application for leave to execute pending appeal is such a special application as not to need to be interpreted or deduced or inferred from the papers. The papers must clearly and specifically indicate the exact nature of the application before the court. The applicant herein has, in my view, H failed in this regard.

Mavangira J

In any event, if it is in effect an application for leave to execute pending A appeal, the applicant does not appear to have taken the care to address the principles or factors which the court must apply in determining such an application. In *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H), Adam J stated at 154 G to 155 E:

> "Under our common law the execution of the order granted by Sandura JP was B automatically suspended upon the noting of the appeal: *Reid & Anor v Godart & Anor* 1938 AD 511 at 513. This meant that, pending the appeal, the order could not be carried out except with the leave of this court and in order to obtain such leave special application had to be made by the applicant: *Geffen v Strand Motors (Pvt) Ltd* 1962 R & N 259 (SR) at 260; 1962 (3) SA 62 (SR).
>
> It is clear that the principles which must be applied by this court in determining the matter are those stated by Corbett JA in *South Cape Corporation (Pty) Ltd* C *v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545:
>
> > 'In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:
> >
> > (1) the potentiality of irreparable harm or prejudice being sustained by the D appellant on appeal (respondent in the application) if leave to execute were to be granted;
> >
> > (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute was refused;

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

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

I should indicate that this court has applied the foregoing principles in *Dabengwa & Anor v Minister of Home Affairs* 1982 (1) ZLR 223 at 225 (HC), *Jeremy Prince (Pvt) Ltd* v *Owen & Anor* HH-14-86; *van t' Hoff v van t' Hoff & Ors (2)* 1988 (1) ZLR 335 (H)."

What the applicant has sought to do is to persuade this court, that because the G respondent did not obtain the leave of this court, its appeal to the Supreme Court is defective and thus provides the justification for the granting of the relief in para 1 of the interim relief. This contention has already been dealt with above and I decline to find in the applicant's favour on it.

Regarding para 2 of the interim relief sought herein, it is clear that the relief, sought (as amended during the hearing) has already been granted by this court H

Mavangira J

A in HC 5213/11. Paragraph 3 is consequential upon the granting of para 2. No justification was furnished for seeking an order of costs in the interim relief. Regarding the final order sought, it is also clear that this is in effect the final relief sought in the provisional order granted in HC 5213/11. However, in view of my main finding regarding the non-requirement for leave to appeal, these further issues may not need to be discussed in this judgment. It also B appears to me that there is no need to discuss the preliminary issues further than this. It appears to me, therefore, for the above reasons, that there is no justification established by the applicant for the granting of the provisional order sought. The application cannot succeed. Costs will follow the result.

In the result it is ordered as follows:

C The application is dismissed with costs.

Mtetwa & Nyambirai, applicant's legal practitioners

Wintertons, respondent's legal practitioners

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Source:
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MOYO & ORS v SIBANDA & ORS 2011 (2) ZLR 186 (H)

Citation	2011 (2) ZLR 186 (H)
Case No	Judgment No. HB-125-11
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	9 September 2011; *CAV*
Judgment	22 September 2011

Counsel *G Nyandoro,* for the applicants
S Mazibisa, for the respondents

Case Type Civil application

Annotations Link to case annotations

Flynote

Practice and procedure – *default judgment – rescission – time limits – need for application for rescission to be made within a month of applicant having knowledge of the judgment – not necessary for application to be heard within that month – delay in making application for rescission of* D *judgment – "good and sufficient cause" for such delay – what applicant needs to prove – need for applicant to set out defence on merits – must establish defence on the merits which cannot be rejected out of hand and which warrants investigation* E

Headnote

The proper interpretation of r 63(1) of the High Court Rules 1971 is that an applicant for rescission of judgment must file the application within one month after he has had knowledge of the judgment. Where that has been done, there is no need for condonation if the application is not heard within one month. F

"The factors which a court will take into account in determining whether an applicant for rescission has discharged the ones for proving 'good and sufficient cause', as required to be shown by r 63 of the High Court Rule, 1971 are well established … They are:

i. the reasonableness of the applicant's explanation for the default; G
ii. the *bona fides* of the application to rescind the judgment;
iii. the *bona fides* of the defence on the merits of the case which carries some prospects of success.

The factors must be considered not only individually but in conjunction with one another and with the application as a whole" (*dicta per* Gubbay CJ in *Stockil v Griffiths* 1992 (1) ZLR 172 (S) at 173D followed). H

Mathonsi J

A In considering the merits of an applicant's defence, a court must be satisfied that the applicant has tendered a defence which, on the face of it, cannot be rejected out of hand and warrants investigation.

Cases cited

Apostolic Faith Mission of Portland, Oregon Inc & Anor v Baltzell & Ors 2005 (1) ZLR 368 (H) B

Mdokwani v Shoniwa 1992 (1) ZLR 269 (S)

Sibanda v Ntini 2002 (1) ZLR 264 (S)

Stockil v Griffiths 1992 (1) ZLR 172 (S)

Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd 1998 (2) ZLR 249 (S) C

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 63(1) & (2)

Case information

G Nyandoro, for the applicants

D *S Mazibisa,* for the respondents

Judgment

MATHONSI J: This matter has a checkered history dating back more than 6 years to April 2005. Since then no less than 6 court processes have been issued out of this court involving the same parties. The parties have been E to the Supreme Court and back but have regrettably come nowhere near resolving the dispute between them.

The genesis of the matter is that about 20 April 2005 a decision was taken to remove the first respondent from the positions he held in the church, namely, being the chairman of the church board and Southern African overseer of F the Apostolic Faith Mission of Portland, Oregon, as well as the pastor of the Apostolic Faith Church in Bulawayo, Zimbabwe. A decision was also taken to appoint the first applicant as his replacement. When that was communicated to the first respondent, he resisted the decisions, resulting in him filing an urgent application under case No. HC 707/05 and obtaining interim relief allowing him to remain as Southern African overseer and pastor for the G Bulawayo church pending the finalisation of the dispute. The confirmation of the provisional order granted by Ndou J on 19 May 2005 was opposed and it was subsequently discharged.

On 30 June 2005 the first respondent filed a court application for the review of the decision to remove him from his post aforesaid and the appointment H of the first applicant in his stead. That application was served on 1 July 2005

---

giving the respondents in that matter ten days thereafter to file opposition. A They did not.

The papers before me suggest that, about the same time, the parties engaged each other in out of court deliberations aimed at resolving the dispute among themselves. During those deliberations it was the understanding between them that court action would be held in abeyance. It has not been disclosed B what the full terms of that moratorium in litigation was and what was to become of the court application which had already been filed.

In fact, the closest one gets to the understanding between the parties is what is contained in the last paragraph of a letter written by Musunga and Associates, then representing the applicants, addressed to Cheda and Partners for the C respondents on 26 July 2005. In that letter, after addressing a number of issues the parties were discussing, Musunga and Associates concluded by saying;

> "As agreed earlier all court litigation remain suspended *until the round table conference is convened* and completed."

It is not apparent from the papers whether that round table conference was ever convened and when it was convened. What is clear however is that the D applicants did not do anything at all about the court application that had been served upon them on 1 July 2005 until it was set down on the unopposed roll for 24 January 2008, about 2½ years later, whereupon Ms *D Vundla,* representing the applicants, appeared to seek a postponement of the matter.

When the matter came up again on 7 February 2008, the legal practitioner E representing the applicants was again in attendance although no documents had been filed for the applicants either to oppose the application or to seek an extension of time, considering that they had been barred more than two years earlier. One gains some insight into the attitude of the applicants towards the matter at the time from a letter written to the Assistant Registrar by Musunga and Associates on 6 February 2008, which reads in part as follows: F

> "RE: REV. R. J. SIBANDA AND ANOTHER VS REV D. L. BALTZELI DARREL, D. LEE AND TWO OTHERS: HCB 1170/05
>
> We refer to the above matter.
>
> We note with concern that the Applicants through their legal practitioners are attempting to obtain an order as unopposed in this matter.
>
> We understand that the Honourable Justice Ndou recused himself and handed G over the matter to his Lordship Justice Bere. We request herewith that any determination of this matter as unopposed be stayed in the interim for the following reasons:
>
> (1) When Musunga and Associates assumed agency on behalf of respondents sometime in 2005, it was specifically agreed between ourselves and applicants through their legal practitioners to hold this matter amongst many others in H

Mathonsi J

A abeyance. We attach our letter to Cheda and Partners dated 26th July 2005. Our clients should have been served with the application round about the same time. Thus of course this matter was shelved from thereon.

(2) Secondly, the applicant's action in setting this matter down is really an ambush. They never advised us that they were now taking that course nor did they invite us to file opposing papers. B

(3) …

(4) When we were told by our correspondents that this matter was enrolled as unopposed, we erroneously thought matter HCB 2937/07 was the one enrolled. Thus we filed matter HCB 227/08 on the 31st January 2008.

We advise that we intend to oppose the matter enrolled but because of the complexities thereto we need more time to prepare the papers and make an C application for extension of time within which to file the opposition. We undertake to file our papers on or before the 21st of February 2008.

We have addressed our concerns to the court simply as an advice of the fact that the matter is improperly before the court and would and will be opposed as matter HCB 707/05 and ancillary matters reflect.

We hope our letter will be on record.

D Yours faithfully

(signed)

Musunga and Associates."

Bere J was not swayed by the request and, despite the appearance of Ms *Vundla* in motion court, he granted the order. It is that order of 7 February E 2008 which applicants seek to have rescinded in this application.

Mr *Nyandoro,* for the applicants, argued that the applicants have given a reasonable explanation for their failure to file opposition timeously in that when the parties agreed to hold litigation in abeyance, it was on the understanding that should negotiations fail and litigation was to be resumed, that would F be on notice to the other party. He further argued that when the respondents sought default judgment they did not give notice to the applicants and that the applicants only got to know about the existence of the judgment when they attempted to evict the first respondent from the church premises he occupied.

When Mr *Nyandoro's* attention was drawn to the letter written by the legal practitioners representing the applicants which is quoted above, he could G only state that he was unaware how Musunga and Partners got to write that letter. He could not reconcile the fact that the applicants were represented by Ms *D Vundla* in court when the order was made to his earlier submission that the applicants were not aware of the existence of the order.

I have already stated that no attempt has been made by the applicants to shed H some light as to when the moritorium in litigation was to take effect and

Mathonsi J

when it was to end. According to the letter from their then legal practitioners, A which they rely upon in advancing the point that they could not file their papers in time because of an understanding between the parties, litigation was only suspended "until the round table conference is convened and completed." The applicants have not taken the court into confidence as to the timing of this event. B

What is common cause, however, is that negotiations between the parties failed. When this happened the applicants were required to take steps to oppose the application. They did not. It is them who had the obligation to put their house in order.

Rule 63 of the High Court of Zimbabwe Rules, 1971 provides:

"(1) A party against whom judgment had been given in default, whether under C these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment; for the judgment to be set aside.

(2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his D action, on such terms as to costs and otherwise as the court considers just."

It would appear that the Supreme Court has now resolved the controversy concerning the interpretation of subr (1) arising out of the seemingly contradictory interpretation of r 63(1) in *Sibanda v Ntini* 2002 (1) ZLR 264 (S) and *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S). E

In the latter case Sandura JA had concluded that a defendant against whom a judgment has been granted in default has a period of one month from the time he becomes aware of the judgment within which to file an application for rescission of judgment, failing which he must first make an application for condonation of the late filing of the application. F

In *Sibanda v Ntini (supra*) Malaba JA (as he then was) interpreted r 63(1) to mean that a person against whom judgment has been entered in default must make the application within one month, which is to say he must file and set down the application within one month failing which he has to seek condonation. G

When this matter was heard by Cheda J, he followed the reasoning in *Sibanda v Ntini supra* and ruled that the applicants were out of time having failed to file and set the matter down within the one month period. He then dismissed the application as no condonation had been sought. On appeal, the full bench of the Supreme Court overturned the judgment of Cheda J and remitted the matter to this court for the purpose of determining the merits H

Mathonsi J

A of the application. While I have not had the benefit of the full judgment of the Supreme Court, the order made suggests an acceptance that the proper interpretation of r 63(1) is that an applicant must file the rescission of judgment application within one month. Where that has been done, there is no need for condonation if the application is not heard within one month.

B Subrule (2) of r 63 was interpreted in *Stockil v Griffiths* 1992 (1) ZLR 172 (S) at 173 D-F as follows:

> "The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving 'good and sufficient cause', as required to be shown by r 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See, for instance, *Barclays Bank of Zimbabwe* C *Ltd v CC International (Pvt) Ltd* S-16-86 (not yet reported); *Roland and Anor v McDonnell* 1986 (2) ZLR 216 (S) at 226 E-H; *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 211 C-F. They are:
>
> (i) the reasonableness of the applicant's explanation for the default.
>
> (ii) the *bona fides* of the application to rescind the judgment; and D
>
> (iii) the *bona fides* of the defence on the merits of the case which carries some prospects of success.
>
> These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

I have already canvassed the explanation given for the applicants' failure to act timeously which falls short of being reasonable regard being had to the E fact that the applicants waited 2½ years before filing their opposition, did not do anything about the automatic bar operating against them and yet they have not even explained what happened to the round table conference for which litigation was suspended. If we assume that the conference in question did take place at some stage, they were obliged to quickly take steps to oppose F the application the moment that conference failed to yield anything.

On the other hand, if the conference never took place it would be unreasonable for the applicants to say that for 2½ years they were still waiting for the conference to materialise. It is also useful to note that the parties had long resumed litigation against each other, as shown by the litigation instituted in both this court and the Supreme Court. Therefore, the applicants cannot G be heard to say that litigation was still suspended.

I am not persuaded that even on the merits the applicants would have sustained a meaningful contest. In that regard I am indebted to Ndou J who had already made findings in *Apostolic Faith Mission of Portland, Oregon Inc & Anor v Baltzell & Ors* 2005 (1) 368 (H). H He adverted to the failure to comply with the provisions of the church's

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Mathonsi J

constitution and the rules of natural justice, in particular, the *audi alteram* A *partem* rule in removing the first respondent from office.

In considering the merits of the applicants' defence, the court must be satisfied that they have tendered a defence which on the face of it cannot be rejected out of hand and warrants investigation. See *Mdokwani v Shoniwa* 1992 (1) ZLR 269 (S) at 274C. The applicants are incapacitated by the fact that they B have not set out fully a defence on the merits of the application, having busied themselves with procedural issues they have not even articulated with sufficient clarity.

Taking into account the factors set out in *Stockill v Griffiths supra* individually and in conjunction with one another, I am unable to say that the applicants have discharged the onus of proving "good and sufficient cause" for the C rescission of the judgment entered on 7 February 2008.

In the result the application for rescission of judgment is dismissed with costs.

Musunga & Assocs, applicants' legal practitioners

Cheda & Partners, respondents' legal practitioners D

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Source:
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CHURCH OF THE PROVINCE OF CENTRAL AFRICA v DIOCESAN TRUSTEES, DIOCESE OF HARARE & ANOR 2011 (2) ZLR 193 (H)

Citation	2011 (2) ZLR 193 (H)
Case No	Judgment No. HH-206-11
Court	High Court, Harare
Judge	Uchena J
Heard	14 September 2011; 15 September 2011; 13 September 2011; *CAV*
Judgment	23 September 2011
Counsel	*J Bhamu,* for the applicant *T M Kanengoni,* for the first respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Court – High Court – *jurisdiction – right to interfere with order of Supreme Court – court having no jurisdiction to interfere with order of the Supreme Court allowing execution of a High Court order pending determination* D *of appeal*

– irrelevance of whether Supreme Court order was given by a single judge or by full bench – order made by Chief Justice as a judge of Supreme Court – not relevant that Chief Justice is also a member of the High Court

Headnote

E The applicant filed an urgent chamber application seeking an order of the High Court staying the execution of an order granted by another judge of the High Court. After the earlier order, which the applicant wanted to be stayed, was granted, the applicant appealed to the Supreme Court. The appeal suspended the execution of that order. The appeal was dismissed for failure to comply with r 46(5) of the Supreme Court Rules. The F applicant applied for its reinstatement, which was granted by the Chief Justice, who ordered that the noting of the appeal should not suspend the operation of the order appealed against. His reasoning was that there had been numerous applications and counter-applications between the parties and there was a need to curtail those applications, the multiplicity of which was simply adding to the confusion and hampering expeditious G finalization of the dispute between the parties.

The applicant argued that the order to be stayed was an order of the High Court and the warrant of execution was issued by the High Court, which therefore had jurisdiction to control its internal processes. The applicant also argued that s 79B of the Constitution gave the High Court jurisdiction H in spite of the prior order of the Supreme Court.

Uchena J

The respondent argued that the Supreme Court has clearly pronounced its A decision on the execution of the order pending appeal, and that the High Court simply had no jurisdiction to alter what the Supreme Court has ordered. Neither party could cite authorities from other jurisdictions supporting the proposition that the High Court had jurisdiction to hear an application seeking to stay execution of the court's order which the B Supreme Court has ordered in spite of its having reinstated the appeal.

Held, that while s 7 of the Supreme Court Act [*Chapter 7:13*] undoubtedly leaves it to the High Court to execute and enforce judgments of the Supreme Court, this does not mean that the High Court is empowered to suspend, even temporarily, the effect of an order of the Supreme Court made either in the exercise of its appellate jurisdiction or pursuant to C s 24(4) of the Constitution. This would constitute a direct interference with the authority of a superior court by one subordinate to it. The fact that the Supreme Court did not *in casu* exercise original jurisdiction when it ordered execution pending appeal did not therefore confer jurisdiction on the High Court to interfere with the Supreme Court's order. The fact D that the order was granted by the Chief Justice in chambers, sitting as a single judge of the Supreme Court, did not open his order to interference by a court subordinate to his. An order of the Supreme Court – whether by one judge or the full bench – is an order of the Supreme Court, and is binding on all courts subordinate to it and cannot be interfered with by them. E

Held, further, that s 79B of the Constitution merely enshrines the independence of the judiciary within the ambit of its judicial authority. It does not sanction the *ad hoc* extension of such judicial authority. The effect of s 79B is that judicial officers are to act independently in the exercise of their judicial authority. They are not subject to the direction or control F of any person or authority, except to the extent that a written law may place them under the direction or control of another member of the judiciary. This does not entitle a judicial officer to vary, set aside or interfere with an order made by a court superior to his, or fail to observe judicial precedents based on the hierarchy of the courts. Precedents are G based on the hierarchy of the courts and simply require a subordinate court to defer to the decisions of the court superior to it. What would be a direction or control prohibited by s 79B would be an administrative order the Chief Justice can give in terms of s 79A of the Constitution as head of the judiciary, if it affects a judicial officer's exercise of his judicial authority. H

Uchena J

A *Held,* further, that the fact that the Chief Justice is in terms of s 81(2)(a) of the Constitution a member of, and can preside in, the High Court as a judge of the High Court, had no relevance in this case, because he did not exercise his High Court jurisdiction when he made the order which

led to this application. He made the order in the exercise of his appellate B jurisdiction as a judge of the Supreme Court.

Cases cited

CFU v Mhuriro & Ors 2000 (2) ZLR 405 (S)

Legislation considered

C Constitution of Zimbabwe 1980, ss 79A, 79B, 80 & 81(2)(a)

Case information

J Bhamu, for the applicant

T M Kanengoni, for the first respondent

Judgment

D **UCHENA J:** The applicant filed an urgent chamber application seeking an order of this court, staying the execution of an order granted by Hlatswayo J on 24 July 2009, in HC 4327/08.

The respondent opposed the application and raised preliminary issues on the jurisdiction of this court to hear and determine an application for a stay of an execution which was authorised by the Supreme Court, urgency E and the authority of the deponent of the applicant's founding affidavit. I will first consider the issue of jurisdiction as the consideration of the other issues depends on whether or not I have jurisdiction entitling me to hear this application.

The history of the parties' disputes leading to this application is as follows. F The parties appeared before Hlatswayo J who granted the order which the applicant wants to be stayed. The applicant appealed to the Supreme Court. The appeal suspended the execution of that order. The appeal SC 180/09 was dismissed for failure to comply with r 46 (5) of the Supreme Court Rules. The applicant applied for its reinstatement which was granted by the Chief G Justice in judgment no. S-19-11.

In granting the reinstatement the Chief Justice, in paras 2 and 3 of his order, ordered that:

1. …
2. It is ordered that the appeal against the first court order of Hlatswayo H J of 24 July 2009 be and is hereby reinstated.

Uchena J

3. The noting of the appeal should not suspend the operation of the order A referred to in para 2 above.

The order in para 3 was given after the Chief Justice had at pp 9-10 of the judgment said;

> "Condonation for failure to comply with the Rules of this court is an indulgence granted by a udge of this court upon the exercise of his judicial discretion. In the B exercise of that judicial discretion the judge may impose appropriate conditions. *In casu,* having considered that there has been numerous applications and counter-applications between these parties, there is need to curtail these applications. The multiplicity of these applications is simply adding to the confusion and hampering expeditious finalization of the dispute between the parties. Taking C these factors into account, it is desirable that the judgment (judgment in HH 166/09), in respect of which I have reinstated the notice of appeal, remain extant until set aside by the court on appeal. For the avoidance of doubt, the judgment will not be suspended by the noting of an appeal against it."

Mr *Bhamu* for the applicant bases the application on an application it has made to the constitutional court against the Chief Justice's order, and another D urgent application it has filed in the Supreme Court seeking the urgent set down of the constitutional application. The parties advised this court that they have since appeared before the Chief Justice and agreed to postpone *sine die* the constitutional application and urgent application in the Supreme Court in preference for the urgent set down of the reinstated appeal. This is E in tandem with the reason for which execution pending appeal was granted. The multiplicity of applications is clearly being frowned upon. Mr *Bhamu* submitted that the order to be stayed is an order of this court and the warrant of execution was issued by this court, therefore this court has jurisdiction to control its internal processes. That would be correct, when this court is acting in the absence of a contrary order from a higher court, on the

execution F of this court's order. In this case the question of jurisdiction arises because the Supreme Court on reinstating the applicant's appeal used its appellate discretion exercised when granting the indulgence the applicant was seeking, to order that the noting of the appeal was not to suspend the execution of the judgment whose appeal it was reinstating. It gave reasons for its order and G specifically said this was to curtail the multiplicity of applications between these parties. My task is to determine whether this court can entertain an application to circumvent the Supreme Court's clear order that execution should proceed in spite of the reinstatement of the applicant's appeal.

Mr *Bhamu* further argued that the Supreme Court's order merely reversed the onus from the respondent to the applicant on whether or not the order H

2011 (2) ZLR p197

Uchena J

A of Hlatswayo J can be executed pending appeal. Ordinarily the onus to apply for execution pending appeal would have been on the respondent. The applicant's counsel therefore argued that the Chief Justice's order has merely shifted the onus to apply for stay of execution to the applicant. That is a simplistic approach to the issue before the court. The issue before the court involves a definitive order backed by clear reasons for the order to B execute pending appeal. It was to stop the multiplicity of applications, not to merely shift the onus from one party to the other.

Mr *Kanengoni* submitted that the Supreme Court has clearly pronounced its decision on the execution of the order pending appeal, and this court can not alter what the Supreme Court has ordered. It simply has no jurisdiction. C Mr *Kanengoni*'s submission seems to have merit, as courts fall within a recognised hierarchy, based on their superiority over each other. The Supreme Court, being the highest court of the land, is superior to the High Court, and its orders are binding on this court, and can not be countered by it. The applicant's attempt to circumvent the Supreme Court's order through this D court is a novel one which Mr *Bhamu* for the applicant and Mr *Kanengoni* for the first respondent conceded has no local precedent. The applicant's counsel, and respondent's counsel, were thus given time to enable them to research and make written supplementary submissions on case law from other jurisdictions. They were put on terms as to when they were to file their respective supplementary submissions.

E In his written supplementary submissions Mr *Bhamu* in para 5 said:

> "While there is a plethora of case law, both in our jurisdiction and beyond, on the particular issue of a court's jurisdiction to determine an application for stay of execution, no case has been found which fits on all fours with the set of facts as in the present matter. However the other authorities found are of great value F in so far as they relate to the generic principles governing stay of execution, which can be equally applied to solve the legal problem in this case."

The lack of precedent in our jurisdiction and elsewhere confirms the novelty of the issue before me. It seems to confirm that I am being asked to act against the current of judicial precedents, and the normal order of the operation of the hierarchy of courts. The generic principle on this court's G jurisdiction to control its own process had been exhausted and needs no further consideration. I will however consider the applicant's submissions on *Commercial Farmers' Union v Mhuriro & Ors* 2000 (2) ZLR 405 (S), and s 79B of the Constitution, which the applicant's counsel argues may justify the assumption of jurisdiction by this court in spite of the Supreme H Court's order.

2011 (2) ZLR p198

Uchena J
The Commercial Farmers' Union v Mhuriro case A

In the *Commercial Farmers' Union v Mhuriro* case (*supra*) a situation similar to that in the present case arose but in slightly different circumstances. The Commercial Farmer's Union had in an earlier case succeeded in obtaining the Supreme Court's order by consent for the eviction of people who had settled at its members' farms. Mhuriro and other settlers applied to the B High Court for the stay of that order, pending their making a constitutional application to set aside the Supreme Court's order before the Constitutional Court. The High Court granted the order sought. The Commercial Farmers Union applied to the Supreme Court for the setting aside of the High Court's order on the ground that the High Court had no jurisdiction to interfere with the Supreme Court's order. The Supreme Court, in granting the Commercial C Farmers Union's application, *per* Gubbay CJ, with the concurrence of four other judges of the Supreme Court at p 408C-E, said;

> "While s 7 of the Act undoubtedly leaves it to the High Court to execute and enforce judgments of the Supreme Court, this certainly does not mean that the High Court is empowered to suspend, even temporarily, the effect of an order of the Supreme Court either made in the exercise of its appellate jurisdiction D or pursuant to s 24(4) of the Constitution. For such would constitute a direct interference with the authority of a superior court by one subordinate to it. It would be to sanction, as occurred in this matter, an interference by a single judge of the High Court with an order concurred in by five judges of the Supreme Court. The proposition only needs to be stated to reveal its inherent flaw.
>
> The fact that an order of the Supreme Court was made by consent does not alter E the situation. It remains an order of the Supreme Court and may only be varied, set aside or, in any way interfered with by the Supreme Court."

In his supplementary submissions Mr *Bhamu* sought to distinguish the *Commercial Farmers Union* case (*supra*) from this case on the following grounds:

1. That the order of the Chief Justice was not issued pursuant to the Supreme F Court exercising original jurisdiction granted by s 24(1) as read with s 24(4) of the Constitution.
2. The order was issued in chambers with only the Chief Justice presiding.
3. The order which was to be stayed in the *Commercial Farmers Union v Mhuriro* case had not originated from the High Court, and G
4. The applicant is not asking for stay of an order made with the consent of the parties.

Mr *Kanengoni* for the first respondent was also not able to find authorities from other jurisdictions supporting the proposition that this court has jurisdiction to hear an application seeking to stay execution of this court's H

Uchena J

A order which the Supreme Court has ordered in spite of its having reinstated the appeal. He commented on the *Commercial Farmers Union* case in para 6 of his supplementary submissions as follows;

> "The only case cited by the applicant that somewhat resembles the present matter is that of *Commercial Farmers' Union v Mhuriro & Ors* 2000 (2) ZLR 405 (S). The applicant has however sought to distance itself from the authority of that B case on the contention that it is distinguishable from the present matter. There are factual differences between the present matter and the *Commercial Farmers' Union* case (*supra*), but it is noteworthy that one of the premises upon which the Supreme Court found that the High Court could not exercise jurisdiction upon orders of the Supreme Court was the hierarchy and judicial authority of the courts in Zimbabwe."

C He however did not deal separately with the four grounds of distinction advanced by the applicant's counsel.

A reading of the *Commercial Farmers' Union* case (*supra*) reveals that the Supreme Court based its finding on its original and appellate jurisdiction. It clearly said:

> D "this certainly does not mean that the High Court is empowered to suspend, even temporarily, the effect of an order of the Supreme Court either made in the exercise of its appellate jurisdiction or pursuant to s 24(4) of the Constitution. For such would constitute a direct interference with the authority of a superior court by one subordinate to it."

In this case the Supreme Court exercised its appellate jurisdiction in ordering E execution pending appeal. The fact that the Supreme Court did not exercise original jurisdiction when it ordered execution pending appeal does not therefore confer jurisdiction on this court to interfere with the Supreme Court's order.

The fact that the order was granted by the Chief Justice in chambers sitting as a single judge of the Supreme Court does not open his order to interference F by a court subordinate to his. The reference to five judges in the *Commercial Farmers' Union* case was merely for emphasis. An order of the Supreme Court, whether by one judge or the full bench, is an order of the Supreme Court and is binding on all courts subordinate to it and cannot be interfered with by them. In the quotation of Gubbay CJ's judgment in the *Commercial Farmers' Union* case (*supra*) referred to earlier the Supreme Court clearly G spelt out the position of its orders when it said at 408:

> "The fact that an order of the Supreme Court was made by consent does not alter the situation. It remains an order of the Supreme Court and may only be varied, set aside or, in any way interfered with by the Supreme Court."

Nothing therefore turns on the order having been issued by the Chief Justice H sitting in chambers.

2011 (2) ZLR p200

Uchena J

The fact that the order which was to be stayed in the *Commercial Farmers'* A *Union* case had not originated from the High Court does not take the applicant's case any further because, as already said, once the Supreme Court issues an order either in the exercise of its appellate or original jurisdiction, it can only be interfered with by itself and by no other court. Therefore nothing turns on the applicant's third distinction of the *Commercial Farmers' Union* case from this case. B

The fact that the applicant is not asking for stay of an order made with the consent of the parties is of no relevance. The issue is on the jurisdiction of this court to interfere with the order of the Supreme Court irrespective of how it was made. As already said, it remains an order of the Supreme Court and may only be varied, set aside or, in any way interfered with by C the Supreme Court.

The precedent created in the *Commercial Farmers' Union* case therefore applies with equal force in this case. Its application in this case has not been ousted by the applicant's counsel's attempt to distinguish it from this case.

Section 79B of the Constitution D

The applicant's counsel also sought to rely on s 79B of the Constitution to prove that this court has jurisdiction in spite of the prior order of the Supreme Court ordering the execution of Hlatswayo J's order which the applicant seeks to stay through this application. In para 7 of his supplementary submissions he said: E

> "The above authority is self explanatory, this court is not subject to the direction or control of any person, including the Chief Justice, except to the extent that may be provided for under a written law. It is up to the first respondent to present a written law which would place the exercise of this court's jurisdiction under the control or direction of the Chief Justice. This is also in view of the fact that the Chief Justice is himself a member of the High Court, which is designated as a superior court of record with inherent jurisdiction in terms of ss 79, 79A, F and 80 of the Constitution."

Mr *Kanengoni* in paras 15 to 17 of his supplementary submissions commented on Mr *Bhamu*'s reliance on s 79B of the Constitution as follows:

> "15 With respect to the contention that s 79B of the constitution allows this honourable court to grant the relief sought herein, one must advert his attention to the first words of that section i.e: G
>
> 'In the exercise of his judicial authority'
>
> 16 The section is therefore premised upon the boundaries of the judicial officer's judicial authority. As highlighted herein above, the hierarchy of the courts and consequent judicial authority in Zimbabwe does not vest this honourable court with jurisdiction to grant the relief sought herein. It follows from this that this honourable court cannot, by virtue of section H

2011 (2) ZLR p201

Uchena J

> A 79B, extend the boundaries of its judicial authority so as to allow it to entertain this matter. Section 79B merely enshrines independence of the judiciary within the ambit of its judicial authority. It does not sanction the ad hoc extension of such judicial authority.
>
> 17 Section 79B can therefore not be a basis upon which this honourable court can exercise jurisdiction in this matter."

B I agree with Mr *Kanengoni*'s submission that s 79B of the Constitution does not extend this court's authority, nor enable it to interfere with the decision of the Supreme Court which authorised execution pending appeal, but merely provides for the independence of the judiciary.

Section 79B provides as follows:

> C "In the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary."

My understanding of s 79B of the Constitution is that judicial officers are to D act independently in the exercise of their judicial authority. They shall not be subject to the direction or control of any

person or authority, except to the extent that a written law may place them under the direction or control of another member of the judiciary.

This does not, in my view, entitle a judicial officer to vary, set aside or E interfere with an order made by a court superior to his, or fail to observe judicial precedents based on the hierarchy of the courts. Precedents are based on the hierarchy of the courts and simply require a subordinate court to defer to the decisions of the court superior to it. Section 80 of the Constitution provides that:

> "(1) There shall be a Supreme Court which shall be a superior court of record F and the final court of appeal for Zimbabwe ..."

Section 80 places the authority of judges of this court under that of judges of the Supreme Court, which is the highest court of the land. It thus, as permitted by s 79B, places judges of this court under the direction or control of the decisions of judges of the Supreme Court, who are members of the judiciary.

G Sections 79 and 81 of the Constitution also place the High Court below the Supreme Court. In this case the Supreme Court, while exercising its appellate jurisdiction which carries finality on any issue, ordered that execution can be carried out pending the reinstated appeal. Therefore s 79B does not apply to the circumstances of this case. It does not excuse a judicial officer from H being bound by a prior decision of a court of superior jurisdiction. A judicial

Uchena J

officer therefore cannot interfere with, vary, or set aside a prior decision of A a court of higher jurisdiction.

In this case the Chief Justice made the order in issue, before an application was made to this court. His court is superior to mine. His prior determination that the order of Hlatswayo J should not be suspended by the reinstated appeal, therefore cannot be said to be a directive to this court. It is a determination B of an application that was before him long before this application was made. It is however an order of the Supreme Court which this court can not vary or interfere with.

The fact that the Chief Justice is, in terms of s 81(2)(a) of the Constitution, a member of and can preside in the High Court as a judge of the High Court does not have any relevance in this case, because he did not exercise his High C Court jurisdiction when he made the order which led to this application. He made that order in the exercise of his appellate jurisdiction as a judge of the Supreme Court as provided in s 80(2)(a) of the Constitution.

What would be a direction or control prohibited by s 79B is an administrative order he can give in terms of s 79A of the Constitution as head of the judiciary D if it affects a judicial officer's exercise of his judicial authority. In view of the above, there is no merit in Mr *Bhamu*'s submissions based on s 79B of the Constitution. I am therefore satisfied that I have no jurisdiction to interfere with the order granted by the Chief Justice.

In the result the applicant's application is dismissed with costs. E

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

Chikumbirike & Associates, first respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/BATSIRAI CHILDREN'S CARE v MINISTER LOCAL GOVERNMENT & ORS 2011 (2) ZLR 203 (H)

BATSIRAI CHILDREN'S CARE v MINISTER LOCAL GOVERNMENT & ORS 2011 (2) ZLR 203 (H)

Citation	2011 (2) ZLR 203 (H)
Case No	Judgment No. HH-198-11
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	29 September 2011
Judgment	29 September 2011
Counsel	*R Nyamudira*, with him *O Sake*, for the applicant *D Kanokanga*, for the second and fifth respondents *F Ruzive*, for the first, third and fourth respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *declaratory order – application – applicant one of many people affected by a police operation – application to have whole operation declared unlawful – not possible for such declaration to be made without evidence on how other people were affected*

D **Practice and procedure** – *interdict – application – purpose for which interdict sought – interdict sought in relation to past event – interdict not competent unless facts alleged justifying reasonable apprehension that harm likely to be repeated*

E **Practice and procedure** – *parties – "clean hands" – requirement to come to court with – limits to such requirement – party not in compliance with law but not challenging such law – application in respect of unrelated matter – party not barred*

Headnote

The applicant was an unregistered private voluntary organization. It had F applied twice for registration but remained unregistered when it brought its application. It ran a children's centre and its activities involved the provision of food, clothing, school and medical fees for orphans in an area of Harare. It had erected certain structures in which the children were housed. During an operation by the police called "*Murambatsvina*', the structures were demolished and the persons there were evicted. The G applicant sought an order declaring the operation to have been unlawful and allowing it to return to the property and re-erect the structures. It also sought an interdict to prevent the authorities from ejecting the applicant or any of its beneficiaries from the premises, from destroying and/or ordering the applicant to destroy its property and from interfering with H the peaceful and undisturbed possession by the applicant of its premises.

The application was opposed on the ground that, as the applicant was operating A in breach of the Private Voluntary Organisations Act [*Chapter 17:05*], it was barred from approaching the court as it had "dirty hands". It was also argued that its activities at the centre were unlawful, because the applicant had no approved plans for the illegal structure which was demolished and that the illegal structure was constructed in a residential B zone, although it was providing services of a commercial nature.

Held, that the applicant was not challenging the law pertaining to its registration. It merely sought to enforce certain of its rights, unrelated to registration, that it alleged had been violated. It was not opposed to registration. Indeed, it had applied, twice, and only happened not to have been registered yet. The "dirty hands" doctrine was not applicable in C such a case, otherwise an

absurd state would be reached where litigants would be required to prove that their affairs are regular in every minute detail before their matters are heard by the courts.

Held, further, that similarly, the applicant was not seeking, surreptitiously, to enforce approval of its plans or of its activities but merely to recover D the property it alleged was despoiled. To uphold the contention of the respondents would amount to interpreting too broadly the principle of not coming to court with dirty hands.

Held, further, that while the applicant might have the necessary interest to obtain a declaratory order, a general declaration that "Operation *Murambatsvina*" was unlawful was too wide and would entail an enquiry E not sufficiently canvassed on the papers. This operation appeared to be a broad programme that had affected, or was likely to affect, various people differently. It was not possible in a matter specifically dealing with the alleged despoliation of the applicants to make a general declaration on the whole operation when a myriad of circumstances and facts had not been brought to the attention of the court. Furthermore, even the F narrow issue of the eviction of the applicants and the destruction of its property did not lend itself to an order by way of a declaration. By seeking a *mandamant van spolie*, the applicant required the restoration of the *status quo ante* pending a full enquiry.

Held, further, with respect to the interdict, that the applicant had to prove G a clear right, an injury actually committed or reasonably apprehended and absence of similar protection. As regards a clear right, it had not been shown that the applicant had a right to occupy the premises in question. The property did not belong to the applicant, and the land in question was zoned for residential purposes and could not be used for the applicant's commercial purposes. Finally, an interdict was no H

A longer competent in respect of a past event. If the infringement was one that *prima facie* appears to have occurred once and for all, and it was finished and done with, the applicant should allege facts justifying a reasonable apprehension that the harm is likely to be repeated. This the applicant had not done.

Cases referred to B

ANZ v Min of State for Information & Ors 2004 (1) ZLR 538 (S)

Chikadaya v Chikadaya & Anor 2000 (1) ZLR 343 (H)

Deputy Sheriff, Harare v Mahleza 1997 (2) ZLR 425 (H)

Mandela v Falati 1995 (1) SA 251 (W)

C *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S)

Legislation considered

High Court Act [*Chapter 7:06*], s 14

Private Voluntary Organisations Act [*Chapter 17:05*], s 16(1)

Case information

D *R Nyamudira*, with him *O Sake*, for the applicant

D Kanokanga, for the second and fifth respondents

F Ruzive, for the first, third and fourth respondents

Judgment

HLATSHWAYO J: The applicant is an unregistered private voluntary E organization (PVO) that has been carrying on business as a children's center since 2003. Its activities involved provision of food, clothing, school and medical fees for orphans in Hatcliffe, Harare. Although the applicant has applied, for the second time, to the Ministry of Labour, Public Service and Social Welfare for registration as a PVO in terms of the Private Voluntary F Organizations Act [*Chapter 17:05*] , it still remains unregistered, and thus exists merely as a common law *universitas*. On this basis, it was

submitted on behalf of the third and fourth respondents (the Minister of Home Affairs and the Police Commissioner, respectively) that the applicant is operating illegally and should not be heard by this court until it has purged this illegality by either ceasing operations or obtaining the necessary permit.

G Section 6 (1) of the PVO Act provides as follows:

> "(1) No private voluntary organization shall –
>
> (a) commence or continue to carry on its activities; or
>
> (b) seek financial assistance from any source unless it has been registered in respect of the particular object or objects in the furtherance of which it is H being conducted."

2011 (2) ZLR p206

Hlatshwayo J

It is common cause that the applicant is operating in breach of the PVO Act, A but can it be said, therefore, that the applicant cannot be heard before this court on any matter affecting its rights? The third and fourth responds answer this question in the affirmative, relying on the following passage in *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity & Anor* 2004 (1) ZLR 538 (S) at 548B-C: B

> "This court is a court of law and, as such, cannot connive at or condone the applicant's defiance of law. Citizens are obliged to obey the law and argue afterwards … For the avoidance of doubt the applicant is not barred from approaching this court. All that the applicant is required to do is to submit itself to the law and approach the court with clean hands on the same papers."

In my view, this case is distinguishable from the *ANZ* matter in that, whereas C ANZ sought to challenge the constitutionality of the requirement for registration while flagrantly violating such law by continuing to operate, the applicant is not challenging the law pertaining to its registration. It merely seeks to enforce certain of its rights, unrelated to registration, that it alleges have been violated. It is not opposed to registration. Indeed, it has applied, D twice, and only happens not to have been registered yet. The "dirty hands" doctrine is not applicable in such a case, otherwise an absurd state would be reached where litigants would be required to prove that their affairs are regular in every minute detail before their matters are heard by the courts.

The second and fifth respondents (the chairperson of the Harare Commission E and the City of Harare) have raised, *in limine*, the "dirty hands" exception yet again, but this time in a different guise, to the effect that the applicant had no approved plans for the illegal structure which was demolished and that the illegal structure was constructed in a residential zone, yet it was providing services of a commercial nature. The respondents relied on *Chikadaya v Chikadaya & Anor* 2000 (1) ZLR 343 (H) where an applicant F sought to transfer property into his own name when several years earlier he had had the property registered in the respondent's name to circumvent the council's policy that no person could own more than one property in that housing scheme. In my view, the facts in *Chikadaya* are distinguishable from the circumstances of the present applicant. This applicant is not seeking, G surreptitiously, to enforce approval of its plans or of its activities, but merely to recover the property it alleges was despoiled. To uphold the contention of the respondents would amount to interpreting too broadly the principle of not coming to court with dirty hands. In *Deputy Sheriff, Harare v Mahleza* 1997 (2) ZLR 425 (H) at 426B-C, the "dirty hands" doctrine was summed up by Bartlett J thus: H

2011 (2) ZLR p207

Hlatshwayo J

> A "People are not allowed to come to court seeking the court's assistance if they are guilty of lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions." .

B The applicant seeks a declaratory order, an interdict and a spoliation order in the following terms:

1. That generally "Operation *Murambatsvina"* and more particularly the eviction from the premises of the applicant and the destruction of the property belonging to the applicant by the fourth and fifth Respondents C be and is hereby declared unlawful.
2. That the respondents, including any member of the Zimbabwe Republic Police and the Harare Municipal Police, be and are hereby interdicted, barred and stopped from ejecting applicant or

any beneficiaries thereof from the described premises, from destroying and/or ordering the D applicant to destroy its property and from interfering with the peaceful and undisturbed possession by the applicant of its premises.

3. That the applicant, its staff members and beneficiaries be and are hereby allowed to return to the premises and re-erect any and all structures that were so destroyed and that the respondents pay the costs of re-erecting the demolished structures. E

4. That each party bears its own costs.

This matter was brought as an urgent one, but it was submitted that the matter should not be dealt with on an urgent basis for the following reasons:

(a) By the time the application was filed, the structures in question had already been demolished, and before the demolition the applicant had F been served with the enforcement and prohibition order.

(b) The applicant's beneficiaries had already been catered for at Caledonia farm.

(c) The structure which the applicant sought to re-erect is not only illegal, in that it was never approved by the fifth respondent, but inhuman in G that it is not fit for the intended use as a children's home or care centre.

The scanned pictures of the so-called children's centre are attached at the end of this judgment. * It consists of an open maize field with crops on two sides and bare ground in the centre and a wooden cabin at one end. The children sit on the dusty ploughed-up field and consume their rations in this most

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unhygienic environment. If there is anything to restore to them, it would be A this bare, ploughed-up ground and wooden cabin.

In the light of the above contentions and in the interest of having fuller legal arguments placed before the court, it was agreed that the matter proceed as an ordinary court application and the parties were required to file heads of argument. B

Regarding the declaratory order, an applicant who seeks such an order must be "an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment" and the interest "must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions C unrelated to such interest": *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S) at 334.

The above conditions are derived from s 14 of the High Court Act [*Chapter 7:06*], which provides as follows:

> "The High Court may, in its discretion at the instance of an interested person, inquire into and determine any existing, future or contingent right or obligation D , notwithstanding that such person cannot claim any relief consequential upon such determination."

While the applicant may have the necessary interest as spelt out above, a general declaration that "Operation *Murambatsvina*" is unlawful is too wide and will entail an enquiry not sufficiently convassed on the papers. "Operation E *Murambatsvina"*, or urban clean-up, appears to be broad programme that has affected, or is likely to affect, various people differently: for example, some could have been removed after proper notification, some might have had their properties destroyed without warning, and yet others could have had their legally and properly registered enterprises affected by the exercise. It is not possible in a matter specifically dealing with the alleged despoliation of the F applicants to make a general declaration on the whole operation when those myriad circumstances and facts have not be brought to the attention of the court. Furthermore, even the narrow issue of the eviction of the applicants and the destruction of its property does not lend itself to an order by way of a declaration. By seeking a *mandament van spolie*, the applicant requires G the restoration of the *status quo ante* pending a full enquiry. Before such an inquiry is carried out, the court cannot make a declaration.

The prayer for an interdict requires that the applicant prove a clear right, an injury actually committed or reasonably apprehended and absence of similar protection. As regards a clear right, it has not been shown that the applicant has a right to occupy the premises in question; the property does H

Hlatshwayo J

A not belong to the applicant and, although there are conflicting submissions as regards the person from whom the applicant is leasing the land, the land in question is zoned for residential purposes and cannot be used for the applicant's commercial purposes. Finally, it has been held that "an interdict [is] no longer competent in respect of a past event": *Mandela v Falati* 1995 (1) SA 251 (W). See also Herbstein and van Winsen *The Civil Practice of* B *the Supreme Court of South Africa* 4 ed p 1071:

> "If the infringement is one that *prima facie* appears to have occurred once and for all, and it is finished and done with, the applicants should allege facts justifying a reasonable apprehension that the harm is likely to be repeated".

Since the applicant has not proved a clear right nor shown that the alleged C wrongful act giving rise to the injury is a continuing one, its prayer for an interdict must fail.

All in all, therefore, this application fails and is hereby dismissed. However, given the status of the applicant as a putative charitable organization, each party shall bear its own costs.

D *Zimbabwe Lawyers for Human Rights,* applicant's legal practitioners

Kanokanga & Partners, second and fifth respondents' legal practitioners

Attorney-General's Office, first, third and fifth respondents' legal practitioners

* The photographs are not included in this report. — *Editor*

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/S v CHAWIRA 2011 (2) ZLR 210 (H)

S v CHAWIRA 2011 (2) ZLR 210 (H)

Citation	2011 (2) ZLR 210 (H)
Case No	Judgment No. HH-42-12
Court	High Court, Harare
Judge	Uchena J & Mwayera J
Heard	27 September 2011; *CAV*
Judgment	29 September 2011
Counsel	*C Mavhondo*, for the appellant Mrs *S Fero*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Appeal – *criminal matter – referral to trial court for trial de novo – referral not proper where evidence led at first trial was not sufficient to sustain a conviction*

Criminal procedure – *trial – date – "fast tracking" of trials in magistrates courts – such procedure permissible provided a fair trial ensues – effect* D *of failure to grant postponement on request*

Evidence – *affidavit – production of – notice required – affidavit produced without requisite notice and without accused's consent – such affidavit not admissible* E

Headnote

The practice of "fast tracking" criminal trials is not is specifically provided for by that name in the Criminal Procedure and Evidence Act [*Chapter 9:07*], but that does not mean it is an unlawful procedure. It is, in fact, a useful procedure which, if well managed, helps to contain and or reduce the courts' backlogs of criminal cases and ensures the delivery of timeous F justice. All that has to be done is to ensure that it is used in compliance with the provisions of the Act and other laws which provide for a fair trial. Under s 163 of the Act, when an accused person is arrested and is to be prosecuted in the magistrate's court, must shall be brought to trial on the next possible court date, which means on the day when the court will be sitting next after the decision to prosecute him in the magistrate's G court will have been made. This, however, does not mean the trial has to start on that day without fail. It is desirable that it should, but regard should be had to the provisions of s 165 of the Act which provides for postponements where necessary.

Undue haste in bringing a person to trial could constitute an irregularity. The haste could be due to the refusal of an accused person's request H

2011 (2) ZLR p211

Uchena J

A for a postponement to enable him to prepare for the trial or to engage the services of a legal practitioner. It could also be due to the trial proceeding without complying with the requirements of a fair trial. However, in the absence of a valid request for the postponement of the pending trial, and if the trial complies with the requirements of a fair trial, a magistrate's court can proceed with an accused person's trial B on the "next possible court day", as provided by s 163. A magistrate's failure to ask the accused if he needs the services of a legal practitioner is, on its own, not a ground for upsetting the conviction. However, if the accused applies for a postponement, the magistrate would err if he ignores the accused's request and orders the trial to proceed in spite of C such a request, as the request would have been made on the accused's first appearance in court.

In terms of s 278(11) of the Act, an affidavit is admissible in evidence if three days' notice has been given or if the accused consents to its production without his having been given such notice. The consent of an unrepresented accused person can only be valid if his right to such notice is explained D to him before he is asked whether or not he consents to its production without the requisite notice. It is not enough to merely ask if he consents to the production of the affidavit, as there is need for him to consent to its production in general and to consent to its production without the statutorily required three days notice of its production. If the affidavit is produced without the requisite notice or consent, it will not have been E properly produced and cannot be used as evidence against the accused.

It would not be proper for an appeal court to refer a criminal case to the trial court for trial *de novo* where the evidence led before the first trial was not such as would sustain a conviction.

Cases referred to F

S v Dube & Anor 1988 (2) ZLR 385 (S)

Legislation considered

Criminal Procedure And Evidence Act [*Chapter 9:07*], ss 163 & 278(11)

High Court Act [*Chapter 7:06*], ss 29(2)(b)(v), 35 & 41(d) & (h)

Case information

G *C Mavhondo*, for the appellant

Mrs *S Fero*, for the respondent

Judgment

UCHENA J: The appellant was convicted on a charge of contravening s 3(1)(a) of the H Sexual Offences Act [*Chapter 9:21*]. He appealed to this court against

Uchena J

both conviction and sentence. After hearing submissions from counsel for A the parties, we upheld his appeal and set aside his conviction and sentence. We indicated that our reasons for judgment would follow. These are they.

The appellant fell in love with the complainant, who was then aged thirteen. Early in the morning of 17 April 2006, he invited her to his house where it is alleged he raped her. He was charged with rape, but was convicted of B contravening s 3(1)(a) of the Sexual Offences Act. He was convicted by a regional magistrate sitting at Harare regional magistrate court, who sentenced him to 36 months' imprisonment of which 12 months were suspended on conditions of good behaviour.

The appellant appealed to this court against conviction and sentence. His appeal against conviction is based on irregularities and evidential deficit C . On irregularities, the appellant alleged that his trial was fast tracked to his prejudice and the State failed to produce the complainant's first statement to the police, in which she denied having been raped by the appellant. Mr *Mavhondo* also challenged the medical report on the ground that it was produced without giving the appellant three days' notice, as required by D s 278(11) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], and without seeking his consent for its production without the requisite notice.

On the evidential deficit, Mr *Mavhondo* submitted that the trial court erred by relying on the evidence of the complainant, who came to court with visible injuries, having been assaulted by her uncle for this case. He submitted that the complainant had freely and voluntarily made an initial statement to the E police, denying having been raped by the appellant. He submitted that the complaint was examined by a doctor four days later and the report does not state that the appellant is the one who had sexual intercourse with her. He also argued that there was no basis for the magistrate preferring the complainant's and her uncle's evidence to that of the appellant and his witness. F

Irregularities

Mr *Mavhondo* raised two main grounds on which he alleged that there were irregularities in the appellant's trial before the court *a quo*. He submitted that the case was unduly fast tracked and the doctor's report on the complainant was improperly produced G .

Mr *Mavhondo* submitted that the appellant was brought to court by the police and his case was heard on the same day. This is not disputed by the respondent. It is in fact confirmed by the record of proceedings. The issue is simply whether or not it is permissible to fast track trials in the magistrates court in the manner the appellant's trial was conducted. The fast tracking of cases started in the early 1990s as a means of reducing the courts' backlog. H

Uchena J

A It is not specifically provided for by that name in the Criminal Procedure and Evidence Act, which I will refer to in this judgment as "the CP&E Act". This, however, does not mean it is an unlawful procedure. It is in fact a useful procedure which, if well managed, helps to contain and or reduce the courts' backlogs of criminal cases, and ensures the delivery of timeous justice. All that has to be done is to ensure that it is used in compliance with B the provisions of the CP&E Act and other laws which provide for a fair trial.

Section 163 of the CP&E Act provides for the timing of an accused person's trial in the magistrates court as follows:

> "Any person to be prosecuted on a criminal charge in a magistrates court shall be brought for trial at the next possible court day."

C This, in my view, means that when an accused person is arrested and is to be prosecuted in the magistrates court, he shall be brought to trial on the next possible court date, which means on the day when the court will be sitting next after the decision to prosecute him in the magistrates court will have been made. This, however, does not mean the trial has to start on that D day without fail. It is desirable that it should, but regard should be had to the provisions of s 165 of the Act which provides for postponements where necessary. The provisions of s 163 are, therefore, in general consistent with the fast tracking of trials in the magistrate's court. The wording is such as can justify the trial of an accused person once he is brought beforea magistrate.

John Reid Rowland *Criminal Procedure in Zimbabwe* commenting on s 163 E of the CP&E Act, says at p 15-3:

> "This does not necessary mean that his trial will take place on that date; it may very well be postponed. Undue haste in bringing a case to court may be prejudicial to the accused and thus constitute an irregularity".

Undue haste can be due to the refusal of an accused person's request for a F postponement to enable him to prepare for the trial or to engage the services of a legal practitioner. It can also be due to the trial proceeding without complying with the requirements of a fair trial. In the absence of a valid request for the postponement of the pending trial, and if the trial complies with the requirements of a fair trial, a magistrates court can proceed with an accused person's trial on the "next possible court day", as provided by s 163.

G In the present case, Mr *Mavhondo* argued that the trial court should have asked the appellant, who was facing a serious charge of rape, whether or not he wanted to be legally represented and, if he had said he did, the case should have been postponed for that purpose. He argued that the fact that the appellant needed the services of a legal practitioner is confirmed by H his engaging one on the following day, but when his trial had already been

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Uchena J

completed. He submitted that the appellant's friend discovered that the A appellant was being tried without legal representation, and arranged for it. He also submitted that the appellant was not given three days' notice for the production of the doctor's report, and that, even though he consented to the production of the report, he did so without having been advised that he was entitled to three days' notice of its production. B

Every accused person is ideally entitled to legal representation at his trial. This becomes more compelling if he is facing a serious charge for which, if convicted, he can be sentenced to a long term of imprisonment. Generally, such legal representation would be at the accused's own expense. It is only in exceptional cases that a magistrate may be required to order legal representation through the legal aid system. Judicial officers should, in C appropriate cases, ask the accused person if he needs the services of a legal practitioner at his own expense. Justice can, however, still be done if the trial magistrate ensures that justice is done by making sure the trial complies with the statutory requirements for a fair trial. This issue was dealt with by the Supreme Court in *S v Dube & Anor* 1988 (2) ZLR 385 (S) at 392H-393F, D where Dumbutshena CJ, without laying down a hard and fast rule, said:

> "In our view judicial officers trying such cases should ask themselves three questions:
>
> 1. Where the accused has pleaded guilty, would it be appropriate nonetheless to enter a plea of not guilty in terms of the provisions of s 255A of the Criminal Procedure and Evidence Act? E
> 2. Where the accused is unrepresented, would it be fair and appropriate to advise him of the complexities of the matter and enquire whether he has considered obtaining legal representation?
> 3. If satisfied that the accused should have legal representation but cannot afford it, should the court certify that he should have legal representation in terms of the provisions of s 3 of the Legal Assistance and Representation F Act [*Chapter 66*], as amended by s 2 of Act 21 of 1974?
>
> We do not mean to suggest, far less to lay it down as a rule of practice, that magistrates should recommend legal aid in every case where a long sentence is possible. In most cases a plea of guilty is quite clear and unequivocal, and the procedures laid down in s 255 will ensure a fair hearing. Equally, there will

be many cases where a fair hearing can be ensured by using the procedure set out in s 255A and changing the plea to 'not guilty' so that questions of law and G admissions of fact can be explored and clarified (see *S v Nyamweda* 1983 (1) ZLR 131 (S); *S v Malili & Anor* 1988 (4) SA 620 (T)).

Finally, there will be some cases where it will be enough for the magistrate to explain the complexities and enquire whether the accused does not want to engage legal representation at his own expense. This should be done at the earliest possible stage, ideally when the accused is first remanded. It will thus only be H

2011 (2) ZLR p215

Uchena J

A in a minority of cases that the magistrate will conclude that there cannot be a fair trial without representation. In such cases his duty is to act in terms of *Chapter 66* and recommend legal aid. Even then, of course, an accused person can waive his right to representation, provided, he does so on a properly informed basis."

B I am therefore satisfied that the magistrate's failure to ask the appellant if he needed the services of a legal practitioner is not, on its own, a sound ground for upsetting the appellant's conviction. The commencement of the trial without affording the appellant a postponement for him to engage the services of a legal practitioner is also not an irregularity as the appellant had not asked for a postponement. He had in fact come to court with his witness who testified. C He was apparently ready for the trial. If he had applied for a postponement, the magistrate would have erred if he had ignored the appellant's request and ordered the trial to proceed in spite of such a request, as the request would have been made on the appellant's first appearance in court. A refusal could not have been justifiable in those circumstances.

The issue of substance, which was dwelt on towards the end of the appeal D hearing, is the magistrate's failure to observe the requirements of s 278(11) of the CP&E Act. Mr *Mavhondo* submitted that the appellant's trial was conducted with such haste that his right to three days' notice before the production of the doctor's report on the complainant's examination was not complied with. Mrs *Fero* for the respondent conceded that the appellant was E not given three days' notice of the State's intention to produce the doctor's report, and that his consent to its production without such notice was not sought. It was also conceded that the law on the production of such documents was not explained to the appellant. The concessions were properly made as the magistrate's omissions are apparent from the record of proceedings. F Section 278(11) of the Act provides as follows:

"(11) An affidavit referred to in this section shall not be admissible unless the prosecutor or the accused, as the case may be, has received three days' notice of its intended production or consents to its production."

In terms of s 278(11), two things must happen for the affidavit to be admissible in evidence. The three days' notice should have been given or the appellant G should have consented to its production without his having been given such notice. The consent of an unrepresented accused person can only be valid if his right to such notice is explained to him before he is asked whether or not he consents to its production without the requisite three days' notice. It is not enough to merely ask if he consents to the production of the doctor's report, as there is need for him to consent to its production in general and to H consent to its production without the statutorily required three days' notice

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2011 (2) ZLR p216

Uchena J

of its production. If the affidavit is produced without the requisite notice A or consent, it will not have been properly produced and cannot be used as evidence against the accused.

In this case, the doctor's affidavit on the examination of the complainant was not properly produced. That evidence was not properly before the trial court. Its use in convicting the appellant should therefore affect the regularity of B the proceedings and the propriety of the conviction. Its production without the requisite three days' notice or his informed consent is an example of the court proceeding with a trial with undue haste, to the prejudice of the appellant. This is an example of how fast track trials should not be conducted.

Mrs *Fero* submitted that in the circumstances the appellant's conviction C and sentence should be set aside and the case be referred back to the trial court for trial *de novo*. She submitted that this court

could use its review powers in terms of s 35 of the High Court Act [*Chapter 7:06*] to do so. Mr *Mavhondo* agreed with her.

Section 35 of the High Court Act provides as follows:

> "When an appeal in a criminal case, other than an appeal against sentence only, D has been noted to the High Court, the Attorney-General may, at any time before the hearing of the appeal, give notice to the registrar of the High Court that he does not for the reasons stated by him support the conviction, whereupon a judge of the High Court in chambers may allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives and E without their appearing before him."

The procedure provided by s 35 is not applicable in this case as it refers to concessions made by the Attorney-General "before the hearing of the appeal", and such concessions are channeled through the registrar for consideration by a judge in chambers. When we brought this to the attention of Mrs *Fero* F and Mr*Mavhondo* they both agreed that s 35 was inapplicable and urged us to use our common law review powers. While it is correct that this court has inherent jurisdiction and can use it to refer this case back to the trial court for trial *de novo*, s 41(d) and (h), as read with s 29(2)(b)(v) of the High Court Act, gives this court supplementary powers to deal with a situation such as G has arisen in this case. Section 41(d) and (h) provides as follows.

> "For the purposes of this Part, the High Court may, if it thinks it necessary or expedient in the interests of justice –
>
> (a) …;
>
> (b) …;
>
> (c) …; H

Uchena J

> (d) having A set aside the conviction, remit the case to the court or tribunal of first instance for further hearing, with such instructions as regards the taking of further evidence or otherwise as appears to it necessary;
>
> (e) …;
>
> (f) …;
>
> (g) …; B
>
> (h) exercise any of the powers of review conferred upon the High Court by section *twenty-nine*:
>
> Provided that, whenever the High Court receives further evidence or gives instructions for the taking of further evidence, it shall make such order as will secure an opportunity to the parties to the proceedings to examine every witness whose evidence is taken."

C Section 29(2)(b)(v) provides as follows:

> "(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings —
>
> (a) …;
>
> (b) are not in accordance with real and substantial justice, it may, subject to D this section —
>
> (i) alter or quash the conviction; or
>
> (ii) reduce or set aside the sentence or any order of the inferior court or tribunal or substitute a different sentence from that imposed by the inferior court or tribunal:
>
> E Provided that –
>
> (i) …;
>
> (ii) …
>
> (*a*) …
>
> (*b*) …
>
> or F
>
> (iii) … or
>
> (iv) … or
>
> (v) remit the case to the inferior court or tribunal with such instructions relative to the further proceedings to be had in the case as the High Court thinks fit …"

G This court can therefore act either in terms of s 41(d) or (h) if it finds it appropriate to refer the case back to the trial court. This, however, depends on our findings on the appellant's grounds of

appeal on evidential deficit. It is, in my view, not proper to refer a case back to the trial court for trial *de novo* when the evidence led before the first trial was not such as would sustain a conviction. This would be tantamount to sending the appellant for another H

trial in circumstances where he should have been acquitted at the first trial.

2011 (2) ZLR p218

Uchena J

[The learned judge then gave his reasons for finding the prosecution evidence A unreliable and the appellant's evidence probable, and concluded:]

It is for these reasons that we upheld the appellant's appeal and set aside his conviction and sentence.

MWAYERA J concurred. B

Sawyer &Mkushi, appellant's legal practitioners

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

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Source:
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MUCHINI v ADAMS & ORS 2011 (2) ZLR 219 (H)

2011 (2) ZLR p219

Citation	2011 (2) ZLR 219 (H)
Case No	Judgment No. HH-208-11
Court	High Court, Harare
Judge	Hlatshwayo J & Karwi J
Heard	5 October 2011
Judgment	5 October 2011
Counsel	*P Nyeperayi*, for the appellant *J Mutonono,* for the second and third respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Administration of estates – *estate property – disposal of before executor appointed – when property may be disposed of – purposes for which property may be disposed of*

Headnote

The appellant bought a house which was part of a deceased estate. The D deceased had died intestate and his widow sold the house, although no executor had by then been appointed. The appellant moved in but did not pay for the house. The widow then sought an eviction order, on the grounds that the sale was invalid.

Held, that in terms of s 21 of the Administration of Estates Act [*Chapter 6:01*], it was the widow's duty to keep custody of the property until E the appointment of an executor or executor dative. In terms of s 41 of the Act, a person who takes it upon himself to administer a deceased estate outside the provisions of the Act becomes personally liable to the creditors for all debts due by the estate should there be a shortfall in the payment of such debts. That person is only excused from such F personal liability if his actions were "absolutely necessary" for, among other things, the subsistence of the family or household. It would thus be permissible to use estate property for, *inter alia*, providing a suitable funeral for the deceased, providing for the subsistence of the deceased's family or household, or the safe custody or preservation of any part of such property, e.g, it may be necessary to purchase feed for cattle. In G this case, the facts did not show that the house was sold in circumstances which satisfied the exception provided by s 41of the Act. The sale thus violated s 21 of the Act.

Legislation considered

H Administration of Estates Act [*Chapter 6:01*], ss 21& 41

2011 (2) ZLR p220

Hlatshwayo J

Case information

P Nyeperayi, for the appellant A

J Mutonono, for the second and third respondents

Judgment

HLATSHWAYO J: The appellant bought from the first respondent, the surviving spouse of the late Alvin Adams, an immovable property, being a certain piece of land in the District of Victoria, Lot 13 of Glynham, also B known as 21 Glynham Road, Masvingo ("the property").

The key developments in this matter can be summarized as follows:

(a) On 9 July 2004 Alvin Adams, the legal owner of the property, died intestate, leaving behind a widow, the first respondent, and three children, all majors. C

(b) Almost a year later, the widow approached the legal firm, Mwonzora and Partners, to help her sell the property and on 7 July 2005 they found a buyer in the form of the appellant, who purchased the property for $350 000 000.

(c) The appellant took occupation of the property after evicting the widow D and her children and started renovating the house.

(d) The widow continued to press Mwonzora and Partners for release of the purchase price, but was told to look for another law firm to assist her as they were now representing the appellant, the purchaser.

(e) The widow's new lawyers, Robinson and Makonyere, wrote letters to the appellant informing him that he bought the property before the estate E was registered and was thus liable for eviction.

(f) On 8 February 2007, the appellant filed an *ex parte* application for an interdict to stop his threatened eviction. The interim relief was granted but onethe return date the rule *nisi* was discharged. It is against this dismissal of his application that the appellant now appeals. F

In his founding affidavit, the appellant submitted that the sale should be upheld because the widow or first respondent "had ostensible authority to dispose of the property by virtue of being the surviving spouse of the late Alvin Ro Adams". Now, in law, the applicant's case falls or stands upon what is said in the founding affidavit. It cannot be propped up by what may G appear in the first respondent's opposition. However, the issue of ostensible authority seems to have been abandoned during the proceedings in the court *a quo*. It certainly is not part of the grounds of appeal. On this basis alone, the conclusion would have been inescapable that the sale of the property fell foul of the

peremptory provisions of s 21 of the Administration of Estates Act [*Chapter 6:01*] ("the Act"), which states as follows: H

2011 (2) ZLR p221

Hlatshwayo J

> A "On the death of any person not being one of two spouses married in community of property, the spouse of the deceased or, in default or absence of the spouse, the child or children of the deceased .... shall secure and take charge of all goods and effects of whatever description belonging to the deceased and being in the house or upon the premises at the time of death, and shall retain the same in his or her custody and possession until delivery thereof is demanded by the executor of the deceased or by any other person lawfully appointed by the High Court or B any judge thereof or the Master, to receive delivery of the same."

It is therefore clear that the first respondent had no authority to deal with the property in the manner she did. Instead, she had to keep custody of the property until the appointment of an executor or executor dative. Can it, however, be said that her actions are saved by the provisions of s 41(a) of C the same Act?

Section 41 states thus:

> "41.If –
>
> (a) before letters of administration are granted by the Master to any executor for the administration of any estate, any person takes upon himself to administer, distribute or in any manner dispose of such estate or any part thereof, except D in so far as may be authorised by a competent court or by the Master *or may be absolutely necessary for the safe custody or preservation thereof or for providing a suitable funeral for the deceased or for the subsistence of the family or household or livestock left by the deceased; or*
>
> (b) ...
>
> every such person shall thereupon become personally liable to pay to the creditors E and legatees of the deceased all debts due by the deceased at the time of his death or which have thereafter become due by his estate, and all legacies left by the deceased in so far as the proceeds and assets of such estate are insufficient for the full payment of such debts and legacies." (emphasis added)

Thus, s 41 merely elaborates on some of the penalties imposed upon those who take it upon themselves to administer deceased estates outside the F provisions of the Act. They become personally liable to the creditors for all debts due by the estate should there be a shortfall in the payment of such debts. They are only excused from such personal liability if their actions were "absolutely necessary" for, among other things, the subsistence of the family or household. It was submitted on behalf of the appellant that sales G conducted pursuant to the exceptions in s 41 are not void and D Meyerowitz *The Law and Practice of Administration of Estates* 5 ed pp 65-66 was cited to the following effect:

> "The obligation of the person in possession to retain possession of the property does not prevent the disposal of any such property for the *bona fide* purpose of –
>
> (a) providing H a suitable funeral for the deceased,

2011 (2) ZLR p222

Hlatshwayo J

> (b) providing for the subsistence of the deceased's family or household, A
>
> (c) the safe custody or preservation of any part of such property, e.g, it may be necessary to purchase feed for cattle."

This appears to be a correct position at law. However, the facts of this case do not show that the property was sold in circumstances which satisfy the exception provided in s 41. For a start, it was not the appellant's submission B in his founding affidavit. The appellant cannot then build its case on this chance mention of family hardship.

Secondly, the statements by second respondent in her opposing affidavit that when the deceased died "the family was left in a crippled financial position" and that "my mother was desperately in need of money" do not prove that the sale was "absolutely necessary" for the upkeep of the family. At any rate, C the family had survived for almost a year since the death of the breadwinner.

Accordingly, the court *a quo* did not misdirect itself in holding that the sale of the house violated s 21 of the Act and was not saved by the exception in s 41. In the light of this finding, there is no need to examine the other requirements for the granting of an interdict. D

In the premises, this appeal is dismissed with costs. The conduct by Mwonzora and Partners in representing both parties in this matter be and is hereby referred to the Law Society of Zimbabwe for its investigation.

Karwi J concurred. E

Costa and Madzonga, appellant's legal practitioners

Chadyiwa & Associates, first, second and third respondents' legal practitioners. F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/KHB ESTATES (PVT) LTD & ANOR v PAMBUKANI & ORS 2011 (2) ZLR 223 (H)

KHB ESTATES (PVT) LTD & ANOR v PAMBUKANI & ORS 2011 (2) ZLR 223 (H)

Citation	2011 (2) ZLR 223 (H)
Case No	Judgment No. HH-209-11
Court	High Court, Harare
Judge	Mavangira J
Heard	1 September 2011;7 September 2011;9 September 2011; *CAV*
Judgment	5 October 2011
Counsel	*T Mpofu*, for the applicants *T Dzvetero*, for the respondent *S Chihuri* (with him *T Mashiri*), for the third respondent, on 1 September *S Maposa*, for the third respondent (at hearings after 1 September) No appearance for the fourth respondent
Case Type	Civil action
Annotations	No case annotations to date

Flynote

C **Land** – *acquisition of land by State – application by former owner to be restored to possession thereof – locus standi – former owner having no authority to occupy such land and no locus standi to bring such application*

Practice and procedure– *application – urgent application – certificate of urgency – legal practitioner's duties – need for practitioner to apply his mind to contents of certificate and believe matter to be urgent*

Headnote

D When issuing a certificate of urgency, a legal practitioner must state his own belief in the urgency of the matter. He is not permitted to make as his certificate of urgency a submission in which he is unable conscientiously to concur. He has to apply his own mind and judgment to the circumstances E and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. It is an

abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent. It is equally an abuse for a lawyer to put his name and affix his signature to a certificate the contents of which he has not addressed F his mind to.

The owner of land which has been lawfully acquired by the State has no locus standito bring a court application to be restored to the occupation,possession and use of such land, as he is no longer the owner of the land. Further, such a person has no authority to occupy, possess or use the land in terms of the Gazetted Land (Consequential Provisions) Act G [*Chapter 20:28*]. He would be guilty of a criminal offence and no court can authorize a person to commit a criminal offence**.**

Cases cited

General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd 1998 (2) ZLR 301 (H)

H *CFU & Ors v Min of Lands* 2010 (2) ZLR 576 (S)

2011 (2) ZLR p224

Mavangira J

Legislation considered A

High Court Rules 1971 (RGN 1047 of 1971), rr 4C, 229A & 244Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*], s 3

Case information

T Mpofu, for the applicants

T Dzvetero, for the respondent B

S Chihuri (with him *T Mashiri*), for the third respondent, on 1 September

S Maposa, for the third respondent (at hearings after 1 September)No appearance for the fourth respondent

Judgment

MAVANGIRA J: The first applicant is the former owner of Wakefield Farm, C Chegutu, measuring 688.64 hectares in extent. The second applicant resides on a portion of the farm measuring 353.06 hectares. The first respondent is the holder of the offer letter in respect of sub-division 2 of Wakefield, 280 hectares in extent.

The first respondent, through his legal practitioners, issued out a writ for the ejectment of the applicants from subdivision 2 of Wakefield Farm. The writ D was predicated upon an order issued by the second respondent in which leave was granted to execute the applicants' ejectment notwithstanding the noting an appeal to the High Court against the judgment. When the application was filed the relief sought was stated as follows:

" DRAFT ORDER E

IT IS ORDERED

1. That the judgment and order of ejectment of the second applicant from "a residence" on Sub-Division 2 of Wakefield Farm, Chegutu District handed down by the second respondent on 7 July 2011 under Chegutu Case No 1379/10 be and is hereby set aside in its entirety.
2. That the judgment handed down by the second respondent concerning leave F to execute an ejectment against the second applicant and all other persons claiming occupation of Sub-Division 2 of Wakefield Farm Chegutu on 29 July 2011 be and is hereby set aside in its entirety.
3. That it be and is hereby declared that the Writ of Ejectment marked Annexure 'F' to this application is invalid and of no force or effect for G want of compliance with the Order of the second respondent rendered on 7 July 2011 and additionally by reason of the incompetence of such order and Judgment.
4. That the costs of this application be paid by the first respondent**."**

By the time that the respondents' opposing papers were filed, the applicants had already been ejected from the farm. At the hearing the applicant's counsel H

2011 (2) ZLR p225

Mavangira J

A with the consent of the other parties, filed an amended order, which this time was in the form of a provisional order. The relief sought is:

" TERMS OF THE FINAL ORDER SOUGHT

That you show cause why the following order should not be made, that,

1. The execution of the ejectment order from the Chegutu Magistrates Court granted under case number 1379/10 be and is hereby stayed pending the B determination of the review proceedings filed of record under case number HC8104/11.
2. Respondents shall not take any such steps as may prejudice the rights of the applicants which rights may be confirmed or restated under case number HC8104/11 and shall not take any such steps as may interfere with the operations of the applicants at their portion of Wakefield Farm C
3. First respondent shall pay costs of suit

INTERIM RELIEF GRANTED

Pending the determination of this matter on the return date it is ordered that

Applicants be and are hereby restored to occupation, possession and use of a portion of Wakefield Farm which comprises dwelling and other D immovable structures from which they were evicted pursuant to an order of the court of the Magistrate's sitting at Chegutu which is now the subject of an application for review under case number HC8104/11."

It is the applicant's contention that they are entitled to the relief that they seek because the second applicant has had meetings with the then acting Minister of Lands and in those meetings the second applicant was advised E that on 22 August or soon thereafter, a decision would be made at Presidential level as to which area he should continue to operate on. They also contend that at the said meetings the second applicant was advised that proceedings for his ejectment before the Chegutu Magistrates Court should be stayed. Notably, the proceedings before the magistrate's court at Chegutu were in F fact not stayed. Secondly, by the time that this matter was heard in chambers, 22 August had since passed and there was no indication that either of the applicants had since been issued with lawful authority to remain in occupation of the piece of land in issue.

The first respondent's legal practitioner, on the other hand, contended that there were preliminary issues that the court had to consider first and on the G basis of which there would be no justification for the applicant to be heard on the merits. The first such preliminary issue was that the matter ought not to be heard on urgent basis as the certificate of urgency does not comply with the rules of court.

The certificate of urgency dated 19 August 2011 and authored by a legal H practitioner reads in part:,

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Mavangira J

"I am a legal practitioner of this Honourable Court…. A

I consider this application for stay of execution pending the outcome of review proceedings, to be lodged at the same time as this application, to be urgent in that:My ejectment from a portion of Wakefield Farm and ejectment of my workers and their families – numbering 500 or more persons – is imminent;

Neither my workers or myself have alternate places of residence or means to B a livelihood. Irreparable damage and harm will be occasioned if execution is allowed to continue notwithstanding the noting of appeals and the review of the magistrates decisions mentioned in the review application which accompanies this application (sic);

A continuation of the magistrates court ejectment process will also subvert a current administrative decision by the Minister and other Government officials to confirm or regulate my stay on a portion of Wakefield which determination C is set to take place next week at Presidential level as indicated to me by the Minister of Lands and Resettlement on Thursday 18 August 2011."

The preliminary point that the certificate of urgency does not comply with the rules as it *inter alia* relates to the legal practitioner and his workers being about to be ejected is raised in para 6 of the first respondents opposing affidavit. No attempt is made in the applicants' answering papers to respond D to this point. Neither was any attempt made at the hearing to do so.

In *General Transport and Engineering (Pvt) Ltd and Others v Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 at 302E Gillespie J stated:

> "Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that invitation must not be E abused. He is not permitted to make as his certificate of urgency a submission in which he is unable *conscientiously* to concur. *He has to apply his own mind and judgment to the circumstances* and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. The reason behind this is that *the court is only prepared to act urgently on a matter where a legal practitioner is involved if a legal practitioner is prepared to give his assurance that such* F *treatment is required*" (emphasis added).

In casu it is not the legal practitioner's ejectment that is imminent. To that extent the certificate of urgency is of no relevance to the matter before the court. Alternatively, and this appears to be more probable, the legal practitioner did not apply his mind to the contents of the certificate of urgency when he G affixed his signature to it. In *General Transport and Engineering (Pvt) Ltd supra*, it was stated at 303A:

> "It is, therefore, an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent."

In casu, I would venture to say that it is equally an abuse for a lawyer to put his name and affix his signature to a certificate the contents of which he has. H

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Mavangira J

A not addressed his mind to. This, *in casu*, is taken in conjunction with the absence of an attempt to regularize or explain the contents of the certificate despite the raising of the issue by the first respondent in his opposing affidavit, that it related to the imminent ejectment of the legal practitioner and his workers and not to that of the applicants.

B Sight is also not lost of the fact that the certificate of urgency related to an application in which was sought, *inter alia*, a stay of execution of the ejectment order issued by the magistrates court at Chegutu. Yet the relief now being sought from this court is restoration to the applicants of occupation, possession and use of a portion of Wakefield Farm from which they were evicted pursuant to the order of the magistrates court. Thus, in addition to C earlier observations made herein, there is no certificate of urgency pertaining to the application now purportedly before this court. Furthermore, it is of significance that the second applicant states in para 12 of the founding affidavit:

> "Should the ejectment proceed, this will effectively amount to a final order." *

This statement was made when the application was for stay of execution. When the application was amended to seek different relief, the ejectment D referred to had in fact "proceeded" or taken place.

As stated in *General Transport and Engineering (Pvt) Ltd supra*, the extension of protection as a matter of urgency is relief available from this court as a matter of discretion. It appears to me, on a reading of the rules, that the consideration by the court whether or not to exercise that discretion E is triggered by the certificate of urgency by a legal practitioner. *General Transport and Engineering (Pvt) Ltd supra* also appears to confirm that position. If I am correct in this construction and also in the finding that there is no certificate of urgency pertinent to the application now before the court in consequence of the amendment of the relief sought, then there would be no basis for this court to consider whether or not there is justification for F exercising its discretion as to whether to treat this matter as urgent or not. On that basis, it would be incumbent upon this court to find that this matter is not urgent in the context provided for by the rules.

The second preliminary point raised by the first respondent was that the matter is not urgent as it has been overtaken by events in the form of the G actual ejectment of the applicants. Concession was made at the hearing that the amended order now sought disposes of the point.

The third preliminary point raised was that the matter is not urgent because there is no potential irreparable harm to the applicants. It was contended that no potential harm can be occasioned by the stopping of unlawful activities

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2011 (2) ZLR p228

Mavangira J

or the stopping of a criminal offence. Furthermore, that as the applicants A have no lawful authority as defined in the Gazetted Land (Consequential Provision) Act [*Chapter 20:28*] **,their continued

occupation amounts to a criminal offence. In the circumstances, the stopping of a criminal offence by the eviction of the applicants cannot occasion irreparable harm to

them.The applicants' contention, on the other hand, is that their occupation is not B unlawful in view of various documents in terms of which their occupation was sanctioned. It is stated that the said documents were furnished to the magistrate consequent to his decision to grant the first respondent leave to execute the applicants' ejectment. It appears to me that for this very reason, the applicants' contention becomes undone. In *Commercial Farmers Union* C & *Ors v Minister of Lands & Ors* 2010 (2) ZLR 576 (S) Chidyausiku CJ held that a court of law cannot authorise an individual to commit a criminal offence. *In casu* the magistrate's order that the applicants be evicted, as well as the decision granting the first respondent leave to execute pending appeal, are extant. They have not been set aside. In any event, documents that, as alleged, may have been furnished to the magistrate after he or she had D made his or her determination, would not have been properly before him or her and could not be relied on for any purpose. In the event, the applicants' contention has no basis and must fall away.

This, in my view, dovetails into the fourth preliminary issue raised by the first respondent, namely that the applicants have no *locus standi* to make E this application and the application for review as they are not the owners of the land. The applicants on the other hand contend that by reason their *de facto* possession and use of the property, buttressed by authority from the Minister, they have necessary *locus standi*.

The facts revealed by the papers before this court are that the land in question F was acquired by the State. The first respondent was issued with an offer letter. The applicants' allegation that they have lawful authority or alternatively that the third respondent has promised to regularize their occupation of the piece of land, is not borne out by the papers. In the opposing affidavit filed on behalf of the third respondent on 1 September 2011 the following G is stated *inter alia*:

> " 4. Ad paragraph 9-1
>
> The application is opposed on the grounds that there are no prospects of success on review. H

Mavangira J

> A 4. Ad paragraph 11-12
>
> It is not in dispute that the applicants have no lawful authority to remain on the property in question and lawful authority has been defined in the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] as an offer letter, permit or lease.
>
> 5.1 The applicants do not have any of these forms of lawful authority
>
> 5.2 They cannot seek to extend or legalize their stay through the courts.
>
> B 5. Ad paragraph 13
>
> Any deliberations regarding applicants' stay do not amount to lawful authority. Applicants should comply with the law and the magistrate's ruling which was in accordance with the law. Should the deliberations result in an offer letter, the applicants will be entitled to occupy and utilize the property in question."

C In the affidavit filed on 7 September 2011 on behalf of the Minister of Lands, the third respondent, the following is stated:

> "2. Following the request to clarify the position of the Ministry in the above matter, I reiterate that the Ministry supports the holder of an offer letter in his/her efforts to evict anyone from the land allocated to him/her.
>
> 3. While it is not in dispute that a meeting was held, it did not culminate in D the issuance of an offer letter to the applicant. If and when it does, he will then be authorized to occupy the property in question"

From the above, it is clear that the applicants have no lawful authority to remain in occupation of the piece of land. Not only has the third respondent said so, the magistrates court has so ordered.

E In *Commercial Farmers Union supra* Chidyausiku CJ stated at p 594:

> " It was submitted that some of the individual applicants and other former owners or occupiers of acquired land have court orders issued by the magistrates courts and the High Court authorizing their occupation of acquired land after the prescribed period. If such orders were issued, they would have the effect of authorizing the doing of something that Parliament has decreed should not be done. This court, F or any other court for that matter, has no jurisdiction to authorize the doing of that which Parliament has decreed would constitute a criminal offence."

On the basis of the above, it appears to me that the applicants have no *locus standi* to bring the instant application, being the application for the restoration of their occupation of the piece of land in issue. The application for review is not before me and I make no pronouncement in relation to it.

G In the result, I find that the matter is not urgent. In addition the applicants have no *locus standi* to bring this application. Consequently, I shall not consider the merits of the matter. With regard to the first respondents counter applications, Mr *Dzvetero* conceded that the first respondent's counter application ought to have, but did not comply with r 229A of the High Court Rules 1971. He H however urged the court to condone the non-compliance in terms of r 4C

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thereof. The problem with this request is that the papers are in such a state as A to cause confusion regarding which papers form the counter application. As the opposing papers are not paginated I am unable to refer to specific pages. But, there firstly appears an opposing affidavit which at the bottom of the fourth page has a heading "Counter Claim". Thereafter there is an annexure and immediately thereafter the "First Respondent's Notice of Opposition" B after which follows an opposing affidavit. It is also dated 31 August 2011 as the earlier opposing affidavit referred to. Attached to it are a number of Annexures. A certificate of urgency then follows. In my view this is not a proper matter for the invocation of r 4C. I find that the counter application is not properly before this court.

Gollop and Blank, applicant's legal practitioners C

Antonio and Associates, first respondent's legal practitioners

Civil Division of the Attorney-General's Office, third respondent's legal Practitioners D

* See r 244 of the High Court Rules, 1971 (RGN 1047 of 1971) – *Editor*.
** See s 3(3) – *Editor*.

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Source:
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CHURCH OF THE PROVINCE OF CENTRAL AFRICA & ORS v JAKAZI & ORS 2011 (2) ZLR 231 (H)

Citation	2011 (2) ZLR 231 (H)
Case No	Judgment No. HH-238-11
Court	High Court, Harare
Judge	Uchena J
Heard	4 October 2011; 6 October 2011; *CAV*
Judgment	10 October 2011
Counsel	*H Zhou,* for the applicants *T M Kanengoni,* for the respondents

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Property and real rights – *spoliation – order – entitlement to – counter-spoliation by person first despoiled – when may be defence to claim for spoliation order – need for counter-spoliation to be part of res gestae* D *– invoking assistance of police to regain property – not due process and not clothing repossession with legality*

Headnote

The parties, factions within the Anglican Church in Zimbabwe, had been involved in a long-running dispute. They had in 2009 consented to an order which allowed each party to remain in charge and control of the church property which was in their respective possession at the time of the consent order. The parties complied with the consent order until the applicants filed an urgent chamber application claiming that they had been despoiled of a particular church by the respondents. The evidence showed that the priest of that church died in May 2011. The church F warden retained the keys of the church and two other priests conducted services. In September 2011 the third and fourth respondents, priests in the respondents' faction of the church, approached the warden and demanded the keys. When he refused, they sought the assistance of the police who forced the warden to hand over the keys. The applicants sought G a spoliation order. The respondents resisted. They claimed that they had possession of the church before the consent order was granted and that their action was an act of "counter-spoliation", an immediate reaction to the applicants' act of unlawfully depriving them of their possession of the church, after the death of the incumbent priest.

Held, that the evidence supported the applicants' contention that their faction H of the church was in possession of the church on the death of the priest.

2011 (2) ZLR p232

Held, further, that to prevent potential breaches of the peace, the law enjoins A the person who has been despoiled of his possession, even though he is the true owner with all rights of ownership vested in him, not to take the law into his own hands to recover his possession: he must first invoke the aid of the law. If the recovery is *instanter,* in the sense of being still a part of the *res gestae* of the act of spoliation, then it is a B mere continuation of the breach of the peace which already exists and the law condones the immediate recovery. However, if the dispossession has been completed, then the effort at recovery is not done *instanter* but is a new act of spoliation which the law condemns.

Held, further, that here, had the respondents' spoliation been completed by the time they discovered it, they would not be entitled to the defence of C counter-spoliation, as that defence can only be successful if it is *in stanter* and forms part of the *res gestae* of original spoliation. If the victim of the first act of spoliation fails to act *instanter* and takes the law into his own hands to regain possession of the thing after the dispossession has been completed, his conduct would constitute a new breach of the peace D and would be regarded as a separate act of spoliation, entitling the first spoliator to a spoliation order against him. The tussle for the keys took place long after the alleged first spoliation and could not be a basis for a defence of counter-spoliation. Counter-spoliation can only succeed if the despoiled party acts by resisting the on-going spoliation.

Held, further, that the use of the police in the dispossession of the applicants E did not clothe the respondents' conduct with legality, as dispossession must be through the due process of the law.

Cases cited

Abbott v von Theleman 1997 (2) SA 848 (C)

de Beers v Firs Invstms Ltd 1980 (3) SA 1087 (W) F

Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-operative & Ors 1999 (2) ZLR 19 (S)

Mans v Loxton Municipality and Another 1948 (1) SA 966 (C)

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

Ness & Anor v Greef 1985 (4) SA 641 (C)

Three Musketeers Properties (Pty) Ltd & Anor v Ongopolo Mining & Processing Ltd & Ors [2008] NASC 15 (NmS)

Case information

H Zhou, for the applicants

T M Kanengoni, for the respondents

Uchena J

Judgment

UCHENA J: The first applicant is the Church of the Province of Central Africa, commonly known as the Anglican Church. The second applicant is the first applicant's Board of Trustees charged with the responsibility of looking after diocesan property in its Manicaland Diocese. The third applicant is the first applicant's warden at All Saints Zimunya Church.

The first respondent is the Bishop of the Diocese of Manicaland for a faction of the first respondent now affiliated to the Anglican Church in the Province of Zimbabwe. The second respondent is a Board of Trustees for the Diocese of Manicaland falling under the first respondent's faction. The third to the fifth respondents are ministers in the first respondent's faction.

The parties had, on 12 October 2009, appeared before Bhunu J in HC 4804/09, before whom they consented to an order which allowed each party to remain in charge and control of the church's property which was in their respective possession at the time of the consent order. The parties complied with the consent order until the applicants filed an urgent chamber application claiming that they had been despoiled of their All Saints Zimunya Church by the respondents.

The applicants narrated their dispossession through the supporting affidavit of Musiiwa Mwashita, the third applicant. He explained how the third and fourth respondents approached him demanding the keys for the All Saints Zimunya church. He refused to give them possession of the church, after which the respondents sought the help of the police, who helped them to force the third applicant to surrender the keys to them. After they had been despoiled the applicants sought the co-operation of the respondents in returning the church to them through their lawyers, who wrote to the respondents' lawyers. When the last letter was not responded to by the date the applicants' lawyers had given as the deadline for the respondents' response, they filed this urgent application.

In their opposing papers, the respondents do not dispute that they dispossessed the applicants in the manner explained by Mwashita, but claim that they had possession of the Zimunya church when the parties entered into the consent order before Bhunu J. They claim to have been acting in counter-spoliation when they dispossessed the applicants as alleged in Mwashita's supporting affidavit. They sought to prove that by tendering documents in which the Zimunya priest communicated with the first respondent and his predecessors, and a voucher through which the priest was paid a stipend by the respondents' faction.

The applicants filed an answering affidavit through which they disputed the respondents' allegation that they had possession of the Zimunya church at the

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time the consent order was entered into. They produced documents which prove that the Zimunya priest, the Reverend Rondozai, was in their faction. They also filed a supporting affidavit by Rev Rondozai's widow in which she categorically denied that she and her husband were in the respondents' faction. A parishioner, Agnes Chipangura, also deposed to an affidavit in which she stated that Rev Rondozai was in the applicants' faction. She also stated that the Zimunya parish has always been under the applicants until the respondents despoiled them.

The evidence in the applicants' affidavits tends to support their claim that they always had possession of the Zimunya church. This is especially so in view of the affidavits of Moreen Virginia Rondozai, Musiiwa Mwashita, Agnes Chipangura and Reverand Chigwanda. These are persons who are directly C connected with the Zimunya church and are expected to know under whom their parish was operating. Mrs Rondozai was the deceased Rev Rondozai's spouse. She and her husband were shepherding the parish. She cannot be mistaken as to which faction they pledged their loyalty. She is supported by the parishioners, Mwashita and Agnes, and the fact that the respondents had to force Mwashita to give them the keys to the church. The applicants' D position is strengthened by the respondents' failure to explain convincingly how, if they had always been the possessors of the Zimunya Church, they ended up having to force the church's warden to give them the keys. There is also no explanation as to why Mrs Rondozai with the concurrence of other parishioners would turn against them. The probabilities favour the applicants' E claim that they were despoiled by the respondents.

The affidavit of Rev Chigwanda confirms that the Zimunya parish was being administered by the applicants through himself and Rev Waiziweyi as they alternated in conducting Sunday services at the All Saints Zimunya church. This raises the question of why the respondents would have allowed this to happen from the time Rev Rondozai died in May 2011 till 6 September 2011. F The respondents said they had appointed a priest to work with Rev Rondozai because of his ill health. They did not have the confidence of stating his name. More importantly, they do not say where he was for the keys to end up in the custody of the church's warden. This also raises questions as to how if there was an assistant priest Revs Chigwanda and Waiziweyi could have G been conducting services at this church since the death of Rev Rondozai.

The documentary evidence also favours the applicants' position. There is Annexure G, a declaration of allegiance to the applicant by Rev Rondozai, dated 27 June 2008, which is supported by his wife's affidavit. The fact that it is dated June 2008 means, by the time the parties entered into the consent order, the applicants had possession of the Zimunya church. There H

Uchena J

A is Annexure H, the contract of employment between the applicants and Rev Rondozai, dated 22 November 2009. This contract was entered into soon after the consent order of 12 October 2009. It seems the applicants went through the allegiance and contracts of employment, confirming who was and was not on their side. Annexure I, dated 1 December 2009, proves that the applicant issued Rev Rondozai with a licence to officiate in the Anglican B Diocese of Manicaland at All Saints Zimunya Chapelry.

On the other hand, all the respondents could do to prove Rev Rondozai's allegiance to them was tendering Annexure D, a petty cash voucher for the payment of a stipend to him, dated 17 April 2009, and Annexure F, a letter dated 15 January 2008, in which the first respondent advised Rev Rondozai of his C appointment of an interim priest because of Rev Rondozai's ill health. While Annexure D tends to show the respondents could have paid Rev Rondozai on 17 April 2009, it is not supported by documents proving persistent and continuous payments to prove that Rev Rondozai was their priest. Mr *Zhou,* for the applicants, submitted that at the beginning of factionalism papers from D one faction could have found their way to the other faction. This renders the solitary proof of payment to be of limited or no value. The letter on the appointment of the interim priest came from the first respondent. There is no proof that it was received at the Zimunya church. It is thus not a strong link between the respondents and Rev Rondozai. It pales into insignificance, when viewed in the light of the priest's name not being given and there being E no evidence of such priest having been posted to the All Saints Zimunya church. The other documents tendered refer to periods before factionalism started and are not relevant to the determination of this application.

The facts of the case, therefore, favour the applicants' application, but the application cannot be determined without considering Mr *Kanengoni's* F submission that the respondents' conduct is nothing more than a counter-spoliation, an immediate reaction to the applicants' act of unlawfully depriving them of their possession of the church, after the death of Rev Rondozai. This submission was premised on the first respondent's deposition that his faction was in charge of the Zimunya church when the parties entered into a consent order before Bhunu J, and that the applicants took advantage of G Rev Rondozai's death to despoil his faction of that possession.

Mr *Kanengoni,* for the respondents, submitted that counter-spoliation is a recognised defence to an application for a spoliation order. He relied on the Namibian case of *The Three Musketeers Properties (Pty) Ltd & Another v Ongopolo Mining and Prossessing Ltd & Others* [2008] NASC 15 (NmS), H in which Mutambanengwe AJA at p 19 to 20 of the judgment said:

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> "Smits AJ cited a number of cases in support of his statement at p 44 of his A judgment that counter-spoliation is accepted by the common law as a defence to an act of spoliation , to mention but one, in *Mans v Loxton Municipality and Another* 1948 (1) SA 966 (C) Steyn J considered the question at length (pp 976-978) citing a number of authorities including common law writers on the subject to illustrate various formulations of the doctrine (van Leeuwen; Voet; Salkowski; Savigny and Huber) and ended with the following statement (at B 977- 978)
>
> > 'Breaches of the peace are punishable offences and to prevent potential breaches the law enjoins the person who has been despoiled of his possession even though he be the true owner with all rights of ownership vested in him, if the recovery is *instanter* in the sense of being still a part of the *res gestae* of the act of spoliation then it is a mere continuation of the breach of the peace which already exists and the law condones the immediate C recovery, but if the dispossession has been completed, as in this case where the spoliator, the plaintiff, had completed his rescue and placed his sheep in his lands, then the effort at recovery is, in my opinion, not done *instanter* or forthwith but is a new act of spoliation which the law condemns'
>
> Smuts AJ pointed out that in *Ness and Another v Greef*, *supra*, a full bench at 648 approved of a statement by van der Merwe in *Sakereg* at 93 'that a court D has a wide discretion to approve an act of counter-spoliation and to refuse the original spoliator against the original possessor' and 'in that matter even though a period of 11 days had elapsed between the appellant's occupation until he was locked out by the respondent, the court held that the respondent's conduct amounted to an *instanter* recovery of the premises.'"

Mr *Kanengoni* also referred the court to the South African cases of *Mans v* E *Loxton Municipality and Another* 1948 (1) SA 966 (C), *de Beers v Firs Investments Ltd* 1980 (3) SA 1087 (W) and *Ness & Anor v Greef* 1985 (4) SA 641 (C).

He submitted that counter-spoliation can be allowed even after a considerable time has lapsed after the first spoliation. He relied on *Ness & Anor v Greef* s*upra* where a tussle over immovable property continued over a period of F eleven days during which the owner was resisting being despoiled by a spoliator, where Vivier J at 649D–H said:

> "It is true that in the present case, a much longer time elapsed from Ness' first occupation of the premises until he was finally locked out by the respondent. Can it be said however, that, having entered the premises on 5 March 1984, against the owner's explicit prohibition, having ignored the notice put up by the G respondent that day, having replaced the lock installed by respondent's locksmith on 7 March 1984 to keep him out, all the time well knowing that he had no right to be on the premises nor to trade there, Ness had become so firmly established or ensconced in his possession that his spoliation of the premises was complete? I think not. That would be, as Coetzee J said in *De Beer's* case, an unrealistic evaluation of the situation. I think it is far more realistic to describe the situation existing on the premises in the days which followed Ness' first intrusion on 5 H

Uchena J

> A March 1984 as 'one indivisible transaction, in which the previous possessor defended his possession by force'. See *von Savigny's Treatise on Possession* (Sir Erskine Perry's translation), which is quoted in *Mans'* case at 976. Respondent did not only use force, as is shown by the letter, written by her attorneys on 9 March 1984. In my view, the tussle for possession of the premises commenced on 5 March 1984 and continued until 16 March 1984 when respondent finally succeeded in ousting Ness from the premises. The events which followed after B 5 March 1984 were all part of the *res gestae* of the original act of spoliation and a continuation of the breach of peace committed by Ness on 5 March 1984. On the facts of the present case, therefore, I am of the view that respondent's conduct of 16 March 1984 amounted to *instanter* recovery."

Relying on these authorities, Mr *Kanengoni* argued that the respondents C discovered that the applicants had despoiled them by taking over the Zimunya church after the death of Rev Rondozai. He submitted that, as stated in Mwashita's affidavit, they tried to get the keys from him on 6 September 2011. He resisted them, causing them to seek police assistance through which they managed to get the keys from him three days later on 9 September 2011. He argued that from the

time the respondents started demanding the keys D on 6 September and their obtaining them on 9 September the tussle for the keys was ongoing. That may be so but the real issue in this case is if the applicants had despoiled the respondents, when had they done so, and had their spoliation been completed by the time the respondents discovered it. If it had been completed the respondents would not be entitled to the defence E of counter-spoliation, as that defence can only be successful if it is *instanter* and forms part of the *res gestae* of original spoliation.

Mr *Zhou,* relying on the South African cases cited by Mr *Kanengoni* for the respondents and on *Abbott v von Theleman* 1997 (2) SA 848 (C) at 852F, submitted that counter-spoliation should be part of the *res gestae* of the original spoliation and cannot be relied upon after the initial spoliation F has been completed. He argued that, in this case, the applicants' warden Mwashita had the keys and therefore possession of the church. He had been in such possession since the death of Rev Rondozai, who had possession of the church before the consent order. He therefore submitted that, even if it was possible that the respondents believed they had been despoiled at G the time of Reverend Rondozai's death in May 2011, they could not have been counter-spoliating five months later in September 2011, as the first spoliation would have been completed in May 2011. He referred the court to Silberberg and Schoeman's *The Law Of Property* 3 ed, at p 144 where the learned authors said:

> "As a general rule a possessor who has been unlawfully dispossessed cannot take H the law into his own hands to recover his possession. Instead, he will have to

> make use of one of the remedies provided by the law, for example the *mandament* A *van spolie*. But if the recovery is *instanter* (forthwith) in the sense of being still a part of the *res gestae* of the act of spoliation, then it is regarded as a mere continuation of the existing breach of the peace and is consequently condoned by the law. This is known as counter-spoliation (*contra spolie*). However if the victim of the first act of spoliation fails to act *instanter* and takes the law into his own hands to regain possession of the thing after the dispossession has B been completed, his conduct would constitute a new breach of the peace and would be regarded as a separate act of spoliation, entitling the first spoliator to a spoliation order against him."

Counsel for both parties agree on the requirements of counter-spoliation. They however disagree on the effect of the lapsing of time between the acts of spoliation and counter-spoliation. Mr *Kanengoni* for the respondents C submitted that a delay of three days does not defeat the defence of counter-spoliation. Mr *Zhou,* for the applicants, relying on Silberberg and Schoeman's discussion of *Ness v Greeff* at p 145 of their book already referred to above, argued that that case was wrongly decided, when it was held that recovery after a period of eleven days was *instanter* recovery.

In my view, the parties' different views on whether the eleven day tussle D for possession in *Ness supra* was *instanter* or not is not material for the resolution of this application. In *Ness supra* the tussle for possession started when the first spoliation commenced. It thus disturbed the completion of the first spoliation and thus laid the basis of counter-spoliation. In this case, the respondents simply allege that the applicants despoiled them when Rev E Rondozai died. Rev Rondozai died in May 2011. Revs Magwanda and Maiziweyi of the applicants then took over the priestly duties at the All Saints Zimunya church. They alternated in conducting church services. Mwashita had physical possession of the keys since the death of Rev Rondozai. This means that if the respondents ever had possession of All Saints Zimunya church, they were despoiled soon after Rev Rondozai's death in May 2011. F That spoliation was well settled and completed by 6 September 2011 when the respondents demanded the keys from Mwashita. Their conduct cannot be described as *instanter* to the alleged despoliation of May 2011. It thus cannot qualify as a counter-spoliation. It is clearly a new spoliation which the applicants are entitled to ward off through this urgent application. G

Mr *Kanengoni*'s reliance on the period 6 to 9 September 2011 as a continuous tussle similar to that in the *Ness* case *supra* misses the fact that the respondents allege that they were despoiled soon after Rev Rondozai's death. The tussle for the keys between 6 and 9 September 2011 therefore took place long after the alleged first spoliation and can not be a basis for a defence of counter-spoliation. Counter-spoliation can only succeed if the despoiled acts by H

A resisting the ongoing spoliation. It, like self-defence, cannot be condoned in circumstances where the initial spoliation has been completed, and the initial spoliator now has firm control and possession of the despoiled property. Revenge spoliation cannot be disguised as counter-spoliation, just as revenge cannot be disguised as self-defence

B Counsel for both parties referred to case law from other jurisdictions to prove that counter-spoliation is a defence to an application for a spoliation order, and as to the circumstances under which such a defence would be accepted. They did not refer to a case from this jurisdiction to show that the defence of counter-spoliation has been accepted by our courts. My own C research has however established that it has. In *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-Operative & Ors* 1999 (2) ZLR 19 (S) at p 21F-H McNally JA, commenting on the requirements for obtaining a spoliation order and the defences which can be raised against such an application, said:

> "The relief applied for was in essence a spoliation order. It is trite that in order to obtain a *mandament van spolie* or spoliation order, the applicant must show D that:
>
> (a) he was in peaceful and undisturbed possession of the thing; and
>
> (b) he was unlawfully deprived of such possession.
>
> See Joubert *Law of South Africa* Vol 27 para 78; *Botha & Anor v Barrett* 1996 (2) ZLR 73 (S) at 79E-F.
>
> E The only valid defences that may be raised are that:
>
> (a) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of the dispossession:
>
> (b) the dispossession was not unlawful and therefore did not constitute spoliation:
>
> (c) restoration of possession is impossible: F
>
> (d) the respondent acted within the limits of counter-spoliation in regaining possession of the article."

Mr *Kanengoni,* for the respondents, submitted that the respondents' conduct was not unlawful as they used the police to take the keys from Mwashita. Mr *Zhou* for the applicants referred the court to the case of *Mutsotso & Ors v Commissioner of Police & Anor* 1993 (2) ZLR 329 (H) at 332H-333C, G where Robinson J held that the use of the police in the dispossession of the applicants in that case, did not clothe the respondent's conduct with legality, as dispossession must be through the due process of the law. I agree with Mr *Zhou's* submission, and find that the use of the police by the respondents to cow Mwashita into surrendering his possession of the church's keys to them H does not make their dispossession of the applicants lawful.

Uchena J

I am satisfied that on the facts placed before me the applicants have A provisionally proved that they were despoiled. They had undisturbed possession until the respondents forced Mwashita to surrender the keys to them. They proved that the respondents were not acting in counter-spoliation, as their acts were not part of the *res gestae* of the alleged original spoliation and were not *instanter* to it. They are therefore entitled to a provisional order B restoring the *status quo.*

In the result it is ordered that:

Pending determination of this matter the applicants are granted the following relief:

The respondents are ordered to forthwith restore to the applicants possession, C control and use of the All Saints Zimunya church.

Gill Godlonton & Gerrans, applicants' legal practitioners

Chikumbirike & Associates, respondent's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/CHIADZWA v COMMISSIONER-GENERAL OF POLICE & ORS 2011 (2) ZLR 241 (H)

CHIADZWA v COMMISSIONER-GENERAL OF POLICE & ORS 2011 (2) ZLR 241 (H)

Citation	2011 (2) ZLR 241 (H)
Case No	Judgment No. HH-224-11
Court	High Court, Harare
Judge	Bere J
Heard	28 September 2011; *CAV*
Judgment	11 October 2011
Counsel	*P Chiutsi*, for the applicant
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Criminal procedure – *forfeiture – article forfeited at conclusion of criminal case – conviction set aside – possession of article an offence – former* D *possessor not entitled to have article returned to him*

Legal practitioner – *conduct and ethics – communication with judge – impropriety of contacting judge directly – correct course of action where joinder in proceedings sought*

Practice and procedure – *parties – joinder – non-joinder – not fatal to* E *application – application for joinder – correct method of making application – impropriety of indirectly seeking joinder by complaining of non-joinder in letter to judge*

Headnote

The applicant had been convicted of possession of diamonds, which were, F following his conviction, declared forfeit to the State. The conviction was quashed on review. The applicant then sought an order under s 61(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for the return of the diamonds, and their transmission, via the Registrar, to the Minerals Marketing Corporation of Zimbabwe.

G None of the cited respondents bothered to defend the action. Neither the Attorney-General nor the Minister of Mines was cited by the applicant. However, the Attorney-General wrote a letter to the judge, complaining of not having been joined as a party.

Held, that under r 87(1) of the High Court Rules 1971, no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party. H In any event, the provisions of s 8 of the State Liabilities Act [*Chapter*

8:14] disabled the court from *mero motu* raising issues to do with non A -compliance with s 6 of the Act.

Held, further, that once a matter has been argued before a court and is awaiting judgment or determination, there should be no direct communication with the presiding judge over the merits or demerits of that case. To do so would be an attempt to influence the decision of the court using B unorthodox and unprofessional means. The Attorney-General's approach was a desperate attempt to influence the decision of the court by addressing the court through the back door. It was both unethical and unprofessional to do so. If the Attorney-General felt the applicant had unfairly treated his office or that his office had an interest in this matter, the proper course of action would have been formally apply for joinder in these C proceedings in order to create a proper platform for him to be heard.

Held, further, that, given the security risk associated with the diamonds, the Registrar could not assume their custody, given that hitherto he had never enjoyed such custody. Even if he had enjoyed such custody, he would have become *functus officio* the moment the order for forfeiture was pronounced. It would therefore not be competent for the Registrar D to accept the diamonds merely to pave way for the applicant to lay his claim to them.

Held, further, that s 3 of the Precious Stones Trade Act [*Chapter 21*:*06*] *inter alia* would criminalise possession of the diamonds by the applicant. To return the diamonds to the applicant would be to sanction the commission E of an act of illegality on the part of the applicant, and such an order would thus not be competent.

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 61(3)

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

Precious Stones Trade Act [*Chapter 21:06*], s 3

State Liabilities Act [*Chapter 8:14*], ss 6 & 8

Case information

P Chiutsi, for the applicant

Judgment

BERE J: Under case number Mutare CRB 1253/09 the applicant was convicted G of the offence of unlawfully possessing 8.61kg of pieces of diamonds. Pursuant to the applicant's conviction and sentence, the diamonds in question were declared forfeited to the State.

Dissatisfied with his conviction the applicant filed a review application in this court, leading to my brother Mutema making the following order: H

Bere J

A "IT IS ORDERED THAT:

1. The proceedings in case number Mutare's court CRB 1253/09 be and are hereby quashed.
2. The conviction and sentence be and are hereby set aside".

I have no wish to debate the correctness or otherwise of the decision arrived B at by my brother Mutema who sat as a single judge in upsetting the decision of the court *a quo*. I believe this could be done at a different forum. Suffice it to say that in dealing with this case I am proceeding on the basis of the decision made by him.

Following the decision of this court in setting aside the conviction and sentence C of the applicant, the applicant has now lodged before me an application against the respondents seeking the following relief:

"IT IS ORDERED THAT:

The respondents be and are hereby ordered to deposit all the diamonds confiscated from the applicant to the Registrar of the High Court within forty hours of being served with this order.

D The diamonds held exhibits in case Mutare magistrates court CRB 1253/09 shall be returned to the applicant in terms of s 61(3) of the Criminal Procedure and Evidence Act.

The Registrar be and is hereby ordered to release the diamonds to the Minerals Marketing Corporation of Zimbabwe on behalf of the applicant.

The respondents shall bear the costs of suit jointly and severally the one paying E the others to be absolved."

During the court proceedings I *inter alia* questioned Mr *Chiutsi*, counsel for the applicant, about the appropriateness of the order sought by his client. Counsel was adamant it was appropriate for the applicant to lodge the application he made.

F In the hearing I also drew counsel's attention to the need to have cited the Attorney-General, who would have initiated the order for forfeiture of the diamonds in question in the first place and would therefore naturally have a vested interest in the fate of those diamonds. Through counsel's heads of

argument filed upon my request, counsel was adamant this was not necessary G because of, among other things, his reading of some sections of the State Liabilities Act.

Since the administration of the Precious Stones Trade Act [*Chapter 21*:*06*] falls under the Ministry of Mines and Mining Development which is sought to be bound by the order desired by the applicant, I queried the non-citation H of the relevant Minister. Counsel felt this was not necessary.

2011 (2) ZLR p244

Bere J

I have not been satisfied by the stance taken by counsel in failing to cite the A Attorney-General and the Minister of Mines and Mining Development, more so given the two's vested interest in the fate of the diamonds.

The Minister of Mines and Mining Development administers the Act which the applicant is alleged to have violated and the relief sought by the applicant seeks to rope in the same Minister. B

Be that as it may, and in the light of the clear provisions of r 87 of the High Court Rules, I do not think I am handicapped in determining this matter by reason of the non-joinder of the Attorney-General and the Minister of Mines and Mining Development. For clarity's sake, r 87(1) of High Court of Zimbabwe Rules, 1971 reads as follows: C

> "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 questions in dispute so far as they affect the rights and interest of the persons who are parties to the cause or matter."

In any event, it would also appear to me, and as rightly argued by the applicant's counsel, that the provisions of s 8 of the State Liabilities Act D [*Chapter 8:14*] disable me from *mero motu* raising issues to do with non-compliance with s 6 of the same Act.

For the avoidance of doubt the relevant section is couched as follows:

> **"8.Court not to take notice of failure to comply with s 6**
>
> No court of its own motion shall take notice of any failure to comply with E section six."

Perhaps before proceeding to consider the applicant's application, I need to comment on the other notable development that has taken place in this matter.

On the day that followed the initial hearing of the instant application the F Attorney-General's Office, through the Criminal Registrar, wrote a letter for my attention as follows:

> "Can you please cause this letter to be placed before the Honourable Judge Justice Bere who is handling the above matter. After learning about the above case through the press (*The Herald* dated 29 September 2011) please note our interest. G
>
> We are concerned with the manner the applicant has resorted to in dealing with this matter. Firstly it is apparent that the matter is improperly before the honourable court.
>
> The applicant clearly departed from the rules of the court by setting down the case after citing only the three respondents without citing the Civil Division of the Attorney-General. H

2011 (2) ZLR p245

Bere J

> A Order number 5A r 4B of the High Court Rules 1971 provides: 'Persons upon whom notice and process to be served'. In terms of that rule the Attorney-General Civil Division, in the instant case ought to have been served.
>
> The applicant's deliberate display of lack of knowledge cannot be condoned.
>
> In any case the applicant is quite aware that the Attorney-General is challenging the applicant's acquittal. The manner and circumstances under which applicant B was acquitted in case number HC 3069/11 was unclear. The Attorney-General in case number HC 7370/11 has challenged that acquittal through an application for rescission of judgment. The application is pending. Given the above background it is quite surprising and unethical why appellant is by passing us in such a matter where we clearly have an interest.
>
> It is our hope and belief that the Honourable Judge will understand our concern C and treat this matter in a deserving manner".

I am extremely concerned with the approach adopted by the office of the Attorney-General's in its effort to register its concerns or positions in this matter.

In my view, once a matter has been argued before a court and is awaiting D judgment or determination, there can be no direct communication with the presiding judge who is seized with the matter over the merits or demerits of that case. Doing so would be an attempt to influence the decision of the court using unorthodox and unprofessional means. The Attorney-General's office's approach is a desperate attempt to influence the decision of the court by addressing the court through the back door. It is both unethical and E unprofessional to do so.

If the Attorney-General felt the applicant had unfairly treated its office or that the office had an interest in this matter (which point I have touched on elsewhere in this judgment) the proper cause of action would have been not to write to the presiding judge but to formally apply for joinder in these F proceedings in order for the Attorney-General's office to create a proper platform for it to be heard.

Fortunately, in this case, I have not allowed the letter from the Attorney-General's office to influence my objective determination of this matter.

It is clear from the application that the applicant is concerned about the fate G of the diamonds that he was originally convicted of unlawfully possessing at Mutare magistrates court whose decision was subsequently upset by this court on 29 June 2011.

Through this application, the applicant has made pointed and very serious allegations against the respondents, who were properly served with the instant H application as evidenced by the returns of service filed of record.

2011 (2) ZLR p246

Bere J

None of the respondents has bothered to defend this action. The court is A naturally concerned with the casual approach adopted by the respondents, more so given the seriousness of the allegations made against them individually and collectively. The carefree attitude exhibited by the respondents does not help the department at all.

Let me at this juncture proceed to determine the application before me. In B doing so I am quite conscious that the applicant, having elected to proceed by way of application, must have entertained the firm view that the matter was capable of being determined on the strength of the papers as filed.

Having made this observation, I now propose to consider the nature of the order sought by the applicant *seriatim*. C

The applicant has sought in his prayer that the respondents be ordered to deposit the diamonds with the Registrar of this court.

It is clear to me that, given the security risk associated with the diamonds in question, the Registrar of this court cannot assume their custody, given that hitherto he never enjoyed such custody. D

In any event, even if he had enjoyed such custody, he would have become *functus officio* the moment the order for forfeiture was pronounced. It would therefore not be competent for the Registrar to accept such sensitive exhibits merely to pave way for the applicant to lay his claim on the diamonds.

Secondly, the applicant has sought to have the diamonds surrendered to him E in terms of s 61(3) of the Criminal Procedure and Evidence Act.

I am unable to follow this request in the light of s 3 of the Precious Stones Trade Act [*Chapter 21*:*06*] which *inter alia* criminalises possession of these diamonds. This becomes abundantly clear if one remains alive to the definition of precious stones as provided by s 2 of the same Act. F

To ask me to return the diamonds to the applicant would be to ask me to sanction the commission of yet another act of illegality on the part of the applicant, and such an order would not be competent. In any case, the papers filed do not convince me of the applicant's entitlement to the diamonds.

Finally, the Ministry of Mines and Mining Development is the sole ministry G in this country which is mandated to administer *inter alia* the Precious Stones Trade Act, a section of which the applicant was alleged to have violated when he initially appeared and was convicted in the criminal court.

It is the same Ministry which is charged with the task of possessing the diamonds in question at the conclusion of the trial and it is up to it to track the movement of such diamonds if they are not accounted for. In doing so, it H

Bere J

A does not require to be assisted by the applicant, because the applicant would have no *locus standi* to initiate that process.

The Ministry of Mines and Mining Development has the capacity to initiate proceedings to follow the movement of its minerals which must naturally end up in its coffers. It is this Ministry which is mandated to initiate legal B processes to demand accountability of its precious minerals like in this case. The Ministry does not share that mandate with the applicant.

For these reasons the applicant's application is dismissed.

C *P Chiutsi Legal Practitioners*, applicant's legal practitioners

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Source:
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S v MAGUYA & ANOR 2011 (2) ZLR 248 (H)

Citation	2011 (2) ZLR 248 (H)
Case No	Judgment-HH-231-11
Court	High Court, Harare
Judge	Patel J
Heard	11 October 2011
Judgment	11 October 2011
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – pledging of a female in compensation for death of a relative (s 94) – offence not created by the Code – conduct already proscribed under Customary Marriages Act [Chapter 5:07]*

Headnote

The two accused pleaded guilty to a charge of contravening s 94 of the D Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Code"). They had pledged the complainant, their female

relative and then a minor, to the family of a person who was killed by one of their relatives in 1980, as compensation. She was pledged in 2005, before the Code came into effect. The issue arose whether the charge criminalised E any conduct perpetrated before the creation of the crime in question.

Held, that by virtue of s 2(2) of the Code, a reference in the Code or any other enactment to a crime mentioned in the Second Schedule shall be construed as referring to that crime as defined in the relevant provision of the Code. The crime of "pledging a female person" is specifically mentioned in the Second Schedule as corresponding to s 94 of the Code. F

Held, further, that under s 11(1) of the Customary Marriages Act [*Chapter 5:07*], any agreement in which a person, whether for consideration or otherwise, pledges or promises a girl or woman in marriage to a man shall be of no effect. Section 11(2) made it an offence for any person to enter into any such agreement. Additionally, s 15 of that Act penalised G any person who, by force, intimidation or other improper means, compels or attempts to compel any female to enter into a marriage against her will. Paragraphs (b) and (c) of s 94(1) of the Code re-enact the offences proscribed by ss 11 and 15 of the Customary Marriages Act. Paragraph (a) of s 94(1) specifically criminalises the so-called practice of "noxal surrender", by making it an offence to hand over a female to another H

Patel J

A person as compensation for the death of a relative of that person or as compensation for any debt or obligation. The crime of pledging females is not new and was clearly penalised under ss 11 and 15 of the Customary Marriages Act. The offence of noxal surrender is not new. Although the compensatory aspect of noxal surrender is distinct and peculiar to the offence under s 94(1)(a), the mischief aimed at by these B offences is the same, *viz*. the non-consensual pledging of females. In practice, noxal surrender has always been treated as a species of the arrangements prohibited by s 11 of the Customary Marriages Act, and has been penalised accordingly.

Editor's note: s 11(2) and s 15 of the Customary Marriages Act were repealed C when the Code came into effect.

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 2 & 94

Customary Marriages Act [*Chapter 5:07*], ss 11 & 15

Judgment

D **PATEL J**: The two accused persons were found guilty on their pleas of guilty to a charge of contravening s 94 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Code"). The facts giving rise to the charge were that the accused persons pledged the complainant, their female relative, to the family of one Fredy Neruwana, who was killed by Nerimonos Maguya in 1980. The complainant was pledged some time in 2005, when she E was a minor, as compensation for the death of Fredy Neruwana. Paragraph 6 of the State outline suggests that she was pledged in marriage to the Neruwana family.

Upon conviction, the two accused persons were sentenced to a fine of US$600 and US$300, respectively, or six months' imprisonment in default of payment F of the fine. After having convicted and sentenced the accused persons, the trial magistrate took the view that the charge was defective in that it criminalised an act committed before the creation of the offence in question.

In terms of SI 152 of 2006, the Code came into operation on 1 July 2006. By virtue of s 2(2) of the Code, a reference in the Code or any other enactment to a crime mentioned in the Second Schedule shall be construed as referring G to that crime as defined in the relevant provision of the Code. The crime of "pledging a female person" is specifically mentioned in the Second Schedule as corresponding to s 94 of the Code.

In terms of s 11(1) of the Customary Marriages Act [*Chapter 5:07*], any agreement in which a person, whether for consideration or otherwise, H pledges or promises a girl or woman in marriage to a man shall be of no

Patel J

effect. Section 11(2) makes it an offence for any person to enter into any A such agreement. Additionally, s 15 of that Act penalises any person who by force, intimidation or other improper means, compels or attempts to compel any female to enter into a marriage against her will.

Paragraphs (b) and (c) of s 94(1) of the Code re-enact the offences proscribed by ss 11 and 15 of the Customary Marriages Act. Paragraph (a) of s 94(1) B specifically criminalises the so-called practice of "noxal surrender", by making it an offence to hand over a female to another person as compensation for the death of a relative of that person or as compensation for any debt or obligation.

As is evident from the foregoing, the crime of pledging females is not new and was clearly penalised under ss 11 and 15 of the Customary Marriages Act. What appears to be new, but in fact is not, is the offence of noxal surrender C elaborated in s 94(1)(a) of the Code. Although the compensatory aspect of noxal surrender is distinct and peculiar to the offence under s 94(1)(a), the mischief aimed at by those offences is the same, *viz* the non-consensual pledging of females. In practice, noxal surrender has always been treated as a species of the arrangements prohibited by s 11 of the Customary Marriages D Act, and has been penalised accordingly.

It follows that the charge *in casu* did not purport to criminalise any conduct perpetrated before the creation of the crime in question. It was not defective or incompetent on the facts of this case. In the result, the conviction of the accused persons is confirmed, as are the sentences imposed upon them, as being in accordance with real and substantial justice. E

Chatukuta J concurs.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/S v MUBVUMBI & ORS 2011 (2) ZLR 251 (H)

S v MUBVUMBI & ORS 2011 (2) ZLR 251 (H)

Citation	2011 (2) ZLR 251 (H)
Case No	Judgment No. HH-239-11
Court	High Court, Harare
Judge	Chiweshe JP and Uchena J
Heard	29 September 2011; 6 October 2011; *CAV*
Judgment	11 October 2011
Counsel	*D Pesanai,* for the appellants *F Nyahunzi,* for the State
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law – *culpable homicide – assaults upon deceased by multiple accused persons – common purpose – need to establish that each accused acted with common purpose*

D **Criminal procedure** – *plea – guilty – explanation of charge and elements – purpose – essential to ensure accused understands charge and that he has no defence – multiple accused – need to put specific questions to each accused, not general questions to all of them*

Headnote

E Section 271(2)(6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] requires that a magistrate be satisfied, before he can convict an accused person in proceedings under that section, that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor. F This satisfaction must come from a careful verification of the accused's plea of guilty by confirming it through questioning him on his attitude to the essential elements of the crime charged and ensuring that he has no defence to offer to the crime charged. It is not possible for a magistrate to be so satisfied if he asks general questions to many jointly charged accused persons whose answers can only be "yes" or "no" because of G the manner the questions will have been put to them

Nine accused persons were convicted and sentenced on a charge of culpable homicide. The deceased had died from a head injury as a result of assaults, with clenched fists, open hands, booted feet and switches, perpetrated on him at two different places, at different times, by two different groups. H All the accused had pleaded guilty. It was not alleged, however, by the

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Uchena J

State that the accused had acted with common purpose nor were they A so asked by the regional magistrate when tendering their pleas of guilty.

Held, that notwithstanding their pleas of guilty there was insufficient before the court to justify their convictions. It could not be said that the conduct of each of the accused caused the deceased's death, as it was not alleged and accepted that they were acting in common purpose. Where several B persons are charged jointly with culpable homicide, there should be a diligent inquiry during the canvassing of the essential elements with each accused, one at a time, to establish which accused used which weapon, where he or she struck the deceased's body and his or her culpability. Each should be questioned to reveal exactly what it was that he was admitting. The purpose of such questioning is not to test the accused C person's credibility or to trap him into further admissions, but simply to determine precisely what it is that he is admitting.

Case cited

S v Dube & Anor 1988 (2) ZLR 385 (S) D

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 271(2)(b) and 272

High Court Act [*Chapter 7:06*], s 41(h) E

Case information

D Pesanai, for the appellants

F Nyahunzi, for the State

Judgment

UCHENA J: The appellants were convicted and sentenced on a charge of culpable homicide. They were convicted and sentenced by a regional F magistrate sitting at Marondera regional magistrates court. They appealed against the severity of the sentence of eight years' imprisonment of which five years were suspended on conditions of good behaviour.

The facts on which they were charged are as follows. On 30 June 2004, Moses Mubvumbi and John Rego took the deceased from his home to the G field where he was first assaulted by the appellants.

They suspected him of having broken into and stolen from Sinikiwe's house. They assaulted him with clenched fists, open hands, booted feet and switches, all over his body. He was later ferried by tractor to Sinikiwe's house where Michael Kazingizi, Moses Mubvumbi and Isaac Gwanyangwanya further assaulted him, with open hands, booted feet, clenched fists, and some switches. They H

A later transported him to his house by tractor as he could no longer walk on his own. The deceased died at his house the following day, 1 July 2004.

The deceased's body was examined by a doctor who found that death was due to a head injury which caused a fracture on the left occipital.

The appellant's appeal, against sentence only, was based on the severity of B the sentence. They alleged that they had told the magistrate that they had paid compensation of 15 head of cattle and two goats to the deceased's family, which the magistrate refused to record and take into consideration in passing sentence. This allegation was made in the appellant's grounds of appeal, to which the magistrate's comments were, "I stand by my reasons for sentence and judgment".

C In his heads of arguments Mr *Nyahunzi,* for the respondent, submitted that the participation of each appellant was not properly canvassed, leaving the propriety of their convictions in doubt. Though Mr *Pesanai*, for the appellants, had not on noting the appeal picked up this irregularity, he responded to it and submitted that it affects the appellant's conviction. In his submissions during D the hearing of the appeal Mr *Nyahunzvi,* for the respondent, in conformity with the professionalism expected from the respondent's officers, submitted that he could not support the conviction as the participation of each appellant was not covered in the canvassing of essential elements.

The appellants are men and women of various age groups, who, at two different places, in two different groups and at two different times, assaulted E the deceased, leading to his death. Their pleas were taken in a collective manner, with questions being asked, to all of them, and their responses to each question being recorded in series as each gave his or her response one after the other.

The purpose of canvassing the essential elements of the offence when a plea F of guilty is tendered is to satisfy the court that the accused committed the offence charged In doing so the court seeks to satisfy itself that the accused is not tendering an ill-informed plea of guilty. It does so by explaining the essential elements of the crime charged and verifying the accused's admission of those essential elements by putting them to him in a series of questions, covering each essential element of the crime, and ensuring that he has no G defence to offer to the crime charged.

As already said, in this case the magistrate asked general questions to all nine accused persons at the same time, which each appellant answered one after the other. This is not the correct way of canvassing essential elements in a trial involving several accused persons who participated in the commission H of the crime at two different places and in different ways, using different

means to assault the deceased. This can be demonstrated by the following A questions and answers.

Q Do you admit that on the 30/6/2004 at Shambahweta Village Murewa you wrongfully and unlawfully assaulted the now deceased with clenched fists, open hands, booted feet , logs, switches, all over his body?

A [From each accused] Yes B

Q Do you admit that because of these assaults by each of you severally he sustained injuries that led to his death on 1/07/04.

A [From each accused] Yes

An examination of these two questions raises the following questions. How did the court satisfy itself from the first question, which appellants used C open hands, clenched fists, booted feet, logs, switches etc? Did every blow by whatever weapon used cause the deceased's death? Did the appellants understand what they were saying yes to when they answered these two questions? More importantly, did the magistrate understand and become satisfied of what the appellants were telling him when they answered his D questions quoted above? These questions would not have arisen if

each appellant had been separately asked these questions and the magistrate had gone further to ask each appellant what he or she used and on what part of the deceased's body. On the second question, the doctor's finding does not show that the deceased died because of all the blows delivered by the appellants. He said it was the head injury which caused the deceased's death. A diligent E inquiry during the canvassing of the essential elements with each appellant one at a time would have established which appellant used which weapon, where he/she struck the deceased's body and his or her culpability. In *S v Dube & Anor* 1988 (2) ZLR 385 (S) at pp 385H-386A Dumbutshena CJ, commenting on the need for a judicial officer to exercise care when taking F a plea of guilty, said:

> "Where there is a plea of guilty, judicial officers must be careful not to regard every fact as proved just because it is admitted. Where the accused admits 'possession' of a prohibited article, the court must establish just what the accused is admitting, possession being a difficult legal concept. A similar caution applies to the explanation of the charge and the elements of the offence." G

Commenting on how a judicial officer should take pleas of guilty from a number of accused persons in one trial, he said at 391A-B:

> "Each accused person should have been dealt with separately. Each should have been questioned to reveal exactly what it was as between 'keeping', 'possessing', 'selling' or 'disposing' that he was admitting. The exact nature of the 'possessing' that he was admitting should have been clarified. H

Uchena J

> A The purpose of such questioning is not to test the accused person's credibility or to trap him into further admissions, but simply to determine precisely what it is that he is admitting."

Section 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9.07*], hereinafter called the CP&E Act, requires that the magistrate be satisfied, before he can convict an accused person in proceedings under that section, B that the accused understands the charge and the essential elements and that the accused admits the elements of the offence and the acts or omissions on which the charge is based. The satisfaction must come from a careful verification of the accused's plea of guilty by confirming it through questioning him on his attitude to the essential elements of the crime charged. It is not possible C for a magistrate to be satisfied if he asks general questions to many jointly charged accused persons whose answers can only be yes or no because of the manner the questions will have been put to them.

Section 271(2)(b) provides as follows:

> "(b) the court shall, if it is of the opinion that the offence merits any punishment referred to in subparagraph (i) or (ii) of paragraph (a) or if requested thereto D by the prosecutor –
>
> (i) explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and
>
> (ii) inquire from the accused whether he understands the charge and the E essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor;
>
> and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge F or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law ..."

In this case the questions asked of the appellants as a group were not capable of establishing how each participated in assaulting the deceased. Thus, G each appellant's acts or omissions were not established. They were also not capable of satisfying the magistrate of each appellant's participation and therefore each appellant's guilt of the offence charged. The magistrate's need to exercise care in satisfying himself or herself of the accused's plea is reinforced by the provisions of s 272, which requires him to alter the plea to one of not guilty if the accused's response to his questions raise a doubt H as to whether or not his plea of guilty is based on his accepting that he acted

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Uchena J

in the manner alleged and that he accepts the essential elements of the crime A charged. Section 272 of the CP&E Act provides as follows:

> "If the court, at any stage of the proceedings in terms of section *two hundred and seventy-one* and before sentence is passed –
>
> (a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or
>
> (b) is not satisfied that the accused has admitted or correctly admitted all the B essential elements of the offence or all the acts or omissions on which the charge is based; or
>
> (c) is not satisfied that the accused has no valid defence to the charge:
>
> the court shall record a plea of not guilty and require the prosecution to proceed with the trial ..." C

In this case the provisions of s 272 must have alerted the magistrate of the difficulty the putting of essential elements to the appellants, as a group, would lead him to. The lack of details of each appellant's participation leaves a doubt as to what offence each is guilty of.

It is not alleged in the State's summary that the appellants were acting in D common purpose, therefore the actions of one appellant cannot be imputed to others. The magistrate did not ask them if they were acting in common purpose. How then did he find that they were all guilty of culpable homicide, when some used switches and open hands, which could not have caused the head injury which caused the deceased's death?

Culpable homicide is the causing of the death of another person by the E accused when he or she:

(a) negligently fails to realise that death may result from his or her conduct; or

(b) realising that death may result from his or her conduct, negligently fails to guard against that possibility. F

The important fact to note in this case is that death must have been caused by the appellants for the trial court to have convicted them of culpable homicide. In view of what has been said above, it cannot be said that the conduct of each appellant caused the deceased's death, as it was not alleged and accepted that they were acting in common purpose G .

It is, however, common cause that each appellant acted unlawfully towards the deceased and can be convicted of some crime as a result of his or her conduct. That, however, cannot be determined in the absence of a proper inquiry on the participation of each appellant and whether or not they were acting in common purpose. It is therefore not possible to avoid the remittal of the case to the magistrate's court for a trial *de novo*, in spite of the offence having H

Uchena J

A been committed in 2004. Counsel for the appellant and for the respondent submitted that we should remit the case to the trial court for trial *de novo*.

I am satisfied that Mr *Nyahunzvi* for the respondent is correct in not supporting the appellants' convictions. He and Mr *Pesanai* for the appellants are correct in submitting that this court has the necessary jurisdiction to remit the case B to the court *a quo* for a trial *de novo.*

In terms of s 41(h) of the High Court Act [*Chapter 7.06*], though this case was on appeal, this court can exercise its supplementary review powers to order its remittal to the magistrate's court for trial *de novo.*

In my view, the new trial must be before a different magistrate because there is reason to doubt the impartiality of the trial magistrate. It was alleged she C had refused to record and consider the payment of compensation by the appellants to the deceased's family. I appreciate that allegations against a judicial officer should not be lightly accepted, but in this case the magistrate was given an opportunity to comment on this issue and chose not to do so. This leaves this court with no option but to accept that she acted as alleged and avoided commenting on it.

D In the result, it is ordered that the appellants' appeal be upheld. Their convictions and sentences are set aside. The case is remitted back to the regional magistrate's court for trial *de novo* before a different magistrate.

E CHIWESHE JP concurred.

I E G Musimbe & Partners, appellants' legal practitioners

F *Attorney-General's Office, Criminal Division*, respondent's legal practitioners

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Source:
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TRUSTCO MOBILE (PTY) LTD & ANOR v ECONET WIRELESS (PVT) LTD & ANOR (2) 2011 (2) ZLR 258 (H)

Citation	2011 (2) ZLR 258 (H)
Case No	Judgment No. HH-211-11
Court	High Court, Harare
Judge	Mavangira J
Heard	1 September 2011; 6 September 2011; *CAV*
Judgment	12 October 2011
Counsel	*T Mpofu* and *S Sadomba*, for the applicants *A P de Bourbon* SC, with him *Mrs J Zindi*, for the first respondent *D Gapare*, for the second respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Appeal – *execution – leave to execute pending appeal – when may be granted – factors to consider – judgment not appealable – need for compelling justification for refusing to grant application to execute* D

Headnote

The first applicant and the respondents concluded an agreement in terms of which the first applicant undertook to license to the first respondent certain intellectual property which would facilitate the provision of the free life insurance cover to Zimbabwean cellular phone users and customers of the first respondent against the purchase of cellular airtime E from the first respondent. Differences arose amongst the parties in relation to the agreement, as a result of which the first applicant brought an urgent application; this resulted in judgment being delivered in favour of the first applicant. The first respondent did not complied with the order; instead it noted an appeal. Consequently, the applicants filed an F urgent chamber application seeking a provisional order that, pending the determination of the dispute between the parties by of arbitration, the provisional order previously granted should remain operational notwithstanding any appeals filed by the respondents.

The applicants argued that leave to execute pending appeal ought to be granted because the judgment appealed against was not appealable G by reason of the provisions of the Arbitration Act [*Chapter 7:15*], in particular art 9(4) of the Schedule thereto, under which the court had previously granted relief. In terms of art 9(4), a decision made by the High Court in terms of art

9(1) is not subject to appeal; and as the decision was made in terms of the provisions of the art 9, s 43 of the High Court Act [*Chapter 7:06*], which gives a right of appeal from the H

A High Court in a civil case, was not applicable. They also argued that if the judgment was not complied with, the applicants would not be able to calculate the quantum of the damages which they would be seeking in the arbitration proceedings. The appeal would thus have the effect of rendering the intended arbitration futile because the applicants would B not be able to determine the extent of their damages. It was contended that the applicants need to have access to the first respondent's systems for this purpose.

The respondents argued that the parties' agreement provided that arbitration would only be resorted to if negotiations failed. There had been no negotiations and consequently there was no right to resort to arbitration. C Accordingly, there was no right to interim measures being afforded the applicants. On the merits, their stance was that the agreement was cancelled by mutual agreement and that as the judgment was therefore wrongly made, execution of the judgment would be unpalatable to it. It would be ruinous to the first respondent's business to resuscitate, by the granting of leave to execute pending appeal, a relationship that had D been created in terms of the agreement.

Held, that in determining an application for leave to execute pending an appeal, the court must have regard to the preponderance of equities, the prospects of success on the part of the appellant and whether the appeal has been noted without the bona fideintention of seeking to reverse the E judgment but for some indirect purpose e.g. to gain time or to harass the other party. A fortiori, where a judgment is not appealable, there must be compelling justification for refusing to grant an application such as the applicant's in casu.

Held, futher, that the balance of convenience or hardship favoured the F applicants, and the application would be granted.

Cases cited

Courtesy Connection (Pvt) Ltd & Anor v Mupamhadzi 2006 (1) ZLR 479 (H)

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

Guwa & Anor v Willoughby's Investments (Pvt) Ltd 2009 (1) ZLR 368 (S) G

Mtetwa & Anor v Mupamhadzi 2007 (1) ZLR 253 (S)

Trustco Mobile (Pty) Ltd & Anor v Econet Wireless (Pvt) Ltd & Anor (2) 2011 (2) ZLR 14 (H)

Whata v Whata 1994 (2) ZLR 277 (S) H

Mavangira J

Legislation considered A

Arbitration Act [*Chapter 7:15*], First Schedule, art 9(4)

High Court Act [*Chapter 7:06*], s 43(1)

Case information

T Mpofu and *S Sadomba*, for the applicants

A P de Bourbon SC, with him Mrs *J Zindi*, for the first respondent B

D Gapare, for the second respondent

Judgment

MAVANGIRA J: On 17 August 2011 the first applicant and the respondents concluded an agreement in terms of which the first applicant undertook to license to the first respondent certain intellectual property ("The Trustco Mobile Concept") which would facilitate the provision of free life insurance C cover to Zimbabwean cellular phone users and customers of the first respondent, against the

purchase of cellular airtime from the first respondent. An amendment was made to the agreement in January 2011.

Certain differences arose amongst the parties in relation to the said agreement. As a result the first applicant approached this court on an urgent basis in HC D 6065/11 and on 25 July 2011 judgment was delivered in that matter in favour of the first applicant. A provisional order was granted in the following terms:

> " **Final Relief Sought**
>
> That you show cause why the following final order must not be granted.
>
> 1. Pending the determination of the dispute between the parties by the process of arbitration in terms of the provisions of the Arbitration Act, the first E respondent shall not take any steps neither shall it act in any such manner as is inconsistent with the rights of the applicants arising from the agreement between the parties (as amended), and shall not act in terms of any arbitral award that may be handed down.
> 2. The costs of this application shall be costs in the envisaged arbitration proceedings. F
>
> **Interim Relief Granted**
>
> That pending determination of this matter on the return date, the applicants are granted the following relief:
>
> 1. The first respondent is directed to restore to the first applicant the internet-based reporting links and all access to Trustco Mobile hardware and software, thus enabling it to monitor and process airtime purchase transactions and G otherwise perform its obligations in terms of the agreement; and
> 2. The first respondent be directed to refrain from undertaking and implementing a competing, infringing service to that provided by the first applicant in terms of the agreement."

The first respondent has not complied with the order. Rather, on 27 July 2011 the first respondent noted an appeal in the Supreme Court. Consequently, on H

Mavangira J

A 4 August 2011, the applicants filed the instant urgent chamber application in which they seek a Provisional Order in the following terms:

> " TERMS OF FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:- B
>
> 1. Pending the determination of the dispute between the parties by the process of Arbitration in terms of the provisions of the Arbitration Act, the provisional order in HC 6065/11 shall remain operational notwithstanding any appeals that may be filed by the respondents.
> 2. First respondent shall pay the costs of this application.
>
> INTERIM RELIEF GRANTED
>
> Applicants are hereby granted the following relief: C
>
> 1. First and second applicants be and are hereby allowed to execute the judgment of the Honourable Justice mutemahanded down in HC 6065/11 on 25 July 2011 notwithstanding first respondent's appeal filed under SC 171/11.
> 2. This order shall remain operational notwithstanding any appeal that may be noted by first respondent."

D At the hearing Mr *Mpofu* indicated that the applicants are no longer pursuing the relief sought in para 2 of the interim relief.

The applicants contend in the founding affidavit, *inter alia*, that the noting of the appeal against the judgment in HC 6065/11 is incompetent and invalid insofar as the judgment was interlocutory in nature and, having been granted E on a provisional basis, it granted interim relief only. As the judgment or order was not final in effect, it is contended, the purported appeal is invalid and a nullity. However, at the hearing, Mr *Mpofu* indicated that this point or contention is no longer being pursued. Rather, he submitted, leave to execute pending appeal ought to be granted because the judgment appealed against is not appealable by reason of the provisions of the Arbitration Act [*Chapter* F *7:15*], particular reference being made to art 9(4) thereof. He submitted that a reading of paras 2 and 3 at p 22 of the judgment clearly shows that the court came to the conclusion that it was affording relief pursuant to art 9 of the Arbitration Act. He submitted that the provisions of the Model Law on International Commercial Arbitration are part and parcel of the Arbitration Act G and

therefore have the force of statutory provisions. cited *Mtetwa & Anor* v *Mupamhadzi* 2007 (1) ZLR 253 (S) in support of this proposition. He further submitted that the court does not have the equitable jurisdiction to dispense with compliance with the Model Law and cited *Courtesy Connection (Pvt) Ltd & Anor v Mupamhadzi* 2006 (1) ZLR 479 (H) in which it was held that once the prescription period set in the Model Law runs out, the right to set H aside an arbitral award is lost and that no court has been granted the power

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2011 (2) ZLR p262

Mavangira J

to revive that right once it has been lost. He made the further submission that A in terms of art 9 (4) of the Model Law, a decision made by the High Court in terms of para 1 of the same article shall not be subject to appeal and that as the decision in HC 6065/11 was made in terms of the provisions of the Model Law, s 43 of the High Court Act, [*Chapter 7:06*] is not applicable in

casu. The section provides:

> "(1) Subject to this section, an appeal in any civil case shall lie to the Supreme B Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction."

Article 9(4) provides:

> "The decision of the High Court upon any request made in terms of paragraph (1) of this article shall not be subject to appeal C ."

In casu, paras 2 and 3 on p 22 of the judgment in *Trustco Mobile (Pty) Ltd & Anor v Econet Wireless (Pvt) Ltd & Anor (1)* read:

> "Article 9 of the Arbitration Act [*Chapter 7:15*] empowers the High Court via ss 1,2 and 3 to grant, upon request, an interim measure of protection in the form of an interdict or other interim measure to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual where the arbitral D tribunal has not yet been appointed and the matter is urgent.
>
> In casu the matter is urgent, the arbitration tribunal has not yet been appointed and the relief sought is designed to ensure that any award which may be made in the arbitral proceedings in favour of the applicants will not be rendered ineffectual

On this aspect, Mr de *Bourbon* submitted that the parties' agreement provides that arbitration would only be resorted to if negotiations failed. He submitted E that there had been no negotiations and consequently there was no right to resort to arbitration. In the circumstances, he submitted, there was no right to interim measures being afforded the applicants. In any event, he further submitted, the court in HH-158-11 was not faced with an art 9 application. He submitted that the first respondent will in fact be amending its notice of F appeal to the Supreme Court but has not done so yet.

It appears to me that the fact of the matter is that the court in granting the relief in HH-158-11 found justification for doing so *inter alia* on art 9 of the Model law as the extract cited earlier from the court's judgment shows. This court is not tasked, nor is it competent, to debate or review the propriety of the decision in HH-158-11. What is inescapable however, in my view, is the G fact that in terms of art 9 (4) that decision is not subject to appeal.

Mr *Mpofu* submitted that the first respondent cannot hide behind an appeal that has been invalidly noted, in failing to comply with its obligations under the order of the court in HC 6065/11. H

2011 (2) ZLR p263

Mavangira J

A In *Whata v Whata* 1994 (2) ZLR 277 (S) at 281B-C Gubbay CJ stated:

> "The principle to be applied by the court considering the grant of an application for leave to execute on a judgment under appeal is what is just and equitable in all circumstances. The enquiry normally involves assessing such factors as: the potentiality of irreparable harm or prejudice being sustained by either the successful or the losing party, and, if by both, the balance of hardship or B convenience; and the prospects of success on appeal, including whether the appeal is frivolous or vexatiois or has been noted for some indirect purpose, such as to gain time or harass the other party. See *South Cape Corporation (Pty) Ltd Eng Mgmt Svcs (Pty) Ltd* 1997 (3) SA 534 (A) at 545E-G."

In *Econet v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H) at 154F-9 Smith J articulated the same principle as follows:

" C In determining an application for leave to execute pending an appeal, the court must have regard to the 'preponderance of equities', the prospects of success on the part of the appellant and whether the appeal has been noted without 'thebona fide intention of seeking to reverse the judgment but for some indirect purpose e.g. to gain time or to harass the other party': see *Fox and Carney (Pvt) Ltd v Carthew-Gabriel (2)* 1997 (4) SA 970 (R) and *ZDECO (Pvt) Ltd v Commercial* D *Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (H)."

It would appear to me on a consideration of these authorities that for the stronger reason where, as appears to apply as in this case, a judgment is not appealable, there must be placed before the court tasked with determining an application for leave to execute pending appeal, compelling justification E for refusing to grant an application such as the applicant's *in casu*.

In casu it was contended that if the judgment in the HH-158-11 is not complied with, the applicants would not be able to calculate the quantum of the damages which they would be seeking in the arbitration proceedings. The appeal would thus have the effect of rendering the intended arbitration F futile because the applicants would not be able to determine the extent of their damages. It was contended that the applicants need to have access to the first respondent's systems for this purpose. Furthermore, that in terms of this agreement the first respondent had some entitlements due to him for a period of six months and the significance of this six month period must be understood in the context that the agreement was a finite eighteen month G agreement and that the contract period would run out before the arbitration.

On the other hand, the first respondent's stance appears to be mainly that the agreement was cancelled by mutual consent and that as this court's judgment in HH-158-11 was therefore, in its view, wrongly made, execution of the judgment would be unpalatable to it. In the applicant's description of H the first respondent's stance, it would be "ruinous to the first respondent's

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business" to resuscitate, by the granting of leave to execute pending appeal, A the relationship that had been created in terms of the agreement.

In my view, the balance of convenience or hardship favours the applicants. It appears to me that the applicants did place before this court adequate justification for a finding that the preponderance of equities favours the granting of the relief that they seek and that they must therefore succeed. The B first respondent on the other hand has not established sufficiently compelling grounds why the balance should tilt in its favour.

After the hearing in chambers the parties were invited to make written submissions on the effect if any, on this matter of the case of *Guwa & Anor v Willoughby's Investments (Pvt) Ltd)* 2009 (1) ZLR 368 (S). In view of my findings above, it appears to me that it is not necessary any more to have C regard to that case or to any of the written submissions filed on the applicants' behalf in response to the court's invitation.

For the above reasons the application therefore succeeds. As already stated above, the applicants have abandoned, and properly so in my view, the relief sought in para 2 of the interim relief sought. D

In the result, a provisional order will issue in the following terms:

"TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. Pending the determination of the dispute between the parties by the process of arbitration in terms of the provisions of the Arbitration Act, the provisional E order in HC 6065/11 shall remain operational notwithstanding any appeals that may be filed by the respondents.
2. First respondent shall pay the costs of this application.

INTERIM RELIEF GRANTED

Applicants are hereby granted the following relief:-

1. First and second applicants be and are hereby allowed to execute the judgment F of the Honourable Justice mutema handed down in HC 6065/11 on 25 July 2011 notwithstanding first respondent's appeal under S.C. 171/11."

SERVICE OF THE ORDER

1. The legal practitioners for the applicants be and are hereby granted leave to effect service of this provisional order on the respondents G .

Gill, Godlonton and Gerrans, applicant's legal practitioners

Mtetwa and Nyambirai, first respondent's legal practitioners

Scanlen and Holderness, second respondent's legal practitioners H

* See above in this volume, at p 14. – *Editor*.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/GWERU TOURISM PROMOTIONS (PVT) LTD v SADLER & ANOR 2011 (2) ZLR 265 (H)

GWERU TOURISM PROMOTIONS (PVT) LTD v SADLER & ANOR 2011 (2) ZLR 265 (H)

Citation	2011 (2) ZLR 265 (H)
Case No	Judgment No. HH-258-11
Court	High Court, Harare
Judge	Gowora J
Heard	25 February 2011; *CAV*
Judgment	12 October 2011
Counsel	*P C Paul*, for the excipients (second defendant) *R M Fitches*, for the respondent (plaintiff)
Case Type	Exception
Annotations	No case annotations to date

Flynote

Practice and procedure – *exception – when may be taken – several claims arising from one cause of action – not permissible to except to one claim without excepting to main claim*

D **Property and real rights** – *ownership – vindicatory action – right of owner to vindicate property in possession of third party – owner's remedy where third party has fraudulently parted with possession of property – when defendant may be ordered to compensate owner for value of property – when value of property to be determined*

Headnote

E The plaintiff alleged that it was the owner of certain railway equipment and that the first defendant purported to sell the equipment unlawfully to the second defendant, who was alleged to be in possession of the equipment. The plaintiff demanded from both defendants the surrender of the equipment, but the defendants refused or were unable return it to F the plaintiff. The defendants

also refused to pay to the plaintiff the value of the equipment. Consequently, the plaintiff sued both defendants for payment of the value of the equipment as at the date of its disposal to the second defendant by the first defendant. Only the second defendant entered appearance to defend the claim, the first defendant being out of G the jurisdiction. The second defendant also filed an exception to the claim on the grounds that there was no averment that, when the first defendant purported to sell and dispose of the equipment to the second defendant, the second defendant was aware of plaintiff's claims to ownership of the equipment. Since the English law of conversion was not part of Roman Dutch law, the fact that the second defendant might now be unable to H return the equipment did not entitle the plaintiff to claim damages from

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the second defendant, nor was the second defendant liable for the value A of the equipment, whether that value be the value as at the date of the purported sale or any subsequent date.

Held, that one of the incidents of ownership is the right of the owner of a thing to claim it from whoever is in possession of the thing and wherever it may be situate. Where an owner claims the return of his property or the B value thereof, it is incumbent upon the defendant to justify his continued detention of the *res* against the wishes and claim by the owner for its return. Where movable property has been stolen, or where the owner has been unlawfully deprived of it in some way, and consequent to that it has been alienated in such circumstances that the owner cannot vindicate, he may claim the value of the property from the thief, or the culprit, or C any person who parted with the *res* with the knowledge of the owner's claim to the property in question. Where the *res* has been consumed or destroyed the owner may also claim its value from a possessor who had knowledge of his claim. If the defendant has parted with possession of the *res*, or if the owner suspects that the defendant has parted with possession of it, the plaintiff, in seeking redress, does not mount a *rei* D *vindicatio*; he brings an action for its return or the value thereof. The elements that the plaintiff needs to allege differ from the *rei vindicatio*.

Held, further, that where a plaintiff seeks to recover the value of his property from a defendant on the ground that the latter had been in possession of it and had parted with possession, it is incumbent upon the plaintiff E to allege and prove that the defendant parted with the property with the full knowledge of the plaintiff's claim to ownership of it. The plaintiff must also allege knowledge of his claim to ownership either at the time of acquiring possession or at the time of disposal, consumption or destruction of the *res* being claimed.

Held, further, that the price of stolen property which has already been sold F cannot be vindicated, nor may things which have been bought with stolen money or negotiable instruments payable to bearer. The owner is, however, not necessarily without remedy. Though the *actio rei vindicatio* is primarily aimed at the recovery of lost possession, a defendant under this action who has fraudulently ceased to possess may nevertheless be G ordered to make good the value of the thing as at the date of trial or judgment. Where a party claims, in the alternative, the value of the thing that he seeks to be restored, he is seeking is to be placed in the same position that he would be if the *res* were restored to him. Restoration can only take place at the time of judgment, so the time for assessing the value of the *res* should be the date of trial or judgment. H

Gowora J

A *Held*, further, that the *actio ad exhibendumis* a personal action which is usually, but not necessarily, instituted in conjunction with the rei vindicatio to compel the possessor of a thing which is to be vindicated to produce it. In that situation, the plaintiff is entitled to bring an *actio ad exhibendum*. If the defendant fails to produce it and is still in possession of the property, he can be ordered to compensate the plaintiff for the value thereof. If B the defendant had ceased to possess the property fraudulently, an action would be brought to recover the value of the property from him.

Held, further, that a defendant is entitled to except to any set of facts together with the relief claimed in respect thereof as being bad in law. What a defendant cannot do is to except to a declaration on the basis that it does C not support one of several claims arising out of one cause of action. An exception taken in this form serves no purpose. An exception is taken in order to avoid the leading of unnecessary evidence. *In casu*, the exception would not dispose of the main

claim, *viz.*, the return of the property claimed by the plaintiff. The exception was not well taken and would be dismissed.

Cases referred to D

Alderson & Flitton (Tzaneen) (Pty) Ltd v Duffeys EG Spares (Pty) Ltd 1975 (3) SA 41 (T)

Chetty v Naidoo 1974 (3) SA 13 (A)

E *Dharumpal Tpt (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A)

*Goller & Ors v van der Merwe*1903 TS 157

Mlombo v Fourie 1964 (3) SA 350 (T)

Philip Bros v Wetzlar(1878) 8 Buch 77

*Stein v Giese*1939 CPD 336

*Sugden, Baron St Leonards v Kannemeyer*1921 OPD 121

F *Vulcan Rubber Works (Pty) Ltd v SAR&H* 1958 (3) SA 285 (A)

Case information

P C Paul, for the excipients (second defendant)

R M Fitches, for the respondent (plaintiff)

Judgment

G **GOWORA J**: The plaintiff herein issued summons against the two defendants out of this court on 13 April 2010. The plaintiff claim as endorsed on the face of the summons was for relief as follows:

(a) delivery to the plaintiff of the equipment described in Annexure A to the plaintiff's declaration; H

(b) alternatively, payment of the sum of US $34 959.42

(c) interest thereon at the prescribed rate from date of judgment to date of A final payment; and

(d) costs of suit.

The claim as set in the declaration is summarised as follows. The plaintiff alleges that it is the owner of certain railway equipment, which equipment has been particularised in Annexure A attached to the declaration. For B purposes of resolving this application the details of the equipment are not pertinent. The plaintiff alleges that in 2007 the first defendant purported to sell the equipment, wrongfully and unlawfully, to the second defendant. The second defendant is alleged to be in possession of the equipment in question. Demand has been made by the plaintiff to both defendants for the surrender C of the equipment in question and the defendants refuse or are unable return the equipment to the plaintiff despite demand. The defendants have also, despite demand, refused to pay to the plaintiff the value of such equipment. Consequently, the plaintiff has sued both defendants for payment of the value of the equipment as at the date of its disposal to the second defendant D by the first defendant.

Only the second defendant has entered appearance to defend the claim. It is suggested that the first defendant is not within the jurisdiction, rendering him outside the reach of the plaintiff. The second defendant, whom I shall refer to hereinafter as the defendant, has also filed an exception to the claim. The substance of the exception is as follows: E

> Take notice that the second defendant excepts to the plaintiff's summons as read with the declaration on the ground that the alternative claim against the second defendant for the payment of US $34 959.42 is bad in law, alternatively that the allegations in support of that claim are vague and embarrassing. F
>
> AND IN PARTICULAR:
>
> 1. There is no averment that when the first defendant purported to sell and dispose of the equipment to the second defendant, the second defendant was aware of the plaintiff's claims to ownership of the equipment. Since the English law of conversion is not part of Roman Dutch law, the fact that the second defendant may now be unable to return the equipment does not G entitle the plaintiff to claim damages from the second defendant nor is the second defendant liable for the value of the

equipment, whether that value be the value as at the date of the purported sale or any subsequent date.

2. In any event, the claim for the value of the equipment as at the date of purported sale or any other date is, on the papers, unclear and therefore vague and embarrassing. H

2011 (2) ZLR p269

Gowora J

A It is trite that one of the incidents of ownership is the right of the owner of a thing to claim it from whomsoever is in possession of the thing and wherever it may be situate. In *Chetty v Naidoo* 1974 (3) SA 13 (A), Jansen JA explained the principle thus:

> "… 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 B whomsoever holding it. It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, therefore need do no more than allege and prove that he is the owner and that the defendant is holding the res– the onus being C on the defendant to allege and establish any right to continue to hold against the owner."

Where, therefore, an owner claims the return of his property or the value thereof, it is incumbent upon the defendant to justify his continued detention of the *res* against the wishes and claim by the owner for its return. Where D movable property has been stolen, or where the owner has been unlawfully deprived of it in some way, and consequent to that it has been alienated in such circumstances that the owner cannot vindicate, he may claim the value of the property from the thief, or the culprit or any person who parted with *res* with the knowledge of the owner's claim to the property in question. Where E the *res* has been consumed or destroyed the owner may also claim its value from a possessor who had knowledge of his claim. If the defendant has parted with possession of the res, or if the owner suspects that the defendant has so parted with possession of the same, the plaintiff in seeking redress does not mount a *rei vindicatio*, he brings an action for its return or the value thereof. The elements that the plaintiff needs to allege differ from the *rei vindicatio*.

F The arguments presented to me do not appear to have a bearing on the initial exception filed by the excipient. The exception and the opposition thereto dealt with the issue as to whether or not the excipient was aware of the plaintiff's claims to ownership at the date that the first defendant purported to dispose of the property to the excipient. Argument was concentrated on G onus and the alternative prayer in the declaration. I believe, however, that the issues raised in the exception are still pertinent in view of the claim being prosecuted by the plaintiff.

In so far as the first issue was concerned, it submitted by Mr Paul that the court had to decide whether or not an onus lies on the plaintiff to allege, in H the declaration, mala fide son the part of the second defendant.

2011 (2) ZLR p270

Gowora J

It is correct to state that it is a principle of law where a plaintiff seeks to A recover the value of his property from a defendant on the ground that the latter had been in possession of it and had parted with possession, it is incumbent upon the plaintiff to allege and prove that the defendant parted with the property with the full knowledge of the plaintiff's claim to ownership of the same. See *Alderson & Flitton (Tzaneen) (Pty) Ltd v Duffeys EG Spares* B *(Pty) Ltd* 1975 (3) SA 41 (H) at 48G-H. This case is also authority for the principle that the owner must also allege knowledge of the plaintiff's claim to ownership either at the time of acquiring possession or at the time of disposal, consumption or destruction of the *res* being claimed.

The position taken by the plaintiff is that the question of whether or not the second defendant was aware of plaintiff's claim of ownership at the time C of the former's acquisition are matters of fact. So, too, it is argued, is the question whether or not the defendant is able to return the equipment or certain of the same. It is the plaintiff's contention that the issues dealt with above require evidence and that therefore they are not issues capable of resolution on the papers D .

The plaintiff argues that the declaration, as framed, is appropriate and that it is for the defendant to prove or aver, if he is not in possession, that he is not. Although the defendant suggests that the prayer as framed in the alternative for the value of the property is bad in law, the plaintiff has

suggested that *Amler on Pleadings* suggests that a plaintiff who suspects that the defendant has parted with possession may in addition plead in the alternative for E payment for the value of the res. Silberberg and Schoeman *Law of Property* 3 ed confirm that the owner of property who has been deprived of the same is not without remedy. They state at p 298:

> "As the English law doctrine of conversion does not apply in our law, the price of stolen property which has already been sold cannot be vindicated nor can F things which have been bought with stolen money or negotiable instruments payable to bearer. He is, however, not necessarily without remedy in these circumstances. Though the *rei vindicatio* is primarily aimed at the recovery of lost possession, a defendant under this action, who has fraudulently ceased to possess, may nevertheless be ordered to make good the value of the thing as at the date of trial or judgment." G

Where a party claims in the alternative the value of the thing that he seeks to be restored, it is correct that what he is seeking is to be placed in the same position that he would be if the res where restored to him. Restoration can only take place at the time of judgment and it is therefore just that the time for assessing the value of the resbe the date of trial or judgment. See *Mlombo* v *Fourie* 1964 (3) SA 350 (T) at 357H-358A. H

Gowora J

A The vindicatory claim is available to the recovery of things which are identifiable and it is a requirement that the thing continue to exist. It is also essential that the defendant be in possession of the plaintiff's thing as at the date the action is brought or at the date of judgment. It may not only be brought in respect of a fraudulent loss of possession but is also available against a *mala fide* possessor who ceased to possess through negligence (see B Silberberg & Schoeman op cit p 277).

According to Silberberg and Schoeman op cit p 278-9 the *actio ad exhibendum* is a personal action which was usually, but not necessarily, instituted in conjunction with the *rei vindicatio* to compel the possessor of a thing which was to be vindicated to produce it. In that situation the plaintiff is entitled to C bring an *actio ad exhibendum*. If the defendant failed to produce it and was still in possession of the property, he would be ordered to compensate the plaintiff for the value thereof. Also, if the defendant had fraudulently ceased to possess the property, an action would be brought to recover the value of the property from him. Where the defendant is no longer in possession of the *res* the plaintiff must allege and establish that the defendant has D either parted with possession of the res or that it has been destroyed. It is a requirement of the *actio ad exhibendum* that the plaintiff must allege and prove bad faith on the part of the defendant in parting with possession of the res. The leading authority on the principle is to be found in *Philip Bros v Wetzler* (1878) 8 Buch 77.

> " E I am clearly of opinion that this exception is a good one; for the fact that the goods were in the possession of the defendant, from whom the plaintiff seeks to recover them, is the very essence of the *rei vindicatio*. As to the pleadings I have no doubt that in an action of *rei vindicatio* it is necessary to allege possession by the defendant or that he had parted with possession fraudulently or with knowledge of the owner's claim. Voet 6.1.22 shows that the plaintiffs could not succeed except as against a possessor whether *bona fide* or *mala fide*; F and he even goes so far as to say that the defendant shall be absolved even if, after *litis contestatio*, he ceased to be the possessor. This statement of the law must be taken with the qualifications mentioned by Voet in the 32nd and 33rd paragraphs of the title. In this declaration there is no allegation that the defendant possessed the goods or had parted with them fraudulently or with knowledge of the plaintiff's claim. The third exception must therefore be allowed."

G Similarly, in *Vulcan Rubber Works (Pty) Ltd v SAR & H* 1958 (3) SA 285 (A) Schreiner JA, dealing with a claim by an owner for delivery of forty-two bales of rubber, stated at p 289:

> " Subject to special defences our law gives the owner of property the right to recover it from anyone who is in possession of it. He may moreover recover its value from anyone who has been in possession of it but has parted with possession H after he has had notice of the owner's right (*Aspeling NO v Joubert* 1919 AD

Gowora J

> 167 at pp 170 & 171). Those were the two remedies which were available to A the plaintiff. If it could prove that the Administration was at the time of the action in possession of the forty-two bales of rubber it could obtain judgment for their delivery. Alternatively, if it could show that the Administration had had possession of the rubber and had parted with possession after it had been notified, as it was on 30 October 1951, of the appellant's claim, it could recover the value of the rubber. The two claims can be brought as alternatives in one B action, but they are not simply alternative forms of relief, as where a purchaser of

property sues for its delivery, or alternatively, for damages. In such cases the purchaser has to prove no more than that he is entitled to delivery. In the present case, the appellant, if it could not prove that the Administration still had the rubber, had to prove that it was in possession of it after 30 October 1951. This the appellant could, of course, do by showing that the Administration had been in possession of the rubber in, say, July or August 1951, and had not parted with C it before 30 October 1951.

It will be observed that the declaration does not allege that the defendant Administration was in possession of the rubber at the commencement of the action (July 1952) or at the date of the declaration (September 1952). It only alleges possession by the Administration in July 1951. The declaration was on that ground excipiable: *Philip Bros v Wetzlar* (1878) 8 Buch 77; SAR&H *v* Natal D Industrial Products Ltd 1949 (2) SA 782 (N)."

My perusal of the authorities leaves me to conclude that the authorities are in agreement that the *actio rei vindicatio* and the *actio* ad *exhibendum* are not alternative claims. They are entirely separate and distinct.

Although the defendant suggests that the plaintiff has not averred that the E defendant parted with the property with the knowledge of the plaintiff's claim to ownership therein, the defendant has not excepted to the declaration on the grounds that it does not disclose a cause of action. The plaintiff has not proceeded under the *actio ad exhibendum* but under the *actio rei vindicatio*. It seems that on that score the plaintiff is satisfied that the declaration discloses a cause of action for a vindicatory claim. F

A close examination of the heads of argument filed by the defendant appears to suggest that he is unable to return the property. The defendant, in raising the exception, is arguing on facts that have not been pleaded; for example, when he argues that the property may have been consumed or incorporated into another object so that its original identity ceases to exist. It does not G seem to me appropriate for an argument to be raised based on a theory as opposed to pleadings on the record. As the plaintiff has argued, it is incumbent upon the defendant to plead to the claim. If the property is no longer in his possession, he must plead that as this is a factual issue. The plaintiff, in my view, cannot be expected to guess as to the whereabouts of the property or speculate on what the defendant may have done with it. H

2011 (2) ZLR p273

Gowora J

A The plaintiff has suggested that a litigant cannot lawfully except to an alternative claim without excepting to the main claim. The plaintiff has referred this court to *Stein v Giese* 1939 CPD 336 at 338 where Jones J, with Sutton J concurring, opined that it was not open to a defendant to except to one of several claims arising out of one and the same cause of action. See *Sugden Baron St Leonards v Kannemeyer* 1921 OPD 121; *Goller and Ors v* B *van der Merwe* 1903 TS 157; *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A). Put differently, a defendant is entitled to except to any set of facts together with the relief claimed in respect thereof as being bad in law. What a defendant cannot do is to except to a declaration on the basis that it does not support one of several claims arising out of one cause C of action. An exception taken in this form serves no purpose. An exception is taken in order to avoid the leading of unnecessary evidence. In casu,the exception will not dispose of the main claim, viz the return of the property claimed by the plaintiff. It follows therefore that a defendant cannot except to a prayer whilst leaving the whole declaration intact.I find that the exception was not well taken and it is hereby dismissed with D costs.

E *Wintertons*, legal practitioners for the excipient

Coghlan, Welsh & Guest, legal practitioners for the plaintiff

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/BHEBHE & ORS v CHAIRMAN, ZIMBABWE ELECTORAL COMMISSION & ORS 2011 (2) ZLR 274 (H)

BHEBHE & ORS v CHAIRMAN, ZIMBABWE ELECTORAL COMMISSION & ORS 2011 (2) ZLR 274 (H)

Citation	2011 (2) ZLR 274 (H)
Case No	Judgment HB-139-11
Court	High Court, Bulawayo
Judge	Ndou J
Heard	28 January 2011; *CAV*
Judgment	13 October 2011
Counsel	*M Ncube*, for the applicants Ms *F Chimbaru,* for the third respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Elections – *by-elections – vacancy in Parliament – whether President is obliged to call by-election within 14 days of notice of vacancy – no public funds available – President not required to call by-election in* D *absence of funds*

Interpretation of statutes – *directory and peremptory provisions – meaning of – determination of whether a provision is directory or peremptory – use of word "shall" – not necessarily indicative of peremptoriness – factors court must consider in making determination – serious public inconvenience – may be a reason for holding provision to be directory* E

Headnote

The three applicants had been members of Parliament elected for one of the main political parties. They fell out of favour with their party and were expelled from the party in 2009. The party ensured that the applicants had their membership of Parliament terminated. In terms of s 41(1)(e) of the F Constitution the Clerk of Parliament notified them that their membership of the house had been terminated with effect from 22 July 2009. On 17 August 2009, the Speaker of the House notified the President, the third respondent, in terms of s 39(11) of the Electoral Act [*Chapter 2:13*] of the vacancies in the applicants' constituencies. Section 39(2) of that Act states that "The President shall, within a period of fourteen days G after … he … has been notified … of a vacancy in the membership of Parliament … publish a notice in the *Gazette* ordering a new election to fill the vacancy". For over 18 months no such notice was published. When the application was brought to compel the President to publish a notice to hold by-elections, the respondents argued that s 39(2) of the Act should be interpreted as being directory and not peremptory, and H

A that such an interpretation would be reasonable given the lack of funds for holding elections.

Held, that the language of a predominantly imperative nature is generally taken to be indicative of peremptoriness. The verb "shall" is one such word. However, to determine whether a particular provision is peremptory or directory, the court must construe the language of the concerned B provision in the context, scope and object of the Act of which it forms part. The mere use of labels such as the word "shall" does not necessarily mean that the provision is peremptory. Such language, in many cases, represents little more than the first stage of the enquiry. The court must carefully examine the objects of the Act and the public importance of C compliance with it. Such case has to be considered on its merits. Procedural requirements should not be construed as mandatory (peremptory) if serious public inconvenience would result. Courts frequently

condone non-compliance with ostensibly mandatory provisions by weighing up all the relevant considerations such as, *inter alia*, public convenience, justice and the objects of the Act.

D *Held,* further, that the court had to consider whether interpreting the Act in a peremptory sense would cause hardships and inconveniences to ratepayers or taxpayers. Provisions of a statute which relate to the performance of a public duty seem to be generally understood as mere instructions for guidance and government of those on whom the duty E in imposed, that is to say, as 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 Legislature. Such an interpretation would be reasonable *in casu*. F If the court were to make an order that by-elections be held when the relevant funds for holding such elections are not there, the order would be a *brutum fulmen* – clearly an undesirable situation. If the Government were to commit the little available funds and resources to the holding of by-elections, that would result in serious general inconvenience to the general public. Section 39(2) of the Constitution should be understood G as nothing more than mere instructions for guidance to the President when he carries out his public duty to gazette election dates. To order the President to gazette by-elections in the absence of the required financial resources would not only disrupt the smooth running of the country but H would cause serious inconvenience to the public.

2011 (2) ZLR p276

Ndou J

Cases cited A

Charlestown Town Bd v Vilakazi 1951 (3) SA 361 (A)

Crawford & Ors v Borough of Eshowe & Ors 1956 (1) SA 147 (N)

J E M Motors Ltd v Boutle & Anor 1961 (2) SA 320 (N)

Liverpool Borough Bank v Turner (1860) 30 LJ Ch 379; 2 de GJF & J 502

Maharaj & Ors v Ramperstad 1964 (4) SA 638 (A)

Messenger of the Magistrate's Court, Durban v Pillay 1952 (3) SA 678 (A) B

Nkisimane & Ors v Santam Ins Co Ltd 1978 (2) SA 430 (A)

R v Busa 1959 (3) SA 385 (A)

Sibanda v President of Zimbabwe 2008 (1) ZLR 305 (H)

Simpson v A-G [1955] NZLR 271

Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 293 C

Legislation considered

Electoral Act [*Chapter 2:13*], s 39

Case information

M Ncube, for the applicants

Ms *F Chimbaru,* for the third respondent D

Judgment

NDOU J: The applicants seek an order in the following terms:

> "It is hereby ordered that:
>
> The third respondent be and is hereby ordered and directed to gazette a date for elections within 14 days of granting of this order in the following House of E Assembly Constituencies:-
>
> (i) Nkayi South
> (ii) Lupane East
> (iii) Bulilima East"

The background facts of this application are as follows. All three applicants F were elected members of the National Assembly in the 2008 general elections under MDC ticket. They represented Nkayi South, Lupane East and Bulilima East constituencies, respectively. They fell out of favour with their MDC party resulting in their expulsion from the party in 2009. The MDC party ensured that the applicants had their membership of Parliament terminated. By notices pursuant to the provisions of s 41(1)(E) of the Constitution, the G Clerk of Parliament notified them that their membership of the House had been terminated with effect from 22 July 2009. The Speaker of the House of Assembly notified the third respondent in terms of s 39(11) of the Electoral Act [*Chapter 2:13*] of the vacancies in the above-mentioned constituencies. The said notice was dated 17 August 2009. Up to date of the issuance of the application the third respondent had not acted in terms of s 39 in order to H

Ndou J

A fill these vacancies. This is the pith and marrow of this application. Section 39 *supra* provides:

> "(1) A vacancy in the membership of Parliament which exists otherwise than by reason of a dissolution of parliament shall, subject to this section, be notified to the President and the Commission in writing by the Speaker as soon as possible after the Speaker becomes aware of the vacancy. B
>
> (2) The President shall, within a period of fourteen days after –
>
> (a) he or she has been notified of this section of a vacancy in the membership of Parliament; or
>
> (b) a declaration is made by the Chief Elections Officer in terms of section fifty; or C
>
> (c) a nomination day or the last nomination day as the case may be, where no person has been duly nominated for election;
>
> publish a notice in the *Gazette* ordering a new election to fill the vacancy in the same manner, with any changes that may be necessary, as is provided in section *thirty-eight* in regard to a general election and the provisions of this Act shall apply accordingly."

D The third respondent, in answer to this application, does not deny that a notice was given to him in terms of s 39(1) of the Act. He contends that s 39(2) *supra* should be interpreted as directory and not peremptory, arguing that such an approach to interpretation would be reasonable given the lack of funds for holding elections. It is trite that language of a predominantly E imperative nature is generally taken to be indicative of peremptoriness. The verb "shall" is one such word: *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A); *R v Busa* 1959 (3) SA 385 (A), *Maharaj & Ors v Ramperstad* 1964 (4) SA 638 (A) at 644. But a court called upon to determine whether a particular provision is peremptory or directory must construe the language of the concerned provision in the context, scope and objects of the F Act of which it forms part: *Charlestown Town Board v Vilakazi* 1951 (3) SA 361 (A). In the *Maharaj* case *supra* at 643G-644B the court had this to say:

> "Appellants' counsel pointed out that the regulation used the word 'shall' … in relation to the requirement of attaching to the application a plan or map tracing, and on the authority of such decisions as *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 A … he contended that this was a 'strong indication' G that the requirement was peremptory. In the former of the two cases referred to immediately above, van den Heever JA described the word '*moet*' ('shall') in Kantian terms as embodying the 'categorical imperative'. It would be a work of supererogation to refer to the long list of examples in our reported case law where that word, in the light of considerations pointing to another conclusion has had to surrender this resounding accolade and been reduced to the status of H a mere directory verb."

Ndou J

Further, in *Nkisimane & Ors v Santam Insurance Co Ltd* 1978 (2) SA 430 (A), A Trollip JA had this to say:

> "Preliminarily I should say that statutory requirements are often categorized as 'peremptory' or 'directory'. They are well known concise and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have B become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non- or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or in other words, upon the intention of the lawgiver as ascertained from the language, scope and purpose of the enactment as a whole and the

statutory C requirement in particular (see the remarks of van den Heever J in *Lion Match Co Ltd v Wessels* 1946 OPD 376 at 380). Thus, on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity. (See authorities quoted in *Shalala v Klerksdorp Town Council & Anor* 1969 (1) SA 582 (T) at 587A-C). On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes not D be necessary at all, and non- or defective compliance therewith may not have any legal consequence (see for example, *Sutter v Scheepers* 1932 AD 165). In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective (see *J E M Motors Ltd v Boutle & Anor* 1961 (2) SA 320 (N) at 327 *in fin*-328B and *Shalala's c*ase E *supra* at 587F-588H, and *Maharaj & Ors v Ramperstad* 1964 (4) SA 638 (A) at 646C-E). It is unnecessary to say anything about the correctness or otherwise of this trend in such decisions. Then, of course, there is also the common kind of directory requirement which need only be substantially complied with to have full legal effect (see for example *Rondalia Versekerings-Korporasie Bpk v Lemmer* 1966 (2) SA 245 (A) at 257H-258H)."

It is thus clear that the mere use of labels such as the word "shall" does not F necessarily mean that the provision is peremptory. Such language, in many cases, represented little more than the first stage of the enquiry. "It is the duty of the courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute concerned to be construed: *Crawford & Ors v Borough of Eshowe & Anor* 1956 (1) SA 147 (N) and *Vita* G *Food Products Inc v Unus Shipping Co Ltd* [1939] AC at 293. The court must carefully examine the object at the Act and the public importance of compliance with it. Such case has to be considered on its merits: *Liverpool Borough Bank v Turner* (1860) 30 LJ Ch 379; 2 de GJF & J 502 at 507. It is not the first time that I have to decide whether s 39(2) is peremptory or directory. In *Sibanda v The President of Zimbabwe* 2008 (1) ZLR 305 (H) H

Ndou J

A the same issue arose. In that case, considered on its merits, I held that the language of s 39(2) is peremptory.

However, there are exceptions to this general rule: *J E M Motors Ltd v Boutle & Anor supra* and New Zealand case of *Simpson v Attorney-General* [1955] NZLR 271 (discussed in de Smith's *Judicial Review of Administrative Action* 4 ed by J M Evans at p 144). In the *Simpson* case it was held that procedural B requirements should not be construed as mandatory (peremptory) if serious public inconvenience would result. Further, in his book *Interpretation of Statutes* G E Devenish at p 228 states that courts do frequently condone non-compliance with ostensibly mandatory provisions by weighing up all the relevant considerations such as, *inter alia*, public convenience, justice C and the objects of the Act. The court has to consider whether interpreting the Act in a peremptory sense would cause hardships and inconveniences to rate payers. According to *Maxwell Interpretation of Statutes* 10 ed at p 381, provisions of a statute which relate to the performance of a public duty seem to be generally understood as mere instructions for guidance and government of those on whom the duty in imposed, that is to say as directory D 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 Legislature.

The view attributed to Maxwell *loc cit* makes a lot of sense and should, E in my humble view, be adopted in the construction of s 39(2). Such an interpretation would be reasonable, given that if the court were to make an order that by-elections be held when the relevant funds for holding such elections are not there, the order would be a *brutum fulmen* and this would clearly be an undesirable situation. If the Government were to commit the little available funds and resources to the holding of by-elections this F would result in serious general inconvenience to the general public. In the circumstances of this case, it should be accepted that the provisions of s 39(2) should be understood as nothing more than mere instructions for guidance to the President when he carries out his public duty to gazette election dates. Clearly ordering the President to gazette by-elections in the absence of the required financial resources would not only disrupt the smooth running of G the country but would cause serious inconvenience to the public.

Accordingly, from the facts of this case, the interpretation of the word "shall" is therefore, directory. Ms *Chimbaru,* for the third respondent submitted that the third respondent would have no problem in

the order sought by the applicants being granted after the lapse of two months from the date of the H hearing. The two months has lapsed so I have no option but to grant the order. Before I grant the

Ndou J

order I wish to make a few observations. The legal A practitioners *in casu* based their legal arguments primarily from what is not contained in the evidence filed in their respective papers. The litigants' case is really what the affidavits and annexures state and not some legal argument that is not tandem with the evidence therein. The applicants' papers were not amended to evince that the fiscus now has the requisite funds to hold B by-elections. This was stated by the applicants' legal practitioner from the bar. The court cannot take judicial notice of the fiscus's ability to fund an election. The third respondent's legal practitioner also made some factual submission from the bar on the Government's ability to hold elections within two months. The litigants should amend their papers to reflect the changed circumstances. C

I accordingly, make an order in the following terms:

It is ordered that:

1. The third respondent be and is hereby directed to gazette a date for elections within fourteen days of service of this order on him in the following House of Assembly constituencies, Nkayi South, Lupane D East and Bulilima East.
2. There is no order as to costs.

Phulu & Ncube, applicants' legal practitioners

Civil Division, Attorney General's Office third respondent's legal practitioners E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/S v KAWAREWARE 2011 (2) ZLR 281 (H)

S v KAWAREWARE 2011 (2) ZLR 281 (H)

Citation	2011 (2) ZLR 281 (H)
Case No	Judgment No. HH-268-11
Court	High Court, Harare
Judge	Uchena J
Heard	25 October 2011
Judgment	25 October 2011
Counsel	Details not Supplied
Case Type	Criminal review
Annotations	Link to case annotations

Flynote

C **Criminal procedure** – *review – automatic review or upon referral by scrutinising regional magistrate – consideration of whether proceedings in lower court are in accordance with "real and substantial justice" – meaning – what constitutes "real and substantial justice" — must broadly satisfy essential requirements of law and practice – what reviewing judge* D *must consider in making assessment – scrutiny by regional magistrate of proceedings in a lower court – similar principles apply*

Words and phrases – *"real and substantial justice" – meaning of – must broadly satisfy essential requirements of law and practice*

Headnote

E In scrutinising criminal proceedings terms of s 58(3)(a) of the Magistrates Court Act [*Chapter 7:10*], all the scrutinising regional magistrate is required to do is to satisfy himself that the proceedings are in accordance with real and substantial justice. If they are, he should certify them. If he is in doubt, he should refer them for review by a judge of the High Court. A judge of the High Court reviewing criminal proceedings of F an inferior court is required by s 29(2) of the High Court Act [*Chapter 7*:*06*] to determine whether or not the proceedings are in accordance with real and substantial justice. If they are, he should confirm the proceedings. If they are not, he can withhold his certificate, alter or quash the conviction, or reduce or set aside the sentence as the circumstances of the case may require.

G For the purposes of both s 58(3) of the Magistrates Court Act and s 29(2) of the High Court Act, "real and substantial justice" is the considerable judicious exercise of judicial authority by the trial court, which satisfies, in the main, the essential requirements of the law and procedure. Failure to comply with minor requirements, minor mistakes and immaterial H irregularities should, however, not result in the scrutinizing or reviewing.

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judicial officers' refusal to certify proceedings as being in accordance A with "real and substantial" justice. The critical consideration is whether the proceedings broadly satisfy the requirements of justice.

"It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant B principles, even it is severer than one that the court would have imposed, sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court" *(dicta per* Korsah JA in *S* v *Nhumwa* S-40-88 followed). This applies with equal force to a scrutinizing and reviewing judicial officer. His duty is merely to be satisfied that real and substantial justice has been done C .

The main features to look out for in scrutinising or review proceedings are:

- the correctness of the charge preferred;
- the agreed facts or State and defence outlines;
- compliance with statutory requirements in taking a plea of guilty or in conducting a trial where the accused pleads not guilty;
- the acceptance or proof of the facts on which the charge is based; D
- the assessment of evidence i.e matching of the law and the accepted or proved facts;
- the trial court's reasons for judgment;
- the correctness or otherwise of the conviction; and
- the justifiability of the charge or sentence. E

With regard to sentence, since the codification of our criminal law, all sentences are provided for in the Criminal Law Code [*Chapter 9:23*] or in the statute which creates the crime charged. All the reviewing or scrutinizing judicial officer should do is check whether the sentence suits the offence and the offender, and is within the range of sentences provided for in the Code or other statute. He must also check the trial F court's reasons for sentence to determine whether or not the correct sentencing principles were applied in passing sentence. Where a crime was committed under common law before codification, the judicial officer should be guided by precedents in similar cases. In all cases, the scrutinising or reviewing judicial officer should bear in mind the G trial court's sentencing discretion, and not interfere unless the sentence imposed induces a sense of shock or unless the trial court misdirected itself in a manner which warrants the intervention of the reviewing judge.

Cases cited

Palser v Grinling [1948] AC 291 H

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A *S v Chidodo & Anor* 1988 (1) ZLR 299 (H)

S v de Jager & Anor 1965 (2) SA 616 (A)

S v Gore 1999 (1) ZLR 177 (H)

S v Mugebe 2000 (1) ZLR 376 (H)

S v Mugwenhe & Anor 1991 (2) ZLR 66 (S)

S v Mundowa 1998 (2) ZLR 392 (H)

B *S v Mutemi* 1998 (2) ZLR 290 (H)

S v Nhumwa S-40-88

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 272

C High Court Act [*Chapter 7:06*], s 29(2)

Magistrates Court Act [*Chapter 7:10*], s 58(3)

Judgment

UCHENA J: The accused person was charged with theft in contravention of s 113 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. He pleaded guilty, and was convicted on his own plea. He was sentenced D to six months' imprisonment, of which three months were suspended on conditions of good behaviour.

The record of proceedings was referred for scrutiny by a regional magistrate. The regional magistrate raised an issue on the propriety of the accused's conviction because the record revealed the following exchange between the E accused and the trial magistrate during the canvassing of essential elements.

> "Q Do you admit that your intention was to permanently deprive complainant of his property?
> A No."

The regional magistrate asked the trial magistrate to comment on the effect F of the accused's answer to the question quoted above.

In response to the regional magistrate's inquiry, the trial magistrate responded as follows:

> "I am convinced that I properly convicted the accused person. I think I made an error in recording the response. The accused admitted as evidenced by his mitigation that when he took the stones he sold them and paid for medical G bills using the money. This clearly shows intention of permanently depriving complainant of his property".

The regional magistrate was not satisfied. He referred the record of proceedings and the communication between him and the trial magistrate for review by a judge of the High Court. The lot fell on me to resolve their dispute. H Such disputes are unfortunately increasing because of an apparent failure

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to appreciate the standard required before proceedings can be certified as A being in accordance with real and substantial justice.

A reading of the whole record proves that the trial magistrate erroneously recorded the accused's answer. This is supported by what the accused said in mitigation, and what he had said when he was asked if he agreed with the facts. He agreed with the facts which clearly state that he had sold the stones B and had not surrendered the proceeds to the complainant. This, coupled with what the

accused said in mitigation, confirms that the accused intended to deprive the complainant permanently.

The purpose of a scrutiny or a review is to ascertain whether or not the proceedings are in accordance with real and substantial justice.

Section 58(3) of the Magistrates Court Act [*Chapter 7*:*10*] (hereinafter C referred to as the Magistrates Court Act) provides for scrutiny by regional magistrate as follows:

> (3) The regional magistrate shall, as soon as possible after receiving the papers referred to in subsection (1), upon considering the proceedings –
>
> (a) if he is satisfied that the proceedings are in accordance with real and substantial D justice, endorse his certificate to that effect upon the proceedings which shall then be returned to the court from which they were transmitted;
>
> (b) if it appears to him that doubt exists whether the proceedings are in accordance with real and substantial justice, cause the papers to be forwarded to the registrar, who shall lay them before a judge of the High Court in chambers for review in accordance with the High Court Act [*Chapter 7:06*]." E

In terms of s 58(3)(a) of the Magistrates Court Act, all the regional magistrate is required to do is to satisfy himself that the proceedings are in accordance with real and substantial justice. If they are, he should certify them. If he is in doubt he should refer them for review by a judge of the High Court.

The judge is, in his review of the proceedings, required by s 29(2) of the High F Court Act [*Chapter 7*:*06*], to determine whether or not the proceedings are in accordance with real and substantial justice. If they are, he should confirm the proceedings. If they are not, he can withhold his certificate, alter or quash the conviction, or reduce or set aside the sentence as the circumstances of the case may require. Section 29(2) provides as follows;

> "If on a review of any criminal proceedings of an inferior court or tribunal, the G High Court considers that the proceedings –
>
> (a) are in accordance with real and substantial justice, it shall confirm the proceedings;
>
> (b) are not in accordance with real and substantial justice, it may, subject to this section –
>
> (i) alter or quash the conviction; or H

Uchena J

> (ii) reduce A or set aside the sentence or any order of the inferior court or tribunal or substitute a different sentence from that imposed by the inferior court or tribunal."

The words "real and substantial justice" are not defined in either the Magistrates Court Act or the High Court Act. An attempt was made to define them in *S v Chidodo & Anor* 1988 (1) ZLR 299 (H) at 302C-303C where B Greenland J said:

> "The power of certifying proceedings as being in accordance with real and substantial justice is an additional power more properly viewed as a prerogative. It seems clear from the words employed, ie 'in accordance with real and substantial justice', that a judge (and regional magistrate) is required to make a value judgment on the question. He must be satisfied that everything that C transpired at the criminal trial conforms with the notions of justice that these words imply. The words employed are individually and collectively very wide in ambit. Notions of justice, being essentially abstract, are necessarily as wide, as any textbook on jurisprudence will show. As Scrutton LJ pithily observed:
>
> > 'I am sure it is justice. It is probably the law for that reason' (*Gardiner v Heading* [1928] 2 KB 284 at 290).
>
> D What is to be considered just, depends on the norms and sense of values generally prevailing in society. The test therefore can only be objective and can be expressed by quoting Lord Devlin *The Judge* at p 58:
>
> > 'The British ... says that justice should not only be done but should be seen to be done, and the English system observes this precept in the spirit and in the letter'.
>
> E So too with our own criminal law and procedure, which are largely English in character.
>
> Adopting this approach it might be difficult to determine what is just. It is however easier to determine what is not just. It is not just that a man should be treated more favourably than others are treated, on the same facts, by a court of law. It is not just that he should be charged with and convicted of a lesser offence when the admitted facts show that he is guilty of a more serious crime. F It is not just that he should be so favoured because of his status as a member of the CIO. These are all impressions, reactions and assumptions which are induced in the mind of a reasonable man with variable degrees of certainty by

the facts in this case, in the absence of an explanation or reason advanced for the apparently extremely favourable treatment. The position is akin to that in the case of *S v Chisango* HH -05-87 where a certificate was withheld because –

> G 'Unfortunately, and to the great prejudice of justice and in breach of the sacrosanct notions of justice adverted to herein, the impression which is given is that the accused was afforded special and favourable treatment because of his status as a soldier. It is therefore necessary to emphasize that all persons are equal before the law.'

It should be noted that that case was different in the sense that the presiding H magistrate had it within his power to prevent the injustice. In this case the

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magistrate's hands were tied because the State, as dominus litis, put the lesser A charge. However, the magistrate's sense of justice should have induced him to, at the least, query the matter. It may be that some satisfactory explanation would have been advanced although this is difficult to imagine in the light of the admitted facts.'"

The case of *Chidodo supra* establishes that the determination of whether proceedings are in accordance with real and substantial justice is a value B judgment to be made by the scrutunising or reviewing judicial officer, and should be supported by notions of what is just or not just. I would add that the decision to grant or withhold the certificate should first and foremost be based on the law and the facts on which the charge is based. It can, in most cases, be determined by whether what has been accepted or proved satisfies C the essential elements of the crime charged. In such cases it would not be a value judgment but an assessment of the trial against the applicable law and procedure. Value judgments would only be applicable in the type of cases Greenland J was dealing with.

In a criminal review or scrutiny the judicial officer must be guided by his knowledge of criminal law and criminal procedure. Greenland J said the D judge or regional magistrate "must be satisfied that everything that transpired at the criminal trial conforms with the notions of justice that these words imply." As Greenland J pointed out:

> "The words 'real and substantial justice' are individually and collectively very wide in ambit, and notions of justice, being essentially abstract E, are necessarily as wide, as any textbook on jurisprudence will show."

This leaves the standard leading to the confirmation of proceedings or a refusal to confirm in the abstract. It sounds mystic and may not be of assistance to an inexperienced regional magistrate. This may leave unnecessary doubts which will lead to unnecessary referrals to reviewing judges. A clearer definition F of the phrase "in accordance with real and substantial justice" is called for.

The Shorter Oxford English Dictionary in the relevant ambits of the words defines the words "real", "substantial" and "justice" as follows:

> "Real" means:
>
> "Having an objective existence; actually existing as a thing; actually existing G or present as a state or quality of things having a foundation in fact; actually occurring or happening; that which is actually and truly such as its name implies; possessing the essential qualities denoted by its name; hence, genuine, undoubted; the actual thing or person that properly bears the name; sincere, straightforward, honest". H

A "Substantial" means

> "That is constitutes or involves an essential part, point, or feature; essential material; that is such in the main; real or true for the most part";

"Justice" means:

> "The quality of being (morally) just or righteous; the principle of just dealing; B just conduct; integrity, rectitude. Exercise of authority or power in maintenance of right; vindication of right by assignment of reward or punishment."

The word "substantial", which is central to the standard required for "real and substantial justice", was defined by Viscount Simon in *Palser v Grinling Property Holding Co Ltd* v *Mischeff* [948] AC 291 at pp 316-317 as follows:

C "What does 'substantial portion' mean? It is plain that the phrase requires a comparison with the whole rent, and the whole rent means the entire contractual rent payable by the tenant in return for the occupation of the premises together with all the other covenants of the landlord. 'Substantial' in this connection is not the same as 'not unsubstantial' i.e just enough to avoid the *de minimis* principle. One of the primary meanings of the word is equivalent to considerable, solid, or big."

D The word 'substantial' is also similarly defined by Butterworth's *Words and Phrases Legally Defined* vol 5 2 ed at pp 141 to 142.

Real and substantial justice would thus be the considerable judicious exercise of judicial authority by the trial court, which satisfies in the main the essential requirements of the law and procedure. Failure to comply with minor E requirements, minor mistakes and immaterial irregularities, should, however not result in the scrutinising or reviewing judicial officer's refusal to certify proceedings as being in accordance with real and substantial justice. This is demonstrated by *S v Gore* 1999 (1) ZLR 177 (H) at 180F-181E, where Gillespie J, commenting on "real and substantial justice" having been done F in spite of some rather serious irregularities, said:

"This brings me back to the irregularity arising out of the failure to record an explanation of essential elements and the apparent failure to give that explanation. My dilemma here is that on the one hand is the clear statutory requirement, reinforced by judicial decisions, for the giving and recording of that explanation. On the other hand is the equally clear statutory injunction that a judge should not quash a conviction on the grounds of irregularity unless he considers that a G substantial miscarriage of justice has occurred. Is there conflict between these two positions?

In my judgment, there is not. If I might be permitted to explain the many dicta to the effect that failure to comply with s 271(2)(b) of the criminal code is a fatal defect, I would say this. So fundamental is the need to confirm a plea of guilty, where a sentence other than a trifling one may be imposed, that in the vast H majority of cases one cannot be satisfied as to the absence of a miscarriage of

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Uchena J

justice if a magistrate has taken no steps, as are required by law, to confirm the A plea by explaining the elements of the offence and recording that explanation and the accused's acknowledgement of guilt. This is not to say that in no such case can one be confident that there is no miscarriage of justice where such a failure has occurred. Indeed, as every judge knows, in the enormous volume of cases on review there are many occasions where one overlooks technical inadequacies or irregularities in s 271(2)(b) procedure because the justice of B the result cannot be in doubt.

I consider that in this case there can be no fear that the convictions constituted a miscarriage of justice. The charge is one which is utterly devoid of legal complexity and innocent of any occasion for misunderstanding and ignorance. There can have been no doubt in the mind of the accused, a highly experienced road user, as to what he was admitting. There can be no doubt that the facts recorded on the 'tickets', admitted as they are by the accused, disclose the offence. I would C therefore decline to interfere with the convictions for speeding."

This case proves that "real and substantial justice" is proof that the conviction is safe despite the imperfections in the proceedings.

In the case of *S v Mugebe* 2000 (1) ZLR 376 (H) at 378E Bartlett J, after pointing out some irregularities in the proceedings commenting on "real and D substantial justice" having been achieved, said:

"The remainder of the proceedings, are probably in broad accordance with real and substantial justice and are confirmed."

The critical consideration is therefore, whether the proceedings broadly satisfy the requirements of justice E.

See also *S v Mutemi* 1998 (2) ZLR 290 (H) at 298E where Chinhengo J said:

"I will therefore, despite the failure by the magistrate in principle to adopt the correct approach to sentencing in this matter, confirm the proceedings as having been in accordance with real and substantial justice."

In a criminal scrutiny or review, the process leading to the confirmation of F proceedings or a refusal to certify the proceedings should, in spite of what Greenland J said, be fairly easy to follow. Every crime has essential elements which, if correctly charged in the charge sheet, and amplified in the agreed facts, state outline, and proved in the canvassing of essential elements or in evidence, would indicate the correctness of the conviction. The standard of proof required in a criminal trial is

a good guide. The scrutinising regional G magistrate or reviewing judge should be satisfied if the proceedings before him were a full trial, whether or not the evidence led proves the accused guilty beyond reasonable doubt. The standard of proof beyond reasonable doubt indicates what real and substantial justice means. It is the standard of justice which justifies a conviction when there is no reasonable doubt that the accused committed the offence. It is the standard of justice which requires H

Uchena J

A that the guilty be convicted and the innocent be acquitted. According to our law a conviction can be safe even if there are some irregularities, as long as they do not vitiate it. Substantial justice is not only achieved by an impeccable trial but one which is in the main real or true for the most part, according to the law being applied which satisfies that standard. The evidence on the record of proceedings should guide the scrutinizing or reviewing judicial B officer. The crucial question should always be has the accused been correctly convicted and sentenced. If he has, the proceedings should be confirmed. If not, the certificate should be withheld.

The main features to look out for in scrutinising or reviewing proceedings are therefore; C

(1) The correctness of the charge preferred;

(2) The agreed facts or state and defence outlines;

(3) Compliance with statutory requirements in taking a plea of guilty or in conducting a trial where the accused pleads not guilty;

(4) The acceptance or proof of the facts on which the charge is based; D

(5) The assessment of evidence i.e matching of the law and the accepted or proved facts;

(6) The trial court's reasons for judgment;

(7) The correctness or otherwise of the conviction; and E

(8) The justifiability of the charge or sentence as discussed in *Chidodo supra*

Since the codification of our criminal law, all sentences are provided for in the code, or the statute which creates the crime charged. All the reviewing or scrutinizing judicial officer should do is check if the sentence suits the offence and the offender, within the range of sentences provided for in the code or other statutes. He or she must also check the trial court's reasons for F sentence to determine whether or not the correct sentencing principles were applied in passing sentence. Where a crime was committed under common law, before codification, the judicial officer should be guided by precedents in similar cases. In all cases the scrutunising or reviewing judicial officer should bear in mind the trial court's sentencing discretion, and not interfere unless G the sentence imposed induces a sense of shock or the trial court misdirected itself in a manner which warrants the intervention of the reviewing judge. In *S v Mugwenhe & Anor* 1991 (2) ZLR 66 (S) at 71A-C Ebrahim JA, while encouraging trial courts to fully exercise their sentencing discretion, said:

> "This is not to say that judicial officers are to throw up their judicial arms in exasperation and do nothing more. All that is being suggested is that judicial H officers exercise their judicial discretion to the full and acknowledge where

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Uchena J

> necessary the shortfalls of existing penal policy. The dynamism necessary for A this approach is not achieved by reference to alleged 'tariffs' of sentences for specific categories of offences. Invariably when dealing with sentences the court refers, or is referred to, innumerable cases which purportedly lay down the limits of the range of appropriate sentences for the case actually before it.
>
> All but the most dogmatic will confess the narrowness of this approach; for it becomes apparent that it is by no means easy to treat the various cases as entirely B uniform and even less so to attempt to extract therefrom a means of propounding a precise statement of principles which can be invoked before the courts which would guide it in respect of the quantum of the sentence to be imposed. (See eg *S v Ncube* HB-19-86; *S v Machetbi* 1974 (2) SA 369 (T); *S v Mutadza* 1983 (1) ZLR 123 (HC); *S v Ndlovu* HH 197-87".

In *S v Mundowa* 1998 (2) ZLR 392 (H) at 395A-E Smith J, commenting C on the need for the appeal court not to lightly interfere with the trial court's sentencing discretion, said:

"The sentence imposed by the magistrate in this case is severe. However, it seems to me that the magistrate did not misdirect himself. He considered suspending part of the sentence on condition that the appellant perform community service D but decided that that would not be appropriate in this case. I cannot disagree with that assessment. In *S v Nhumwa* S-40-88 at p 5 of the judgment Korsah JA said:

> 'It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the E relevant principles, even if it is severer than one that the court would have imposed, sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court.'

He referred with approval to *S v de Jager & Anor* 1965 (2) SA 616 (A) at 628-9 where Holmes JA said:

> 'It would not appear to be sufficiently recognised that a court of appeal F does not have a general discretion to ameliorate the sentences of the trial courts. The matter is governed by principle. It is the trial court which had the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say, unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard, an accepted test is whether G the sentence induces a sense of shock, that is to say, if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.'

Accordingly, the appeal is dismissed." H

Uchena J

A This applies with equal force to a scrutinising and reviewing judicial officer. His duty is merely to be satisfied that real and substantial justice has been done.

In the present case the simple issue to be determined is whether or not it is probable that the trial magistrate erroneously, recorded the word "no" instead of "yes". The probabilities favour his explanation. The accused confirmed it in his mitigation, when he explained what he did with the proceeds of B the stones he sold. The record of proceedings must be read as a whole. It should, if thus read and understood, inform the scrutunising or reviewing judicial officer on whether or not the accused admitted the element in doubt or whether the evidence proves him guilty beyond reasonable doubt.

If the accused had indeed said "no" the magistrate would have been expected C to ask him to explain his answer which would have indicated whether or not a plea of not guilty should have been entered in terms of s 272 of the Criminal Procedure and Evidence Act [*Chapter 9*:*07*]. The fact that he did not tends to show his recording of that answer was a mistake. This is supported by the accused's acceptance of the agreed facts and his confirming in mitigation that he sold the complainant's property and kept the proceeds D for his own use. If the regional magistrate had considered the facts of this case, in view of the principles to be applied in determining whether or not real and substantial justice had been done, he would not have remained in doubt and would have himself confirmed the proceedings without referring them for review by a judge of the High Court.

E In the result, I am satisfied that the accused's conviction is safe and should be allowed to stand. The sentence imposed is within the permissible range and the trial magistrate's discretion. The proceedings are therefore confirmed as being in accordance with real and substantial justice.

F Bhunu J concurs.

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IMARA EDWARDS SECURITY (PVT) LTD & ORS v ZIMBABWE REVENUE AUTHORITY 2011 (2) ZLR 292 (H)

Citation	2011 (2) ZLR 292 (H)
Case No	Judgment No. HH-223-11
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	17 October 2011
Judgment	17 October 2011
Counsel	*S Njerere*, for the appellants *M Sinyoro*, for the respondent
Case Type	Fiscal appeal
Annotations	No case annotations to date

Flynote

Interpretation of statutes – *fiscal statute – exemption provision – should be interpreted pro fisco*

Revenue and public finance – *value added tax – exemptions from – person supplying financial services – stockbroker not such a person* D

Stock exchange – *stockbroker – role of – whether stockbroker is a person who "supplies financial services" – traditional functions of stockbroker do not constitute "financial services"*

Headnote

The appellant, all stockbrokers, argued in a fiscal appeal that they were E exempt from paying value added tax on the services they provided for their clients. Under s 11 of the Value Added Tax Act [*Chapter 23:12*], the "supply of financial services" is exempt from VAT. "Financial services" is defined in s 2 of the Act as "the issue or transfer of any share in a company or interest in a private business corporation". The revenue authority argued that the primary activity of stockbrokers is "brokerage" F or "purchase or sale" of listed securities. For this they charge commission or fees, called "brokerage".

Held, that the statutory provision at issue was an exemption section. An exemption must be expressly granted and not be inferred or implied. An exemption, like any other concession in a taxing statute, has the effect of narrowing the tax base defined in the charging section. Thus, while the imposition of a tax must be narrowly restricted to what is specifically and clearly defined, and in the case of an ambiguity interpreted against a larger imposition or *contra fiscum*, an exemption section must similarly be construed in terms of what is clearly stated and in the case of ambiguity restricted specifically to the class so favoured, or construed *pro fisco* H .

Hlatshwayo J

A *Held*, further, that a broker is a middleman or intermediary whose office is to negotiate between two parties until they are *ad idem* as regards terms upon which they are prepared to buy and sell. A stockbroker is specialized type of broker who, as a member of a stock exchange, deals in the shares, debentures and other securities of public companies which have been accepted as "listed securities" under the rules of the stock B exchange. Stockbrokers are registered in terms of s 23 of the Stock Exchange Act [*Chapter 24:18*] and it is an offence in terms of s 34 of that Act for any unregistered person to hold himself out as a registered stockbroker. In terms of the

Securities Act [*Chapter 24:25*] stockbrokers have to be licensed as they are persons who "deal in securities" and carry C out "licensable activities". Both these phrases are defined in the Act. The effect of them is that, to the extent that the stockbroker is involved in one or other of the traditional stockbroking activities which are spelt out in paras (a) to (d) of the definition of "licensable activities", those activities do not constitute "financial services" as defined. The only activity which qualifies is in para (e), i.e., "on behalf of an issuer of securities, D recording transfers and other transactions relating to those securities".

Held, further, that on the clear wording of the relevant exemption provisions, traditional activities of stockbrokers in respect of which they earn commissions and fees do not constitute "financial services" and are, accordingly, not exempt from VAT. If the legislature desires such activities should be exempt from VAT, then it should say so in clear words. The E exemption cannot be implied.

Legislation considered

Sales Tax (Exemptions) Amendment Regulations 1994 (SI 215 of 1994)

Securities Act [*Chapter 24:25*], s 2

F Stock Exchange Act [*Chapter 24:18*], s 2

Value Added Tax Act [*Chapter 23:12*], ss 2(e) & 11(a)

Foreign legislation considered

South Africa: Value Added Tax Act (Act 89 of 1991), s 2(1)(d)

Case information

G *S Njerere*, for the appellants

M Sinyoro, for the respondent

Judgment

HLATSHWAYO J: The appellants are all incorporated companies in the business of purchasing and selling listed securities on behalf of others, or H simply stockbrokers. The respondent is the Zimbabwe Revenue Authority, an

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Hlatshwayo J

agent of the State charged with assessing, collecting and enforcing payments A of all revenues and established in terms of s 3 of the Revenue Authority Act [*Chapter 23:11*].

The background to this matter is well captured in the appellants' heads of argument, thus:

> "The Rhodesian Stock Exchange was established on 18 January 1974 by Act B 27 of 1973 which became Act 198 of the revised statutes in 1974. The change of name to the Zimbabwe Stock Exchange was effected on 2 May 1980 by the Amendment of Laws Order, 1980 found in Statutory Instrument No. 236 of 1980. On 1 June 2008, the Securities Act (Act No. 17 of 2004) [*Chapter 24:25*] came into effect and relegated the bulk of the Zimbabwe Stock Exchange Act to rules made under the Securities Act in terms of s 121(5) thereof. When these C appeals were launched the Securities Act had been passed, but had not yet come into operation.
>
> On 1 January 2004, the Value Added Tax Act [*Cha*pter *23:12*] came into effect replacing the Sales Tax Act [*Chapter 23:08*].
>
> On divers occasions during the first half of 2006 officials of the Zimbabwe Revenue Authority issued value added tax (VAT) assessments against the commissions D earned by appellants. Stockbrokers had never paid sales tax under the repealed Sales Tax Act and they immediately and *en masse* objected to the imposition of VAT and the attendant penalties. In particular they objected and state that:
>
> - Stock broking fees are exempt from VAT in terms of s 11(a) of the VAT Act as read with the definition of 'financial services' in s 2 of the Act, in E particular subparagraph (e) thereof;
> - Appellants should not be charged the 100 per cent penalty as the delay had not been occasioned by a desire to evade tax, nor should interest be levied; and
> - Even if the Commissioner General was correct in imposing VAT, the VAT so computed was incorrect as it did not account for input tax paid at source F .

To drive the point home, the Zimbabwe Stock Exchange did not trade from 22 May 2006 to 30 May 2006 when an accommodation was reached with the responsible Ministry of Finance. Thereafter, the Commissioner-General disallowed the first ground of the objections, waived the penalties, insisted on interest, and invited the stockbrokers to provide the necessary information to claim the input tax. The Commissioner General also held the collection of VAT G from stockbrokers in abeyance pending the Fiscal Appeal Court's judgment. Inflation and indeed the wholesale move to foreign currencies has rendered the issue of interest academic."

By agreement of all the parties, the matters have been consolidated and the only issue remaining is "whether stockbrokers are exempt from collection and payment of VAT for the services they offer". H

2011 (2) ZLR p295

Hlatshwayo J

A The appellants submitted that stockbrokers are specifically exempted from collection and payment of VAT in terms of the VAT Act as they provide financial services. Section 11 of the VAT Act provides for exempt supplies and reads as follows:

> **"11 Exempt supplies**
>
> B The supply of any of the following goods or services shall be exempt from the tax imposed in terms of paragraph (a) of subsection (1) of section *six*:
>
> (a) the supply of any financial services, but excluding the supply of financial services which, but for this paragraph, would be charged with tax at the rate of zero *per centum* under section *ten* …"

Section 2(e) defines "financial services" as "the issue or transfer of any share C in a company or interest in a private business corporation". The question that arises, therefore, is whether stockbrokers provide "financial services" as defined and are thus exempt. In other words, does the work of a stockbroker entail "the issue or transfer of any share in a company or interest in a private business corporation"? The respondent submitted that the primary activity of stockbrokers is "brokerage" or "purchase or sale" of listed securities. D Stockbrokers may, however, engage in secondary or derivative consequences of the purchase or sale of listed stock, such as effecting delivery of the securities so purchased or sold by registration or transfer thereof, although the delivery by transfer or registration of securities is traditionally the chief function of transfer secretaries. The appellants disputed the role ascribed to E transfer secretaries. In my view, however, nothing turns on the resolution of that dispute. What matters is that stockbrokers, in addition to what has been termed their "primary activity", may attend to the registration or transfer of securities. I am alive, of course, to the appellants' position that stock broking entails the whole gamut of activities including purchase or sale and F registration or transfer, which are inseparable.

The respondent maintained that the fact that stockbrokers may transfer or register securities does not detract from the primary activity of the stockbroker being focussed on purchase or sale of securities for which stockbrokers are entitled to charge commission or fees. Their fee is called "brokerage" and is defined in s 2 of the Stock Exchange Act as "the commission charged by a G registered stockbroker in respect of the purchase or sale of listed securities on behalf of a client".

Now, it is in respect of this "brokerage" that the respondent argues that it is entitled, in terms of s 6(1)(a) of the VAT Act, to charge and levy and collect VAT for the services provided by stockbrokers in the course of their ordinary, H primary and general business and trade.

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But who or what are stockbrokers? A

The Stock Exchange Act defines stockbroker in s 2 as follows:

> "'stockbroker' means a person who –
>
> (a) carries on the business of purchasing and selling or purchasing or selling listed securities on behalf of other persons; or
>
> (b) regularly purchases and sells or purchases or sells listed securities on his B own behalf".

R H Christie *Business Law in Zimbabwe* (Juta & Co, 1998) defines "broker" and "stockbroker" as follows:

> "A broker is a middleman or intermediary whose office is to negotiate between two parties until they are *ad idem* as regards terms upon which they are prepared C to buy and sell" (p 330).

"A stockbroker is specialized type of broker who, as a member of a stock exchange, deals in the shares, debentures and other securities of public companies which have been accepted as 'listed securities' under the rules of the stock exchange" (p 331).

And "brokerage" as follows:

"Brokerage, the remuneration or commission to which a broker becomes entitled for services rendered."

Stockbrokers are registered in terms of s 23 of the Stock Exchange Act and it is an offence in terms of s 34 of the same Act for anyone to hold themselves out as a registered stockbroker. In terms of the Securities Act stockbrokers have to be licensed as they are persons who "deal in securities" and carry out "licensable activities".

Section 2 of the Securities Act has the following pertinent definitions:

"'deal in securities' means to enter into an agreement:

(*a*) to acquire, dispose of, subscribe for or underwrite any security; or

(*b*) to secure a profit from the yield of any security or from fluctuations in the price of any security;

or to offer to enter into any such agreement or to attempt to induce a person to enter into any such agreement;

'licensable activity' means any of the following activities, when carried on for remuneration that bears a direct relation to the activity –

(a) brokering or dealing in securities, that is to say:

(i) entering into an agreement on behalf of another person to acquire, dispose of, subscribe for or underwrite a security; or

(ii) offering to enter into an agreement referred to in subparagraph (i) or attempting to induce someone to enter into such an agreement;

(b) the giving of investment advice, that is to say –

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(i) advising other persons on their investments in securities;

(ii) issuing or publishing analyses or reports on securitie s;

(iii) on behalf of a client, undertaking the management of a portfolio of securities for the purpose of investment, including the arranging of purchases, sales or exchanges of securities through a licensed dealer;

(c) investment management, that is to say managing another person's portfolio of investments, where the portfolio consists wholly or mainly of securities;

(d) holding securities in custody for another person and dealing with them to the extent necessary for that custody;

(e) on behalf of an issuer of securities, recording transfers and other transactions relating to those securities."

Now, the above definitions present two views of stockbroking: the traditional or "primary activities" role as spelt out in the Stock Exchange Act and the learned author's elucidation, on the one hand. On the other hand is what one may term the expanded or extended view of stockbroking. The appellants, however, regard the definition of licensable activities in the Securities Act as not extending or expanding the traditional role of the stockbroker, but rather splitting it into its constituent parts, i.e., dealing, giving investment advice, managing investments, holding securities in custody and recording transfer. The appellants do, however, in their heads of argument, concede that the Securities Act does make it possible for a stockbroker to specialize in any one or other of the licensable activities. It appears to me, therefore, that to the extent that the stockbroker is involved in one or other of the traditional stockbroking activities, which are spelt out in paras (a) to (d) of the definition of "licensable activities", those activities do not constitute financial services as defined. The only activity which qualifies is in para (e), i.e., "on behalf of an issuer of securities, recording transfers and other transactions relating to those securities".

This conclusion is in line with basic tenets of interpretation of statutes, especially tax statutes. Where the words of the law giver are clear, they must be given their ordinary, literal, grammatical meaning. The statutory provision at issue is an exemption section. Now, an exemption must be expressly granted and not be inferred or implied. An exemption, like any other concession in a taxing statute, has the effect of narrowing the tax base defined in the charging section. Thus, while the imposition of a tax must be narrowly restricted to what is specifically and clearly defined, and in

the case of an ambiguity interpreted against a larger imposition or *contra fiscum*, an exemption section must similarly be construed in terms of what is clearly stated and in the case of ambiguity restricted specifically to the H class so favoured or construed *pro fiscum*, as it were.

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The appellants' claim based on the exemption of brokerage under the repealed A Sales Tax Act is not sustainable. The Sales Tax (Exemptions) Amendment Regulations SI 215 of 1994 defined "financial services" to include "the issue or transfer of ownership of any share in a company or interest in a private business corporation." The wording is identical to that used in the VAT Act and the subject of this appeal. The term was erroneously adjudged to mean B or include traditional activities of stockbrokers and brokerage was thus exempted from sales tax. That error in the interpretation and application of the repealed Sales Tax Act cannot be used to justification for a departure from the clear wording of the VAT Act.

Additionally, the appellants seek exemption on the basis of comparative analysis with the equivalent South African legislation. The South African C legislature modified a similar law on VAT by inserting a proviso to the definition of "financial services" whose effect was to expressly declare that "fees and commissions" fell outside the definition of financial services. Section 21(d) of the South African VAT Act (Act 89 of 1991) reads as follows:

> "For the purpose of this Act, the following activities shall be deemed to be financial D activities:
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) the issue, allotment or transfer of ownership of an equity security or a participatory security: E
>
> Provided that the activities contemplated in paragraphs (a), (b), (c), (d) and (f) shall not be deemed to be financial services to the extent that the consideration payable in respect thereof is any fee, commission, merchant's discount or similar charge, excluding any discounting cost."

The appellants submitted that the fact that South Africa had to amend its legislation in order to levy VAT on stock brokers "is clear testimony that F no such tax was intended in this jurisdiction. It is clear that, by design, the Zimbabwean legislature omitted a proviso similar to that in South Africa at drafting". They also add that even the amendment that was affected even before the VAT Act came into operation failed to include a proviso similar to the South African one, proving that it was never the intention of the G legislature to levy VAT on stockbrokers' commissions. However, it seems to me the above proviso in the South African legislation, from which our own VAT Act borrowed heavily, was inserted *ex abundante cautela*, i.e., for the avoidance of doubt. The proviso also shows that earnings from traditional stockbroking activities may be subjected to VAT while exempting financial services *strictu sensu*, which may be carried out by the same or some H

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A stockbrokers. No doubt, there would be some accounting, tax compliance and enforcement challenges regarding the identification of the true and proper basis of the earnings, but as the South African approach shows, such difficulties are not insurmountable.

In conclusion, therefore, my findings are that on the clear wording of the B relevant exemption provisions, traditional activities of stockbrokers in respect of which they earn commissions and fees do not constitute "financial services" and are, accordingly, not exempt from VAT. If the legislature desires such activities should be exempt from VAT, then it should say so in clear words. The exemption cannot be implied. It is further recommended that the legislature should intervene to ensure that the liability of stockbrokers C to VAT is not imposed or enforced retroactively, given the mixed signals from the revenue authority in first exempting the same activities under the repealed Sales Tax Act and then seeking to tax them under an identical provision in the VAT Act. In the same vein also, although the respondent has been successful and would the entitled to costs, it is fair that each party should bear its own costs.

D Accordingly, this appeal is dismissed. Each party shall bear its own costs.

Honey & Blankenberg, appellants' legal practitioners

E *Sinyoro & Partners,* respondent's legal practitioners

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POWER COACH EXPRESS(PVT)LTD v MARTIN MILLERS (PVT) LTD 2011 (2) ZLR 300 (H)
2011 (2) ZLR p300

Citation 2011 (2) ZLR 300 (H)

Case No Judgment No. HH-232-11

Court High Court, Harare

Judge Gowora J

Heard 22 February 2011; *CAV*

Judgment 19 October 2011

Counsel *B Chidziva,* for the applicant
T Mpofu, for the respondent

Case Type Application for leave to execute pending appeal

Annotations None

Flynote

Contract – *breach – damages – general and special damages – distinction between – claim for damages as alternative to claim for specific performance – such a claim for general damages – not necessary to* D *specify amount of such damages in summons – value to be assessed as at date of trial*

Contract – *breach – remedies – specific performance – claim for specific performance, alternatively damages – whether necessary to specify amount of damages being claimed – when amount of damages in lieu of specific performance must be assessed* E

Headnote

The applicant issued summons against the respondent for delivery of certain fuel storage tanks, alternatively payment of damages representing the replacement cost of the tanks. The amount being claimed for damages was not indicated in the summons or declaration. The matter proceeded to trial and judgment was given in favour of the applicant. The respondent F noted an appeal against the whole judgment and the applicant filed an application for leave to execute against the judgment.

The applicant had ordered and paid for the tanks, but rejected them because they were made of a thinner metal than that specified. The applicant acted on the recommendation of a fuel company. The respondent thereafter G disposed of the tanks for value. It offered to reimburse the plaintiff

the price paid, but the applicant refused the offer and, instead, demanded payment in damages reflecting the replacement cost of the tanks. This demand was refused by the respondent.

The defendant argued that the summons issued by the applicant was fatally defective and that the defect was such that it could not be cured by H

A evidence. It was argued that the summons should contain a true and concise statement of the nature, extent and grounds of both the cause of action and the relief sought. It was argued that in a claim for damages, ordinarily the claim must appear *ex facie* the summons and that a failure to comply with the rules in this regard renders the summons invalid.

B *Held*, that for purposes of pleading, damages may be claimed as general (otherwise referred to as intrinsic) or special (otherwise known as extrinsic). As a general rule of pleading, special damages have to be to be stated with particularity in a pleading, but general damages, which are those which flow naturally and generally from the kind of breach of contract in question, may be claimed without particulars being given.

C *Held,* further, that where a plaintiff claims specific performance and, in the alternative, damages, the time for assessing the value is the date of trial. In this situation, he is content to treat the seller's obligation to deliver the article as continuing and to take it with the value it may have at the date of trial. Where, however, the purchaser elects instead to claim damages in D place of actual performance, his reimbursement depends upon the value of the thing he ought to have received, calculated at the date when he ought to have received it, or when the seller declines definitely to deliver it. Here, the purchaser's election to release the seller from the obligation to deliver and to claim in lieu a sum of money crystallizes the claim both E in nature and amount at the date of the seller's breach of contract, and subsequent variations in the value of the article are immaterial.

Held, further, that a claim for specific performance or, in the alternative, damages, gives the seller an election which lasts until he is judicially compelled to exercise it one way or another. If the seller chooses to tender payment before judgment he must tender an amount based on F the then value of the item.

Held, further, that the respondent did not and could not argue that there was no cause of action disclosed on the summons and declaration. The trial court was entitled to accept the evidence adduced by the applicant as to the value of the tanks as at the date of trial.

G *Held,* further, that the respondent had no prospect of success on appeal. If there was the potentiality of irreparable harm to both parties, the balance of hardship or convenience clearly showed that the applicant would suffer greater hardship if the trial court's order were suspended H through the noting of the appeal. Leave to execute would be granted.

Gowora J

Cases cited A

Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A)

Local Authorities Pension Fund v F & R Travel Tours & Car Sales (Pvt) Ltd HH-90-10

Masimbe v Masimbe 1995 (2) ZLR 31 (S)

MacFoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC) B

McKelvey v Cowan NO 1980 ZLR 235 (G)

Mlombo v Fourie 1964 (3) SA 350 (T)

Payn v Lokwe 1912 EDL 33

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

Sam Hackner & Co (Pty) Ltd v Saltzman 1940 OPD 200 C

Standard Bank of South Africa Ltd v Stama (Pty) Ltd 1975 (1) SA 730 (A)

Stephens v Liepner 1938 WLD 30

Umlilwan v Beningfield 1911 NPD 320

Legislation considered D

High Court Rules 1971 (RGN 1047 of 1971), r 11(c)

Case information

B Chidziva, for the applicant

T Mpofu, for the respondent

Judgment

GOWORA J: At the commencement of this matter Mr *Mpofu* moved for E the condonation of the late filing of the respondent's heads of argument. Mr *Chidziva* was gracious enough to consent to the application which I then granted.

This matter is concerned with an application for leave to execute pending appeal. The history of the matter is as follows. F

On 29 November 2009 the applicant caused summons to be issued against the respondent herein under Case No HC 7385/05 for delivery of 1 x 10 000 litres underground tank, 1 x 25 000 litre underground tank and 2 x 35 000 litre tanks, or in the alternative payment of damages representing the replacement cost of the tanks. The matter proceeded to trial before Bere J, who subsequently G issued a judgment on 21 July 2010 in favour of the applicant herein. On 28 July 2010 the respondent noted an appeal against the whole judgment of the learned judge. This resulted in the applicant filing this application for an order granting it leave to execute against the judgment of Bere J.

The applicant's claim is premised upon an alleged breach of contract. It is common cause that on 31 May 2009 the respondent furnished the applicant H

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A with a quotation for the manufacture of one 10 000 litre underground tank, one 25 000 litre underground tank and two 35 000 litre underground tanks. In terms of the quotation, delivery would be effected within one or two weeks of confirmation of the order or payment.

The applicant placed an order for the tanks on 31 May 2006 and paid a B deposit of 60 per cent of the quoted price. The balance was paid on 10 July 2006 when the respondent called upon the applicant to effect payment of the balance. It has never been disputed by the respondent that it was paid in full for the tanks.

It is also common cause that the respondent manufactured tanks which the applicant rejected because it alleged breach on the part of the respondent. C The applicant contended that the parties had contracted for the fabrication of the storage tanks using 6 mm steel plates. The respondent contended that the applicant had consented to a change of the specification and that in the result the parties had agreed to use plates other than the 6 mm initially contemplated by the parties.

D In his judgment Bere J found that the respondent had breached the contract. This is what he had to say in his judgment at pp 3-4.

> "It is abundantly clear to the court that the contract in issue was between the plaintiff and the defendant and that the alterations allegedly made by the defendant as a result of the instructions of Muzondiwa (if any) were of no force and effect. If anything such conduct can only serve to confirm there was a clear breach of E contract by the defendant.
>
> In the absence of the evidence of Muzondiwa it is too far-fetched to try and infer his agency to the plaintiff particularly in the light of the plaintiff's clear evidence.
>
> More importantly it is also clear that in the absence of the evidence of Muzondiwa the court cannot on a balance of probability accept that he authorised any attention to the contract entered into by the parties and that when he did so he was acting F as an agent for Total Zimbabwe."

The learned judge went further to quote from a report generated by Total Zimbabwe in which it was recommended that the tanks be rejected as they did not meet the required design specification in that 4.5 mm plate was used in their fabrication instead of the desired 6 mm plate.

G It is not in dispute that after the tanks were rejected by the applicant and Total Zimbabwe the respondent disposed of them for value. It has offered to reimburse the plaintiff the price paid. The applicant has refused the tender of the price paid and, instead, demanded payment in damages reflecting the replacement cost of the tanks. This the respondent has consistently refused H to do.

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The respondent has in the opposing affidavit stated that it had offered to A refund the purchase price but that the applicant had not responded to the offer and the money had remained in the bank account held by the respondent until it was eventually eroded by inflation. It is further contended that, had the applicant accepted the refund timeously, the dispute between the parties would have long been settled and, further, that although the applicant had B initially sued for delivery of the tanks it had abandoned that and opted for damages. It is also contended that the delays were caused by the applicant in refusing to accept the refund.

Even though Total Zimbabwe was never a party to the proceedings in the trial court, it is the case for the respondent that it is the former that introduced the applicant to the respondent. It is also suggested that because of the interest it C had in the tanks it was Total that inspected the tanks and it was as a result of this interest that Muzondiwa inspected the tanks and the respondent contends that Muzondiwa authorized an alteration to the specifications of the material recommended for the manufacture of the tanks. It is, in fact, not in dispute that the applicant never inspected the tanks, the inspection being conducted D by the employees of Total on whose behalf the applicant had contracted the respondent to manufacture the tanks.

The last issue was the sufficiency of evidence adduced by the applicant in relation to the quantum of damages being claimed by it. The respondent was of the view that it was necessary to obtain quotations from more than one supplier within the region. It did not accept that D C de Souza was the only E manufacturer of the tanks in question. Finally the respondent contended that the appeal was not frivolous.

Mr *Mpofu* argued that the summons issued by the applicant in the trial court is fatally defective and no judgment could be based upon the same. He argued further that the defect was such that it could not be cured by evidence. He F argued that Order 3 r 11(c) requires that a summons contain a true and concise statement of the nature, extent and grounds of both the cause of action and the relief sought. It was argued that in a claim for damages ordinarily the damages claim must appear *ex facie* the summons and that a failure to comply with the rules in this regard renders the summons invalid. It was contended that this was a defect that could not be cured by evidence. Counsel sought G reliance on the *dicta* of Lord Denning in *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172 to the following effect:

> "If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and H

Gowora J

> A incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

The applicant claimed for specific performance, or alternatively damages. The amount being claimed was not indicated in the summons or declaration. According to the respondent, damages for breach of contract are calculated as at the date of breach as such damages would have been known as having B been incurred already. This is the basis of the contention by the respondent that the summons was a nullity and not capable of condonation by the court. For purposes of pleading damages may be known as general, otherwise referred to as intrinsic, or special, known as extrinsic. As a general rule of pleading, special damages have to be stated with particularity in a pleading. C See *Holmdene Brickworks (Pty) Ltd* v *Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687D-E where damages were defined as follows:

> "[General or intrinsic damages are] those which flow naturally and generally from the kind of breach of contract in question. These may be claimed without particulars being given.
>
> "[Special or extrinsic damages are those which] are ordinarily regarded in law D as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties

actually or presumptively contemplated that they would probably result from its breach."

A claim for unliquidated damages is normally brought by means of action and a plaintiff has to make the necessary averments in his pleading to found a claim for damages and to prevent a successful exception being raised. The E summons must therefore contain sufficient particulars to enable the defendant to reasonably assess the quantum thereof. Therefore a distinction is made between general and special damages. Since general damage is presumed, it may apparently be pleaded without precise particularity.

Although not described as such by the parties, the relationship between F them was akin to that of a purchaser and a seller. The respondent was in the business of fabricating specialised tanks which it would provide on demand and according to specification. Where a plaintiff has claimed specific performance and in the alternative damages, McKeurtan's *Sale of Goods in South Africa* 5 ed puts the time for assessing the value at the date of trial. The learned author states at para 8.1.3 p 105:

G "In claiming specific performance the purchaser has elected not to crystallize his claim at the date of the seller's breach by its reduction to money terms at that date, but to demand the very thing contracted for, and if he receives it to be satisfied with it, irrespective of intermediate fluctuations in its value. In other words he is content to treat the seller's obligation to deliver the article as continuing and to take it with the value it may have (saving of course, questions H of negligence, or accident while the seller is in *mora)* at the date of trial. It

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follows where the court awards him specific performance with damages failing A delivery, that compensation is fixed in relation to the value of the article at the time of trial. (See *Avery* v *Bowden* (1856) 26 LJQB 3; 119 ER 1119., which is authority for the proposition that the relevant date is the date of judgment and not *litis contestatio*.)"

Where, however, the purchaser elects instead to claim damages in place of B actual performance, his reimbursement depends upon the value of the thing he ought to have received, calculated at the date when he ought to have received it, or when the seller declines definitely to deliver it. His election to release the seller from the obligation to deliver, and to claim in lieu of that a sum of money, crystallizes the claim both in nature and amount at the date of the seller's breach of contract, and subsequent variations in the C value of the article are immaterial). See *Stephens* v *Liepner* 1938 WLD 30 at 34; *Sam Hackner & Co* v *Saltzman* 1940 OPD 200 at 204

The learned author also states that a claim for specific performance or in the alternative damages gives the seller an election which lasts until he is judicially compelled to exercise it one way or another. If the seller chooses D to tender payment before judgment he must tender an amount based on the then value of the item. See *Umlilwan* v *Beningfield* 1911 NPD 320; *Payn* v *Lokwe* 1912 EDL 33

See also *Mlombo* v *Fourie* 1964 (3) SA 350 (T), *Standard Bank of South Africa Ltd* v *Stama (Pty) Ltd* 1975 (1) SA 730 (A) and *Philip Robinson* E *Motors (Pty) Ltd v N M Dada (Pty) Ltd* 1975 (2) SA 421 (A). In *Mlombo's* case (*supra*) Trollip J opined at 357H:

"It now remains to fix the value of the cattle that were sold and which are still in the defendant's possession. This being a vindicatory action, the object in awarding the value as an alternative relief to the restoration of the cattle is to put the plaintiff in the same position, as far as money can achieve that, as he F would be if the cattle were to be restored to him. The value of the cattle as at the date of trial must therefore be the correct measure of the monetary restitution. If that value is less than the value at the commencement of the proceedings or *litis contestatio* (whichever is the correct critical stage) it may be that such difference can be claimed as damages if the defendant is liable in law therefor, but, as no such claim is made here, I need express no view on that aspect. That G value is not necessarily the market value at that date."

It is pertinent to note that, even though before me Mr *Mpofu* submitted that the summons was null and void, the defendant had not excepted thereto. This is because the summons and declaration disclosed a cause of action. In *McKelvey* v *Cowan NO* 1980 ZLR 235 (G) at 236B Beadle AJ (as he had then become) stated: H

A "… It is a first principle in dealing with matters of exception that if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only

excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action."

In my view, the respondent cannot argue, and in fact has never argued, that there is no cause of action disclosed on the summons and declaration. The B court then rightly, in my view, accepted the evidence adduced by the applicant as to the value of the tanks as at the date of trial. Whether or not the trial court was correct in condoning the failure by the plaintiff during the trial to seek condonation the alleged defect is not for me to comment on as the trial court enjoys parallel jurisdiction with myself. That aspect would be dealt with by the Supreme Court. I have as a result not considered the authorities C referred to by counsel in his extensive heads of argument. I cannot be seen to be reviewing a judge of the High Court, even in comments. For my part, however, I see no defect on the summons and declaration.

I turn then to the question of the award of relief in foreign currency. Counsel accepts that the court has the right to award damages sounding in foreign D currency but that the court can only make such an award if the award truly expressed the plaintiff's loss. He argues further that it is an issue which must be pleaded and that the court cannot take judicial notice of the issue. I was referred to *Local Authorities Pension Fund* v *F & R Travel Tours & Car Sales (Pvt) Ltd* HH-90-10. I have already dealt at length with the election by the plaintiff to quantify his loss and have found that in the circumstances E it was not inappropriate for the quantification to have been done at the date of trial. It will serve no purpose in my view to revisit this aspect. I also do not see the relevance of an exchange rate in this matter. The quotation presented to court was in United States dollars and there is no suggestion that the court undertook a process of conversion from the Zimbabwe dollar F to United States dollars.

The contention is made that the law is not settled. I fail to understand the logic behind the submission. The applicant received an award in damages sounding in money. The respondent does not deny contracting with the plaintiff for the manufacture of the tanks in question. It was paid the contract sum in full. The tanks it manufactured were rejected by the applicant. It did G not reimburse the applicant the amount paid under the contract. It sold the tanks and consumed the proceeds. Even at the trial it did not prove that it had in its bank account any funds to pay to the applicant in reimbursement of the contract sum.

The requirements for an application for leave to execute pending appeal H are as follows:

Gowora J

(i) The potentiality of irreparable harm or prejudice being sustained by the A appellant on appeal, if leave to execute were granted;

(ii) the potentiality of irreparable harm or prejudice being sustained by the respondent if leave to execute were refused;

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

(iv) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent the balance of hardship or convenience as the C case may be. See *Masimbe* v *Masimbe* 1995 (2) ZLR 31 (S).

In 2006 the applicant paid a quoted sum to the respondent for the fabrication of tanks. The respondent fabricated tanks which the applicant rejected. The respondent went on to sell those tanks and did not account to the applicant for the proceeds of the sale. It is very clear on these facts which party suffered prejudice and which party continues to suffer prejudice. Even though at D the trial the respondent's witness intimated that it had offered to refund the applicant, it was never established that it had the funds and was in a position to refund the purchase price. In my view, the applicant has established that there is potential prejudice to be occasioned to itself.

The approach taken by Mr *Mpofu* was that the applicant can only suffer E harm if the application is not granted and the appeal itself is hopeless. He contended that if the appeal has merit then the grant of the application would result in the respondent suffering harm especially if one has regard to the nature of the claim.

The question then is whether the appeal is *bona fide* and has good prospects F of success. The success of the appeal was grounded on the contention that the summons was defective. That has

been dealt with above. The other issue in contention was that Muzvondiwa had played a pivotal role in the manner in which the parties dealt with each other. It was contended that, if Muzvondiwa was an agent of the applicant, then he had the power to cause the alteration in the specification for the fabrication of the tanks. It was G part of the evidence that Muzvondiwa was employed by Total and not the applicant. It was also part of the evidence that the respondent had written to the applicant on 25 September 2006 advising that the tanks had been fabricated according to the specifications. Assuming, as contended by the respondent, that the specifications had been altered through the agency of Muzvondiwa, surely the respondent would have stated that the tanks had H

Gowora J

A been fabricated using the material recommended by Muzvondiwa. Instead reference was made to the 6 mm plate as being the source of the material used in the fabrication. Given the stance taken by the applicant throughout that Muzvondiwa was not its agent it was incumbent upon the respondent to have adduced evidence to substantiate the allegation that he had authorised the alteration in the specifics. He who avers must prove. The respondent B averred but did not prove the alleged role of Muzvondiwa.

I cannot accept the contention by the respondent that there was no need to call Muzvondiwa as his role could be inferred from the surrounding circumstances. If the respondent is to be believed, his actions caused a complete departure from the material terms of the contract agreed to between the parties. The C tanks had to be manufactured using a specific size of steel sheet. Muzvondiwa altered this allegedly on behalf of the applicant, thus changing the nature of the items being manufactured. His evidence as to whether or not this occurred, whether he was acting on behalf of the applicant or some other party would have assisted the court in resolving the dispute. The tanks were rejected for the sole reason that the wrong material was used. To that end, D whatever role Muzvondiwa played, it was necessary that he be called by the party relying on his alleged actions. This the respondent failed to do. Clearly the applicant has prospects of success on the appeal. The respondent does not. However, if there is the potentiality of irreparable harm to both parties the balance of hardship or convenience clearly dictates that the applicant will suffer greater hardship if the order by Bere J is suspended through the F noting of the appeal.

In the premises the application succeeds and an order is issued as follows:

IT IS ORDERED THAT:

1. Leave to execute against the judgment of BERE J under Case No HC121/10 dated 21 July 2010 be and is hereby granted. G
2. The respondent is ordered to pay the costs of this application.

Kantor & Immerman, applicant's legal practitioners

Mtombeni, Mukwesha, Muzawazi & Associates, respondent's legal H practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/TELECEL ZIMBABWE (PVT) LTD v ATTORNEY-GENERAL 2011 (2) ZLR 310 (H)

TELECEL ZIMBABWE (PVT) LTD v ATTORNEY-GENERAL 2011 (2) ZLR 310 (H)

Citation 2011 (2) ZLR 310 (H)

Case No Judgment No. HH-233-11

Court High Court, Harare

Judge Hlatshwayo J

Heard 19 October 2011

Judgment 19 October 2011

Counsel *G v Mamvura*, for the applicant
C Mutangadura, for the respondent

Case Type Opposed application

Annotations None

Flynote

Criminal procedure – *private prosecution – who may prosecute – whether a company which has suffered loss may bring private prosecution*

Headnote

The applicant, a private company, discovered a potentially massive fraud perpetrated against it with prejudice of around US$1 700 000 and reported the matter to the police. The police carried out investigations D and arrested four persons, two of whom were the company's employees. The four accused persons were charged with fraud. Upon completion of police investigations and the appearance of the suspects in court, the respondent's office withdrew the charges against all the four accused persons before plea, indicating that the respondent's directive was that E there was insufficient evidence against the four of them. The applicant then decided to mount a private prosecution. It instructed its legal practitioners to request from the respondent a certificate signed by him that he has seen the statements and affidavits on which the charge of fraud is based and declined to prosecute at the public instance. The respondent refused to issue a certificate of *nolle prosequi* on the grounds F that there was insufficient evidence. The applicant then brought an application to compel the respondent to issue the certificate, arguing that the respondent had no discretion. The respondent raised a point in limine that the applicant, as a private person, had no locus standi to launch a private prosecution. G

Held, that a "private party" is defined in s 12 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as a person authorised under s 13 or s 14 to prosecute any offence. Under s 13, any "private party", who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence, may bring a private prosecution. Various other persons H

A (such as a husband, in respect of an offence committed against his wife) are specified under s 14, although the applicant would not fall into any of those categories. The question was whether a company could be classed as a "private party". In terms of s 2 of the Act and s 3 of the Interpretation Act [*Chapter 1:01*], the words "person" and "party" would include a company.

B *Held*, further, that the normal dictionary definitions of the phrase "private person" mean an individual and the reference to an injury which "he individually suffered" is a potent pointer to the fact that the legislature intended to refer only to natural persons. The use of the word "he" is another consideration, as it is certainly not permissible usage to speak in C English of an injury which "he suffered" when referring to a company. Section 18(1) of the Act envisages an appearance in person by the private prosecutor.

Held, further, that prosecution is not primarily designed to recover compensation. The expression "substantial and peculiar interest" is not intended to convey only a pecuniary interest in respect

of which the D prosecutor may obtain compensation or restitution. The object of the phrase is clearly to prevent private persons from arrogating to themselves the functions of a public prosecutor and prosecuting in respect of offences which do not affect them in any different degree than any other member of the public; to curb, in other words, the activities of those who would E otherwise constitute themselves public busybodies. The "interest" the legislature had in mind may be pecuniary, but may also be such that it cannot sound in money – such imponderable interests, for example, as the chastity and reputation of a daughter or ward, the inviolability of one's person or the persons of those dear to us. Permission to prosecute in such circumstances was conceived as a kind of safety valve and to prevent F injured parties from taking the law into their own hands. A corporate body as such has no human passion and there can be no question of the company, as such, resorting to violence.

Held, further, that there may also be practical difficulties in a private company exercising the right of private prosecution. Does it do so on the recommendation of its directors, the majority shareholders or are G minority interests also to be taken account of? What if those interests conflict, as they so often do? How could we accept a death penalty carried out on the basis of a company private prosecution instituted on a split majority decision? The fact that corporate bodies have better resources to conduct private prosecutions than individuals does not necessarily H mean that they should be allowed to do so at a policy level. It may, in

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fact, point to a danger which opening up private prosecutions to private A companies may pose to the general public precisely because of the vast resources that private corporations, various interest organizations, political parties, etc, command.

Cases referred to B

A-G v van der Merwe & Bornman 1946 OPD 197

Barclays Zimbabwe Nominees (Pvt) Ltd v Black 1990 (4) SA 720 (A)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 2, 13, 14, 18

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

Foreign legislation considered

South Africa: Criminal Procedure Act (Act 51 of 1977), s 7(1)

Case information

G v Mamvura, for the applicant D

C Mutangadura, for the respondent

Editor's note:

(1) *Section 16 of the Criminal Procedure and Evidence Act reads:"... in every case in which the Attorney-General declines to prosecute he shall, at the request of the party intending to prosecute, grant the* E *certificate required" (emphasis supplied).*

It would thus appear that the Attorney-General would have no discretion as to whether or not to issue a certificate of nolle prosequi.

(2) *Section 7(1) of the South African Criminal Procedure and Evidence Act 51 of 1977 refers to "any private person", which phrase is not defined in the Act. The word "person" not defined in that Act either. "Person"* F *is defined in the South African Interpretation Act 33 of 1957 as including "any company incorporated or registered as such under any law".*

Judgment

HLATSHWAYO J: Two questions arose for decision in this matter: firstly, whether a private company is entitled to bring a private prosecution and, G secondly, whether the Attorney-General

has discretion to issue or withhold the certificate *nolle prosequi* where he declines to prosecute at the public instance. The questions arose in the following circumstances.

The applicant, a private company incorporated in terms of the laws of Zimbabwe and focused on telecommunications, discovered a potentially massive fraud perpetrated against it, with prejudice of around US$1 700 000 H

2011 (2) ZLR p313

Hlatshwayo J

A and reported the matter to the police. The police carried out investigations under CID serious frauds and identified two employees of the applicant as suspects: Charles Mapurisa, the regional sales manager and Naquib Omar, the commercial director. The police also arrested the managing director of Oxygon Investments (Pvt) Ltd, Jane Mutasa and her personal assistant, B Caroline Gwinyai. The four accused persons were charged with fraud involving recharge cards and starter packs valued at US$1 700 000.

Initially, the accused persons were denied bail on the basis that the *prima facie* evidence against them was very strong and that the fourth accused, Naquib Omar, had not been apprehended then. However, they were subsequently all released on bail, including the fourth accused, who had subsequently C surrendered himself to the police.

Upon completion of police investigations and the appearance of the suspects in court, the respondent's office withdrew charges against all the four accused persons before plea, indicating that the respondent's directive was that there was insufficient evidence against the four of them. The applicant then decided D to mount a private prosecution. It instructed its legal practitioners, Messrs Scalen & Holderness, to request from the respondent a certificate signed by him that he has seen the statements and affidavits on which the charge of fraud is based and declines to prosecute at the public instance.

In response, the respondent wrote a letter to the applicant's legal practitioners, E the relevant part of which reads:

> "Kindly note that I have read the witnesses' statements in the police docket and I have satisfied myself that the evidence therein does not establish a criminal offence against the four suspects. In the circumstances, I find it *contra bonos mores* for me to grant my certificate in this matter. In essence, therefore, I withhold my certificate of *nolle prosequi* and decline to issue the same."

F What followed was quite some bad-tempered litigation, which spilt unnecessarily into the administrative processing of the matter. The applicant immediately launched a terse court application for review of the respondent's decision, arguing that the respondent had no discretion whatsoever where he has declined to prosecute but must issue the certificate to a would-be private prosecutor. Furthermore, the applicant charged that "the respondent's decision G that the evidence in the docket does not establish a criminal offence against the four suspects is so devoid of logic that no reasonable Attorney-General properly applying his mind could come to such a decision considering that at the accused persons' initial court appearance the remand magistrate refused to admit them to bail on the ground that the evidence against them H was overwhelming and they were likely to abscond if admitted to bail".

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Hlatshwayo J

In an equally testy opposing affidavit, the respondent maintained he had such A discretion and that the applicant could not place much on the preliminary finding by the remand magistrate as the bail decision was made without hearing evidence or seeing the docket. In the midst of all this vituperation, the respondent raised a point *in limine*, that the applicant being a private person has no *locus standi* to institute a private prosecution, a point which B could have assisted in curtailing proceedings had it been given due attention at this stage.

The applicant did not bother to file a replying affidavit, but straight away lodged its heads of argument. The effect of not filing a replying affidavit is that the court must then accept as correct the unchallenged statements in the opposing affidavit, for example concerning the attribution of the fraud C where the respondent states thus:

> "No issues arise herein save to state that the docket alleges that a shortfall of US$1 725 875 was detected of which US$750 000 was traceable to Oxygon Investments (Pvt) Ltd in respect of Telecel lines valued at

US$300 000 and US$450 000 in respect of recharge cards. In essence, it is extravagant to aver that 'most of the stock was released to Oxygon Investments (Pvt) Ltd' as that D is not factually true according to information in the docket."

Now, concerning the point *in limine* raised by the respondent that the applicant, being a company and not a private person, has no *locus standi* to institute a private prosecution, reference must be made to s 13 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (hereinafter called "the CP&E E Act") which provides as follows:

"**13 Private prosecution on refusal of Attorney-General to prosecute**

In all cases where the Attorney-General declines to prosecute for an alleged offence, any *private party,* who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence, may prosecute, in any court competent F to try the offence, the person alleged to have committed it" (emphasis added).

"Private party" is then defined in this part of the statute as "a person authorized by section *thirteen* or *fourteen* to prosecute any offence". Section *fourteen* provides thus:

"**14 What other persons entitled to prosecute**

The following shall possess the right of prosecution – G

(a) a husband, in respect of offences committed against his wife;

(b) the legal guardians or curators of minors or mentally disordered or defective persons, in respect of offences committed against their wards;

(c) the wife or children or, where there is no wife or child, any of the next-of-kin of any deceased person, in respect of any offence by which the death of such person is alleged to have been caused; H

Hlatshwayo J

(d) public A bodies and persons on whom the right is specially conferred by statute, in respect of particular offences."

So far, one can say that a private company, such as the applicant, would definitely not qualify under s 14 , but may qualify under s 13, depending on how that provision is interpreted. In terms of the general definition section B of the CP&E Act (s 2):

"'person' and 'owner' and other like terms, when used with reference to property or acts, include corporations of all kinds, and any other association of persons capable of owning or holding property or doing acts and they also, when relating to property, include any department of the State."

The Interpretation Act [*Chapter 1:01*] defines "person" in the following C terms in s 3:

"'person' or 'party' includes –

(a) any company incorporated or registered as such under an enactment; or

(b) any body of persons, corporate or unincorporated; or

(c) any local or other similar authority."

D The above definitions show that the words "person" or "party" are used interchangeably and include a private company. The question, therefore, is whether the qualification of these terms by the word "private" changes their usual meaning in the context of the private prosecution provisions of the CP&E Act. The applicant submits that it does not and the respondent maintains it does.

E In the South African case of *Barclays Zimbabwe Nominees (Pvt)Ltd v Black* 1990 (4) SA 720 (A) it was held that a company is not a "private" person as intended by s7 of the Criminal Procedure Act 51 of 1977 and therefore does not have *locus standi* to institute a private prosecution. Mr *Mamvura*, for the applicant, sought to distinguish the South African case authority from F the present matter on the basis that the South African legislation uses the words "private person", whereas the Zimbabwean Act provides for a "private party" as having the right to prosecute, but, as shown above and is implicit in the applicant's own heads of argument, the words "party" and "person" are used interchangeably by the legislature. Section 12 of the CP&E Act states that the words "private party" in the context of private prosecutions mean "a G *person* authorized by section thirteen or fourteen to prosecute any offence" (emphasis added). Thus, the respective South African and Zimbabwean Acts are *in pari materia*. According to the *Barclays Zimbabwe Nominees* case (*supra*), a company cannot conduct a private prosecution for reasons expounded in that case, which are summarized below, with comments on H the equivalent Zimbabwean provisions:

Hlatshwayo J

(a) In the *Barclays* case, the court noted that the Oxford Dictionary (2 ed) A vol xii at p 515 defines "private" in the context "of a person", and noted that the illustrations made by the editors of the use of the words in this sense refer to "private men" or "private individual" as if "private persons were synonymous with them".

(b) Reference to an injury which "he individually suffered"(compare s 13 B of the Zimbabwean Act) was held to be a potent pointer to the fact that the legislature intended to refer only to natural persons since this "is language peculiarly apposite in the case of natural persons".

(c) Another consideration was the use of the word "he" in respect of an injury suffered by a private prosecutor. The use of the word "he", it was held, "is certainly not permissible usage to speak in English of an injury C which 'he suffered' when referring to a company".

(d) The requirement for the private prosecutor to appear in person indicates that a human being, and not a company, is the envisaged private prosecutor as a company cannot appear in person. The use of the pronoun "his" was held to suggest a natural person (see s 18(1) of the CP&E Act). D

(e) It was also held in *Attorney-General v van der Merwe and Bornman* 1946 OPD 197 that the rationale behind establishing private prosecutions was not for recovery of pecuniary interest but to protect injured parties from taking the law into their own hands:

(f) "The interest the legislature had in mind may be pecuniary, but may also E be such that it cannot sound in money – such imponderable interests, for example, as the chastity and reputation of a daughter or ward, the inviolability of one's person or the persons of those dear to us. Permission to prosecute in such circumstances was conceived as a kind of safety valve. An action for damages may be futile against a man of straw and a private prosecution affords a way of vindicating those imponderable F interests other than the violent and crude one of shooting the offender".

In this context it was held in the *Barclays* case that "a corporate body as such has no human passion and there can be no question of the company, as such, resorting to violence". And, of course, there is the time-honoured aphorism which one may take liberties with and summarize as that "a company has no G soul to damn and no butt to kick". Thus, lacking those intrinsically human qualities, it would be stretching the language of the legislature too far to hold that a private company was expected to exhibit the same "imponderable interests" as those outlined in s 14(a) to (c) of the Act.

There may also be practical difficulties in a private company exercising the right of private prosecution. Does it do so on the recommendation of its H

Hlatshwayo J

A directors, or of the majority shareholders or are minority interests also to be taken account of? What if those interests conflict, as they so often do? How do we accept a death penalty carried out on the basis of a company private prosecution instituted on a split majority decision with a vociferous minority in strong opposition and directors at sixes and sevens?

B I am satisfied that the *Barclays Zimbabwe Nominees* decision, based as it was on a statute *in pari materia* with our CP&E Act, is highly persuasive authority for holding that a private company cannot institute a private prosecution. In further heads of argument, it was suggested on behalf of the applicant that since corporate bodies have better resources to conduct private prosecutions than individuals, they should be allowed to do so at a policy C level. However, I doubt the merit of such a submission. It certainly does not assist in the interpretation of the provisions in issue. It may in fact point to a danger which opening up private prosecutions to private companies may pose to the general public precisely because of the vast resources that private corporations, various interest organizations, political parties, etc, command, D a spectre which has justified the various restrictions imposed on the right to institute a private prosecution even by individuals, the risk so ably noted by van den Heever AJP (as he then was) in *Attorney-General v van der Merwe and Bornman (supra)* at 201 thus:

> "Prosecution is not primarily designed to recover compensation. I do not think, therefore, that the expression 'substantial and peculiar interest' was intended E … to convey only a pecuniary interest in

respect of which the prosecutor may obtain compensation or restitution. The object of the phrase was clearly to prevent private persons from arrogating to themselves the functions of a public prosecutor and prosecuting in respect of offences which do not affect them in any different degree than any other member of the public; to curb, in other words, the activities of those who would otherwise constitute themselves public F busybodies."

In the premises, therefore, this application for review cannot succeed. If the applicant has no *locus standi* to institute a private prosecution as I have found, there is no need to go on to examine whether the respondent has discretion to issue the *nolle prosequi* certificate. As far as costs are concerned, I am G not persuaded that there is a sufficient basis from departing from the general rule that costs, on the ordinary scale and not on the punitive scale as prayed by the respondent, should follow the outcome, the intemperate pleadings (which were evident on both sides, it must be noted) notwithstanding.
H This application is accordingly dismissed with costs.

2011 (2) ZLR p318

Hlatshwayo J

Scanlen & Holderness, applicant's legal practitioners A

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

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Source:
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MAZUVA v SIMBI & ANOR; SIMBI v MAZUVA 2011 (2) ZLR 319 (H)

2011 (2) ZLR p319

Citation 2011 (2) ZLR 319 (H)

Case No Judgment No. HB-155-11

Court High Court, Bulawayo

Judge Mathonsi J

Heard 12 October 2011; *CAV*

Judgment 20 October 2011

Counsel *I Murambasvina*, for the applicant
Miss *H M Moyo*, for the first respondent

Case Type Application for rescission of judgment

Annotations None

Flynote

Practice and procedure – *rescission – order granted by consent – order granting relief pending determination of appeal – appeal noted to wrong forum and thus a nullity – rescission granted*

Headnote

D There had been a mining boundary dispute between the applicant and the first respondent. The dispute was referred to the second respondent, the local mining commissioner, for adjudication. The mining commissioner ruled in favour of the first respondent on the ownership of the disputed mine shaft. The applicant lodged an appeal to the Secretary of Mines E against the decision of the mining commissioner. As that appeal was still pending, the applicant sought an order stopping mining operations at the disputed mining claim and barring the mining commissioner from dealing with the dispute. The application was unopposed and was granted. The first respondent sought to have the order rescinded. He argued that the purported appeal was invalid, as it had been pursued in F the wrong forum, instead of being noted in the High Court as provided for in s 361 of the Mines and Minerals Act [*Chapter 21:05*]. Even if it could be taken as a valid appeal, it would still not automatically suspend the decision of the mining commissioner.

Held, that in deciding whether an applicant for rescission of judgment has G discharged the onus of proving "good and sufficient" cause as provided for in r 63(2) of the High Court Rules 1971, the court must have regard to the reasonableness of the applicant's explanation for the default; the *bona fides* of the application to rescind the judgment; and the *bona fides* of the defence on the merits of the case. These factors must be considered not only individually but in conjunction with one another and with the H application as a whole. To the extent that the appeal was purportedly

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made to the Secretary of Mines, it was a nullity. There was no appeal at A all. The order sought to be rescinded was made pending a non-existent appeal and could not stand *.

Cases referred to

Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd S-16-86 B

BMG Mining (Pvt) Ltd v Mining Commr, Bulawayo & Ors 2011 (1) ZLR 74 (H)

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

Mwanyisa v Jumbo & Ors HH-3-10

Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S) C

Stockil v Griffiths 1992 (1) ZLR 172 (S)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 63(2)

Mines and Minerals Act [*Chapter 21:05*], s 361 D

Case information

I Murambasvina, for the applicant

Miss *H M Moyo*, for the first respondent

Judgment

MATHONSI J: These two applications are inter-related. HC 1349/10 is an application for rescission of judgment made by Charles Simbi (herein after referred to as "the first respondent"), who is the first respondent in HC 1310/10, an application made by Sabawe Mazuva (hereinafter referred to F as "the applicant"), who is the respondent in the former case.

On 1 July 2010 the applicant obtained a default judgment in HC 905/10 which is to the following effect:

> "It is ordered that:
>
> 1. The first respondent be and is hereby ordered to cease the operations at G Thunderbird 42 and 21 mine forthwith, *pending the hearing of applicant's appeal.*

2. The second respondent be and is hereby barred from dealing with the dispute whatsoever other than for purposes of complying with the orders of this honourable court or his superiors.
3. The first respondent only be and is hereby ordered to pay the costs of suit." H

2011 (2) ZLR p321

Mathonsi J

A In order to obtain that order, the applicant had made a court application in which he argued that there was a boundary dispute between himself and the first respondent, which had been referred to the second respondent for adjudication. He had gone on to argue that, after the second respondent had ruled in favour of the first respondent on the ownership of the disputed mine shaft, he had lodged an appeal to the Secretary of Mines against the decision B of the second respondent made on 4 March 2010.

As that appeal was still pending before the Secretary of Mines, he sought an order stopping mining operations at the disputed mining claim and barring the Mining Commissioner for Gweru from dealing with the dispute. As the application was unopposed, I granted the aforesaid order on 1 July 2010 . It is C that order which the first respondent wishes to have rescinded in HC 1349/10.

With the consent of the applicant and the first respondent, on 28 September 2011 I ordered the consolidation of the two matters and directed that they be heard at the same time on 11 October 2011. This judgment is in respect of the two applications.

D In seeking rescission of judgment, the first respondent stated that, when the application in HC 905/10 was served upon his wife, he had been out at his mining claim where he spends his time during the week. Upon his return home his wife gave him the papers, part of which had been torn by his child. He had a "cursory" look at them and assumed they were the same documents he had received earlier in respect of another application that had been filed E in this court because they bore a striking resemblance to the earlier court papers, especially as there was no case number.

The first respondent stated that he had ignored the application and it was not until he received the court order I have referred to above that he realized his error and rushed to his lawyers with instructions to file an application for F rescission of judgment.

The first respondent went on to say that the purported appeal against the Mining Commissioner's decision of 4 March 2010 was invalid, given that it was noted in the wrong forum, the Secretary of Mines and Mining Development, instead of being noted in this court as provided for in s 361 of the Mines and G Minerals Act [*Chapter 21:05*]. If it could be taken as a valid appeal it would still not automatically suspend the decision of the Mining Commissioner.

Mrs *Moyo* for the first respondent argued that the default judgment of 1 July 2010 cannot stand because there is, in essence, no appeal pending and that the filing of HC 1310/10 by the applicant was a clear indication that the H purported appeal had been abandoned. Indeed, in his heads of argument, Mr

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2011 (2) ZLR p322

Mathonsi J

Murambasvina for the applicant abandoned the appeal completely, saying A in para 6:

> "this application will not address anymore the propriety or otherwise of applicant's appeal to the Permanent Secretary of the fourth respondent and the desirability that mining operations should stop pending the resolution of the dispute."

In his address to the court Mr *Murambasvina* submitted that the determination B of HC 1310/10 should resolve the rights of the parties and that the order of 1 July 2010 in HC 905/10 would be overtaken by events.

In deciding whether an applicant for rescission of judgment has discharged the onus of proving "good and sufficient" cause as provided for in r 63(2) of the High Court Rules 1971, the court has regard to the reasonableness of the applicant's explanation for the default; the *bona fides* of the application to C rescind the judgment; and the *bona fides* of the defence on the merits of the case which carries some prospects of success: *Barclays Bank of Zimbabwe Ltd* v *C C International (Pvt) Ltd* S-16-86*; Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 211C-F.

As stated in *Stockil* v *Griffiths* 1992 (1) ZLR 172 (S) at 173F; D

> "These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

In my view, the concession made by *Mr Murambasvina* on the fate of the purported appeal to the Secretary of Mines was well made. Section 361 of the Act provides:

> "Any party who is aggrieved by any decision of a Mining Commissioner's court E under this Act may appeal against such decision to the High Court, and that court may make such order as it deems fit on such appeal."

In casu, no appeal was made to this court. To the extent that the appeal was purportedly made to the Secretary of Mines, then it is a monumental nullity. There is no appeal at all. The order sought to be rescinded was made pending F a non-existent appeal.

While the explanation for the first respondent's failure to respond to the application in HC 905/10 is what Makarau JP (as she then was) referred to in *Mwanyisa v Jumbo & Ors* HH-3-10 as "a dog's breakfast", if the factors to be taken into account in deciding a rescission of judgment application G as set out in *Stockil v Griffiths (supra*) are taken in conjunction with one another, the applicant has discharged the onus of proving "good and sufficient cause" for the rescission of the judgment entered on 1 July 2010. It simply cannot stand.

In HC 1310/10 the applicant made a climb down on the order that he sought in this court by amending the draft order, remaining only with a prayer for a H

Mathonsi J

A declaratory order that he is the registered owner of a mining claim known as Thunderbird 21 in which the disputed mining shaft falls and that his claim has priority over the claims of the first respondent which were subsequently registered after his.

This is the same dispute that was placed before the second respondent. In B order to adjudicate on the dispute, the second respondent commissioned a survey by the Regional Mining Engineer, one C C Goremusandu. In pursuance thereof, the erstwhile Regional Mining Engineer compiled a report dated 15 February 2010 which reads in part as follows:

> **"RE: PEGGING DISPUTE BETWEEN S. MAZUWA VS C. SIMBI**
>
> **INTRODUCTION**
>
> C The survey of this dispute was requested by the Mining Commissioner see dated letter 09 February 2010 (i.e. pegging dispute 15/2010)
>
> The actual surveying using the GPS was done by the Regional Mine Surveyor Mr Goremusandu in the presence of the two miners Mr C Simbi for Thunderbird 42, Mr Mazuwa and Gambe for Thunderbird 45 and 21. The CID Minerals, Shurugwi were unable to be present because of other work. The results were D plotted by the (RMS) Mr Goremusandu. The plan so produced is divided into three sections as figure 1 in the survey report sheet, figure 2 as the claims report sheet and 3a and 3b are the registration sketches.
>
> **SURVEY REPORT SHEET (Fig 1)**
>
> The plan was prepared using the GPS co-ordinates taken by the RMS on the 15 February 2010. The plan was drawn to 1:1000, the plotted two mines are shown E as Thunderbird 21 and 45 (Mr S. Mazuwa) in bold lines and Thunderbird 42 (Mr C. Simbi) in broken lines.
>
> **CLAIMS REPORT SHEET (Fig 2)**
>
> This is a redirection of a survey report sheet (fig 2). It is drawn to a scale of 1:2 500. The purpose of this plan is to be able to compare these plottings with the registration sketch (fig 3a and 3b). From this we determined the position F and distance from the reference point as described on the registration certificate. In this case the reference point in homestead P2340 on Ballock Farm hence Thunderbird 45 is approximately 1.7 km south west, Thunderbird 42 is 1 km south west and Thunderbird 21 is 0.95 km south west of the homestead.
>
> **COMMENT**
>
> 1. For Thunderbird 21 and 45 (S Mazuwa) the positions on ground are G approximately the same on the registration notice to the GPS coordinates taken by the RMS. Also in Thunderbird 21 the reef have been mined towards Thunderbird 42 also note that the disputed shaft is on the common boundary.
> 2. The calculated area on the registration sketch equals to 21 hectares and the area calculated by the RMS equals 21.35 hectares. The difference in area is equal to the common unpegged area that is, the area between Thunderbird H 21 and Thunderbird 42. See fig 3b.

Mathonsi J

3. For Thunderbird 42 C Simbi the position differs from Approved Prospector A Mr Gambe registration sketch (Mining Commissioner's plan) and Mr Gambe GPS co-ordinates submitted. *Thus it is likely S Mazuwa shifted Thunderbird 21 boundaries to include the unpegged area.*
4. On figure 1 the position marked X is the disputed shaft which is in Thunderbird 42 (Mr Simbi).

C C Goremusandu B

For: REGIONAL MINING ENGINEER"

(The emphasis is mine)

That the second respondent acted on the strength of this survey report in arriving at a decision can be found in his letter dated 15 March 2010 addressed to the Secretary for Mines and Mining Development, which reads C in part as follows:

> "The writer would like to point out that the survey was carried out by the Regional Mine Surveyor – Gweru, who produced a report and a map plan of the disputed area for this office to make a determination of dispute. *The decision was made by this office based on that report and survey.*"

The second respondent determined that "the disputed shaft falls within D Thunderbird 42", thereby liberating the first respondent to continue mining operations at the shaft. In doing so, it is not clear whether he considered the argument made by the applicant that the first respondent's Thunderbird 42 was registered much later than his Thunderbird 21 in 2005 when his was E registered in 2001. The applicant's argument is that the first respondent's claim over-pegged extant claims belonging to himself.

Whichever way, these are the issues that have to be determined. Unfortunately, the second respondent relied upon a survey report which was later disowned by its author. In an affidavit deposed to much later, on 12 May 2010, Christopher Goremusandu, the Regional Mining Surveyor for Gweru Mining District, F recanted the survey report relied upon by the second respondent. He said:

> "I submit that indeed I made an error particularly on p 3 of my report para 3. The correct position and what comment number 3 should is as (*sic*)
>
> > 'For Thunderbird 42 C Simbi the position differs from the Approved Prospector Mr Gambe – registration sketch (Mining Commissioner's plan) G and Mr Gambe GPS coordinates submitted. *Thus it is likely Mr C Simbi shifted Thunderbird 42 boundaries to include the unpegged area.*'

The Regional Mining Surveyor therefore contradicts himself sharply and yet the decision of the second respondent was premised upon his findings. Mrs *Moyo* for the first respondent submitted that the affidavit was elicited after the second respondent had made a decision and therefore it must be ignored. H

Mathonsi J

A Regrettably I am unable to do that. The affidavit has come to my attention and it shows that the Surveyor is one person that cannot be relied upon. The second respondent determined the matter on the basis of a survey report which is demonstrably unreliable. It is a principle of our law that an interested party should be allowed to approach the court at any time to seek a declaratory order that an act done on the strength unreliable advice B is a nullity. The courts should be very slow to turn away a party seeking a declaration of its rights or status.

In *BMG Mining (Pvt) Ltd v Mining Commissioner, Bulawayo & Ors* 2011 (1) ZLR 74 (H) at 78D-E at p 4 I cited with approval the pronouncement made by Robinson J in *Musara v Zinatha* 1992 (1) ZLR 9 (H) at 13F where C the learned judge said:

> "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, starring 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 D technical ground would, I agree, be to ignore the court's fundamental duty to see that justice is done, which, after all, is the duty which the layman expects the courts to discharge."

That there is a boundary dispute between the parties in respect of their adjoining mining claims is beyond doubt. That the said dispute has not been addressed satisfactorily is pretty obvious from the prevarications of E the Surveyor whose findings were relied upon by the second respondent. I cannot ignore such a glaring injustice.

There is a need to remit the matter for a proper survey to be carried out by an untainted person to enable the second respondent to resolve the dispute between the parties.

F Regarding costs, this is one of those rare instances where the success of the parties concerned is evenly balanced. The applicant has not been significantly successful as to attract an award of costs in his favour. The same goes for the first respondent. For that reason the loss should lie where it falls.

In the result I make the following order that: G

1. The default judgment entered on 1 July 2010 be and is hereby set aside.
2. The first respondent should file his opposing papers in HC 905/10 within 10 days of the date of this order.
3. The decision of the second respondent contained in his letter of 4 March 2010 to the effect that the disputed mining shaft falls within Thunderbird H 42 is hereby set aside.

2011 (2) ZLR p326

Mathonsi J

4. The dispute over ownership of the mining shaft is remitted to the second A respondent for adjudication and the second respondent should assign another Mining Surveyor, other than Christopher Goremusandu, to conduct a fresh survey and compile the requisite report to enable a fair determination of the matter.
5. Each party should bear its own costs. B

I Murambasvina, applicant's legal practitioners

Jumo Mashoko & Partners c/o Mabhikwa, Hikwa & Nyathi, first and second respondents' legal practitioners C

* *Editor's note:* presumably the judgment could also have been set aside under r 449 of the High Court Rules, on the grounds that it had been E granted in error.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/MURIMBA & ANOR v LAWS ORGANISATION (PVT) LTD & ORS 2011 (2) ZLR 327 (H)

MURIMBA & ANOR v LAWS ORGANISATION (PVT) LTD & ORS 2011 (2) ZLR 327 (H)

2011 (2) ZLR p327

Citation 2011 (2) ZLR 327 (H)

Case No Judgment No. HH-265-10

Court High Court, Harare

Judge Gowora J

Heard 1 October 2010; *CAV*

Judgment 20 October 2011

N Madya, for the excipient (first defendant)

Counsel *C W Guiro*, for the respondents (plaintiffs)

Case Type Exception

Annotations None

Flynote

Agency – *agent – liability – negligence – breach of duty of care – misrepresentation – need for plaintiff to allege and show facts which prove existence of and breach of duty of care – fraudulent misrepresentations* D *by principal – agent not liable for such misrepresentations*

Delict – *negligence – liability – misrepresentation – breach of duty of care – need for plaintiff to allege and show facts which prove existence of and breach of duty of care*

Headnote

E The first defendant, a registered estate agent, was engaged by the second defendant to sell a certain unimproved stand, the number of which was given, in Harare. The plaintiffs responded to the newspaper advertisement inserted by the first defendant and, having visited a property at the address they were given, went to the first defendant's offices and entered into an agreement to buy the property. Having paid transfer fees, the plaintiffs F learned from the Surveyor General's Office that the stand number they had purported to buy was an improved stand, that it belonged to another person, not to the second defendant, and that its address was not the one they had been to. The plaintiffs claimed against all the parties involved, alleging negligence on the part of them all. The first defendant excepted to the summons as being vague and embarrassing. G It was common cause that the second defendant had acted fraudulently, having obtained documents in the name of another person. However, the first defendant argued that it was acting as agent for a disclosed principal and that the plaintiffs had not alleged that the first defendant owed them a duty of care not to act negligently. It also argued that the H plaintiffs had not alleged that the first defendant had acted negligently

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in making the representations it did on behalf of the second defendant. A There was no allegation that the first defendant was aware of the fraud by the second defendant, or should have been.

Held, that for an action based on negligence to succeed it is necessary for the plaintiff to prove patrimonial loss, provided the damages are not too remote. The plaintiff must therefore allege and prove the causal B connection between the negligent act and the damages suffered. An action will lie for damages based on negligent misstatements only if the defendant owed a duty of care in making the statement – for example, by reason of a contractual relationship between the parties. A plaintiff must allege facts upon which wrongfulness can be inferred. Wrongfulness on the part of the defendant may then constitute a breach of a duty of care. C The plaintiff must, however, allege the particular duty of care owed and the act or omission which is the basis of his cause of action. Where the plaintiff relies on the breach of a duty of care, the plaintiff must set out the facts that could or should have been foreseen by the defendant. A plaintiff seeking relief based on the basis of negligence has an onus to establish that a *diligens paterfamilias* in the position of the defendant D would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and would take reasonable steps so as to guard against such an occurrence and that the defendant failed to take such steps.

Held, further, that an agent is contractually bound to protect the interests of E his principal and it was incumbent upon the plaintiffs in their declaration to plead the basis upon which the agent of another party would have an obligation to protect the plaintiffs' interests in the absence of any relationship between the two.

Held, further, that the plaintiffs' action against the second defendant was premised on fraud. There was no suggestion that the first defendant F was a party to the fraud. Whilst a principal is liable for the fraudulent misrepresentations of his agent, an agent is not liable for the fraudulent

misrepresentations of his principal. It seems that the plaintiffs, having accepted that they were defrauded by a person whose identity could not be ascertained, decided to cut their losses by replacing the fraudster with G the estate agent. That argument was untenable.

Held, accordingly, that the exception would be upheld.

Cases referred to

Barlow Rand Ltd v Lebos & Anor 1985 (4) SA 341 (T)

Bruce NO v Berman 1963 (3) SA 21 (T) H

Gowora J

A *Hamman v Moolman* 1965 (4) SA 340 (A)

Herschel v Mrupe 1954 (3) SA 464 (A)

Case information

N Madya, for the excipient (first defendant)

C W Guiro, for the respondents (plaintiffs)

Judgment

B **GOWORA J**: On 11 February 2010 the plaintiffs herein issued out summons against the four defendants for payment of the sum of US$48 518.50 jointly and severally, the one paying the others to be absolved, interest on the said sum and costs of suit. Only the first and the third defendants entered appearance to defend. The first defendant then filed an exception to the summons and C declaration after requesting and being furnished with further particulars. The third defendant has not filed any further pleadings.

The facts surrounding the dispute can be summarised as follows. The excipient is a registered estate agent. The excipient was engaged by the second defendant to advertise for and secure a purchaser for an immovable property known as Stand 780 Greystone Park Harare on defendant's behalf. On 3 September D 2009 the excipient caused an advert to be flighted in the *Financial Gazette* for the sale of the stand in question. The plaintiffs responded to the advert by attending upon the excipient. They were then given directions of the location of the stand to enable them to view the stand. The physical address given to them of Stand 780 Greystone Park was 32 Winchcombe Road, Greystone E Park, Harare. According to the description, the stand was unimproved.

In due course, the plaintiffs visited the stand and on 9 September 2009 they attended at the offices of the excipient and were advised that it, the excipient, was acting as an agent for the second defendant, who was the owner of the stand. On 14 September 2009 the plaintiffs entered into an agreement of F sale with the second defendant in respect of the stand for the purchase price of US$45 000, which sum was paid to the excipient in four instalments.

On 3 December 2009 the plaintiffs paid a sum of US$3 518.50 at the excipient's offices towards transfer fees. On 10 December 2009 the plaintiffs were informed by the excipient that the title deeds had been processed and were ready for collection. On 11 December 2009 the plaintiffs learnt from G the Surveyor General's Office that Stand 780 belonged to a Sekai Hove but was a developed stand and not an unimproved stand. They also learnt that it had a different physical address to the one that they had viewed. They then issued summons against all the parties involved in the transaction. The first defendant then filed this exception

H The first ground of exception is as follows:

Gowora J

"(3) It being common cause that the first defendant was acting as agent for a A disclosed principal, the plaintiffs do not allege or plead the basis upon which the first defendant owed the plaintiffs a duty of care not to act negligently. Negligence can only arise in relation to a duty of care owed to a party *ipso jure*. The first defendant owed the duty of care to its principal only and not to the plaintiffs.

(4) Further, and without in any way derogating from the foregoing, the plaintiffs B merely allege in para 17 that the first defendant was negligent in making representations to the plaintiffs, without in any way alleging or stating the particulars in which it is alleged the first defendant was negligent in making those representation on behalf of its principal. The first defendant is accordingly unaware of the manner in which it is alleged to have acted negligently in making the representations it made to the plaintiffs on behalf of the second defendant, it being accepted that it was acting as agent of the C second defendant.

(5) Consequently, the first defendant is embarrassed as to the particulars of its alleged negligence in making the representations.

(6) In addition to the foregoing, and without in any way derogating therefrom, the plaintiffs acknowledge and accept in their pleadings that the second defendant fraudulently misrepresented herself as the real owner of Stand D 780 Greystone Park and duly signed the agreement of sale.

(7) It being accepted that second defendant acted fraudulently, the plaintiffs neither allege nor plead the basis upon which the first defendant can be liable for the second defendant's fraud. The plaintiffs neither plead nor aver that the first defendant was aware of the fraud.

(8) It being common cause that the second defendant committed identity E document fraud, the plaintiffs plead an obligation upon the first defendant of ascertaining the fraud that may have been committed on the Registrar of Births and Deaths, which duty the law does not impose on the agent in the position of the first defendant. *Ipso jure*, as no such duty devolved upon the first defendant, the breach of which could give rise to an actionable wrong, the plaintiffs' claim is bad in law. F

(9) It being common cause *ex facie* the plaintiffs' pleadings that a contract of sale was executed by the plaintiffs and the second defendant as a result of the fraudulent misrepresentations of the second defendant with respect to her identity and the identity of the property, the plaintiffs were and are entitled to claim *restitutio in integrum* and can only recover from the first defendant (assuming there is a basis therefor) if they are unable to recover G the purchase price from the seller and only then would they have suffered a loss. *In casu,* the plaintiffs neither aver nor plead that they have been unable to recover from the second defendant. Without such an allegation, the plaintiffs have suffered no loss and consequently the plaintiffs' claim against the first defendant is bad in law and should be struck out.

(10) The plaintiffs seek payment of US$48 518.50 against the defendants 'jointly and severally, with the one paying the other to be absolved'. By reason of the H

Gowora J

A fraudulent misrepresentation by the second defendant, which the plaintiffs acknowledge in paragraph 17.1 of their declaration, the first defendant cannot at law be a joint wrongdoer in the absence of any allegation that it acted in collusion with the second defendant in perpetrating the said fraud. Consequently, the plaintiffs' claim as against the first defendant is bad in law and should be struck out."

B The contention by Mr *Madya* was that the excipient had disclosed all the information it had regarding the transactions and, further, that the plaintiffs were aware that the excipient was acting for a disclosed principal and that, in the circumstances, it was incumbent upon the plaintiffs to plead the basis upon which the excipient owed them, and not its principal, a duty of care.

Generally, negligence is defined as an absence of that degree of diligence C which the law requires to be observed by everyone in the ordinary relation of life and may consist of acts of commissions or omissions. For an action based on negligence it is necessary for the plaintiff to prove patrimonial loss, provided the damages are not too remote. There will therefore be no damages sustained through negligence which may be considered too remote. D The plaintiff must therefore allege and prove the causal connection between the negligent act and the damages suffered. An action will lie for damages based on negligent misstatements only if the defendant owed a duty of care in making the statement, for example, by reason of a contractual relationship between the parties. See *Herschel v Mrupe* 1954 (3) SA 464 (A), *Bruce NO v Berman* 1963 (3) SA 21 (T); *Hamman* v *Moolman* 1965 (4) SA 340 (A).

E It is therefore trite that a plaintiff seeking relief under the *Lex Aquilia* is required to plead and prove wrongfulness on the part of the defendant. See *Barlow Rand Ltd v Lebos & Anor* 1985 (4) SA 341 (T).

The averments on the alleged negligence of the parties to the transaction appear in paras 17 and 18 of the declaration, which are worded as follows: F

"17. The first defendant was negligent, in that it made representations to the plaintiffs to the effect that stand 780 Greystone Park was the same as stand 32 Winchcombe Road Greystone Park and that that particular stand was owned by the second defendant who was their principal, and that the stand was being sold by the second defendant. Further, the first defendant represented to the plaintiffs that it had verified the authenticity of the title G deeds and that everything was proper and called upon the plaintiffs to repose trust in the first defendant.

17.1 The second defendant was negligent in that she signed the agreement of sale knowing that she is not the real owner of stand 780 Greystone Park.

17.2 The third defendant was negligent in that it did not satisfy itself that H the power of attorney to pass transfer was signed by the real owner of

stand 780 Greystone Park and not the second defendant. Further, the A third defendant was obliged to do a deeds search to establish whether the title deed presented by the second defendant was authentic.

18. As a result of the aforementioned negligence of the first, second and third defendants the plaintiffs parted with their money being the sum of US$48 518.50 constituted of (*sic*) the purchase price and the transfer costs."

A plaintiff must allege facts upon which wrongfulness can be inferred. B Wrongfulness on the part of the defendant may then constitute the breach of a duty of care. The plaintiff must, however, allege the particular duty of care owed and the act or omission which is the basis of his cause of action. Where the plaintiff relies on the breach of a duty of care, the plaintiff must set out the facts that could or should have been foreseen by the defendant. C A plaintiff seeking relief based on the basis of negligence has an onus to establish that a *diligens paterfamilias* in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and would take reasonable steps to guard against such an occurrence, and that the defendant failed to take such steps. D

The plaintiffs have not alleged that the excipient owed them a duty of care not to act negligently, nor the facts upon which such duty of care was based on. It is correct, as contented by Mr *Gumiro,* that the relationship between an estate agent and its principal is *sui generis* and is distinguishable from the agency relationship as between principal and agent. He did not provide E any authority for the need to distinguish between an ordinary agent and his principal and an estate and his principal. I did not hear him say, however, that the excipient was not acting for a named or disclosed principal. It is to that principal that the excipient was contractually bound, and in that sense to whom it owed a legal duty. An agent is contractually bound to protect the interests of his principal and it was incumbent upon the plaintiffs in their F declaration to plead the basis upon which the agent of another party would have an obligation to protect their, the plaintiffs', interests in the absence of any relationship between the two. The plaintiffs have not laid a basis for the extension of this duty to themselves.

It would appear that, after a realising that the pleadings were wanting in G some respect, the plaintiffs found in necessary in the heads of argument to raise issues of alleged negligence on the part of the excipient, which allegations had been omitted in the declaration. It is argued in those heads that the excipient had made representations to the plaintiffs in a reckless manner, without ascertaining the truth of those representations, and that the reckless conduct on the part of the excipient amounted to negligence. The H

A point is made that the excipient made representations to the plaintiffs that it had verified the said averments and requested the plaintiffs to repose their trust in it. It was concluded that the particulars of negligence were apparent *ex facie* the declaration. Counsel for the plaintiffs did not, however, point to the particular paragraphs of the declaration that exhibited the particulars of negligence he was referring to. Even if this court were persuaded to accept B that the excipient had been negligent, negligent conduct on its own is not actionable. It is only actionable where there is a positive act or an omission which causes damage to the person or property of another. Where the wrongfulness consists of omissions and pure economic loss is sustained as a result of negligent

misconduct, there must exist a legal duty not to cause such C economic loss. There is no such duty pleaded on the part of the excipient.

It was further submitted on behalf of the excipient that the plaintiffs had pleaded allegations of fraud against the second defendant. It was therefore suggested that, given the fact that the plaintiffs were aware that the second defendant had acted fraudulently in offering the stand for sale, in the absence of any averment in their declaration that the excipient was aware of the fraud, D any claim against the excipient would be bad in law.

In fact, although the substance of the complaint against the second defendant is that she had negligently signed the agreement of sale knowing that she was not the real owner of the stand, the implication behind the averment is that second defendant had acted fraudulently. It was an act done intentionally E to cause prejudice to the plaintiffs, the second defendant knowing full well that she could not transfer rights to the would-be purchasers of the stand. It cannot be negligence when one sells or disposes of an article which one knows full well does not belong to one.

By pleading as they have, the plaintiffs accept that the second defendant had F deliberately set out to defraud them by purporting to be the owner of the stand in question. The plaintiffs' action against the second defendant is premised on fraud. There is no suggestion that the excipient was a party to the fraud. Whilst a principal is liable for the fraudulent misrepresentations of his agent, an agent is not liable for the fraudulent misrepresentations of his principal. It seems that the plaintiffs, having accepted that they were defrauded by a G person whose identity cannot be ascertained, have decided to cut their losses by replacing the fraudster with the excipient. Their argument is untenable.

It is also common cause that the second defendant committed identity fraud in that she obtained from the office of the Registrar of Births and Deaths, documents in the name of Sekai Hove. It is the possession of these documents H that facilitated and perfected the fraud committed by the second defendant.

Gowora J

In point of fact, she defrauded everyone she dealt with in connection with A the stand. In so far as the excipient was concerned, she misrepresented that the title deeds she presented in respect of the mandate she had given for the disposal of a the stand related to an undeveloped stand, when in fact it was a stand with developments. The stand shown to the excipient was not the one described on the deed of transfer. B

The contention by the excipient is that the plaintiffs in the claim allege that the excipient had a duty to ascertain that the person selling the stand was not an imposter. The possession of documents lawfully issued by the office of the Registrar is *prima facie* proof that the holder of those documents is in fact the person described in the documents. The plaintiffs have sought in the C declaration to have the excipient found negligent for not having found out that the person it was dealing with was an imposter. Given the possession of seemingly authentic documents by the so-called seller, it was incumbent upon the plaintiffs to plead the legal basis upon which they sought to have such a duty imposed on the excipient. They have not done so. The fraud was also committed against the Registrar and it stands to reason that it would D be impossible for the plaintiffs to prove the existence of such a duty upon the excipient.

The plaintiffs, as part of their claim, have sought an order for *restitutio in intergrum* against the three defendants cited in the summons. The excipient has argued that they can only seek this order against the excipient if they E are unable to recover from the seller. It is correct that they have not alleged that they are unable to recover from the seller. Consequently, the excipient is arguing that their claim against it for restitution is bad in law and should be struck out. I think that the excipient is tying itself in knots. It is admitted between the parties that the second defendant committed identity fraud. She F has been cited in the name that she fraudulently used to sell the stand. If the plaintiffs had been aware of her true identity, it stands to reason that they would have cited her correctly in order to obtain judgment.

It is correct, however, that the plaintiffs have not alleged that they have been unable to recover from the seller. As such, their claim for restitution against G the excipient is bad at law. It is correct, as submitted by the excipient, that, in the absence of an allegation by the plaintiffs that the former was aware of the fraud perpetrated by the second defendant or, further, that the excipient had

participated in such fraud, then the two cannot be joint wrongdoers. The claim against the excipient on the basis that it should be found jointly liable with the second defendant is accordingly bad in law. H

2011 (2) ZLR p335

Gowora J

A The excipient has asked this court to dismiss the plaintiffs' claim against it. I will not put the plaintiffs out of court merely due to bad pleading on the part of its legal practitioners. In argument, it was conceded by the excipient's counsel that the heads of argument filed on behalf of the plaintiffs contained the essentials of negligence that should have been pleaded in the declaration. To dismiss the claim would be to conclude that the plaintiffs do not have a B cause of action against the excipient. I cannot say whether or not they have one, because the exception was not taken on the basis of a lack of cause of action. It was predicated on pleadings that were vague and embarrassing. I am of the view that the plaintiffs are entitled to an opportunity to amend their pleadings to make the necessary averments.

C In the premises I would uphold the exception. The plaintiffs are given leave to amend para 17 of their declaration in order to remove the offensive paragraphs complained about by the excipient. None of the parties addressed the court as to the time frame within which the amendment should be filed and I will consequently not seek to impose a time in the absence of argument. The D plaintiffs are ordered to pay the costs of the exception.

Mhiribidi, *Ngarava & Moyo*, plaintiff's legal practitioners

Wintertons, first defendant's legal practitioners

E *Desai & Associates Legal Practitioners*, third defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/MUGABE v CHIUMBURU NO & ANOR 2011 (2) ZLR 336 (H)

MUGABE v CHIUMBURU NO & ANOR 2011 (2) ZLR 336 (H)

2011 (2) ZLR p336

Citation 2011 (2) ZLR 336 (H)

Case No Judgment No. HB-157-11

Court High Court, Bulawayo

Judge Ndou J

Heard 14 October 2011; *CAV*

Judgment 20 October 2011

Counsel *P Dzimba*, for the applicant
S Maphosa, for the second respondent

Case Type Opposed application

Annotations None

Flynote

Constitutional law – *Constitution of Zimbabwe – s 24(2) – application for referral of matter to Supreme Court – dismissal of application by lower court – dissatisfied applicant should then approach Supreme Court directly – High Court not empowered to review lower court's decision* D

Headnote

When he appeared before a magistrate on a criminal charge, the applicant made an application for his case to be referred to the Supreme Court in terms of s 24(2) of the Constitution. The magistrate dismissed the application on the ground that it was frivolous and vexatious. The applicant brought the dismissal on review before the High Court. The E Attorney-General argued that application should have been made to the Supreme Court and not to the High Court.

Held, that although s 24(9) of the Constitution provides that a written law may make provision with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred upon F it under s 24 and of subordinate courts in relation to references to the Supreme Court under s 24(2), no such written law has been made. The Supreme Court itself has indicated that the procedure to be followed in relation to matters which are raised under the provisions of s 24 is the procedure as announced by the Supreme Court itself. Sections 24(2) and 24(4) specifically mention the Supreme Court. There is no reference to G the High Court, which indicates a deliberate limitation of the inherent jurisdiction of the High Court. The applicant should, in a constitutional matter under s 24, approach the Supreme Court directly for a speedy redress. An order under s 24 is a distinct legal redress established by the Constitution itself, to have important constitutional issues decided directly by the final court in the land, without protracted litigation. The H

Ndou J

H Supreme Court is the only court empowered to deal with this kind of application. Although s 24(2) is intended to give the magistrate power to protect the Supreme Court from frivolous and vexatious litigation, a party who is not satisfied with the magistrate's determination should approach the Supreme Court directly. The Supreme Court can deal with such matters on an urgent basis if the circumstances so demand. It can also B grant a stay of proceedings where a case has been made for such relief.

Cases referred to

Beattie Farms (Pvt) Ltd v Mugova NO & Anor S-32-09

CCJP v A-G & Ors 1993 (1) ZLR 242 (S)

C *Mandirwhe v Minister of State* 1986 (1) ZLR 1 (A); 1981 (1) SA 759 (ZA)

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

MDC & Anor v Chinamasa & Anor 2001 (1) ZLR 69 (S)

Mukoko v Comr-General of Police 2009 (1) ZLR 21 (S)

Nyamandhlovu Farmers' Assn v Min of Lands & Anor 2003 (1) ZLR 185 (H)

D *S v Mbire* 1997 (1) ZLR 579 (S)

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

Williams & Anor v Msipha NO & Ors 2010 (2) ZLR 552 (S)

Legislation considered

E Constitution of Zimbabwe 1980, s 24

Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*], s 3

Case information

P Dzimba, for the applicant

S Maphosa, for the second respondent

Judgment

F **NDOU J**: The application is one for review. The applicant was charged with contravening s 3(2) as read with s 3(3) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] in that he remained in occupation of gazetted land without the authority of the state. When the applicant appeared before the magistrate (i.e. the first respondent) he made an application for his case G to be referred to the Supreme Court in terms of s 24(2) of the Constitution of Zimbabwe ("the Constitution"). The magistrates court dismissed the application on the ground that it was frivolous and vexatious. The dismissal is the source of this application for review. This application was served upon the second respondent by delivering a copy of the application to an officer H of the second respondent at the second respondent's office in Bulawayo.

Ndou J

In his opposing affidavit, the second respondent raised two points *in limine* A . The first point *in limine* was that he was not properly served with the application. The second point was that the applicant should have made the application to the Supreme Court and not to the High Court.

I propose to deal with these points in turn.

Objection *in limine* **as to jurisdiction** B

The gravamen of the objection is that this court has no jurisdiction to review a decision made by a magistrates court pursuant to the provisions of s 24(2) of the Constitution. It is trite that no written law has yet been made in terms of s 24(9) of the Constitution, which provides –

> "A written law may make provision with respect to the *practice and procedure* – C
>
> (a) *of the Supreme Court in relation to the jurisdiction and powers* conferred upon it by or under this section; and
>
> (b) of subordinate courts in relation to *references to the Supreme Court* under subsection (2)" (emphasis added).

As no written law has yet been made in terms of s 24(9) of the Constitution, the Supreme Court itself has indicated the procedures to be followed in D relation to matters which are raised under the provisions of s 24, *supra – Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) and *Tsvangirai* v *Mugabe & Anor* 2006 (1) ZLR 148 (S). These cases make it amply clear that the procedure to be followed in relation to applications brought in terms of s 24 of the Constitution is the procedure as announced by the Supreme Court E itself in the absence of a written law prescribing such procedure.

The highlighted provisions of s 24(9) and the provisions of s 24(4) specifically mention the Supreme Court. There is no mention of such s 24 references being made to the High Court. This reference to the Supreme Court alone in s 24 is a deliberate limitation of the inherent jurisdiction of the High Court – *S v Mbire* 1997 (1) ZLR 579 (S) at 581B; *Mandirwhe v Minister of State* 1986 (1) ZLR 1 (S) F at 7; 1981 (1) SA 759 (ZA) at 764; *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors* 1993 (1) ZLR 242 (S) at 250 and *Movement for Democratic Change & Anor v Chinamasa & Anor* 2001 (1) ZLR 69 (S) at 76.

This issue was discussed extensively in a judgment of this court in G *Nyamandlovu Farmers Assoc v Min of Lands & Anor* 2003 (1) ZLR 185 (H) at 190F to 194B. The applicant should, in such a constitutional matter under s 24 approach the Supreme Court directly for a speedy redress. A s 24 order is a distinct legal redress established by the Constitution itself, to have important constitutional issues decided directly by the final court in the land, without protracted litigation. The Supreme Court is the only court H

Ndou J

A empowered to deal with this kind of application and has indeed done so in similar circumstances – *Williams & Anor v Msipha NO & Ors* 2010 (2) ZLR 552 (S) at 567; the *Martin* case *supra* and *Beattie Farms (Pvt) Ltd v Mugova NO & Anor* S-32-09. Section 24 (2), *supra*, is intended to give the magistrate power in cases of this kind, to protect the Supreme Court from frivolous and vexatious litigation. A party who is not satisfied with the determination B should approach the Supreme Court – the *Martin* case *supra*. The issue in this case is whether the magistrate "paid lip service to the interpretation of the words "frivolous or vexatious" in her interpretation of s 24(2). The prayer sought by the applicant is in the following terms: "It is sought that first respondent's decision of 29 September 2009 be set aside and that the case be referred to the Supreme Court." This is a case which should clearly C have gone straight to the Supreme Court. The Supreme Court has dealt with such matters on an urgent basis if the circumstances so demand. The Supreme Court has granted a stay of proceedings where a case has been made for such relief – *Mukoko v Commissioner-General of Police* 2009 (1) ZLR 21 (S) and the *Williams* case *supra*. *In casu,* it is not clear why the applicant chose D this long and winding route when the Constitution affords him, in s 24, the opportunity to obtain expeditious redress. When this objection was raised, the applicant should, with respect, have withdrawn this application and approached the Supreme Court directly. From the foregoing the objection *in limine* has merit and should be upheld. On this point alone the application is dismissed with costs.

E **Objection** *in limine* **as to the method of service**

The second respondent filed opposing papers, presumably "under protest", notwithstanding his challenge to the method of service on him of the application. I have just upheld the other objection raised by the second respondent. All these factors render this objection academic and I do not F see any need to deal with it.

Accordingly, as alluded to above, the application is dismissed with costs.

Dzimba, Jaravaza & Associates, c/o Coghlan & Welsh, applicant's legal practitioners

G *Civil Division, Attorney General's Office,* second respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/SHAVA v BERGUS INVESTMENTS (PVT) LTD & ANOR 2011 (2) ZLR 340 (H)

SHAVA v BERGUS INVESTMENTS (PVT) LTD & ANOR 2011 (2) ZLR 340 (H)

2011 (2) ZLR p340

Citation 2011 (2) ZLR 340 (H)

Case No Judgment No. HH-226-11

Court High Court, Harare

Judge Chiweshe JP and Mutema J

Heard 9 June 2011; *CAV*

Judgment 26 October 2011

Counsel *D Gapare,* for the appellant
Mrs *J B Wood,* for the respondent

Case Type Civil appeal

Annotations None

Flynote

Practice and procedure – *execution – judgment sounding in local currency – local currency not in use at time of execution – not competent for judgment creditor to revalue debt in foreign currency – need for judgment creditor to make court application for conversion of currency*

Headnote

"The judgment upon which execution is issued must be a judgment from D which there can be gathered what money or thing the judgment debtor must deliver" (*dicta per* Clayden J in *McNutt v Mostert* 1949 (3) SA 253 (T) followed).

The appellant and the first respondent had entered into a lease agreement for E certain domestic premises in 2003. In March 2008, the first respondent, following its cancellation of the lease agreement, obtained an order in the magistrates court for the eviction of the appellant and payment of holding over damages, which were calculated in Zimbabwean currency. The first respondent did nothing about enforcing the order until a year later, by which time Zimbabwean currency was no longer in use. It then F enforced the eviction order and executed against the appellant's property, having arbitrarily revalorised the claim in US dollars on execution. The appellant filed an urgent chamber application in the High Court to stay execution of the writ. Among the issues to be determined was whether the first respondent was entitled to revalorise its claim on execution.

Held, that the claim was in Zimbabwe dollars, as was the judgment of the G court *a quo*. The revalorisation of the claim in US dollars on execution was not only incompetent for arbitrariness but offended against the time honoured principle of currency nominalism. That principle holds that a debt sounding in money has to be paid in terms of its nominal value, irrespective of any fluctuations in the purchasing power of the H

Mutema J

A currency. The first respondent ought to have made a court application for the conversion of the currency.

Cases cited

Hartley v Hartley 1999 (1) ZLR 431 (S)

Komichi v Tanner & Anor 2005 (2) ZLR 358 (H)

B *McNutt v Mostert* 1949 (3) SA 253 (T)

Mukorera v Ocean Breeze Engine & Cooling Systems HH-13-08

Treseder-Griffin & Anor v Co-operative Ins Soc Ltd [1956] 2 QB 127 (CA)

Legislation considered

C Magistrates Court (Civil) Rules 1980, Order 26 r 1

High Court Rules 1971 (RGN 1047 of 1971), r 323

Case information

D Gapare, for the appellant

Mrs *J B Wood,* for the respondent

Judgment

D **MUTEMA J**: The bare bones of the dispute in this appeal are these: The appellant and the first respondent entered into a lease agreement for premises situate at 26 East Road, Belgravia, Harare on 16 May, 2003. On 14 March, 2008, the first respondent, following its cancellation of the lease agreement, obtained an order in the Magistrates' court under case number MC 1701/07. E The contentious order was couched in these words:

> "claim granted, defendant to vacate the premises of the plaintiff by 30 June 2008. Defendant ordered to pay holding over damages as claimed by the plaintiff from February 2007."

The first respondent did not enforce the order from 14 March 2008 until February 2009, when it proceeded to have the appellant evicted from the F premises and also caused the appellant's property to be attached by the second respondent to satisfy the judgment debt. There is a dispute as to why the first respondent sat on its laurels for almost a year without executing the judgment. The appellant avers that subsequent to the 14 March 2008 order he concluded a verbal lease agreement with the first respondent, in terms of which the appellant would have continued use of the premises provided G he paid rentals in foreign currency. While the first respondent disputed the existence of such a verbal lease agreement, the odds are against it for it could not proffer any plausible explanation for the delay in enforcing the judgment.

Be that as it may, following the eviction of the appellant and attachment of his property alluded to above, the appellant successfully filed an urgent H chamber application in this court under case number HC 1116/09 to stay

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execution of the writ. The terms of the final order sought were that the first A respondent stay execution of the warrant pending finalisation of this appeal in terms of which a determination would be made with regard to whether it was proper that the warrant should be sounding in foreign currency when the judgment sounded in Zimbabwe dollars and whether the fact that the warrant was signed by a representative of the second respondent and not a B legal practitioner was fatal to the execution thereof.

The crisp issues for our determination are three, *viz*:

1. Whether the judgment of the magistrate in case number MC 1701/07 met the requirements for the issue of a warrant;
2. Whether the first respondent was entitled to revalorise its claim on C execution; and
3. Whether the warrant was fatally/totally defective.

Hereunder we proceed to deal with those issues *seriatim*.

1. Requirements for the issue of a warrant

It is trite that a writ of execution will be set aside on application if the D judgment upon which it is premised was not definite and certain. The test to apply was propounded by Clayden J (as he then was) in *McNutt v Mostert* 1949 (3) SA 253 (T) and cited with approval in *Hartley v Hartley* 1999 (1) ZLR 431 (S) at 435. It is that:

> "… the judgment upon which execution is issued must be a judgment from which E there can be gathered what money or thing the judgment debtor must deliver."

In the instant case, the magistrate's judgment was worded in the following language:

> "*claim* granted, defendant to vacate the premises of the plaintiff by 30 June 2008. Defendant ordered to pay holding over damages as *claimed* by the plaintiff from F February 2007" (my emphasis).

While the magistrate's order was inelegantly drafted it is, however, clear that the claim that was granted is the claim as stated in the summons. That claim includes the following:

(a) An order cancelling the lease;

(b) That defendant pays holding over damages at the rate of Z$1 137 000 G per month with effect from 21 February 2007 for the duration that the defendant remained in occupation of the premises;

(c) Specific performance that the defendant replaces the damaged kitchen door alternatively pays as damages replacement value of the damaged door *at the time judgment is entered* i.e. 14

March 2008; and H

Mutema J

(d) Specific A performance that the defendant redecorates interior of premises alternatively he pays for cost of paint, materials and labour *costs at the time judgment is entered* i.e. 14 March 2008 (my emphasis).

While the judgment is definite and certain, in that it can be gathered what money or thing the judgment debtor must deliver, the first respondent only B executed it some eleven months later and wrongly included amounts sounding in United States dollars for a maximum of only one quotation obtained long after judgment had been entered, contrary to the time prayed for in the claim. In terms of the judgment that was granted, the value of the damaged door and the costs for materials and labour was to be pegged at the time judgment was entered namely, 14 March 2008, and not at the time of execution eleven C months later. At the time judgment was entered, the currency in use was the Zimbabwe dollar and not US dollar.

From a legal standpoint the first respondent was not entitled to effect currency conversion on the warrant of execution without an application for the same having been made and granted.

D **2. Whether first respondent was entitled to revalorise its claim on execution**

The claim was in Zimbabwe dollars and the court *a quo*'s judgment was in Zimbabwe dollars. However, the first respondent revalorised the claim in US dollars on execution. This, as alluded to in (1) above, was not only E incompetent for arbitrariness but offended against the time honoured principle of currency nominalism. That principle holds that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of the currency. The appellant relied, for this principle, on *Komichi v Tanner & Anor* 2005 (2) ZLR 358 (H). Counsel for the first respondent argued that the principle of currency nominalism is only invoked F where there is a specific amount of money. She submitted that case law to that effect abounds but failed to cite even a single such case.

It is trite that the principle of currency nominalism is part of our law. In *Mukorera v Ocean Breeze Engine and Cooling Systems* HH-13-08, Makarau JP (as she then was) stated the principle as follows:-

> G "The concept of currency nominalism has been held to be applicable in all aspects of South African law … I hold the view that the distortions caused by inflation in the economy should not lead to the wholesale distortion of legal principles that have withstood the test of time in a bid to find legal solutions to a problem that is not legal in nature and origin and may prove to be transient. I am yet to be persuaded that revalorization is part of our law of debt collection".

H We respectfully associate ourselves within those sentiments.

Mutema J

Even in England, the same principle applies. In *Treseder-Griffen & Anor v* A *Co-operative Insurance Society Ltd* [1956] 2 QB 127 (CA) at 144 Denning LJ had this to say:

> "… In England we have always looked upon a pound as a pound, whatever its international value … In all our dealings we have disregarded alike the debasement of the currency by kings and rulers or the depreciation of it by the B march of time or events … A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time".

The learned judge commented on currency nominalism in the Netherlands and German legal systems which he found to be similar and then went on to consider the reasons commonly given for currency nominalism in these words:

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

It is beyond argument that the first respondent's debt sounded in money and D the judgment was given in March 2008 with the specific directive that the values of whatever was damaged by the appellant were to be as at the time of judgment. Those values were in Zimbabwe dollars and not in

US dollars. The principle of currency nominalism was therefore still applicable. It was accordingly idle for the first respondent to revalorise its claim on execution. E It ought to have made a court application for the conversion of the currency.

3. Whether the warrant was fatally defective

Order 26 r 1(1) of the Magistrates Court (Civil) Rules provides that a warrant is issued and signed by the clerk of court and addressed to the messenger of court. Subrule (2) provides that such process may be sued out by any person F in whose favour any such judgment has been given. *In casu* the warrant was sued out by the first respondent as the judgment creditor. Rule 323 of the High Court Rules 1971 is the corresponding provision to Order 26 r 1(2) of the Magistrates Courts (Civil) Rules and it has the addition that suing out a writ of execution is done at the risk of the party who does so. *Hartley*'s case *supra* held that the judgment creditor ran the risk of liability for costs G if the writ were set aside.

In casu, while the warrant was not defective in form, it was fatally defective in content due to the revalorisation. It therefore cannot be allowed to stand.

In the event, it is ordered that:

(i) The appeal succeeds with costs. H

2011 (2) ZLR p345

Mutema J

(ii) The A second respondent is ordered to release the appellant's attached property.

(iii) If the first respondent still wishes to pursue the enforcement of the judgment it must first, on notice to the appellant, make an application before the magistrates court for leave to revalorise the claim as well as B proof of the damages.

CHIWESHE JP concurred.

Scanlen & Holderness, appellant's legal practitioner

C *Coghlan, Welsh & Guest*, first respondent's legal practitioners

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MAVURUDZA & ANOR v MEIDLER POOLS & CONSTRUCTION (PVT) LTD 2011 (2) ZLR 346 (H)

2011 (2) ZLR p346

Citation 2011 (2) ZLR 346 (H)

Case No Judgment No. HH-234-11

Court High Court, Harare

Judge Bhunu J

Heard 22 June 2011; *CAV*

Judgment 26 October 2011

Counsel *P Chiutsi,* for the plaintiffs
D P Drury, for the defendant

Case Type Application for declaratory order

Annotations None

Flynote

Costs – *taxation – party and party costs – costs incurred during period before current tariff came into effect – not permissible to use current tariff to calculate costs – costs must be assessed in accordance with* D *tariff applicable at time costs incurred*

Headnote

An award of costs following a civil action was made during the period extending from January 2009 to December 2010, when there was no statutory tariff for the claim of costs in foreign currency. The plaintiff's legal practitioner was of the view that costs were claimable in foreign E currency for that period because the Zimbabwean currency had by then become dysfunctional and of no use to anyone. The taxing master considered that costs were claimable in terms of the governing statutory instrument as at the time the costs were incurred. He referred the matter to a judge in chambers for a decision.

Held, that the taxing officer is a statutory functionary who is strictly bound F by the four corners of the enabling statute. His powers in taxing party and party costs are laid down under r 308(2) of the High Court Rules 1971. This rule requires him to be guided as far as is possible by the prescribed tariff without strictly binding him to slavishly follow that tariff. He is allowed a certain measure of discretion, provided he keeps G within reasonable limits of the tariff. The proviso to r 308(2) expressly prohibits the taxing officer from relying on a subsequent amendment to the tariff. During the period in question the applicable tariff was denominated in Zimbabwean currency in terms of the High Court (Fees and Allowances) (Amendment) Rules (SI 166 of 2005).There was no tariff denominated in foreign currency until 4 February 2011, when SI H

2011 (2) ZLR p347

Bhunu J

A 12 of 2011 was promulgated. In the absence of an official conversion rate from Zimbabwean to any foreign currency, the tariff denominated in Zimbabwean dollars did not offer any guidance to the taxing officer with regard to taxation in foreign currency. That being the case, there could be no basis upon which the taxing officer could tax bills in foreign B currency for the period in question other than in Zimbabwean dollars.

Cases cited

In re *Est Matimura* 2010 (1) ZLR 17 (H)

Legislation considered

C High Court Rules 1971 (RGN 1047 of 1971), rr 308(2) & 313

High Court (Fees and Allowances) (Amendment) Rules (SI 166 of 2005)

Case information

P Chiutsi, for the plaintiffs

D P Drury, for the defendant

Judgment

D **BHUNU J**: Sometime in October 2006 the plaintiffs contracted the defendant to refurbish their swimming pool, whereupon the defendant rendered defective service, thereby giving rise to a claim for specific performance or alternatively damages in the sum of US$7 000.

I subsequently issued the following order in favour of the plaintiffs:

E "It is accordingly ordered:

1. That the defendant be and is hereby ordered to rectify the defects on the plaintiffs' mabalite tiles in terms of specifications from Cemcrete South Africa (Private) Limited within 14 days of service of this judgment upon it.
2. In the alternative, the defendants be and are hereby ordered to pay damages F in the sum of US$7 000 being the cost of repairing the defects.
3. The defendant shall bear the costs of suit."

A dispute has now arisen as to whether or not costs awarded in para 3 of the order are claimable in foreign currency although they were incurred during the period extending from January 2009 to December 2010 when there was G no statutory tariff for the claim of costs in foreign currency.

The plaintiff's legal practitioner is of the view that costs are claimable in foreign currency for that period because the Zimbabwean dollar had by then become dysfunctional and of no use to anyone, whereas the taxing master is of the view that costs are claimable in terms of the governing statutory H instrument as at the time the costs were incurred.

2011 (2) ZLR p348

Bhunu J

The taxing officer has now referred the matter to me sitting in chambers for A the determination of the above dispute in terms of r 313 of the High Court Rules 1971 (RGN 1047 of 1971) as amended, which provides that:

"**313. Taxing officer may refer point to judge in chambers**

The taxing officer may, without filing any formal documents, submit any point arising at a taxation for decision by a judge in chambers, and it shall be competent B for the taxing officer and for the legal practitioners who appeared at the taxation to appear before the judge respecting such point."

The taxing officer is a statutory functionary who is strictly bound by the four corners of the enabling statute. The taxing officer's powers in taxing party and party costs are laid down under r 308(2), which provides that:

"(2) In the taxation of costs as between party and party in respect of work done C in connection with judicial proceedings, a taxing officer shall be guided as far as possible by the tariff of legal practitioners' fees prescribed in the High Court (Fees and Allowances) Rules 1994:

Provided that no regard shall be paid to any amendment to the said tariff of fees if the work concerned was done before the said amendment came into operation" (my emphasis). D

The rules require the taxing officer to be guided as far as is possible by the prescribed tariff without strictly binding him to slavishly follow the prescribed tariff. What this means is that the taxing officer is allowed a certain measure of discretion provided he keeps within reasonable limits of the tariff.

It is common cause that during the period under review the applicable tariff E was denominated in Zimbabwean dollars in terms of the High Court (Fees and Allowances) (Amendment) Rules, SI 166 of 2005.There was no tariff denominated in foreign currency until 4 February 2011, when SI 12 of 2011 was promulgated.

As I have already pointed out, the taxing officer is required by law to derive guidance from the existing tariff as at the time the work was performed. F It stands to reason that, in the absence of an official conversion rate from Zimbabwean to any foreign currency, the tariff denominated in Zimbabwean dollars does not offer any guidance to the taxing officer with regard to taxation in foreign currency. That being the case, there can be no basis upon which the taxing officer can tax bills in foreign currency for the period in question G other than in Zimbabwean dollars.

The plaintiff's reliance on the subsequent tariff denominated in foreign currency was misplaced, in so far as the proviso to r 308 (2) expressly prohibits the taxing officer from relying on a subsequent amendment to the tariff.

"(2) In the taxation of costs as between party and party in respect of work done in connection with judicial proceedings, a taxing officer shall be guided as far H

Bhunu J

A as possible by the tariff of legal practitioners' fees prescribed in the High Court (Fees and Allowances) Rules:

Provided *that no regard shall be paid to any amendment to the said tariff of fees if the work concerned was done before the said amendment came into operation."*

The applicable tariff is, therefore, the ruling tariff as at the time the work was done. Bere J came to the same conclusion in a well reasoned judgment B concerning Law Society tariffs in In Re *Estate Matimura* 2010 (1) ZLR 17 (H).

The taxing officer was accordingly correct in disregarding the tariff prescribed in SI 12 of 2011 as it was promulgated after the work concerned was done.

In the result it is determined that the applicable tariff in this case is SI 166 of 2005, being the tariff applicable at the time the work in this case was done.

C *P Chiutsi Legal Practitioners,* plaintiff's legal practitioners

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S v T (A JUVENILE) 2011 (2) ZLR 350 (H)

Citation	2011 (2) ZLR 350 (H)
Case No	Judgment No. HH-279-11
Court	High Court, Harare
Judge	Mutema J
Heard	28 October 2011
Judgment	28 October 2011
Counsel	Details not Supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *general principles – youthful offender – probation officer's report and recommendations – weight to be given to recommendations as to sentence – sentencing court should give reasons for not following recommendations – need for recommendations to be specific, not vague and generalised* D

Criminal procedure (sentence) – *offences under Criminal Law Code – rape – juvenile offender – need to avoid imprisonment – different sentencing approach required*

Headnote

The accused, a 17-year old, was convicted of the rape of a 14-year-old girl E. The probation officer recommended "a corrective and rehabilitative sentence" in terms of s 358(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which provides for the passing of sentence but ordering the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify. The trial magistrate disregarded the probation F officer's recommendation, without saying why, and sentenced the accused to nine years' imprisonment of which two years were conditionally suspended. On review:

Held, that while the court is not bound by the recommendation of a probation officer, this does not mean that the court should or can dismiss such G recommendation out of hand without giving reasons. Probation officers are well trained professionals in their field and their recommendations ought to be accorded due weight unless they are clearly out of line. Probation officers must not be vague in their recommendations. They should say exactly what sentence they think should be meted out, instead of giving a vague and generalised recommendation. H

Mutema J

A *Held*, further, that against the appropriate increase in the severity of sentences imposed for rape needs to be balanced the consideration of the age of the offender. While it may be for the benefit of a youthful offender that he be punished so as to reduce him to a sober frame of mind and make him appreciate the seriousness with which society views his conduct, such punishment must be geared principally towards the correction of B the youth in the hope of preventing him from ruining his life. In view of the accused's age and personal circumstances, it was a gross error of judgment to sentence him to an effective term of imprisonment, let alone one of seven years. Elementary common sense and the need for rehabilitation demanded a different sentencing approach, such as a moderate correction of cuts, coupled with a wholly suspended term of C imprisonment to enable the accused to carry on with his education and be rehabilitated. There was absolutely no justification for brutalising him by incarceration.

Cases referred to

D *S v Green* HB-177-87

S v Malanga HH-218-93

S v Muguti & Anor S-218-92

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

Judgment

MUTEMA J: The accused person is a 17-year-old juvenile first offender. E He is an orphan doing Form 3 at M Secondary School. He was residing with his senile grandmother. He pleaded not guilty to raping a 14-year-old complainant who is his friend's niece. He initially went to the kitchen hut where the complainant and her siblings were to put up for the night and, when asked what he wanted, bolted out without saying anything. He later F returned after the complainant and her siblings had fallen asleep, opened the door, entered, throttled the complainant and raped her.

The accused was correctly convicted of rape. The probation officer recommended "a corrective and rehabilitative sentence in terms of s 358 2(b) (*sic*)".

The relevant statute is not stated but presumably it must be the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Section 358(2)(b) of that Act G provides for the passing of sentence but ordering the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify.

In her reasons for sentence, the regional magistrate did not say why she disregarded the probation officer's recommendation. The sole reference to H the probation officer's report reads:

Mutema J

"The probation officer's report shows that the accused is a delinquent child who A lacks parental guidance".

I am alive to the fact that the court is not bound by the recommendation of a probation officer, but this does not mean that a court should or can dismiss such recommendation off hand without giving reasons for disregarding it. Probation officers are well trained professionals in their field and their B recommendations ought to be accorded due weight, unless they are clearly out of line, but even so reasons should be proffered why a court has decided not to take the recommendation on board.

The regional magistrate was correct to disregard the probation officer's recommendation but should have given reasons therefor. In view of the seriousness of the offence, the determination and resilience exhibited by C the accused and the violence that was employed in its perpetration, it is not plain whether the recommendation in terms of the cited section referred to a wholly suspended or partly suspended sentence. Probation officers must not be vague in their recommendations – they are enjoined to nail their colours to the mast and stipulate what it is exactly they think should be the sentence D to be meted out, instead of giving a vague and generalised recommendation.

The regional magistrate said she was very much alive to the sentencing approach highlighted in *S v Zaranyika & Ors* 1995 (1) ZLR 270 (H) but felt a custodial sentence appropriate in sending a correct message to like-minded persons, though the accused would not be sentenced as an adult. She then proceeded to sentence accused to – E

> "9 years' imprisonment of which 2 years is suspended for 5 years on condition during that period accused does not commit any offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine".

This sentence, apart from inducing a sense of shock, offends against all known tenets of civilised justice. I cannot comprehend the rationale behind the regional magistrate's decision to ruin the 17-year-old Form 3 orphan's F education and transform him into a veritable criminal instead of rehabilitating him. In this regard, I can do no more than respectfully associate myself with Bartlett J's salutary warning in the *Zaranyika* case *supra* at p 273 where he said that against the appropriate increase in the severity of sentences imposed for rape needs to be balanced the consideration of the age of the offender G .

In this regard, the learned judge went on to quote the words of Korsah JA in *S v Muguti & Anor* S-218-92 at pp 2-3 when dealing with rapists aged 18 and 17 years respectively, where the victims were aged 5 and 8 years. He said:

> "However, the effective sentence of seven years is the sentence usually imposed on more mature male culprits for this offence. Youth, the world over, has always been considered, where a person does not act out of inherent wickedness, as a H

Mutema J

> A strong mitigatory factor for all crimes. This is because youthfulness is associated with immaturity, thoughtlessness and a lack of experience of life. It is, therefore, odious to impose the same penalty as would be justified in the case of a mature offender on a youthful offender.
>
> While it may be for the benefit of a youthful offender that he be punished so as to reduce him to a sober frame of mind and make him appreciate the seriousness with which society views his conduct, such punishment must be geared principally B towards the correction of the youth in the hope of preventing him from ruining his life. With regard to mature offenders, the sentencing principles are directed more towards retribution and deterrence rather than any hope of correction."

And in *S v Green* HB -177-87 Muchechetere J (as he then was), in dealing with a 17-year-old who had attempted to rape a 4-year-old, observed that –

> C "Although the offence he committed was brutal and degrading, it is usual for first offenders who are under the age of 18 years to be sentenced to a correction of cuts in rape cases unless there are aggravating factors".

Also, Chhidyausiku J's (as he then was) comments in *S v Malanga* HH-218-93 are apposite. He said:

> "In my view, a 16-year-old juvenile should never be sentenced to an effective D prison terms unless the offence is so serious that only such a sentence can be justified for the offence … (To) send such an accused young offender to prison where he is bound to mix with the worst elements of our society is a gross error of judgment. Elementary common sense and the need for rehabilitation demands a different approach …"

Whilst acknowledging that rape is a serious offence and is disturbingly E prevalent and also that *in casu* the accused showed perseverance and determination in the commission of the offence, I am constrained to hold that it was, in view of the accused's age and personal circumstances, a gross error of judgment to sentence him to an effective term of imprisonment, let alone one of seven

years. Elementary common sense and the need for rehabilitation F demanded a different sentencing approach, such as the common moderate correction of cuts, coupled with a wholly suspended term of imprisonment to enable the accused to carry on with his education and be rehabilitated. There was absolutely no justification for brutalising him by incarceration.

Magistrates are well advised not to get emotional when it comes to sentencing, lest judicious discretion gets easily clouded by such emotion.

G The hapless accused was imprisoned on 4 July 2011. He has already served nearly four months behind bars. While this is unfortunate, it cannot be undone. The sentence imposed by the regional magistrate cannot be allowed to stand. It is hereby set aside and substituted with the following:

> The accused is sentenced to three years' imprisonment, the whole of H which is suspended for five years on condition accused does not during

Mutema J

> that period, commit any offence of a sexual nature of and for which he A is sentenced to imprisonment without the option of a fine.

The accused person is entitled to his immediate release and a warrant for his immediate liberation is hereby issued.

Kudya J agrees. B

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Source:
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PMA REAL EST AGENCY (PVT) LTD v ARDA 2011 (2) ZLR 355 (H)

Citation	2011 (2) ZLR 355 (H)
Case No	Judgment No. HH-236-11
Court	High Court, Harare
Judge	Patel J
Heard	14 June 2011; *CAV*
Judgment	1 November 2011
Counsel	*A R Chizikani*, for the plaintiff *C M Jakachira,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract – *validity – contract made between State agency and another person – such contract concluded without following procedures laid down by relevant procurement legislation – such contract void ab initio and unenforceable*

D **Revenue and public finance** – *tender procedure – need for procuring entity to follow requirements of procurement legislation – effect of failure to do so – contract in breach of such requirements void ab initio*

Headnote

The plaintiff operated a real estate business, including the valuation of assets E and auctioning. The defendant was a statutory body established under the Agricultural and Rural Development Authority Act [*Chapter 18:01*]. The plaintiff issued summons claiming from the defendant a certain sum as valuation fees, together with interest, collection commission and costs. The arrangement between the parties had been that the defendant would pay a percentage of the value of assets valued by the plaintiff as valuation F fees and that those fees would be paid out of the proceeds of sales by auction. This arrangement came to an end when the defendant told the plaintiff to stop further auctions as the plaintiff was not registered with the State Tender Board. The issue for determination was the validity of the contract between the parties in the context of the legislation on procurement.

G Under s 3(1) of the Procurement Act [*Chapter 22:14*], the provisions of the Act apply to procurement by all procuring entities as defined in s 2(1), including every statutory body such as the defendant. Under s 30(1) of that Act, services by a procuring entity shall be done by a method which complies with s 32, which sets out the general procedures to be H followed in the procurement of services. These relate to, *inter alia*, the

publication of notices, tender documentation, criteria for qualification, A the submission and evaluation of proposals and other tender formalities. All proceedings for the procurement of a service must be in accordance with procurement regulations made by the Minister or, with regard to any matter not prescribed in such regulations or in the Act, in accordance with such procedure as the procuring entity may fix. The Procurement B Regulations 2002 set out the procedures governing the invitation of tenders generally. It is an offence to contravene any provision of the Regulations, although the Regulations are silent as to the penalty to be imposed. The Act is equally silent in this regard.

Held, that the more pertinent enquiry was whether the contract was concluded in compliance with other procedures enjoined by the Act and C the Regulations. Reading all of the relevant provisions together, what was contemplated by the Act in relation to the procurement of services was that every procurement entity must adopt a method that complies with the general procedures set out in s 32(1) of the Act, as read with the detailed procedures elaborated in the Regulations. Any departure from the prescribed procedures must be sanctioned under the Act or D the Regulations. The defendant did not follow the general procedures set out in s 32(1) of the Act or the formal tender procedures stipulated in ss 4 and 8 of the Regulations. There was nothing to indicate that it adopted any other method of procurement allowed by the Regulations in its contract with the plaintiff. In particular, there was no evidence of E the quotations or approvals enjoined by s 5 of the Act. The defendant's departure from the prescribed procurement regime was not otherwise provided by the Act nor was it in accordance with the Act, and was clearly unsanctioned by the State Procurement Board or its Chairman.

Held, further, that the provisions of ss 30, 31 and 32 of the Act were couched in peremptory terms and compliance with them, as well as the Regulations, F was intended to be mandatory rather than merely directory. However, the Act did not state the legal consequences of any failure to so comply.

Held, further, that the scope of a State employee's authority is more often than not determined by statutory provisions and the requirements of the statute or regulations concerned must be complied with. If such requirements are mandatory, any contract made in breach of them is invalid and unenforceable. No State employee has the authority to circumvent or dispense with the requirements of a statute. To recognise or enforce any such contract would operate to render the applicable enactment nugatory. Although it might be argued, by analogy with company law, that persons dealing with the State are entitled to assume that the functionaries in H

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A question have duly complied with the prescribed formalities, any hardship which might befall persons contracting with the State is outweighed by the public interest in safeguarding State property and public monies. If contracts made in material breach of a statute were to be recognised and enforced, the unavoidable result would be to frustrate and defeat an explicit injunction of the Legislature.

B *Held,* further, that a contract in breach of a statute cannot be retrospectively ratified or otherwise validated because (a) the law does not countenance the ratification of a contract or transaction which, being contrary to a statute, is null and void *ab initio*; and (b) the Executive is not at liberty to waive or renounce a peremptory statutory obligation imposed by C the legislature for the protection of State property and public monies. Accordingly, the contract *in casu* was invalid and unenforceable.

Cases cited

Cape Dairy & General Livestock Auctioneers v Sim 1924 AD 167

Collector of Customs v Cape Central Rlys Ltd (1888) 6 SC 402

Foroma v Minister of Public Construction & National Housing & Anor 1997 (1) ZLR 447 (H) D

Gambiza v Taziva 2008 (2) ZLR 107 (H)

Maceys Consol (Pvt) Ltd & Anor v TA Hldgs Ltd (1) 1986 (2) ZLR 5 (S); 1987 (1) SA 173 (ZS)

Mega Pak Zim (Pvt) Ltd v Global Technologies Central Africa (Pvt) Ltd 2008 (2) ZLR 195 (H) E

RB Ranchers (Pvt) Ltd v Est McLean & Anor 1985 (2) ZLR 24 (H)

Ritch & Bhyat v Union Govt (Min of Justice) 1912 AD 719

SAR&H v Tvl Consol Land & Exploration Co. Ltd 1961 (2) SA 467 (T)

Legislation considered F

Procurement Act [*Chapter 22:14*], ss 3,30,31, 32 & 33

Procurement Regulations 2002 (SI 171 of 2002), ss 4,5,6,7 & 8

Case information

A R Chizikani, for the plaintiff

G *C M Jakachira,* for the defendant

Judgment

PATEL J:The plaintiff operates a real estate business, including the valuation of assets and auctioning. The defendant is a statutory body established under the Agricultural and Rural Development Authority Act [*Chapter 18:01*] ("ARDA"). The plaintiff issued summons in March 2010, claiming from the H defendant the sum of US$17,309.86 as valuation fees, together with interest

at the rate of 5 per cent per month, 10 per cent collection commission and A costs of suit.

The issues for determination that were identified at the pre-trial conference were materially altered during the course of the trial. The first issue concerns the impact of the Procurement Act [*Chapter 22:14*] on the contract concluded between the parties. The second issue relates to the percentage of the valuation B fees payable to the plaintiff and the price upon which such fees are claimable.

The evidence

Simon Mkondo is the managing director of the plaintiff and is registered with the Estate Agents Council. His evidence was that the parties have been in business together since 1997 when the plaintiff first began valuating the C defendant's assets. The arrangement was that the defendant would pay 2.5 per cent of the value as valuation fees and that those fees would be paid out of the proceeds of sale by auction. This arrangement came to an end in 2009 when the defendant told the

plaintiff to stop further auctions as the plaintiff was not registered with the State Tender Board. By the time the plaintiff was duly registered, the defendant had appointed other auctioneers. The plaintiff's D claim arises from a specific contract concluded by correspondence between December 2007 and January 2008. The defendant invited the plaintiff to set out its current terms and conditions. The plaintiff responded and a few weeks later the defendant wrote back accepting the terms stated by the plaintiff. The valuation fee was based on the valuation amount or reserve value and not on the auction amount. The documents furnished by the defendant show E that the plaintiff's valuations were generally accurate and that it carried out its work professionally. The plaintiff's claim for interest at the rate of 5 per cent per month was based on the prevailing bank rate for loans. However, the witness withdrew the claim for 10 per cent collection commission as it was not part of the contract with the defendant. Under cross-examination, F he conceded that, according to the plaintiff's letter of 28 December 2007, the 2.5 per cent valuation fee under the contract with the defendant was based and chargeable on the auction value and not on the reserve value. The plaintiff's claim is based on the reserve value because the defendant decided to stop further auctions by the plaintiff. It would have sued on the auction values realised by other auctioneers for the assets already valuated G by it, but the defendant did not avail these figures. The witness admitted, as per the plaintiff's letter of 7 May 2009, that the reserve values were too high and needed to be adjusted. Consequently, as appears from the relevant invoices and auction returns, the sale figures from auctions conducted by others were generally lower than the original reserve values computed by the plaintiff. He further accepted that there was nothing in the contract to H

A preclude the defendant from dealing with other auctioneers. However, this term was implied because the valuation fees were to be collected at the end of every auction. At this juncture, even if the auction values were to be compiled, the plaintiff was still not prepared to accept valuation fees based on the auction figures.

B Willard Mbona is the acting general manager of ARDA. He testified as follows. As per the plaintiff's letter of 28 December 2007, which formed the terms of the agreement, the 2.5 per cent valuation fee was to be paid at the end of each auction on the proceeds of the auction sale. Valuation was not conclusive proof of income received from auction sales, the proceeds of which were the only source for paying auction and valuation fees. The C agreement between the parties was in respect of the whole process, *i.e.* valuation, setting up the auction, selling at the auction, and gathering the proceeds of sale for payment to the defendant, after deducting valuation and auction fees. There was no auction where all the valuated assets were sold by the plaintiff. It was never agreed that the 2.5% fee be paid on the reserve value. It was only payable on assets that were actually bid and D paid for. Before February 2009, although valuations were in United States dollars, all transactions were carried out in Zimbabwe dollars. In May 2009, the plaintiff advised that all previous valuations needed to be reduced because of changed economic circumstances. The defendant terminated the contract with the plaintiff in June 2009 after receiving an internal audit E report on the Middle Sabi auction. The ARDA Board then resolved to open up the auctions to wider competition. On 1 October 2009 the plaintiff was specifically invited to participate and regularise its position, but it applied too late for inclusion on the ARDA tender list. By November 2009, the State Tender Board had already approved the tenders of LM Auctioneers (Pvt) Ltd and KM Auctions (Pvt) Ltd to carry out all ARDA auctions at 1 per F cent commission on gross proceeds. This 1 per cent commission related to the entire process of valuation, auctioning and reconciliation of proceeds. It was the charge that was then applied by the two auctioneers who carried out their own independent valuations. Because of the volatile state of the defendant's assets, the plaintiff's valuations of 2007 and 2008 had become G outdated and obsolete by 2009. Moreover, its invoices were only generated from October 2009 to March 2010, based on estimated reserve values. In any event, the Procurement Regulations expressly required a tender process in respect of the disposal of assets above certain values. The defendant was not prepared to pay the plaintiff's invoices because it did not complete the entire valuation-cum-auctioning process. At some stage, there was an offer H of 1.5 per cent fees on actual proceeds from the auctions conducted by the

other auctioneers, but no agreement was ever reached. Finally, the plaintiff's A claim for interest at the rate of 5% per month was never contemplated or agreed upon by the parties.

My overall assessment of the plaintiff's managing director is that he was a very poor witness on almost every material aspect. His evidence was fraught with contradictions and inconsistencies and was frequently at B variance with the documentary evidence before the court. In contrast, the testimony of ARDA's acting general manager was very clear and generally consistent with the probabilities in this case. Consequently, his evidence on the facts and probabilities is to be preferred where it conflicts with that of the plaintiff's witness. C

Procurement Act and Regulations

During the course of the trial, it became necessary to consider the validity of the contract between the parties in the context of the prevailing legislation on procurement. This was an aspect that was not canvassed in the pleadings but one that was raised by the court *mero motu* as an important matter of law impinging on the legality and enforceability of the contract D .

By virtue of s 3(1) of the Procurement Act [*Chapter 22:14*] ("the Act")the provisions of the Act apply to procurement by all procuring entities as defined in s 2(1), including every statutory body such as the defendant *in casu*. See also the list of public enterprises itemised in the Second Schedule to the Procurement Regulations 2002 (SI 171 of 2002). E

Part IV of the Act governs procurement proceedings generally. In terms of s 30:

> "(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 F with section *thirty-two*.
>
> (2) Where, in accordance with this Act, a procuring entity adopts a method of 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."

Section 32(1) of the Act sets out the general procedures to be followed in G the procurement of services. These relate to, *inter alia*, the publication of notices, tender documentation, criteria for qualification, the submission and evaluation of proposals, and other tender formalities. In terms of subs (2) thereof:

> "Subject to subsection (1), a procuring entity shall conduct all proceedings for the procurement of a service in accordance with procurement regulations or, H

Patel J

> A in regard to any matter that is not prescribed in such regulations or this Act, in accordance with such procedure as the procuring entity may fix:
>
> Provided that any procedure so fixed shall be such as to ensure that all suppliers are treated fairly and impartially and shall be communicated without delay to all suppliers concerned."

Section 33 of the Act, in its relevant portions, enables the framing of B procurement regulations as follows:

> "(1) Subject to this Act, the Minister, after consultation with the Minister responsible for finance and the State Procurement Board, may make regulations providing for all matters relating to procurement by procuring entities.
>
> (2) Procurement regulations may provide for– C
>
> (a) methods of procurement that may be adopted by procuring entities instead of or in addition to the methods specified in section *thirty*;
>
> (b) classes of procurement in which any of the provisions of sections *thirty-one* and *thirty-two* may be dispensed with or applied subject to modification; ...
>
> (d) the procedure to be adopted by procuring entities and suppliers, and the manner in which they shall conduct themselves, in procurement proceedings; ... D
>
> (l) circumstances in which the provisions of the regulations may be departed from or waived."

Part II of the Procurement Regulations 2002 details the procedures governing the invitation of tenders generally. Section 4(1) stipulates that where a procuring entity requires the supply of goods, construction works or services the value of which exceeds the prescribed amount, the State Procurement E Board shall invite tenders for such supply in accordance with the procedure for formal tenders set out in s 8 or approved list tenders set out in s 25. The prescribed amount at the present

time (as amended by SI 161 of 2008) is US$50 000. In terms of s 4(2), where the supply value exceeds US$10 000 but does not exceed US$50 000, the procuring entity shall seek tenders in F accordance with the procedure for informal tenders set out in s 6. [Between December 2007 and January 2008, the prescribed figures were ZW$5 billion under s 4(1) and ZW$1 billion to ZW$5 billion under s 4(2)]. Section 8 delineates the procedures to be adopted in the case of supplies subject to formal tender, as required by s 4(1), through notices to be published in the *Gazette* and in such national newspapers as the Board may deem expedient.

G Section 5 enumerates those supplies that are not required to be tendered for by the State Procurement Board. In terms of s 5(1), where the supply value is less than US$10 000 (ZW$1 billion in 2007-2008), the procuring entity may dispense with the requirement of seeking tenders, if it considers that the public interest will not benefit from tender procedure. In any such case, H the procuring entity must obtain at least three competitive quotations from

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suppliers. Section 5(2) permits the purchase of second-hand goods by private A treaty or at public auction sales, as may be authorised by the accounting officer of the procuring entity, where the estimated value of the goods does not exceed US$50 000 (ZW$5 billion in 2007-2008). By virtue of s 5(3), where a procuring entity considers that it would not be in the public interest to call for tenders for a particular supply of goods, construction works or B services in terms of s 4, such supply may be purchased without calling for tenders. In any such case, s 5(4) requires the procuring entity to obtain the prior approval of the State Procurement Board, where the estimated value of the supply exceeds US$50 000 (ZW$5 billion in 2007-2008), or the approval of the Chairman in consultation with at least three members of the Board, where the estimated value of the supply exceeds US$10 000 but the C does not exceed US$50 000 (ZW$1 billion to ZW$5 billion in 2007-2008). Additionally, the procuring entity must clearly and fully state in writing to the Board or the Chairman, as the case may be, the reasons why it would not be in the public interest to call for tenders for the supply in question. Where approval to procure supplies in terms of s 5(4) is denied, s 5(5) enjoins the D procuring entity to follow normal tender procedures.

Section 6 sets out the procedures to be followed and records to be kept in relation to informal tenders, as permitted by s 4(2). Section 7(1) authorises procuring entities to adopt what are called special-formal tenders, subject to prior approval by the Board or its Chairman, in accordance with such instructions as may be issued by the Board from time to time. Special E -formal tenders may be invited only in the cases specified under s 7(2), *i.e.* urgent requirements, supplies and services of local interest, requirements of a proprietary nature, formal tenders to which there has been no response, services of a specialist nature and services which concern national security.

Section 25(1) authorises the Board to compile a list of approved tenderers in respect of specific articles and services, which must be published in F the *Gazette*, for the purpose of approved list tenders under s 4(1). Before framing this list, the Board is required by s 25(2) to publish a notice in the *Gazette* inviting tenderers to submit applications for inclusion on the list. Section 25(4) empowers the Board to invite all tenderers on the approved list to submit special-formal tenders or informal tenders instead of calling G for formal tenders. In terms of s 25(5), all tenders submitted in terms of s 25(4) must be processed in accordance with the Regulations.

For the purposes of enforcement, s 35 declares that any person who contravenes any provision of the Regulations shall be guilty of an offence. However, the Regulations are silent as to the penalty to be imposed in the case of any such offence. The Act is equally silent in this regard in s 33 which enables H

Patel J

A the framing of procurement regulations, and in s 48 which only penalises misrepresentations and collusive agreements or arrangements relating to procurement.

Legality of contract

Mr *Chizikani* for the plaintiff submitted that the contract between the parties B was not tainted with any breach of the Act or the Regulations. Because s 30(2) of the Act allows procuring entities to

adopt alternative methods of procurement, the legality of the transaction *in casu* cannot be impeached. On the other hand, Mr *Jakachira* for the defendant contended that the contract should have gone to tender because its value was in excess of the prescribed minimum under s 5(4) of the Regulations. He further submitted that the C peremptory provisions of s 30 of the Act obliged the parties to conclude their contract through the State Procurement Board and that their failure to do so renders the contract null and void *ab initio*. That being so, the plaintiff's claim ought to be dismissed on this basis alone, without any need for the court to delve into the merits or demerits of the claim.

D For the reasons set out below, I am unable to accept either of the positions propounded by counsel. What is relevant is not the value of the assets that were appraised by the plaintiff, as is contended by Mr *Jakachira*, but the valuation fees that were payable to the plaintiff for the services rendered by it to the defendant. At the time when the contract was concluded, between December 2007 and January 2008, the relevant thresholds for the purposes E of s 5 of the Regulations were between ZW1 billion and ZW$5 billion. However, there is nothing in the evidence before me, whether by way of currency conversion rates or otherwise, to indicate that the value of the services to be provided by the plaintiff exceeded the prescribed thresholds. It is highly probable that it did but, without any clear evidence on the point, F I am unable to make any definitive finding based on pure conjecture.

The more pertinent enquiry, in my view, is not whether the relevant threshold was exceeded, but whether the contract was concluded in compliance with other procedures enjoined by the Procurement Act and Regulations. Section 30(1) of the Act stipulates that a procuring entity must procure services by a G method which complies with s 32, *except as is otherwise provided in the Act.* Section 30(2) envisages the adoption of a method of procurement otherwise than one specified by s 30(1), but only where this is done *in accordance with the Act*. Section 32(1) sets out the procedures to be followed in the procurement of services generally. Additionally, s 32(2) enjoins the procuring entity to conduct all proceedings for the procurement of a service in accordance with H procurement regulations. Section 33(2) enables the framing of regulations

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providing for: the methods of procurement that may be adopted by procuring A entities instead of, or in addition to, the methods specified in s 30; the classes of procurement in which any of the provisions of sections 31 and 32 may be dispensed with or applied subject to modification; and the circumstances in which the provisions of the Regulations may be departed from or waived.

Taking all of these provisions together, what is contemplated by the Act B in relation to the procurement of services is that every procurement entity must adopt a method that complies with the general procedures set out in s 32(1), as read with the detailed procedures elaborated in the Regulations. Any departure from the prescribed procedures must be sanctioned under the Act or the Regulations. In particular, s 5 of the Regulations spells out the instances in which formal tender procedures need not be followed, in C relation to supplies of values below the specified thresholds, subject to the requisite approvals having been obtained. Additionally, the provisions of s 6 govern informal tenders, while s 7 deals with special-formal tenders in specific circumstances, subject again to the relevant approvals and prevailing instructions. Finally, s 25 details the procedures to be followed in the case D of approved list tenders.

In the instant case, it is common cause that the defendant, *qua* procuring entity, did not follow the general procedures set out in s 32(1) of the Act or the formal tender procedures stipulated by ss 4 and 8 of the Regulations. And there is nothing before the court to indicate that it adopted any other method of procurement allowed by the Regulations in its contract with the plaintiff. E In particular, there is no evidence of the quotations or approvals enjoined by s 5. In short, the defendant's departure from the prescribed procurement regime was neither otherwise provided for by the Act nor in accordance with the Act, and was clearly unsanctioned by the State Procurement Board or its Chairman. It follows that the contract *in casu* was concluded in contravention F of the Act and Regulations.

Consequences of illegality

There can be no doubt that the provisions of ss 30, 31 and 32 of the Act are couched in peremptory terms and that compliance with them, as well as the Regulations, is intended to be mandatory

rather than merely directory. G However, the Act does not specify the legal consequences of any failure to so comply. Generally speaking, the validity of contracts in breach of statute depends upon the expressed or implied intention of the legislature as manifested in the statute in question. Where nullity is not explicitly declared, it may be inferred from other features of the statute. These may include the express prohibition of conduct in breach of the statute and/or the criminalisation of H

Patel J

A such conduct. As I have explained above, the Act and the Regulations are imperfectly drafted in this respect.

In any event, the position of contracts involving the State is somewhat special. The scope of a State employee's authority is more often than not determined by statutory provisions and the requirements of the statute or regulations B concerned must be complied with. If such requirements are mandatory, any contract made in breach of them is invalid and unenforceable. This follows from the proposition that no State employee has the authority to circumvent or dispense with the requirements of a statute. To recognise or enforce any such contract would operate to render the applicable enactment nugatory. See Hogg *Liability of the Crown* at p 125, and the authorities cited by Smith J in C *Foroma v Minister of Public Construction and National Housing & Anor* 1997 (1) ZLR 447 (H) at 460-463.

It might of course be argued, by analogy with company law, that private individuals and entities dealing with the State are entitled to assume that the functionaries in question have duly complied with the prescribed formalities. As against that, however, is the crucial consideration that any hardship which D might befall persons contracting with the State is outweighed by the public interest in safeguarding State property and public moneys. See *Collector of Customs v Cape Central Rlys Ltd* (1888) 6 SC 402, cited with approval in *Foroma's* case *supra*, at 461-463. Indeed, it may even be justified in this context to invoke the argument that contracts in breach of statute, being E inimical to the interests of the State as well as the community at large, should be declared contrary to public policy and therefore unenforceable. See *Foroma's* case *supra* at 465-466. If contracts made in material breach of a statute were to be recognised and enforced, the unavoidable result would be to frustrate and defeat an explicit injunction of the legislature. Apart from repudiating such contracts, the only other remedy available to the State would F be to discipline and/or surcharge the culpable official or officials concerned. But this would be wholly ineffective and futile where financially sizeable contracts are involved.

I would also add that a contract in breach of a statute cannot be retrospectively ratified or otherwise validated. This is so for two very cogent reasons. Firstly, G the law does not countenance the ratification of a contract or transaction which, being contrary to a statute, is null and void *ab initio*. See *Cape Dairy & General Livestock Auctioneers v Sim* 1924 AD 167 at 170. Secondly, the executive is not at liberty to waive or renounce a peremptory statutory obligation imposed by the legislature for the protection of State property and public moneys. See *Ritch & Bhyat v Union Government (Minister of* H *Justice)* 1912 AD 719, at 735, and *SAR&H v Transvaal Consolidated Land*

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& Exploration Co Ltd. 1961 (2) SA 467 (T) at 481, followed in *Foroma's* A case *supra* at 464-465.

In the premises, I am of the view that the contract under consideration, inasmuch as it was concluded in breach of the prescribed requirements, is invalid and unenforceable for contravention of ss 30 and 32 of the Act. As a general rule, it is trite that a contract which is null and void *ab initio* is B illegal and therefore unenforceable. See *Foroma's* case *supra* at 467; *Mega Pak Zimbabwe (Pvt) Ltd v Global Technologies Central Africa (Pvt) Ltd* 2008 (2) ZLR 195 (H); *Gambiza v Taziva* 2008 (2) ZLR 107 (H). The same conclusion must follow in the present case. Notwithstanding this conclusion, I deem it necessary, for the sake of completeness, to consider and determine C the plaintiff's claim on its merits.

Percentage and price

The dispute *in casu*, in essence, is whether or not the terms of the contract between the parties were duly fulfilled. The plaintiff contends that valuation ended with the submission of its report to

the defendant indicating the reserve values ascertained. In keeping with the usual trade practice, professional D fees for valuation became due upon presentation of the valuation report. As regards the percentage claimable, the plaintiff asserts the freedom and sanctity of contract and insists that it is entitled to 2.5 per cent of the reserve value. The fact that the other auctioneers levied only 1 per cent of the auction value is irrelevant as are the principles of equity and *quantum meruit*. It E was further submitted that it was an implied term of the contract, in the event of the exercise ending with valuation, that the reserve price would be determinative in calculating valuation fees. This is consistent with the principle, articulated in *RB Ranchers (Pvt) Ltd v Estate McLean & Anor* 1985 (2) ZLR 24 (H), that a term will be implied into a contract in order to give it efficiency. Moreover, as was held in *Maceys Consolidated (Pvt) Ltd* F *& Anor v TA Holdings Ltd* 1986 (2) ZLR 5 (S); 1987 (1) SA 173 (ZS), in the absence of fraud, collusion or caprice, the parties are usually bound by the figures presented in the valuation report.

The defendant maintains that the contract encompassed all the activities to be undertaken by the plaintiff, including auctioning and the payment of G auction proceeds. Having regard to the terms of the contract, as captured in the relevant correspondence between the parties, I see no reason to disagree with the defendant's position. To be more specific, the defendant wrote on 24 December 2007 asking the plaintiff to valuate and auction its assets and to spell out its "current terms and conditions". The plaintiff responded on 28 December 2007, stating that "the fees for the exercise would then remain H

Patel J

A at 2.5 per cent of the auction value deducted at the end of the sale". On 24 January 2008, the defendant replied to accept the stated "terms and conditions of valuation and auctioning" and to request a meeting "to draw a schedule of valuation and auctioning dates and sites".

It is abundantly clear from the foregoing that the parties expressly and B unequivocally agreed that payment to the plaintiff was to be calculated at 2.5 per cent of the auction value at the end of each auction sale. There was no agreement for the payment of any percentage based on the reserve value upon submission of the valuation report. Nor can any such term be implied from the written stipulations of the contract or the prior or subsequent conduct of the parties. Indeed, in its letter of 7 May 2009, the plaintiff openly conceded C that its "original reserve values [had become] too high" and proposed that "we adjust all reserved values on estates which were assessed last year basing on the current prices". In this regard, no documentary evidence was furnished to show that the plaintiff did in fact submit adjusted valuations to the defendant before the contract was terminated in June 2009. Moreover, as was stated by the defendant's witness, which evidence was not challenged, D the plaintiff's claim is calculated on invoices which were generated from October 2009 to March 2010 and based on estimated valuations, well after the actual valuations were carried out. In short, the plaintiff's claim is wholly misconceived in its reliance upon the reserve value as the basis for computing its fees under the contract.

E What the plaintiff should have done in this case was to compel the defendant to disclose the auction values realised by the other two auctioneers and then found a claim for a lower percentage on those auction values, *ad quantum meruit*, in respect of the assets already valuated by it. It did not do so but chose instead to lodge a claim premised on the reserve values, entirely outside the contractual terms agreed between the parties. Indeed, when it F became apparent at the trial that its claim was ill-founded, the plaintiff was still not prepared to accept valuation fees based on the auction figures. It also claimed an interest rate of 5 per cent per month on the capital amount, without any legal foundation whatsoever, as well as 10 per cent collection commission, which claim was only withdrawn at the trial.

G Taking all of these factors together, there appears to be ample justification for a punitive award of costs. In the result, the plaintiff's claim is dismissed with costs on a legal practitioner and scale.

Chizikani Legal Practitioners, plaintiff's legal practitioners

H *Jakachira & Co*, defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/MOYO v GWINDINGWI NO & ANOR 2011 (2) ZLR 368 (H)

MOYO v GWINDINGWI NO & ANOR 2011 (2) ZLR 368 (H)

Citation	2011 (2) ZLR 368 (H)
Case No	Judgment No. HB-168-11
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	25 October 20011; *CAV*
Judgment	3 November 2011
Counsel	Miss *H M Moyo,* for the applicants *J Tshuma,* for the respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Employment – *Labour Court – exclusive jurisdiction over labour matters – High Court only having jurisdiction where cause of action and remedy not provided for in Labour Act [Chapter 28:01] – possession by employee of employer's property – intimately connected with contract of employment,* D *giving Labour Court jurisdiction*

Practice and procedure – *review – need to exhaust domestic remedies – High Court slow to exercise review jurisdiction unless all domestic remedies are exhausted – review of labour matters by High Court – code of conduct providing for an appeal to the Labour Court – such appeal a domestic remedy which must be exhausted before approaching the High Court* E

Headnote

The applicant had been dismissed from her employment in terms of procedures provided for in the employer's code of conduct. When her final internal appeal was dismissed, she was advised that her next appeal would be to the Labour Court. She did not appeal to the Labour Court as advised and F in terms of the code of conduct; instead she filed an urgent application in the High Court. A provisional order was issued in her favour. The order interdicted the respondents from evicting the applicant from a company house belonging to her employer, which she occupied by virtue of her employment. The final relief sought was an order setting aside her dismissal and granting reinstatement without loss of salary G or benefits. The respondents raised two points *in limine*, namely, that the applicant had not exhausted her domestic remedies and therefore has approached the wrong court; and that this being a purely labour dispute, the High Court did not have jurisdiction as in terms s 89(6) of the Labour Act [*Chapter 28:01*] the application should have been made to the Labour Court. H

A *Held*, that a court will be very slow to exercise its general review jurisdiction in a situation where a litigant has not exhausted the domestic remedies available to him, unless good reasons are shown for making an early approach. In so far as labour matters are concerned, domestic remedies will include an appeal to the Labour Court, where an appeal is provided for in the

relevant code of conduct. "Domestic remedies" *in casu we*re B those remedies and the procedure set out in the code of conduct as being available to an aggrieved party to pursue. An appeal to the Labour Court from a decision of the employer's director of corporate services was provided for in the code of conduct. That appeal was a domestic remedy available to the applicant and it was capable of according the applicant C effective redress. She had to exhaust that remedy.

Held, further, that the occupational right of the applicant in respect of the company house was intertwined with the employment contract. That did not constitute a special reason for by passing available domestic remedies and approaching the High Court early.

Held , further, that the Labour Court has exclusive jurisdiction in matters D relating to suspension from employment, and where the possession of the employer's property by an employee is so interdependently linked to the contract that one cannot decide the one without deciding on the other, the Labour Court similarly has exclusive jurisdiction. The court has jurisdiction in all matters where the cause of action and remedy are E provided for in the Labour Act [*Chapter 28:01*]. It is only where the cause of action and remedy exist at common law that the jurisdiction of the High Court in not ousted.

Cases cited

Chawora v RBZ 2006 (1) ZLR 525 (H)

F *DHL Intl (Pvt) Ltd v Madzikanda* 2010 (1) ZLR 201 (H)

Girjac Services (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243 (S)

Medical Investments Ltd v Pedzisayi 2010 (1) ZLR 111 (H)

Moyo v Forestry Commission 1996 (1) ZLR 173 (H)

Musandu v Cresta Lodge Disciplinary Grievance Cttee HH-115-94

Plaza Hotel (Pvt) Ltd v Marambita & Anor 2007 (1) ZLR 80 (H)

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

Tutani v Minister of Labour & Ors 1987 (2) ZLR 88 (H)

Legislation considered

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

2011 (2) ZLR p370

Mathonsi J

Case information

Miss *H M Moyo,* for the applicants A

J Tshuma, for the respondents

Judgment

MATHONSI J: The applicant was employed by the second respondent as a quality controller. She was charged under a code of conduct with neglect of duty in May 2006. Following an internal disciplinary hearing, she was found B guilty and dismissed from employment. As she was dissatisfied with that outcome she appealed to the manufacturing director who dismissed the appeal.

The applicant's further appeal to the director of corporate services did not find favour either and she was advised in the determination of the director of corporate services dated 22 June 2006 as follows:

> "My determination is that the verdict of the original disciplinary hearing to dismiss C you is upheld. In line with the code of conduct your next level of appeal is at the Labour Court."

The applicant did not appeal to the Labour Court as advised and in terms of the code of conduct. Instead she filed an urgent application in this court which was a hybrid of a chamber application and a review application. On D 13 July 2006 a provisional order was issued in the applicant's favour, the interim relief of which interdicted the respondents from evicting the applicant from house number 5

Lourie Road, Burnside, Bulawayo, a company house belonging to the second respondent, which was occupied by the applicant by virtue of her employment.

The final relief the applicant sought was to the following effect: E

"(1) That the decision of the first respondent dated 7th June 2006 in terms of which the applicant was dismissed from the second respondent be and is hereby set aside.

(2) The second respondent be and is hereby ordered to reinstate applicant to her position of quality controller without loss of salary or benefits. F

(3) The second respondent be and is hereby interdicted and prohibited from evicting the applicant from No. 5 Lourie Road, Burnside, Bulawayo or threatening such eviction or in any way interfering with her peaceful occupation and enjoyment thereof pending the determination of the applicant's application for review and if the applicant be unsuccessful, proper notice to vacate.

(4) The first and second respondents pay the costs of this application on an G attorney and client scale jointly and severally the one paying the other to be resolved (*sic*)."

The judge who granted the provisional order directed that the applicant should make a separate application for review. She did not. In fact, it would appear that the judge's directive was not brought to the applicant's attention. She only made a separate application after I had drawn her attention to the directive. H

Mathonsi J

A At the hearing of this application and with the consent of the respondents I granted the following order:

"IT IS hereby ordered that:

(1) The late application for review of the first respondent's determination of 7June 2006 be and is hereby condoned and accordingly the applicant be and is hereby given leave to file the application for review out of time. B

(2) This court application and the urgent chamber application under case number HC 1564/06 be and are hereby consolidated and all the documents filed of record in HC 1564/06 including the founding affidavit, the notice of opposition and opposing affidavits and the applicant's answering affidavit and the heads of argument by both parties are hereby incorporated in this application so that it shall not be necessary for either of the parties to file C any further documents in support or in opposition of the court application for review."

The motivating factor in granting the order was to save the applicant's case which would have failed by reason of her failure to comply with the directive to file a separate application for review.

D The respondents have raised a two pronged point *in limine,* namely that the applicant has not exhausted domestic remedies and therefore has approached the wrong court and that being a purely labour dispute, this court does not have jurisdiction as the application should have been made in the Labour Court in terms of the Labour Act [*Chapter 28:01*].

E In a line of cases, this court has determined that it will be very slow to exercise its general review jurisdiction in a situation where a litigant has not exhausted the domestic remedies available to him. A litigant is expected to exhaust available domestic remedies before approaching the courts unless good reasons are shown for making an early approach. See *Musandu v Cresta Lodge Disciplinary and Grievance Committee* HH-115-94; *Moyo v Forestry* F *Commission* 1996 (1) ZLR 173 (H); *Tuso v City of Harare* 2004 (1) ZLR 1 (H); *Chawora v Reserve Bank of Zimbabwe* 2006 (1) ZLR 525 (H); *Tutani v Minister of Labour and Others* 1987 (2) ZLR 88 (H).

In her heads of argument Mrs *Moyo* for the applicant submitted that an application for review can be made to the High Court provided the applicant G can show "special circumstances" or "good reason" for not exhausting domestic remedies. She argued that the dispute between the parties was intertwined between the termination of employment and the applicant's tenancy at a house belonging to the first respondent from which she was threatened with eviction. This, therefore, created the special reason to H approach the court earlier.

Mathonsi J

Counsel for the applicant appeared to shift from the above argument in her A submissions in court. She stated that the applicant had in fact exhausted the available domestic remedies as "domestic"

should be interpreted to exclude the Labour Court where the applicant should have appealed in terms of the code of conduct.

I do not agree with both schools of thought. In my view, domestic remedies B in this particular case are those remedies and the procedures set out in the code of conduct as being available to an aggrieved party to pursue. An appeal to the Labour Court from a decision of the director of corporate services is provided for in the code of conduct. It is a domestic remedy available to the applicant and she has to exhaust it.

In *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 243 (S) at 249C–F C Gubbay C J stated:

> "In *Tutani v Minister of Labour and Others* 1987 (2) ZLR 88 (H) at 95D, Mutambanengwe J observed that where domestic remedies are capable of providing effective redress in respect of the complaint and secondly, where the unlawfulness alleged has not been undermined by the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching D the courts unless there are good reasons for not doing so. The same approach was applied by Smith J in *Musandu v Chairperson Cresta Lodge Disciplinary Committee* HH-115-94 (not reported) and was referred to with approval by Malaba J in *Moyo v Forestry Commission* 1996 (1) ZLR 173 (H) at 191D–192B. I respectfully endorse it.
>
> In this matter, the procedure under s 6 of the code of conduct, and the availability E of an appeal to the Labour Relations Tribunal, was capable of affording the respondent effective redress against the unlawful termination of his employment. Furthermore, the unlawfulness had not been undermined by such domestic remedies, for the grievance procedure had not been resorted to. Finally, no special circumstances or good reasons were advanced by the respondent for approaching the High Court." F

Clearly, therefore, the availability of an appeal to the Labour Court is part of domestic remedies and it was capable of according the applicant effective redress.

I agree with Mrs *Moyo* that the occupational right of the applicant in respect of the company house is intertwined with the employment contract. However, G that does not constitute a special reason for bypassing available domestic remedies and approaching this court early.

I am in total agreement with Makarau JP (as she then was) when she stated in *DHL International Ltd v Madzikanda* 2010 (1) ZLR 201 (H) that the Labour Court has exclusive jurisdiction in matters relating to suspensions from employment and that the possession of the employer's property by an H

Mathonsi J

A employee in terms of the contract of employment is so interdependently linked to the contract that one cannot decide on one without deciding on the other. For that reason, if the Labour Court has exclusive jurisdiction over the one, it must have exclusive jurisdiction over the other.

Section 89(6) of the Labour Act [*Chapter 28:01*] provides:

> B "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)."

In addition to that, s 89(1)(d1) of that Act provides that the Labour Court shall have "the same powers of review as would be exercisable by the High Court in respect of Labour matters."

C This court has had occasion in a number of cases to interpret these provisions which were introduced to the Labour Act in 2003. Bhunu J was more explicit in *Tuso v City of Harare (supra*) at 3F where he said:

> "It is manifestly clear to me that the intention of the legislature was to expressly exclude the jurisdiction of all other courts in areas where the Labour Court has jurisdiction in the first instance."

D At 4C he said:

> "It is my considered view that it is only in respect of those employees who do not fall under the purview of the Labour Relations Act that the High Court may exercise its general powers of review because its powers in this regard have not been expressly excluded by statute."

E This interpretation was followed by Bere J in *Plaza Hotel (Pvt) Ltd v Marimbita and Another* 2007 (1) ZLR 80 (H) at 83E. On his way to dismissing an application on the basis that the applicant had not exhausted domestic remedies Karwi J in *Chawora v Reserve Bank of Zimbabwe (supra*) at 529F criticised the decision in *Tuso's* case as follows:

> "It seems to me that there is no specific provision in the Labour Act that ousted F this court's jurisdiction. I am of the considered opinion that a cursory and simplistic approach was adopted in the *Tuso* case. Besides

jealously guarding the inherent jurisdiction of this court, the Sibanda case (*Sibanda and Another v Chinemhute NO and Another* HH-131-04) correctly takes into recognition the fact that there is no law in Zimbabwe which has ousted the jurisdiction of this court in such matters."

G I respectfully disagree. Section 89(6) is clear and unambiguous that "no court" has jurisdiction over matters falling under the purview of the Labour Court. This court does not possess the machinery to jealously guard its inherent jurisdiction where the legislature has specifically taken it away.

I find the interpretation made by Makarau JP in *Medical Investments* H *Ltd v Pedzisayi* 2010 (1) ZLR 111 (H) more compelling. It is to the effect

Mathonsi J

that the Labour Court has jurisdiction in all matters where the cause of A action and remedy are provided for in the Labour Act. Where the cause of action and remedy are at common law, the jurisdiction of the High Court is not ousted. See also *DHL International Ltd v Madzikanda (supra*) *In casu*, the applicant is contesting the termination of her employment contract on which her right of occupation of No. 5 Lourie Road, Burnside B is premised. The cause of action and the remedy are in the Labour Act. For that reason the jurisdiction of this court has been ousted by s 89(6) of the Act.

The applicant has, therefore, proceeded in the wrong court. She did not exhaust remedies available to her. No amount of equivocation can alter that position. The provisional order granted to the applicant was predicated upon a valid application being made to challenge the termination of applicant's C contract of employment. There is no such application in existence. It must be discharged.

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

(1) The application is hereby dismissed with costs.

(2) The provisional order made on 13 July 2006 is hereby discharged. D

Joel Pincus Konson & Wolhuter, applicant's legal practitioners

Webb Low and Barry, respondents' legal practitioners E

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Source:
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ZAWAIRA v NYAMUPFUDZA & ORS 2011 (2) ZLR 375 (H)

Citation	2011 (2) ZLR 375 (H)
Case No	Judgment No. HH-241-11
Court	High Court, Harare
Judge	Chitakunye J
Heard	24 February 2011; *CAV*
Judgment	3 November 2011
Counsel	*H Mukonoweshuro,* for the applicant *A Nyamupfukudza,* for the first respondent

N P Munangati-Munongwa, for the third to ninth respondents

Case Type Opposed application

Annotations No case annotations to date

Flynote

Administration of estates – *customary law – application – person married under general law – when such person's estate may be dealt with according to customary law*

D **Customary law** – *application – when a person is subject to customary law – person married under general law – what must be shown for customary law to apply*

Succession – *intestate – heirs ab intestato – children born out of wedlock – general law and customary law positions – children born out of wedlock sired by father married under Marriage Act – no purported customary* E *law unions with mothers of such children – such children not entitled to succeed ab intestato*

Headnote

The deceased married his wife in terms of the Marriage Act. Six children were born of the union. In addition, the deceased fathered 10 children out of F wedlock, by different mothers. He did not purport to marry any of those women. He died intestate. The executor lodged with the Master a second and final administration and distribution account, in terms of which he distributed the estate equally to the surviving spouse and all the children of the deceased. The applicant, one of the sons of the marriage, lodged an objection with the Master, contending that in terms of the general G law children born out of wedlock cannot succeed *ab intestato* to their father or father's relatives. The Master dismissed the objection on the grounds that the laws of succession in this country treat all children of the deceased as being equal. In this regard he cited ss 3 and 3A of the Deceased Estates Succession Act [*Chapter 6*:*02*] and referred to s 10 of H the Deceased Persons Family Maintenance Act [*Chapter 6*:*03*] as further

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support for his contention that there is no longer any distinction between A children born out of wedlock and those born in wedlock.

The applicant sought a declaratory order that only the children of the deceased who were born in wedlock were the legitimate intestate beneficiaries.

Held, that under the general law, illegitimate children cannot succeed *ab intestato* to their father or their father's relatives; similarly, the father and B his relatives cannot succeed *ab intestato* to the illegitimate children. The issues of succession under general law would be dealt with in terms of the Deceased Estates Succession Act. The customary law position, on the other hand, is that all children, regardless of whether they were born in wedlock or out of wedlock, are entitled to benefit from their late father's estate as "beneficiaries". The issue of succession under customary law C is governed by the Administration of Estates Act [*Chapter 6*:*01*]. For Part III of that Act to apply, it must be shown first that the deceased was subject to customary law. Section 68G of the Act creates a presumption that the general law of Zimbabwe applies to a person who, at the date of his death, was married in accordance with the Marriage Act. For that D presumption to be rebutted, the respondents would have to show that, despite the deceased having married in terms of the general law, the surrounding circumstances were such that he was subject to customary law. Under s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*], customary law applies in a civil case where, *inter alia*, regard being had to the nature of the case and the surrounding circumstances, it appears E just and proper that it should apply. Section 3(2) defines "surrounding circumstances" as including, *inter alia*, the mode of life of the parties and the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe. The fact that the deceased sired ten children out of wedlock with different women did not show that he was F subject to customary law. Siring children out of wedlock with various women is not peculiar to people subject to customary law. Children born of a customary law union contracted before a civil marriage could be regarded as beneficiaries in terms of s 68(3) of the Administration of Estates Act [*Chapter 6:01*], but in this case the deceased was already

married in accordance with the Marriage Act when he associated with G other women and sired the 10 children out of wedlock. Such associations did not purport to be customary law marriages, but even if they were customary law marriages, they came after the civil rites marriage and so they could still not be valid marriages for purposes of Part III of the Act. Accordingly, the children of the deceased born out of wedlock were not legitimate intestate beneficiaries of the deceased's estate. However, H

Chitakunye J

A those classed as dependants might have recourse to the Deceased Persons Family Maintenance Act.

Cases cited

Chinho v Chinho 2006 (2) ZLR 163 (H)

Legislation considered B

Administration of Estates Act [*Chapter 6:01*], ss 68A & 68G

Customary Law and Local Courts Act [*Chapter 7:05*], s 3(1) & (2)

Deceased Estates Succession Act [*Chapter 6:02*], ss 3 & 3A

Deceased Persons Family Maintenance Act [*Chapter 6:03*], ss 2, 3 & 10

Case information

C *H Mukonoweshuro,* for the applicant

A Nyamupfukudza, for the first respondent

N P Munangati-Munongwa, for the third to ninth respondents

Judgment

CHITAKUNYE J: The applicant is a son to the late Thomas Tavagwisa D Zawaira who died on 5 September 2003.

The first respondent is the executor in the estate of the late Thomas T Zawaira. The second respondent is cited in his official capacity. The third respondent is a mother and guardian of a minor child, George Zawaira. The fourth to ninth respondents are all adults.

E The late T T Zawaira was married to the late Felistas Jimisayi Zawaira at Chirumanzu on 21 August 1958 in terms of the Marriages Act [*Chapter 5*:*11*]. The marriage was blessed with six children, including the applicant. All these children are now adults.

The late T T Zawaira also had a total of ten children out of wedlock. The ten F include the fourth to ninth respondents, George Zawaira, Veronica Zawaira, Sekai Zawaira and Mary Zawaira. Of the ten out-of-wedlock children, three are minors whilst one suffers from mental disability.

The late T T Zawaira died intestate on 5 September 2003. His estate was duly registered under DR 988/07. The first respondent was appointed executor G dative thereof.

Upon being appointed, the first respondent went about administering the estate. He thereafter lodged with the second respondent a second and final administration and distribution account in terms of which he distributed the estate equally to the surviving spouse and all the children of the late T H T Zawaira.

Chitakunye J

The account was duly advertised in terms of the law and lay in inspection A from 27 February 2009 to 20 March 2009.

The applicant lodged an objection with the second respondent. In his objection he contended that in terms of the general law children born out of wedlock cannot succeed *ab intestate* to their father or father's relatives.

The second respondent dismissed the objection, arguing that the laws of B succession in this country treat all children of the deceased as being equal. In this regard the second respondent cited ss 3 and 3A of the Deceased Estates Succession Act [*Chapter 6:02*]. In his report in terms of r 248 of the High Court Rules 1971 (RGN 1047 of 1971) the second respondent also referred to s 10 of the Deceased Persons Family Maintenance Act [*Chapter 6:03*] as further support of the contention that there is no more distinction between C children born out of wedlock and those born in wedlock.

Not being satisfied with the second respondent's response the applicant approached this court seeking a declaratory order that the children of the late T T Zawaira born in wedlock are the only legitimate intestate beneficiaries D of the late T T Zawaira.

The first respondent opposed the application, contending that in as far as the applicant acknowledges that the ten out-of-wedlock children are those of T T Zawaira, there is no longer the question of legitimacy and so there should be no differentiation between children born in wedlock and those born out of wedlock. E

The third respondent also opposed the application, contending that all children born of the late T T Zawaira must benefit equally from the estate. The fourth to the ninth respondents did not file any opposing affidavits.

The issues for determination were identified as:

1. Whether or not the children born out of wedlock of the late Thomas F Tavagwisa Zawaira can succeed *ab intestato* to their father or father's relatives.
2. Whether customary law or general law should apply in the resolution of the matter.
3. Whether or not the children of the deceased born out of wedlock are G legitimate intestate beneficiaries of the estate of the late Thomas Tavagwisa Zawaira.

The applicant argued that as the deceased was married in terms of the Marriages Act [*Chapter 5:11*], general law must apply. The respondents on the other hand contended that though the applicant married in terms of the Marriages Act, customary law must apply. H

Chitakunye J

A On the question of succession the general law position is that:

> "… illegitimate children cannot succeed *ab intestate* to their father or their father's relatives similarly; the father and his relatives cannot succeed *ab intestate* to the illegitimate children."

See Welshman Ncube *Family Law in Zimbabwe* (LRF) at pp 72-73.

B That position has not been altered. The issues of succession under general law would be dealt with in terms of the Deceased Estates Succession Act [*Chapter 6*:*02*].

The customary law position on the other hand is to the effect that all children regardless of whether they were born in wedlock or out of wedlock are entitled to benefit from their late father's estate as "beneficiaries". The issue C of succession under customary law is governed by the Administration of Estates Act [*Chapter 6*:*01*].

The applicant argued that the estate must be dealt with in terms of the Deceased Estates Succession Act whilst the respondent contended that the estate must be dealt with in terms of the Administration of Estates Act (*supra*). The D respondents' contention was premised on the apparent favourable provision under Part III of that Act. However, for that part to apply, it must be shown first that the deceased was subject to customary law.

Section 68A of that Act states that:

> "(1) Subject to subsection (2), this part shall apply to the estate of any person to whom customary law applied at the time of his death."

E To determine whether the deceased person was subject to customary law or not, s 68G thereof provides that:

> "(1) Section 3 of the Customary Law and Local Courts Act [*Chapter 7:05*] shall apply in determining the question whether or not customary law applied to a deceased person for the purpose of this Part:
>
> F Provided that it shall be presumed, unless the contrary is shown, that –
>
> (a) customary law applied to a person who, at the time of his death, was married in accordance with customary law; and

(b) the general law of Zimbabwe applied to a person who, at the date of his death, was married in accordance with the Marriages Act [*Chapter 5*:*11*] or the law of a foreign country, even if he was also married to the same G person under customary law."

Section 3 of the Customary Law and Local Courts Act (*supra*) provides that –

"(1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires –

(a) customary law shall apply in any civil case where – H

(i) the parties have expressly agreed that it should apply; or

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2011 (2) ZLR p380

Chitakunye J

(ii) regard being had to the nature of the case and the surrounding A circumstances, it appears that the parties have agreed 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." B

Subsection (2) of s 3 states that –

"surrounding circumstances", in relation to a case, shall, without limiting the expression, include –

(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 C 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."

In casu, it is common cause the deceased was married in terms of the Marriage Act [*Chapter 5*:*11*]. No other marriage is alleged with any other D woman. Thus, even going by the respondents' arguments, the presumption is that he intended his estate to be governed in terms of the general law. For that presumption to be rebutted the respondents must show that despite the deceased having married in terms of the general law the surrounding circumstances are such that he is subject to customary law.

The respondents' major point in this bid was the fact that the deceased sired E ten out-of-wedlock children with different women. They contended that that showed that he was subject to customary law. The respondents could not allude to any other factors. One may thus ask: is the factor of siring children out of wedlock with various women peculiar to people subject to customary law only? The answer, in my view, is no. F

Apart from siring the children, the deceased did not marry the women in question. It was not shown that he had expressly agreed that customary law should apply despite his marriage in terms of the Marriages Act. His mode of life was not shown to have been such as to infer that he was subject to customary law. G

In my view, the fact of having out-of-wedlock children, on its own, is inadequate to conclude that the deceased was subject to customary law at the time of his death.

The next point to consider is whether or not the differentiation between legitimate and illegitimate children on issues of intestate succession has been removed. H

2011 (2) ZLR p381

Chitakunye J

A The first respondent referred to *Chinho v Chinho* 2006 (2) ZLR 163 (H) as support for the contention that there is no longer a differentiation between children born in wedlock and those born out of wedlock even under general law. That argument was clearly misplaced.

In *Chinho v Chinho (supra*) the applicant had been married to the deceased B for about 27 years under an unregistered customary law marriage. Four children were born of that marriage. About three years before he died, the deceased contracted a marriage under the Marriage Act [*Chapter 5:11*] with the first respondent. In determining the status of the two women Kamocha J said at 167G-168A that:

"The legislature appeared to have paid heed to the court's call to amend the law and C amended the Administration of Estates Act [*Chapter 6*:*01*] by the Administration of Estates Amendment Act No. 6 of 1997 which repealed s 68 of the principal Act and substituted it with a new part which caters for estates of persons subject to customary law. The new part defines a beneficiary as follows:

> '"beneficiary" in relation to a deceased person's estate means –
>
> (a) a surviving spouse or child of the deceased person; or D
>
> (b) where the deceased person left no surviving spouse or child, any person who is entitled to inherit any property in the estate in terms of this Part.'"

The learned judge went on to say that:

> "*the amendment Act validated marriages contracted in terms of customary law for purposes of the estates of persons subject to customary law by providing* E *the following* in s 68(3):
>
> '(3) A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this part not withstanding that it has not been solemnized 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* F *of this part if, when it was contracted, either of the parties was married to someone else in accordance with the Marriages Act* **[***Chapter 5:11*] or the law of a foreign country under which persons are not permitted to have more than one spouse" (emphasis is mine).

In casu the deceased was already married in accordance with the Marriage Act [*Chapter 5*:*11*] when he associated with other women and sired the out G of wedlock children. Such associations were not referred to by any of the parties as customary law marriages. In any case, even if one argued that they were customary law marriages, they came after the civil marriage and so in terms of the above proviso they could still not be valid marriages for purposes of this part of the Act. Thus the respondent's contention in this H regard was without merit.

2011 (2) ZLR p382

Chitakunye J

I am of the view that the deceased cannot be said to have been subject to A customary law at the time of his death. His estate must be dealt with in terms of the general law.

The amendment to the definition of beneficiary alluded to in the *Chinho* case (*supra*) pertained to Part III of the Administration of Estates Act. That part applies to persons subject to customary law and so is not applicable B in this case.

The legislature has not seen it fit to alter the position on intestate succession under general law. The second respondent's opinion that ss 3 and 3A of the Deceased Estates Succession Act and s 10 of the Deceased Persons Family Maintenance Act removed the distinction between children born in wedlock C and out of wedlock was incorrect.

Sections 3 and 3A of the Deceased Estates Succession Act pertain to the entitlement of spouses of deceased persons who die intestate and the inheritance of the matrimonial home and household effects by such spouses. Those sections do not in any way affect the general law position on succession *ab intestato*.

Section 10 of the Deceased Persons Family Maintenance Act provides D temporary protective rights to the surviving spouse and children, which rights terminate upon the completion of the administration of that portion of the deceased estate to which those rights relate. This section does not in any way amend the general law position on intestate succession.

Accordingly, the children of the deceased born out of wedlock are not E legitimate intestate beneficiaries of the estateof the late Thomas T Zawaira. Though the illegitimate children cannot succeed *ab intestato* to their father, they may have recourse to the Deceased Persons Family Maintenance Act as dependants.

Section 3 of the Deceased Persons Family Maintenance Act (*supra*) states that:

> "(1) Any dependant of a person who dies after the 19th January, 1979 may, subject F to this Act, make application for an award from the net estate of the deceased".

In s 2(1) of that Act a dependant is defined as:

> "'Dependant', in relation to a deceased, means –
>
> (a) a surviving spouse;

(b) a divorced spouse who at the time of the deceased's death was entitled to G the payment of maintenance by the deceased in terms of an order of court;

(c) a minor child;

(d) a major child who is, by reason of some mental or physical disability, incapable of maintaining himself and who was being maintained by the deceased at the time of his death;

(e) parent who was being maintained by the deceased at the time of his death; H

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(f) any A other person who –

(i) was being maintained by the deceased at the time of his death; or

(ii) was entitled to the payment of maintenance by the deceased at the time of his death;"

A "child" is defined as "in relation to a deceased, includes an adopted and an illegitimate child of the deceased;"

B I am of the view that, depending on the individual circumstances of each respondent, they may proceed in terms of this Act.

Accordingly the application is granted as follows:

1. The only lawful intestate beneficiaries of the estate of the late Thomas Tavagwisa Zawaira are the children born out of the late T C T Zawaira's union with the late Mrs. F J Zawaira.
2. The costs of suit shall be borne by the estate of the late T T Zawaira

H Mukonoweshuro & Partners, applicant's legal practitioners

Phiri & Partners, first respondent's legal practitioners

D *Munangati & Associate*s, third to ninth respondents' legal practitioners

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BUBYE MINERALS (PVT) LTD v MINISTER OF MINES & ORS 2011 (2) ZLR 384 (S)

Citation	2011 (2) ZLR 384 (S)
Case No	Judgment No. S-3-11
Court	Supreme Court, Harare
Judge	Malaba DCJ, Sandura JA & Ziyambi JA
Heard	26 October 2010; *CAV*
Judgment	14 November 2011
Counsel	*H Zhou*, for the appellant *S Maposa*, for the first and third respondents *A P de Bourbon SC*, for the fourth respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Contract – *cession – what constitutes – bilateral agreement under which cedent agrees to transfer rights and cessionary agrees to acquire them*

Mines and minerals – *special grant to mine precious stones – cession of – requirement for permission of Minister – grant specifying that cession required written consent of Secretary for Mines – Secretary having no right to transfer grant to another person – need for holder of right to agree to cede right and for Minister to grant permission – Mines and Minerals Act [Chapter 21:05], s 282 – overriding nature of section*

Headnote

In 1992 the first respondent, the Minister of Mines, issued a special grant under Part XVII of the Mines and Minerals Act [*Chapter 21:05*], to a company, the fourth respondent, authorizing it to carry out mining operations for diamonds for a renewable period of 25 years. A clause of the grant provided that rights under the grant could not be transferred, ceded or otherwise assigned without the written consent of the Secretary for Mines, such consent being subject to the provisions of s 282 of the Act, which provides that –

> "Notwithstanding anything contained in this Act or any other enactment, no holder of a mining location registered for precious stones or a mining lease on which the principal mineral being mined or to be mined is precious stones shall tribute, cede, assign, sell or otherwise alienate in any manner whatsoever that mining location or mining lease or any interest therein without the permission of the Minister."

In 1998 the fourth respondent was placed under voluntary provisional liquidation. In 1999 the provisional liquidator, representing the fourth

respondent and its creditors, entered into an agreement of compromise with the appellant company, which had recently been incorporated by two persons who had acted as the fourth respondent's buyers before it was placed under provisional liquidation.

The appellant did not have money with which to meet its obligations to the creditors in terms of the agreement of compromise and an agreement was reached under which, *inter alia*, the appellant was given the right to treat stockpiles of ore at the mine in order to raise the money to pay the creditors. It was not given authority to mine the pit. The appellant operated the mine until 2000 but did not have sufficient capital to conduct mining operations. It borrowed heavily from companies belonging the fourth respondent's principal shareholder.

In 2000 a letter was written of behalf of the appellant to the Minister seeking advice as to whether the special grant held by the fourth respondent could be "registered" in the appellant's name. The appellant was told that Mining Affairs Board had resolved that the "application" could not be considered until outstanding payments to the creditors were made in terms of the agreement of compromise. The payments were never made by the appellant; the creditors were paid in 2004 by the fourth respondent's principal shareholder. He decided to appoint a new board of directors and management to run the fourth respondent. The new board was tasked with taking possession of the mine and carrying out mining operations in accordance with the special grant. The board was also mandated to demand from the appellant a statement of account on the administration of the affairs of the fourth respondent during the period October 1999 to March 2004.

Despite receiving this demand, the appellant wrote to the Secretary saying that the appellant was renewing the "application" it previously made for "cession" of the special grant from fourth respondent to it and asking that the "application" be placed before the Board. The reason given for the renewed "application" was that all outstanding payments owed to the creditors had been made. The fourth respondent was not given notice of the renewed application. The appellant withheld from the Secretary the fact that the outstanding payments to the creditors had been made by the fourth respondent's principal shareholder and not by itself.

Subsequently, without notifying the fourth respondent of its intention to consider the application, the Board decided to "approve" the transfer of the special grant from the fourth respondent to the appellant.

In 2005, the fourth respondent, after abortive proceedings in the High Court, wrote to the Minister, questioning the legality of the decision to

transfer the special grant to the appellant and asking that the decision be reversed. It pointed out that the decision was invalid for contravening s 282 of the Act; that the decision had been based on false information; that at no time had the fourth respondent agreed to cede the rights to the appellant; and that the fourth respondent had not even known that the appellant had approached the Ministry seeking to have the special grant transferred to it. Some months later, a letter was written to the fourth respondent on behalf of the Secretary advising that the decision of the Board to transfer the special grant to the appellant had been set aside by the Minister because the Board's decision was in contravention of s 282 of the Act, as the permission of the Minister had not been obtained and because the decision was made without notice to the holder of the special grant.

In 2006 the appellant made an application to the High Court for a provisional order declaring that the "purported cancellation of the cession" by the first respondent was null and void and be set aside. The High Court discharged the order on the ground that the validity of the decision of the Board to transfer the special grant from the fourth respondent to the appellant was the critical question for determination. The legality of the "cancellation of the cession" could not be established if the decision of the Board was illegal, being in contravention of s 3(2) of the Administrative Justice Act [*Chapter 10:28*], in that the fourth respondent was not given notice of the proposed action.

Held, that whilst the High Court found that the decision of the Board was unlawful on the ground of procedural unfairness, in fact the Board did not have the power to entertain the "application for cession" of the rights held by the fourth respondent under the special grant. A public official or public body can only do things which are governed by law and cannot act where there is no law authorizing the kind of action to be undertaken. As the validity of the decision of the Board was challenged, justification of the action taken had to be tested by reference to evidence of compliance with the procedural and substantive requirements of the provisions of the special grant as read with s 282 of the Act. Section 294(1) of the Act provides that a special grant shall be governed by its terms and conditions, so the validity of the decision of the Board had to be determined in accordance with the terms and conditions of the special grant. The special grant prescribed specifically the power to be used in cases of cession of rights thereunder, the form the exercise of the power had to take, the repository thereof and conditions which had to prevail before it could be exercised. The Secretary had no power to

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cede the rights under the special grant because he was not the holder of those rights. The condition precedent to the exercise by the Secretary of the power reposed in him was that there had to be a proposed cession in terms of which the holder of the rights (the cedent) agreed to cede them to the third party (the cessionary) who agreed to acquire them. A cession is a bilateral agreement to transfer rights from one person to another. It cannot be a unilateral act. There must be an agreement consisting of a concurrence between the cedent's *animus transferendi* of the right and the cessionary's corresponding *animus acquirendi*.

Held, further, that in addition, s 282 of the Act prohibited specifically the holder of rights to mine precious stones within a mining location under a special grant from ceding those rights without the permission of the Minister.

Held, further, that accordingly the Board which made the decision to transfer the rights held by the fourth respondent under the special grant had no power to do what it did.

Cases referred to

Barker v Edger [1898] AC 748

Botha v Shadeports (Pty) Ltd 1992 (1) SA 202 (A)

Hippo Quarries (Tvl) (Pty) Ltd v Eardley 1992 (1) SA 867 (A)

LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd 1974 (1) SA 747 (A)

MacFoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC)

Mugwebie v Seed Co Ltd & Anor 2000 (1) ZLR 93 (S)

Shell Zimbabwe (Pvt) Ltd v Webb 1981 ZLR 498 (H); 1981 (4) SA 749 (Z)

Legislation considered

Administrative Justice Act [*Chapter 10:28*], s 3(2)

Mines and Minerals Act [*Chapter 21:05*], ss 274, 282 & 294(1)

Case information

H Zhou, for the appellant

S Maposa, for the first and third respondents

A P de Bourbon SC, for the fourth respondent

Judgment

MALABA DCJ:This is an appeal against the judgment of the High Court given on 6 December 2006 granting an application for a final order and confirmation of an interim order authorising the appellant to have rights under Special Grant No. 1278 to mine precious stones (diamonds) in area No. 405 in the district of Masvingo.

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The background facts are these. On 13 December 1992 the first respondent gave to Auridiam Zimbabwe (Pvt) Ltd a "Special Grant" No. 1278 under Part XV11 of the Mines and Minerals Act [*Chapter 21:05*] ("the Act") authorizing it to carry out mining operations for diamonds in an area covering approximately 70 hectares within reserved area No. 405 in the mining district of Masvingo for a renewable period of 25 years.

Clause 14 of the Special Grant provides:

> "Rights under this grant cannot be transferred and shall not be ceded or otherwise assigned without the consent of the Secretary in writing. Such consent shall be subject to the provisions of s 265 of the Act."

The Secretary referred to in clause 14 of the Special Grant is the Secretary for Mines and Mining Development ("the Secretary"). The reference in clause 14 to s 265 of the Act was the numbering as it existed in 1992 in terms of what was then called the Mines and Minerals Act [*Chapter 165 of 1974*]. In the Revised Edition of Statutes of 1996 the section number became 282. Section 282 of the Act provides:

> "Notwithstanding anything contained in this Act or any other enactment, no holder of a mining location registered for precious stones or a mining lease on which the principal mineral being mined or to be mined is precious stones shall tribute, cede, assign, sell or otherwise alienate in any manner whatsoever that mining location or mining lease or any interest therein without the permission of the Minister."

On 13 February 1997 Auridiam Zimbabwe (Pvt) Ltd changed its name to River Ranch (Pvt) Ltd ("the fourth respondent"). The fourth respondent continued the mining operations and production of diamonds in terms of the Special Grant until it was placed under voluntary provisional liquidation on 24 February 1998. Mr Lewis Bailey of KPMG was appointed the provisional liquidator.

On 13 October 1999 the provisional liquidator representing the fourth respondent and its creditors entered into an agreement of compromise with the appellant. The company had recently been incorporated by Mr and Mrs Farquhar who had acted as fourth respondent's buyers before it was placed under provisional liquidation. The purpose of the agreement of compromise was stated as being to enable the appellant to take transfer of all proved claims of creditors of fourth respondent and for the creditors to effect transfer of the liabilities of fourth respondent to the appellant in accordance with the terms and conditions set out in the agreement.

It was a condition of the agreement of compromise that specific classes of creditors had to be paid specific sums of money by the appellant on specific dates from the effective date. The terms and conditions of the agreement of

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A compromise had to be made part of a court order by which fourth respondent was to be removed from provisional liquidation. Mr Bailey was to be appointed the agent of the creditors for the purposes of effecting transfer to the appellant of their claims. He was also to be appointed the agent of the appellant in order to receive, administer and make payments of money due to the creditors in terms of the agreement. It was also a term of the agreement of B compromise that the shareholding structure of the fourth respondent would not be altered. The directors of the appellant made a declaration, which was a term of the agreement, that neither the appellant nor any of them had any interest in the fourth respondent.

The order was made by the High Court in case HC 1591/99 on 20 October C 1999. As a result of the court order the provisional liquidation of the fourth respondent was set aside. In terms of the order, Mr Bailey was appointed the agent of the parties for the purposes of effecting transfer of the claims of the creditors and for the receipt, administration and payment of all monies due to the creditors in terms of the agreement of compromise. The effective date was the date on which the court order and a copy of the agreement of D compromise were served by the Deputy Sheriff for Harare on the office of the Registrar of Companies. The appellant took transfer of all proved claims of the creditors, excluding the shareholders' loans.

The appellant did not have money with which to meet its obligations to the creditors in terms of the agreement of compromise. It had controlling E shareholding in two external companies, Sedna and Cornerstone, which had shares in the fourth respondent. The appellant entered into an agreement with Mr Adel Aujan, an external investor, who agreed to purchase shares in the two external companies. Mr Bailey, who still exercised administrative powers under the agreement of compromise, gave the appellant the right to treat stockpiles of ore at the mine in order to raise the money to pay the creditors. It was not given authority to mine the pit F.

The appellant operated the mine until 2000. It did not have sufficient capital to conduct mining operations. It borrowed heavily from Mr Aujan. Over the period from 23 February 1999 to 1 October 2001 the appellant obtained seven loans from companies belonging to Mr Aujan who was the fourth G respondent's principal shareholder. The loans totaled US1 399 764. The first three loans were for capital expenditure and working capital at the mine. There was then one loan of US1 million in March 2000 for payment of a creditor of the fourth respondent because the appellant had failed to meet its commitments under the agreement of compromise. The last three loans were for payment of wages at the mine. From January 2001 the mine was H under care and maintenance management.

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On 21 February 2000, Mr E Matikiti wrote a letter to the first respondent A seeking advice as to whether the Special Grant held by the fourth respondent could be "registered" in the appellant's name. He misrepresented that the appellant had purchased all the shares and assets of the fourth respondent which was liquidated. The letter reads:

> "Re: SPECIAL GRANT NO. 1278 – RIVER RANCH LIMITED B
>
> Given that liquidation proceedings are now complete and Bubye Minerals (Pvt) Ltd has been awarded the shares and assets of River Ranch Limited (previously in liquidation) we are proceeding with the necessary matters of good housekeeping. This brings us to the matter of the Special Grant, which remains registered to River Ranch Limited. We strongly believe it is in the interests of the local partners that the Special Grant is registered to Bubye Minerals (Pvt) C Ltd since the aforesaid company was the successful bidder for the shares, claims and assets of River Ranch Limited (Zimbabwe). This will serve to protect the interests of local shareholders and ensure that the partnership retains a majority indigenous component.
>
> We would be glad to have your advice in this matter given that the way is legally clear for the transfer."

Notwithstanding the attempt to found the right to claim transfer of the Special D Grant from the fourth responded to it on an alleged sale, the appellant sought the transfer at a time it was in breach of the agreement of compromise. On 16 May 2000 an official in the Ministry responded to the request for transfer of the Special Grant by saying that at its 492nd meeting the Mining Affairs Board ("the Board") had resolved that the "application" could not be considered until E outstanding payments to the creditors were made in terms of the agreement of compromise. On 12 September 2000 another letter was written to the appellant advising that at its 494th meeting the Board had resolved that a final reminder be sent to it to the effect that, unless the outstanding payments to creditors were made by the appellant before the Board's next meeting on 11 October, the

"application" for transfer of the Special Grant would not be F considered. The appellant failed to pay the outstanding amounts owed to the creditors. The money was paid by Mr Aujan in 2004.

Mr Aujan decided to appoint a new board of directors and management to run the affairs of the fourth respondent. In March 2004 a general meeting of shareholders, at which the appellant was represented, was held. A new G board of directors was appointed. It was tasked with taking possession of the mine and carrying out mining operations in accordance with clause 10 of the Special Grant requiring continuous working of the mine. The board of directors was also mandated to demand from the appellant a statement of account on the administration of the affairs of the fourth respondent during the period October 1999 to March 2004. H

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A On 17 June 2004 Mr Farquhar wrote to the Secretary saying that the appellant was renewing the "application" it made on 21 February 2000 for "cession" of the Special Grant from fourth respondent to it. He asked that the "application" be placed before the Board. The reason given for the renewed "application" was that all outstanding payments owed to the creditors had been made. The fourth respondent was not given notice of the renewed application. The B appellant withheld from the Secretary the fact that the outstanding payments to the creditors had been made by Mr Aujan and not itself. At the time the appellant wrote the letter of 17 June 2004 it had been served on 27 April with a letter of demand for the statement of account.

On 7 September 2004 the fourth respondent applied to the High Court in C case HC 10814/04 for an order directing the appellant and its directors to render an account of the administration of its affairs from October 1999 to March 2004. The appellant opposed the application on the ground that the fourth respondent had no *locus standi*.

On 25 January 2005, without notifying the fourth respondent of its intention to consider the application, the Board at its 518th meeting, decided to "approve" D the transfer of the Special Grant from the fourth respondent to the appellant. The letter written on 28 January 2005 by the Secretary of the Board reads:

> "RE: APPLICATION FOR CESSION OF SPECIAL GRANT NO.1278: FROM RIVER RANCH (PVT) LTD TO BUBYE MINERALS (PVT) LTD
>
> The above matter refers.
>
> E I am pleased to advise that the Chairman of the Mining Affairs Board who is also the Secretary for Mines and Mining Development has approved cession of the abovementioned Special Grant viz from River Ranch (Pvt) Ltd to Bubye Minerals (Pvt) Ltd with effect from 25 January 2005."

On 15 February 2005 the High Court made an order in case No. HC 10814/04 referring the question of the obligation on the appellant to render F the statement of account to trial on the ground that there was a dispute of facts which could not be resolved on the papers. On 13 May 2005, the fourth respondent made an application to the High Court in case No. HC 2091/05 for an order setting aside the decision of the Board to transfer the Special Grant to the appellant. The grounds on which the application was made were two. The first ground was that the decision was unlawful, as no agreement G of cession had been entered into by the fourth respondent with the appellant. The second ground was that the fourth respondent had not been notified of the proposed decision. The appellant opposed the application.

On 13 May 2005 the High Court stayed the proceedings pending the determination of the issues referred to trial in case No. HC 10814/04. The H ground on which the decision to stay the proceedings was made was that the

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two cases raised the same questions for determination. The fourth respondent A appealed against the judgment of the High Court in case No. SC-289-05. There is no doubt that the decision of the High Court to stay the proceedings for the reasons given was wrong. The issue of the validity of the decision of the Board made on 25 January 2005 was unrelated in time and substance to the question whether the appellant was under an obligation to render the B statement of account demanded by the fourth respondent in case No. HC 10814/04. The validity of the decision of the Board could not

have been raised in case No. HC 10814/04 because the decision had not been made when those proceedings were commenced.

On 16 May 2005 the fourth respondent wrote a letter to the Minister questioning the legality of the decision to transfer the Special Grant to the appellant and C asking that the decision be reversed. The argument put forward in support of the proposed action was that the decision was invalid for contravening s 282 of the Act. It was also pointed out to the Minister that the invalidity of the decision had been conceded by the representative of the Ministry at the hearing of the application in case No. HC 2091/05 on the ground that it had been made on false information to the effect that the appellant had D been awarded all shares and assets of the fourth respondent. It was indicated that at no time had the fourth respondent agreed to cede the rights under the Special Grant to the appellant. It said that the fourth respondent had not even known that the appellant had approached the Ministry seeking to have the Special Grant transferred to it E.

On 28 July 2005 the fourth respondent made another application to the High Court in case No. HC 3336/05 for a provisional order setting aside the decision of the Board. The appellant opposed the application, which was dismissed by the court on 7 September. The ground for the dismissal of the application was that it raised the same issues as were referred to trial in case HC 10814/04. The decision of the High Court was clearly wrong. The F question of the validity of the decision of the Board arose after the decision was made on 25 January 2005. It could not have been part of the cause of action in case no. HC 10814/04 which was commenced on 7 September 2004. The fourth respondent appealed in SC-144-05 against the judgment of the High Court. G

On 22 November 2005 a letter was written to the fourth respondent on behalf of the Secretary advising that the decision of the Board to transfer the Special Grant to the appellant had been set aside. The letter was communicating the decision of the first respondent made on 16 November. The first reason given for the reversal of the decision of the Board was that it was in contravention of s 282 of the Act, as the permission of the Minister had not been obtained. H

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A The second reason was that the decision was made without notice to the holder of the Special Grant.

On 1 February 2006 the appellant made an application to the High Court in case No. HC 278/06 for a provisional order declaring that the "purported cancellation of the cession" by the first respondent was null and void and be B set aside. An interim order interdicting the third respondent from giving effect to the "purported cancellation of the deed of cession of Special Grant 1278" was granted on 2 February 2006. The first respondent was also interdicted from representing to any person or authority, pending determination of the application for the provisional order, that "the cession of Special Grant 1278" to the appellant was cancelled save in terms of the law. The appellant also C sought a final order confirming the interim order and directing the fourth respondent to restore vacant possession of the area covered by the Special Grant save under express written authority of the appellant.

On 6 December 2006 the High Court discharged the interim order and dismissed the application for the provisional order. Although it was argued on D behalf of the appellant that the sole issue for determination was the legality of "the cancellation of the cession" by the first respondent, the learned judge accepted the contention advanced on behalf of the respondents that the validity of the decision of the Board to transfer the Special Grant from the fourth respondent to the appellant was the critical question for determination. The argument was that the legality of the "cancellation of the cession" could not E be established if the decision of the Board was illegal.

Proceeding on the basis of the assumption that the Board had the power to entertain the "application for the cession" of the rights under the Special Grant from the fourth respondent to the appellant, the learned judge held that the manner in which the decision to transfer the Special Grant was made F was unfair and in contravention of s 3(2) of the Administrative Justice Act [*Chapter 10:28*], in that the fourth respondent was not given notice of the proposed action The conclusion was that, as the unlawful decision could not confer rights on the appellant, the decision of the first respondent setting it aside did not affect any rights of the appellant under the Special Grant. Authority for the principle relied upon that all proceedings founded upon G a decision which is null and void *ab initio* are also bad and incurably bad was found in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I and *Mugwebie v Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S) at 97A-B.

The grounds of appeal are repetitive. They can be addressed comprehensively by addressing the question whether the learned judge was correct in holding H that the validity of the decision of the Board to transfer the Special Grant

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from the fourth respondent to the appellant was the critical question for A determination.

It is necessary to point out that, at the time the application was made to the High Court, the fourth respondent had formally withdrawn all the appeals it had filed in the Supreme Court in cases SC-289-05 and SC-144-05. It had also formally withdrawn cases HC 10814/04 and HC 2091/05 from the B High Court. The question of the validity of the decision of the Board was therefore not *lis pendens* in relation to any of the previously filed cases at the time the application in case HC 278/06 was made to the High Court, as had been argued by Mr *Zhou* on behalf of the appellant.

Whilst the learned judge found that the decision of the Board was unlawful C on the ground of procedural unfairness based upon breach of the right of the fourth respondent to be heard, the facts show that the Board did not have the power to entertain the "application for cession" of the rights held by the fourth respondent under the Special Grant. It is a fundamental principle of law that a public official or public body can only do things which are governed by law and cannot act where there is no law authorizing the kind D of action to be undertaken. As the validity of the decision of the Board was challenged, justification of the action taken had to be tested by reference to evidence of compliance with the procedural and substantive requirements of the provisions of clause 14 of the Special Grant as read with s 282 of the Act. Section 294(1) of the Act provides that a Special Grant shall be E governed by its terms and conditions. It was to the terms and conditions of the Special Grant No. 1278 that the court *a quo* had to turn to decide the question of validity of the decision of the Board.

Clause 14 of the Special Grant prescribed specifically the power to be used in cases of cession of rights under the Special Grant, the form the exercise of the power had to take, the repository thereof and conditions which had to F prevail before it could be exercised. The power prescribed under clause 14 was exercisable by the repository giving consent to the holder of the mining rights under the Special Grant to cede those rights to a third party. The power was specifically vested in the Secretary, acting as such. The consent had to be in writing. It is clear that no other public official could give written consent G to the holder of mining rights under the Special Grant relating to precious stones to cede them to any other person. The Secretary clearly had no power to cede the mining rights under the Special Grant because he would not have been the holder of those rights. He could not cede what he did not have. The condition precedent to the exercise by the Secretary of the power reposed in him or her was that there had to be a proposed cession in terms of which H

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A the holder of the mining rights under the Special Grant (the cedent) agreed to cede them to the third party (the cessionary) who agreed to acquire them.

The prohibition directed specifically at the holder of the rights under the Special Grant, to the effect that he or she could not cede the rights to any person without the written consent of the Secretary and the permission of the Minister, did not only underlie the significance of the content of the power as a B consent but also underlies the existence of an agreement of cession involving the holder of the mining rights as a condition precedent to the exercise of the power by the Secretary. The Secretary could not create a cession. He could not enter into an agreement of cession involving rights belonging to another person. It was the party holding the rights under the Special Grant C who could enter into an agreement to cede the rights to another person who upon written consent being given by the Secretary would move into the shoes of the cedent to become the new holder of the rights under the Special Grant.

The authorities emphasize the conception of a cession as a bilateral agreement to transfer rights from one person to another. It cannot be a unilateral act. In *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747(A) D at 762A Jansen JA said:

> "A cession is now considered to be a bilateral juristic act (agreement) whereby the cedent transfers his right of action to the cessionary, the latter taking the place of the former as creditor."

In *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992 (1) SA 867 (A) at 873E-F, E Nienaber JA said:

> "Cession, it is trite, is a particular method of transferring a right. The transfer is effected by means of agreement. The agreement consists of a concurrence between the cedent's *animus transferendi* of the right and the cessionary's corresponding *animus acquirendi*. If a complete surrender of the right is not intended the transaction, however it is dressed up, is not an out-and-out cession."

F See also *Shell Zimbabwe (Pvt) Ltd v Webb* 1981 ZLR 498 (H) at 506; 1981 (4) SA 749 (Z) at 754 and *Botha v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A) at 214.

The additional requirement for a valid exercise of the power vested in the Secretary under clause 14 was that under s 282 of the Act the written G consent given to the holder of the rights under the Special Grant must have the permission of the Minister. In other words, s 282 prohibited specifically the holder of rights to mine precious stones (in this case, diamonds) within a mining location under a Special Grant from ceding those rights without the permission of the Minister. Under s 274, which falls under Part XVII of the Act, together with s 282 of the Act, the words "mining location" are H defined so as to exclude a special grant.

Malaba DCJ

The contention advanced on behalf of the appellant was that s 282 of the A Act did not apply to the Special Grant because of the definition of "mining location" in s 274 of the Act. It is, however, clear from the examination of the provisions of ss 275 to 281 that they deal with the registration of transfers, hypothecations, options, tribute agreements and conditions governing mining rights on reserved ground. These are matters which would apply generally B to all minerals. In each instance, specific provision is made and a special grant excluded because of the wording of s 274.

The contention ignored the fact that s 282 starts with the words "notwithstanding anything contained in this Act or any other enactment …". It is a rule of construction that when a provision starts with the *non obstante* clause the intention of the legislature is that the provision should have overriding C effect in relation to any other provision in the same statute or any other enactment to the contrary.

So no other provision of the Act, including s 274, or any other statute would apply to the holder of a mining location dealing in precious stones. In respect of such mining location the holder could not cede mining rights under a D special grant without the permission of the Minister.

The contention also ignored the fact that s 282 makes special provision in respect of mining locations where precious stones are mined. Section 274 makes general provision applicable to all minerals. The principle of *generalia specialibus non derogant* would apply. It is to the effect that general provisions do not override special provisions. In *Barker v Edger* [1898] AC 748 at 754 E Lord Hobhouse said:

> "The general maxim is *generalia specialibus non derogant.* When the legislature has given attention to a separate subject and made provisions for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own F terms."

So, s 282 of the Act must be construed according to its subject-matter which is the prohibition of the holder of a mining right relating to precious stones from ceding those rights without the permission of the Minister. In this case, the Special Grant related to precious stones (diamonds). Accordingly, s 282 G applied to the cession of those rights. The cession would have required the permission of the Minister.

In applying the principles of the law to the facts of the case, there is no question that none of the requirements of clause 14 of the Special Grant, as read with s 282 of the Act, were complied with. There was no cession within the meaning of clause 14 of the Special Grant as read with s 282 of the Act H

Malaba DCJ

A entered into between the holder of the mining rights and the appellant. The fourth respondent denied that it ceded or intended to cede the rights it held under the Special Grant to the appellant. The appellant did not produce any evidence to the contrary. Without a proposed cession, there would have been no cause for the exercise of the power conferred on him or her by the Secretary under clause 14 of the Special Grant. There would have been no B cause for the granting of

permission by the Minister in terms of s 282 of the Act. It is, indeed, clear that the Secretary did not give written consent to the fourth respondent to cede any rights under the Special Grant. It is also common cause that the permission of the Minister was not sought.

The Board which made the decision to transfer the rights held by the fourth C respondent under the Special Grant had no power to do what it did. When the decision was made the Secretary was not acting as such. He was acting in the capacity of chairman of the Board. In any case, the repository of the power prescribed under clause 14 of the Special Grant had no power to grant a cession of rights under the Special Grant. The Board could not have had power outside the provisions of clause 14 of the Special Grant to grant D cession of rights it did not hold. The learned judge was correct in holding that the question of the validity of the decision of the Board was the critical question for determination. Whilst he arrived at the correct conclusion that the decision of the Board was a nullity, he was wrong in assuming that the Board had power to entertain the application by the appellant for transfer of the Special Grant from the fourth respondent to itself E lf.

The appeal is dismissed with costs.

SANDURA JA and ZIYAMBI JA concurred

Hussein Ranchhod & Co, appellant's legal practitioners

F *Civil Division of the Attorney-General's Office*, first and third respondent's legal practitioners

Costa & Madzonga, fourth respondent's legal practitioners

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Source:
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KDB HOLDINGS (PVT) LTD v MEDICINES CONTROL AUTHORITY OF ZIMBABWE 2011 (2) ZLR 398 (S)

Citation	2011 (2) ZLR 398 (S)
Case No	Judgment No. S-25-11
Court	Supreme Court, Harare
Judge	Garwe JA, Cheda AJA & Omerjee AJA
Heard	4 October 2011; *CAV*
Judgment	15 November 2011
Counsel	*D Ochieng*, for the appellant *S Njerere*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Interpretation of statutes – *intention of legislature – reading of words into legislation – when permissible – powers given to regulatory authorities – power given to Medicines Control Authority to withdraw defective medical supplies from the market – no specific power given to order* D *destruction of such supplies – such power not to be inferred*

Medicine – *Medicines Control Authority – power given to Authority to withdraw defective medical supplies from the market – no specific power given to order destruction of such supplies – such power not to be inferred* E

Headnote

The appellant applied to the respondent in terms of the Medicines and Allied Substances Control (Gloves) Regulations (SI 1 of 2006) for approval of a batch of latex examination gloves which the appellant intended to distribute in Zimbabwe for medical purposes. The gloves were subjected to tests and failed. The respondent directed the appellant to destroy the F entire batch, save for some 980 boxes that had already been authorized by the respondent to be supplied to Harare Hospital. The appellant wrote to the respondent seeking permission to return the gloves to the manufacturer and obtain a replacement batch. The respondent declined to grant permission but re-affirmed its decision to direct that the gloves be destroyed. An application by the appellant to the Administrative Court G failed, the court finding that once the respondent had formed the opinion that it was not in the public interest that the gloves be availed to the public, it (the respondent) was entitled to prohibit the sale, supply or delivery of the gloves to any person for any reason whatsoever. The court held that the respondent was accordingly empowered to order destruction of the gloves on the basis that such destruction was "reasonably incidental" H

A to its power to ensure "that the gloves are not available to the public for any reason". Under s 12 of the Regulations, "where the authority is of the opinion that the withdrawal of any batch of gloves is necessary for the protection of the public, the Authority may require any person to withdraw such batch of gloves in accordance with the procedure as determined by the Authority".

B *Held*, that a reading of this provision revealed that it was never the intention of the legislature to confer upon the respondent the power to order destruction. The Regulations simply empowered the respondent to prescribe a procedure for the withdrawal of the gloves from the market for the protection of the public. It was a misinterpretation of the provision C to hold that any power to destroy faulty gloves could be inferred from the regulations. Had the legislature intended such a drastic measure, it would have said so expressly, in either the Act or the Regulations. It is clear from similar provisions of other enactments that, where the legislature intends to confer the power to destroy articles, it has expressly said so. D In those other enactments, the legislature has also laid down a form of judicial control, where the party whose products are to be destroyed is required to show cause why the goods should not be destroyed. This approach is in keeping with principles of fairness and natural justice.

Held, further, that the courts are extremely loath to read into legislation words which are not there. They will only do so in circumstances where not E to do so would lead to an absurdity so glaring that it could never have been contemplated by the legislature.

Held, further, that a proper construction of the purpose and scope of the powers conferred upon the respondent showed that the Regulations did not support an inference in favour of a power authorizing destruction F of the gloves. They set out a procedure for the withdrawal of the gloves from the market. It is clear from the language used that the purpose of this provision is to provide measures to regulate and preserve the existence of the gloves and not their destruction.

Cases referred to G

In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)

van Heerden NO & Ors v Queen's Hotel (Pvt) Ltd & Ors 1972 (2) RLR 472 (A); 1973 (2) SA 14 (RA)

Legislation considered

H Foods and Food Standards Act [*Chapter 15:04*], s 12(1)

Omerjee AJA

Medicines and Allied Substances Control (Gloves) Regulations 2006 A (SI 1 of 2006), s 12

Public Health Act [*Chapter 15:09*], s 27(4)

Case information

D Ochieng, for the appellant

S Njerere, for the respondent B

Judgment

OMERJEE AJA: This is an appeal against the judgment of the Administrative Court which upheld the decision by the respondent to order the destruction of gloves that it had found to be defective.

The background facts, which are largely common cause in this matter, are as C follows. On 12 July 2010, the appellant applied to the respondent in terms of the Medicines and Allied Substances Control (Gloves) Regulations (SI 1 of 2006). The appellant sought regulatory approval of Muller and Vale Latex examination gloves Batch Number 003050001000 which the appellant intended to distribute in Zimbabwe for medical purposes. The gloves were subjected to tests and failed. The respondent directed the appellant to destroy D the entire batch save for 1980 boxes that had already been authorized by the respondent to be supplied to Harare Hospital. The appellant wrote to the respondent seeking permission to return the gloves to the manufacturer and obtain a replacement batch. The respondent declined to grant permission but re-affirmed its decision to direct that the gloves be destroyed. The appellant E appealed against the directive to the Administrative Court. The Administrative Court dismissed the appeal wherefore the appellant has appealed to this court.

The only issue which arises for determination during this appeal is whether or not the finding by the court *a quo* that the respondent had the power to order destruction of the gloves was a correct finding. F .

The court *a quo* having found that, once the respondent had formed the opinion that it was not in the public interest that the gloves be availed to the public, it (the respondent) was entitled to prohibit the sale, supply or delivery of the gloves to any person for any reason whatsoever. The court *a quo* held that the respondent was accordingly empowered to order destruction of the gloves on the basis that such destruction was "reasonably incidental" to the G respondent's power to ensure "that the gloves are not available to the public for any reason".

The relevant section of the Medicines and Allied Substances Control (Gloves) Regulations (hereinafter referred to as "the regulations") is s 12. It provides as follows: H

Omerjee AJA

> A "Where the authority is of the opinion that the withdrawal of any batch of gloves is necessary for the protection of the public, the Authority may require any person to withdraw such batch of gloves in accordance with the procedure as determined by the Authority."

A reading of this provision reveals that it was never the intention of the legislature to confer upon the respondent the power to order destruction. The B courts generally try to give effect to legislative intention. The regulations simply empower the respondent to prescribe a procedure for the withdrawal of the gloves from the market for the protection of the public. The court *a quo* misinterpreted the provision by holding that the power to destroy faulty gloves could be inferred from the regulations.

C The power to order destruction ought not to be lightly inferred from the regulations. This principle was affirmed by Beadle CJ in *van Heerden v Queen's Hotel (Pvt) Ltd* 1972 (2) RLR 472 (A) at 494; 1973 (2) SA 14 (RA) at 26 where he said:

> "Courts are extremely loath to read into an Act words which are not there. They will only do so, when not to do so will lead to an absurdity so glaring that it D could never have been contemplated by the legislature."

Had the legislature intended such a drastic measure it would have said so expressly, in either the Act or the Regulations. It is clear from similar provisions of other enactments that, where the legislature intends to confer the power to destroy articles, it has expressly said so. For example s 12(1) E of the Foods and Foods Standards Act [*Chapter 15:04*] authorizes, unless good cause is shown, the destruction of food found to be prohibited for sale or manufacture for sale. Section 27(4)

of the Public Health Act [*Chapter 15:09*] authorizes a local authority to destroy any article that cannot be disinfected for the purpose of preventing the spreading or eradication of F any infectious disease.

It is apparent that where the legislature has deemed that the goods or articles, as the case maybe, should be destroyed, the legislature has expressly provided for such power. Furthermore, the legislature has also laid down a form of judicial control where the party whose products are to be destroyed by the authorities, is entitled to show cause why the goods may not be destroyed. G This approach is in keeping with principles of fairness and natural justice.

It was held in Re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) at 59 *per* Gubbay CJ:

> "Derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide, construction. Rights and freedoms are not to be diluted or diminished unless necessity or intractability of language H dictates otherwise."

Omerjee AJA

For the court *a quo* to hold that destruction is "reasonably incidental" to the A respondent's power to ensure "that the gloves are not available to the public for any reason" was a misdirection. This court is of the view that the power to order destruction cannot reasonably be inferred *in casu*.

A proper construction of the purpose and scope of the powers conferred upon the respondent shows that the regulations do not support an inference in favour B of a power authorizing destruction of the gloves. It sets out a procedure for the withdrawal of the gloves from the market of medical consumers. It is clear from the language used that the purpose of this provision is to provide measures to regulate and preserve the existence of the gloves and not their destruction.

In the circumstances it follows that the order of the court *a quo* cannot stand. C Accordingly, it is ordered as follows:

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and the following substituted:

   "(i) The appeal be and is hereby allowed with costs.

   (ii) The respondent's directive to the appellant dated 6 September D 2010 that it destroys Muller Vale Latex Examination Gloves Batch Number 003050001000 (the Gloves) be and is hereby declared to be unlawful and is hereby set aside."

Garwe JA and Cheda AJA concurred E

Coghlan, Welsh & Guest, appellant's legal practitioners

Honey & Blackenberg, respondent's legal practitioners F

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Source:
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CHIROSWA MINERALS (PVT) LTD & ANOR v MINISTER OF MINES & ORS 2011 (2) ZLR 403 (H)

Citation 2011 (2) ZLR 403 (H)

Case No Judgment No. HH-261-11

Court High Court, Harare

Judge	Patel J
Heard	16 June 2011; *CAV*
Judgment	15 November 2011
Counsel	*F M Katsande*, for the plaintiffs *S v Kwacha*, for the second and third defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Interpretation of statutes – *directory and peremptory provisions – distinction between – principles of how to ascertain whether provision is directory or peremptory*

D **Mines and minerals** – *tribute agreement – necessity for such agreement to be registered and approved by mining commissioner or Mining Affairs Board – invalidity of agreement not approved*

Headnote

The first plaintiff concluded a tribute agreement with the second and third E defendants. The agreement was to last for 10 years, but the agreement was rejected by the Mining Commissioner on the ground that a 10 year tribute agreement was not registrable. It was then superseded by a second, three year, tribute agreement entered into the next day. That agreement having expired, the first plaintiff entered into a third tribute agreement with the second plaintiff, and sought the eviction of the second and third F defendants. It also sought an order nullifying the 10-year agreement and registering the third agreement. The application for eviction was resisted on the grounds that the first tribute agreement was still valid. The High Court had, in referring the matter for trial litigation, previously ruled that the first agreement was novated and superceded by the second.

G *Held*, that it is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect. The disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected. It is impossible to lay down any conclusive test as to when a legislative provision is directory and when it is H peremptory, though the fact that the provision is couched in a negative

form means that it is to be regarded as peremptory rather than directory. A Ultimately, the court must determine the intention of the legislature. Where powers are granted with a direction that certain regulations or conditions shall be complied with, it is neither unjust nor inconvenient to insist on a vigorous observance of them as essential to the acquisition of the authority conferred, and it is therefore probable that such was the B intention of the legislature.

Held, further, that under s 284 of the Mines and Minerals Act [*Chapter 21:05*], every tribute agreement must be reduced to writing. The agreement, together with the prescribed number of copies thereof, must be submitted to the mining commissioner for examination and approval by the Board or the mining commissioner. A tribute agreement which C conforms to a standard agreement drawn up and approved by the Mining Affairs Board may be approved by the mining commissioner. Any other agreement must be submitted to the Board for examination and approval. Section 286 prescribes the criteria for approval of tribute agreements by the Board. Under s 289, it is an offence for any party to a tribute D agreement to exercise any right under such agreement unless and until such agreement has been examined and approved by the Board or a mining commissioner. Section 290 prohibits and penalises the disposal of minerals under an unapproved agreement.

Held, further, that ss 289 and 290 of the Act are couched in negative form and any contravention of their proscriptive injunctions is to be visited E with penal sanctions. Accordingly, these provisions are intended to be peremptory rather than merely directory. No person may exercise any right under a tribute agreement or exploit any minerals thereunder unless and until the agreement is approved by the mining commissioner or the Board. Taking into account the criteria for approval enumerated in s 286, the object of these provisions is to ensure, *inter alia*, that the F interests of both grantor and tributor are adequately safeguarded and, more importantly, that the mine in question is mined to best advantage so as to avoid the premature cessation of mining operations. To allow the parties to operate a mine under an unapproved tribute agreement would be to totally disregard the critical factors that Parliament has prescribed G as being essential to the orderly and beneficial exploitation of mining locations generally. The first tribute agreement was therefore invalid and unenforceable. It followed that the second agreement was valid, but, that agreement having expired, the second and third defendants must vacate or be evicted. H

Patel J

Cases referred to A

Leibbrandt v SAR 1941 AD 9

Messenger of the Magistrate's Court, Durban v Pillay 1952 (3) SA 678 (A)

NCR Zimbabwe (Pvt) Ltd v Gulliver Consol Ltd & Anor 1993 (1) ZLR 205 (H)

Nkisimane & Ors v Santam Ins Co Ltd 1978 (2) SA 430 (A)

B *S v Gatsi; S v Rufaro Hotel (Pvt) Ltd* 1994 (1) ZLR 7 (H)

Schierhout v Min of Justice 1926 AD 99

Sutter v Scheepers 1932 AD 165

X-Trend-a-Home (Pvt) Ltd v Hoselaw Investments 2000 (2) ZLR 348 (S)

Legislation considered C

Mines and Minerals Act [*Chapter 21:05*], ss 284, 286, 287, 289 & 290

Case information

F M Katsande, for the plaintiffs

S v Kwacha, for the second and third defendants

Judgment

D **PATEL J**: The parties herein concluded three separate tribute agreements relating to the mining location at Dodge Mine in Shamva. The issues for determination arise from the subsistence of the first 10 year agreement between the first plaintiff and the second defendant, following the conclusion of a E second 3 year agreement between the same parties. The plaintiffs seek the nullification of the first agreement and the registration by the first defendant of a subsequent tribute agreement entered into between the plaintiffs. The first plaintiff also seeks an order for the ejectment of the second and third defendants from Dodge Mine and for the payment of royalties in respect of their use and occupation of the mining location. The second and third F defendants contend that they are entitled to remain in occupation by virtue of the first agreement. The first defendant has indicated that it will abide by the judgment of the court.

At the conclusion of the trial, both counsel were directed to file their closing submissions in writing. They were specifically tasked to consider, G as a preliminary matter, the legality and enforceability of the first ten year agreement. Mr *Katsande* duly filed his submissions, while Mr *Hwacha's* submissions have yet to be filed, four months after the trial.

The evidence

John Richard Needham Groves is the managing director and sole shareholder H of the first plaintiff. He testified as follows. The first 10 year tribute agreement

Patel J

between the first plaintiff and the second defendant was concluded on 17 A May 2005. It was rejected by the Mining Commissioner on the ground that a 10 year tribute agreement was not registrable. It was then superseded by the second three year tribute agreement entered into on 18 May 2005. There was a further agreement on 18 August 2005 for the purchase of the first plaintiff's mining equipment by the second defendant. Following various breaches of B both agreements, an addendum was signed on 8 August 2006 extending the deadlines for payment of the capital sum and 5 per cent royalties. The second defendant did not comply with his obligations under these agreements, despite several written warnings and a notice of cancellation dated 9 October 2006. According to the purchase agreement of 18 August 2005, the capital assets were valued at US$75 000. The second defendant made payments C totalling ZW$671 million, which were treated as interest. After the expiry of the second three year agreement on 22 May 2008, the first plaintiff did not receive any further payments for the capital assets or royalties, nor did the second defendant submit any production returns. A registered letter was sent to the second defendant at his address for service on 7 May 2008, asking him to rectify these breaches. However, it was returned as having been D unclaimed. The second and third defendants remain in productive occupation of the six claims at Dodge Mine. The claims are registered in the name of Chirozwa Syndicate which also concluded the tribute agreements with the second defendant. The syndicate was a partnership between the witness and one Cargill. The latter withdrew from the partnership and the witness then E became the sole owner of the claims.

Lovemore Kakuvi has been the finance manager of the first plaintiff since 1985. He confirmed that since 2008 no production returns for the Dodge Mine claims were filed with the Mining Commissioner's offices in Harare and that no copies of any such returns were received by him. He wrote to the second defendant asking for copies and delivered his letter by hand, but F there was no response.

Peter Valentine is the managing director of the second plaintiff. In May 2008 the first and second plaintiffs concluded a tribute agreement in respect of the Dodge Mine claims. The first defendant has not registered this agreement because of the present dispute. In 2008, the witness was appointed by Groves G to manage Dodge Mine. He ascertained from the offices of the Ministry of Mines and the Mining Commissioner that no production returns were submitted. However, as was confirmed by the Minerals Marketing Corporation of Zimbabwe, the second and third defendants were exporting minerals to two companies in South Africa. He compiled and produced records of the monies received by the third defendant from January 2007 to November H

Patel J

A 2010 in respect of these exports. He queried the exports with the Ministry of Mines, but received no response. He visited Dodge Mine in January 2011 and found that mining operations were continuing but, as at the present time, there are still no production returns for the mine.

Morris Tendayi Nyakudya is the second defendant and managing director of B the third defendant. His evidence was that the first ten year agreement was never cancelled. It was not registered by the Ministry of Mines because it was not a standard tribute agreement. However, it was agreed by the parties that it would govern what was intended to be a long term relationship between them. The second three year agreement was concluded as a device to enable the parties to begin mining operations immediately. The third defendant C was then formed to take over the operations at Dodge Mine. The notice of cancellation referred to by Groves was merely a notice to rectify various breaches, and there was no formal cancellation thereafter. Various payments were made by the third defendant and accepted by the first plaintiff in respect of royalties and assets from June 2006 to September 2008. The amount of D royalties paid was 10 per cent of export proceeds, and not 10 per cent of production as was required by the tribute agreements. The total amount paid was $671 million, being $91 million for royalties and $580 million for assets. At the exchange rate of ZW$100 000 to US$1 prevailing on 31 July 2006, this amount equated to a sum of US$5 800. Apart from what E was contained in the record, the third defendant made certain payments in foreign currency and fuel coupons equating to about US$10 000. The first plaintiff also withdrew US$4 000 from export receipts, and it benefited from a sum of US$3 000 garnished by the National Social Security Authority. The second defendant kept a production record at Dodge Mine. Although F both

agreements required him to file production returns with the Ministry of Mines, it was verbally agreed that the first plaintiff would do so. The production record was removed from Dodge Mine by Valentine. Thereafter, the third defendant obtained quarterly export licences without the submission of production returns. Under cross-examination, the second defendant could not explain why his assertions relating to the production record and returns G were not put to the three previous witnesses. He also stated that after the expiry of the registered 3 year agreement on 22 May 2008, he and the third defendant continued mining in terms of the unregistered ten year agreement. This clearly contradicted the averments in his opposing affidavit, in Case No. HC 5009/08, to the effect that the three year agreement was renewed H and was currently registered.

Patel J

Subsistence of ten year agreement A

It is common cause that the first ten year agreement was entered into on 17 May 2005 but was never registered at any stage thereafter. It was immediately replaced, the following day, by the second three year agreement, which eventually expired on 18 May 2008. The intention of the parties in concluding two tribute agreements is not entirely clear. According to the B second defendant, they were meant to operate concurrently. The letter of 9 October 2006 from the first plaintiff, giving the second defendant 30 days' notice to rectify certain breaches, would appear to support that contention, though the evidence of Groves was that the letter was written as a mere formality. In any event, the letter states that the second defendant's failure to rectify his breaches would entitle the first plaintiff to cancel the ten year C agreement without further notice. It is not in dispute that there was no further notice of cancellation thereafter. Nevertheless, it is arguable that cancellation automatically ensued upon expiry of the 30 day deadline without any remedial action having been taken by the second defendant.

There is also the clear and unchallenged determination of Bhunu J in HH-107- D 10, handed down on 16 June 2010, that "the first agreement was superseded, novated or amended by this second agreement … for the simple but good reason that it was never registered [and] having been novated, abrogated, superseded or amended by the second agreement it became a nullity and of no force or effect". While I am in broad agreement with these findings, it seems to me that there is a further and stronger ground for invalidating and E disregarding the first agreement, arising from the statutory requirement of registration.

Non-compliance with statute

The general principle governing non-compliance with statutory provisions F was concisely spelt out by Innes CJ in *Schierhout* v *Minister of Justice* 1926 AD 99 at 109:

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect. … And the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected."

The nature and effect of statutory injunctions was fully considered by G this court in *S v Gatsi; S v Rufaro Hotel (Pvt) Ltd* 1994 (1) ZLR 7 (H). The principal issue for determination was the validity of the Presidential Powers (Temporary Measures) (Control of Omnibuses and Heavy Vehicles) Regulations 1991, consequent upon the failure to lay them before Parliament within the time specified in the enabling statute, the Presidential Powers H

Patel J

A (Temporary Measures) Act 1988. The court (comprising Sandura JP, Smith J and Adam J) cited several South African and English cases dealing with the distinction between peremptory and directory statutory requirements and the effect of non-compliance with such requirements. In *Sutter v Scheepers* 1932 AD 165 at 173-174, Wessels JA observed as follows:

> "Now it is admittedly a difficult matter to lay down any conclusive test as to B when a provision is directory and when it is peremptory. A long series of cases both here and in England have evolved certain guiding principles. Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive, but as useful guides. The word 'shall' when used in a statute is rather to be construed as

peremptory than as directory unless there are other circumstances which negative this construction: *Standard Bank Ltd v van Rhyn* C 1925 AD 266.

(1) If a provision is couched in a negative form it is to be regarded as a peremptory rather than as a directory mandate. To say that no power of attorney shall be accepted by the Deeds Office unless it complies with certain conditions rather discloses an intention to make the conditions peremptory than directory, though even such language is not conclusive. D

(2) 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 of an intention to make the provision only directory.

(3) 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 if there is no explicit statement that the act is to be void if the conditions E are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

(4) The history of the legislation will also afford a clue in some cases."

Similarly, in *Leibbrandt v South African Railways* 1941 AD 9 at 12-13, de Wet CJ stated that:

"The cases on the subject show that it is impossible to lay down any conclusive F test as to when a legislative provision is directory and when it is peremptory. In the case of *Liverpool Bank v Turner* 30 LJ Ch 379, Lord Campbell summed up his conclusion as follows:

'No universal rule can be laid down as to whether mandatory enactments 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 G intention of Legislature by attending to the whole scope of the statute to be construed.'

In the case of *Howard v Bodington* 2 PD 203, Lord Penzance, after stating that he had considered the principal cases on the subject and as a result agreed with the conclusion expressed by Lord Campbell, went on to say:

'I believe as far as any rule is concerned, you cannot safely go further H than that in each case you must look to the subject-matter; consider the

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importance of the provision that has been disregarded and the relation of A that provision to the general object intended to be secured by the Act; and upon review of the case in these aspects decide whether the matter is what is called imperative or only directory.' "

Again, in *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 682-683, van den Heever JA noted that:

"In *Sutter v Scheepers* 1932 AD 165 at p 173, Wessels JA stated certain rules B as guidance in determining whether a statute is peremptory or directory but, as he himself observed, his rules were not intended to be an exhaustive list or a comprehensive guide. The cardinal rule is that stated in *Standard Bank v Estate van Rhyn* 1925 AD 266 at p 274: 'After all what we have to get at is the intention of the legislature' or as Viscount Cave LC observed in *Salford Guardians v Dewhurst* [1926] AC 619 at p 626: C

'I base my decision upon the whole scope and purpose of the statute, and upon the language of the sections to which I have specifically referred.' "

Turning to the consequences of non-compliance, van den Heever JA stated as follows:

"In the first place the sub-rule with which we are concerned is couched in peremptory terms: the messenger 'shall cause the sale to be advertised …' D The Afrikaans has the categorical imperative 'moet'. If a statutory command is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion, that issuers of the command intended disobedience to be visited with nullity."

As is pointed out in Maxwell *Interpretation of Statutes* 7 ed at p 316, the failure to comply with a peremptory requirement is usually presumed to E entail nullity:

"Where powers are … granted with a direction that certain regulations or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a vigorous observance of them as essential to the acquisition of the … authority conferred, and it is therefore probable that such was the intention of F the legislature."

To similar effect, in *Nkisimane & Ors v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 434, Trollip JA stated that:

> "…a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity."

In the *Gatsi & Rufaro Hotel* case, *supra*, at 28-29, Smith J correctly observed G that the proper inquiry as to the consequences of non-compliance is to ascertain the true intention of Parliament:

> "Where a statute requires that something be done without stating the consequence of non-compliance with the provision, the normal course followed in order to determine the consequence is to ascertain whether H

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> A the provision concerned is peremptory or merely directory. If it is peremptory, then the act is a nullity; if it is directory, then the act has legal effect despite the non-observance of the provisions of the statute. In *Lion Match Co v Wessels* 1946 OPD 376 van den Heever J (as he then was) pointed out that the expressions 'peremptory' and 'directory', as applied to statutory provisions, are unfortunate ones, as the court is B concerned not with the quality of the command but with unexpressed consequences following from it, as presumed to have been intended by the Legislature.
>
> … Whatever terminology is used, however, and whatever label is given to the test, it does not affect the nature of the inquiry which the court is called on to C make in order to attempt to ascertain the intention of the Legislature."

A case that is highly instructive in the present context is that of *X-Trend-a-Home (Pvt) Ltd v Hoselaw Investments* 2000 (2) ZLR 348 (S), relating to compliance with s 39 of the Regional Town and Country Planning Act [*Chapter 29:12*]. The question to be decided was whether, when an D agreement for the sale of a portion of property was made conditional on the obtaining of a permit for subdivision, the agreement was valid. In the earlier case of *NCR Zimbabwe (Pvt) Ltd v Gulliver Consolidated Ltd & Anor* 1993 (1) ZLR 205 (H), it was held that s 39 did not prohibit a sale agreement if it was made conditional on the grant of a permit for subdivision. In the instant case, the Supreme Court overruled that decision. It was held that, E assuming this was an agreement of sale subject to a suspensive condition, such an agreement constituted a contract which could be enforced, but subject to any legislation to the contrary. Section 39 forbids an agreement for the change of ownership of any portion of a property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement F under consideration was clearly an agreement for the change of ownership of an unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing, or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited and therefore unenforceable.

G **Governing statutory provisions**

Part XVIII of the Mines and Minerals Act [*Chapter 21:05*] regulates the approval of tribute agreements. In terms of s 284:

> "The terms of every tribute agreement shall be reduced to writing and such agreement, together with the prescribed number of copies thereof, shall be submitted to the mining commissioner for examination and approval by the H Board or the mining commissioner."

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Section 285 enables the mining commissioner to approve a tribute agreement A which conforms to a standard agreement drawn up and approved by the Mining Affairs Board. In every other case, the agreement must be submitted to the Board for examination and approval. Section 286 prescribes the criteria for approval of tribute agreements by the Board and provides as follows:

> "If upon examination of any tribute agreement which has been submitted to it B by a mining commissioner the Board is satisfied –
>
> (a) that the method of fixing the tribute royalty payable to the grantor and the rate of such royalty are satisfactory and are not likely to retard the progress or expansion of the mine or bring about the early cessation of mining operations; and
>
> (b) that the interests of both the grantor and the tributor are adequately safeguarded C thereunder; and
>
> (c) that the period of such agreement is clearly defined and, if termination of the agreement by notice is provided for, that the interests of the parties to the agreement are adequately protected; and

(d) that the development work required by the agreement is reasonable in the circumstances and is not unduly burdensome or likely to cause the premature D cessation of mining operations on the mine; and

(e) that the tributor is required to carry out sufficient development work to ensure the continuity of mining operations on the mine; and

(f) that the grantor is entitled periodically and at reasonable times to inspect the mine and satisfy himself that the terms of the agreement are being observed; and E

(g) that in all respects the agreement is satisfactory and likely to result in the mine being mined to the best advantage;

the Board may approve the agreement and shall endorse such approval thereon and shall inform the owner or occupier of the land concerned of such approval."

Section 287 empowers the Board to decline its approval or to approve an agreement subject to such amendments as it may deem fit. Section 288 F mandates the Board and the mining commissioner to keep a copy of every tribute agreement submitted for approval.

Section 289 stipulates the penalty for acting under any unapproved agreement as follows:

"(1) No party to a tribute agreement shall exercise any right under such agreement G unless and until such agreement has been examined and approved by the Board or a mining commissioner.

(2) Any party who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level six."

Section 290 prohibits and penalises the disposal of minerals under an unapproved agreement: H

2011 (2) ZLR p413

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"(1) If A a tributor is mining a mining location under an unapproved agreement or in conflict with the terms of an approved agreement the mining commissioner shall issue an order prohibiting the disposal of minerals from such mining location until he is satisfied that the agreement has been approved under this Part or until the terms of the approved agreement are complied with.

(2) Any miner of such mining location who fails to observe such an order and B any person knowing of such an order who contrary thereto receives any minerals from such mining location shall be guilty of an offence."

Validity of ten year agreement

section 284 of the Mines and Minerals Act requires that every tribute agreement must be submitted for examination and approval by the Board or the mining C commissioner. More significantly, s 289(1) declares, in unequivocally clear language, that no party to a tribute agreement shall exercise any right under such agreement unless and until such agreement has been examined and duly approved. Section 289(2) makes it a punishable offence for any person to contravene this prohibition. Equally significantly, s 290(1) enjoins the mining commissioner to prohibit the disposal of any minerals extracted from any D mining location under an unapproved agreement. In terms of s 290(2), any miner who fails to observe such prohibition is guilty of an offence.

Applying the interpretive guidelines enunciated in *Sutter's* case, *supra*, we find that the provisions of ss 289 and 290 are couched in negative form. We also find that any contravention of their proscriptive injunctions is to be E visited with penal sanctions. Having regard to these features, I have no doubt whatsoever that these provisions are intended to be peremptory rather than merely directory. In other words, no person may exercise any right under a tribute agreement or exploit any minerals thereunder unless and until the agreement is approved by the mining commissioner or the Board.

F What then are the consequences of disobedience? In particular, does it entail the nullification of an unapproved tribute agreement? Taking into account the criteria for approval enumerated in s 286, it seems to me that the object of these provisions is to ensure, *inter alia*, that the interests of both grantor and tributor are adequately safeguarded and, more importantly, that the mine in question is mined to best advantage so as to avoid the premature G cessation of mining operations. To allow the parties to operate a mine under an unapproved tribute agreement would be to totally disregard the critical factors that Parliament has prescribed as being essential to the orderly and beneficial exploitation of mining locations generally. Taking all the provisions of Part XVIII within the context of the Act as a whole, I take the view that

Parliament intended to render invalid any tribute agreement which has not H

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been approved by the Board or the mining commissioner. Any other conclusion A would simply serve to negative the very purpose of Part XVIII of the Act.

It follows from all of this that the first ten year tribute agreement *in casu*, having never been approved in terms of Part XVIII, is invalid and unenforceable. Consequently, it cannot be invoked or relied upon to confer any right or interest on any of the parties thereto. B

Royalties and capital assets

The second defendant was unable to furnish any production returns for the period in question in order to determine what royalties should have been paid in respect of the productive use of Dodge Mine since May 2005. His assertion that the production record was seized by Valentine is nothing more C than fanciful creativity, neither having been mentioned in the defendants' pleadings nor having been put to the plaintiffs' witnesses in cross-examination. In any event, the paltry sums that were paid were entirely deficient and were delivered later than was stipulated.

In terms of the Memorandum of August 2005 and the Addendum of August D 2006, the purchase price for the capital assets sold by the first plaintiff was US$75 000. According to the second defendant, the total amount paid by the defendants towards royalties and the purchase of assets was $671 million, being $91 million for royalties and $580 million for assets, which sums at the prevailing exchange rate equated to US$910 and US$5 800 respectively. Apart from this, the second defendant claims that the first plaintiff received E about US$10 000 in cash and fuel coupons and a further US$7,000 from other sources. The papers filed of record contain no mention of such payments and no documentation was produced at the trial to support them. The second defendant's evidence in this regard cannot be accepted.

In short, the second and third defendants have defaulted continually and F massively in their payment obligations relating to capital assets and royalties. The first plaintiff is therefore entitled to the payment of royalties at the rate of 5 per cent stipulated in the registered tribute agreement. Moreover, by virtue of clause 9 of the 2005 Memorandum and clause 4 of the 2006 Addendum, it is entitled to repossess the assets without compensation. G

Relief granted

First and foremost, it is necessary to declare the invalidity of the ten year tribute agreement and the validity of the three year tribute agreement as the operative contract between the parties. Secondly, the latter agreement having expired by effluxion of time, the second and third defendants must vacate Dodge Mine or be ejected therefrom. Thirdly, there being no legal H

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A obstacle to the registration of the tribute agreement between the first and second plaintiffs, the first defendant, who was to abide by the decision of the court, must be ordered to cause the registration of that agreement by the relevant authorities in accordance with the governing statutory provisions.

The determination of royalties can only be achieved by appointing an expert B assessor to calculate the amount of production on which the 5 per cent royalties should be assessed, having regard, *inter alia*, to the production records and returns, if any, furnished by the second and third defendants. As regards capital assets, the second and third defendants must be ordered to restore the assets listed in the annexure to the 2005 Memorandum. Insofar as concerns the amounts that they claim to have paid for the assets, *i.e.* the C Zimbabwe dollar equivalent of US$5 800, it seems just and equitable that they be forfeited and accounted for as fees for the beneficial use of the assets, valued at US$75 000, for a period of over six years.

As for costs, there is no reason why they should not follow the result. They must be borne by the second and third defendants.

It is accordingly declared that:

1. The tribute agreement dated 17 May 2005 between the first plaintiff and the second and third defendants is invalid and of no force or effect.
2. The approved tribute agreement dated 18 May 2005 (registration No. 10/2005), which expired on 18 May 2008, is the only valid agreement in terms of which the second and third defendants occupied and mined the first plaintiff's mining claims situated at Dodge Mine, Shamva, Mashonaland Central.

It is further ordered that:

1. The second and third defendants shall deliver to the first plaintiff all the assets listed in Annexure "A" to the Memorandum of Agreement entered into on 18 August 2005 between them and the first plaintiff, within five days of the service of this order upon them, failing which the Deputy Sheriff be and is hereby authorised and directed to attach and remove the said assets for delivery to the first plaintiff.
2. The second and third defendants, and all those claiming the right of occupation through them, shall vacate the first plaintiff's aforesaid mining claims within ten days of the service of this order upon them, failing which the Deputy Sheriff be and is hereby authorised and directed to evict them.
3. The first plaintiff shall appoint a qualified mining engineer to determine the quantity of minerals mined by the second and third defendants from

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18 July 2005 to the date they shall have vacated or been evicted from the aforesaid mining claims.

4. Within ten days of having received the mining engineer's report, the second and third defendants shall pay royalties due to the first plaintiff, calculated at the rate of 5 per cent of the gross value of the minerals mined by them, less such royalties as they may by documentary evidence prove to have already paid to the first plaintiff.
5. Within ten days of the service of this order at his offices, the first defendant shall refer the tribute agreement entered into between the first and second plaintiffs to the appropriate mining commissioner for approval and registration in accordance with the provisions of Part XVIII of the Mines and Minerals Act [*Chapter 21:05*].
6. The second and third defendants jointly and severally, the one paying the other to be absolved, shall pay the costs of suit.

F M Katsande & Partners, plaintiffs' legal practitioners

Dube, Manikai & Hwacha, second and third defendants' legal practitioners

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S v NYAMUKAPA 2011 (2) ZLR 417 (H)

Citation 2011 (2) ZLR 417 (H)

Case No Judgment HH-60-12

Court High Court, Harare

Judge Zimba-Dube J & Bhunu J

Heard 17 November 2011

Judgment 17 November 2011

Counsel *M Kajokoto*, for the appellant
E. Nyazamba, for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Appeal – *criminal matter – notice of appeal – appeal against conviction – need to state grounds of appeal clearly and specifically – reason for such requirement – notice consisting of vague averments invalid – not saved by providing details in heads of argument*

Headnote

D After the appellant's conviction and sentence on a charge of theft of "trust property", a notice of appeal was filed on his behalf, which stated as follows. With regard to conviction, the appellant argued that the court *a quo* erred or misdirected itself in one or more of the following ways: firstly, whether or not it relied heavily on unsafe evidence which did not E point to the guilt of the appellant; secondly, whether or not it relied on flouting of workplace procedures by the appellant as evidence of theft, the charge alleged by the State. With regard to sentence, the appellant queried whether it imposed a disproportionate and stiffer penalty without regard to the accused's personal circumstances, mitigation and contrition.

The respondent argued that the notice and grounds of appeal raised in respect F of conviction fell short of the requirements of r 22(1) of the Supreme Court (Magistrates Courts) (Criminal Appeals) Rules 1979 ("the Rules"), being vague and too generalised. The rules require a notice of appeal to be clear and specific and to indicate whether the misdirection alleged is one of fact or law. The appeal, it was argued, was not properly before the court. The appellant's counsel submitted that there was no need to G give further details because the notice of appeal stated clearly what the grounds of appeal were. He contended that the State had not suffered any prejudice as the grounds were amplified by appellant's heads of argument.

Held, that r 22(1) of the Rules provides that a notice of appeal should set out "clearly and specifically the grounds of the appeal". Failure to comply H renders the notice a nullity. In terms of r 47 of the Rules, if the notice is

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a nullity and the time for noting an appeal has lapsed, the right to appeal A must be deemed to have lapsed. Our criminal courts in practice do not strictly scrutinise grounds of appeal for compliance with the requirements of the Rules, and the Attorney-General's Office has, in the past, not paid particular attention to the format of grounds of appeal. Most grounds of appeal, though not complying with the Rules, have gone unchallenged B , resulting in litigants not adhering strictly to them.

Held, further, that the if the first ground, which averred that the magistrate relied on unsafe evidence to convict, was meant to challenge the magistrate's findings of fact, it did not specifically say so. A ground that the court *a quo* misdirected itself in that it heavily relied on unsafe evidence which did not point to the guilt of the appellant is too general. It lacks precise C detail of the points the appellant seeks to rely on. It is vague as it does not state whether the magistrate erred in law or fact. The second ground was also vague, and did not state whether the challenge was of law or fact.

Held, further, that the procedure governing the filing of notices of appeal is separate from that for heads of arguments. The two processes serve two different purposes and the processes are filed at different stages. Grounds of appeal are required at the initial stages of the appeal to inform all concerned of the appeal. Their purpose is to advise the trial magistrate of the points challenged on appeal. The magistrate's views and comments in turn are meant to assist the appeal court on the points challenged. It is difficult for a magistrate to make a meaningful response to an imprecise ground of appeal. The respondent, similarly, needs to be sufficiently informed of the points the appellant wishes to take on appeal so that the respondent is capable of making a meaningful response. The appeal court should also be adequately advised of points on which its decision is required. Heads of argument, on the other hand, serve a completely different purpose, that of identifying arguments in opposition to, or in support of, the appeal. It is inappropriate to file grounds of appeal that are vague on the premise that these will be bolstered up by the appellant's heads of argument.

The grounds of appeal were accordingly a nullity.

Cases cited

Kilian v Messenger of Court, Uitenhage 1980 (1) SA 808 (A)

R v Blom 1939 AD 188

R v Difford 1937 AD 370

R v Emerson & Ors 1957 R & N 743 (SR); 1958 (1) SA 442 (SR)

S v Hartlebury & Anor 1985 (1) ZLR 1 (H)

Zimba-dube J

S v Jack 1990 (2) ZLR 166 (S)

S v Machakasa S-106-89

S v Marange & Ors 1991 (1) ZLR 244 (S)

S v Masawi & Anor 1996 (2) ZLR 472 (S)

S v Mayberry HH-248-86

S v Mpofu (2) 1985 (1) ZLR 285 (H); 1985 (4) SA 322 (ZH)

R v N 1946 AD 1023

S v Ndlovu S-84-84

Legislation considered

Supreme Court (Magistrates Courts) (Criminal Appeals) Rules, 1979 (SI 504 of 1979), rr 22 & 47

Case information

M Kajokoto, for the appellant

E. Nyazamba, for the respondent

Judgment

ZIMBA-DUBE J: The appellant appeared before an Mvurwi magistrate facing a theft of trust property charge in terms of s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The State allegations were that the appellant received US$ 2 440 from his employer for purposes of paying wages for contract workers at Tel-One Mvurwi Depot. Instead of handing over the money to the intended beneficiaries, the appellant converted the money to his own use. The appellant was convicted and fined US$300 or six months' imprisonment.

Aggrieved by the conviction, the appellant appeals against both conviction and sentence. His grounds of appeal are as follows:

With regard to conviction:

F "The court *a quo* erred or misdirected itself in one or more of the following ways:

(a) whether or not it relied heavily on unsafe evidence which did not point to the guilt of the appellant;

(b) whether or not it relied on flouting of workplace procedures by the appellant as evidence of theft, the charge alleged by the State.

With regard to sentence:

G "Whether or not imposed a disproportionate and stiffer penalty without regard to the accused's personal circumstances, mitigation and contrition".

The respondent's counsel, Mr *Nyazamba,* raised a point *in limine* which he requested the court to deal with before proceeding to deal with the merits of the matter. He submitted that the notice and grounds of appeal raised in respect H of conviction fall short of the requirements of r 22(1) of the Supreme Court

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2011 (2) ZLR p420

Zimba-Dube J

(Magistrates Courts) (Criminal Appeals) Rules 1979 (hereinafter referred to A as "the Rules"). He submitted further that the appellant's grounds of appeal are vague and too generalised. The Rules require a notice of appeal to be clear and specific and to indicate whether the misdirection alleged is one of fact or of law. He urged the court to dismiss the appeal as it is not properly before the court, is a nullity and on the basis that there is no appeal before B the court. Mr *Nyagamba* in his response submitted that there was no need to give further details because the notice of appeal states clearly what the grounds of appeal are. He maintained that the grounds of appeal state what was not canvassed by the trial court and that the substance of the appellant's appeal was that the State had failed to prove its case beyond a reasonable doubt. He contended that the State has not suffered any prejudice as the C grounds are amplified by appellant's heads of argument.

The court directed the parties to proceed and argue the matter on the merits and indicated that its ruling will be encompassed in the main judgment.

Rule 22(1) provides that a notice of appeal should set out "clearly and specifically the grounds of the appeal". Failure to comply renders the notice D a nullity. In terms of r 47, if the notice is a nullity and the time for noting an appeal has lapsed, the right to appeal must be deemed to have lapsed.? Our criminal courts in practice do not strictly scrutinise grounds of appeal for compliance with the requirements of r 22(1). The Attorney-General's Office has, in the past, not paid particular attention to the format of grounds of appeal and most grounds of appeal though not complying with the rules, have gone E unchallenged resulting in litigants not adhering strictly to the rule. There is need to comply with the rules of court. There are a number of cases which have emphasised the need to comply with this rule as well as set out the requirements of the rule. In *Kilian* v *Geregsbode Uitenhage* 1980 (1) SA 808 (A), the court set out the requirements of a notice of appeal and held that F

"a notice of appeal requires that the points upon which an appellant relies be set out in precise detail so that the respondent can know the points upon which a decision is required. The magistrate must be properly informed [of the grounds upon which the appeal is based]."

Grounds of appeal should be clearly stated and should not be in general G form. As enunciated in *S* v *Jack* 1990 (2) ZLR 166 (S), a notice without meaningful grounds of appeal is not a notice of appeal, and if the time within which to note an appeal has lapsed, it cannot later be amended and the right to appeal falls away.

The first ground avers that the trial magistrate relied on unsafe evidence to convict. If the ground is meant to challenge the magistrate's findings H

2011 (2) ZLR p421

Zimba-Dube J

A of fact, it is not specifically so stated. In *R* v *Emerson & Ors* 1957 R & N 743 (SR); 1958 (1) SA 442 (SR) at 442, Beadle J said the following approach was emphasised:

"… if the ground of appeal is that the magistrate erred in law this should be stated, and the particular mistake of law which the magistrate is alleged to have made should be set out. If however, the ground of appeal is that the magistrate erred B on the facts this should be stated, and the appellant should go further and state whether the magistrate erred in accepting the evidence led or in regarding that evidence as sufficient to prove the offence".

A ground that the court *a quo* misdirected itself in that it relied heavily on unsafe evidence which did not point to the guilt of the appellant is too general. It lacks precise detail of the points the appellant seeks to rely on. C It is vague as it does not state whether the magistrate erred in law or fact. The ground seems to attack the magistrate's findings of fact. The appellant is not clear whether the magistrate erred in accepting the evidence led or in regarding the evidence as sufficient to prove the offence. That ground was not adequately canvassed.

D The second ground raises the query whether or not the court relied on flouting of work place procedures to prove the offence of theft. The appellant's style is quite interesting. Instead of stating his ground of appeal, he poses a general question. Furthermore, that question is vague and does not state whether the challenge is of law or fact. Both grounds of appeal are superficial and empty and do not comply with the rules.

E The procedure governing filing of notices of appeal is a procedure separate from that for heads of arguments. The two processes serve two different purposes and the processes are filed at different stages. Grounds of appeal are required at the initial stages of the appeal to inform stakeholders of the appeal. Heads of argument, on the other hand, serve a completely different F purpose of identifying the heads of argument in opposition to or in support of the appeal. It is inappropriate to file grounds of appeal that are vague on the premise that these will be bolstered by the appellant's heads of argument as that objective is not achievable. Filing of grounds and a notice of appeal is not a mere formality. The grounds should therefore be precise, clear and unambiguous at the stage at which they are filed. Appellant's argument that G the defects in the notice of appeal are cured by the heads of argument does not therefore find favour with this court.

This court cannot overemphasize the need for grounds of appeal to be always clear and precise. They should set out in detail the points upon which the appellant relies. They serve a purpose which is to advise the trial magistrate H of the points challenged on appeal. The magistrate's views and comments

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in turn are meant to assist the appeal court on the points challenged. It is A difficult for a trial magistrate who is expected to reply to an imprecise ground of appeal to make a meaningful response. The respondent should also be sufficiently informed of the requisite points the appellant wishes to take on appeal so that the respondent is capable of making a meaningful response. The appeal court on the other hand should be adequately advised on points B over which its decision is required. Looking at the contents of the grounds and the format in which they are in, this court is at a loss as to the basis of this appeal and the points over which its decision is required. It is undesirable to pose questions in a notice of appeal whose purpose it is to identify issues and clearly define them for purposes of the appeal.

A notice of appeal which does not comply with the rule of law, at law is a C nullity. The present grounds of appeal are a nullity as they fall far short of the requirements of r 22. The application succeeds.

Notwithstanding that the grounds of appeal are a nullity, we would still dismiss the appeal on the merits for the following reasons. Mr *Nyazamba* D supported both conviction and sentence. Mr *Kajokoto* submitted that it was illogical for the court to conclude that the appellant stole the money when there is someone else who had keys to where the money was left and there is evidence that he entered that room searching for pins; and that the inference drawn by the trial court was not consistent with all proved facts.

The trial magistrate convicted the appellant after finding that the appellant E failed to follow procedures and that his design was to steal the money. That he failed to give the money to his assistant or put the money in a lockable cabinet and instead put it in an unlocked drawer. That he failed to make a report and only did so on Thursday after being prodded to report by his co-accused. The magistrate found that the only reasonable inference to be F drawn is that the appellant misappropriated the money. That the possibility that anyone else other than accused stole the money is very remote. That his conduct, when he received the money and upon discovery of the theft, shows that he stole the money. The magistrate convicted the appellant on the basis of circumstantial evidence and drew the inference that he stole the G money. The trial court considered, and had regard to, all the circumstances of the case, as well as the appellant's explanation for his failure to secure the money and to report the theft soon after discovering the

offence, before coming to the conclusion it did. What this court is being called upon to decide is whether the inference drawn by the court *a quo* was the only reasonable inference to be drawn from the proven facts. H

2011 (2) ZLR p423

Zimba-Dube J

A It is trite that where a judicial officer convicts an offender on the basis of a finding of circumstantial evidence, there must not be other co-existing circumstances which would weaken or destroy the inference sought to be drawn. The inference drawn must be the only reasonable inference that can be drawn from the proved set of circumstances. See *S* v *Marange & Ors* 1991 (1) ZLR 244 (S); *S* v *Hartlebury & Anor* 1985 (1) ZLR 1 (H); *S* v B *Machakasa* S-106-89, for that approach.

The court is required to have regard to all the facts and the probabilities of the matter and as Watermeyer JA put it in *R* v *Blom* 1939 AD 188 at 202-203:

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored: C
>
> (i) The inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.
>
> (ii) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct".

D The appellant gave his own account of the events leading to the loss of the money. Whilst there is no onus on an appellant to show his innocence, the court is still required to be satisfied that his explanation was improbable and that it was false. As put in *R* v *Difford* 1937 AD 370 at 373.

> "… No onus rests on the accused to convince the court of the truth of any E explanation which he gives. If that explanation is probable, the court is not entitled to convict unless satisfied not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal".

See also *R* v *N* 1946 AD 1023.

The magistrate considered both the State version and appellant's explanation. F The court considered cumulatively all the evidence available. There is sufficient evidence on record to support the conviction. The appellant violated the standing procedures for securing money. He kept money in a drawer instead of a locker in his office. He gave the keys to another person and failed to tell him that there was some money in the drawer. He went away for four days without paying the wages, when he was required to ask G his second-in-charge to take over the assignment if he could not perform it himself. He was aware that the contract workers required to be paid before the holiday break. Upon his return, he spent a day without asking for the keys and his explanation is that the person with the keys did not have them close by. When he subsequently entered the office at 8 am, he says that he did not H notice that the money was missing until three hours later. After discovering

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2011 (2) ZLR p424

Zimba-Dube J

that the money was missing, he did not make an immediate report. He did A not inform his second-in-charge of the theft and yet he had a meeting with him the same day. His explanation is that he had not decided to tell him. When asked in cross-examination why he did not later phone him, he gave no response. He failed to report until he was prodded by a colleague to report the theft. He failed to report the theft the same day, only to report B the next day. His explanation that he did not phone him because he had not decided to tell him shows that he had something to hide. The appellant's explanation for failing to secure the money and to report the theft on time is improbable, fanciful and unreasonable .The only reasonable inference that can be drawn is that he stole the money. His conduct is not consistent with a person who had had money stolen from him but that of someone who stole C the money and had something to hide. The trial court cannot be faulted for the approach it adopted.

Having found no misdirection on the part of the trial court, this court finds no basis for interfering with the lower court's findings. As remarked by Korsah JA in *S* v *Masawi & Anor* 1996 (2) ZLR 472 (S) commenting on D the findings of a lower court:

> "If these findings have support in the facts established and in reasonable inferences, they are conclusive on appeal. After conviction a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there substantial evidence to support it".

The appellant challenges the sentence imposed, on the basis that it is E unreasonably stiff. The trial magistrate, in considering the appropriate sentence, considered that the appellant was a first offender with family responsibilities; that he has since reimbursed the complainant. The court also considered that the appellant's moral blameworthiness is very high. It considered imposing both a custodial sentence and community service and F decided against such sentences.

The appellant stands convicted of a very serious offence. Theft of trust funds is viewed in a very serious light. He stole from his employer and breached the trust entrusted in him. He cannot expect to be treated leniently. As put in *S* v *Ndlovu* S-84-84 *per* Gubbay JA at 99:

> "the offence involved a serious breach of trust placed in the appellant by his G employer … The regrettable prevalence of theft by employees occupying positions of trust … has resulted in the court issuing stern warnings that such offenders cannot expect to be treated leniently".

The aggravating features of this case far outweigh the mitigating features. The magistrate properly considered that the appellant has since compensated the complainant. The court was not expected to place too much weight on H

2011 (2) ZLR p425

Zimba-Dube J

A the mitigating effect of restitution as the appellant was convicted of a very serious offence and his moral blameworthiness is very high. He stole from his employer and he did so out of greed rather than need, as he was gainfully employed. Our courts view seriously the offence of theft of trust funds.

As put in *S* v *Mayberry* HH-248-86:

> B "In cases involving dishonesty a willingness or ability to make restitution is always a mitigating factor. Generally speaking, it will be given considerable weight especially where the accused is a first offender. The judicial officer should try to ensure that the complainant is compensated for his pecuniary loss at the expense of the accused, but a balance must be struck with the seriousness of the offence …"

C Similar sentiments were expressed in *S* v *Mpofu* 1985 (1) ZLR 285 (H); 1985 (4) SA 322 (ZH).

The magistrate properly considered that the appellant was gainfully employed and stole out of greed rather than need. The applicant stands convicted of a very serious and prevalent offence and he stole from his employer, thereby breaching the trust entrusted in him. His moral blameworthiness is very high.

D What is in the appellant's favour is the fact that he is a first offender and, ordinarily, all efforts should be made to keep first offenders out of jail.

A suspended sentence would not have met the justice of the case. A caution and discharge would also not have been appropriate, regard being had to the aggravating features of this case. The appellant is lucky that he got away E with a fine. A short and stiff custodial sentence would, in my view, have met the justice of the case. The appellant is lucky that he got away with a fine. If the trial court erred, it erred on the side of leniency.

In the result, the appeal is without merit and is dismissed.

F BHUNU J concurred.

Kajokoto & Co, appellant's legal practitioners

G *Attorney-General's Office*, respondent's legal practitioners

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Source:

CHIDAWU & ORS v SHAH & ORS 2011 (2) ZLR 426 (H)

Citation	2011 (2) ZLR 426 (H)
Case No	Judgment No. HH-108-12
Court	High Court, Harare
Judge	Uchena J
Heard	15 November 2011; *CAV*
Judgment	18 November 2011
Counsel	*H Zhou,* for the applicants *L Uriri,* for the first respondent Mrs *B Mtetwa,* for the second and third respondents *A B Chinake*, for the fifth respondent
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Practice and procedure – *application – urgent – certificate of urgency – duty of legal practitioner – must personally have applied his mind thereto and honestly believe the matter to be urgent – certificate cannot be uninformed endorsement of another legal practitioner's opinion – delay in bringing an urgent application – explanation for delay required in* D *supporting affidavit*

Headnote

For the purposes of r 244 of the High Court Rules 1971 (RGN 1047 of 1971), an urgent chamber application can only properly be before the court or be heard on an urgent basis, if the applicant is legally represented, if a E legal practitioner files a certificate certifying its urgency. If the certificate filed is not the product of the legal practitioner who purports to have applied his mind thereto, it is patently inadequate, to the extent of its not being a valid certificate. The case cannot be heard on an urgent basis and will, in fact, be improperly before the court. It will be similar to a case where a legally represented applicant comes to court without a legal practitioner's certificate of urgency. Such an application would be improperly before the court and should be dismissed.

A certificate of urgency must be prepared by a legal practitioner after personally carefully assessing the urgency of the application. It should be based on his or her honour. It should not be an uninformed endorsement of G another legal practitioner's previous opinion.

"What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows, that the H

Uchena J

A certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay" (*dicta per* Chatikobo J in *Kuvarega* v *Registrar-*

General & Anor 1998 (1) ZLR 188 (H) at 193 followed).

Cases cited B

General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd 1998 (2) ZLR 301 (H)

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 242(2) & 244

Case information

C *H Zhou,* for the applicants

L Uriri, for the first respondent

Mrs *B Mtetwa,* for the second and third respondents

A B Chinake, for the fifth respondent

Judgment

D **UCHENA J**: The first applicant borrowed money from the first respondent, to whom he surrendered Pelhams shares belonging to the second to the fourth applicants as security for the loan. He gave out the shares in a negotiable form. The applicants had signed share transfer forms, making it possible for E the first respondent to transfer them to himself or a third party.

The second to the fourth applicants are duly registered companies in which the first applicant has interests and are holders of the shares in dispute. They are respectively holders of 171 037 346, 100 000 000 and 83 666 586 Pelhams shares.

F A dispute later arose between the applicants and the first respondent over the loan, leading to the first respondent threatening to sell the shares. He threatened to sell them on two occasions. On each occasion the applicants threatened to institute litigation to stop the threatened sale but did not do so. The first respondent eventually sold the shares to the second respondent.

G The third respondent is the broker who facilitated the sale of the shares between the first respondent and the second respondent.

The fourth respondent is the Zimbabwe Stock Exchange on whose bourse the shares in dispute were sold and it is the fourth respondent who can reverse the sale if the applicant's application succeeds.

H The fifth respondent is the share transfer secretary for Pelhams Ltd.

Uchena J

The applicants seek an interim order restraining the fifth respondent or any A other person from transferring the second to the fourth applicants' Pelhams shares on the instructions of the first and the second respondents.

The first to the fourth respondents opposed the application. Mr *Uriri* for the first respondent and Mrs *Mutetwa* for the second and thirdrespondents raised preliminary issues on the validity of the applicant's certificate of urgency B , and absence of urgency. They submitted that the certificate of urgency was not the product of the deponent's independent opinion based on her personal and honest opinion on the urgency of the application. They forcefully argued that Tecla Mapota who prepared the certificate of urgency simply copied most of the paragraphs in her certificate of urgency from the certificate of urgency which had been previously prepared by Sarudzai Njelele for the applicant's C earlier application which was dismissed by Makoni J. Mr C*hinake* for the fourth respondent agreed with them.

A certificate of urgency must be prepared by a legal practitioner after personally carefully assessing the urgency of the application. It should be based on his or her honour. It should not be an uninformed endorsement of D another legal practitioner's previous opinion.

Mr *Uriri* in his submissions closely analysed Tecla Mapota's certificate of urgency against that previously prepared for the applicant's previous application by Sarudzai Njelele. The similarities in most paragraphs were not disputed by Mr *Zhou* for the applicants. In some paragraphs there is no E difference between Mapota's and Njelele's certificates. There are identical paragraphs tending to show that Mapota simply copied them from Njelele's certificate. Mr *Uriri* demonstrated that in some paragraphs the wording sentences and punctuations are identical.

Mr *Zhou* for the applicant responded that this was due to there being a standard way of doing things among legal practitioners. Mr *Uriri* however argued that F it is demonstrably clear that Mapota did not apply her mind to the facts of the case before she certified that the application was urgent. The deficiencies are extensively dealt with from pp 2 to 5 of the second respondent's opposing affidavit. In para 3.1(a) of the second respondent's opposing affidavit, it is pointed out that the loan should have been repaid by 10 March 2011, after G which the shares, which had been tendered together with signed share transfer forms in negotiable form, could have been transferred to the first respondent or a third party. This means the shares had been exposed to disposal by the first respondent from that date, yet no action was taken to stop the possible sale of the shares till 20 October 2011. It was pointed out that Mapota did not deal with or explain that delay in her certificate of urgency, proving that H

Uchena J

A she did not apply her mind to the facts of this application before certifying the application as meriting the urgent attention of this court. I accept that this should have been explained and that failure to do so shows a failure by Mapota to apply her mind to the facts of this application.

In para 3.1(b) and (c) the second respondent questions the applicant's failure B to institute litigation when the two notices of sale of the shares were given by the first respondent. Again Miss Mapota did not deal with that issue in her certificate of urgency, again demonstrating her failure to deal with the facts of the application before certifying it as urgent.

In paras 3.1(e) and (g) the second respondent questions why the applicants did not communicate with second respondent on realising that it was buying the C shares. The second respondent was only engaged through these proceedings eighteen days after the applicants became aware of the sale of the shares to it. Again Mapota did not deal with this issue in her certificate of urgency. She should have explained why the applicants did not engage the purchaser of the shares if they were treating this matter as one of urgency. She also D did not explain the delay between the application which was dismissed by Makoni J and this application, in spite of it being common cause that the applicant's attempt to amend that application on 25 October 2011, to deal with the issues now being dealt with in this application, was dismissed. This means from that date the applicants where aware of the need to make this application but did not do so until 8 November 2011. Mapota should, if she E was applying her mind to the urgency of this matter, have explained this delay.

The above demonstrates Mapota's lack of attention to the facts of this case before certifying this application as one requiring the urgent attention of this court. The need to explain delays was dealt with by Chatikobo J in the case of *Kuvarega* v *Registrar-General* & *Anor* 1998 (1) ZLR 188 (H) at p F 193E-G where he said:

> "The certificate of urgency does not explain why no action was taken until the very last working day before the election began. No explanation was given about the delay. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from G action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows, that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay"

As already said, Mapota did not apply her mind to the facts of this case before certifying it as urgent. That affects the validity of the certificate of urgency. H A certificate of urgency can only be valid and of assistance to the court if it

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Uchena J

is the legal practitioner's honest opinion of the urgency of the case derived A from an analysis of the facts of the case.

In *General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 at 302E-303B Gillespie J, commenting on this issue, said:

> "Where the rule relating to a certificate of urgency requires a legal practitioner B to state his own belief in the urgency of the matter that invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable conscientiously to concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. The reason behind this is that the court is only prepared to act urgently on a matter where a legal practitioner C is involved if a legal practitioner is prepared to give his assurance that such treatment is required.
>
> It is, therefore, an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a D lawyer could not reasonably entertain the belief that he professes in the urgency of a matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency".

In this case, it is clear that the legal practitioner did not apply her mind to the facts of the case, as demonstrated by her not dealing with issues which E could have confirmed the urgency or lack of it in this case. This is further demonstrated by the apparent reliance on Njelele's certificate, which she seems to have copied without seriously applying her own mind to the facts of this case and its having progressed further after the dismissal of the applicant's application, for which Njelele had given her certificate.

An urgent chamber application can only be properly before the court or be F heard on an urgent basis if the applicant is legally represented, if a legal practitioner files a certificate certifying its urgency. If the certificate filed is not the product of the legal practitioner who purports to have applied his mind thereto, it is patently inadequate, to the extent of its not being a valid certificate. The case cannot be heard on an urgent basis, and will in fact G be improperly before the court. It will be similar to a case where a legally represented applicant comes to court without a legal practitioner's certificate of urgency. Such an application would be improperly before the court, and must be dismissed.

Rule 244 of the High Court rules provides for the certificate of urgency as follows: H

2011 (2) ZLR p431

Uchena J

> A "Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith."

In terms of r 244, it is only when such an application is accompanied by a "certificate in terms of paragraph (b) of subrule (2) of rule 242 to the effect that B the matter is urgent, giving reasons for its urgency", that "the registrar shall immediately submit it to a judge, who shall consider the papers forthwith".

In the absence of a certificate of urgency, the registrar is not obliged to submit to a judge an application in which the applicant is legally represented. A judge is also not expected to consider an application where the applicant C is legally represented, if the application is not accompanied by a certificate of urgency or a valid certificate of urgency. A judge can, in considering the validity of a certificate of urgency, consider the reasons given in the certificate of urgency to determine whether or not the legal practitioner has applied his or her mind in preparing the certificate.

Having found that Mapota's certificate of urgency is a product of copying D and pasting and is not one in which she applied her mind, I cannot act on it. The applicant's application is therefore dismissed with costs.

Honey & Blanckenberg, applicant's legal practitioners

Atherstone & Cook, first respondent's legal practitioners

E Mutetwa & Nyambirai, second and third respondent's legal practitioners

Kantor & Immerman, fourth respondent's legal practitioners

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Source:
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S v NYARUGWE & ORS 2011 (2) ZLR 432 (H)

Citation	2011 (2) ZLR 432 (H)
Case No	Judgment No HH-287-11
Court	High Court, Harare
Judge	Patel J
Heard	22 November 2011
Judgment	22 November 2011
Counsel	Details not Supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal law – *statutory offences – failure to pay maintenance – no mandatory* C *sentence of imprisonment provided – court may suspend all or part of sentence imposed*

Family law – *maintenance – failure to pay – conviction for – no mandatory sentence of imprisonment provided – court may suspend all or part of sentence imposed*

Headnote

When a person who has been ordered to pay maintenance fails to do so and D is prosecuted for contravening s 23(1) of the Maintenance Act [*Chapter 5:09*], there is nothing to preclude the convicting court from suspending all or any portion of the term of imprisonment imposed, on condition that the accused makes all payments due in terms of the maintenance order, including any payments which are in arrears, by a fixed date. E This is borne out by the wording of paras (a) and (b) of s 23(3), which specifically envisage the possibility of the accused being convicted and not necessarily being sentenced to an effective custodial term. The same possibility emerges from the opening words of s 25(1). Section 23 does not contemplate any mandatory period of imprisonment, and affords the requisite discretion, where this is deemed appropriate, to allow for F the payment of arrears by a fixed date, through a suspended term of imprisonment. Such a construction does not defeat the purpose of the section. On the contrary, it accords with its application in circumstances where compliance with the maintenance order requires that the accused remain out of custody in order to fulfil his maintenance obligations. G Obviously, a suspended sentence may not be appropriate in the case of a repeat offender who is prosecuted and convicted under s 23(3). At any rate, each case must be considered on its own particular merits.

Legislation considered

Maintenance Act [*Chapter 5:09*], s 23(1), (2) & (3); s 25(1) H

2011 (2) ZLR p433

Patel J

Judgment

A **PATEL J**: The scrutinising regional magistrate has referred these three matters to the registrar for guidance. Although they were dealt with by two different magistrates, they involve similar facts and circumstances.

The accused in all three cases were convicted on their pleas of guilty to charges of failing to pay maintenance in contravention of s 23 of the Maintenance Act [*Chapter 5:09*]. In each case, the accused defaulted on his B maintenance obligations in terms of the relevant maintenance order issued by the magistrates civil court. And in each case, the accused was sentenced to a term of imprisonment suspended on condition that he complies with the maintenance order and pays the maintenance arrears by a specified date.

The scrutinising regional magistrate queried the appropriateness of the C sentences imposed. He is of the view that allowing a maintenance defaulter time to pay his arrears defeats the whole purpose of s 23 and is not permitted by that provision. Instead, the accused should be imprisoned and can only be released in terms of s 25 of the Act upon payment of the arrears or if he makes arrangements for the payment of all such arrears. The trial magistrates take a different view of s 23. They hold that this provision is discretionary D in nature and permits the convicting court to allow the defaulter time to pay his maintenance arrears.

Sections 23 and 25 of the Maintenance Act, in their relevant portions, provide as follows:

> "23 (1) Subject to subsection (4), any person against whom an order to which E this section applies has been made who fails to make any particular payment in terms of the order shall be guilty of an offence and liable to imprisonment for a period not exceeding one year.
>
> (2) If a person is convicted of the offence referred to in subsection (1), the court may, in addition to any penalty which it may impose, order that all payments in terms of the order, including any payments which are in arrears, shall be made F through the clerk of the appropriate maintenance court of the province or district where the convicted person resides.
>
> (3) Subject to subsection (4), a person who has been convicted or acquitted of an offence referred to in subsection (1) and who fails –
>
> (a) within two months after such conviction or acquittal; or
>
> (b) if upon such conviction he was sentenced to and has undergone imprisonment, G other than periodical imprisonment, within two months after his release from such imprisonment;
>
> to make payments in terms of the order shall be liable to be prosecuted again under subsection (1) and his previous conviction or acquittal shall not be a bar to his conviction on the later charge."
>
> "25 (1) Where a person who has been imprisoned in respect of a conviction H by a magistrates court for an offence which involves the failure to comply

2011 (2) ZLR p434

Patel J

> with an order for the payment of maintenance pays all arrears of maintenance A outstanding or makes arrangements for the payment of all such arrears, he may make application in writing to a magistrate of the court which convicted him for his release from prison stating that all such arrears have been paid or, as the case may be, the details of the arrangements made for the payment of all such arrears."

Reading the provisions of s 23(1) and 23(2) together, it appears to me that there is nothing to preclude the convicting court from suspending all or any B portion of the term of imprisonment imposed, on condition that the accused makes all payments due in terms of the maintenance order, including any payments which are in arrears, by a fixed date. This is borne out by the wording of paras (a) and (b) of s 23(3) which specifically envisage the possibility of the accused being convicted and not necessarily being sentenced to an C effective custodial term. The same possibility emerges from the opening words of s 25(1).

I therefore take the view that s 23 of the Act does not contemplate any mandatory period of imprisonment, and affords the requisite discretion, where this is deemed appropriate, to allow for the payment of arrears by a fixed date, through a suspended term of imprisonment. Such

construction does not D defeat the purpose of s 23. On the contrary, it accords with its application in circumstances where compliance with the maintenance order requires that the accused remain out of custody in order to fulfil his maintenance obligations. Obviously, a suspended sentence may not be appropriate in the case of a repeat offender who is prosecuted and convicted under s 23(3). At any rate, E each case must be considered on its own particular merits.

Kudya J concurs. F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/SAMABAWAMEDZA v CHIYANGWA 2011 (2) ZLR 435 (H)

SAMABAWAMEDZA v CHIYANGWA 2011 (2) ZLR 435 (H)

Citation	2011 (2) ZLR 435 (H)
Case No	Judgment No. HH-277-11
Court	High Court, Harare
Judge	Gowora J
Heard	23 November 2011
Judgment	23 November 2011
Counsel	*I E G Musimbe*, for the applicant *H Zhou*, as *amicus curiae*
Case Type	Application for rescission of judgment
Annotations	No case annotations to date

Flynote

C **Family law** – *husband and wife – divorce – decree granted in default – whether may be set aside on normal grounds for rescission of judgment*

Practice and procedure – *rescission – judgment capable of being rescinded – decree of divorce – whether capable of being rescinded*

Headnote

D *Semble*, that a decree of divorce is capable of rescission. Section 9 of the Matrimonial Causes Act [*Chapter 5:09*] grants to an appropriate court the power, on good cause shown, the power to vary, suspend or rescind an order, issued in terms of s 7 of the Act, in relation to the matrimonial assets of the parties as or appropriate maintenance in respect of the minor children of the union. The Act itself makes no similar provision about E the decree of divorce itself. While there is no authority in point within this jurisdiction regarding the rescission of a decree of divorce granted in default, in a number of cases in England and South Africa the courts have granted applications for rescission of decrees for divorce. Their approach has been a judgment for a decree of divorce is a judgment like F any other and that, in the event a party had been

granted such judgment in default, there is nothing in the rules precluding the court from rescinding such judgment on the usual grounds.

Cases referred to

Gopalakirstan v Ambaleegai 1949 (3) SA 1070 (D)

G Ex p *Kruger* 1982 (4) SA 411 (SE)

Munro v Central Mini Cabs S-163-95

Mutebwa v Mutebwa 2001 (2) SA 193 (Tk)

H *Rowe v Rowe* 1997 (4) SA 160 (SCA)

2011 (2) ZLR p436

Gowora J

Legislation considered A

Matrimonial Causes Act [*Chapter 5:09*], ss 7 & 9

Case information

I E G Musimbe, for the applicant

H Zhou, as *amicus curiae*

Judgment

GOWORA J: After hearing this matter I issued an order in terms of the draft. B The record was then mislaid resulting in the applicant constructing a dummy file so that an order could be issued. The respondent, despite having been served with the application and having entered opposition, failed to appear at the hearing. In view of the relief being sought, I found myself unable to grant an order in the absence of argument on the legality of the order being C sought. I therefore sought the assistance of Mr *Zhou* specifically to advise the court whether or not the form of relief being sought in the application was competent. I am profoundly grateful to counsel for having agreed to file heads of argument and appear in support thereof.

The applicant and the respondent were formerly husband and wife. On 2 D November 2006, under Case No. HC 8631/03 this court granted the respondent a decree of divorce and ancillary relief. The order was granted in default of the applicant herein. On 11 May 2007 the applicant filed this application for an order setting aside the judgment granted under HC 8631/03. The facts surrounding the application are discussed hereunder.

The applicant avers in his founding affidavit that the default judgment should E be "cancelled". He avers that he has a *bona fide* defence to the claims in the divorce action and further that he had a reasonable explanation as to why the default judgment was entered against him.

The applicant states that he had instructed a firm of legal practitioners to represent him in the divorce action. As a result, he was under the impression F that those legal practitioners had conduct of his case and he was awaiting a trial date in respect of the same. He was at the time based in South Africa and had appointed one John Nhema to deal with the legal practitioners on his behalf. He was as a result not aware that the firm of legal practitioners had renounced agency. What he was made to understand was that they had G informed his agent that the matter would come up for trial in September 2006 and that they therefore needed cover for their fees for the trial.

He stated that his suspicions about the legal practitioners' conduct of his case were raised when an estate agent approached his agent enquiring about the sale of the parties' matrimonial home. He had not given instructions for the house to be sold and was therefore surprised. It then transpired that the H

2011 (2) ZLR p437

Gowora J

A house was being sold consequent to an order of this court. Enquiries with the legal practitioners did not yield any result as they professed ignorance over the whole issue. He then requested the legal

practitioners in writing to renounce agency. It was only after he received his file from them that he realised that they had renounced agency on 14 February 2005 and that the court order had been issued on 2 November 2006. He discovered that B the matter had reached the stage of pre-trial conference but that no papers relating to the pre-trial conference had been served on him or his agent. He contended that if he had been made aware of the renunciation of agency he would have instructed other legal practitioners to handle the divorce on his behalf. He had all along shown an intention to defend the proceedings as C evident from the fact that the matter had reached pre-trial conference stage.

As regards his defence to the claim, he stated that he agreed that the marriage had broken down irretrievably. He was of the view that it could not be salvaged. However, as regards the distribution of the assets of the parties, his view was that there were two immovable properties. There was a house in Cranborne in respect of which he said he had contributed about 95 per cent D towards the acquisition of the stand. He had then solely been responsible for paying for the construction of the house built thereon. The respondent had not contributed a single cent thereto. He therefore questioned the respondent's claim to 50 per cent of the value of that property. The second property was a stand in Adore Gold Norton. He stated that he had purchased this stand after E the parties had separated and the respondent had not contributed towards its purchase. He stated that initially the parties had purchased a stand in the same suburb which was repossessed due to non payment but that the one being claimed by the respondent had nothing to do with the parties union as it was acquired after they stopped living together. It was for these reasons that he argued that the court should exercise its discretion in his favour and F grant an order rescinding the default judgment against him.

The applicant's appointed agent, John Nhema, has also deposed to an affidavit. He confirms that the applicant had appointed a firm of legal practitioners and that there was no occasion when he was advised that they had renounced agency. In 2007 he was approached by an estate agent who indicated that the G applicant's house was being sold. He then sought clarification from the legal practitioners on the issue who professed ignorance and said they would check with the registrar's office. He was advised by the applicant to collect his file and it was only on perusing it that he noticed that they had renounced agency in February 2005. The notice of renunciation had not been served upon him. He noticed further that the matter had reached pre-trial conference stage but H papers to do with the pre-trial conference had not been served upon him.

2011 (2) ZLR p438

Gowora J

The respondent had filed papers in opposition of the application but despite A being served with a notice of set down she failed to appear. The matter therefore had to be decided in default of her appearance. As the respondent did not appear at the hearing, I will not determine the issue of good and sufficient cause as there is no opposition before me on that aspect. I will confine myself to the issue as whether or not a decree of divorce is capable B of rescission.

Mr *Musimbe* submitted that in terms of r 63 of the High Court Rules this court has the power to set aside a judgment given in default. He argued that a judgment in this context would include an order for divorce given in default. I have not been referred to an authority in this jurisdiction where this court has considered an application for the rescission of a decree of divorce. Mr C *Musimbe* also made reference to the provisions of s 9 of the Matrimonial Causes Act [*Chapter 5:13*]. The section reads as follows:

> "Without prejudice to the Maintenance Act [*Chapter 5*:*09*], an appropriate court may, on good cause shown, vary, suspend or rescind an order made in terms of section seven and subsections (2), (3), and (4) of that section shall apply, *mutat* D *is mutandis*, in respect of any such variation, suspension or rescission."

Section 7 of the Matrimonial Causes Act is the section in terms of which the court is empowered to make orders in relation to the matrimonial assets of the parties as well determining appropriate maintenance in respect of the minor children of the union. Section 7 of the Act is restricted to the division of the assets that form the matrimonial estate of the parties, it does not deal E with the dissolution of the union. Section 4 provides for the grounds upon which an appropriate court may grant a decree of divorce. Sections 5 and 6 provide the appropriate court with the legal basis for the dissolution of the unions. When all these provisions are read together it becomes clear that only orders relating to the distribution of the matrimonial assets are susceptible to rescission. I can therefore perceive no impediment to this court entertaining F an application for rescission of a judgment in respect of divorce proceedings. Section 9 of the Matrimonial Causes Act grants to an

appropriate court the power, on good cause shown, the power to vary, suspend or rescind an order issued in terms of s 7 of the Act.

The applicant does not seek the setting aside of the decree of divorce itself. G As the proceedings are to all intents unopposed by the respondent, it does not seem appropriate that I should embark upon the merits or otherwise of an application to set aside the decree of divorce. Mr *Musimbe* made reference to *Rowe* v *Rowe* 1997 (4) SA 160 (SCA). In that case the court accepted the principle that a decree of divorce, where it was induced by fraud could be rescinded. In Ex p *Kruger* 1982 (4) SA 411 (SE) the court therein accepted H

Gowora J

A the principle that an order for divorce granted on the premise that the husband had deserted his wife when in fact he was deceased could be set aside.

Mr *Zhou* also accepts the principle that a decree of divorce granted in default, or in certain restricted circumstances by consent, is capable of rescission, variation or suspension. He also accepts that there is no authority in point B within this jurisdiction regarding the rescission of a decree of divorce granted in default. He has cited a number of authorities in England and South Africa where courts have granted applications for rescission of decrees for divorce.

In *Gopalakirstan* v *Ambaleegai* 1949 (3) SA 1070 (D) Selke J found that a judgment for a decree of divorce was a judgment like any other and that in C the event a party had been granted such judgment in default there was nothing in the rules precluding the court from rescinding such judgment on the usual grounds. In *Mutebwa* v *Mutebwa & Anor* 2001 (2) SA 193 (Tk) the court had granted a divorce in default based on a return from the Deputy Sheriff that the summons had been served on the applicant personally. The applicant had never received the summons. The decree of divorce was rescinded on D the ground that it had been erroneously granted. In view of the fact that the issue of the default or reasons behind the default judgment have not been argued it is not necessary that I debate the circumstances under which this jurisdiction may set aside a decree of divorce granted in the absence of the party seeking its rescission. It is only pertinent to note that it is relief that is E precluded and may be available.

In casu, the applicant accepts that the marriage has broken down irretrievably and therefore the decree of divorce itself need not be interfered with. What is before me therefore is a partial rescission of the order of 2 November 2006. In *Munro* v *Central Mini Cabs* S-163-95 the Supreme Court upheld F the principle of partial rescission of an order of this court.

It is accepted that this court enjoys wide discretionary powers when one considers the ambit of good and sufficient cause. In this case, I cannot determine on the merits whether or not the applicant has shown good and sufficient cause for the default judgment to be set aside in the restricted sense. G The respondent has chosen not to appear and the application is to all intents and purposes unopposed. The applicant does not wish to have the order in respect of custody and maintenance set aside. My order will therefore be restricted to the proprietary part of the order granted on 2 November 2006. In the premises an order will be issued to the following effect:

H IT IS ORDERED AS FOLLOWS:

Gowora J

1. Paragraph 5 of the order of this court under case number HC 8631/03, A relating to the division of the immovable properties of the parties herein, be and is hereby set aside.
2. The applicant shall bear the costs of this application.

I E G Musimbe, applicant's legal practitioners B

Mbidzo, Muchadehama and Makoni, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/MAYISWA v MASTER & ANOR 2011 (2) ZLR 441 (H)

MAYISWA v MASTER & ANOR 2011 (2) ZLR 441 (H)

Citation	2011 (2) ZLR 441 (H)
Case No	Judgment No. HH-278-11
Court	High Court, Harare
Judge	Gowora J
Heard	12 November 2010; *CAV*
Judgment	23 November 2011
Counsel	*K Kadzere*, for the applicant *L Uriri*, with him *T Z Chadambuka*, as *amici curiae*
Case Type	Opposed court application
Annotations	No case annotations to date

Flynote

Administration of estates – *direction by Master – review of – failure to observe time limits for making application for review – failure to notify persons affected by Master's direction – both fatal to application – court has no power to condone failure to file within time limit*

Headnote

D The applicant was a widow. She and her late husband had been married under the civil law and had five children. The deceased had fathered a further 13 children by other women during the subsistence of the marriage. The Master held a meeting where a decision was made that all the 18 children E sired by the deceased, including those born out of wedlock, were the heirs to the deceased's estate in equal shares. The Master directed that the 13 children born out of wedlock by the applicant's late husband be included in the distribution plan. The applicant had therefore approached the court to have the decision of the Master reviewed on the ground that it was unlawful and illegal as it had no basis in law. When the application F was served on the Master, he pointed out that the application had been filed outside the 30 days provided by s 52(9) of the Administration of Estates Act [*Chapter 6:01*]. The beneficiaries who had been accorded the status of heirs by the Master, although not cited in the application, had applied to be joined as parties to the dispute and had in fact been G joined. The present application was, however, not served upon them.

Held, that the provision which affords the right to an aggrieved party to seek a review does not allow for an extension of the time within which such review may be launched. The court could not accord to itself the power to condone the failure on the part of the applicant to file the application within the period provided for by the statute. To do so would be to usurp H Parliament's power to legislate. In the absence of compliance on the part

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Gowora J

of the applicant to observe statutory time limits, the court would have to A find that the application is not properly before it. Further, s 52(9) requires that before an application for review is made, notice thereof must be given to any person affected by the Master's direction. No such notice was given and failure to give it is fatal to the applicant's case. Under r 256 of the High Court Rules, any proceedings for the review of a decision B of any court, tribunal or official shall be by way of court application and delivered to the official whose decision is being reviewed and to all the other parties affected. In spite of this requirement, the applicant sought to enrol the matter as unopposed in circumstances where the parties directly affected by the order being sought had sought an order for their joinder and had in fact been joined as parties. C

Held, further, that while under the common law, which has not been altered by statute, illegitimate children are not entitled to succeed *ab intestato*, there are arguments that this provision is unconstitutional. However, in the circumstances the only course open to the court was to withhold its jurisdiction. D

Editor's note: on the issue of whether illegitimate children are entitled to succeed *ab intestato*, see *Zawaira* v *Nyamupfukudza NO & Ors* above, in this volume.

Cases cited E

Chibvamupera & Ors v Mudzengerere & Ors HH-46-08

Mtetwa v Mupamhadzi 2007 (1) ZLR 253 (S)

Mujawo v Chogugudza 1992 (2) ZLR 321 (S)

Smyth v Ushewokunze & Anor 1997 (2) ZLR 544 (S)

Legislation considered F

Constitution of Zimbabwe 1980, ss 17, 18 & 23

Deceased Estates Succession Act [*Chapter 6:02*], s 10

High Court Rules 1971 (RGN 1047 of 1971), rr 231 & 256

Case information

K Kadzere, for the applicant

L Uriri, with him *T Z Chadambuka,* as *amici curiae* G

Judgment

GOWORA J: The applicant was married to the late Tom Peterkin Mayisva under the Marriage Act, which is now [*Chapter 37*] on 1 January 1970. Tom Mayisva passed away on 11 April 2006. The parties had five children. It is not in dispute that Tom Mayisva had a long-term adulterous relationship with H

Gowora J

A one Linah Pilime and that four children were born out of this relationship. Mayisva had another long-term adulterous relationship with Margaret Maramba, with whom he had another five children. The applicant has no knowledge of the details pertaining to these children, with the exception of two born in 1982 and 1992, respectively. In addition, the applicant states that Tom Mayisva had four more children with different women whose further B details are not known to her.

On 15 July 2007 the Master held a meeting at his offices where a decision was made that all the 18 children sired by Tom Mayisva, including those born out of wedlock, were the heirs to his estate in equal shares. The Master further ruled that the law relating to intestate succession had changed and C that it now recognised children born out of wedlock as beneficiaries to the estates of their biological fathers. As a result, the Master directed that the 13 children born out of wedlock by the applicant's late husband be included by the executor in the distribution plan. The applicant had therefore approached this court to have the decision of the Master reviewed on the ground that it was unlawful and illegal as it had no basis in Zimbabwe law.

D The applicant contended that the union she and her husband contracted was a civil union, which was monogamous in nature, and that such a marriage was subject to the general law as it related to intestate succession. She contends further that the estate of the late Tom Mayisva was governed by the common law as modified by the Deceased Estates Succession Act [*Chapter 6:02*] E which provides that a surviving spouse is entitled, as of right, to inherit the matrimonial home and the household goods and effects and, thereafter, the remaining free residue of the estate would be shared equally among the legitimate children of the deceased and the surviving spouse. She contended further that, at common law, children born out of wedlock were illegitimate and not entitled as of right to inherit from their father *ab intestato*. She stated F that the common law position, to her knowledge, had not been altered by any statutory provision. The law, as she was made to believe, had only provided for children born out of wedlock to have the right to claim maintenance from the estate of the deceased. It had not bestowed upon them the right to inherit. The decision of the Master was therefore unlawful as having no foundation in law and she accordingly prayed for it to be set aside.

G The application was served on the Master, who filed a report in response thereto. It was noted in that report that the application was filed outside the 30 days provided for the filing of a review against his decision in terms of the Administration of Estates Act [*Chapter 6:01*]. In terms of s 52(9)(i) thereof, a person aggrieved by a decision of the Master in relation to a H distribution account may make application to the High Court within thirty

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days of the decision being made for such decision to be set aside. The right A to have the decision of the Master set aside is provided for in a statutory provision, which sets a time period for the filing of such application. The Master has not responded to the substantive relief being claimed as he is not an interested party in the resolution of the dispute. He has, however, stated in the report referred to above that the application has no merit and that it B ought to be dismissed. The applicant did not cite the beneficiaries who had been accorded the status of heirs by the Master.

Mr *Kadzere,* in addressing the court, indicated that although not cited, they had applied to be joined as parties to the dispute and had in fact been joined. This application was, however, not served upon them. I felt compelled, in C view of the nature of the application before me, to seek the assistance of counsel in seeking clarity in the law. I am indebted to Mr *Uriri* for affording his time to file heads of argument and appear as *amicus curiae.*

It was argued by Mr *Uriri* that the applicant states in the founding affidavit that she is seeking a review of the decision of the Master of the High Court. Therefore it was critical that the factual basis for the review be stated in D the founding affidavit. The affidavit speaks of a meeting held on 15 July 2007 but does not disclose the circumstances leading up to the meeting itself. The only circumstances under which the Master would have given a direction is if he were dealing with an objection under s 52 of the Act. It was his contention that this court has been left in the invidious position E where it has to assume that the meeting was convened because the Master was dealing with an objection. If the Master was dealing with an objection, he could only have done so under s 52 (9) and, in terms of that section, an application to have the decision set aside has to be filed within thirty days of the date of the decision. F

Mr *Kadzere* submitted that what the applicant actually seeks is a declaratory order as part of the relief she has asked this court to provide, even though the actual application speaks of a review. His submission was that, in view of the provisions of s 14 of the High Court Act [*Chapter 7:06*], this court has the power and discretion to issue a declaratory order at the instance of G an applicant. That is correct. The applicant has clearly not complied with the provisions of s 52 (9). This is a hurdle that the applicant cannot surmount. The declaratory order would, in my view, only be issued subsequent to a review of the decision of the Master.

In *Mtetwa* v *Mupamhadzi* 2007 (1) ZLR 253 (S) at 255G-256A Gwaunza JA had this to say: H

> A "As the judge *a quo* found, the clear meaning of this provision is that an application to set aside an award may not be made more than three months after the party seeking to have it set aside received the award. It is not in dispute that the application in question was filed some 14 months after the appellants had

received the arbitral award in question. The learned judge *a quo,* I find, correctly noted that that Article 34 does not provide for a possible extension of the period for good cause shown or any other ground. I can also find no fault with her B conclusion, based on the authorities cited, that the right to have the award set aside was irrevocably lost when the applicants failed to file their application on or before 1 December 2004, the last day of the three month period stipulated in the Arbitration Act."

I respectfully associate myself with those comments. *In casu*, the application C to set aside the decision of the Master was launched more than 30 days after it was made. The section which affords the right to an aggrieved party does not allow for an extension of the time within which such review may be launched. This court cannot accord to itself the power to condone the failure on the part of the applicant to file the application within the period provided for by statute.

D Mr *Uriri,* in his heads of argument, submitted that this court does not have the jurisdiction to entertain the application given the failure on the part of the applicant to comply with the time limits set by the provision. A court does not have the power to waive requirements or time limits set in a statutory provision unless the statute accords the court such power. In the instant case the applicant has filed her application outside the thirty day limit set E in the section from which the right to set aside the decision by the Master is derived. I agree with the submission by Mr *Uriri* that this court does not have the jurisdiction to determine the application for review.

In *Chibvamuperu & Ors* v *Mudzengerere & Ors* HH-46-08 Makarau JP (as she then was) said that a court did not have the power to extend a time F limit set in a statutory provision. To do so would be to usurp the power to legislate which is the purview of Parliament. In the absence of compliance on the part of the applicant to observe statutory time limits I have to find that the application is not properly before me.

This application was set down on the unopposed roll for an order to be granted in default of any party that may have been cited or served. The section under G which the decision of the Master is reviewed requires that notice be given to any person affected by the direction given by the Master. In this case, the applicant was supposed to send notice to the children who the Master had directed be regarded as heirs to the estate of the late Tom Mayisva. Although the order sought would have the effect of depriving them of the right to inherit H from the estate of their father, as directed by the Master, the applicant did

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not cite or serve them with documents. In my view, this failure to give them A notice of the application for review is fatal to the applicant's case.

Mr *Kadzere* has accepted that, despite the provisions of the Act, the application was not served on the beneficiaries who had in fact been joined as parties under Case No. HC 459/08. This application is described as a review by the applicant. Order 33 r 256 of the High Court Rules provides that any B proceedings for the review of a decision of any court, tribunal or official shall be by way of court application and delivered to the official whose decision is being reviewed and to all the other parties affected. Order 32 applies to applications for review brought under Order 33. In terms of Order 32 r 231, a copy of a court application and of every affidavit by which it is supported C shall be served upon every respondent.

It seems to me strange that any litigant would be presumptuous enough to enrol a matter as unopposed in circumstances where the parties directly affected by the order being sought have sought for an order for their joinder and have in fact been joined as parties to the *lis*. The fact of their joinder does not appear in the papers but was a submission by the applicant's legal D practitioner from the bar. This court has the discretion under r 87 to order the joinder of a party to proceedings in order to ensure that all matters in dispute may be effectually and completely be determined and adjudicated upon. I cannot join a party who has already been joined to proceedings. I cannot, however, hear a matter in the absence of a party who may be prejudiced by E the matter being heard in his or her absence. In this case, the applicant has deliberately avoided serving the documents on the beneficiaries to the estate of Tom Mayisva, even though there exists an order for their joinder to this *lis*. I have not been afforded a reason as to the failure to serve them with papers and it is not for me to speculate. However, the failure to serve them with papers is fatal to the application, in that the applicant is deliberately F seeking redress in the face of persons who are entitled to be heard without notice to them. The prejudice to their rights is such that I am unable to accede to the application

In view of the nature of the relief that the applicant seeks and the effect that such relief would have on the lives of the children sired by the applicant's G deceased husband, I am compelled to deal with the matter in substantive form rather than dismiss it on a technicality. Mr *Uriri* accepts that, indeed, the common law position is to the effect that a child born out of wedlock has no entitlement to inherit *ab intestato* from the estate of his or her father. He submitted that the common law position flies in the face of the human rights set out in the Constitution of Zimbabwe for the following reasons: H

A it is a violation of the right to the protection of the law as enshrined in s 18(1) of the Constitution; it is a violation of the right to the protection of the law, as read with the rule of law, as enshrined in s 18(1) as read with s 18(1a) of the Constitution; it is a violation of the right to the protection of the law, as read with the freedom from discrimination, as enshrined in s 18(1) as read with s 23(1) of the Constitution; it is a violation of the freedom from B discrimination, as enshrined in s 23(1) of the Constitution; it is a violation of the right to privacy, as read with the right to the protection of the law, as enshrined in s 17(1), as read with s 18(1), of the Constitution; it is a violation of the right to privacy, as read with the right to the protection of the law and the rule of law as enshrined in s 17(1), as read with ss 18(1) and 18(1a) of C the Constitution.

He contended further that the position in classical Roman-Dutch common law flies in the face of customary international law and therefore municipal law in respect of the rights of children. It was his further argument that this court had the power to change the common law in light of contemporary D concerns and considerations and that his case was an appropriate case for the court to act accordingly.

common law position

The Roman-Dutch common law holds that illegitimate children are not related to their natural fathers and are not entitled to succeed *vis-à-vis* their E natural father and his relatives and *vice versa*. Given the obligation that a father has, together with the mother, to maintain a child, this generalisation is misleading as a father cannot therefore be held to be a complete stranger to his own child. The father of an illegitimate child is also within the prohibited degrees as it relates to marriage and sexual intercourse. Equally, legislative intervention in amending the common law has failed to address the issue of F children born out of wedlock or illegitimate children. The Deceased Estates Succession Act [*Chapter 6:02*] refers to descendants who are entitled to inherit *ab intestato* without defining who those descendants are. Section 10 of the same Act provides as follows:

> "Nothing in this Part shall affect or alter the laws of Zimbabwe regarding G inheritance *ab intestato*."

The intention, therefore, was not to amend the common law position and thus keep children born out of wedlock from the group of persons entitled to inherit *ab intestato* from the estate of their natural fathers. It would seem that even under customary law itself, unless a child was born of a union H wherein a marriage under customary rights was concluded a child would

not be entitled to inherit from its father's estate *ab intestato*. See *Mujawo* v A *Chogugudza* 1992 (2) ZLR 321 (S) at 330D-E.

It is trite that the Constitution is the supreme law in this jurisdiction and any provisions that are inconsistent with provisions in the Constitution are, as a matter of law, considered unconstitutional and liable to be struck down for that reason. That a provision in the Constitution is meant to secure protection B of the citizens or rights belonging to the citizens is beyond dispute. In order to achieve the intent of the legislature, it has been held that it is necessary to adopt a broad purposive and progressive interpretation of the rights set out in the Constitutional Bill of Rights. In *Smyth* v *Ushewokunze & Anor* 1997 (2) ZLR 544 (S) Gubbay CJ stated:

> "In arriving at the proper meaning and content of the right guaranteed by s 18(2), it C must not be overlooked that it is a right designed to secure a protection, and that the endeavour of the court should always be to expand the reach of a fundamental right rather than attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one that takes full account of the changing conditions, social norms and values, so that the provision remains flexible enough to keep D pace with and meet the newly emerging problems and

challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people."

As Mr *Uriri* is *amicus curiae,* he cannot move for the dismissal of the application. The only course open to this court, on the facts stated above, is to withhold jurisdiction. I therefore withhold my jurisdiction in this matter. E

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

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Source:
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MVUDUDU v AGRICULTURAL & RURAL DEVELOPMENT AUTHORITY 2011 (2) ZLR 449 (H)
2011 (2) ZLR p449

Citation	2011 (2) ZLR 449 (H)
Case No	Judgment No. HH-286-11
Court	High Court, Harare
Judge	Bhunu J
Heard	12 January 2011; *CAV*
Judgment	23 November 2011
Counsel	*O Shava,* for the applicant *L Uriri,* for the respondent
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

Appeal – *notice of – effect – suspension of decision appealed against – applicability to arbitral award under Labour Act [Chapter 28:01] – award* C *suspended if appeal noted in terms of Labour Act – execution pending* D *appeal – leave to execute pending appeal required from High Court*

Arbitration – *award – award under Labour Act [Chapter 28:01] – registration of – what applicant for registration must show – applicant's entitlement to registration if conditions met, even if appeal noted against award*

E **Employment** – *Labour Court – appeal to – appeal against arbitral award – effect of noting appeal – award suspended*

Headnote

In order to qualify for registration of an arbitral award in terms of s 98(14) of the Labour Act [*Chapter 28:01*], all that an applicant has to do is to F satisfy the court that:

(a) he is a party to the arbitral proceedings;

(b) the award relates to him;

(c) the copy he is presenting for registration has been duly certified by the arbitrator in terms of s 98(13) of the Act.

G If those conditions are met, the applicant is entitled, as of right, to register the arbitral award. While it may be correct that at common law it is incompetent to seek the enforcement of a judgment that is being appealed against, for the purposes of such an arbitral award, this legal principle has no relevance to the registration thereof under the Labour Act.

The applicant obtained and arbitral award in his favour against the respondent, H his former employer. The arbitrator had awarded him certain sums of

money. The applicant applied for the award to be registered as an order of A the High Court, in terms of s 98(14) of the Labour Act [*Chapter 28:01*]. The applicant also noted an appeal to the Labour Court against the award on the grounds of its inadequacy, and the respondent cross-appealed. The issue arose as to whether the applicant could register the award in spite of noting an appeal against it and whether a registered award B is enforceable notwithstanding a pending appeal to the Labour Court.

Held, that the Labour Act does not provide for the suspension of the registration of an arbitral award and there is no other law which provides for such a suspension pending an appeal of the award. That being the case, the applicant could seek the registration of the award in spite of the pending appeal C .

Held, further, that upon registration with the High Court, an arbitral award is converted into a civil judgment of the High Court for the purposes of enforcement only.

Held, further, that the noting of the appeal to the Labour Court in terms of s 98(10) of the Labour Act automatically suspended the arbitral award D appealed against. But where, as *in casu,* a litigant had only appealed against a portion of the judgment, the suspension only applied to that portion which had been appealed against. The applicant's appeal against the non-award of more damages than those awarded by the arbitrator had, therefore, no bearing on the amount granted by him.

Held, further, however, that the amount granted by the arbitrator was still E subject to the universal common law rule that an appeal suspends the decision appealed against and it was for this reason that the applicant would have to seek the leave of the court in terms of the High Court Rules 1971 (RGN 1047 of 1971) for leave to execute pending the appeal.

Cases cited F

Independent Municipal & Allied Trade Union & Ors v MEC for Environmental Affairs, Northern Cape & Ors 1999 (4) SA 267 (NC)

Sagittarian (Pvt) Ltd v Workers' Cttee, Sagittarian (Pvt) Ltd 2006 (1) ZLR 115 (S)

Founders Bldg Soc v Mazuka 2000 (1) ZLR 528 (H)

Vengesai & Ors v Zimbabwe Glass Industries Ltd 1998 (2) ZLR 593 (H) G

Phiri & Ors v Industrial Steel & Pipe (Pvt) Ltd 1996 (1) ZLR 45 (S)

Legislation considered

Labour Act [*Chapter 28:01*], ss 92E, 98(10), 98(13), 98(14) & 98(15) H

Bhunu J

Case information

A *O Shava,* for the applicant

L Uriri, for the respondent

Judgment

BHUNU J: The applicant was employed by the respondent as its chief executive officer. On 27 October 2010 he obtained an arbitral award against B the respondent under the Labour Act [*Chapter 28*:*01*] in the following terms:

> "In the final analysis therefore, I order that respondent pay the claimant as follows:
>
> 1. Backpay and benefits in the sum of US$19 384.09
> 2. Cash in lieu of leave
> 3. Sixty (60) months salary from 26 January 2010 as damages for loss of employment in the sum of US$60 540.00 C
> 4. Sixty (60) months salary as punitive damages in the sum of US$60 540.00
> 5. Interest at the prescribed rate."

The applicant has now filed the award for registration with this court in terms of s 98(14) of the Act as a prelude to seeking payment of US$140 464.09. Despite having been successful to a large extent, the applicant appealed to the D Labour Court against the award on the basis that the award was inadequate and the respondent cross-appealed.

The relevant section provides:

> "(14) Any party to whom an arbitral award relates may submit for registration the copy of it furnished to him in terms of subsection (13) to the court of any E magistrate which would have had jurisdiction to make an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrates court, the High Court.
>
> (15) Where an arbitral award has been registered in terms of subsection (14) it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court."

F The respondent is resisting the registration on the basis that the applicant cannot seek to enforce a judgment he has appealed against. There are two cardinal issues for determination in this application. The first issue is whether the applicant is automatically, as a matter of right, entitled to register an award upon satisfying the conditions specified in s 98(14) of the Act. In G order to qualify for registration all that an applicant has to do is to satisfy the court that:

(a) He is a party to the arbitral proceedings.

(b) The award relates to him.

(c) The copy he is presenting for registration has been duly certified by the H arbitrator in terms of subs (13).

Bhunu J

Once the applicant has satisfied the above three requirements, he is entitled A as of right to register the arbitral award in terms of s 98(14) as read with subs (13).

Any opposition to registration is therefore limited to showing that the applicant has not satisfied anyone or more of the three prescribed requirements for registration. Thus, the respondent can only succeed in opposing registration B if he proves on a balance of probabilities that:

(a) The applicant is not a party to the proceedings;

(b) The arbitral award does not relate to him; or

(c) The copy presented for registration is not a duly certified copy in terms of subs (13). C

In this case, the applicant has unquestionably managed to satisfy all the three requirements for registration. He has shown without any contradiction that he is a party to whom the arbitral award relates and that the copy he is presenting for registration was duly certified by the arbitrator.

According to the *Thesaurus Dictionary* the term "register" is interpreted D to mean "list, record, catalog, roll index, inventory, chronicle or schedule".

Given its ordinary and grammatical meaning, by seeking registration of the arbitral award, the applicant is simply seeking at this stage the conversion of the award into an order of this court to render it capable of enforcement in terms of the rules of this court, since the Labour Court and related arbitration E tribunals have no machinery for enforcing their judgments.

While it may be correct that at common law it is incompetent for one to seek enforcement of a judgment or order one is appealing against, as articulated by Steenkamp AJP in *Independent Municipal & Allied Trade Union & Ors* v *MEC for Environmental Affairs, Northern Cape &*

Ors 1999 (4) SA 267 F (NC), for purposes of registration of the arbitral award this legal principle is inapplicable as it has no relevance to the registration process.

The Labour Act does not provide for the suspension of the registration of an arbitral award in terms of the Act and I know not of any law, statutory or otherwise, that provides for the suspension of the registration of an arbitral G award pending appeal.

That being the case, I can perceive no lawful reason why the applicant cannot register the arbitral award he obtained against the respondent on 27 October 2010. Once the arbitral award is registered, we immediately proceed to the second stage where the court is enjoined to determine whether the registered award is enforceable, notwithstanding the pending appeal to the Labour Court. H

Bhunu J

A The first issue for determination in this respect is whether the noting of an appeal by either party suspended execution of the arbitral award pending the Labour Court's determination on appeal. Section 92E of the Act regulates appeals to the Labour Court generally. It provides:

> "**92E Appeals to the Labour Court generally**
>
> (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."

C The Supreme Court has already ruled in *Sagittarian (Pvt) Ltd* v *Workers' Committee, Sagittarian (Pvt) Ltd* 2006 (1) ZLR 115 (S) that the provisions of s 97(4) (now s 92E) do not apply to an appeal made in terms of s 98 of the Act.

In other words, where an appeal is made in terms of s 98, there is no express D provision in the Labour Act to the effect that an appeal shall not have the effect of suspending the determination or decision appealed against. There being no such provision, one has to turn to common law for an answer. Herbstein & van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed at p 643 state:

> "*At common law the execution of all judgments is suspended upon the noting of* E *an appeal.* The foundation of this rule is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by a levy under a writ or by the execution of the judgment in any other manner appropriate to the nature of the judgment appealed from, but by statutory instrument or rule of court the trial court is usually empowered, upon application being made to it to exercise a discretion in ordering execution of a judgment appealed against subject to security" (my emphasis).

F The learned authors go on to clarify the apparent confusion introduced by Mungwira J in *Founders Building Society* v *Mazuka* 2000 (1) ZLR 528 (H) at 531 in which she quoted Gillespie J with approval in *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) at 598*,* where the latter suggests that the common law rule, that an appeal suspends the decision G appealed against, is limited to superior courts of unlimited jurisdiction. In that case Gillespie J had this to say:

> "In stating the common law, Corbett JA referred to the automatic stay of execution upon the noting of appeal, as a general rule of practice. That is not a rule of law, but a long established practice regarded as generally binding, subject to the court's discretion. The concept of a rule of practice is peculiarly appropriate only H to superior courts of inherent jurisdiction. Any other court, tribunal or authority

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Bhunu J

> is a creature of statute and bound by the four corners of its enabling legislation. A Moreover, the authorities cited by Corbett JA are authorities relevant to appeals from superior courts."

At p 719 the learned authors, however, go on to say the rule applies to all adjudicating authorities without exception including the magistrate's court. They then state that:

> "When a magistrate's court makes no order in terms of the above provisions, the B ordinary common law rules govern the matter, and execution is automatically suspended by the noting of an appeal."

The magistrates court, being an inferior court of limited jurisdiction, cannot be treated differently from the Labour Court. Thus, the noting of the appeal to the Labour Court in terms of s 98(10) of the Act automatically suspended C the arbitral award appealed against.

It is, however, common cause that the applicant did not appeal against the whole determination of the arbitrator. He merely appealed for a higher award than that granted by the arbitrator. That conduct does not in my view amount to an appeal against or rejection of the lesser amount granted by the D arbitrator. It stands to reason that an appeal for more does not constitute a rejection of the lesser amount already given.

In *Phiri & Ors* v *Industrial Steel and Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S) the Supreme Court reaffirmed the common law position, to the effect that in the absence of statutory provisions to the contrary, an appeal to the Labour E Tribunal, now the Labour Court, suspends the decision appealed against. The Supreme Court was, however, careful and quick to point out that where a litigant has only appealed against a portion of a judgment *the suspension only applies to that portion of the judgment appealed against. It does not extend to portions not appealed against.* The applicant's appeal against the non-award of more damages than those awarded by the arbitrator has F therefore no bearing on the amount granted by the arbitrator. The amount granted by the arbitrator is, however, subject to the universal common law rule that an appeal suspends the decision appealed against.

Section 98(15), however, states that where an arbitral award has been registered in terms of subs (14) it shall have the effect, for purposes of enforcement, G of a civil judgment of the appropriate court.

What this means is that upon registration with this court an arbitral award is converted into a civil judgment of this court for purposes of enforcement only. That being the case, this court has the power, upon proper application, to determine in terms of the High Court Rules whether or not execution should be effected, notwithstanding the noting of appeal to the Labour Court. H

2011 (2) ZLR p455

Bhunu J

A In the result it is ordered:

1. That the application for registration of the arbitral award granted to the applicant by the arbitrator on 27 October 2010, be and is hereby granted.
2. That the noting of appeal to the Labour Court in terms of s 98 of the Labour Act [*Chapter 28*:*01*] suspended the determination of the above B arbitral award pending appeal.
3. That the applicant shall not execute the registered arbitral award without leave of this court to execute the arbitral award pending appeal.
4. That as both parties have been equally successful, there is no order as to costs.

C *Mbidzo Muchadehama & Makoni*, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/CHINA SHOUGANG INTERNATIONAL v STANDARD CHARTERED BANK ZIMBABWE LTD 2011 (2) ZLR 456 (H)

CHINA SHOUGANG INTERNATIONAL v STANDARD CHARTERED BANK ZIMBABWE LTD 2011 (2) ZLR 456 (H)

2011 (2) ZLR p456

Citation 2011 (2) ZLR 456 (H)

Case No	Judgment No. HH-310-11
Court	High Court, Harare
Judge	Bere J
Heard	22 November 2011; *CAV*
Judgment	23 November 2011
Counsel	*P Muzvuzvu*, for the applicant Mrs *F Nyakabawo*, for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Bank – *duty to client – undertaking to pay client's money out on demand – bank handing money to Reserve Bank following directive – bank's duty to protect interests of client – bank's duty to ensure that directive* D *issued lawfully*

Practice and procedure – *application – subject matter of application – when proceedings may be brought by application rather than summons – claim for money owed – may be brought by application proceedings if facts not in dispute and claim liquidated*

Headnote

The applicant held foreign currency accounts with the respondent bank. In E 2007, in line with a directive from the Reserve Bank, the respondent debited the applicant's accounts with all the foreign currency in those accounts and transferred the money to the Reserve Bank. When the applicant sought the return of its money, the respondent argued (a) that it F was improper for the applicant to have proceeded by way of application to recover a debt due to it and that the applicant ought to have instituted proceedings by way of summons; and (b) that since the funds in issue were held by the Reserve Bank, it was against the Reserve Bank of Zimbabwe that this application should have been directed. By debiting the applicant's corporate foreign currency account, the respondent was G merely complying with a directive issued by the Reserve Bank (to all commercial banks) to so act.

Held, that what determines the nature of the proceedings to initiate is whether or not there are material disputes of facts. If there are such disputes, motion proceedings would be incompetent. Institution of proceedings would have to be by way of summons. Legally it is competent for a creditor in H

A a proper case to claim money owing to him by way of notice of motion, provided that the facts are not in dispute and the claim is liquidated.

Held, further, that the respondent as a commercial banker undertook to keep the applicant's money and pay it out to the applicant upon demand. The respondent failed to do so when called upon to do so by the applicant. The respondent claimed it had transferred the money into B a third party's account. There was no privity of contract between that third party and the applicant. The party with whom the applicant had entered into a contractual arrangement was the respondent. While the Reserve Bank was empowered by Exchange Control Regulations 1996 (SI 109 of 1996) to order the expropriation of the applicant's deposits, C any such directive had to be approved by the Minister and published in the *Gazette.* Non-compliance with this mandatory requirement would render any directive unlawful. The Regulations gave the respondent, as an authorised dealer, an adequate opportunity to make representations if it felt it had an obligation to protect the deposits made by the applicant. D Not only that, the regulations provided for an appeal by the respondent against any decision by the Reserve Bank.

Held, further, that given the special relationship that existed between the respondent and the applicant, the decision by the former to interfere with the applicant's deposits was not one that should have been taken lightly. The onus was on the respondent to ascertain the lawfulness of the Reserve E Bank's directive, instead of blindly following it. The respondent had a natural obligation thrust upon it to protect the applicant's deposits. That duty entailed, *inter alia*, verifying the legality or otherwise of the directive given by the Reserve Bank because the Reserve Bank was not privy to the contractual relationship between the applicant and the respondent. The respondent should be ordered to reimburse the monies due to the F applicant without putting the applicant into the further unnecessary cost of insisting that it joins the Reserve Bank in these proceedings. The respondent could take appropriate action against the Reserve Bank of Zimbabwe if it so desired.

Cases referred to G

A-G for Canada v A-G for Quebec & Ors [1947] AC 33 (PC)

Regal Trading Co (Pty) Ltd v Coetzee 1956 (1) SA 766 (O)

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

Legislation considered

H Exchange Control Regulations 1996 (SI 109 of 1996), s 40(3)

2011 (2) ZLR p458

Bere J

Case information

P Muzvuzvu, for the applicant A

Mrs *F Nyakabawo*, for the respondent

Judgment

BERE J: The facts, which are fairly straightforward and common cause in this matter, can safely be summarised as follows.

The applicant is a company duly registered and incorporated in terms of the B laws of Zimbabwe. The respondent is a registered commercial bank with a number of branches in Zimbabwe.

The applicant runs two distinct corporate bank accounts with the respondent's Kwekwe branch. As of October 2007, the applicant's two accounts had an aggregate credit balance of US$47 739.86 C .

The applicant's accepted position is that it is a foreign investor company which is legally in Zimbabwe carrying out a specific purpose, *viz*. the refurbishment of the blast furnaces of a Zimbabwean company called Zisco Steel. The applicant maintained it was not involved in any "foreign exchange" activities.

In October 2007, the respondent's two corporate accounts were debited D with an aggregate amount of US$47 739.86 without its consent or approval.

The applicant engaged the respondent with a view to recovering its money, to no avail – hence the instant application.

The respondent's position

The respondent has offered a two-pronged defence to the application filed E by the applicant for the recovery of its money.

Firstly, the respondent has contended as a point *in limine* that it is improper for the applicant to file a court application to recover a debt that is due to it. The correct position is that the applicant ought to have instituted proceedings by way of summons, so the argument went. F

The second point raised *in limine* is that the applicant has targeted the wrong respondent. It was contended on behalf of the respondent that, since the funds in issue are held by the Reserve Bank, it is against the Reserve Bank that this application should have been directed.

Intricably linked to the second point *in limine* is the argument that, by debiting the applicant's corporate foreign currency account, the respondent G was merely complying with a directive issued by the Reserve Bank so to act.

In elaboration, the respondent's position is that in October 2007 the respondent, together with all other commercial banks in Zimbabwe, were directed by the Reserve Bank to lodge all foreign currency accounts balances in respect of corporate and non-governmental organization accounts with the Reserve H

Bere J

A Bank and to maintain mirror accounts in its own books for purposes of keeping track with these accounts.

I propose to deal with the issues raised by the respondent *seriatim*.

Points *in limine*

B **Was it competent for the applicant to institute proceedings by way of motion proceedings as opposed to issuing out summons?**

It is not a rule of law that proceedings to recover a debt due must be instituted by way of summons as opposed to motion proceedings. It is clear to me that what determines the nature of the proceedings to initiate is whether or not C there are material disputes of facts in the action contemplated.

Where the action contemplated is likely to have material disputes of facts, motion proceedings would be incompetent. Institution of proceedings would have to be by way of summons.

Is not the correct position of law that a creditor in a proper case for a claim D sounding in money owing to him cannot initiate its recovery by way of notice of motion, as argued by Mrs *Nyakabawo?*

De Villiers J summed up the correct legal position in *Regal Trading Co (Pty) Ltd* v *Coetzee* 1956 (1) SA 766 (O) at 768, after carrying out a survey of a number of South African decisions, when he stated as follows:

> E "I have come to the conclusion that *legally it is not incompetent for a creditor in a proper case to claim money owing to him by way of notice of motion, provided at least that the facts are not in dispute*. This does not, however, refer to unliquidated claims for damages. The court has a discretion whether it will allow a creditor to depart from the more usual procedure of rauw aktie, and that discretion will depend upon all the circumstances of the case …" (my emphasis)

F It is correct that application procedure is inappropriate where disputes of facts exist. Where a party alleges the existence of dispute of facts, one is expected to clearly spell out the basis of such dispute, as it must be distinct from an "illusory dispute of fact" (*per* Gubbay JA in *Zimbabwe Bonded Fireglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) at 339). That explanation must be rooted G in the respondent's opposing papers, as opposed to giving them a magnified stature in the heads of argument, as seems to have happened in this case.

I am unable to locate any dispute of facts in this matter except that the parties are unable to agree on the legal implications of the directive given to the respondent. That is certainly not a dispute of facts but a legal issue that must H be determined on the papers.

Bere J

Did the applicant target the wrong respondent? A

The agreed facts in this matter are fairly simple and straightforward. The respondent, as a commercial banker, undertook to keep the applicant's money and pay it out to the applicant upon demand. The respondent failed to do so when called upon to do so by the applicant. The respondent claimed it had transferred the money into another third party's account. There was B no privity of contract between that other third party and the applicant. The easy to see party and with whom the applicant had entered into a contractual arrangement was none other than the respondent.

I do not see how the applicant would have initiated any action against the Reserve Bankwhich for all intents and purposes is a stranger to the applicant C for purposes of the deposit in issue.

I was not persuaded at all by the points *in limine* and it was for the above reasons that I had no hesitation at the hearing in ordering that the matter be heard on the merits.

On merits

The main thrust of the respondent's position is that it debited the applicant's D account pursuant to a directive given by the Reserve Bank. Reference was made to the Exchange Control Regulations 1996 (SI 109 of 1996) as the authority behind this directive and ss 35 up to 40 were relied upon as the specific sections which the Reserve Bank relied upon in literally ordering the expropriation of the applicant's deposits. E

It will be noted that the legislature in its wisdom qualified the operations of the Exchange Control Regulations by making a specific provision of s 40(3) thereof, which read as follows:

> "Orders made under subsection (1) shall not have effect until they have been approved by the Minister and published in the *Gazette*." F

It appears to me that such checks and balances were meant to guard against improper use of the exchange control regulations and it follows that non-compliance with this mandatory requirement would render any directive unlawful.

It has not been demonstrated to me by Mrs *Nyakabawo* that the directive by G the Reserve Bank was lawful or above board.

It occurs to me that, given the special relationship that existed between the respondent and the applicant, the decision by the former to interfere with the applicant's deposits was not one that could have been taken lightly. In my view, the onus was on the respondent to ascertain the lawfulness of the Reserve Bank's directive, instead of blindly or religiously following it. The H

Bere J

A respondent could have satisfied itself by relying on its compliance division within its institution or by simply seeking counsel's views before taking such a drastic action with the applicant's deposits.

Mrs *Nyakabawo* put up a spirited and persuasive argument in support of what she referred to as the predicament faced by the respondent pursuant B to a directive given to it by the Reserve Bank which required all authorised dealers (inlcuding the respondent) to transfer to the Reserve Bank of Zimbabwe all corporate foreign currency account balances and to maintain a mirror account for tracking purposes.

In support of her position, counsel relied on the views of M W Jones and C H C Schoeman *An Introduction to South African Banking and Credit Law* (2006) p 4 who described the relationship between a banker and a customer in the following terms:

> "… the banker-customer relationship is not based solely on contract but imposes many additional duties on banks and customers alike. These duties are established by banking practice and custom, legislation and court decisions. The relationship D between a bank and its customer can thus be described as a contract *sui gneris*, or a unique type of contract".

Building on the views of the two authors, Mrs *Nyakabawo* argued that the directive given by the Reserve Bank was decisive at the material time as the respondent could not have risked losing its banking licence by refusing E to comply with the directive in question.

With respect, I am unable to agree with the simplistic interpretation of the relationship between the bank (the respondent) and the customer (the applicant in the instant matter) by counsel. That interpretation is too narrow and dangerous. It is dangerous and risky in the banking business, because it tends to depart from the legitimate expectations of the two contractual F parties when they entered into a contract, a unique type of contract. I take a very strong view that the respondent had a natural obligation thrust upon it to protect the applicant's deposits. As already highlighted elsewhere in this judgment, that duty entailed *inter alia* verifying the legality or otherwise of the directive given by the Reserve Bank because the Reserve Bank was not G privy to the contractual relationship between the applicant and the respondent.

I am extremely impressed by the view taken by the Privy Council in *Attorney-General for Canada* v *Attorney-General for the Province of Quebec and Ors & related appeals* [1947] AC 33 (PC) at 44 when they (*per* Lord Porter) described the relationship between the bankers and customer in H the following terms:

Bere J

> "Their Lordships cannot but think that the receipt of deposits and the repayment A of the sums deposited to the depositors or their successors as defined is an essential part of the business of banking.
>
> The relationship between banker and customer who pays money into the bank is stated in *Foley* v *Hill* (1848) 2 HLC 28 as 'the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers B to honour the customer's drafts'.
>
> No question of possession of or property in the deposit arises. The obligation is *mutuum* not *commodatum*. Once a deposit is made there remains only a debt due from the banker to the customer"

It is clear to me, and it must be the most logical conclusion, that once money is placed in the custody of a banker, that banker must be held C accountable to the depositor of that money. The banker must be able to repay the depositor upon demand. It is as simple as it comes. It requires no complicated interpretation. It therefore naturally follows that the respondent must account to the applicant of the deposits made to it by the applicant. To hold otherwise would be to create chaos in the banking sector. It would D be to allow banks like the respondent to ride roughshod over innocent and unsuspecting customers like the applicant and would in addition severely undermine the assumed intergrity of the banking sector.

The penalty which the respondent feared would have visited it if it had not blindly followed the directive was specifically provided for. In terms of s 37 E the Exchange Control Regulations the respondent, as an authorised dealer, was to be given an adequate opportunity to make representations if it felt it had an obligation to protect the deposits made by the applicant. Not only that, but the Regulations further provided for the process of appeal by the respondent against any decision by the Reserve Bank. F

It occurs to me that what the respondent did in this case was to blindly expropriate the applicant's deposits without due regard to the law and this was obviously *ultra vires* even the Constitution of this country.

In conclusion, I find that it is inevitably befitting that the respondent should be ordered G to reimburse the monies due to the applicant without putting the applicant into the further unnecessary cost of insisting that it joins the Reserve Bank in these proceedings, for the simple reason that there was never any privity of contract between the applicant and the Reserve Bank.

It is up to the respondent to take appropriate action against the Reserve Bank if it so desires. H

Bere J

A **Costs**

It was ironic that, despite what appears to be reckless execution of its mandate by the respondent in transferring the applicant's deposits to a third party's account without the consent and or approval of the applicant, the respondent had the audacity to ask for costs on attorney-client scale against the applicant B as its counsel argued for the dismissal of the claim.

I am convinced that the reverse must in fact be true. The respondent has been stubborn in refusing to accede to the applicant's claim. The respondent took an extremely dangerous or casual approach in paying out the applicant's deposits to a third party without the approval and or consent of the latter, let alone before attempting to verify the lawfulness or otherwise of the Reserve C Bank directive.

I believe the conduct exhibited by the respondent is deplorable and must be punished by an appropriate order for costs.

Accordingly I grant the following order:

1. That the respondent pays to the applicant US$38 843.88 and US$8 895.98 D being monies unlawfully debited from the applicant's accounts, namely Account number 8740064001800 and

8740064001801 respectively totalling to US$47 739.86 within seven days of this order.

2. The respondent be and is hereby ordered to pay interest at the prescribed rate from the date of this application to date of full payment. E

3. The respondent be and is hereby ordered to pay costs of suit at the higher scale.

Masawi & Partners, applicant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/PHIRI v NAWASHA 2011 (2) ZLR 464 (H)

PHIRI v NAWASHA 2011 (2) ZLR 464 (H)

Citation	2011 (2) ZLR 464 (H)
Case No	Judgment No. HH-20-12
Court	High Court, Harare
Judge	Mutema J
Heard	23 November 2011
Judgment	23 November 2011
Counsel	*D Dhumbura,* for the applicant *S Mahuni,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Agency – *agent – liability – when person contracting with agent can sue* C *agent instead of principal – agent making himself jointly responsible – party entitled to claim against agent personally – non-joinder of principal not fatal*

Headnote

The applicant bought a house from a deceased estate. The respondent, acting D on behalf of the executor of the estate, concluded the agreement of sale. The sale agreement provided, *inter alia*, that "the agent [identified as the respondent] hereby undertakes and guarantees that the seller will perform as per the agreement and in the event of any material breach he will be jointly responsible with the seller for paying damages to the purchaser". E The applicant paid the agreed purchase price but the respondent did not deliver. In a subsequent agreement, the respondent undertook to deliver to the applicant an alternative house within 14 days of signing of the memorandum. He did not comply with this undertaking, nor did he return the purchase price. When the applicant claimed for specific performance, the respondent argued that the non-joinder of the principal F was fatal to the application.

Held, that the general rule is that a person contracting with an agent can only sue the principal on that contract, but in some cases he can sue the agent. If, for example, he contracts with the agent as a principal, makes him his debtor and gives credit to him and not to his principal, then he G can sue the agent personally on such contract. The usual test would be to enquire to whom the contracting party looked. In the agreement of sale, the respondent held himself out as a guarantor and surety and being "jointly responsible with the seller in paying damages to the purchaser" in case of a material breach of the contract. He thus made himself a co-principal debtor. The only consequence (albeit an important one) that H

Mutema J

A flows from a surety also undertaking liability as a co-principal debtor is that, *vis-à-vis* the creditor, he thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussion and division, and he becomes liable jointly and severally with the principal debtor. By the respondent holding himself out as a guarantor and surety, by retaining the purchase price in his company's trust account for some 13 months, B and by undertaking to secure for the purchaser an alternative property, the applicant looked to the respondent not only as a co-principal debtor but, through novation, as the sole debtor who could be sued in either instance alone without joining the principal or original principal as the case may be. In any event, by agreeing to be a co-principal debtor, the C respondent tacitly renounced the benefit of excussion and it was idle for him now to claim it.

Cases cited

Blower v van Noorden 1909 TS 890

Cohen v Shires, McHattie & King (1882) 1 SAR 41

D *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343

Haynes v King Williamstown Municipality 1951 (2) SA 371 (A)

Intercontinental Trading (Pvt) Ltd v Nestlé Zimbabwe (Pvt) Ltd 1993 (1) ZLR 21 (H)

Neon v Cold Cathode Illuminations (Pty) Ltd v Ephron 1978 (1) SA 463 (A) E

Tamarillo (Pty) Ltd v R N Aitken (Pty) Ltd 1982 (1) SA 398 (A)

Wood v Visser 1929 CPD 55

Woods v Walters 1921 AD 303

Case information

D Dhumbura, for the applicant

F *S Mahuni,* for the respondent

Judgment

MUTEMA J: The dispute *in casu* is steeped in the sale of a deceased estate immovable property whose purchase price was paid by the applicant but transfer of which the respondent failed to effect. The draft order the applicant G seeks is couched in these words:

"IT IS HEREBY ORDERED THAT:

1. The respondent is hereby ordered to deliver and register a four roomed house; comprising two bedrooms, kitchen, dining room and a toilet in either Nyameni, Dombotombo, Rujeko or Rusike high density Suburbs of Marondera, to the plaintiff (*sic*) within thirty (30) working days of this H order.

Mutema J

2. In the event of the respondent failing to perform in accordance with para A 1 above, the applicant is hereby empowered to execute this order against respondent's property
3. The respondent to pay costs of suit on a client legal practitioner scale".

The facts

The respondent is a co-director of Pricassons Investments (Pvt) Ltd, a B company, as can be gleaned from its letterheads, whose core business is buying and selling of stands and houses, developers and brokers, driving school, car hire, dealers in imported new and used cars, trucks and mini buses and construction of agreements of sale.

In December 2007 the respondent, acting on behalf of Joseph Tsamwayi, the C appointed executor of the estate of the late Patrick Tsamwayi, entered into an agreement of sale with the applicant in terms of annexure A1-A5 wherein the applicant purchased stand number 8 Dziva, Dombotombo, Marondera for a purchase price of Z$18 billion. The salient terms of annexure A1-A5 are:-

(i) Clause 2(c), which provides that all the moneys shall be deposited into Pricassons (Pvt) Ltd's Standard Chartered Bank account number D 0100254284900;

(ii) Clause 9, which provides that in the event of the seller breaching any term or condition of this agreement and the seller fails to remedy the breach within seven days of written notice to do so, then without prejudice to his rights at law, the purchaser shall be entitled to either E cancel the agreement and claim damages, which shall be equal to the value of purchasing a similar comparable property at the time of such claim, or seek an order of specific performance;

(iii) Clause 10, which provides that the seller shall cede all rights in the property to the purchaser within three months of signing this agreement F by which time it is anticipated the seller would have been issued with the certificate of authority by the master; and

(iv) Clause 11, which provides that the agent Mr Patson Nawasha of Pricassons (Pvt) Ltd hereby undertakes and guarantees that the seller will perform as per the agreement, and in the event of any material breach he will be jointly responsible with the seller for paying damages to the purchaser. G

The applicant paid the full purchase price for the house which was brick under asbestos composed of two bedrooms, kitchen, lounge and toilet.

The respondent failed to fulfil his part of the agreement and admitted that he had sold a deceased estate house which had a dispute – the minor children of the deceased having refused to approve of the sale. On 4 July, 2008 the H

Mutema J

A parties signed a memorandum of understanding (annexure "B"), clause 2 of which stipulated that the respondent would deliver to the applicant an alternative house within 14 days of signing of the memorandum. Despite this undertaking the respondent still did not deliver the alternative house. On 26 July 2008 the respondent wrote to the applicant and her then husband Gideon Muchada reiterating that he wanted to honour his undertaking in B annexure "B" *Vide* annexure "C". However, to date the respondent has not fulfilled his undertaking.

The defence

In his opposing papers, as well as in the heads of argument, the respondent basically raised three issues or defences.

C The first is that there exists a material dispute of fact which cannot be resolved on the papers without hearing *viva voce* evidence. This is premised on the allegation by the respondent that the applicant averred that the respondent knew that the estate property had a dispute and despite that knowledge he fraudulently misrepresented to the applicant to enter into the contract of sale. D Because the respondent disputes this averment this necessitates the hearing of *viva voce* evidence.

The second issue raised is one of supervening impossibility. This is premised on the fact that the purchase price was deposited into the respondent's trust account and it remained there until the Zimbabwe dollar currency became moribund through no fault of the respondent. This was out of his control E hence constitutes a supervening impossibility to perform. He could not provide the alternative house he had guaranteed to do because the purchase price paid had been rendered valueless.

The third issue raised relates to non-joinder of the principal, *viz.* Joseph Tsamwayi. For this averment the respondent relies on clause 11 of the F agreement of sale alluded to *supra*, *viz.* that in the event of any material breach of the agreement by the seller the respondent will be jointly

responsible with the seller for paying damages to the purchaser. The non-joinder of the seller, so the argument went, is fatal to the application.

Mr *Mahuni* is from the law firm Matsanura and Associates, who are G corresponding attorneys of Laita and Partners, representing the respondent. The latter firm drafted the respondent's opposing papers, including the heads of argument. At the hearing of argument Mr *Mahuni* conceded, correctly in my view, that the averments that there exist a material dispute of fact and also supervening impossibility have no legal leg to stand on. The concession's propriety is hinged on the fact that the alleged material dispute of fact is H misplaced because the applicant's cause of action is founded not on the

agreement of sale annexure "A1-A5" but on annexures "B" and "C" and A also that for more than a year the purchase price lay in the respondent's trust account without the respondent either purchasing an alternative house for the applicant or reversing the transfer of the deposited funds.

The sole issue that is left for my resolution is the one relating to the alleged non-joinder of the principal. B

The law and its application to the facts

In *Wood* v *Visser* 1929 CPD 55 at 56 Watermeyer J restated the general rule regarding the liability of an agent in these words:

> "The general rule undoubtedly is that a person contracting with an agent can only sue the principal on that contract, but in some cases he can sue the agent; if, for C example, he contracts with the agent as a principal, makes him his debtor and gives credit to him and not to his principal, then he can sue the agent personally on such contract".

See also *Blower* v *van Noorden* 1909 TS 890 at 898 where Innes CJ said:

> "The usual test would be to enquire to whom the contracting party looked. *Nam in talibus contractibus semper inspictur cujus fides secuta sit*. That would be D the governing principle."

In clause 11 of the agreement of sale quoted above, the respondents holds himself out as a guarantor and surety, and will be "jointly responsible with the seller in paying damages to the purchaser" in case of a material breach of the contract. He thus makes himself a co-principal debtor. E

In *Neon & Cold Cathode Illuminations (Pty) Ltd* v *Ephron* 1978 (1) SA 463 (A) at 472B-C it was held that the only consequence (albeit an important one) that flows from a surety also undertaking liability as a co-principal debtor is that *vis-à-vis* the creditor he thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussion and division, and he becomes liable jointly and severally with the principal debtor. See also Caney's *The* F *Law of Suretyship In South Africa* 3 ed (Juta and Co Ltd, 1982) pp 46-47.

In the instant case, it is beyond cavil that the unassailable interpretation that must be gleaned from the wording of clause 11 of the agreement of sale is that by holding himself out as a guarantor and surety, followed by his conduct of retaining the purchase price in his company's trust account for some 13 G months coupled with his undertaking in annexure 'B' as "agent and guarantor in the main agreement of sale … to secure for the purchaser an alternative property within 14 days from the signing of this agreement", the applicant purchaser looked to the respondent not only as a co-principal debtor but through novation via annexure 'B', as the sole debtor who could be sued in either instance alone without joining the principal or original principal H

A as the case may be. In any event, by agreeing to be a co-principal debtor, the respondent tacitly renounced the benefit of excussion and consequently it is idle for him to now clamour or grope for it. The applicant is perfectly entitled at law to proceed against either party at her discretion. The party successfully sued may be reimbursed by the other party who has not been B joined to the suit.

Can the applicant rightly demand specific performance from the respondent?

It was held in *Cohen* v *Shires, McHattie & King* (1882) 1 SAR 41 that, as far back as the 17th century, Roman-Dutch law clearly recognised the right to a specific performance of a contract. And in *Farmers' Co-operative Society* C *(Reg)* v *Berry* 1912 AD 343 at 350 Innes JA stated:

> "*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract."

That right has been recognised and re-affirmed in a plethora of cases such D as *Woods* v *Walters* 1921 AD 303 at 309, *Haynes* v *King Williamstown Municipality* 1951 (2) SA 371 (A) at 378D-F, and *Intercontinental Trading (Pvt) Ltd* v *Nestlé Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H).

It is settled law that the grant or refusal of an order for specific performance is entirely a matter for the discretion of the court in which the claim for specific performance is made: *Intercontinental Trading supra* at *26.*

E This judicial discretion is not circumscribed by rigid rules, rather, each case must be judged in the light of its own circumstances. Courts have ruled that the remedy of specific performance can be eschewed where such an order is inequitable to the defaulting party or operates unreasonably harshly on the defendant, or where the agreement giving rise to the claim was unreasonable, F or where the decree would produce injustice or would be inequitable under all circumstances: see *Haynes supra*.

In *Tamarillo (Pty) Ltd* v *R N Aitken (Pty) Ltd* 1982 (1) SA 398 at 442E-443H (A) Miller JA dealt with the question of what the plaintiff or the defendant must do in order to persuade the court, in the exercise of its discretion, to grant or refuse an order for specific performance, and on which party the G onus lies. It is for the defendant to raise impossibility as a defence and the onus rests on him to prove impossibility.

In the instant case the respondent did not raise the defence of impossibility of performance. In fact the defence of supervening impossibility that was initially raised was abandoned at the hearing by Mr *Mahuni*. The sole defence that H remained for resolution pertained to the non-joinder of the principal which

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Mutema J

I have already disposed of *supra*. Mr *Mahuni* submitted that the respondent A was not disputing liability in the face of annexures "A" and "B". His only quarrel was regarding the non-joinder.

On the facts of this case, it has not been shown that a decree of specific performance as prayed for in the draft order would produce injustice or be inequitable or operate unreasonably harshly upon the respondent. On the B contrary, its refusal would produce grave injustice or operate unreasonably harshly on the applicant who parted with her lifetime savings paying for a house which the respondent failed to deliver even following an undertaking to deliver an alternative property within 14 days, yet the respondent kept her money in his company's trust account for 13 months. To deny the decree and direct that the applicant should claim damages when the currency she paid C is no longer of any value to anyone would offend against all known tenets of equity and justice. She performed her part of the contract and was not responsible for the respondent's non-performance. The statements of account attached to the respondent's opposing affidavit are of no probative value. They simply indicate that the applicant on 24 December 2007 deposited Z$15 billion. The statements run up to 29 February 2008. It has not been proven D that by February 2009, when the new currency regime was introduced, the applicant's purchase price was still locked in that trust account. The respondent could have and must have used it for his benefit. Why should the applicant be unduly harshly treated by denial of the decree in the circumstances? Justice and even public policy considerations would not allow it. E

In the result judgment be and is hereby entered for the applicant in terms of the draft order with the amendment in para 3 thereof that costs be on the ordinary scale.

Coghlan Welsh & Guest, applicant's legal practitioners F

Laita & Partners, respondent's legal practitioners G

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/CHIMHOWA & ORS v CHIMHOWA & ORS 2011 (2) ZLR 471 (H)

CHIMHOWA & ORS v CHIMHOWA & ORS 2011 (2) ZLR 471 (H)

Citation	2011 (2) ZLR 471 (H)
Case No	Judgment No. HH-183-12
Court	High Court, Harare
Judge	Chiweshe JP
Heard	8 March 2011; 17 November 2011; *CAV*
Judgment	23 November 2011
Counsel	*T Moyo*, for the applicants *T I Gumbo*, for the first respondent
Case Type	Application for review
Annotations	No case annotations to date

Flynote

Succession – *intestate – heirs ab intestato – widow remarrying after death of husband – children of first marriage – entitlement to matrimonial property – spouse and children of second marriage – only entitled to assets acquired during second marriage*

Headnote

D In introducing provisions such as s 3A of the Deceased Estates Succession Act [*Chapter 6:02*], s 68F of the Administration of Estates Act [*Chapter 6:01*] and the Deceased Persons Family Maintenance Act [*Chapter 6:03*], the legislature gave effect to its desire to protect widows and E minor children against the growing practice by relatives of deceased persons of plundering the matrimonial property acquired by the spouses during the subsistence of the marriage. Under this practice, which had become rampant, many widows were deprived of houses and family property by marauding relatives, thus exposing the widows and their minor children to the vagaries of destitution. In many cases, the culprit F relatives would not have contributed anything in the acquisition of such immovable and movable properties, often the result of years of toil on the part of the deceased and the surviving spouse. This is the mischief that the legislature sought to suppress.

The legislature intended to protect, in the case of widows, the property G acquired during the subsistence of their marriage to the deceased persons. This protection benefitted not just the widows but their minor children as well. It was not the legislature's intent to extend this protection and privilege to persons outside the marriage within which such property might have been acquired. To impute that kind of interpretation would lead to serious absurdities in the application of the law. For example, H A marries B. They acquire jointly what may be termed matrimonial

Chiweshe JP

property. They have children. A, the husband, dies and in terms of the law A B, the wife and surviving spouse, is awarded the matrimonial property. Thereafter B contracts another marriage with X, the second husband. She dies and X, the second husband and surviving spouse, inherits the matrimonial property that B inherited from A, at the expense of A and B's children in that marriage. Clearly those children will have been B disinherited of their parents' property. They may as a result end up in the street, particularly if X sells the property and converts the proceeds to his own ends. The result would be that the noble intention of Parliament – to keep the property within the family for the benefit of the surviving spouse and the children – would have been subverted. The protection afforded to surviving spouses is, in terms of inheritance, limited to C those assets that were acquired during the course and subsistence of that spouse's marriage to the deceased person whose estate is under distribution. In particular, surviving spouses cannot by right claim any right to matrimonial property acquired outside their own marriage. To allow them to do so would lead to the absurdities alluded to. It would be against public policy and conscience to deprive the children of deceased D persons the common law right to inherit from their parents, merely because at some stage the surviving parent had remarried.

Legislation considered

Administration of Estates Act [*Chapter 6:01*] , s 68F E

Deceased Estates Succession Act [*Chapter 6:02*], s 3A

Deceased Persons Family Maintenance Act [*Chapter 6:03*]

Case information

T Moyo, for the applicants

T I Gumbo, for the first respondent

Judgment

CHIWESHE JP: This is an application to review the actions of the second F and third respondents with regards the distribution of the estate of the late Lloyd Chimhowa, who died intestate on 3 December 2007.

At the time of his death the deceased was married to the first respondent, Joyce Chimhowa, in terms of the then Marriages Act [*Chapter 37 of 1974*]. G The parties initially contracted a customary law union. This union was subsequently solemnised on 14 June 1991. Up till then the deceased was a widower, having been customarily married to Mary-Maria Mabwe in 1971. She died intestate in October 1987. During the subsistence of this first marriage the spouses acquired an immovable property known as house number 7447, 6th Way, Glen View 7, Harare. The house was registered in the H

Chiweshe JP

A name of the deceased, Lloyd Chimhowa. The house was acquired in 1979. The spouses jointly contributed to the development of the stand, including the construction of a dwelling house. Mary-Maria died after completion of the house. For one reason or another her estate was neither registered nor administered as required by law. She was survived by her husband Lloyd Chimhowa and six children, the applicants in this matter.

B The late Lloyd Chimhowa's second marriage to the first respondent was blessed with four children. The new family continued to reside at the house left behind by Mary-Maria Mabwe. Also residing at the same address were the six children borne out of the deceased's marriage to Mary-Maria Mabwe.

When the late Lloyd Chimhowa died, the first respondent was appointed C executor of the deceased estate. She did not last long in that appointment after the Master wrote to her accusing her of falsifying information in order to get authority to transfer estate assets into her name. For this, the Master threatened her with criminal prosecution. Her appointment as executor was then revoked in favour of the second respondent. The first respondent and the applicants were in bitter dispute as to the distribution of the matrimonial D home. The parties eventually buried the hatchet and came to a mutually agreed distribution plan. It was agreed that the matrimonial home be jointly owned by the

applicants, the first respondent and her four children, in equal share. This agreement was referred to as "the family tree".

This agreement did not last long. The first respondent opted out of it and, in a E letter addressed to the executor (the second respondent), dated 30 September 2008, she advised that she was resiling from the agreement and demanded to be allocated what belonged to her and her biological children. She followed this with another letter dated 21 October 2009 in which she demanded to be allocated fifty per cent of the matrimonial home, with the other fifty per cent F being allocated to the sixth respondent and her minor biological children.

On 4 August 2009 the executor (second respondent) submitted to the third respondent the first and final distribution account in terms of which it was proposed *inter alia* to award the immovable property (matrimonial home) No. 7447 6th Way, Glen View 7, Harare, to the second respondent. Despite the applicants' written objection to the distribution of the matrimonial home, G the third respondent, the Master, confirmed the distribution, advising the applicants to seek review by this honourable court should they persist with their objections.

The applicants have proceeded accordingly by launching the present application. They contend as follows. The Master did not take their objections H into account and for that reason he failed to apply his mind to the issues

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before him. Chief among the applicant's reasons for objection was that the A distribution did not take into account the fact that the matrimonial home also constituted part of their late mother's estate (Mary-Maria Mabwe's estate). This should have been taken into account in finalising the estate, they argue.

Secondly, the applicants were aggrieved that, in compiling the inventory, the first respondent had left out the Rusape rural home, which their late father had B specifically built for her. It is this rural home to which, in the opinion of the applicants, the first respondent would be entitled as she had not contributed to the acquisition and development of the Glen View matrimonial home. It is further argued that the third respondent failed to recognise that he was essentially dealing with two estates. Maria Mary Mabwe's estate, argue the applicants, would be entitled to fifty per cent of the matrimonial home. The C balance of the value of the matrimonial home would have accrued to her late husband's estate. That is the value that the first respondent would have been entitled to. The applicants admit that at one stage the first respondent had offered that they buy out her fifty per cent share. They were however unable to raise the amounts involved. Further, the applicants aver that on a D number of occasions the first respondent had indicated that she wanted to sell the matrimonial property and that if she did so, the applicants, especially the sixth applicant, who is disabled, would be greatly prejudiced.

For these reasons, the applicants seek an order setting aside the decision of the third respondent to award the matrimonial home to the first respondent. In its place they seek the substitution of an order awarding the Rusape rural E home to the first respondent with the applicants and the first respondent being jointly awarded the Glen View matrimonial home in equal share. Alternatively, in the event that the matrimonial home is awarded to the first respondent, that the applicants, in particular the sixth applicant, be granted the right to use the property and that the fourth respondent be directed to register a caveat against the property to prevent the first respondent from F disposing of the property without the consent of the applicants.

The first respondent says she was initially amenable to sharing the immovable property with the applicants but because the applicants, continually undermined her authority as mother and also because, there being ten people, the house was always overcrowded, she had changed her mind. G She expected those of the applicants who had attained adulthood to move out. They refused to so move out. She said she had left out the rural home, in compiling the inventory because although she regarded it as the family's rural home (Mary-Maria Mabwe's hut is also situated there), she did not regard it as her matrimonial home as she hardly lived there, except for the odd weekend. She denied that it was her intention to sell the matrimonial H

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A home in Glen View. Above all, however, the first respondent argues that at law, being the surviving spouse, she is entitled to the matrimonial home and that she is not obliged to co-own the matrimonial home with the applicants. She also avers that had the estate of Mary-Maria Mabwe been registered it would have been handled under customary law and thus the house would have been excluded from her estate and awarded to her husband instead. It B cannot therefore be argued that the house transcends two separate estates. To that end, contends the first respondent, the Master's decision was sound at law and meets the justice of the case.

I believe from the facts of this matter that the office of the Master followed the procedures outlined in terms of the Administration of Estates Act [*Chapter* C *6:01*]. An edict meeting was held, attended by all stakeholders. When the first respondent failed to meet the required standards, the Master quickly intervened, revoking her appointment as executor and replacing her with the second respondent. Various meetings were held among the parties with a view to getting them to agree on the way forward. They were unable to agree and, naturally, the Master directed that the executor proceeds in terms of s 3A of D the Deceased Estates Succession Act [*Chapter 6:02*]. In general, therefore, the Master and the second respondent cannot be faulted in the manner in which they handled this deceased estate. They were guided ultimately by the provisions of s 3A of the Deceased Estates Succession Act, which provide that the surviving spouse of a person who dies wholly or partially intestate E shall be entitled to receive from the free residue of the estate

> "the house or other domestic premises on which the spouses or the surviving spouse, as the case may be, lived immediately before the person's death and the household goods and effects which immediately before the person's death were used in relation to the house or domestic premises referred to in para graph(a), where such house, premises, goods and effects form, part of the deceased person's F estate."

Section 68F(2)(d) of the Administration of Estates Act, on the other hand, provides, in relation to the estates of persons who die intestate, as follows:

> "… where the deceased person is survived by one spouse and one or more children, the surviving spouse should get –
>
> (i) ownership of, or, if that is impracticable, a usufruct over, the house in which G the spouse lived at the time of the deceased person's death, together with all the household goods in that house".

In reading the legislation governing deceased estates in so far as the rights of surviving spouses are concerned, it is important to bear in mind the intention of the legislature, bearing in mind that this branch of the law has in H the last decade been the subject of much debate and controversy. A number

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of amendments have been brought to bear to this branch of the law. The A chief driver of this process has been the desire by the legislature to protect widows and minor children against the growing practice by relatives of deceased persons of plundering the matrimonial property acquired by the spouses during the subsistence of the marriage. Under this practice, which had become rampant, many widows were deprived of houses and family B property by marauding relatives, thus exposing the widows and their minor children to the vagaries of destitution. In many cases, the culprit relatives would not have contributed anything in the acquisition of such immovable and movable properties, often the result of years of toil on the part of the deceased and the surviving spouse. This is the mischief that the legislature sought to supress in introducing provisions such as s 3A of the Deceased C Estates Succession Act and s 68F of the Administration of Deceased Estates Act and the Deceased Persons Family Maintenance Act [*Chapter 6:03*].

In my view, the legislature intended to protect, in the case of widows, that property acquired during the subsistence of their marriage to the deceased persons. This protection benefitted not just the widows but their minor D children as well. I do not perceive the legislature's intent to be to extend this protection and privilege to persons outside the marriage within which such property might have been acquired. To impute that kind of interpretation would lead to serious absurdities in the application of the law. For example, A marries B. They acquire jointly what may be termed matrimonial property. They have children. A, the husband, dies and in terms of the law B, the wife E and surviving spouse, is awarded the matrimonial property. Thereafter B contracts another marriage with X, the second husband. She dies and X, the second husband and surviving spouse, inherits the matrimonial property that B inherited from A, at the expense of A and B's children in that marriage. Clearly the children will have been disinherited of their parents' property. They may as a result end up in the street, particularly if X sells the property F and converts the proceeds to his

own selfish ends. In the result, the noble intention of Parliament to keep the property within the family for the benefit of the surviving spouse and the children will have been subverted.

During the course of hearing this application, an example was given of a surviving male spouse whose wife died leaving him to fend for their G minor children. He was in terms of the law awarded the matrimonial house and movables. He retained the maid because it was in the interests of the children to keep them under the care of a person they were familiar with. In time a relationship developed between the maid and the widower, leading to marriage. The widower dies and the maid, being the surviving spouse, is awarded the family's matrimonial home acquired during the subsistence H

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A of the first marriage, without the maid's contribution. Thereafter the maid sells the matrimonial home, takes the money, deserts the deceased husband's children and marries another man. Again, in instances such as this example, the intention of the legislature is subverted.

For these reasons I would conclude that the protection afforded surviving B spouses is, in terms of inheritance, limited to those assets that were acquired during the course and subsistence of that spouse's marriage to the deceased person whose estate is under distribution. In particular, surviving spouses cannot by right claim any right to matrimonial property acquired outside their own marriage. To allow them to do so would lead to the absurdities alluded to above. It would be against public policy and conscience to deprive the children C of deceased persons the common law right to inherit from their parents merely because at some stage the surviving parent had remarried. If that had been what Parliament intended to do it would have expressly so provided. I am satisfied that Parliament intended only the consequences I referred to earlier.

In my view, it is of paramount importance that the legislature revisits the D relevant legislation in order that its intention be expressed in clearer terms than is presently the case.

In the result, I agree with the submissions made on behalf of the applicants *vis-à-vis* the distribution of the immovable property in this estate. I agree that it is impracticable and indeed undesirable that the first respondent be awarded property acquired before her marriage to the deceased Lloyd E Chimhowa. At the same time, I recognise the first respondent's right to live at this property, which to all intents and purposes is also her matrimonial home. Her four minor children, being dependants of the deceased person, also have the right to live with their mother at that property.

In the result I order as follows: F

(1) That the immovable property commonly referred to as house No. 7447 6th Way, Glen View 7, Harare be and is hereby awarded to the first to sixth applicants in equal shares.

(2) That the first respondent be and is hereby granted a life usufruct over the said immovable property. G

(3) That the final order of the third respondent given under DR 15/08 Estate late Lloyd Chimhowa be and is hereby amended to the extent of paras (1) and (2) above.

(4) That there be no order as to costs.

Matsanura & Associates, applicants' legal practitioners

H *Atherstone & Cook*, first respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/MASIYA & ANOR v SADOMBA & ANOR 2011 (2) ZLR 478 (H)

MASIYA & ANOR v SADOMBA & ANOR 2011 (2) ZLR 478 (H)

Citation	2011 (2) ZLR 478 (H)
Case No	Judgment No. HH-28-12
Court	High Court, Harare
Judge	Mutema J
Heard	28 November 2011; *CAV*
Judgment	29 November 2011
Counsel	*A Marara*, for the plaintiffs *C Maunga*, for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Delict – *negligence – duty of care – when duty of care arises – estate agent – financial loss caused to client by breach of duty of care – estate agent liable to client*

Estate agent – *liability – duty of care to client – when duty arises –financial* D *loss caused to client by breach of such duty by estate agent – estate agent liable*

Headnote

The first defendant was a property consultant and the second defendant a firm of estate agents. The plaintiffs claimed damages from the defendants, arising out of the alleged breach of duty of care and misrepresentation on E the part of the defendants in respect of the sale of a piece of land which turned out not to belong to the purported sellers introduced to them by the first defendant. By then payment for the property had already been effected into the second defendant's trust account and various other disbursements had been made. The money paid to the defendants was F released to the purported sellers after the plaintiffs had signed transfer papers.

The defendants' defence was that they breached no duty of care because they followed the standard practice of requesting a copy of the title deeds which they used to ascertain the identity of the sellers (gleaned from their national identity cards) and did a deeds search and found no G caveat placed on the property. They then prepared the agreement of sale which allowed them to release the purchase price, less capital gains tax and estate agent's commission, to the sellers upon the sellers signing the necessary transfer documents. They argued that was not only not a pre-requisite but also not a term of the agreement of sale that the plaintiffs should have been availed with the original title deeds. H

A *Held*, that the question of whether a duty of care arises in a particular situation has to be approached in two stages: (a) as between the alleged wrongdoer and the person who has suffered damages, whether there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care B arises; and (b) if there is, are there any considerations which ought to negative or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. The issue *in casu* was this: in the real estate industry, can an estate agent or property consultant/negotiator be held liable for negligently C breaching a duty of care which occasions

financial loss to purchasers to whom he had made assurances that they would not be defrauded by the prospective seller; and can a real estate agency be held vicariously liable for the negligence of its property consultant even where vicarious liability had not been pleaded in the pleadings?

Held, further, that the first defendant was employed by the second defendant; D his dealings with the plaintiffs were done during the course and scope of his employment and were advancing the interests of the second defendant. The first defendant earned an agent's commission which went into the coffers of the second defendant. At no stage in the pleadings did the second defendant put the issue of vicarious liability into question. E It went without saying that if the second defendant were to be found liable its liability would be grounded on vicarious liability. The first defendant's assurance to the plaintiffs that he was a professional who would protect their interests meant that he therefore owed them a duty of care. Accordingly, as between the defendants and the plaintiffs, there was created a sufficient relationship of proximity such that, in the F reasonable contemplation of the former, negligence or carelessness on their part might be likely to cause damage to the latter. Every person has a right not to be injured in his property by the negligence of another. The transaction in the instant case took place at a time when the real estate industry was awash with prospective innocent purchasers being conned of their hard earned money by fraudsters who thrived on the G innocence or gullibility of the former. Where, therefore, a purchaser entrusts his money to a professional estate agency or property consultant who assures him that the money will be safe, a duty of care is thereby established. If the estate agency negligently breaches the duty of care so created, it must be held liable in damages for the ensuing harm where H a *diligens paterfamilias* would have foreseen the danger and guarded

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against it. The standard practice, in conformity with the actions of a A *diligens paterfamilias* in the field of real estate, is releasing the cash against transfer, not against mere signing of the necessary transfer papers. When the fly by night sellers *in casu* proposed to the first defendant to insert the release clause, without having even produced the original title deeds, the first defendant should have been put on his guard and should B have reasonably foreseen the likelihood of loss being occasioned to the plaintiffs if the purchase price were released before the actual transfer of the stand had gone through.

Held, further, that it was thus not only equitable but good law that in the real estate industry, an estate agent or property negotiator/consultant can be held liable for negligently breaching a duty of care which occasions C financial loss to a client and a real estate agency can be held vicariously liable for the negligence of its property negotiator or estate agent, even where vicarious liability has not been pleaded in the pleadings, provided that it is proved that the agent/negotiator was acting within the course and scope of his employment. D

Cases referred to

Anns & Ors v London Borough of Merton [1977] 2 All ER 492 (HL)

Cape Town Municipality v Paine 1923 AD 207

Halliwell v Johannesburg Municipal Council 1912 AD 659

Peri-Urban Areas Health Bd v Munarin 1965 (3) SA 367 (A)

Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd 1972 (1) RLR 56 (G); 1972 (2) SA 703 (R) E

S v Burger 1975 (4) SA 877 (A)

Scotfin Ltd v Ngomahuru (Pvt) Ltd 1997 (2) ZLR 567 (H); 1998 (3) SA 466 (ZH)

Zimnat Insurance Company Limited v Chawanda 1990 (2) ZLR 143 (S); 1991 (2) SA 825 (ZS) F

Case information

A Marara, for the plaintiffs

C Maunga, for the defendants

Judgment

MUTEMA J: The plaintiffs are husband and wife respectively, while the G defendants are respectively employee and employer.

The plaintiffs are claiming payment by the defendants, jointly and severally, the sum of US$21 593, being what they termed damages which they suffered owing to the defendants' breach of duty of care and misrepresentation in the sale of a piece of land called stand 249 Good Hope, which turned out not to belong to the purported sellers introduced to them by the first defendant H

A when payment for the property had already been effected into the second defendant's trust account. By the time the plaintiffs discovered the true position, the purchase price of $20 000 had already been paid to the purported sellers while $373 had been paid to the City of Harare to process building plans for the intended house and $1 220 had been paid as conveyancing fees.

B The claim is being disputed.

The plaintiffs' case is premised on the evidence of the two spouses. The first plaintiff's evidence is this. He resides at 6421 Mboroma Street, Masvingo. He is employed by Harare Municipality. Around June/July 2010 the first defendant flighted an advertisement in the paper for sale of a stand in Good Hope. The plaintiff contacted the first defendant via the phone number C given in the advertisement. He drove the first defendant to the stand. When he expressed interest in the stand, the first defendant proceeded to draft an agreement of sale. He was egged into signing that agreement by the first defendant in the absence of the seller whom he had not seen. He later enquired if the seller had signed the agreement and was advised that the seller had D not come, so the intended agreement was called off.

Then, in July 2010, the first defendant phoned him on a Friday, asking if he was still interested in a stand in Good Hope. He said he was and on the Monday he went to the first defendant's office and together they went to view stand 249. He was interested in it, so on the Sunday he took his wife, the second plaintiff, to view the stand in the absence of the first defendant. E She liked it also. On Monday 16 August 2010 he went with his wife to the second defendant's offices where they had an interview with the first defendant. They told the first defendant that they had read in the newspapers about people being conned, hence they wanted to deal with a registered real estate agency. The first defendant assured them not to worry about being F conned, because he had 31 years in the real estate business. He then went on to draw up the agreement of sale. One of the terms in that agreement was that the purchase price must be paid into the second defendant's trust account before 17 August 2010.

The first defendant produced a copy of the title deeds. The first plaintiff asked him where the original title deeds were and the first defendant told him not G to worry since he was in the business and would not release the money to the sellers, whom he named as Nelson Matinde and I Matinde before the sellers satisfied all the necessary requirements. The second plaintiff also queried the absence of the original deeds and the first defendant told her not to worry since they were dealing with professionals. On asking where the sellers H were, the first defendant said they were at a funeral but would come and sign

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the agreement of sale. Based on the first defendant's age and his assurance A that they were dealing with professionals, they then signed the agreement.

The first defendant gave them the second defendant's trust account number and they went to the bank and deposited the $20 000 into that trust account. Upon return to the second defendant's office they were then issued with a receipt of payment. The first defendant told them Mr and Mrs Matinde B would come and sign. Later on the first defendant told him that Mr Matinde had signed the agreement but the wife had not. He said not to worry, for the sellers had gone to Gokwe, but he knew their cousin, so the wife would come and sign.

After Mrs Matinde had signed the agreement of sale the first plaintiff went to C the first defendant and again asked for the original title deeds. This is what the first defendant told him: Nelson Matinde had told him that his wife had gone behind his back and had borrowed money from a lawyer's trust fund account using the original deeds as collateral therefore the original deeds could

not be released. The first defendant then asked him to write a letter authorising the second defendant to release some money to pay the sellers D an advance, which they would use to pay off $4 500 to enable the release of the original title deeds by the lawyers in Marondera. He refused to write such a letter. While there, someone who said he was Mr Matinde phoned him, asking him to write the letter so that the transaction would be speeded up. He told the person that he would not do such a thing.

On 24 August 2010 he had paid for transfer fees to Mtombeni, Mkwesha E and Muzawazi legal practitioners. In September 2010 he went there and queried with Mr Msengezi why there was delay in the transfer. He was asked to top up the money with $80 which he paid to make a total of $1 040. The conveyancers said they were still waiting for the original deeds to be sent to them by the second defendant. F

In October 2010 a certain detective inspector Majaya invited him to his office. The police officer advised him that he had been swindled because Nelson and I Matinde did not exist. He had taken the first defendant in, following a report of a certain stand whose title deeds had disappeared from some lawyers and, on checking the same lawyers, the title deeds for stand G 249 had also been discovered missing. He further said the purported sellers' given addresses were false, the given phone numbers were unreachable and the identity cards were forged.

In October, 2010 Mr Msengezi advised him that they had got the title deeds from the second defendant, but transfer could not go through as the property had a caveat and there was need to verify authenticity of the Matindes. When H

A he contacted the first defendant to explain the mystery the first defendant said he was sorry for he was also duped.

The second plaintiff's evidence is substantially corroborative of the first plaintiff's. After her evidence the plaintiffs closed their case.

For the defendants, only one witness, namely, the first defendant, gave B evidence. It is to the following effect.

He is authorised to represent the second defendant via a company resolution. He is employed by the second defendant as a property consultant. He has been a property consultant for twenty years but has been with the second defendant from 2003. His duties are to advertise for sale properties brought by clients or to advertise for properties which clients would have asked them C to scout for. Where a client expresses an intention to purchase an available property they convey the intention to the seller and if the parties reach an agreement he proceeds to draft an agreement of sale.

He knows both plaintiffs in this case. He dealt with the first plaintiff on a first sale of a Good Hope stand which failed to consummate. Regarding the D second stand he had advertised for, Mr Matinde responded and showed him stand 249 in Good Hope. He asked Matinde to prove he was the owner of the stand in question. He produced a copy of the title deeds and identified himself by producing his plastic national identity card. The particulars on the two documents tallied.

He later contacted the first plaintiff. The first plaintiff was shown the stand E and said he would buy it. The first defendant communicated with the seller and gave him the first plaintiff's offer, which he accepted. He then proceeded to draft the agreement of sale after having checked with the Deeds Office that there was no caveat on the property. The conditions in the agreement were given by the seller, who said he was in need of money for his development F project, so once all the conveyancing documents were signed the cash should be released to him.

The plaintiffs read through the agreement. They did not object to the conditions and they signed it. In order to protect the plaintiffs' interests, he photocopied the sellers' identity cards (which were later taken by the police for their investigations).

G The purchasers' declarations were signed in his office and he witnessed for them. The sellers' transfer documents were signed at Mtombeni's offices. The money was only released to the sellers after the necessary transfer documents had been signed and the original title deeds had been produced. The transfer documents were signed on 18 August 2010, the first release of H the money was on 14 September 2010 in the amount of $1700 needed for

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release of the original title deeds and the rest of the money was released on A 28 September 2010.

He confirmed that the first plaintiff phoned him expressing worry concerning the delay in the release of the original title deeds. The first plaintiff also told him Matinde had phoned him asking for release of the $1700 so that the original deeds could be released. He told the first plaintiff that Matinde had B also phoned him telling him that he had phoned the first plaintiff. This was on the phone and the first plaintiff said to him, "I cannot write but since it is that amount which is going to be subtracted from the purchase price, you can go ahead and do it."

He told the court that in terms of clause (a) of the agreement, it was not C necessary to delay release of the purchase price until 14 September 2010 or seek the purchasers' leave since the clause had already been satisfied. The production of the original title deed was not a condition for release of the money. He only realised that the transfer could not go through when the police came to him saying there was a problem with the sale. Mtombeni had lodged the transfer documents with the Deeds Office and had told him that D there was a problem with the property. He was adamant that he performed his brief regarding the sale of the property in the normal manner, in the way he was supposed to do. He concluded by saying that he was duped and so were the conveyancers and Zimra. The defendants then closed their case.

The joint pre-trial conference minute reflects three issues, *viz.*: E

1. Whether or not the defendants are liable to the plaintiffs in the sum claimed at all.
2. Whether or not the property had a caveat at the time the agreement was signed.
3. Whether or not the defendants breached a duty of care towards the F plaintiffs.

I consider that issues 1 and 3 above are interwoven, in that once the defendants are found to have owed the plaintiffs a duty of care which they negligently breached, then it follows that they are liable in the sum claimed. As regards issue 2, it became common cause during the hearing that the property in G question was not encumbered by way of a caveat at the relevant time. Exhibit 8 puts paid to the issue. This is a letter dated 31 January 2011 from the Chief Registrar of Deeds Office confirming the same.

The main plank of the defendants' defence is that they breached no duty of care, because they followed the standard practice of requesting a copy of the title deed, which they used to ascertain the identity of the sellers H

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A gleaned from their national identity cards. They did a deeds search and found no caveat placed on the property. They then prepared the agreement of sale which allowed them to release the purchase price less capital gains tax and estate agent's commission to the sellers upon the sellers signing the necessary transfer documents. That the plaintiffs should have been availed with the original title deeds is not only not a pre-requisite, but is not a term B of the agreement of sale.

The last averment that the issue of original title deeds is not contained in the agreement prodded counsel for the plaintiffs to invoke his knack for the poetic by opening his written closing submissions with a quote from William Shakespeare's *The Merchant of Venice*, Act 4 Scene 1 lines 252- C 257 which reads:

> "*Portia:* Have by some surgeon Shylock, on your charge,
>
> To stop his wounds, lest he do bleed to death.
>
> *Shylock:* Is it so nominated in the bond?
>
> *Portia:* It is not so express'd, but what of that?
>
> ' D Twere good you do so much for charity.
>
> *Shylock:* I cannot find it, 'tis not in the bond."

The position of the law regarding duty of care has been developed over generations. In *Halliwell* v *Johannesburg Municipality* 1912 AD 659 at 672, Innes ACJ said:

> E "… where in consequence of some positive act, a duty is created to do some other act or exercise some special care so as to avoid injuries to others, then the person concerned is, under Roman-Dutch law, liable for damages caused to those whom he owes such duty by an omission to discharge it."

Some eleven years later, in *Cape Town Municipality* v *Paine* 1923 AD 207 at 216-217 (followed in *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 (1) RLR 56 (G) F at 74) Innes CJ held that:

> "It has repeatedly been laid down in this court that accountability for un intentioned injury depends upon *culpa* – the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable man to denote the *diligens paterfamilias* of Roman law – the average prudent person. Every man has a right not to be injured in his person or property by the negligence of G another, and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon the consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established … But as pointed out in *Transvaal Estates* v *Golding* and *Farmer* v *Robinson GM Co* 1917 AD 18 and H 501 there is an advantage at adhering to the general principle of the Aquilian

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> law and in determining the existence or non-existence of *culpa* by applying the A test of a reasonable man's judgment to the facts of each case."

On the question of negligence, in *Peri-Urban Areas Health Board* v *Munarin* 1965 (3) SA 367 (A) at 373, Holmes JA had this to say:

> "Negligence is the breach of a duty of care. In general, the law allows me to mind my own business. Thus if I happen to see someone else's child about to drown B in a pool, ordinarily I do not owe a legal duty to anyone to try to save it. But sometimes the law requires me to be my brother's keeper … I owe him such a duty if a *diligens paterfamilias*, that notional epitome of reasonable prudence, in the position in which I am in, would –
>
> (a) foresee the possibility of harm occurring to him; and
>
> (b) take steps to guard against its occurrence. C
>
> Foreseeability of harm to a person, whether he be a specific individual or one of a category, is usually not a difficult question, but when ought I to guard against it? It depends upon the circumstances in each particular case."

But in *S* v *Burger* 1975 (4) SA 877 (A) the same learned judge said:

> "One does not expect of a *diligens paterfamilias* any extremes such as Solomonic D wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense."

I find neither quote detracting from the other.

And in England, on the concept of duty of care, Lord Wilberforce in *Anns & Ors* v *London Borough of Merton* [1977] 2 All ER 492 (HL) at 498 E observed as follows:

> "Through the trilogy of cases in this House, *Donoghue* v *Stevenson* [1932] All ER Rep 1, *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1963] 2 All ER 575 and *Home Office* v *Dorset Yacht Co Ltd* [1970] 2 All ER 294, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within F those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. Firstly, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damages there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care G arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."

In resolving the issue agreed upon at the pre-trial conference stated above, this court can afford to elaborate it and pose the following question(s): H

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A In the real estate industry, can an estate agent or property consultant/negotiator be held liable for negligently breaching a duty of care which occasions financial loss to purchasers to whom he had made assurances that they would not be defrauded by the prospective seller; and can a real estate agency be held vicariously liable for the negligence of its property consultant even where vicarious liability had not been pleaded in the pleadings?

B In endeavouring to answer the foregoing, sight should not be lost of the defendants' main plank of their defence, which, although they did not specifically mention it, hinges on the doctrine of *caveat subscriptor,* since the plaintiffs appended their signatures on the agreement whose clause (a) allowed release of the purchase price to the sellers once the necessary transfer C documents had been signed.

Also, should our courts remain subservient to the John Austin positivist theory of jurisprudence or take a leaf from the salutary words of Gubbay ACJ (as he then was), McNally JA and Manyarara JA in *Zimnat Insurance Company Ltd* v *Chawanda* 1990 (2) ZLR 143 (S) at 153 where they said:

> D "Law in a developing country cannot afford to remain static. It 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 adopt 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 by the people because E 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."

What was laid bare before the court, which is either common cause or found proven is the following.

The first defendant is employed by the second defendant; his dealings with F the plaintiffs were done during the course and scope of his employment and was advancing the interests of the second defendant. The first defendant earned an agent's commission which went into the coffers of the second defendant. At no stage in the pleadings did the second defendant put the issue of vicarious liability into question, save to simply plead that "ad prayer: the G defendants deny being liable to the plaintiffs in the sum claimed or at all and puts (*sic*) the plaintiffs to the strict proof thereof." In the event, it is idle for the second defendant to now want to put vicarious liability in issue on the flimsy argument that the legal principle was never pleaded in the summons and declaration. It goes without quarrel that if the second defendant is found liable *in casu* its liability will be grounded on the basis of vicarious H liability.Also common cause or found proved is that the plaintiffs told the

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first defendant that they had heard of many prospective property buyers A being defrauded by conmen, hence they had come to entrust their money in the hands of professionals or registered estate agents. The first defendant assured them that he was a professional who had been in the business for a long time and that their money would be safe. In other words, the first defendant assured the plaintiffs that he would protect their interests. He B therefore owed the plaintiffs a duty of care.

I say so because, as between the defendants and the plaintiffs, there was created a sufficient relationship of proximity, such that in the reasonable contemplation of the former, negligence/carelessness on their part might be likely to cause damage to the latter. Every person has a right not to be injured in his property by the negligence of another. The transaction in the C instant case took place at a time when the real estate industry was awash with prospective innocent purchasers being conned of their hard earned money by fraudsters who thrived on the innocence or gullibility of the former. Where, therefore, a purchaser entrusts his/her money to a professional estate agency/property consultant who assures him/her that the money would be safe, a duty of care is thereby established. If the estate agency negligently D breaches the duty of care so created, it must be held liable in damages for the ensuing harm where a *diligens paterfamilias* would have foreseen the danger and guarded against it.

In the case at hand, to hold that, because in clause (a) of the agreement the plaintiffs authorised the defendants to release the purchase price once the E sellers had signed the relevant transfer documents, the defendants are not liable for the loss, would not only be too simplistic and positivist, but the law would have dismally failed to do justice to the citizenry whom it is supposed to protect. It would also amount to glorifying fraud or con artistry.

The first defendant owed the plaintiffs a duty to take reasonable care not to F cause the latter financial loss by carelessly inserting clause (a) in the agreement when the standard practice in conformity with the actions of a *diligens paterfamilias* in the field of real estate is to release the cash against transfer, not against the mere signing of the necessary transfer papers. The duty of care here was made even more weighty, if account is had of the numerous similar frauds perpetrated *via* the same *culpa* by estate agencies. When the G fly by night sellers *in casu* proposed to the first defendant to insert clause (a), as he alleged happened, and not having even produced the original title deeds, the first defendant should have been put on his guard and should have reasonably foreseen the likelihood of loss being occasioned to the plaintiffs if the purchase price were released before the actual transfer of the stand had gone through. A property consultant with 22 years' experience in the field H

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A now wants to lamely hide behind that clause when he owed the plaintiffs a duty of care to professionally alert them that the clause in question was fraught with this danger.

Apart from failing to draft an agreement of sale with a safety valve of paying out the cash against transfer – B

- the first defendant accepted a photocopy of the title deeds;
- he proceeded to draft the agreement without having seen the other seller, Ivy Matinde, or her identity document;
- the plaintiffs demanded to see the original title deed but same was not availed to them;
- he inexplicably failed to "reck" when on 16 August 2010 "Nelson Matinde" C told him that the original title deeds were at home with "Ivy" who was attending a funeral (in fact under cross-examination, the first defendant gave two conflicting versions, *viz.* that he asked and was told Ivy had the original deed and that he never asked about it);
- on 17 August 2010 Ivy came to sign the agreement and no explanation is D given as to why she did not bring the original deeds;
- on the same date both sellers came and signed the power of attorney to pass transfer at the first defendant's office and no explanation was given about absence of the original deeds;
- again, on 18 August 2010, both sellers came and signed the declaration E by the seller and a week later, it is when the first defendant says Nelson told him that the original deeds had been pledged by his wife as security.

The first defendant did not alert the plaintiffs to all this. He accepted the purchase price on 16 August 2010 well before Ivy Matinde, the second seller, had signed the agreement of sale and before he had verified her identity particulars. This was certainly gross negligence on his part. He advised the F first plaintiff to pay conveyancing fees before the sellers had produced the original title deeds, and when the first plaintiff complained about the delay in being shown the original title deeds, the first defendant assured him all would be well. The first plaintiff was phoned by "Nelson" to write a letter authorising release of $4 500 from the purchase price, to be used to redeem the original deeds but he refused. The first defendant was told about this but G he went on to release $1 700 for that purpose without advising the plaintiffs. The first plaintiff demanded his money back, but the first defendant would not see reason but continued to promise to deliver him to the land of Canaan. The $1 700 was released to one P Majoni but his other particulars were not recorded, the first defendant relying simply on the assertion that he was H Nelson Matinde's cousin.

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Under cross-examination, I formed the impression, from his demeanour A and conflicting versions, that the first defendant is a person not to be relied upon, despite his advanced age. He said it was not necessary to let the parties meet one another because everything was done normally. He later

surprised even himself when he averred that the plaintiffs did meet the sellers, for, when asked "where?" he went silent. He said the sellers could not meet the B plaintiffs because the former signed the transfer documents at Mtombeni's offices while the latter signed their declaration at his offices. He later denied this, saying that all the parties signed these documents at his offices, but he could not give a plausible explanation why he failed to arrange that they meet. All he could say was that it was not a pre-requisite that they should meet. But now he is saddled with the singular task of identifying the tricksters as C *per* his letter to the Estate Agents Council. He also averred that he held onto the purchase price despite clause (a) of the agreement having been satisfied, because he was protecting the plaintiffs' interest by insisting on production of the original deeds, yet he went on to release $1 700 of it without having been furnished with the deeds. He could not explain why he did it, save to D lie when he said that the first plaintiff had so authorised him.

On the totality of the evidence adduced, the probabilities and the law, I find it not only equitable but good law that in the real estate industry, an estate agent or property negotiator/consultant can be held liable for negligently breaching a duty of care which occasions financial loss to a client and a real estate agency can be held vicariously liable for the negligence of its property E negotiator or estate agent even where vicarious liability has not been pleaded in the pleadings, provided that it is proved that the agent/negotiator was acting within the course and scope of his/her employment.

In the instant case I find for the plaintiffs but para (c) of the prayer in the summons and declaration, *viz*. of collection commission must be expunged F therefrom on the authority of *Scotfin Ltd* v *Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 567 (H); 1998 (3) SA 466 (ZH).

In the result judgment is entered for the plaintiffs as follows:

(a) Payment by the defendants jointly and severally, the one paying the other to be absolved in the sum of US$21 593;

(b) Interest at the rate of 5 per cent per annum on the above amount from G the date of summons to date of full payment; and

(c) Costs of suit on an attorney and client scale.

Matsikidze & Mucheche, plaintiff's legal practitioners

Maunga, Maanda & Associates, defendants' legal practitioners H

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WESTWOOD v MERCERS PROPERTY BROKERS 2011 (2) ZLR 491 (H)

Citation	2011 (2) ZLR 491 (H)
Case No	Judgment No. HH-281-11
Court	High Court, Harare
Judge	Chiweshe JP & Patel J
Heard	30 June 2011; *CAV*
Judgment	30 November 2011
Counsel	*C W Gumiro,* for the appellant *I Maja,* for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Agency – *agent – authority – institution of legal proceedings on behalf of principal – need for specific authority to be given – mandate given to estate agent to manage property – does not imply authority to institute proceedings on behalf of principal*

D **Estate agent** – *authority – mandate given to estate agent to manage leased property – does not imply authority to institute eviction proceedings on behalf of owner – need for specific authority to be given*

Practice and procedure – *locus standi – agent – agent bringing action purportedly on behalf of principal – need for agent to be expressly* E *authorised to do so*

Headnote

The respondent, a firm of estate agents, successfully brought eviction proceedings against the appellant, the tenant of a leased property. The only issue on appeal was whether the respondent had *locus standi* to bring the proceedings. The lease agreement purported to have been F made and entered into by the respondent as agent for the owner of the property in question. However, the agreement was not signed by the respondent, but by the owner himself *qua* lessor.

*Held ,*that no matter how broad an agent's mandate may be to manage the leased property on behalf of the owner or lessor, he must be given specific G authority to sue before he can institute legal proceedings against the lessee, whether for rent due or for recovery of the property. In terms of the contract *in casu*, it was the owner who granted vacant possession of the property to the appellant. No authority to sue on behalf of the owner was given to the respondent by its principal, either in its management mandate or in the lease agreement. The clause of the agreement relating H to the enforcement rights of the lessor contemplated that the lessor would

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instruct his attorney to make demand and to institute legal proceedings A against the lessee. Similarly, the property management mandate executed by the owner only allowed the respondent to manage the property. It did not expressly authorise the respondent to sue on behalf of the owner. Accordingly, the respondent lacked the requisite *locus standi* to institute proceedings for eviction. B

Cases cited

Ashley v South African Prudential Ltd 1929 (1) TPD 283

Austerlands (Pvt) Ltd v Trade & Invstm Bank Ltd & Ors 2006 (1) ZLR 372 (S)

Donnelly v Barclays National Bank Ltd 1990 (1) SA 375 (W) C

Manyika v Manyika 1983 (2) ZLR 198 (H)

Mtemererwa & Anor v Tawarwisa & Anor 2004 (2) ZLR 172 (H)

Nyahuma v Barclays Bank (Pvt) Ltd 2005 (2) ZLR 435 (S)

Case information

C W Gumiro, for the appellant D

I Maja, for the respondent

Judgment

PATEL J: This is an appeal against the decision of the Harare magistrates court, sitting on 10 June 2010, granting an eviction order against the appellant. The appellant seeks an order setting aside

that decision and dismissing the respondent's application for eviction of the appellant. He also seeks an order E for costs on a legal practitioner and client scale.

The original grounds of appeal were that the court *a quo* erred in:

(i) finding that the respondent had *locus standi* to institute litigation on behalf of its principal;

(ii) arriving at its decision to grant the eviction order without according the F appellant an opportunity to make submissions on the merits;

(iii) failing to take into account that the appellant was a statutory tenant and granting the eviction order without being furnished with an eviction certificate from the Rent Board;

(iv) finding that the appellant was in breach of his obligation to pay rent. G

At the hearing of the appeal, Mr *Gumiro* withdrew the second ground of appeal. He also withdrew the third and fourth grounds of appeal when it became evident that the appellant had paid his monthly rent, either out of time or only in part. He had therefore lost his statutory tenancy status. The magistrate's finding in this regard is unassailable and must therefore be H

A upheld. Consequently, the only remaining ground of appeal relates to the *locus standi* of the respondent to institute eviction proceedings in the court *a quo*.

Issues *in limine*

Before the hearing of the appeal, Mr *Maja* sought condonation for the late filing of the respondent's heads of argument. The lawyer who initially dealt B with the matter had left the firm and the respondent had been attempting to settle the matter with the appellant. On these grounds, the application for condonation and upliftment of the bar was granted by consent. Mr *Maja* raised the further point that the appellant's opposing affidavit in the court below had not been commissioned. This nullified his opposition and, therefore, there C was no basis for his grounds of appeal founded on the averments contained in his opposing affidavit.

It is not in dispute that this issue was only raised belatedly in the respondent's heads of argument. As a rule, a matter not raised in the court *a quo* cannot be raised on appeal, which must be confined to the correctness of the decision appealed against. However, a question of law may be advanced for the first D time on appeal provided that: the point is covered by the pleadings; there would be no unfairness to the other party; the facts are common cause or virtually incontrovertible; and no other or further evidence would have been produced that could have affected the point. See *Donnelly* v *Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 380-381; applied in *Austerlands* E *(Pvt) Ltd* v *Trade & Investment Bank Ltd & Ors* 2006 (1) ZLR 372 (S) at 378. While I am not convinced that all of these criteria are fulfilled *in casu*, it seems to me that the point raised herein can be satisfactorily disposed of without disadvantage to either party.

It is trite that an affidavit must be duly commissioned in order to be validly F attested and for the averments contained in it to be recognised in legal proceedings. See *Manyika* v *Manyika* 1983 (2) ZLR 198 (H). Nevertheless, it is also trite that not all procedural irregularities suffice to vitiate the proceedings in question. It must be shown, additionally, that the party concerned was prejudiced by the irregularity. See *Nyahuma* v *Barclays Bank (Pvt) Ltd* 2005 (2) ZLR 435 (S).

G In the instant case, the copy of the affidavit that was served on the respondent's lawyers was duly commissioned, as was the copy retained by the appellant's lawyers. Only the copy filed with the court was not commissioned. Mr *Maja* accepted this and conceded that no prejudice was occasioned to the respondent by the defective court copy. In these circumstances, it seems to me that we are H perfectly justified in exercising our discretion, under r 4C of the High Court

Rules 1971, to condone this irregularity on the equities. It is accordingly so A condoned and the respondent's objection *in limine* is dismissed.

The merits: *locus standi*

In *Ashley* v *South African Prudential Ltd* 1929 (1) TPD 283, the agent in question was given authority to obtain title deeds but not authority to sue. Tindall J observed as follows, at 285: B

> "The institution and prosecution of legal proceedings is an important step which may involve the principal in great expense and I see no justification for holding, that where a principal authorises an agent to demand and receive a thing, the principal must be taken to have intended to include the authority to bring and prosecute legal proceedings. There is no reason for construing the word 'demand' in a sense other than its ordinary sense which is well understood and means C 'claim', in other words an extrajudicial demand."

Again, in *Mtemererwa & Anor* v *Tawarwisa & Anor* 2004 (2) ZLR 172 (H), the agent himself had signed the relevant purchase agreement on behalf of the purchaser. Nevertheless, the court accepted with approval the rule crisply and concisely stated in Herbstein & van Winsen T*he Civil Practice of the Superior Courts of South Africa* 4 ed at p 233 that: D

> "Authority to demand transfer does not include authority to institute legal proceedings to obtain transfer on behalf of the principal".

Kamocha J went on to hold, at 175, that:

> "*In casu* the power of attorney nominated and appointed the agent for managing and transacting all the principal's affairs involving the purchase of the property. E There would be no justification for construing it to have authorised him to bring and prosecute legal proceedings. He had no mandate to do that."

It is common cause that the lease agreement *in casu*, dated 6 March 2009, purports to have been made and entered into by the respondent as agent for the owner of the property in question. However, the agreement was not signed by the respondent but by the owner himself *qua* lessor. It was therefore F the latter who granted vacant possession of the property to the appellant. Moreover, clause 17 of the agreement, relating to the enforcement rights of the lessor, contemplates that it is the lessor who would instruct his attorney to make demand and to institute legal proceedings against the lessee. By the same token, the property management mandate executed by the owner on G 27 February 2009 only allows the agent to manage the property. It does not expressly authorise the respondent to sue on behalf of the owner.

Having regard to the case authorities cited above, I see no reason, in the present context of landlord and tenant, to deviate from the rationale applied in those cases. No matter how broad the agent's mandate to manage the leased property on behalf of the owner or lessor, he must be given specific H

Patel J

A authority to sue before he can institute legal proceedings against the lessee, whether for rent due or for recovery of the property.

In the instant case, no such authority was given to the respondent by its principal, either in its management mandate or in the lease agreement. It follows that the respondent lacked the requisite *locus standi* to institute B proceedings for eviction on behalf of its principal, and that the court *a quo* clearly erred in its finding to that effect.

As regards costs, contrary to the appellant's contention in this regard, clause 17 of the lease agreement is expressly limited to the recovery of all legal costs that may be incurred by the lessor in enforcing his rights under the agreement. It does not confer any right on the lessee to recover his costs on C a legal practitioner and client scale. Quite apart from the lease agreement, the appellant has not proffered any other ground or justification for claiming costs on a higher scale.

In the result, the appeal is allowed with costs on the ordinary scale. It is ordered that the judgment of the court *a quo* be set aside and substituted D with the following:

> "The application for eviction is dismissed with costs".

CHIWESHE JP concurred.

E *Mhiribidi, Ngarava & Moyo*, appellant's legal practitioners

Maja & Associates, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/CORISCO DESIGN TEAM v ZIMSUN ZIMBABWE (PVT) LTD 2011 (2) ZLR 496 (H)

CORISCO DESIGN TEAM v ZIMSUN ZIMBABWE (PVT) LTD 2011 (2) ZLR 496 (H)

Citation	2011 (2) ZLR 496 (H)
Case No	Judgment No. HH-291-11
Court	High Court, Harare
Judge	Bhunu J
Heard	9 November 2010; *CAV*
Judgment	30 November 2011
Counsel	*T M Kanengoni,* for the plaintiff *E Manikai,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Practice and procedure – *admissions – notice seeking admissions of fact – failure to respond to notice – facts deemed to have been admitted*

Practice and procedure – *pleadings – striking out – purpose of allowing* D *for striking out pleadings – approach to be followed by court when application made to strike out pleadings*

Headnote

Rule 141 of the High Court Rules 1971, which provides for the powers of the court in relation to pleadings, vests a wide discretion in the trial court. The overriding consideration is to correct pleadings by removing E inconsistencies and contradictions. The rule also endeavours to clarify the pleadings by removal or amendment of superfluous, extraneous or irrelevant material. Its purpose is certainly not to kill a case on the basis of a legal technicality where irregularities can be corrected and put right. Striking out a pleading should be the remedy of last resort, F when everything else has failed, to correct the irregular pleading. The ends of justice are better served when cases are won or lost on the merits rather than technicalities.

The provisions of r 187 of the High Court Rules, which deal with the effect of failure to reply or refusal to admit facts, are self-explanatory and peremptory. In the absence of a response to a notice seeking admissions G of fact within the prescribed ten day limit such admissions shall be deemed to have been made.

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971) rr 141 & 187 H

Bhunu J

Case information

A *T M Kanengoni,* for the plaintiff

E Manikai, for the defendant

Judgment

BHUNU J: The plaintiff issued summons against the defendant claiming payment of US$16 175 740.72 for fees owed by the defendant for professional services at the defendant's special instance and request in or around 2007. B The amount was due and payable sometime around 3 April 2009.

The plaintiff is a consortium of duly registered architects, civil and electrical engineers, quantity surveyors and project managers. In para 4 of its declaration the plaintiff claims that on or around 10 April 2007 at Harare the parties concluded an oral agreement wherein the defendant contracted the plaintiff as C its consultants for the purposes of design and development of hotel buildings in Corisco, Equatorial Guinea.

In para 5 the plaintiff alleged that despite the parties' agreement to reduce the oral agreement to a written memorandum of understanding, the defendant has to date not signed the memorandum of understanding.

D In para 4.1 the defendant denied ever entering into a contract of service as alleged by the plaintiff or at all. In para 4.2 the defendant admitted discussing the contract and being provided with a copy of the memorandum of understanding but did not sign it as it did not agree with the terms therein.

Under para 4.7 the defendant pleaded as follows:

> "4.7. In February 2008 the government of Equatorial Guinea and the defendant E concluded a Consultancy Services and Advisory Agreement for the construction of the training school at Mogomo. This is the only project which received the approval from government of Equatorial Guinea for implementation."

Thereafter the defendant proceeded to contradict itself at para 7.2 by saying:

> "7.2.1 The defendant denies that the government of Equatorial Guinea has F approved the construction drawings in relation to any of the projects, the plaintiff is put to the proof thereof."

The defendant further adds to the confusion when it denies that the government of Equatorial Guinea approved the three projects save for the Mogomo project.

Under para 5.5 of its plea, the defendant denied that any fees were due but G immediately thereafter contradicts itself under para 5.6 by stating that fees for selling drawings prepared by the team were due and owing.

Relying on r 141 the plaintiff has now applied for the striking out of the defendant's plea as being bad at law. The rule provides that:

> "**141. Powers of court in relation to pleadings**
>
> H At any stage of the proceedings the court may –

(a) order to be struck out or amended – A

(i) any argumentative or irrelevant or superfluous matter stated in any pleading;

(ii) any evasive or vague and embarrassing or inconsistent and contradictory matter stated in any pleading;

(iii) any matter stated in any pleading which may tend to prejudice, B embarrass or delay the fair trial of the action;

(b) order either party to furnish a further and better statement of the nature of his claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars."

It is clear that the rule vests a wide discretion on the trial court. A reading of the rule, however, gives the impression that the overriding consideration C is to correct pleadings by removing inconsistencies and contradictions. The rule also endeavours to clarify pleadings by removal or amendment of superfluous, extraneous or irrelevant material. The idea is certainly not to kill a case on the basis of a legal technicality where irregularities can be corrected and put right. In my view,

striking out a pleading should be the remedy of last resort when everything else has failed to correct the irregular D pleading. The ends of justice are better served when cases are won or lost on the merits rather than technicalities.

In this case, I am satisfied that the justice of the case can be met by the defendant being given an opportunity to sanitize its pleadings by amending them so as to remove or correct the irregularities complained of. E

The plaintiff also complained that, despite being served with notice seeking admissions, the defendant did not respond to that notice. In that case the plaintiff sought a declarator in terms of r 187 to the effect that the defendant must be deemed to have admitted by silence the facts sought to be admitted.

The rule provides that:

> "**187. Effect of failure to reply or refusal to admit facts** F
>
> (1) In the case of failure to reply to the notice to admit any facts within ten days of delivery the party called upon therein *shall* be taken as having admitted all such facts for the purposes of the cause, matter or issue only.
>
> (2) In the case of refusal to admit any facts, the costs of proving them shall be paid by the party so refusing, whatever the result of the cause may be, unless G the court considers that the refusal to admit was reasonable" (emphasis added).

The provisions of the rule are self-explanatory and peremptory. The defendant was legally obliged to respond to the notices seeking admissions, which, upon failure, it is deemed to have admitted the facts therein. In the absence of a response within the prescribed ten day limit, the admissions in this respect are automatic by operation of law. The defendant can only escape H

Bhunu J

A the consequences of r 187 by showing that it in fact responded to the notice within the prescribed time limit. This defendant has failed to do.

For the foregoing reasons it is ordered:

1. That the defendant be and is hereby ordered to amend its pleadings so as to remove the irregularities pointed out in this judgment. B
2. That the defendant be and is hereby deemed to have admitted all the facts contained in the notices to admit which it failed to reply to.
3. That whether or not the defendant actually failed to reply to any notices in terms of r 187 is a matter of fact to be determined by way of evidence during the trial. C
4. Costs shall be costs in the cause.

Chikumbirike & Associates, plaintiff's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/NJINI & ANOR v NGWENYA & ANOR 2011 (2) ZLR 500 (H)

NJINI & ANOR v NGWENYA & ANOR 2011 (2) ZLR 500 (H)

Citation 2011 (2) ZLR 500 (H)

Case No Judgment No. HB-190-11

Court	High Court, Bulawayo
Judge	Cheda J
Heard	24 November 2011; *CAV*
Judgment	1 December 2011
Counsel	*Z Ncube,* for the first and second applicants *P Ncube,* for the first and second respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Costs – *de bonis propriis – when should be awarded – young and inexperienced lawyer – may be treated with more sympathy than experienced one*

Headnote

The common reasons for awarding costs *de bonis propriis* are where the legal D practitioner is guilty of improper or unreasonable conduct, or lack of *bona fides*. In making such determination, some of the factors which should be taken into account are: (a) the lawyer's age; (b) his qualifications; (c) his experience; and (d) his general character and attitude towards his work. The less experienced a lawyer is, the more sympathy he should receive from the courts; the actions of the more experienced lawyers E may in contrast be viewed as deliberate.

Cases cited

CABS v Ndlovu HH-3-06

Forestry Commission v Moyo 1997 (1) ZLR 254 (S) F

Hattingh v Pienaar 1977 (2) SA 182 (O)

Hove v Comm-Gen Zimra HB-29-11

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

Levben Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd 1957 R & N 575; 1957 (4) SA 225 (SR)

MacFoy v United Africa Company Ltd [1961] 3 All ER 1169 (PC) G

Madzivanzira & Ors v Dexprint Investments (Pvt) Ltd & Anor 2002 (2) ZLR 316 (H)

Matsambire v Gweru City Council S-183-95

Mlondiwa v Regional Director of Education, Midlands NO & Anor HB-19-94

Nkosi v *Caledonian Insurance Company* 1961 (4) SA 649 (N) H

Cheda J

A *Triangle Ltd v ZRA* HB-12-11

Union Govt v Heiberg 1919 AD 477

Legislation considered

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

Case information

B *Z Ncube,* for the first and second applicants

P Ncube, for the first and second respondents

Judgment

CHEDA J: This is an urgent application seeking to suspend the construction C and development of a maternity and gynaecological clinic or medical suite at stand number 18 Hillside, Bulawayo.

The facts of the matter are that the applicants are an elderly couple residing at 54 Cecil Avenue, Hillside, Bulawayo. The first respondent is a consultant obstetrician and gynaecologist. The second respondent is the local authority D in charge of administering the affairs of the City of Bulawayo.

The applicants and the respondents are adjacent neighbours and are separated by a durawall. Sometime in May 2011, the first respondent notified the respondents of his intention to construct and develop a clinic. This was after the second respondent advised him to notify his immediate neighbours as E per its requirements where one intends to put up a structure or embark on a development which may adversely affect his neighbours. The applicants lodged an objection to the said intended development. Their objection was considered by the second respondent which however overruled them and proceeded to grant the applicant permission to construct and develop a clinic.

The applicants were not happy with the second respondent's decision and F filed an application for review of the second respondent's decision under case number HCR 132/11. This application is still pending. In order to stop the further development the applicants filed this urgent chamber application. It is their argument that the construction of this clinic next to their property will: G

(1) affect the peace and quiet atmosphere of the suburb,

(2) introduce communicable diseases and

(3) encourage undesirable elements of society such as thieves and some such other unlawful activities.

Both respondents opposed this urgent application. Mr *P Ncube* for both H respondents raised two points *in limine,* namely:

Cheda J

(1) Urgency A

It is his argument that the applicants have not adequately shown that the matter is urgent as they did not show that irreparable harm will result if it is not dealt with urgently. In the ordinary course of events, all matters coming before the courts are as a result of one dispute or the other, which dispute has an inherent prejudice to the other party. Therefore, in an urgent B application in order to succeed, the applicant must show that, in addition to either impending or existing prejudice irreparable harm will result if the matter is not urgently acted upon, see *CABS* v *Ndlovu* HH-3-06. The urgency of a matter as envisaged by the rules of this court is that the applicant should show that he stands to suffer either actual or potential prejudice which is irreparable. Since an urgent application takes precedence on the court's roll C , the applicant must, therefore, justify his desire to be accorded first preference ahead of others. This point was made clear in *Madzivanzira & Ors v Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H).

The applicant's certificate of urgency has failed to justify the urgency as laid down in the cases cited *supra*. It is the duty of the applicant to put the D court in its confidence by clearly showing the irreparable harm; it can not leave it to the court's conjecture. The court can only exercise its discretion in determining the urgency of the matter at hand, and that discretion can only be exercised on the basis of facts: *Triangle Ltd* v *Zimbabwe Revenue Authority* HB-12-11 and *Hove* v *Commissioner-General Zimra* HB-29-11. E

(2) Review

The second point raised is the validity of the application for review. The respondents have argued that the application was filed out of time.

Review applications are governed by r 259 of the High Court Rules, which reads: F

> "**Order 33**
>
> Reviews
>
> **259 Time within which proceedings to be instituted**
>
> Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceedings in which the irregularity or G illegality complained of is alleged to have occurred:
>
> Provided that the court may for good cause shown extend the time."

The eight weeks expired on 30 September 2011 and the application for review was filed on 15 November 2011. It was, therefore, way out of time. The proviso in r 259 allows the applicant to apply for the extension of time on good cause shown. H

2011 (2) ZLR p503

Cheda J

A On 18 November 2011 the respondent's legal practitioners wrote a letter to the applicants wherein they advised them of the defect of their application for review. They advised them that the said application was filed out of time and that they should, therefore, have first applied for condonation of the late filing of the said review application. They went further and courteously advised then to withdraw the said review application. In the same letter B they asked them to do so by 22 November 2011, failing which they would file their opposing papers and ask for costs *de bonis propriis*. Needless to say, the applicants' legal practitioners did not heed this advice. The correct legal position is that, for a court to hear the application for review where it has been filed out of time, an application for condonation must not only be C filed but must be filed, determined and granted first. There is a plethora of authorities emphasising this time-honoured principle in our law. In *Mlondiwa* v *Regional Director of Education, Midlands Province NO and Minister of Education* HB-19-94 Manyarara AJ held that where an application for review filed in terms of r 259 is to be heard, an application for condonation must be D filed and granted first. Such an application precedes the main application. The non-compliance with the rules must be condoned by the court or judge first. This is the law. The Supreme Court has emphasised that principle in *Matsambire* v *Gweru City Council* S-183-95 and *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S), amongst other cases.

In casu, the applicants did not comply with r 259, in particular the proviso E therein. The current application is predicated on the application for review. The said application, however, has fallen foul of the requirements of such application. The non-compliance is no doubt fatal and cannot, therefore, be revived as it is, in my view, stillborn. In other words, there is no application for review to talk about.

F The position in this matter, therefore, is that the urgent chamber application before me is a nullity as there is no base for it to stand on in view of the non-compliance with the rules regarding the application for an extension of time. This renders this application fatally defective and invalid.

Such a defect is incurable, as stated by that eminent jurist and the doyen G of English Law, Lord Denning, in *MacFoy* v *United Africa Company Ltd* [1961] 3 All ER 1169 (PC) at 1172 where he stated:

> "every proceeding which is founded on it is also bad and incurably bad. You can not put something on nothing and expect it to stay there. It will collapse."

See also *Hattingh* v *Pienaar* 1977 (2) SA 182 (O) and *Jensen* v *Acavalos* H 1993 (1) ZLR 216 (S).

2011 (2) ZLR p504

Cheda J

There has been an attempt to cure this defect by an application for condonation A filed on 24 November 2011. This defect cannot be cured by a mere application of this nature, as the application should not only be filed, but should be filed and granted first, thereby authorising the applicant to apply for review of the proceedings complained of.

Costs B

Mr *P Ncube,* by letter of 18 November 2011, advised the applicant's legal practitioners to withdraw their review application with a threat of punitive costs *de bonis propiis* in the event of them not complying. Unfortunately, the applicants' legal practitioners in their wisdom (or lack of it) were not

persuaded. They persisted with this application until the day of the hearing. C It was during the hearing that a half-hearted attempt was made to concede that indeed a wrong procedure was used.

The general rule with regards to costs is that costs follow the event. The awarding of costs is the discretion of the court and such discretion should be judicially exercised: *Levben Products (Pvt) Ltd* v *Alexander Films (SA) (Pty)* D *Ltd* 1957 R & N 575; 1957 (4) SA 225 (SR) at 227 and *Union Government* v *Heiberg* 1919 AD 477 at 484.

The common practice in the awarding of costs *de bonis propriis* is where the legal practitioner is guilty of improper or unreasonable conduct, or lack of *bona fides*. What falls for determination here is whether or not Mr *Z Ncube* is indeed guilty of such conduct. In making such determination, the following E are some of the factors which in my view should be taken into account;

(1) the lawyer's age,

(2) his qualifications,

(3) his experience and

(4) his general character and attitude towards his work. F

Mr *Z Ncube* is a recently qualified legal practitioner with very little experience, to my knowledge. He is fairly young and strikes me as a determined and ambitious young lawyer. It is for that reason that his burning desire to win an argument at all costs tends to cloud his judgment, thereby depriving himself of G tapping from wise counsel; hence his failure to heed Mr *P Nucbe's* advice to withdraw his urgent chamber application before dealing with his application for review. This, in my view, explains why he was determined to fight for his clients even against all odds. His motives were, therefore, beyond reproach. He is, however, guilty of a considerable amount of muddled thinking which led him to act incorrectly. H

Cheda J

A In my view, the less experienced the lawyer is, the more sympathy he should receive from the courts, as opposed to the more experienced lawyers whose actions may be viewed as deliberate.

In view of his entirely innocent motive, it is one of those cases where in the exercise of my discretion, he can be spared the agony and financial burden of costs *de bonis propriis*: *Nkosi* v *Caledonian Insurance Company* 1961 (4) SA 649 (N) B at 663. In view of the time wasted and costs incurred by the respondents in this matter which could have been avoided, the applicants cannot avoid punitive costs.

Mr *Z Ncube* is, however, warned to be more prudent in future. The application, therefore cannot pass the first hurdle of the points *in limine* raised in this C application.

Accordingly the following order is made:

(1) The application be and is hereby dismissed

(2) The respondents be and are hereby awarded costs as between attorney and client scale.

D *Phulu & Ncube,* the applicants' legal practitioners

Coghlan & Welsh, the respondents' legal practitioners.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/GIGA v ALBION PROPERTIES & ORS 2011 (2) ZLR 506 (H)

GIGA v ALBION PROPERTIES & ORS 2011 (2) ZLR 506 (H)

Citation 2011 (2) ZLR 506 (H)

Case No	Judgment No. HH-159-12
Court	High Court, Harare
Judge	Uchena J
Heard	28 November 2011; 1 December 2011; *CAV*
Judgment	2 December 2011
Counsel	*E Hamunakwadi*, for the applicant *P Nhokwara*, for the first respondent *C Takaendesa*, for the third respondent
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Practice and procedure – *execution – warrant of ejectment – notice required – earlier ejectment invalid*

Headnote

Order 26 r 4A of the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980) D provides that where a warrant of ejectment or attachment is executed, the affected person must be given notice of the date of execution, which must be not less than 48 hours after the notice is served. Any earlier ejectment is invalid, unless it is shown that one of the exceptions provided in the proviso to r 4A(1) applies. This provides that the messenger need not deliver or leave notice of ejectment or attachment where he has E reasonable grounds for believing that immediate execution of the warrant is necessary in order to prevent the execution debtor from concealing or disposing of any property in order to avoid its attachment.

Legislation considered F

Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), Order 26 r 4A(1)

Case information

E Hamunakwadi, for the applicant

P Nhokwara, for the first respondent

C Takaendesa, for the third respondent G

Judgment

UCHENA J: The applicant was the first respondent's tenant at No. 5 Albion House, 74 Harare Street. She was evicted from the premises without being given 48 hours' notice as provided by r 4A(1) of Order 26 of the Magistrates Court (Civil) Rules 1980. She seeks an order of this court reinstating her into the premises, pending the hearing of her application for the condonation H

2011 (2) ZLR p507

Uchena J

A of her late noting of an appeal against the decision of the magistrate on the strength of which the first respondent evicted her from the property.

The first respondent was the applicant's landlord for 11 years. It sought and obtained an eviction order against the appellant. The order was enforced in the manner already explained above.

B The second respondent is the messenger of court, Harare. He is an officer of the magistrates court, entrusted with the responsibility of enforcing that court's orders.

The third respondent is the first respondent's new tenant, with whom it entered into a lease agreement after this application had been issued and served on C the first respondent. It has not yet taken occupation of the property in dispute.

The applicant was aware of the court's order for h er eviction. She was then being represented by her erstwhile legal practitioners whom she instructed to appeal against the magistrate's decision. In her founding affidavit she said she was surprised when the messenger of court gave her notice and forthwith evicted her. On inquiring with her erstwhile legal practitioners, she was D advised that they had not filed the appeal as instructed, as she had not paid them. She has since retrieved her file from them and instructed her current legal practitioners to note the appeal and file an application for condonation of the late noting of the appeal concurrently with this application.

The applicant's property was removed from the premises and is now stored E outside her residential property and is exposed to the elements. She therefore filed this urgent application in which she seeks reinstatement mainly on the ground that her ejectment did not comply with r 4A(1) of Order 26 of the Magistrates Court (Civil) Rules.

Mr *Nhokwara* for the first respondent submitted that this application is not F urgent because the applicant did not immediately act after her ejectment. Mr *Hamunakwadi* submitted that she acted as soon as she could in the circumstances of this case. She was surprised by the ejectment as she believed her erstwhile legal practitioners had attended to her appeal against the magistrate's decision, though she erroneously believed that the appeal would suspend the magistrate's decision. She was ejected without the G requisite 48 hours' notice. She had to retrieve her file from her erstwhile legal practitioners, and instruct her current legal practitioners. She had to do this in the circumstances she had been plunged into by the unprocedural eviction. I am satisfied that the delay between 16 November 2011, when she was ejected, and her filing this urgent application on 21 November 2011 H has been adequately explained. I am also satisfied that her erstwhile legal

---

Uchena J

practitioner's failure to note the appeal and the sudden unprocedural ejectment A justifies the hearing of the applicant's application on an urgent basis.

Her application is strengthened by her having been evicted without being given 48 hours' notice. Rule 4A(1) of Order 26 of the Magistrates Court (Civil) Rules 1980, which provides for the notice, provides as follows;

> "(1) Upon receiving – B
>
> (a) a warrant of execution against property; or
>
> (b) a warrant of ejectment and execution against property; or
>
> (c) a warrant of delivery and execution against property;
>
> the messenger shall, within twenty-four hours or as soon as circumstances permit, go to the house or place of business of the execution debtor and deliver to the C debtor or leave at the house or place of business a notice warning the debtor of the date of the proposed execution of the warrant, which date shall not be sooner than forty-eight hours after the notice was so delivered or left:
>
> Provided that the messenger need not deliver or leave such a notice in any case in which he has reasonable grounds for believing that immediate execution of the warrant is necessary in order to prevent the execution debtor from concealing D or disposing of any property in order to avoid its attachment."

The second respondent did not oppose this application, nor did he file any papers explaining why he executed without giving the requisite 48 hours' notice. Mr *Nhokwara* for the first respondent submitted that the messenger of court's inadvertent failure to deliver or leave notice to the judgment debtor E in terms of subr (1) shall not invalidate the ejectment. Mr *Hamunakwadi* for the applicant submitted that the issue in this case is not on failure to deliver or leave the notice, but giving inadequate notice contrary to subr (1). Subrule (2), which the respondent's counsel relied on, provides as follows:

> "An inadvertent failure by the messenger to deliver or leave a notice in terms of subrule (1) shall not invalidate any attachment, sale in execution or ejectment F effected in accordance with a warrant."

The first respondent's submission cannot be accepted, in view of the fact that there is no evidence that there was an inadvertent failure to deliver or leave the notice at the applicant's premises. The applicant's case is in fact that she was given notice, but was evicted without being given 48 hours after that G notice, which would have given her time to take legal action against that notice. Her claim is that the second respondent acted unlawfully by not giving her 48 hours, during which he should not have ejected her, after the delivery of the notice. That argument is supported by r 4A(1) of Order 26 which is couched in peremptory terms, and provides exceptions which would justify, failure to give 48 hours' notice. The rule requires the messenger of court to H

Uchena J

A deliver notice "of the date of ejectment which date shall not be sooner than forty-eight hours after the notice was so delivered or left".

The exceptions are provided in the proviso to r 4A(1) which deals with circumstances when a messenger can justifiably not deliver or leave notice of ejectment or attachment. The first respondent's opposing papers do not allege the existence of such circumstances. The second respondent, whom the B proviso authorises to make such a decision, did not file any papers to oppose this application, nor did he file any papers supporting the first respondent's opposition of this application. There is, therefore, no explanation before this court justifying the immediate ejectment of the applicant. In the absence of such an explanation, I hold that the applicant was unlawfully ejected from C the premises.

Mr *Nhokwara* for the first respondent argued that as the horse has already bolted from the stable, the application should be dismissed, as the premises have already been occupied by a new tenant. Mr *Hamunakwadi* then applied for the joinder of the third respondent who was alleged to be the new tenant who had taken occupation of the premises. The application for joinder D and postponement was not opposed. The third respondent and his legal practitioner appeared before the court and confirmed that it had entered into a lease agreement with the first respondent for the premises in dispute. It, however, told the court that it had not yet taken occupation of the premises, contrary to what the first respondent had told the court. The lease agreement E was entered into after the first respondent had been served with notice of this application.

The illegality of the applicant's ejectment and the fact that the third respondent and the first applicant entered into the new lease agreement when these proceedings were pending and that the third respondent has not yet taken occupation justifies an order for the reinstatement of the applicant into the F premises in terms of the draft provisional order.

The provisional order is therefore granted in terms of the draft order.

Hamunakwadi, Nyandoro & Nyambuya, applicant's legal practitioners

Mambosasa Legal Practitioners, first respondent's legal practitioners

G *Hangaha & Charamba Legal Practitoners*, third respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/COCHRANE v MACKIE 2011 (2) ZLR 510 (H)

COCHRANE v MACKIE 2011 (2) ZLR 510 (H)

Citation 2011 (2) ZLR 510 (H)

Case No Judgment No. HH-303-11

Court	High Court, Harare
Judge	Musakwa J
Heard	24 February 2011; *CAV*
Judgment	7 December 2011
Counsel	*E W W Morris*, for the applicant *I E G Musimbe*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Landlord and tenant – *lessee – right to possession after expiry of lease – no right of retention as a lien against claim for compensation for improvements*

Practice and procedure – *summary judgment – claim for ejectment and* D *arrears of rental – permissible to grant summary judgment for ejectment and to grant leave to defend claim for arrears*

Headnote

The applicant brought an action against the respondent for ejectment from the property the latter was leasing, for arrear rentals and for holding over damages. He then applied for summary judgment. The respondent E resisted the claim on the grounds that he was a statutory tenant, that he had effected repairs to the premises, the cost of which he wished to set off against any rental owed and that he had a right to remain in possession pending settlement of his claim for the value of repairs.

Held, that in terms of r 73 of the High Court Rules 1971, it was permissible F to grant summary judgment in respect of the claim for the respondent's ejectment whilst granting the respondent leave to defend the claims for arrear rentals and holding over damages. With regard to the claim to be entitled to remain in possession, a tenant has no *ius retentionis* after the termination of the lease as a lien against compensation for improvements. Consequently, summary judgment would be granted for ejectment, and G leave to defend granted in respect of the claim for arrear rentals and holding over damages.

Cases referred to

CABS v Ndahwi 2010 (1) ZLR 91 (H)

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

Musakwa J

A *Hughes v Lotriet* 1985 (2) ZLR 179 (H)

Jena v Nechipote 1986 (1) ZLR 29 (S)

Mbayiwa v Eastern Highlands Motel (Pvt) Ltd S-139-86

Omarshah v Karasa 1996 (1) ZLR 584 (H)

R v Rhodian Invstms Trust (Pvt) Ltd 1957 R & N 723; 1957 (4) SA 631 (SR)

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

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 10 & 73

Case information

C *E W W Morris*, for the applicant

I E G Musimbe, for the respondent

Judgment

MUSAKWA J: This is an application for summary judgment. The applicant issued summons against the respondent in which he is claiming the following D relief-

1. Cancellation of lease agreement between the parties in respect of the property known as number 37 Hillview Road, Philadelphia, Harare.
2. Ejectment of the respondent from number 37 Hillview Road, Philadelphia, Harare. E
3. Payment of arrear rent accrued from February 2009 to July 2010.
4. Payment of holding over damages at US$750 per month.
5. Costs of suit.

In his founding affidavit the applicant claims that when he went to England F in 2000 he left Michael O'Leary in charge of his property. Michael O'Leary was either to sell the property or lease it. In 2000 Michael O'Leary leased the property to Melcome Pharmaceuticals Ltd. The lease expired at the end of January 2009. Michael O'Leary subsequently entered into an agreement for the lease of the property with the respondent, who is a former managing director of Melcome Pharmaceuticals Ltd, with effect from 1February 2009. G The applicant contends he never agreed that the respondent could carry out alterations or additions to the property. In 2010 the applicant learnt that the respondent had failed to pay any rent since February 2009. He immediately instructed his legal practitioners to seek cancellation of the lease and for the respondent to vacate the premises. Having received no response he instructed H that legal proceedings be instituted.

Musakwa J

Michael O'Leary deposed to a supporting affidavit in which he confirmed A entering into a lease with Melcome Pharmaceuticals Ltd on behalf of the applicant. The period of lease was one year with effect from 1 September 2000. Melcome Pharmaceuticals was represented by the respondent in his capacity as its managing director. The lease was renewed for several years until it lapsed on 31 January 2009. On 1 February 2009 he negotiated a C lease of the same property to the respondent for US$750 per month. The lease expired on 31 January 2010. The respondent is said not to have paid any rent despite several requests for him to do so. He also disputes that the respondent was ever authorized to effect any repairs to the premises.

On the other hand, the respondent contends that the lease between the applicant and Melcome Pharmaceuticals lapsed on 31 July 2006. It was never renewed. C He disputes entering into a lease for US$750 per month with effect from 1 February 2009. He contends that he has been a statutory tenant since 1 August 2006. He also contends that he has a *bona fide* defence against the claim. Since February 2009 there has been no agreement either in respect of the lease or the rent. This is because he wanted to offset the rent against D the repairs he had effected to the premises. In essence he contends that there are material disputes of facts which the applicant has always been aware of.

In heads of argument filed on behalf of the applicant, Mr *Morris* submitted that summary judgment is being sought only in respect of the claim for eviction. It was conceded that there is a dispute regarding the claim for arrear E rent whereas the claim for holding over damages is not liquid.

The law applicable in an application for summary judgment is well settled. In this respect Mr *Musimbe* cited *Hughes* v *Lotriet* 1985 (2) ZLR 179 (H), *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H), *CABS* v *Ndahwi* 2010 (1) ZLR 91 (H) and *Scropton Trading (Pvt) Ltd.* v *Khumalo* 1998 (2) ZLR 313 (S). F

In *Hales* v *Doverick Investments (Pvt) Ltd supra* it was held by Malaba J (as he then was) at 238-239:

> "The onus is on the defendant to satisfy the court by its affidavit that it has a good prima facie defence to plaintiff's action."

The test that is to be applied to the defendant's affidavit is clear on the G authorities. In *R* v *Rhodian Investments Trust (Pvt) Ltd* 1957 R&N 723; 1957 (4) SA 631 (SR) the phrase ``good *prima facie* defence to the action'' in r 66(1)(b) of the Rules of Court 1971, was interpreted by Murray CJ at 633G to mean:

> "… that the defendant must allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence at the trial." H

2011 (2) ZLR p513

Musakwa J

A In *Jena* v *Nechipote* 1986 (1) ZLR 29 (S) Gubbay JA (as he then was) said at 30D-E:

> "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'; 'he has a plausible case'; there is a real possibility that an injustice may be done if summary judgment is granted."

B The defendant's affidavit should not only disclose the nature of the defence relied upon to resist the plaintiff's claim for ejectment, but must also 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 C 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:

> "... 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* D v *Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426D).
>
> ... 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 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 requirement of E bona fides (*Breitenbach* v *Fiat SA (Edms) Bpk* 1976 (2) SA 226 at 228D-E)... 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)."

The submission by Mr *Morris* that a court can grant summary judgment in F respect of part of the claim is provided in the rules of court. Order 10 r 73 of the High Court Rules provides that:

> "If on the hearing of an application made under this Order it appears -
>
> (*a*) that a defendant is entitled to leave to defend and some other defendant is not so entitled; or G
>
> (*b*) that a defendant is entitled to leave to defend as to part of the claim;
>
> the court may –
>
> (i) give leave to defend to a defendant so entitled thereto and give judgment against a defendant not so entitled; or
>
> (ii) give leave to defend to the defendant as to such part of the claim, and enter judgment against the defendant as to the balance of the claim; H or make both orders mentioned in (i) and (ii)."

2011 (2) ZLR p514

Musakwa J

What then remains to be determined is whether the court can grant summary A judgment in respect of the claim for the respondent's ejectment whilst granting the respondent leave to defend the claims for arrear rentals and holding over damages.

It is difficult to make out what the respondent's defence is to the claim for ejectment. The respondent claims to be a statutory tenant by virtue of the B lease between him and the applicant having expired in January 2010. He also claims that there had been no agreement on rent. He therefore disputes failing to pay rent as claimed. On the other hand, he contends that he is entitled to retain possession of the property since he is owed money for the renovations and repairs he made to the property.

The applicant's cause for seeking the respondent's ejectment is that the lease C expired. He is the owner of the property. Is the respondent entitled to retain possession of the property pending settlement of his claim for improvements and repairs? This issue was dealt with succinctly by

Gillespie J in *Omarshah* v *Karasa* 1996 (1) ZLR 584 (H). The facts of that case are similar to the present matter, save that the defendant was a sub-lessee. It appears from the D brief facts of the matter that, after expiration of the sub-lease, the defendant was given notice to vacate the premises. After the defendant failed to vacate the premises, the plaintiff issued summons commencing action, to which the defendant filed appearance to defend. The defendant then raised the defence of *ius retentionis* when the applicant applied for summary judgment. Commenting on the defence of lien for improvements Gillespie J had this E to say at 589:

> "The next defence may be dealt with even more shortly. It is that the defendant may persist in occupation of the property in order to enforce a claim for compensation against the landlord. Assuming in the defendant's favour, although it is by no means clearly established on the papers, that the defendant effected improvements for which he is entitled to compensation, nevertheless he may not hold over in F occupation. On this point of law I can do no better than to refer with respect, and to adopt with diffidence, the statement of law expounded by van Zyl J in *Syfrets Participation Bond Managers Ltd* v *Estate & Co-op Wine Distributors (Pty) Ltd* 1989 (1) SA 106 (W). From 109H to 111B the learned judge embarked upon a thorough discourse of the jurisprudential basis of a *ius retentionis* and the extent to which such a lien has been recognised as enforceable by lessees G according to the Roman-Dutch law.
>
> His treatment of the subject can leave one in no doubt that such a right of retention, which might on first principles otherwise have been available to lessees as *bona fide* possessors of the property concerned, was removed from them by the *Placaat van die Staten van Hollandt, techens die Pachters ende Bruyckers van de Lande*. This measure limited the lessee's right to claim compensation to a claim to be brought only after the property had been vacated by the lessee, thus H

Musakwa J

> A removing the right of retention. The learned judge noted the reception of this law into South Africa, as acknowledged in the matter of *de Beers Consolidated Mines* v *London and South African Exploration Co* (1893) 10 SC 359 at 368-9 (and thence into the law of Zimbabwe) and found (at 112B) that the law applies equally to rural and urban tenements.
>
> The effect of this law is unequivocally that a lessee, and consequently the defendant, has no right of retention of occupation of leased property after the B termination of the lease as a lien against compensation for improvements. The second defence therefore also fails."

In the present matter the respondent has not been able to justify why he wants to retain occupation of the property apart from the claim for compensation. That claim for compensation can still be pursued after the respondent has C vacated the premises.

Accordingly, it is ordered as follows-

(a) Summary judgment in case number HC 5526/10 is granted for the ejectment of the respondent from 37 Hillview Road, Philadelphia, Harare.

(b) Leave is given to the respondent to defend the claim for arrear rentals D and holding over damages.

(c) The respondent shall pay the costs of this application.

Sawyer & Mkushi, the applicant's legal practitioners

E *I E G Musimbe & Partners*, the respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/MEDA v HOMELINK (PVT LTD & ANOR 2011 (2) ZLR 516 (H)

MEDA v HOMELINK (PVT LTD & ANOR 2011 (2) ZLR 516 (H)

Citation 2011 (2) ZLR 516 (H)

Case No	Judgment No. HB-195-11
Court	High Court, Bulawayo
Judge	Ndou J
Heard	30 September 2011; *CAV*
Judgment	15 December 2011
Counsel	*L Nkomo,* for the applicant *P Ncube,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Interpretation of statutes – *intention of legislature – situation not within the contemplation of legislature – need for interpretation which achieves sense rather than nonsense – such interpretation particularly necessary where statute deals with procedural matters*

Practice and procedure – *execution – sale in execution – dwelling house* D *– property subject to mortgage – mortgagor not entitled to claim stay of execution*

Property and real rights – *immovable property – property subject to mortgage – mortgagee's right to foreclose if debt not paid – execution of warrant* E *– mortgagor not entitled to seek suspension of execution*

Headnote

"One is entitled to look closely at the wording of the section in order to find an interpretation which achieves sense rather nonsense, justice rather than injustice, in the application of the section in a situation almost certainly not contemplated by the legislature. This must be specially F so in a statute which deals with procedure rather with substantive law" *(dicta per* McNally JA in *S* v *Kachipare* 1998 (2) ZLR 271 (S) at 283C followed).

Rule 348A(5a) of the High Court Rules 1971 (RGN 1047 of 1971) enables an execution debtor to make a chamber application to the High Court to suspend the sale of a dwelling or the eviction of its occupants G where it is occupied by the execution debtor or members of his family. Execution of mortgaged property, however, was not contemplated by the legislature in drawing up the rule. It is, therefore, not applicable to foreclosure proceedings.

The applicant mortgaged her property as security for a loan from the first respondent. She failed to service the loan and the first respondent issued H

A summons against her, claiming the sum loaned plus interest thereon and an order declaring the house specially executable. Negotiations followed, but no payment was made and the first respondent obtained summary judgment. Faced with the warrant of execution and the attachment of the house, the applicant filed an application in terms of r 348A(5a) of the High Court Rules 1971 for the suspension of the sale of the house.

B *Held*, that execution of mortgaged property is different from the property being referred to in r 348A. These were foreclosure proceedings. In such proceedings, the security which the mortgagor pledged is the one that is sold after institution of judicial proceedings for the amount of the debt, whereafter a writ of execution against the property is issued. C In other words, if the mortgagor does not pay the capital when due, or if he commits any breach of the conditions of the contract entitling the mortgagee to foreclose, then the latter is entitled to have the secured property sold and obtain the amount of his debt from the proceeds of the sale. A mortgagor cannot claim a stay of execution in terms of r 348A. As a general rule, a creditor who has

obtained judgment is entitled D to enforce such judgment by levying execution and the court has no jurisdiction to restrain the judgment creditor from enforcing such legal right. By declaring the house "specially executable", the court gave the first respondent the right to sell the house in execution to recover what was owed to it. The mortgagor's first and foremost duty is to pay the E debt secured, and the mortgagee's corresponding right is to "call up" or "foreclose" the bond. The significance of mortgage bonds and all other forms of hypothecation lies in the fact that they provide the creditor with a "real security" for the payment of his claim. If the debtor is unable to raise the necessary funds to pay the debt which is secured, the creditor is entitled to demand that the property, that being the thing which is F subject matter of his security, be sold and that the proceeds of such sale are used for the satisfaction of his claim. This situation is different from an ordinary debt, as this debt is inexorably tied to the house which has been declared by the court order to be specially executable

Held, further, that to put residential immovable property which is a person's home into that class of assets beyond the reach of execution would be G to sterilize the immovable property from commerce, thereby rendering it useless as a means to raise credit. Preventing debtors from using their homes as security to raise credit will create a class of homeless persons: those who are unable to afford the full purchase price of their homes in a cash sale, but could afford to repay a loan for the purchase price. It H would lock up capital and prevent the home owning entrepreneur from

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Ndou J

using his home as security to finance business initiative. Members of the A poor communities will not be able to obtain finance from banks, who will not advance money to purchase immovable property if the immovable property cannot be used as security for repayment.

Cases cited B

Benson v Hirschhorn 1936 NPD 277

Masendeke v CABS 2003 (1) ZLR 65 (H)

Nedbank Ltd v Fraser & Anor 2011 (4) SA 363 (GSJ)

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

Sabena Belgian World Airlines v ver Elst 1981 (1) SA 1235 (W)

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

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 348A(5a)

Case information

L Nkomo, for the applicant D

P Ncube, for the respondent

Judgment

NDOU J: The applicant seeks an order in the following terms:

"It is ordered that:

1. The sale in execution of the said dwelling being stand 2096 Bulawayo E North of Bulawayo Township, Bulawayo held under Deed of Transfer number 1563/2006 be and is hereby suspended until the fulfillment of the debt by way of payment of GBP800.00 per month with effect from the 30th of August 2011.
2. The second respondent be and is hereby ordered to put in abeyance the sale in execution pursuant to paragraph 1 above and in terms of Order 40 Rule F 348a.
3. The first respondent pays costs on an attorney-client scale if the relief sought is opposed."

The background facts are the following. In or about June 2006, at the special instance and request of the applicant, the first respondent lent and advanced G to the applicant a sum of £28 659.25

(Twenty eight thousand six hundred and fifty-nine British pounds and twenty-five pence). As security for the loan, the first respondent specially hypothecated certain immovable property as a first mortgage, being stand 2096 Bulawayo North of Bulawayo Township, Bulawayo otherwise known as No. 12 Plummer Street, Northend, Bulawayo (hereinafter called the Northend house). The said loan was payable by way H

Ndou J

A of instalments as stipulated by the first respondent from time to time but at any rate, within a period of five years, that is, on or before 2 July 2011.

The applicant failed to pay the instalments due since 2008 and as a result, on 25 November 2010, the first respondent issued summons against the applicant claiming a sum of £22 898.98 plus interest thereon and an order declaring the Northend house specially executable. On 6 December 2010, B through her current legal practitioners of record, the applicant entered appearance to defend. Thereafter, on 12 January 2011, the first respondent filed an application for summary judgment and served it on that same day on the applicant's legal practitioners of record. On 21 January 2011, a round table conference of the parties was held at the first respondent's legal C practitioners, where all outstanding issues were clarified and the applicant was left in no doubt as to what was owed. On 27 January 2011, as shown in annexure "E 1" to this application, the applicant made an offer to pay an unquantified "substantial" deposit within three months and to pay off the whole balance outstanding by second July 2011. Because the initial deposit was unquantified, a counter offer was proposed to the applicant as shown D in annexure "E 2" on 31 January 2011 and, despite the applicant stating that they would revert to the first respondent by 18 February 2011, the applicant never did so. After warning the applicant that summary judgment would be proceeded with as shown in annexure "D 1" and "D 2", the first respondent obtained judgment against the applicant and subsequently issued the warrant of execution. Faced with the warrant of execution and the attachment of the E Northend house, the applicant filed this application in terms of r 348A(5a) of the High Court Rules 1971, on 2 August 2011. On 5 August 2011 the first respondent opposed the application. It is significant, as well as common cause, that since 2008 the applicant has not paid any instalment to the first respondent to date. In other words, not only has the applicant failed to pay F the instalments as per her offer on 27 January 2011, she has failed to liquidate the whole balance due by 2 July 2011 and or to pay even a penny towards what she owes.

Rule 348A(5a) provides:

> "Without derogation from subrules (3) to (5), where the dwelling that has been attached is occupied by the execution debtor or members of his family, the G execution debtor may, within *10 days after the service upon him of the notice* in terms of rule 347, make a chamber application in accordance with subrule (5b) for the suspension of –
>
> (a) the sale of the dwelling concerned; or
>
> (b) the eviction of its occupants" (emphasis added).

H See *Masendeke* v *CABS* 2003 (1) ZLR 65 (H).

Ndou J

In casu, the Northend property was laid under judicial attachment on 8 July A 2011. This application was filed on 2 August 2011, well after the expiry of the ten days stipulated in r 348A (5a) above. On this point alone, it would seem the application is not properly before me.

Be that as it may, this point was not averred so I will determine the application on the points raised in the papers and during the hearing. B

In my humble view, execution of mortgaged property is different from the property being referred to in Order 40 r 348A. The difference is that we are dealing here with foreclosure proceedings. In foreclosure proceedings, the security which the mortgagor pledged is the one that is sold after institution of judicial proceedings for the amount of the debt, whereafter a writ of execution against the property is issued. In other words, if the mortgagor C does not pay the capital when due, or if he commits any breach of the conditions of the contract entitling the mortgagee to foreclose, then the latter is entitled to have the secured property sold and obtain the amount of his debt from the proceeds of the sale: *Benson* v *Hirschhorn* 1936 NPD 277. A mortgagor cannot claim a stay of

execution in terms of r 348A *supra*. It has D to be noted that, as a general rule, a creditor who has obtained judgment is entitled to enforce such judgment by levying execution and the court has no jurisdiction to restrain the judgment creditor from enforcing such legal right: *Sabena Belgian World Airlines* v *ver Elst* 1981 (1) SA 1235 (W) and *South Cape Corp (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544. Rule 348A should be viewed as an exception E to this general rule. *In casu,* in the summons and the summary judgment application, the first respondent specifically sought an order allowing it to sell the Northend house. The applicant was served with all those processes and she was legally represented. She could have defended the matter even on that aspect alone. She did not. On 3rMarch 2011 this court acceded to the F prayer sought by the first respondent and ordered that the Northend house be sold. Having made an order directing the sale of the house, the applicant cannot now bring an application in terms of r 348A (5a) stopping the sale on the basis she has made a reasonable offer. She is thus precluded from doing so, as allowing the application would have the effect of rescinding, through the back door, the order that has been made by a competent court. G By declaring the house "specially executable", the court has given the first respondent the right to sell the house in execution to recover what is owed to it. The mortgagor's first and foremost duty is to pay the debt secured and the mortgagee's corresponding right is to "call up" or "foreclose on" the bond. The significance of mortgage bonds and all other forms of hypothecation lies in the fact that they provide the creditor with a "real security" for the H

Ndou J

A payment of his claim, for if the debtor is unable to raise the necessary funds to pay the debt which is secured, the creditor is entitled to demand that the property, that being the thing which is the subject matter of his security, be sold and that the proceeds of such sale are used for the satisfaction of his claim: Silberberg and Schoeman *The Law of Property* 3 ed at 419 and 429. The rights of the judgment creditor will enjoy relative primacy. If this B were not so, it would bring about a situation in which debtors could borrow money to purchase immovable property and defeat their creditors' legitimate claims to repayment by using r 348A(5a). To put residential immovable property which is a person's home into that class of assets beyond the reach of execution would be to sterilize the immovable property from commerce, thereby rendering it useless as a means to raise credit. Preventing debtors C from using their homes as security to raise credit will create a class of homeless persons: those who are unable to afford the full purchase price of their homes in a cash sale, but could afford to repay a loan for the purchase price. It would lock up capital and prevent the home-owning entrepreneur from using his home as security to finance business initiative. Members of D the poor communities will not be able to obtain finance from banks who will not advance money to purchase immovable property if the immovable property cannot be used as security for repayment: *Nedbank Ltd* v *Fraser & Anor* 2011 (4) SA 363 (GSJ) at para [21].

The situation *in casu* was not the one contemplated by the legislature in drawing r 348A(5a). It is different from an ordinary debt, as this one is E inexorably tied to the house which has been declared by the court order to be specially executable. The only interpretation that makes sense, rather than a mockery of justice, is one which says r 348A is not applicable to foreclosure proceedings. In this regard I am guided by what McNALLY JA said in *S* v *Kachipare* 1998 (2) ZLR 271 (S) at 283C:

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

For these reasons the application must fail.

G Accordingly, the application is dismissed with costs on this preliminary point.

Cheda & Partners, the applicant's legal practitioners

H *Coghlan & Welsh,* the first respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2011/Volume 2/A-G v MABUSA & ORS 2011 (2) ZLR 522 (H)

A-G v MABUSA & ORS 2011 (2) ZLR 522 (H)

Citation	2011 (2) ZLR 522 (H)
Case No	Judgment No. HB-199-11
Court	High Court, Bulawayo
Judge	Mathonsi J
Heard	16 December 2011
Judgment	16 December 2011
Counsel	*T Makoni,* for the appellant *K Ncube,* for the respondents
Case Type	Appeal against grant of bail
Annotations	No case annotations to date

Flynote

Criminal procedure – *bail – grant of – notice of intention to appeal by* C *Attorney-General against grant of bail – such notice having effect of accused remaining in custody – abuse of powers given to Attorney-General – Attorney-General should not announce such intention unless appeal has merit*

Headnote

Section 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] D gives the Attorney-General power to veto the grant of bail to an accused person. It accords him a discretion to prevent the release of a person who has been granted bail in situations where he intends to appeal against that decision. To the extent that it interferes with the liberty of a person who E has been admitted to bail, that discretion should be exercised judiciously because the legislature, in its wisdom, entrusted the Attorney-General with huge powers. It is unacceptable for any representative of the Attorney-General to shoot up the moment bail is pronounced and invoke s 121 without applying his mind to the basis for such invocation. The abuse of s 121 to keep persons in custody who have been granted bail F has tended to bring the administration of justice into disrepute. It must be discouraged by all means and the time has come to announce to law officers prosecuting on behalf of the Attorney-General that s 121 should be invoked only in those situations where there is merit in the appeal. Admitting a person to bail is the judicial discretion of the magistrate or G judge. An appeal court can only interfere with that discretion where it is shown that there was a misdirection or that the discretion was exercised injudiciously. Persons who have been properly granted bail should not be kept longer in custody merely as a way of punishment. That would be an improper exercise of the discretion given to the Attorney-General by s 121. H

Mathonsi J

Cases cited A

A-G v Ndlovu & Ors HB-159-10

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 121

Case information

B *T Makoni,* for the appellant

K Ncube, for the respondents

Judgment

MATHONSI J: The three respondents are being charged with contravening s 25(1)(b) as read with s 25(2) of the Public Order and Security Act [*Chapter* C *11:17*] (POSA) and contravening s 37(1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). Alternatively, they are charged with contravening s 33(2) of the Criminal Law Code.

The penalty for breaching s 25 of the POSA is a fine not exceeding level 12 or imprisonment for a period not exceeding one year or both. The penalty for breaching s 37(1)(b) of the Criminal Law Code is a fine not exceeding D level 10 or imprisonment for five years or both. That of contravening s 33 of the Criminal Law Code is a fine not exceeding level 6 or imprisonment for a period not exceeding one year or both.

The respondents were arrested on 5 December 2011 when they presented themselves to the police. They appeared on initial remand at Gwanda E magistrates court on 7 December 2011 and were admitted to bail. They were ordered to pay a bail deposit of US$50.

Immediately after bail was granted the appellant invoked the provisions of s 121(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] giving notice of his intent to appeal to this court against the judgment of F the magistrates court granting the respondents bail. That way, the appellant succeeded in keeping the respondents in custody where they have remained until now.

Section 121 of the Act provides:

> "1. Subject to this section and to subsection (5) of section 44 of the High Court Act [*Chapter 7:06*], where a judge or magistrate has admitted or refused to admit G a person to bail –
>
> (a) the Attorney-General or his representative, within 7 days of the decision;
>
> or
>
> (b) the person concerned, at any time,
>
> may appeal against the admission or refusal or the amount fixed as bail or any H conditions imposed in connection therewith.

Mathonsi J

> 2. … A
>
> 3. A decision by a judge or magistrate to admit a person to bail shall be suspended if, immediately after the decision, the judge or magistrate is notified that the Attorney-General or his representative wishes to appeal against the decision, and that decision shall thereupon be suspended and the person shall remain in custody until –
>
> (a) if the Attorney-General or his representative does not appeal in terms of B subsection (1) –
>
> (i) he notifies the judge or magistrate that he has decided not to pursue the appeal; or
>
> (ii) the expiry of seven days
>
> whichever is the sooner; or
>
> (b) if the Attorney-General or his representative appeals in terms of subsection C (1), the appeal is determined."

The appellant noted an appeal to this court as notified on the following grounds:

> "(a) The court *a quo* erred in not giving sufficient weight to the fact that the respondents know the source of the CDs in question. Their release would result in further production and distribution of the material which is the D foundation of all three counts.
>
> (b) The court *a quo* erred by not imposing/attaching any other condition to the bail thereby (*sic*) the respondents are at liberty to abscond, interfere with witnesses and commit similar offences."

The allegations against the respondents are that on 24 November 2011 at Gwanda Hotel, they convened a public meeting, the discussion of which E was of a political nature, without notifying the police as provided for in s 25 of the POSA. It is further alleged that during that meeting they distributed DVDs of the Media Monitoring Project Zimbabwe containing abusive or insulting content intending to provoke a breach of the peace.

In the alternative, they are accused of undermining the authority of or insulting F the President, in that the DVDs they allegedly distributed carried messages which undermined or insulted the President.

Following a full hearing of the bail application the court *a quo* reasoned as follows:

> "It is trite law that where the State elects to oppose bail on the basis that the G bail applicant is a flight risk, then, as with other grounds for opposing bail, a bald assertion is not enough. The court was guided on this by the Supreme Court judgment in the case of *S* v *Jongwe* 2002 (2) ZLR 209 (S). In terms of this judgment the court has considered the character of the charges against the accuseds and the penalty provision. It will also consider the apparent strength of the State case. Clearly up to now there is no evidence that the accuseds are likely to run away and not stand trial. In other words they have not so far conducted H

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> A themselves in such a way that it can be reasonably concluded that should they be given bail they will try to run away and not stand trial. … The State alleges the accuseds may further distribute some CDs if released on bail and that these CDs which have similar content to those in question are in Harare. This is a mere suspicion by the State that since accused 2 and 3 brought CDs to Gwanda from Harare there must be more where the others came from. The police in more than two weeks have not made a single move to recover them. The court B would not accept this as a ground to refuse the accuseds bail."

The court *a quo* also considered the fact that the matter was brought for remand after the police had "compiled a full docket meaning all witnesses have had statements recorded and the issue of them being interfered with by the accused does not arise".

C I have already made reference to the fact that the penalty for all the charges preferred against the respondents is, first and foremost, a fine. It is trite law that where a statute provides for a penalty of a fine and an alternative penalty of imprisonment the sentencing court must give effect to the fine first. Imprisonment is always reserved for extremely serious breaches or repeat offenders: *AG* v *Ndlovu & Ors* HB-159-10 at pp 3-4.

D The above excerpt of the judgment of the court *a quo* shows that it was alive to the penalty likely to be visited upon the respondents if convicted. Surely where a bail applicant is likely to be sentenced to a fine, any risk of abscondment is completely non-existent.

The first ground of appeal in the matter suggests that the appellant has an E apprehension that the respondents are likely to commit further offences if granted bail. The court *a quo* considered that issue and concluded that it was "a mere suspicion" not supported by fact. The appellant had an opportunity at the first instance to lead evidence to sustain his apprehension that offences may be committed in future. He did not take advantage of F that opportunity, contenting himself with placing reliance on the public prosecutor's unsubstantiated say-so from the bar. That did not find favour with the court, which dismissed the argument.

The second ground of appeal, relating to the decision not to impose bail conditions fearing interference with witnesses, is regrettably without merit either. The court *a quo* took into account the fact that investigations had already G been completed and that there was no chance of interference whatsoever given that statements had been recorded from witnesses. Submissions made before that court to that effect were not challenged whatsoever by the prosecution. For that reason the findings of the court *a quo* were proper.

It has not been shown that there was any misdirection on the part of the court H *a quo* in admitting the respondents to bail and in not imposing stringent

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conditions to the bail. Quite to the contrary, the record of proceedings clearly A illustrates that the court *a quo* applied its mind sufficiently to all the relevant factors and came to the conclusion that

the respondent should be admitted to US$50 bail and nothing more.

The grounds of appeal which the appellant relies upon are spectacularly devoid of merit. Section 121 of the Criminal Procedure and Evidence Act B gives the appellant power to veto the grant of bail to an accused person. It accords the appellant a discretion to prevent the release of a person who has been granted bail in situations where he intends to appeal that decision. To the extent that it interferes with the liberty of a person who has been admitted to bail, that discretion should be exercised judiciously because the legislature, C in its wisdom, entrusted the appellant with huge powers.

For that reason, it is unacceptable for any representative of the Attorney-General to shoot up the moment bail is pronounced and invoke s 121 without applying his or her mind to the basis for such invocation. I have said that there is no merit in the grounds for appeal which do not show any misdirection at all on the part of the court *a quo*. In fact those grounds are legendary by D their lack of merit.

One is therefore left wondering whether the appellant's representative did apply his mind at all. The abuse of s 121 to keep persons in custody who have been granted bail has tended to bring the administration of justice into disrepute. It must be discouraged by all means and the time has come E to announce to law officers prosecuting on behalf of the Attorney-General that s 121 should be invoked only in those situations where there is merit in the appeal.

Admitting a person to bail is the judicial discretion of the magistrate or judge. An appeal court can only interfere with that discretion where it is shown that there was a misdirection or that the discretion was exercised injudiciously. F Whichever way, persons who have been properly granted bail should not be kept longer in custody merely as a way of punishment. That is an improper exercise of the discretion given to the Attorney-General by s 121.

In the present case, even if the respondents are convicted they are likely to be visited with a fine. Therefore the seriousness of the offence or lack of it, G leads to the conclusion that a moderate bail deposit is called for.

This is what the court *a quo* ordered and in my view there is absolutely nothing wrong with that.

Accordingly, I order as follows; that:

1. The appeal be and is hereby dismissed. H

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2. The A decision of the magistrate to grant the three respondents bail pending trial in the sum of US$50 stands.
3. The said US$50 should be deposited by the respondents to the Assistant Registrar of the High Court, Bulawayo.

B Criminal Division, Attorney-General's Office, applicant's legal practitioners

K Ncube & Associates, respondents' legal practitioners

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